THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Special Circuit Court Judge

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

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

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, P.A.; and John D. Kassel ..... Respondents.

FINAL BRIEF OF RESPONDENT JOHN D. KASSEL

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STATEMENT OF THE CASE

This is an appeal from a decision of the lower court dismissing Appellants' Complaint. On November 1, 2011, Appellants commenced this action with the filing of a Summons and Complaint. The causes of action asserted against Respondent John D. Kassel ("Respondent Kassel") are 1) breach of fiduciary duty, 2) breach of the duty of confidentiality, and 3) injunctive relief. (R. p. 31-54.) Appellants asserted the following causes of action against Respondents 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, P.A. (collectively "Class Action Respondents")[1]: 1) wrongful appropriation of personality; 2) conversion; 3) civil conspiracy; 4) constructive trust; 5) breach of fiduciary duty; and 6) injunctive relief. (R. p.p. 31-54.) Respondent Kassel filed a Motion to Dismiss the Complaint on December 15, 2011. (R. p.p. 169-170.) Subsequent to Respondent Kassel's filing, each of the Class Action Respondents filed a Motion to Dismiss. Respondent Kassel also moved to stay discovery until the motions to dismiss could be heard.

On June 6, 2012, a hearing was held before the Honorable Joseph M. Strickland.[2] Immediately prior to the hearing, Appellants agreed that the breach of fiduciary duty cause of action did not apply to Respondent Kassel. Respondent Kassel's attorney recorded this

[1] This group of attorneys represented the Appellants as Objectors in a Tennessee products liability class action involving defective stucco.

[2] Another judge was originally scheduled to hear the motions, but upon learning the parties involved at the hearing, she recused herself from the case. Rather than have the hearing postponed after all parties had prepared for the argument, Judge Strickland agreed to hear Respondents' motions.

agreement on the record. (R. p. p. 66-67.) Appellants also stipulated on the record that they would not seek discovery responses until thirty days after receiving the trial court's ruling on the motions to dismiss, assuming that the trial court denied the motions. (R. p. 158.) At the conclusion of the hearing, the lower court decided to take the motions to dismiss under advisement, and requested that all parties submit proposed orders for his review.[3]

On June 14, 2013, the lower court sent correspondence to counsel for all parties notifying them of the court's intent to grant Respondents' motions to dismiss. (R. p. 224.)

On October 24, 2013, the lower court granted the Class Action Respondents' Motions to Dismiss and also granted Respondent Kassel's Motion to Dismiss. (R. p.p. 1-12 and 13-28.) Both orders had the effect of dismissing all of Appellants' causes of action against all Respondents.

On November 18, 2013, Appellants filed a Motion to Alter or Amend Judgments Granting Defendants' Motions to Dismiss. (R. p.p. 260 – 273.) On December 9, 2013, the Class Action Respondents filed a Return to Appellants' Motion to Alter or Amend. (Resp't Return to Mot. to Alter or Amend J. (R. p.p. 371 – 375.) On February 18, 2014, Respondent Kassel filed a Memorandum in Opposition to Appellants' Motion to Alter or Amend. (Resp't Kassel Mem. in Opp'n to Mot. to Alter or Amend. (R. p.p. 376 - 380.)

On March 3, 2014, Respondent Kassel received Appellants' Notice of Appeal and the Order Denying Appellants' Motion to Alter or Amend. (R. p.p. 29-30.) This appeal followed.

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[3] Respondent Kassel had also filed a Motion to Stay Discovery that was pending before the Court. However, Appellants agreed to stay discovery until the Motions to Dismiss were decided.

STATEMENT OF THE FACTS

Appellants' claims against Respondent Kassel arise out of an allegation that Kassel disclosed confidential information to the Class Action Respondents without Appellants' permission. In July 2002, Appellants consulted with Respondent Kassel regarding a possible construction claim related to the stucco installation on their home. (R. p. 35 ¶ 14.) Appellants allege they received Respondent Kassel's opinion and advice and subsequently retrieved their documents from Respondent Kassel. Appellants expressly allege that they did not retain Kassel to represent them. (R. p. 36 ¶¶ 16-17.) Appellants further allege that they never authorized Respondent Kassel to engage or associate any other lawyer or to reveal to any other person their privileged communications or information about their potential case. (R. p. 36 ¶¶ 19-23.) Appellants claim in their brief that Respondent Robertson's affidavit states that Respondent Kassel disclosed to Respondent Robertson the Appellants' names and confidential information during a telephone conversation on September 3, 2002.[4] (Appellants' Br. p. 11.) However, the portion of Respondent Robertson's affidavit quoted in the Complaint simply states that Respondent Robertson had a time entry on September 3, 2002 documenting a conversation with Respondent Kassel and that the time entry also reflects Allison DeLoache's social security number. (R. p.p. 38-39 ¶¶ 31-32).

According to Appellants, Class Action Respondents never directly contacted Appellants despite Respondent Robertson's time entries noting a telephone call with John

[4] Appellants cite to Respondent Robertson's affidavit but do not attach the document to the Complaint. (R. p.p. 38-39 ¶¶ 31-32).

DeLoache on September 30, 2002 and a time entry on October 3, 2002 noting a meeting with Allison DeLoache. (R. p.p. 38-39 ¶ 32.) Appellants claim that they never engaged any of the Class Action Respondents to represent them. (R. p. 41 ¶ 46.)

Class Action Respondents appeared on behalf of the Appellants, as objectors, at a Fairness Hearing in Tennessee for the settlement of a lawsuit related to defective stucco. (R. p.p. 39-40 ¶ 36.) At a hearing on October 1, 2002, Class Action Respondents made arguments objecting to the proposed settlement in the Tennessee stucco action. (R. p.p. 39-40 ¶ 36.) As a result of the objections raised by Class Action Respondents in the Tennessee settlement, Class Action Respondents reached an agreement with Dryvit Systems, the defendant in the Tennessee action, whereby Class Action Respondents were to receive $825,000 in attorneys' fees. (R. p.p. 40-41 ¶ 41.) Of the $825,000, only $600,000 had been paid to Class Action Respondents as of the date of the filing of the Complaint in this case. (R. p.p. 40-41 ¶ 42.)

There are no allegations in the Complaint that Respondent Kassel participated in any way in the Tennessee class action or that Respondent Kassel received any of the $600,000 distributed to the Class Action Respondents.

In late January or early February 2009, lawyers who intervened in and were representing plaintiffs in a South Carolina lawsuit, which has been certified as a class action originally styled *Cardamone, et al. v. Dryvit Systems, Inc., et al.*, approached Appellants. (R. p.p. 36-37, ¶¶ 24-25.) 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. (R. p.p. 36-37, ¶ 24.)

Appellant Allison DeLoache filed an affidavit dated February 4, 2009 explaining that Appellants had never authorized any lawyers to take action on their behalf in the Tennessee matter, and that they were unaware of any action taken on their behalf. (R. p.p. 37-38. ¶¶ 25, 27, 28.) Appellants allege that the Class Action Respondents appeared and wrongfully used Appellants' surname without Appellants' authorization and without ever consulting with Appellants. (R. p.p. 41-42 ¶¶ 45-49.) This is the basis of Appellants' claims against Class Action Respondents.

Appellants contend that Respondent Kassel disclosed Appellants' confidential information obtained during Appellants' consultation with Respondent Kassel. (R. p. 52 ¶ 116.) At no point in the Complaint do Appellants identify the specific confidential information that Respondent Kassel allegedly disclosed.

Appellants claim Respondent Kassel is liable for breach of the duty of confidentiality and sought an injunction enjoining Respondent Kassel from using Appellants' names in any manner in the future and from making any claim in any court that they ever represented Appellants in any proceedings or on any claim. (R. p.p. 51-52 ¶¶ 114-120.)

STANDARD OF REVIEW

On appeal from the dismissal of a case for failure to state a claim, the appellate court applies the same standard of review as the trial court. *Rice-Marko v. Wachovia Corp.*, 398 S.C. 301, 307, 728 S.E.2d 61, 64 (Ct. App. 2012). A motion to dismiss a claim pursuant to Rule 12(b)(6), SCRCP, must be based "solely on allegations set forth in the complaint." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). The appellate court must consider whether the allegations in the complaint, when viewed in the light most favorable to the plaintiff, state any valid claim for relief. *Rice-Marko* at 398 S.C. at 307, 728 S.E.2d at 64.

The facts alleged in Appellants' Complaint, even if true, do not support relief against Respondent Kassell under any theory or law. Thus, it is clear that this Court should affirm the trial court's order dismissing Kassell from this case.

Although Appellants did not file a proper motion to amend their complaint, they are appealing on the ground that the lower court erred in not allowing them to amend their complaint. An abuse of discretion standard of review applies to Appellants' claim on this issue because a "motion to amend is within the sound discretion of the trial judge." *Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry*, 403 S.C. 623, 743 S.E.2d 808 (2013).

ARGUMENT

I. The trial court properly found that Appellants were required to file an expert affidavit at the time of the filing of their Complaint.

Appellants' claims against Respondent Kassel fall within the parameters of S.C. Code § 15-36-100.

Appellants' Complaint against Respondent Kassel alleges that he violated a duty of confidentiality owed to Appellants. This is incorrect. Simply put, a lay person does not owe another lay person a duty of confidentiality. With some nuanced exceptions, such a duty only arises in a professional setting. But for the fact that Respondent Kassel is a practicing attorney, Appellants would have no ability to claim that they are owed a duty of confidentiality by Respondent Kassel.

A "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 of each claim based on the available evidence at the time of the filing of the affidavit." S.C. Code Ann. § 15-36-100(B) (Supp. 2013). Section 15-36-100 includes attorneys in the list of professionals for whom a plaintiff must file an expert affidavit with their complaint alleging professional malpractice. S.C. Code Ann. § 15-36-100(G). Despite the clear requirements of § 15-36-100, Appellants failed to file an expert affidavit with their Complaint.

Appellants claim that because they did not formally engage Respondent Kassel, there can be no legal malpractice claim and thus no expert affidavit requirement. However, this argument is without merit as it pertains to Section 15-36-100. Either there was some type of professional relationship between Appellants and Respondent Kassel and thus a

duty of confidentiality existed, or there is no duty of confidentiality because there is no relationship between Appellants and Respondent Kassel. Appellants cannot have it both ways.

Appellants also claim that to require an expert affidavit in this case would expand the rule to require an expert affidavit in any action against an attorney. That is simply not the case. Appellants have not alleged just any action against Respondent Kassel. Rather they have alleged that he breached his duty of confidentiality. Appellants claim Respondent Kassel owed them a duty of confidentiality ***because*** he is an attorney.[5] Regardless of the labels that Appellants attempt to apply to this case, it is a legal malpractice case whereby Appellants claim that Respondent Kassel breached a duty that is owed only as a result of a relationship between a client and an attorney.[6]

Appellants contend that their claim for breach of fiduciary duty is an intentional tort and therefore does not fall into the ambit of § 15-36-100, which only applies to professional negligence claims. There are no allegations that Respondent Kassel committed an intentional tort. "Failure to exercise due care, not intent, is the critical element in negligence." *Snakenberg v. Hartford Cas. Ins. Co., Inc.*, 299 S.C. 164, 173, 383 S.E.2d 2, 7 (Ct.App. 1989). The fact that an actor may knowingly act does not make an act an intentional tort. "Intent" is a state of mind about the consequences of the act.

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[5]Appellants draw distinctions between a breach of fiduciary duty claim and a legal malpractice claim in their brief. However, these arguments do not apply to Respondent Kassel since he was not included in the fiduciary duty claim.

[6] In the civil cover sheet form Appellants filed with their Complaint, they classify this case as a conversion action. This is curious because, by all accounts, Respondent Kassel has received no benefit that could arguably belong to Appellants. There is no allegation in the Complaint that Respondent Kassel converted anything owned by Appellants to his own use.

Peay v. U.S. Silica Co., 313 S.C. 91, 93, 437 S.E.2d 64, 65 (1993). *See also* W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser & Keeton on the Law of Torts*, § 8 (5th ed. 1984 & Supp. 1998). As discussed previously, even assuming Respondent Kassel breached his duty of confidentiality, there are no allegations that Respondent Kassel could have foreseen that the Class Action Respondents would have allegedly claimed to represent Appellants in a class action in Tennessee without Appellants' knowledge and approval. Even assuming, as Appellants have alleged, that Respondent Kassel intentionally disclosed Appellants' confidential information, this act alone does not qualify as an intentional tort.

In the recent case of *H & H of Johnston, LLC v. Old Republic National Title Ins. Co.*, this court found that despite the attempts by plaintiff to classify an action as a breach of contract, the matter was still one of professional negligence because the attorney was acting as an attorney at a real estate closing. 405 S.C. 469, 474, 748 S.E.2d 72, 74 (Ct.App. 2013). Thus, the case fell within Section 15-36-100, and failure to file an expert affidavit was grounds for dismissal. *Id.* Similarly, pursuant to the allegations against him, Respondent Kassel was acting as an attorney, and therefore Appellants were required to file an expert affidavit.

Appellants have essentially alleged a breach of the exercise of due care by Respondent Kassel. A defendant's failure to exercise due care falls within a negligence cause of action. *Id.* Simply because a defendant had to make an affirmative act in order to breach a standard of due care, it does not make that alleged breach an intentional tort. The claims against Respondent Kassel are professional negligence claims, and therefore, the requirements of Section 15-36-100 apply.

Appellants' claims arose in 2009 when Appellants claim they learned of their involvement in the Tennessee action, and therefore, the requirements of Section 15-36-100 apply to their claims.

Section 15-36-100 applies to all claims arising after the date of its enactment, July 1, 2005. See 2005 Act. No. 32, §4, eff. July 1, 2005. Thus, this statute applies to Appellants' claims because they allege in their Complaint that their claims arose in 2009.[7] A claim arises when a plaintiff's right to sue comes into existence. *Murphy v. Owens-Corning Fiberglass Corp.*, 356 S.C. 592, 597-598, 590 S.E.2d 479, 482 (2003) (citing *Stephens v. Draffin*, 327 S.C. 1, 488 S.E.2d 307 (1997)). Viewing Appellants' allegations in a light most favorable to Appellants, their claim arose in 2009 when they discovered their involvement in the Tennessee case, which they claim occurred without their knowledge. If, in fact, Appellants' claims arose in 2002, when Appellants claim Respondent Kassel breached his duty of confidentiality, their claims would be barred by the applicable three-year statute of limitations.

This court decided similar issues in *Johnson v. Phifer*. 309 S.C. 505, 424 S.E.2d 532 (Ct.App. 1992). In that case, the plaintiff claimed dental malpractice based on dental work performed between 1974 and 1977, yet plaintiff claimed she was not aware of the negligence until 1987, and she did not file suit until 1990. This court held that the claims arose at the time the negligence was discovered in 1987, and thus, the statute of repose, which was not in place in 1977, applied to plaintiff's lawsuit. Like the instant case, plaintiff argued that her claim accrued at two separate times: 1) in 1977 to avoid the statute of

[7] Respondent Kassel would argue that Appellants' claims still have not arisen because they have suffered no discernable damages. However, accepting Appellants' claim of damages as true for purposes of this discussion, Appellants' claims arose in 2009.

repose; and 2) in 1987 to avoid the shorter statute of limitations period. This court did not accept plaintiff's argument and based its decision on the discovery rule finding the claim arose when plaintiff discovered the negligence.

Accepting the allegations in the light most favorable to Appellants, their claims arose in 2009 upon their alleged discovery of their involvement in the Tennessee class action. As a result, the requirements of Section 15-36-100 apply.

Appellants cite *Williamson v. South Carolina Insurance Reserve Fund* for the proposition that the Tort Claims Act does not apply to a plaintiff's claims because the claims accrued or arose prior to the effective date of the Act. 355 S.C. 420, 426, 586 S.E.2d 115, 118 (2003). The *Williamson* case involved allegations of medical malpractice during delivery, which resulted in severe defects of the baby. *Id.* Although the opinion does not specify, it appears based on the allegations that the claims were readily apparent at the birth or shortly thereafter. The Tort Claims Act was enacted approximately five months after the birth, and the plaintiffs filed the lawsuit approximately four months after the enactment. *Id.* The plaintiffs were aware of the negligence due to the defects that were apparent shortly after the baby's birth and prior to the enactment of the Tort Claims Act, and thus, based on the discovery rule, plaintiffs' claims arose before enactment.

Accepting Appellants' facts in the light most favorable to Appellants, their claims did not arise until 2009, three-and-a-half years after enactment of Section 15-36-100. Appellants' claims arose after the enactment of Section 15-36-100, and therefore Appellants are required to file an expert affidavit with their complaint.

A duty of confidentiality to a potential client is not common knowledge.

A lay person would not likely be aware that an attorney owes a duty of confidentiality to clients, much less to potential clients such as the Appellants. While there are many complaints about our litigious society, in reality very few people have detailed interactions with attorneys other than a possible real estate closing. Even fewer members of society appreciate the nuanced and detailed rules that govern the legal profession. The requirement of confidentiality owed to potential clients is not common knowledge. In fact, the duty of confidentiality to potential clients was not documented in a professional responsibility rule in South Carolina until 2005, three years after Respondent Kassel's alleged breach. See Rule 1.18, RPC, Rule 407, SCACR. The duty of confidentiality to potential clients as it existed in 2002 was something less than Rule 1.18. Thus, the standard of care as it existed in 2002 is not common knowledge, does not qualify for the common knowledge exception to the statute, and must be established by expert testimony.

As this court found in *Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, OSHA requirements setting forth the standard of care for professional engineers are not matters of common knowledge, and expert testimony is necessary to determine whether the defendant acted negligently. 351 S.C. 459, 475, 570 S.E.2d 197, 205 (Ct. App. 2002). Similarly, the standard of care for an attorney must be established by expert testimony and is not common knowledge. Appellants cannot avoid the requirement to file an expert affidavit in this matter by claiming the common knowledge exception.

Appellants have not produced an expert in this case.

Importantly, Appellants have never provided the name of a potential expert, and at this point, it is too late. Almost three years have passed since Appellants filed this action,

yet as of today's date, Appellants have not named an expert to support their allegations of wrongdoing by Respondents. Rather than produce an expert, Appellants argue the technicalities of whether an expert affidavit is required. At this point, the statute of limitations has run from the date of Appellants' alleged discovery in 2009. Pursuant to Section 15-36-100(F)[8], Appellants' failure to file an expert affidavit does not toll the statute of limitations during the pendency of this action. As a result, Appellants' claims are barred by the statute of limitations.

Appellants will need an expert witness at trial. In the very recent case of *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, Op. No. 27395 (S.C. Sup. Ct. filed June 4, 2014) (Shearouse Adv. Sh. No. 22), the Supreme Court again noted the requirement of expert testimony to prove a legal malpractice case. "With respect to a legal malpractice claim, a claimant must rely on expert testimony to 'establish both the standard of care and the deviation by the defendant from such standard.'" *Id.* (citing *Gilliland v. Elmwood Props.*, 301 S.C. 295, 301, 391 S.E. 2d 577, 580 (1990); *Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 435, 472 S.E.2d 612, 613 (1996); *Hall v. Fedor*, 349 S.C. 169, 174, 561 S.E.2d 654, 657 (Ct.App. 2002)). The fact that Appellants have been unable or unwilling to name an expert is fatal to their request for relief from this court.

[8] Section 15-36-100(F) provides, in pertinent part, "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..."

Appellants have failed to produce an expert affidavit supporting their Complaint as required by Section 15-36-100 and for that reason, this court should affirm the order of the trial court.

II. The trial court properly found that Appellants failed to establish proximate cause.

"The touchstone of proximate cause in South Carolina is foreseeability." *Mellen v. Lane*, 377 S.C. 261, 279, 659 S.E.2d 236, 246 (Ct.App. 2008) (citing *Young v. Tide Craft*, 270 S.C. 453, 462, 242 S.E.2d 671 (1978)). "Foreseeability of some injury from an act or omission is a prerequisite to its being a proximate cause of injury for which recovery is sought." *Kennedy v. Carter*, 249 SC 168, 153 S.E.2d 312 (1967).

Even viewing Appellants' claims against Respondent Kassel in the light most favorable to Appellants, it is not foreseeable that Appellants would suffer any harm as a proximate cause of Respondent Kassel's alleged breach of the duty of confidentiality. The basis of Appellants' claims against Respondent Kassel is that he shared confidential information about Appellants' potential stucco claims without authorization from Appellants. Appellants allege Respondent Robertson and other Class Action Respondents used Appellants' confidential information to successfully object to the class settlement in the case pending in Tennessee without obtaining Appellants' permission to represent them. (R. p.p. 39-40 ¶¶ 35-36.)

The Complaint failed to allege any facts giving rise to an inference that any negligent conduct by Respondent Kassel in providing the Appellants' name to the Class Action Respondents would result in harm. Even assuming that Respondent Kassel breached his alleged duty of confidentiality and shared Appellants' information with Class

Action Respondents, there is nothing to show that it was reasonably foreseeable for Respondent Kassel to expect that any of the Class Action Respondents would move forward without the express permission of Appellants. Stated differently, it is not foreseeable that Class Action Respondents would file an objection on the Appellants' behalf without the Appellants' express permission.

One is not charged with foreseeing something which is unpredictable or which could not be expected to happen. *Stone vs. Bethea*, 251 S.C. 157, 161-162, 161 S.E.2d 171, 173 (1968). When a defendant's conduct appears merely to have brought about a series of affairs where an entirely independent and separate agency intervenes to cause the injury, the intervening party is the direct or proximate cause and the former party is only the indirect or remote cause. *Locklear v. Se. Stages*, 193 S.C. 309, 318, 8 S.E.2d 321, 325 (1940). "A defendant cannot be held liable for unpredictable or unexpected consequences." *Mellen*, 377 S.C. at 280, 659 S.E.2d at 246 (citing *Young*, 270 S.C. at 463).

In this case, assuming Respondent Kassel provided Appellants' confidential information to Class Action Respondents, he could not have foreseen that they would use this information and pursue an objection in Tennessee without receiving Appellants' authorization. There is no allegation in the Complaint that Respondent Kassel had any inclination that Appellants had not authorized the Class Action Respondents to proceed in Tennessee on their behalf.

In *Hensley v. Heavrin*, the Supreme Court, in a decision regarding a motion to dismiss, noted that it was not foreseeable that a patient would be assaulted by her husband after she was incorrectly diagnosed by the physician as having contracted syphilis, and therefore the doctor was not liable for her injuries. 277 S.C. 86, 87-88, 282 S.E.2d 854

(1981).[9] Similarly, Respondent Kassel cannot be held liable for the alleged actions of the Class Action Respondents because it is not foreseeable that a group of attorneys would represent individuals in a matter without obtaining their authorization.

III. The trial court properly found that Appellants have not alleged specific damages.

Appellants have not alleged any specific damages against Respondent Kassel, and thus their claims against him were properly dismissed. Appellants must be able to plead the damages element with some degree of specificity. In their Complaint, Appellants simply state that they have suffered actual, consequential, and incidental damages in an amount to be determined by the jury. (R. p. 52 ¶ 117.)

In a personal injury case or a matter with obvious damages, a defendant would be able to discern the damages suffered. In this case, with the set of facts as presented by Appellants in their Complaint, there are no discernable damages. Even if the facts alleged by Appellants against Respondent Kassel are true, the alleged damages are not ascertainable.

A general allegation of damages will suffice to allow a party to prove damages that naturally, logically, and necessarily result from acts complained of except when damages do not necessarily result from the acts alleged and are not implied by law. *Carolina Life Ins. Co. v. Bank of Greenwood*, 217 S.C. 277, 290, 60 S.E.2d 599, 605 (1950). *See also Hobbs v. Carolina Coca-Cola Bottling Co.*, 194 S.C. 543, 548, 10 S.E.2d 25, 27 (1940). Where damages are not necessarily the result of the acts complained of, and are not implied

[9] The Supreme Court ultimately did not dismiss the matter because it found that the plaintiff had stated a claim for emotional distress due the doctor's alleged malpractice. *Id.*

by law, the complaining party must state their damages with particularity in order to avoid surprise. *Id.* (citing *Henry Sonneborn & Co. v. S. Ry. Co.*, 65 S.C. 502, 44 S.E. 77 (1903); *Lipscomb v. Tanner*, 31 S.C. 49, 9 S.E. 733 (1889)). In this case, Appellants' alleged damages cannot be ascertained from the acts complained of. Moreover, Appellants' damages are not implied by law.

Appellants cannot claim that the attorneys' fees paid to the Class Action Respondents equate to damages for Appellants. Appellants are not attorneys and are, therefore, not entitled to attorneys' fees. There is no theory under which Appellants could have received the awarded attorneys' fees. Further, in their brief, Appellants state that they did not have standing in the Tennessee action and thus could not question or object to the award of attorneys' fees in that matter. (R. p. 40 ¶¶ 37-39.) Therefore, it is incomprehensible how Appellants would have any right to the attorneys' fees awarded to the Class Action Respondents. Even if the attorneys' fees could constitute damages, they should not be borne by Respondent Kassel because there are no allegations that Respondent Kassel received any of the attorneys' fees or even made an appearance in the Tennessee action.

Appellants admit in their Complaint that they do not have any proof that they have Dryvit on their home, which is the product that was the subject of the class action in Tennessee. (R. p. 40 ¶ 37.) As a result, nothing Respondent Kassel or the Class Action Respondents did deprived Appellants from receiving an award as a result of a Dryvit class action because they were not entitled to participate in the first place. Appellants could never recover any money from a Dryvit lawsuit, and any alleged award from a Dryvit lawsuit cannot be the basis of a damages claim in this case.

Appellants' theory that they may suffer future possible risks is not a valid claim of damages. More than three years have passed since Appellants allegedly learned of their involvement in the Tennessee class action, yet no one has taken any steps to hold Appellants in contempt of court or to claim that Appellants committed fraud on the court. Even if such a threat were legitimate, speculative future damages will not satisfy the required element of damages. In order to be recoverable, damages must be shown 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, 281 S.E.2d 794, 796 (1981).

Appellants also suggest that they have suffered damages as a result of having had prepared an affidavit and appearing at a deposition. (R. p.p. 110, 145.) Such activities are not a proper basis for the calculation of damages.

Appellants argue that under the wrongful appropriation of personality claim, nominal damages are presumed. However, Appellants have not and cannot assert a claim against Respondent Kassel for wrongful appropriation of personality. "Wrongful appropriation of personality involves the intentional, unconsented use of the plaintiff's name, likeness, or identity by the defendant for his own benefit." *Gignilliat v. Gignilliat, Savitz & Bettis, LLC*, 385 S.C. 452, 459, 684 S.E.2d 756, 759 (2009). Appellants did not include Respondent Kassel in the wrongful appropriation of personality claim because they cannot show that Respondent Kassel benefited in any way from the alleged wrongful appropriation of personality by the Class Action Respondents. Respondent Kassel did not appear in the action in Tennessee and did not receive any portion of the award of attorneys' fees. Appellants do not allege otherwise. Therefore, to the extent that a wrongful

appropriation of personality claim presumes damages for Appellants, those damages do not apply to Respondent Kassel.

Finally, a claim of breach of the duty of confidentiality cannot be likened to an invasion of privacy claim for purposes of claiming that damages are presumed. The New York case cited by Appellants, which has no precedent in South Carolina, seems to discuss whether a breach of confidentiality sounded in contract or tort for the purpose of allowing an award of emotional damages. *See MacDonald v. Clinger*, 84 A.D. 2d 482, 446 N.Y.S.2d 801 (N.Y. App. Div. 1982). To the extent that Appellants are attempting to claim that they have suffered some type of emotional damage, they have not plead any such damage. Additionally, in South Carolina, courts have repeatedly found that there can be no emotional damages in a legal malpractice action, which is what Appellants have alleged in this case. *See Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981); *Caddel v. Gates*, 284 S.C. 481, 327 S.E.2d 351 (Ct.App. 1984).

Further, this case cannot be likened to an invasion of privacy claim. A required element of an invasion of privacy claim in South Carolina is a showing that the invasion of privacy was to bring shame or humiliation to a person of reasonable sensibilities. *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 478, 514 S.E.2d 126, 130 (1999) (citing *Meetze v. Associate Press*, 230 S.C. 330, 95 S.E.2d 606 (1956)). There is no such requirement in a breach of confidentiality claim. *See Swinton Creek Nursery*, 334 S.C. at 483, n.14, 514 S.E.2d at 133, n.14 (noting the differences between a breach of confidentiality claim and an invasion of privacy claim). In the event that there was such an element in a breach of confidentiality claim in South Carolina, Appellants could not satisfy that element with the facts alleged against Respondent Kassel in the Complaint.

Based on the allegations in the Complaint and considering the additional assertions made by Appellants at the hearing and in their briefs to the trial court, Appellants' damages cannot be determined. Because Appellants' allegations against Respondent Kassel do not show that they suffered damages with any particularity or specificity, the trial court properly dismissed Appellants' claims.

IV. The lower court properly found that Appellants do not have standing to bring this action.

As discussed in the prior section, Appellants cannot show that they have suffered any damages pursuant to the claims against Respondent Kassel. As a result, Appellants do not have standing to bring this lawsuit against Respondent Kassel because they have suffered no 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 Care Facilities, Inc. v. South Carolina Dep't of Health & Envtl. Control*, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (Ct.App. 2006) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)). The party seeking to establish standing carries the burden of demonstrating each of the three elements. *Commander Health Care Facilities,* 370 S.C. at 301, 634 S.E.2d at 666.

"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.*

As discussed in the previous section, Appellants cannot demonstrate, based on the allegations of the Complaint, that they suffered any injury and thus cannot establish standing. A party must suffer an actual 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, 551 S.E.2d 588 (Ct. App. 2001). In this case, Appellants are unable to show any injury in fact. As a result, the trial court properly dismissed Appellants' claims against Respondent Kassel.

V. The trial court properly refused to allow Appellants to file an amended complaint.

Appellants never filed a motion to amend their Complaint and failed to provide a proposed amended complaint. As a result, this issue was not properly raised before the trial court. "An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought." Rule 7(b)(1), SCRCP.

Appellants requested leave to amend their complaint during the hearing on the motion to dismiss, but provided no detail or specific reasons why such an amendment would resolve the Complaint's fatal flaws. (R. p. 89.) On June 14, 2013, the trial court wrote to all parties indicating its intention to grant Respondents' Motions to Dismiss. Appellants, in a June 17, 2013 letter, again requested that the trial court include language in its order allowing Appellants leave to amend their complaint. (R. p.p. 226-227.) However, Appellants never filed a formal motion seeking such relief and, most

importantly, never provided any detail as to how they would amend the Complaint to cure the deficiencies.

In order for a court to properly assess a motion to amend, the court must determine whether the motion would be futile. For this reason, it is customary to file a proposed amended complaint with any motion to amend a complaint. In this instance, the lower court could not determine the grounds on which an amendment could be made because Appellants never provided the lower court with any detail as to how they would amend the Complaint.

A plaintiff is not entitled to a dismissal without prejudice or leave to amend a complaint where he has failed in his Rule 59(e) motion and in his appellate brief to cite any new factual allegations that would impact the grounds for dismissal. *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 153, 723 S.E.2d 835, 840-41 (Ct.App. 2012). Appellants have not provided a proposed amended complaint, nor offered any suggestion as to how they could revise the Complaint to correct the fatal flaws, including designation of their damages, foreseeability, or proximate cause.

The trial court properly refused to grant Appellants' request for leave to amend the complaint. The determination of a motion to amend is within the circuit court's sound discretion. *Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 22, 431 S.E.2d 587, 590 (1993).

Appellants cite *Dockside Ass'n v. Detyens, Simmons & Carlisle* to support their claim that they should have been allowed leave to amend the Complaint once it was dismissed. 297 S.C. 91, 95, 374 S.E.2d 907, 909 (Ct.App. 1988). However, in *Dockside Ass'n*, unlike this case, the plaintiff filed an actual motion to amend the complaint. *See* 297 S.C. at 94, 374 S.E.2d at 909.

Appellants' appeal on this issue should be denied because it was not properly raised before the lower court, and Appellants have not shown with any particularity how an amendment could save the deficiencies of the Complaint.

VI. The amount of time it takes a court to thoughtfully rule on a motion is not reversible error.

Appellants ask this Court to reverse the decision by the lower court solely based on the amount of time the lower court spent on thoughtfully and thoroughly deliberating the issues raised by the parties. Simply put, this is not the proper subject of an appeal. Due process is not a factor in this instance, as Appellants had ample opportunity to present their arguments to the lower court. Further, there is no violation of Rule 1, SCRCP.

The Honorable Joseph Strickland agreed to hear the motions on the day of the hearing immediately following the recusal of the original judge so that all parties could argue the motions for which they had prepared. (R. p.p. 60-61.) Judge Strickland knew nothing about the case prior to the hearing, yet he worked quickly to understand the issues and asked thoughtful questions during the arguments. Following the hearing, Judge Strickland received significant information in the form of proposed orders from the parties. The issues raised are difficult and required research. Judge Strickland appreciated the complexity of the case as well as the seriousness of the allegations claimed against Respondents. For Appellants to make the claim against Judge Strickland that he is the fox watching the hen house is disrespectful to the trial court and the time and effort he has put into this case. Such commentary should not be tolerated.

In summary, this is a complex matter that the lower court was willing to thoughtfully and deliberately determine. There is no error when a trial court spends more

time than the Appellants believe is reasonable to make sure that it provides a well-determined decision in a complicated matter.

CONCLUSION

The lower court correctly dismissed Appellants' Complaint against Respondent Kassel, and this Court should affirm the lower court's Order granting Respondent Kassel's Motion to Dismiss.

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August 25, 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

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

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

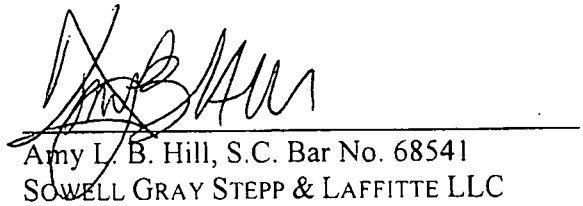
v.

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, P.A.; and John D. Kassel ..... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that the final briefs comply with Rule 211(b), SCACR.

August 25, 2014.



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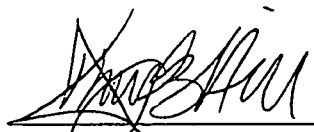

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