

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY COURT OF COMMON PLEAS

Deadra Jefferson, Circuit Court Judge

Maite Murphy, Circuit Court Judge

Appellate Case No. 2019-001951

RECEIVED

Dec 30 2020

SC Court of Appeals

Alan G. Nix, Appellant,

v.

Churchill Park, Churchill Park HOA, Churchill Park Homeowners' Association, Inc., Churchill at Park West Association, Inc., Churchill Property Owners Association, Churchill Park Property Owners Association, Churchill Park at Parkwest, Inc., Churchill Park at Park West Association, Inc., Churchill Park @ Park West Association, Inc., Southern Community Services, LLC, Park West Development Corp., LPPM, Inc., **McCabe, Trotter & Beverly, PC**, Dobson Builders, **Stephanie Trotter, Ryan McCabe, Jamie McSweeney**, Larry Riddlehoover, Mike Hurd, Sheri Cothran, David Brown, Catherine Brown, Stephen Sumner, Richard Riccoboni, Rick Cumberland, Park West Master Association, Inc., Park West Amenity Association, Inc., C. Richard Dobson, Builders, Inc., DR Horton, Inc., Brian Gardner, Venture Management of South Carolina, Inc., Dodds & Hennessey, LLP, Kim Atkeson, Jennifer Williamson, Jessica Turner, Kevin Steelman, Landtech Development, LLC, Landtech Incorporated of South Carolina, Land Tech Charleston, LLC, Rogers, Townsend & Thomas, PC, Henry Munn, Charleston County (Christine Smith), Judge Mikell Scarborough, Sandlapper Reporting, LLC, William H. Sloan, Sloan Law Firm, Individual Agents, Assigns, Attorneys, Accountants, Employees, Officers, Directors, Independent Contractors, Investors, Successors, Predecessors, Insurers, Representatives, Parents, Sister

and Affiliated Entities, Partners, Members of all Persons
Who Might be Liable..... Respondents.

INITIAL BRIEF
OF RESPONDENTS’ MCCABE, TROTTER & BEVERLY, PC, STEPHANIE TROTTER,
RYAN MCCABE, AND JAMIE MCSWEENEY

December 30, 2020

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STATEMENT OF ISSUE(S) ON APPEAL

I. DID JUDGE JEFFERSON ERR IN GRANTING THESE RESPONDENTS' MOTION TO DISMISS? NO, SHE DID NOT.

STATEMENT OF THE CASE

A. Background

1. The Foreclosure Matter, Churchill Park v. Nix

Appellant Alan Nix has owned and lived in a house in the Churchill Park subdivision of the Park West neighborhood, located at 1401 Densmore Circle, Mount Pleasant, South Carolina. Ryan McCabe and Stephanie Trotter (now Stephanie Trotter Kellahan) are lawyers and partners at the law firm McCabe, Trotter & Beverly, PC ("MTB") based in Columbia. Jaime McSweeney is a lawyer who used to work at MTB.

MTB represented Appellant's homeowners' association in an action seeking to foreclose a lien on Appellant's home for unpaid assessments and other charges. MTB filed that case, Churchill Park v. Alan G. Nix and Norma J. Nix, C/A 2014-CP-10-5407 on September 4, 2014, in the Charleston County Court of Common Pleas ("Foreclosure Case"). The court dismissed the Foreclosure Case pursuant to Rule 40(j), SCRCF, in March 2016.

The court restored the Foreclosure Case in May 2017 and assigned it C/A 2017-CP-10-4031. Appellant proceeded to represent himself *pro se*. He lost at trial in 2017, and the court issued a Judgment against the Defendants in the Foreclosure Case in the amount of \$22,554.97. (Mot. to Dismiss, p. 2) Since then, Appellant has pursued multiple appeals, all of which he has lost. The home was recently sold at auction for \$136,000.

2. 2018 Lawsuits against MTB

In 2018, Appellant filed two lawsuits in the Charleston County Court of Common Pleas naming certain of these Respondents as Defendants in 2018. (Mot. to Dismiss, p. 4) Appellant alleged MTB and certain of its lawyers violated the Fair Debt Collections Practices Act in the course of representing Churchill Park in the Foreclosure Case. Those cases were removed to federal court, where Judge Gergel ultimately dismissed them with prejudice. He also awarded judgments for costs against Appellant. (Mot. to Dismiss, p. 4, Tanscr., p. 35)

3. Case 3315, Nix v. Churchill Park, et al.

Appellant also filed a *pro se* appeal of a small claims case in June 2018. That matter is captioned Alan Nix v. Churchill Park, et al., 2018-CP-10-3315, Charleston County Court of Common Pleas (“Case 3315”). In Case 3315, Appellant appealed the issuance of a Restraining Order against him as to neighbors David and Catherine Brown, who Appellant also named as Defendants (and who are Respondents) in this matter. In fact, Appellant named many of the same parties in Case 3315 as in this case, although he did not name any of these Respondents. Judge Murphy handled a number of motions in that case and ultimately dismissed it via an Order filed September 27, 2019.

Judge Murphy also issued an Order in Case 3315 on September 27, 2019, “Enjoining Plaintiff from Re-Filing this Matter and Imposing Sanctions Upon the Plaintiff” (“Sanctions Order”). Among other things, the Sanctions Order precluded the Charleston County Clerk of Court from accepting further pleadings in Case 3315 on behalf of Appellant unless filed by a licensed lawyer. He included the Sanctions Order in an appeal filed September 24, 2020, Appellate Case No. 2020-001304. In an Order filed November 6, 2020, this Court dismissed the appeal as to the Sanctions Order. Appellant

also included the Sanctions Order in yet another appeal, Appellate Case No. 2019-001878, Alan Nix v. Churchill Park.

4. Case 067, Nix v. Churchill Park, et al.

Appellant, *pro se*, then filed this matter on behalf of himself and the Estate of Norma J. Nix on January 4, 2019, in the Charleston County Court of Common Pleas, C/A 2019-CP-10-067 (“Case 067”). (Compl., p. 1) The Complaint names thirty-six people and entities, as well as “Individual Officers, Agents, Attorneys, Accountants, Independent Contractors, Investors, Successors, Sister and Affiliated entities, Partners and Members of all named Entities.” (Compl., p. 1) The Complaint identifies seventeen causes of action. (Compl., p. 1)

The Complaint appears to be a blank version of a template pleading taken from some other case. It contains one statement in the “Parties and Jurisdiction” section, “Plaintiff is a resident of Charleston County, South Carolina.”¹ (Compl., p. 2) The “Factual Allegations” section is completely blank, and the pleading proceeds to list subheadings for seventeen causes of action with no substantive language at all in any of those sections. (Compl., p. 2)

The Complaint lists the following causes of action: (1) breach of fiduciary duty; (2) aiding and abetting breach of fiduciary duty; (3) interference with contractual relationship; (4) abuse of process; (5) breach of contract; (6) breach of contract accompanied by fraudulent act; (7) constructive fraud; (8) fraud and misrepresentation; (9) Unfair Trade Practices Act; (10) civil conspiracy; (11) consumer protection code violation; (12) intentional infliction of emotional distress; (13) negligence; (14) negligent misrepresentation; (15) negligent supervision; (16) slander of title;

¹ Note, the Complaint names two Plaintiffs.

and (17) unjust enrichment. (Compl. pp. 2 – 5). After the final cause of action subheading, the Complaint concludes with a statement about another matter involving Appellant and a prayer for relief. (Compl. p. 5)

On January 14, 2019, Respondents MTB, Stephanie Trotter, Ryan McCabe and Jamie McSweeney (“these Respondents”) filed a Motion to Dismiss the Complaint with Prejudice on the grounds of Rule 12(b)(6), SCRCP. (Mot. to Dismiss) The Motion cited the following specific grounds for dismissal: (1) failure to state facts sufficient to constitute a cause of action (Rule 12(b)(6)); (2) failure to file an affidavit of expert witness under S.C. Code § 15-36-100; (3) lawyer immunity of liability to third-parties; (4) no liability of individual Defendants; (5) Res judicata and judicial estoppel; (6) Norma J. Nix as an improper party; and (7) statute of limitations/failure to serve. (Mot. to Dismiss, pp. 8 – 9) The Motion also requested a gatekeeper order and sanctions on the grounds of Alan Nix’s frivolous, abusive, and harassing filings. (Mot. to Dismiss, p. 1 – 2)

Counsel for these Respondents served Appellant with the Motion to Dismiss via U.S. mail sent January 10, 2019. (Mot. to Dismiss, Cert. of Serv.) The Court set the Motion for a hearing with Judge Knie to take place on June 4, 2019. On April 26, 2019, counsel for these Respondents sent Appellant a letter notifying him of the hearing for the Motion to Dismiss via certified mail, which he refused to accept. (Apr. 26, 2019 Ltr.) On April 29, 2019, counsel for these Respondents sent Judge Knie a letter about the upcoming hearing and including a copy of the Motion, with a copy to Appellant. (Apr. 29, 2019, Ltr.)

Counsel for these Respondents received the April 26th letter back as unaccepted from Appellant. Thus, on May 20, 2019, counsel sent another letter, via regular U.S. mail, notifying Appellant of the hearing and enclosing a copy of the April 26th letter. (May 20, 2019, Ltr.)

Respondents David Brown and Catherine Brown also filed a Motion to Dismiss the Complaint on or about May 24, 2019. (Brown Mot. to Dismiss)

Judge Knie declined to hear any Motion to Dismiss at the June 4, 2019, hearing pending a decision on Plaintiffs' then-pending Motion to Change Venue. Judge Knie denied the Motion to Change venue, and the Court set a hearing for these Respondents' Motion to Dismiss for September 26, 2019, in front of Judge Jefferson. Counsel for these Respondents sent Appellant a letter notifying him of the hearing via regular U.S. mail on July 21, 2019. (Jul. 21, 2019, Ltr.)

On September 3, 2019, counsel for these Respondents sent Judge Jefferson an email attaching a copy of the Motion to Dismiss for her to review prior to the upcoming hearing, with a copy to Appellant. (Sep. 3, 2019, email) He never filed or served any response to the Motions to Dismiss, nor did he move to amend the Complaint.

A hearing took place on September 26, 2019, in Courtroom 3E of the Charleston County Courthouse. Counsel for these Respondents (Andrew Countryman), Appellant Alan Nix, as well as counsel for Catherine and David Brown (G. Troy Thames) attended. (Transcr., p. 1) At the end of a lengthy hearing that resulted in a 46-page transcript, Judge Jefferson took the matter under advisement and asked for proposed Orders in five days. (Transcr. 42 and 45)

On September 28, 2019, Appellant sent a letter addressed to Judge Jefferson and copying numerous other recipients in an attempt to supplement his argument offered at the hearing for the Motion to Dismiss. (Sep. 28, 2019, Ltr.) Counsel for David Brown and Catherine Brown submitted a proposed Order via email on September 20, 2019. (Sep. 20, 2019, email) Counsel for these Respondents submitted a proposed Order via email as instructed on October 1, 2019, copy to Appellant. (Oct. 1, 2019, email) On October 8, 2019, Judge Jefferson sent Appellant a letter

recapping the procedure related to the hearing and instructing him not to engage in *ex parte* communication. (Oct. 8, 2019, Ltr.) Judge Jefferson sent Appellant a second letter, again instructing him not to engage in *ex parte* communication on October 17, 2019. (Oct. 17, 2019, Ltr.)

Judge Jefferson entered Orders granting the Motions to Dismiss of these Respondents' and David and Catherine Brown on October 17, 2019. (Oct. 17, 2019, Orders). Counsel for these Respondents served Appellant with a filed copy of the Order via regular mail on October 22, 2019. (Oct. 22, 2019, Ltr.) Appellant filed no motion to reconsider or for clarification with the Lower Court. Appellants filed this Appeal on November 25, 2019. This Court has granted Motions to Dismiss of the Respondents as to Norma J. Nix and the Estate of Norma J. Nix, leaving Alan Nix as the lone Appellant.

B. Orders on Appeal

Appellant appeals Judge Jefferson's Orders granting the Motions to Dismiss of these Respondents and Catherine and David Brown in Case 067. (Exs. B and C to Notice of Appeal) Appellant also appeals two Orders Judge Murphy issued on motions in Case 3315. Those Orders were mistakenly filed in Case 067. Those are: (i) Order Granting Motion to Quash Subpoena Issued to Kevin Mims (Ex. A to Notice of Appeal) and (ii) Order Denying Motion to Set Aside. (Ex. D to Notice of Appeal)

These Respondents were not party to Case 3315 and therefore, are unequipped to respond to appeals of Orders issued on motions in it. Orders issued in that case (Exs. A and D to the Notice of Appeal) are not properly included on any appeal of Judge Jefferson's Orders granting the Motions to Dismiss in Case 067. To the extent those orders are appealable, they should be addressed in Appellate Case No. 2020-001304. The only question properly before this Court on this appeal is

whether Judge Jefferson erred in granting the Motions to Dismiss in Case 067 (Orders filed as Exs. B and C to the Notice of Appeal).

STANDARD OF REVIEW

The appellate court may affirm any ruling, order decision or judgment upon any ground(s) appearing in the Record on Appeal. Rule 220, SCACR. A complaint must contain a “short and plain statement of facts showing that the pleader is entitled to relief.” Rule 8, SCRCR. Rule 12(b)(6) provides that a defendant may move for dismissal based on the plaintiff’s failure to state facts sufficient to constitute a cause of action. Flateau v. Harrelson, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003). In considering a 12(b)(6) motion, “the trial court must base its ruling solely upon allegations set forth on the face of the complaint.” Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007) (emphasis added); *see also* Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (1987) and Williams v. Condon, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001).

The appellate court applies the same standard of review as the trial court in reviewing the dismissal of an action pursuant to Rule 12(b)(6). Cole Vision Corp. v. Hobbs, 384 S.C. 283, 680 S.E.2d 923 (Ct. App. 2009). The appellate court may sustain the dismissal when the facts alleged in the complaint do not support relief under any theory of law. Flateau v. Harrelson, *supra*. “The question for the court is whether in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the allegations set forth on the face of the complaint state any valid claim for relief.” Sloan Constr. Co. v. Southco Grassing, Inc., 377 S.C. 108, 112, 659 S.E.2d 158, 161 (2008). The court will not sustain the motion if the “facts alleged and inferences reasonably deducible therefrom would entitle the 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). To survive a motion to dismiss, the complaint must

state a valid claim which entitles the plaintiff to relief. See Gentry v. Yonce, 337 S.C. 1, 522 S.E.2d 137 (1999).

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

ARGUMENT

I. JUDGE JEFFERSON CORRECTLY GRANTED THESE RESPONDENTS’ MOTION TO DISMISS.

Appellant’s brief does not substantively argue that Judge Jefferson erred in granting these Respondents’ Motion to Dismiss. Instead, it rambles incoherently and about unfounded conspiracies and alleged misconduct in the many cases Appellant has chosen to litigate as a *pro se* party. The only semi-coherent argument Appellant makes as to Judge Jefferson’s Orders dismissing the case is that she:

“clearly didn’t have control of the facts in some instances, and in others, clearly committed misconduct by not adhering in good faith to the Judicial Code of Conduct and, in others, clearly joining a conspiracy with [lawyers] Wood and Countryman, of which they were already involved in a conspiracy with their client’s [sic], McCabe, Trotter and McSweeney, who have been involved in a conspiracy with [Judge] Scarborough, [Judge] Dukes-Beck, [Clerk of Court Julie] Armstrong and Charleston County since sometime in 2017.” (Appellant’s brief, p. 16)

Appellant offers no discussion of the standard of review applicable to the Orders dismissing Case 067, much less application of the law under that standard. He fails to substantively challenge

any basis for dismissal in Judge Jefferson's Orders. This Court should deny his appeal on that basis alone. Regardless, Judge Jefferson properly granted the Motions to Dismiss in Case 067.

A. The Complaint is facially deficient. It contains no factual allegations or substantive allegations that could support a claim for relief under any reading.

Rule 8(a), SCRCP 8 prescribes what a pleading must contain. It says that a pleading which sets forth a cause of action *shall* contain (1) a short and plain statement of the grounds including facts and a basis for jurisdiction; (2) a short and plain statement of facts showing that the pleader is entitled to relief and (3) a prayer or demand for relief sought (emphasis added). *Id.* Further, Rule 12(b), SCRCP prescribes how one responding to a complaint may plead. One available defense is a failure to state facts sufficient to constitute a cause of action. Rule 12(b)(6), SCRCP. The Rule also permits a party responding to a complaint to make a motion on one of the cited defenses, including failure to state a claim.

These Respondents made such a Motion in response to the subject Complaint in Case 067. On its face, the pleading fails to state *any* actual facts. The Factual Allegations section is completely blank. No reading of the Complaint, even in the light most favorable to Appellant, and with every doubt resolved on his behalf, gives rise to the basis of a claim against these Respondents. In fact, there could be no other interpretation. The Complaint literally contains no fact or any discussion of facts with respect to any cause of action. Merely listing various causes of action without any statement or discussion of facts on which they are based does not and cannot give rise to the standard(s) of pleading the Rules of Civil Procedure prescribe. Submitting such a defective pleading is an affront on the Court and violation of the Rules applicable to pleadings.

Counsel for these Respondents served the Motion to Dismiss on Appellant on or about January 10, 2019. The hearing on the Motion took place on September 26, 2019, 259 days later. At no time before or during the hearing, did Appellant ever move to amend the Complaint. As Judge Jefferson correctly pointed out at the hearing, “it [a complaint] just has to be concise. . . but there’s – there are absolutely no facts alleged in this summons [sic]. If I read this, I wouldn’t know what you were suing about.” (Transcr., p. 32)

Appellant himself agreed with this assessment at the hearing. In response to Judge Jefferson’s statement above, he said, “[A]nd so I agree with you, your Honor, and I, I fully appreciate the situation.” (Transcr., p. 32). Appellant did not even attempt to argue his blank Complaint somehow states facts sufficient to state a cause of action against these Respondents.

THE COURT: But you'd still have to plead facts.

MR. NIX: I understand, Your Honor. You know, the fact that 5 -- the 60(b) motion has never been heard or ruled on is a problem.

THE COURT: No, the problem is you haven't alleged any facts in the summons and complaint.

MR. NIX: And, and I understand, Your Honor.

(Transcr., p. 34) Dismissal was the only appropriate result.

B. Judge Jefferson correctly dismissed the Complaint for failure to serve.

Rule 3(a), SCRCF provides that a civil action is commenced when the summons and complaint are filed with the clerk if (1) they are served within the statute of limitations; or (2) if not served within the statute, actual service must be accomplished no later than 120 days after filing. Rule 5(d), SCRCF provides that a proof of service shall be filed within ten days after service of the

summons and complaint. Upon failure to serve the summons and complaint, the court may dismiss the action on its own initiative or on the application of a party. Id.

Appellant filed the Summons and Complaint on January 4, 2019. He never served it or filed any proof of service to any Defendant. These Respondents raised failure to perfect service of process as a basis for dismissal in their Motion. (Mot. to Dismiss, p. 9) This was also raised at the hearing of the Motion. (Transcr., p. 9 – 10, 19, 43 – 44) Two hundred sixty-four days passed between the filing of the Complaint and the hearing for the Motion to Dismiss, and Appellant did not serve these Respondents or file any proof of service. Appellant did not address his failure to serve the Summons and Complaint at the hearing.

Appellant has still not made any effort to serve these Respondents with the Summons and Complaint. Under Rule 3(a), SCRCF, this lawsuit never even commenced because more than 120 days have passed since the filing of the Summons and Complaint. Appellant has also filed no proof or affidavit of service. Thus, the Complaint was subject to dismissal under Rule 5(d), SCRCF, and Judge Jefferson properly dismissed it.

C. Judge Jefferson appropriately dismissed the Complaint pursuant for failure to file an expert affidavit pursuant to S.C. Code § 15-36-100.

S.C. Code § 15-36-100 is part of the South Carolina Frivolous Proceedings Sanctions Act. It provides that a complaint alleging professional negligence requires the contemporaneous filing of an affidavit of a qualified expert witness, which states at least one negligence act or omission of the professional defendant and the factual basis for each claim based on the evidence available at the time of the filing. S.C. Code § 15-36-100(B). This Code Section specifically applies to South Carolina lawyers. S.C. Code § 15-36-100(G)(2). The statute does not require the contemporaneous filing 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 § 15-36-100(C)(2). If a plaintiff fails to file an expert affidavit in compliance with the statute, and the defendant raises this issue by motion to dismiss filed, the complaint is subject to dismissal for failure to state a claim. S.C. Code § 15-36-100(C)(1).

The contemporaneous filing requirement also does not apply to a case in which the statute of limitations 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 with 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. S.C. Code § 15-36-100(C)(1).

The Complaint contains no factual allegation(s) but does name these Respondents. Of them, MTB is a law firm, and Ryan McCabe, Stephanie Trotter and Jaime McSweeney are or were lawyers at MTB. The firm, through those lawyers, represented Plaintiff's homeowners' association in a lien foreclosure action referenced in the Complaint. In addition to naming these Defendants, the pleading names two other law firms (Rogers, Townsend & Thomas, PC and Dodds & Hennessy, LLP). The pleading also contains references to causes of action sounding in professional negligence, including

negligence, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, negligent supervision and negligent misrepresentation.

Appellant did not file an expert affidavit specifying a negligent act or omission of any of the lawyer/law firm Defendants named in the case with the Complaint or at any time after filing it. He also never filed a motion asking for leave to file an expert affidavit outside of the time period prescribed in the statute. The Complaint was therefore subject to dismissal pursuant to S.C. Code § 15-36-100.

Judge Jefferson discussed this issue at length with Appellant at the hearing on the Motion to Dismiss. Appellant tried to say he is not suing these Respondents for malpractice. However, Judge Jefferson correctly pointed out that their acts, of which he complains, were taken in their professional capacity. Appellant confirmed this in discussing how it all relates to these Respondents' representation of his homeowners' association in the foreclosure action against him. (Trancr., pp. 26 – 31) He was unable to present any substantive or legal reason as to why his Complaint is somehow exempt from the expert affidavit requirement of S.C. Code § 15-36-100. The entire Complaint is therefore subject to dismissal under S.C. Code § 15-36-100, and Judge Jefferson correctly dismissed it.

D. Appellant is unable to maintain a claim against lawyers who did not represent him.

Judge Jefferson also granted these Respondents' request to dismiss the Complaint to the extent it maintains claims against them for actions they took as lawyers acting on behalf of clients, as they did not represent Appellant. The Complaint does not contain any actual fact describing the basis of his claim. However, it lists claims for negligence, breach of fiduciary duty, negligent

misrepresentation, negligent supervision, and other claims sounding in malpractice against lawyers/law firms. The claim also clearly relates to or arises out of the underlying Foreclosure Case in which certain of these Respondents represented Appellant's homeowners' association (which the Complaint does reference). (Compl., p. 5) Appellant discussed this at the hearing for the Motion to Dismiss and admitted he only sued these Respondents because of their involvement with the foreclosure matter. (Transcr., pp. 26 – 31)

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

South Carolina law also provides that lawyers are immune from liability to third parties arising from the performance of professional activities as a lawyer on behalf of and with the knowledge of the client. Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995). *See also* Gaar v. N. Myrtle Beach Realty Co., 287 S.C. 525, 339 S.E.2d 887 (Ct. App. 1986). The only exception to these generally recognized principles is the context of a beneficiary of a will. Rydde v. Morris, 318 S.C. 643, 675 S.E.2d 431 (2009).

These Respondents are a law firm and lawyers that work(ed) there, and the Complaint purports to maintain claims sounding in professional negligence against them. The pleading fails to

allege they represented Appellant, who admitted as much at the hearing. The Complaint also fails to allege these lawyers did anything outside of the scope of their representation of their client that could serve as the basis of a claim by Appellant, a non-client. Therefore, Judge Jefferson properly dismissed the Complaint for failure to allege facts to support a claim by Appellant against lawyers who did not represent him.

E. Judge Jefferson properly dismissed the Complaint as to individually named Defendants Trotter, McCabe, and McSweeney.

These Respondents raised the Complaint's improper naming of Defendants Trotter, McCabe and McSweeney as a basis for dismissal. The Complaint does not state facts underlying any claim against them, but it does reference two other cases, 2014-CP-10-05407 and 2017-CP-10-04031. Those cases are the Foreclosure Case, Churchill Park v. Nix, in which MTB represented Appellant's homeowners' association in the pursuit of various amounts he allegedly owed to the association. The case (initially filed as C/A 2014-CP-10-05407) was dismissed under SCRCP 40(j) and restored as case C/A 2017-10-04031.

Stephanie Trotter, Ryan McCabe and Jamie McSweeney are or were lawyers at MTB during the time period when MTB represented the plaintiff the Foreclosure Case against Appellant. The Complaint contains no allegation any of these individuals were acting outside their scope as lawyers for the homeowners' association at any time. They are therefore not proper defendants in Case 067. Plaintiff's claims against Ryan McCabe, Stephanie Trotter and Jamie McSweeney are subject to dismissal, and Judge Jefferson's Order correctly held this.

F. Improper Plaintiff Norma J. Nix and the Estate of Norma J. Nix

Judge Jefferson's Order granting these Respondents' Motion to Dismiss also held Norma J. Nix and the Estate of Norma Nix were not proper parties to Case 067. Appellant is not a lawyer and is thus unable to represent Norma J. Nix or the Estate of Norma J. Nix in a legal matter. The Complaint does not state that Appellant is the Personal Representative of her Estate. By pursuing legal matters on her behalf and/or on behalf of the Estate, Appellant is engaging in the unauthorized practice of law. Recognizing this, this Court properly dismissed this appeal as to Norma J. Nix and the Estate of Norma Nix. This Court should also affirm Judge Jefferson's Order on these Respondents' Motion to Dismiss on this basis.

G. Judge Jefferson appropriately dismissed the Complaint with prejudice.

Appellants' brief does not specifically challenge the propriety of Judge Jefferson's dismissal of the Complaint in Case 067 with prejudice. It does include a statement in the issues on appeal regarding which causes of action she dismissed with prejudice. The Order clearly dismisses the entire Complaint as to these Respondents with prejudice, and correctly so.

In order to be addressed on appeal, a matter must have been addressed by the trial judge or mentioned in a subsequent Rule 59(e), SCRPC motion. *Id.* citing Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *see also* Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (finding issue was not preserved where the trial judge did not explicitly rule on the appellant's argument and the appellant did not raise the issue in a Rule 59(e), SCRPC, motion to alter or amend the judgment).

The subject Motion to Dismiss asked the Lower Court to dismiss the Complaint with prejudice. Appellant never filed any brief in response to the Motion or moved to amend the Complaint (despite the initial pleading being completely blank). A full hearing took place more than nine months later, and Appellant still never raised this issue with the Lower Court. After Judge Jefferson granted the Motion to Dismiss granting dismissal with prejudice, Appellant never filed a Rule 59(e), SCRCR, motion to alter or amend the judgment raising this issue. The law precludes him from raising it now, for the first time, on appeal.

To the extent this Court considers the propriety of dismissal with prejudice versus dismissal without prejudice, it should affirm Judge Jefferson's Order. The appellate court may affirm dismissal with prejudice if it determines the lower court properly dismissed the complaint. Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006) citing Ark. Dept. of Env. Quality v. Brighton, 352 Ark. 396, 102 S.W.3d 458 (2003). When a complaint is dismissed with prejudice but fails to present additional factual allegations or a different theory of recovery which may give rise to a claim upon which relief may be granted, the appellate court may, in its discretion, affirm the dismissal of the complaint with prejudice. Id., referencing Potter, Prescott, Jamieson & Nelson, PA, 708A.2d 283 (ME 1998) (trial court acted within its discretion in dismissing the case with prejudice pursuant to Rule 12(b)(6) where plaintiff was unable to show how he would cure defects in his complaint if granted leave to amend it); also referencing Baker v. Town of Middlebury, 753 N.E.2d 67, 74 (Ind. App. 2001) (dismissal of complaint with prejudice was harmless error because plaintiff failed to show how he would have amended his complaint to avoid dismissal).

Again, the Complaint at issue is completely substantively blank. This is not a situation where the pleading failed to contain a specific factual allegation or element of a cause of action. The

Complaint actually contains *no* factual allegations or elements of any cause of action. Appellant is a disgruntled homeowner who decided to fight his homeowners' association in court *pro se*. Losing at every turn, he continues to lash out in numerous ways, including filing Case 067. This pleading names numerous individuals and companies, including these Respondents. They have been forced to defend this case since January 2019. This is clearly nothing more than a dilatory and spurious attempt by Appellant to harass these Respondents (and many others).

Appellant surely knew this when he filed a blank lawsuit. It was further brought to his attention upon the filing of the Motion to Dismiss in immediate response to it. In the nine months that passed between then and the hearing for the Motion to Dismiss, he never moved to amend or made any effort whatsoever to address the facially deficient – blank – Complaint. He had no explanation for this at the hearing of the Motions to Dismiss and, in fact, agreed.

9 THE COURT: No, the problem is you haven't alleged any
10 facts in the summons and complaint.
11 MR. NIX: And, and I understand, Your Honor.

(Trancr., p. 34)

The only thing Appellant made clear at the hearing on the Motions to Dismiss is that he filed Case 067 because he is upset about losing the Foreclosure Case, as well as every other matter he has pursued arising out of his issues with his neighbors and homeowners' association. Appellant brazenly filed a blank and baseless lawsuit, and then incredulously never tried to amend it to add even a scintilla of substance. Instead, he accuses these Respondents, their counsel, various judges and court officials of impropriety and criminality. If there was ever a case where dismissal with prejudice was

appropriate, it is this one. Under no circumstance should this Court do anything other than affirm Judge Jefferson's Order granting dismissal with prejudice as to these Respondents.

H. Appellant's brief and designation of matter violate the Rules

Appellant's brief and designation of matter fail to comply with the Rules in a variety of ways as detailed in these Respondents Motion to Strike/Dismiss filed September 25, 2020. These Respondents also adopt the arguments of the other Respondents in their briefs pursuant to Rule 208, SCACR, including their arguments regarding Appellant's various failures to follow the Appellate Court Rules in the filing of his brief and designation of matter.

CONCLUSION

This Court should affirm Judge Jefferson's Order Granting these Respondents' Motion to Dismiss and award these Respondents costs, attorney's fees and other such and further relief as the Court deems just and proper.

Respectfully submitted,

/s/ Andrew W. Countryman
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY COURT OF COMMON PLEAS

Deadra Jefferson, Circuit Court Judge

Maite Murphy, Circuit Court Judge

Appellate Case No. 2019-001951

RECEIVED

Dec 30 2020

SC Court of Appeals

Alan G. Nix, Norma J. Nix
and the Estate of Norma J.

Nix.....Appellants,

v.

Churchill Park, Churchill Park HOA, Churchill Park Homeowners' Association, Inc., Churchill at Park West Association, Inc., Churchill Property Owners Association, Churchill Park Property Owners Association, Churchill Park at Parkwest, Inc., Churchill Park at Park West Association, Inc., Churchill Park @ Park West Association, Inc., Southern Community Services, LLC, Park West Development Corp., LPPM, Inc., **McCabe, Trotter & Beverly, PC**, Dobson Builders, **Stephanie Trotter, Ryan McCabe, Jaime McSweeney**, Larry Riddlehoover, Mike Hurd, Sheri Cothran, David Brown, Catherine Brown, Stephen Sumner, Richard Riccoboni, Rick Cumberland, Park West Master Association, Inc., Park West Amenity Association, Inc., C. Richard Dobson, Builders, Inc., DR Horton, Inc., Brian Gardner, Venture Management of South Carolina, Inc., Dodds & Hennessey, LLP, Kim Atkeson, Jennifer Williamson, Jessica Turner, Kevin Steelman, Landtech Development, LLC, Landtech Incorporated of South Carolina, Land Tech Charleston, LLC, Rogers, Townsend & Thomas, PC, Henry Munn, Charleston County (Christine Smith), Judge Mikell Scarborough, Sandlapper Reporting, LLC, William H. Sloan, Sloan Law Firm, Individual Agents, Assigns, Attorneys, Accountants, Employees, Officers, Directors,

Independent Contractors, Investors, Successors,
Predecessors, Insurers, Representatives, Parents, Sister
and Affiliated Entities, Partners, Members of all Persons
Who Might be Liable.....Respondents.

PROOF OF SERVICE

I certify I have served the Initial Brief and Designation of Matter of Respondents McCabe, Trotter & Beverly, PC, Stephanie Trotter, Ryan McCabe and Jaime McSweeney on all parties/their counsel in this case via email addressed as follows:

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[signature page to follow]

December 30, 2020

/s/ Andrew W. Countryman

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C O U N T R Y M A N
L A W F I R M

December 30, 2020

Via AIS Electronic Filing

South Carolina Court of Appeals
Attn.: Clerk, Jenny Abbott Kitchings
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RECEIVED
Dec 30 2020
SC Court of Appeals

Re: Nix v. Churchill Park, *et al.*
Appellate Case No.: 2019-001951
CLF: 000006 – 000050

Dear Jenny:

I represent Respondents McCabe, Trotter & Beverly, P.C., Stephanie Trotter, Ryan McCabe and Jaime McSweeney in this case. I am filing with this letter, these Respondents': (a) Initial Brief; (b) Designation of Matter and (c) Proof of Service. Pursuant to the Supreme Court's Order of May 29, 2020, regarding the Operation of the Appellate Courts During the Coronavirus Emergency (Appellate Case No. 2020-000447), I am submitting this electronically and not including copies. Thanks for your assistance, and please let me know if you have any questions.

Sincerely,

Andrew W. Countryman

AWC/sgc
Attachments
Cc via email: Appellant, counsel of record for other Respondents