

RECEIVED
 MAR 07 2013
 SC Court of Appeals

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF CHARLESTON
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011-CP-10-04537

Alan Sheppard

William Higgins

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> 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.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41, 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 _____

FILED
 2012 NOV 21 PM 11:13
 SHARLENE J. ARMS, CLERK OF COURT

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This Court's Order filed 10/22/2012 is hereby rescinded. The case is Ordered restored back to the Active Jury Docket.

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.

AK Jeffe
 Circuit Court Judge

2128
 Judge Code

11/19/12
 Date

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011-CP-10-4537

Alan Sheppard

William O Higgins, Ronald C. Owens,
Russell Bennett, Charles P. Darby, Lynn
McCants, and Kiawah Resort Associates, L.P.

PLAINTIFF(S)

Submitted by: _____	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant or <input type="checkbox"/> 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.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41, 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 _____

FILED
 2013 JAN 25 PM 12:04
 CLERK OF COURTS
 BY _____

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: The Court hereby GRANTS Defendants' Motion for Judgment on the Pleadings.

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)
N/A	N/A	\$ N/A
		\$
		\$
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.

William O. Higgins
Circuit Court Judge

2163
Judge Code

01/18/13
Date

STATE OF SOUTH CAROLINA

)

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

)

NINTH JUDICIAL CIRCUIT

ALAN SHEPPARD,

)

C.A. No.: 2011-CP-10-4537

Plaintiff,

)

vs.

)

**ORDER GRANTING DEFENDANTS'
MOTION FOR JUDGMENT
ON THE PLEADINGS**

WILLIAM O. HIGGINS, RUSSELL BENNETT,
RONALD OWENS, CHARLES P. DARBY,
LYNN MCCANTS, AND KIAWAH RESORT
ASSOCIATES, L.P.

)

)

)

)

)

)

Defendants.

)

FILED
2013 JAN 25 PM 12:04
JULIE J. ARMASTRONG
CLERK OF COURT
BY _____

THIS MATTER COMES BEFORE THE COURT on a Motion for Judgment on the Pleadings filed by Defendants Russell Bennett ("Bennett"), Ron Owens ("Owens"), Charles P. Darby ("Darby") and Kiawah Resort Associates, L.P. ("KRA") (collectively, the "Defendants"), relating to the Complaint filed in this action by Plaintiff Alan Sheppard. A hearing took place before the undersigned on April 25, 2012. After a careful review of the submissions and arguments of the parties, I find that no viable cause of action exists against these Defendants and judgment on the pleadings is warranted. Thus, Defendants' Motion is **GRANTED**.

LEGAL STANDARD

After the pleadings are closed, but within such time as not to delay the trial, any party may move for a judgment on the pleadings. Rule 12(c), SCRPC. The motion will be sustained only where the pleadings are so defective that, taking all the facts alleged in the pleadings as admitted, no cause of action or defense is stated. *Rosenthal v. Unarco Indus., Inc.*, 278 S.C. 420, 297 S.E.2d 638 (1982). All properly pleaded factual allegations are deemed admitted for

purposes of considering the motion for judgment on the pleadings. *Baker Hosp. v. Firemans Fund Ins. Co.*, 314 S.C. 98, 441 S.E.2d 822 (1994).

FINDINGS OF FACT


1. On February 4, 2008, Defendants KRA and Bennett filed an action against Plaintiff to enforce a contract relating to the Wando River Property (the "Prior Action").¹

2. Plaintiff asserted counterclaims for (1) interference with contractual relationship, (2) breach of fiduciary duty, (3) interference with contract and (4) breach of the implied covenant of good faith and fair dealing, which included factual allegations relating to alleged interference [by the current Defendants] with Plaintiff's relationship with his attorney and retention of earnest money (the "Counterclaims").

3. Plaintiff, KRA and Bennett settled the Prior Action and memorialized the terms of their settlement in a Settlement and Release Agreement, which allowed for an entity controlled by Plaintiff (Wando River, LLC) to sell the Wando River Property to a third party (Wando E, LLC).

4. Plaintiff signed the Settlement and Release Agreement both in his individual capacity and as managing member of Wando River, LLC, as Plaintiff was a named party in the Prior Action. The Settlement Agreement included a broadly-worded, unrestricted mutual release of claims ("Mutual Release"), as follows:

Mutual Release of Claims. In consideration for the mutual promises and obligations hereunder, KRA, Bennett, Wando River, Sheppard, [and] Simmons, on behalf of themselves and their

¹The documents relevant to the prior action, including the Complaint, Amended Answer and Counterclaims, Stipulation of Dismissal with Prejudice, and the Settlement and Release Agreement, were all attached as exhibits to Defendants' Amended Answer in this case, and are therefore considered part of the pleadings for purposes of Defendants' Motion for Judgment on the Pleadings.

subsidiaries, affiliate entities, principals, shareholders, directors, officers, employees, representatives, members, managers, agents, heirs, successors, and assigns each hereby release and discharge each other and their respective subsidiaries, affiliate entities, principals, shareholders, directors, officers, employees, representatives, members, managers, agents, heirs, successors, and assigns from any and all claims or causes of action of any kind as they may have against one another including but not limited to all claims and counterclaims raised in this Action.

See Settlement and Release Agreement, Exhibit C, at Section 6.

5. KRA and Bennett were parties to the Settlement and Release Agreement. Darby signed the document on behalf of KRA as its authorized officer. As alleged in the Complaint, Defendant Owens is an agent of KRA. As agreed, the Mutual Release included not only the parties to the Settlement Agreement, but also their “subsidiaries, affiliate entities, principals, shareholders, directors, **officers, employees**, representatives, members, managers, **agents**, heirs, successors, and assigns.” *Id. (emphasis added)*.

6. Consistent with the terms of the Settlement Agreement, the parties concluded the Prior Action by filing a Stipulation of Dismissal with Prejudice with the Berkeley County Court of Common Pleas on July 15, 2008.

7. On June 27, 2011, Plaintiff filed the current lawsuit (“Complaint”) in which Plaintiff asserted the same claims against Defendants that he set forth in his Counterclaims in the Prior Action. These claims relate to the purchase and sale of the Berkeley County Wando River property (“Wando River Property”).

8. The Prior Action, including the Counterclaims, was based on the same facts and alleged injuries as set forth in the current Complaint.

am
-3-

CONCLUSIONS OF LAW

9. The Court finds that this matter is barred by *res judicata*. The Complaint is based on the same claims and subject matter as the Counterclaims in the Berkeley County lawsuit. The Counterclaims were dismissed with prejudice. Under South Carolina law, a dismissal with prejudice constitutes an adjudication on the merits and, operating as *res judicata*, precludes subsequent litigation to the same extent as if the action had been tried to a final adjudication. *See Nunnery v. Brantley Constr. Co., Inc.*, 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986); *see also Nelson v. QHG of S.C., Inc.*, 354 S.C. 290, 311 580 S.E.2d 171, 182 (Ct. App. 2003) (affirming grant of motion to dismiss on basis of *res judicata* for parties who were omitted from the initial action but were related to the parties included), *aff'd in part and rev'd in part on other grounds*, 362 S.C. 421, 608 S.E.2d 855 (2005). Based on the pleadings, *res judicata* applies to these facts and precludes Plaintiff from pursuing his Complaint.

10. To establish *res judicata* and obtain dismissal of the Complaint, Defendants proved the following three elements: (1) identity of the parties, (2) identity of the subject matter and (3) adjudication of the issue in the former suit. *See e.g., Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999).

11. The first element is satisfied, as the parties in the two actions are the same. Plaintiff, KRA, and Bennett were named parties in the Prior Action, while Darby and Owens are officers or agents of KRA and are therefore considered "parties" for purposes of *res judicata*.

12. The second element is also satisfied, as there is identity of subject matter between the two actions. Both the Prior Action and Plaintiff's Complaint relate specifically to the Wando River Property, allegations of interference with the attempt to sell the Wando River Property, and

allegations that Defendants should not have received the earnest money for the Wando River Property.

13. The third element is also satisfied as the entry of a Stipulation of Dismissal with Prejudice is specifically considered a prior “adjudication” of the issues under South Carolina law. *See, e.g., Nunnery*, 289 S.C. at 209 345 S.E.2d at 743.

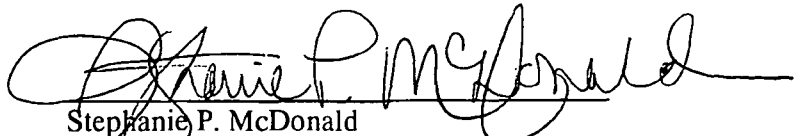
14. The Court further finds that the Complaint is barred by the Mutual Release in the Settlement and Release Agreement. The Settlement and Release Agreement included a broadly-worded Mutual Release, which was a component of the consideration for the Settlement and Release Agreement. As indicated by its terms, the Mutual Release was intended specifically to apply to each of the Defendants, who are named parties or officers or employees of named parties, as indicated in the record. Because the Complaint attempts to assert claims that were released under the Mutual Release against parties that were included in the Mutual Release, the Complaint is barred and should be dismissed. Under South Carolina law, a release is recognized to constitute a contract. *See Hyman v. Ford Motor Co.*, 142 F.Supp.2d 735 (D.S.C. 2001). In construing the terms of a contract, this Court must first look at the language of the contract to determine the intentions of the parties. *C.A.N. Enterprises, Inc. v. South Carolina Health & Human Services Fin. Comm’n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988).

15. By looking at the language of the Mutual Release, it is clear that it was intended as a voluntary and mutual waiver of all claims relating not only to the Wando River Property, but also to any claim relating to any subject that was asserted or could have been asserted in the Prior Action. Through the Complaint, Plaintiff is attempting to re-assert claims relating to the Wando River Property, which are squarely within the scope of the binding Mutual Release.

16. The Court further finds that the Complaint is barred by the applicable statutes of limitations. The Complaint was filed nearly five years after the events relating to the earnest money occurred and more than three years after Plaintiff asserted the same claims in the Prior Lawsuit. Plaintiff did not commence this action until more than three years after the alleged claims accrued. Pursuant to S.C. Code Ann. §15-3-530, the applicable statute of limitations for each of the claims asserted or alluded to in the Complaint (conversion, conspiracy, fraud and negligence) is three years. Claims relating to the earnest money arose in September 2006, when Plaintiff authorized the money to be disbursed. Any other claims asserted in the Complaint arose before April 4, 2008, the date when the same claims were asserted in the Prior Action. Additionally, these claims existed prior to June 26, 2008, which is the date on which Plaintiff previously released these same claims by entering into the Settlement and Release Agreement. Plaintiff has not made any allegation relating to causes of action arising on or after June 27, 2008, and therefore his Complaint is barred under the applicable statutes of limitations.

WHEREFORE, the Court grants Defendants' Motion for Judgment on the Pleadings on the separate and independent grounds that the claims in the Complaint are barred by (1) *res judicata*, (2) prior release and (3) the applicable statutes of limitation.

AND IT IS SO ORDERED.


Stephanie P. McDonald
Presiding Judge
Charleston County Court of Common Pleas

January 18, 2013
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

C/A NUMBER: 2009-CP-10-5838

Alan Sheppard, Ed Sheppard, Randy)
Bates, Eddie White and Dan)
Radovanick, Individually and as)
Members of Wando River, L.L.C. v.)
William O. Higgins, Trenholm Walker)
and Clay McCullough)
)
Plaintiff(s),)
)
v.)

**ORDER GRANTING DEFENDANT
WILLIAM O. HIGGINS MOTION TO
DISMISS**

William O. Higgins, Trenholm Walker)
and Clay McCullough)
)
Defendant(s).)
_____)

FILED
2011 JAN 21 PM 4:51
JULIE J ARMSTRONG
CLERK OF COURT
BY _____

Pursuant to Rules 12(b)(5) and 12(b)(6) of the South Carolina Rules of Civil Procedure, Defendant William O. Higgins, by and though his counsel, moved this Court for an Order dismissing the causes of action set forth in Plaintiffs' Complaint. A hearing on this motion took place on December 9, 2010 before the Honorable Roger Young, wherein counsel for all parties appeared and presented their respective arguments. For the reasons stated herein, the Complaint is dismissed as to William O. Higgins.

FACTS

On September 15, 2009, Plaintiffs filed this action sounding in legal malpractice against Defendant William O. Higgins arising out of transaction from September of 2006 involving real property located at Detyens Lamb Lane in Mt. Pleasant, South Carolina. Plaintiffs selected the box for legal malpractice on the Civil Action Coversheet that was

filed with the Complaint. On January 14, 2010 the Summons and Complaint was hand-delivered to Mary Conn at Ellis, Lawhorne & Sims, P.A., who is the legal assistant to Higgins. More than 120 days elapsed from the time the Summons and Complaint was filed and service of the same was attempted. Mary Conn is an employee of Ellis, Lawhorne, and Sims, P.A. and she serves as legal secretary to Higgins. As stated in Ms. Conn's affidavit, which is attached to Defendant's Motion to Dismiss, a gentleman gave her a copy of the Summons and Complaint at the offices of Ellis, Lawhorne, and Sims, P.A. Further, Ms. Conn states that she is not authorized by appointment or by law to receive service on behalf of Higgins.

After this attempted service, Plaintiffs have not attempted to serve William O. Higgins. To date, William O. Higgins has neither been personally served with the Summons and Complaint nor has anyone left copies of the Summons and Complaint at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, nor has anyone delivered a copy of the Summons and Complaint to an agent authorized by appointment or by law to receive service of process.

LAW/ANALYSIS

I. SERVICE OF THE SUMMONS AND COMPLAINT WAS IMPROPER.

Plaintiffs' case must be dismissed pursuant to SCRCP 12(b)(5) because service was improper so it was not accomplished as to Higgins. SCRCP 4(d)(1) allows service to be made as follows:

Upon an individual other than a minor under the age of 14 years or an incompetent person, by delivering a copy of the summons and complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing

A handwritten signature in black ink, appearing to be the initials 'P' followed by a stylized flourish.

therein, or by delivering a copy to an agent authorized by appointment or by law to receive service of process.

While the Supreme Court of South Carolina has "never required exacting compliance with the rules to effect service of process." Roche v. Young Bros., 318 S.C. 207, 456 S.E.2d 897, 899 (1995), the must be sufficient compliance with the service rules. See also Langley v. Graham, 322 S.C. 428, 472 S.E.2d 259, 259-60 (App.1996) (noting that process was addressed to defendant at his private residence, but defendant's sister signed for the process). In Roche, the Supreme Court ruled that the Plaintiff must only show compliance with the rules. Id. at 211. The person in Roche who signed the certified mailing slip was an officer of the defendant company that was sued and the defendant failed to show that the officer was not authorized to accept service. In the present case, Ms. Conn's affidavit proves that she was not authorized to accept service.

Plaintiffs completely failed to comply with SCRCP 4(d)(1) regarding service of process. Service was only attempted upon an employee of Ellis, Lawhorne, and Sims, P.A. who was not authorized by appointment or by law to receive service of process. Ms. Conn is not an agent for Higgins, rather she is an employee of the law firm. Plaintiffs have provided no testimony to contradict this statement or to show that proper service was attempted by the other methods outlined in SCRCP 4(d)(1). Rather, Plaintiffs rely upon hearsay and conclusory statements when stating in their brief that the "Defendant was in his office when service was being made upon him, and his secretary indicated to the process server that she could take the papers for him." The statement must be excluded because Plaintiffs have provided no proof of service or testimony from the process server to support this allegation. There is no evidence that the process server



asked Ms. Conn to confirm that she was authorized to accept service or that she sign a document or an affidavit confirming service.

Plaintiffs also rely upon Mull v. Ridgeland Realty, LLC, 387 S.C. 479, 693 S.E.2d 27 (Ct.App. 2010) for the propositions that they sufficiently complied with the service rules such that Defendant had notice of the action and the Court has personal jurisdiction of Defendant. In Mull, the sole issue was whether the defendant was properly served at the registered agent's address that was on file with the South Carolina Secretary of State. The plaintiff's attorney served the complaint via certified mail at the registered agent's South Carolina address and sent a copy of the complaint via certified mail to the registered agent's address in New York. The registered agent signed the return receipt, contacted plaintiff's counsel, and sought an extension to respond, but never responded to the complaint. In Mull, the registered agent had notice and interacted with plaintiff's counsel, but chose to not participate in the litigation. The Mull Court ultimately ruled that service was proper under the statute dealing with service of a corporation through its registered agent.

That is not the case in the present action. Higgins did not answer and instead has filed a Motion to Dismiss to challenge the service of the Summons and Complaint, which was not proper as to an individual pursuant to the South Carolina Rules of Civil Procedure. The court lacks personal jurisdiction over Higgins because service was not proper. Further, in the Mull case, and the others cited by Plaintiffs, service was attempted upon a corporate entity rather than an individual. Corporations must be notified through an agent because they must operate through their agents and employees. In this case,

A handwritten signature in black ink, consisting of a large, stylized capital letter 'P' followed by a cursive 'y'.

Plaintiffs sued Higgins as an individual rather than a corporate entity. Plaintiffs failed to properly serve William O. Higgins so the Complaint is dismissed.

II. SERVICE WAS NOT TIMELY.

Plaintiffs failed to commence the action against William O. Higgins. Even if this Court finds that Plaintiffs substantially complied with the service rules, the Summons and Complaint were untimely so this lawsuit has not commenced and must be dismissed.

SCRCP 3(a)(2) requires:

A civil action is commenced when the summons and complaint are filed with the clerk of court if:

....

(2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.

(emphasis supplied). Until an action is commenced, there is no proceeding pending and, thus, nothing to refer. Chabek v. Nationwide Mut. Fire Ins. Co., 303 S.C. 26, 397 S.E.2d 786 (Ct.App. 1990); cf. State v. McQuillan, 252 Mo. 334, 338-9, 158 S.W. 652, 653 (1913) ("Before there can be a reference there must be an action pending."). In Chabek, the case was referred to a Master before the Summons and Complaint was filed and served in the prior related action. Therefore, the Court had nothing to refer.

The statute of limitations for legal malpractice claims is three years. S.C. Code § 15-3-530(5). The transaction at issue in this matter took place in September of 2006 so the Summons and Complaint had to be served by September of 2009 to avoid the rule found in SCRCP 3(a)(2), which requires service not later than 120 days after the Summons and Complaint are filed if they are not served prior to the expiration of the statute of limitations. Service was not attempted until January 14, 2010, after the expiration of the

A handwritten signature or set of initials, possibly "RS", written in black ink.

statute of limitations, so SCRCP 3(a)(2) is applicable such that the Summons and Complaint must be served within the required 120 days of filing to commence the action. Plaintiffs filed the Summons and Complaint on September 15, 2009 so these must be served by January 13, 2010, which was the 120th day after filing. Plaintiffs attempted service of the Summons and Complaint on January 14, 2010, which was the 121st day after the Summons and Complaint were filed. Therefore, this action was not commenced.

Plaintiffs state that the Plaintiffs were filing the case pro se so the rules of procedure should not strictly apply in their case because they were trying to comply. However, there is only one set of procedural rules in civil court that apply to represented and unrepresented parties who choose to proceed in the Court of Common Pleas. In this matter, the Summons and Complaint is dismissed as to William O. Higgins because it was not timely commenced.

III. ALAN SHEPPARD LACKED STANDING TO BRING THIS ACTION ON BEHALF OF WANDO RIVER, LLC.

Wando River, LLC was not represented by an attorney at the time that Alan Sheppard filed the action pro se. Wando River, LLC must be dismissed from this action because Alan Sheppard did not have standing to bring this action on behalf of the corporate entity. Defendant requests that this Court take judicial notice that Alan Sheppard is not a member of the South Carolina Bar and is not authorized to practice law in this State. In Renaissance Enterprises, Inc. v. Summit Teleservices, Inc., 334 S.C. 649, 515 S.E.2d 257 (1999), the Supreme Court held that a non-lawyer may not represent a corporation in circuit or appellate courts. In later action, the United States District Court relied upon the reasoning in Renaissance Enterprises when it dismissed claims, without prejudice, that were brought on behalf of a corporate entity that was not represented by

counsel on the grounds that the non-lawyer did not have standing to bring claims on behalf of the corporation. See Penland Financial Services, Inc. v. Select Financial Services, LLC, 2008 WL 5279638 (D.S.C. 2008). For this reason, the claims asserted by Wando River, LLC against William O. Higgins are not properly before this Court and are dismissed.

IV. PLAINTIFFS FAILED TO COMPLY WITH STATUTORY REQUIREMENTS PRIOR TO BRINGING A PROFESSIONAL MALPRACTICE ACTION.

S.C. Code §15-36-100(B) requires that “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. This requirement is applicable to legal malpractice actions via S.C. Code §15-36-100 (G)(2). The proper result for failure to file the required expert affidavit is dismissal and is governed by S.C. Code §15-36-100(F) of this statute states in relevant portion that:

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.

Plaintiffs have not provided an expert affidavit, specifying the acts or omissions, contemporaneously with filing the complaint that alleges professional negligence against Defendant William O. Higgins. Plaintiff did not file an expert affidavit prior to or with the filing of the Summons and Complaint, nor any time since.

A handwritten signature or set of initials, possibly 'B', written in black ink.

S.C. Code §15-36-100(C) provides an exception to the contemporaneous filing requirement. The statute states in relevant part:

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.

Plaintiffs have not filed an expert affidavit in this matter at any time so the exception is not applicable in this case.

The appellate courts in South Carolina have not applied these statutory provisions in a legal malpractice context. In the recent opinion, Rotureau v. Chaplin, 2009 WL 5195968 (D.S.C.), the United States District Court dismissed the legal malpractice claim, without prejudice, for failure to state a claim because the plaintiff did not provide an affidavit from an attorney that stated a single negligent act or omission. The Rotureau court held that the requirement was substantive law of South Carolina rather than merely procedural. In this case, Plaintiffs allege in Paragraph 4 of their Complaint that Higgins:

was required to exercise the same legal skill as a reasonably competent attorney and to use reasonable care in determining and implementing a strategy to be followed to achieve the Plaintiff's legal goals. As a fiduciary of Plaintiff, Defendant was obligated to treat all information relating to a Plaintiff's representation as confidential and to zealously represent the



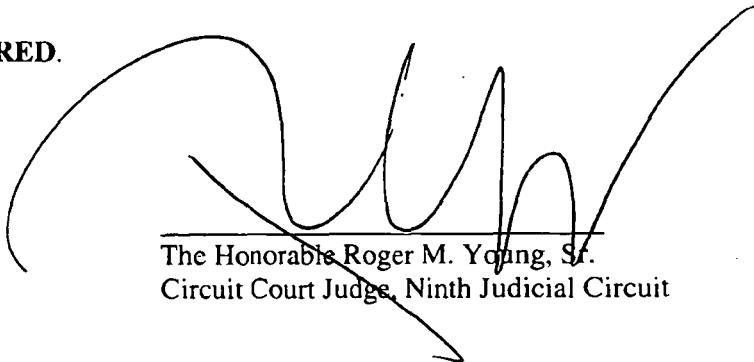
Plaintiff's interests, including the disclosure of any conflicts of interest that might impair the Defendant's ability to represent the Plaintiff.

Allegations such as those stated above require the affidavit of an expert to establish the duty and the breach thereof. Further, Plaintiffs allege in Paragraph 6(c) that Higgins failed "to provide Plaintiff with the minimum standard of care." Again, an expert affidavit is required for this allegation regarding the standard of care. These allegations are a complex amalgam of ethical rules, which require an expert affidavit to establish. For this reason, Plaintiffs' Complaint is dismissed against William O. Higgins.

CONCLUSION

For the reasons set forth above, the Complaint is dismissed with prejudice as to Defendant William O. Higgins.

AND IT IS SO ORDERED.



The Honorable Roger M. Young, Sr.
Circuit Court Judge, Ninth Judicial Circuit

Columbia, South Carolina
11/16, 2011

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011-CP-10-4537

Alan Sheppard

William O Higgins, Ronald C. Owens,
Russell Bennett, Charles P. Darby, Lynn
McCants, and Kiawah Resort Associates, L.P.

PLAINTIFF(S)

Submitted by: _____	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> 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.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(e), 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 _____

FILED
 2013 JAN 25 PM 12:04
 JULIE J. ARMSTRONG
 CLERK OF COURT

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

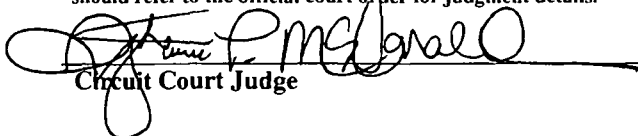
IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: At a hearing on April 25, 2012, the Plaintiff consented to dismissing Defendant Lynn McCants as a party to this action. Therefore, the Court GRANTS Defendant Lynn McCants' Motion to Dismiss.

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)
N/A	N/A	\$ N/A
		\$
		\$
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

2163
Judge Code

1/18/2013
Date

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON)	
Alan Sheppard,)	CIVIL ACTION NO.: 2011-CP-10-4537
)	
Plaintiff,)	
)	
v.)	ORDER GRANTING DEFENDANT
)	WILLIAM O. HIGGINS'
)	MOTION TO DISMISS
William O. Higgins, Russell Bennett,)	
Ronald Owens, Charles P. Darby, Lynn)	
McCants and Kiawah Resort Associates,)	
L.P.,)	
)	
Defendants.)	

FILED
 2013 JAN 25 PM 12:04
 JULIE J. ARMSTRONG
 CLERK OF COURT
 BY _____

This matter came before the Court on the Motion to Dismiss of Defendant William O. Higgins ("Defendant" or "Higgins") pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. Defendant Higgins asserts that he is entitled to dismissal because 1) the Plaintiff's case against him previously has been dismissed with prejudice, and 2) Plaintiff failed to comply with the requirements of S.C. Code § 15-36-100(B).

The Court held a hearing on Defendant's Motion on April 25, 2012, along with various other Motions filed by the parties. Present at that hearing were the Plaintiff, Alan Sheppard, who appeared *pro se*; John J. Pringle, Jr., Esquire, on behalf of Defendant Higgins; Ellis R. Lesemann, Esquire, on behalf of Defendants Russell Bennett, Ron Owens, Charles P. Darby and Kiawah Resort Associates, L.P.; and L. Lynn McCants, Esquire.

The Court has heard and considered the arguments of the parties, reviewed the pleadings in this case, and reviewed the memoranda and other materials presented.

Handwritten initials: JPM

Plaintiff was instructed that the Court would hold the matter open in the event that he needed to submit an additional memorandum of law. On September 10, 2012, Plaintiff submitted an "Inventory of Preliminary/Witnesses, Proof of Facts, and Exhibits." He submitted written objections and revisions to the Defendants' proposed orders on November 5, 2012. For the reasons set forth below, the Court grants Defendant Higgins' Motion to Dismiss.

FACTS

1. On September 15, 2009, Plaintiff filed an action in Charleston County (Case No. 2009-CP-10-5838) alleging that Higgins committed legal malpractice "in connection with property located at on (sic) Detyens Lamb Lane in Mt. Pleasant, SC . . ." (the "Previous Complaint").

2. Following a Motion to Dismiss by Defendant, on January 21, 2011, the Honorable Roger M. Young dismissed with prejudice Plaintiff's claims against Defendant Higgins. A copy of Judge Young's Order is attached hereto. Judge Young determined that Plaintiff had never properly commenced his case against Higgins pursuant to SCRCP 3(a)(2), and that the statute of limitations for the Plaintiff's claim against Higgins had run pursuant to S.C. Code § 15-3-530(5).

3. On June 27, 2011, Plaintiff filed this action against Higgins seeking to resurrect the very claim that Judge Young dismissed. On November 18, 2011, Defendant filed a Motion to Dismiss Plaintiff's Complaint in its entirety.



APPLICABLE LAW

“Under Rule 12(b)(6), SCRCivP, a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action.” Bergstrom v. Palmetto Health Alliance, 358 S.C. 388, 395, 596 S.E.2d 42, 45 (2004). “In considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint.” Id. If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the granting of a motion to dismiss for failure to state a claim is improper. Id.

When ruling on Rule 12(b)(6) motions to dismiss, courts must also consider “matters of which a court may take judicial notice.” Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007); Cobin v. Hearst-Argyle Television, Inc., 561 F.Supp.2d 546, 551 (D.S.C. 2008). A court of record may take judicial notice of its own judgments, Freeman v. McBee, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984), as well as “matters of public record.” Secretary of State For Defence v. Trimble Navigation Ltd., 484 F.3d 700, 705 (4th Cir. 2007).

Judge Young previously ruled that Plaintiff never properly commenced a timely “action” against Higgins:

The statute of limitations for legal malpractice claims is three years. S.C. Code § 15-3-530(5). The transaction at issue in this matter took place in September of 2006 so the Summons and Complaint had to be served by September of 2009 to avoid the rule found in SCRCP 3(a)(2), which requires service not later than 120 days after the Summons and Complaint are filed if they are not served prior to the expiration of the statute of limitations. Service was not attempted until January 14, 2010, after the expiration of the statute of limitations, so SCRCP 3(a)(2) is applicable such that the Summons and Complaint must be served within the required

120 days of filing to commence the action. Plaintiffs filed the Summons and Complaint on September 15, 2009 so these must be served by January 13, 2010, which was the 120th day after filing. Plaintiffs attempted service of the Summons and Complaint on January 14, 2010, which was the 121st day after the Summons and Complaint were filed. Therefore, this action was not commenced.

(Young Order, pp. 5-6). Accordingly, the Order dismissed the Plaintiff's Complaint against Higgins with prejudice because the Plaintiff failed to serve his Complaint in the time frames required by S.C. Code § 15-3-530(5) and SCRPC 3(a)(2). Dismissal of a complaint "with prejudice" is intended to bar relitigation of the same claim. Spence v. Spence, 368 S.C. 106, 128, 628 S.E. 2d 869, 881, (2006).

A review of the language in the two Complaints reveals that Plaintiff's action against Higgins in the instant case involves the same facts and circumstances as set forth in the previously dismissed matter:

Further, the cause of action which is the subject of this suit occurred and accrued in Charleston County, SC, In connection with property located at on (sic) Detyens Lamb Lane in Mt. Pleasant, SC, hereinafter "Legal Matter" and other real estate contracts. (Complaint, Page 1).

Further, the cause of action which is the subject of this suit occurred and accrued in Charleston County, SC, In connection with property located at on (sic) Detyens Lamb Lane in Mt. Pleasant, SC, hereinafter "Legal Matter". (Previous Complaint, **Exhibit One**, Page 2).

The claims for legal malpractice in the Plaintiff's two actions are identical. In the instant case, Plaintiff alleges in Section III of his Complaint that:

Defendant William Higgins undertook to provide legal services for Plaintiff and held himself out as confident in the area of law dealing with the legal matter for which Plaintiff retained the services of Defendant. Plaintiff and Defendant acted under an attorney/client relationship in which Defendant undertook to represent Plaintiff. Defendant was required to exercise the same legal skill as a reasonably competent attorney and to use reasonable care in determining and implementing a strategy to be followed to achieve the Plaintiff's legal goals. As a fiduciary of Plaintiff, Defendant was obligated to treat all information relating to a Plaintiff's

DM
-4-

(sic) representation as confidential and to zealously represent the Plaintiffs interests, including the disclosure of any conflicts of interest that might impair the Defendant to ability (sic) to represent the Plaintiff. In the course of handling the legal matter for the Plaintiff, Defendant negligently failed to act with the degree of competence generally possessed by Attorneys in the State who handle legal matters similar to Plaintiff s.

Paragraphs 3-5 in Plaintiff's Previous Complaint are substantively identical to the above allegations set forth in the current matter.

A dismissal "with prejudice" is an adjudication on the merits and operating as *res judicata*, precludes subsequent litigation to the same extent as if the action had been tried to a final adjudication. Nunnery v. Brantley Const. Co., Inc., 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986); Mumford v. Hutton & Bourbonnais Co., 267 S.E.2d 511 (N.C. App. 1980); 46 AM.JUR.2d JUDGMENTS § 482 at 645 (1969). Where an action has been so dismissed, the judgment operates, in a subsequent action involving the same subject matter, "so as to conclusively settle not only all matters litigated in the earlier proceedings, but also all matters which might have been litigated therein." *Id.* Plaintiff cannot reassert the claim against Higgins that has been previously dismissed with prejudice.

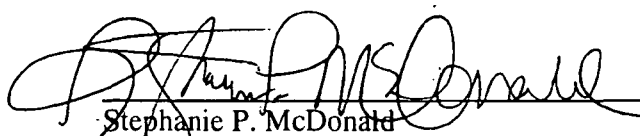
Because the Court's ruling dismisses the Plaintiff's Complaint with prejudice, the Court need not reach Defendant's argument that Plaintiff failed to state a legal malpractice claim against Higgins by failing to comply with S.C. Code §15-36-100(B). Still, it is clear that Plaintiff has *never* provided an expert affidavit specifying any negligent act or omission constituting professional negligence against Higgins, either prior to the filing of his Complaint, contemporaneously with that filing, or at any time thereafter.

AM
-5-

CONCLUSION

For the reasons set forth above, the Complaint is dismissed with prejudice as to Defendant William O. Higgins.

AND IT IS SO ORDERED.


Stephanie P. McDonald
Circuit Court Judge, Ninth Judicial Circuit

January 18, 2013
Charleston, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Alan Sheppard)

APPELLANT)

VS.)

William O. Higgins, Lynn McCants,)
Ronald C Owens Russell Bennett, Charles)
P Darby)

RESPONDENT(S))

Civil Court
notice
of
Appeal

The plaintiff ALAN SHEPPARD hereby gives notice of appeal from the judgment of the magistrate's court in the above action, to the Circuit Court of Common Pleas, in the county of CHARLESTON.

This notice of appeal is made subsequent to personal notice of the judgment which was received on the 28TH day of JANURARY, 2013.

The appellants' exceptions to the judgment of the magistrate are set forth as follows:

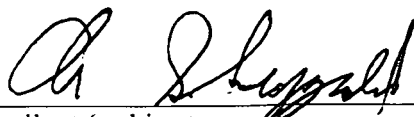
1, Because the fraud was started at the purchase of the property in August 2004 and was not brought to light until the release of Atty's Walker and McCullough in Nov. 2010 from the Legal Mal-practice case in 2009 when their actions on Higgins involvement with the Guarantors, KRA, Bennett and Darby was fully realized. Therefore considering the release releasing KRA Bennett and Darby was executed under intent to defraud and therefore must be waved.

2, The Judge cited the case must be dismissed for Res Judicata regarding the original case in Feb 2008. The Fraud involving Guarantors, KRA, Bennett and Darby was not discovered until after this case. Therefore the judge erred in her ruling to dismiss the current case under Res Judicata. The Ruling in the case in 2008 must be set aside due to the discovery of fraud involving Guarantors, KRA, Bennett and Darby in Nov. 2010. The element of fraud that was not discovered until Nov 2010 has not been addressed by the court at this point.

3, The answers to this fraud was addressed at the hearing April 25 2012 and again in writing on Nov 2 2012 in the recorded "Reply to Motion to Dismiss and Supporting Documents which neither are addressed in the orders for dismissals and therefore warrant an appeal.

4, the Court cited the statute of limitation in the dismissal. However the Fraud was not discovered until 2010 therefore the statute of limitations involving Fraud would begin on this date. The appellate was within the date that the fraud was discovered. Therefore the court erred in their decision that the statue of limitations had tolled at that time. As of the date of the appeal the statute has yet to toll based on the discovery of the fraud in Nov 2010

Dated: February 22, 2013


Appellant (or his attorney)

I have mailed a copy to all the parties below including the Clerk of Court

Alan Sheppard
462 Commonwealth Road
Mount Pleasant, SC 29466

Pro Se Plaintiff

John J. Pringle, Jr., Esq.
Ellis, Lawhorn & Sims, P.A.
P.O. Box 2285
Columbia, SC 29202

John Lynn McCants, Esq.
P.O. Box 2025
Mt. Pleasant, SC 29465

Ellis R. Leseemann
Email: ellisr@hvlawsc.com
HARVEY & VALLINI, LLC
497 Bramson Court, Suite 201
Mount Pleasant, South Carolina 29464
Phone: (843) 388-8883
Fax: (843) 388-8884

**ATTORNEYS FOR RUSSELL BENNETT, RONALD
OWENS, CHARLES P. DARBY, AND KLAWAH
RESORT ASSOCIATES, L.P.**

STATE OF SOUTH CAROLINA)
)
 COUNTY OF Charleston)
)
 Alan Sheppard)
 _____)
 Plaintiff,)
 vs.)
)
 William O. Higgins, Lynn McCants, Ronald)
 C Owens Russell Bennett, Charles P Darby)
 _____)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT
 CASE NO.: 2011-CP-100-4537

**MOTION AND ORDER INFORMATION
 FORM AND COVERSHEET**

Plaintiff's Attorney: Alan Sheppard, Bar No. _____ Address: _____ Phone: 843-224-9169 Fax _____ E-mail: _____ Other: _____	Defendant's Attorney: Ellis R. Lesemann, John Pringle, Lynn McCants, Bar No. N/A Address: _____ Phone: 843-388-8883 Fax _____ E-mail: _____ Other: _____
--	---

- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

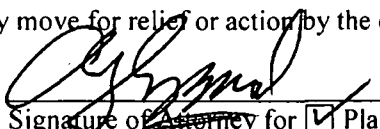
SECTION I: Hearing Information

Nature of Motion: Properly Plead the Fraud that has been Mis Interpreted by the Court Due to Extensive Pleading and Support Memorandum
 Estimated Time Needed: 2 Hours Court Reporter Needed: YES / NO

SECTION II: Motion/Order Type

- Written motion attached
 Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


 Signature of Attorney for Plaintiff / Defendant Date submitted _____

Written motion support documents to follow

SECTION III: Motion Fee

- PAID - AMOUNT: \$ _____
 EXEMPT: (check reason)
 - Rule to Show Cause in Child or Spousal Support
 - Domestic Abuse or Abuse and Neglect
 - Indigent Status State Agency v. Indigent Party
 - Sexually Violent Predator Act Post-Conviction Relief
 - Motion for Stay in Bankruptcy
 - Motion for Publication Motion for Execution (Rule 69, SCRCP)
 - Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
 Name of Court Reporter: _____
 Other: _____

JUDGE'S SECTION

- Motion Fee to be paid upon filing of the attached order.
 Other: _____
- JUDGE CODE _____
 Date: _____

CLERK'S VERIFICATION

- Collected by: _____ Date Filed: _____
 MOTION FEE COLLECTED: \$ _____
 CONTESTED - AMOUNT DUE: \$ _____

STATE OF SOUTH CAROLINA)
)
COUNTY OF: CHARLESTON)
)
IN THE MATTER OF: ALAN SHEPPARD VS)
WILLIAM HIGGINS ET AL)

IN THE CIRCUIT COURT
MOTION FOR NEW TRIAL
CASE NUMBER: 2011CP1004537

MOTION FOR A NEW TRIAL
Rule 60(b)

TO adequately address question of fraud in the REPLY TO MOTION AND SUPPORTING MEMORANDUM Dated October 29, 2012, to develop the record accordingly and make the court aware of all of the circumstances AND MOVE THE COURT FOR AN ORDER TAKING "JUDICIAL NOTICE" OF THIS FRAUD the existence of a "planned and fraudulent scheme,"

Outside the court the same cause supports claims beyond a reasonable doubt. Here in the civil case the court does not find the same facts prove the same claims by the preponderance of the evidence. Historically similar cases in like circumstance did meet these fundamental requirements. Which calls into question procedural due process, and where this case finds itself in the balancing test in violation of the Fifth Amendment of the Constitution of the United States

To develop the record accordingly the circumstances so require,
Court must be aware of all of the circumstances before it acts.
that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done
Thus, the parties must be allowed to develop the record accordingly.

Applicant: ALAN SHEPPARD

Executed this 25 day of January, 2013.

Signature: *Alan Sheppard*
Name: ALAN SHEPPARD
Address: 462 Commonwealth Rd
MtPleasant SC 29466
Telephone (O): 843-224-9169
(H): _____

Signature: _____
Name: _____
Address: _____
Telephone (O): _____
(H): _____

FILED
2013 FEB 27 PM 12:09
JULIE J. ARMSTRONG
CLERK OF COURT

ORDER FOR NEW TRIAL

IT IS HEREBY ORDERED that the NEW TRIAL GRANTED DENIED

Executed this 20th day of February, 2013
[Signature] P. McDonald
Circuit Court Judge

2011-CP-10-4537

Supporting Documents
For The
Motion For New Trial

Discovery

FILED
2013 FEB 22 PM 4:59
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

Timing of Fraud; Darby, KRA & Bennett represented that they would be guarantors in late September 2004. Terms were agreed upon over the next 3 to 4 weeks. Closing was scheduled for Aug. 24th. 2004. Somewhere on the 22nd or 23rd of Aug. 2004 Mr Bennett was added to the Guarantors without any conversation regarding this with Wando River LLC. Mr Bennett had just finished squirming his way through **Ellis VS Davidson 1999CP1003195** and the Appeal where the Appellate Court, Opinion No. 3748 Heard February 11, 2004 – Filed March 1, 2004, took up the matters on Mr Bennett for A. Fiduciary Duty & Relationship Between the Parties, B. Attorney-Client Relationship. C. Legal Malpractice, D, Civil Conspiracy E, Conversion. Mr. Bennett set precedent throughout Law Books on Legal MalPractice regarding these areas of law before exiting the South Carolina Bar prior to any other choices and then pressed on with this case till the court would hear no more and then settled out of Court in 2006 when they would ask for all evidence to be destroyed. Eight years of a new law degree that you don't get a diploma for. Just fresh out of this KRA Darby and Bennetts' would put that education to good use on Wando River llc where they would interfere with Wando River 's attempt to use a new guarantor by breaching their Fiducary Duty and sending their intensions to the new Guarantor that he would be sued if he stepped in to help. Then giving the new Guarantor a glimpse into Wando River's future when they informed him that Alan Sheppard and Wando River are going to get sued and lose their money and property either way.

I could tell what happened to each of the 22 signed contracts here but I will save that for the Discovery part of this action if I ever get a chance to have this heard in front of any court in or around Charleston SC. Everyones knows how long this group will go on to keep this out of the court. If it does get there they will destroy any evidence of their tactics used to hide their other side.

This Fraud began in Aug 2004. When KRA Darby and Bennett tried to complete their hostile takeover of Wando River in the end of 2007 as they did in the end of 2006, my group was ready and prepared by having the loan paid off on December 28th. 2007. According to all the signed documents between both parties this pay off terminated the relationship. As my lawyer Mr. Dodds noted, KRA Darby and Bennett knew this and that's why it was the main item in the 2nd. Amendment to Investment Agreement. The Amendment that was never signed. Thus all actions brought against Wando River LLC beginning in Jan 2008 with Lis pendens and continuing on with the lawsuit in Feb. 2008 were carried out in Duress as they continually sent documents threatening the original investment of \$650.000 via Attorney Ellis LeseMann. With every response regarding this fact ignored KRA Darby and Bennett continued to file these _____ Lawsuits until the weaker group was pinned under the pressure till they walked away with what they wanted, Fraudulently.

A.

To establish a cause of action for fraud, the following elements must be proven by clear, cogent, and convincing evidence:

Fraud in 3 projects A- Wando River LLC
 B- Sand Mine Project
 C- Charleston Marine Terminal

(1) a representation of fact;

A,

Darby, KRA & Bennett represented that they were honest business men and would have a fiduciary duty to be our guarantor(Attachment 1)'. As such they maintained that they were helping us in the development loan and sale of the property when in reality they were hindering the sale and development of the property at every turn. Specifically they ran off several serious potential buyers to the property. They also illegally & fraudulently took possession of \$500,000 in earnest money paid by D R Horton and paid themselves fees from that account that were unauthorized. They also withheld payment of authorized fees in order to cause financial hardship on Wando River LLC and its members. Also, in mid 2005 on the date of the signing on the contract for sale of the property, Darby, KRA & Bennett removed Robert Dodds as the escrow attorney and inserted William Higgins as the escrow attorney for the property. They maintained that Higgins was a neutral third party as the escrow attorney. However, the Fraud was later discovered during the release of Mr. Walker and Mr. McCullough from the legal Malpractice lawsuit in October 2010 where Mr. Higgins acted against the depository instructions and the informed consent he had given for these instructions that included confidential business matters related to Wando River llc loan contingencies among other items listed in documented to the court ,and that Higgins had acted on guarantors Darby, KRA & Bennett's instructions to with hold the funds till Wando River llc was in default on loan. Guarantors had working business relationship as far back as 2000(evidenced in documents submitted to the court) and never disclosed that info.

B,

Early in 2005, Darby, KRA & Bennett represented that they liked my ability to find strong waterfront development projects and they offered their financial backing for a fee similar to the Wando River project. They found out about the sand mine project I was working on after I received a commitment letter from Carolina First. Darby, KRA & Bennett represented that they "could make that loan happen easy with one phone call". After that phone call the closing was set. Sale price \$3.8 Million with NPV <\$50 Million. It should be easy.

C,

During the sand mine project and the Wando River Project a friend came to me with the Charleston Marine terminal. A family friend of theirs was going to sell it and they came to me to put together a contract so that we could sell the property and make some money for our mutual friend. After doing the due diligence on the project and getting a contract to the seller in a short turn around with the assistance of CC Harness, the value on this property started looking very profitable and the seller had agreed to sell the property to us with a 6 months due diligence period for \$250,000 a month prior to closing where I would turn the property or Close it with my new relationship at Carolina First backed by Darby, KRA & Bennett. After running this project by KRA, Mr. Darby and getting a "Go Ahead", I took the contract to my friend who would hand deliver it the following morning where the two worked together. All was great.

(2) its falsity;

A,

Darby, KRA & Bennett wanted Wando River LLC to be a front to purchase the property and get the dock permits in hand so that KRA would be out of the public eye. The then planned to secretly hinder the sale or development of the property so that Wando River LLC would go into default and the ownership of the property would revert to KRA, Darby and Bennett. They had secret meetings and conversations with William Higgins in order to illegally take the \$500,000 escrow money and place it into their account. After Wando River refuse to provide proper consent by signing the escrow check Guarantors/ KRA, Darby & Bennett voided the check and wired the funds after informing several Wando River LLC members that they don't need us to sign a check to have escrow money wired to their account.(Evidenced in two affidavits attached to previous documents) They met secretly with bankers and discussed private protected information concerning Wando

River LLC finances that was outside of their authority. They continuously ran off potential buyers of the property to create financial hardships on Wando River LLC. They refused to make payments to creditors and vendors that were authorized to be made by Wando River LLC B, Darby, KRA & Bennett did line the closing up. The week of Closing I am notified that the closing is not going to happen because KRA, Darby does not have the money. Later that day The Escrow agent (Atty. Lynn McCants) for the Sand Mine closing notifies my Sand group that Closing funds have been deposited in his account. Funds are secured by John Darby President of The Beach Co and Brother of Buddy Darby, President KRA.

C,

The Charleston Marine terminal contract was hand delivered that morning and I told my friend to leave it with the owner and he will send it to his lawyer to be checked for correctness and returned to the seller for signing within the week. The end of the week brought news from my friend that the seller had to go with another contract that was for the same price with the same down payment of \$250,000.. The contracts were identicle with one exception, The identicle contract the seller signed gave the seller \$250,000 at signing then gave them 6 months to close. The new buyer, The Beach Company, President John Darby.

(3) its materiality;

A,

Wando River LLC relied on the honesty and advise of KRA, Darby & Bennett to help them develop and sell the property. Based on this reliance on KRA, Darby and Bennett, Wando River would then present all 22 potential sales contracts of the property to KRA etc. in good faith. KRA etc. would then use that information to gain the names of potential buyers and run them off or sell other properties that KRA had to these potential buyers. KRA used Higgins to illegally obtain the \$500,00 in escrow money asserting themselves in between Higgins and Wando River LLC. They would use their past and current business relationship w/ Higgins to illegally coerce him into forcing Wando River LLC to place the \$500,000 in the KRA account.

KRA, Darby & Bennett made it known that they wanted the commercial property in their first change came in December 2004 when they realized the Marina and commercial property value together. They immediately change the terms of the original acquisition and development loan closed on Aug. 2004. 1st. change was that KRA, Darby & Bennett get the commercial property for being guarantor. 2nd. change, KRA, Darby & Bennett put a stop to the developer fee of \$5,000 each for Developer Sheppard and Simmons. The fee that was there to prevent (Sheppard and Simmons) developers from having any financial hardship that would interfere with work on the development project, clearly showing the intension. KRA, Darby & Bennett intension is futher shown by the purchase of the 100 acres across the river and the 8 acres adjacent to the property where they would interfere with Wando Rivers' marina permit to increase the size of the one they had purchased that only had 1 single dock and a boat landing.

B,

KRA, Darby & Bennett not only set us up on the sand closing but they began threatening my sand group lawyers that we would be sued if we show up to this closing without the funds. KRA, Darby & Bennett's solution to this was to go ahead and sign over the closing rights to them. Unknown to KRA, Darby & Bennett I had a backup financier. Beach Co Mr. Darby wanted the Sand property so bad that they obstructed closing until Mr. Darby could call me and offer money to each of my group to walk away. After two calls where I would state I could not do it. The third and final call I informed Mr John Darby that I had signed rights over to my new partner to show up to close the sand property in order to protect my Sand partners from being sued for not having funds at the closing.

C,

The Marine terminal was a cut from Beach Company President. It was a bold move that stepped out in front of everyone involved that the Darby Brothers could not be trusted. To me it was of great concern as I had a very close friend Mr. Rucker and I prepared to close on the sand mine in the weeks to follow.

(4) either knowledge of its falsity or a reckless disregard of its truth or falsity;

A,

KRA, Darby and Bennett was never honest w/ Wando River in what their true plans were for the property. They broke their fiduciary duty to help develop and sell the property w/ Wando River

LLC. Since Wando River did not know of KRA true desire and intents, they continued to rely on KRA to fulfill their fiduciary duty not knowing that KRA would continue to sabotage their development and potential sale of the property. KRA, Darby and Bennett knew of their business relationship w/ Higgins and demanded that he be inserted as the impartial third party escrow attorney in place of attorney Robert Dodds and never disclosed this info to Wando River. They would later use their influence with William Higgins to have Higgins fraudulently take possession of the \$500,000 in escrow money owed to Wando River LLC and wire it into KRA's account after Wando River llc refused to endorse escrow check. They inserted themselves into Wando River LLC private financial information by using their power to secretly meet w/ bankers involved with Wando River and sabotage that banks relationship w/ Wando River LLC.

(5) intent that the representation be acted upon;

A,

KRA knowingly placed Higgins as the "neutral third party" escrow attorney at the initial contract to purchase of the property in order to be able to have influence over any monies held in escrow by attorney Higgins. KRA also demanded that Wando River act upon their advise on the development or potential sales of the property knowing that it would be to the detriment of Wando River LLC and to the potential good fortune of KRA. In doing so KRA systematically intended to cause undue financial hardship on Wando River and its members at every turn.

B.

KRA, Darby & Bennett made sure the closing was on with Carolina First for the Sand Project

(6) the hearer's ignorance of its falsity;

A,

Wando River relied on KRA, Buddy Darby and Bennett's advise at every turn. Many of the members of Wando River LLC had a generational friendship w/ Buddy Darby and his extended family and trusted that he and the other guarantors would act in their best interest. Given KRA's influence in the area and knowledge of similar business ventures, Wando River relied upon him and his company to fulfill their fiduciary duty to Wando River LLC. Wando River would take the actions advised by KRA based on this reliance.

B.

I prepared my sand group to close and defended KRA, Darby & Bennett as solid business associates

C,

I placed the trust that my friend had been given by the owner of Charleston Marine Terminal. It was a closing bonus from this business that the two had worked together on for 10+ years managing family assets. Trust and a sizable amount of money approaching 6 figures was lost. Trust from a friend that's not replaceable with money..

(7) the hearer's reliance on its truth;

A,

Wando River relied on KRA, Buddy Darby and Bennett at every turn during the sale and development of the property by providing them with 22 signed contracts for the sale of the property. Wando River dealt in good faith w/ KRA knowing that their long friendship and fiduciary duty was intact. Wando River was deceived by KRA, Darby and Bennett throughout the entire process of the sale and development of this property.

B.

Right up to the week of Closing the Sand Project I traveled and prepared to start up the mining project in order to meet the need at the State of SC's new inland port at the intersection of I-95 and I-26 whos first need would be a 40 million sq ft Concrete pad for the covered warehouse plus the parking lot for the trucks..KRA, Mr. Darby sent me to meet with Gordon Darby to go over the Sand Project with him to get a "Family approval" of sorts. I did as asked.

C,

After getting the "GO Ahead" from KRA, Mr. Darby I informed my friend that the contract was solid. Meaning that in the event that the Marine terminal did not move within 6 months, there was a genuine commitment to close the property at that time

(8) the hearer's right to rely thereon; and

A,

Given that KRA, Buddy Darby and Bennett were the guarantors of the deal, they had a fiduciary duty to Wando River LLC and as such were required to help them with the sale and development of the property. This fiduciary duty also required that KRA not do anything that would hinder or sabotage the potential sale or development of the property. Wando River was entitled to this right of fiduciary duty and were denied this right by the fraudulent actions and the continued deceptions of KRA, Darby and Bennett.

B,

KRA, Buddy Darby and Bennett were standing behind me on the Wando Project while it was under contract with DR Horton with \$750,000 in nonrefundable escrow money. All was above board and I had no reason to doubt them at this time with the bank Carolina First providing the funding.

C,

Here again the value on other property like the Marine Terminal if they ever came up for sale drew a hefty price tag due to the capabilities of the pier in place for ships with harbor access. An Approval from KRA, Mr Darby instantly put the Bank Carolina First behind this project.

(9) the hearer's consequent and proximate injury. Kahn Constr. Co. v. S.C. Nat'l Bank of Charleston, 275 S.C. 381, 271 S.E.2d 414 (1980). The failure to prove any element of fraud or misrepresentation is fatal to the claim. *Id.*

A,

By Wando River LLC relying on KRA to fulfill their fiduciary duty, they were denied the the right to receive profits from the sale of the property since KRA ran off or sabotaged many potential sales. Wando River was also denied access to the \$500,000 in escrow monies that KRA had Higgins refuse to release in Wando River's name and later wired into KRA's account and placed under KRA's control. This directly resulted in the loan that Wando River llc had approved to complete the development of a sold out project that included approx. 47 lots 15 to 20 townhomes and a commercial property that Wando River llc would continue to operate as a Marina store/ restaurant.

When the Darby Brothers purchased the Boat yard they went to OCRM with the Wando Project marina information and split the size of the marina in my groups name Wando River LLC and had half the docks permitted to their site. A move that was one of the main written reason DR Horton Walked with \$750,000 in nonrefundable funds. Where Wando River LLC is relying on KRA to fulfill their fiduciary duty they were acting in a way that clearly ran off a buyer.

B,

Mr Gordon Darby is the man whos name the mining permit is in presently. The injury is clear that the trust I gave to the KRA, Darby group was a scam to take the mining project from my sand group.

C,

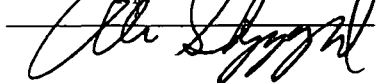
When my friend came home she was very upset and could not understand how the contracts were so similar with that one winning item that forced the hand of the sellar.

Carter v. Boyd Construction Co., 178 SE 2d 536 - SC: Supreme Court 1971

"If more than one reasonable inference may be drawn from the evidence, then the question of fraud is for the jury. Thompson v. Bass, 167 S.C. 345, 166 S.E. 346." Cook v. Metropolitan Life Ins. Co., 186 S.C. 77, 194 S.E. 636.

I can attest that all of the above is true to the best of my knowledge .

Alan Sheppard Feb 22 2013



I have mailed a copy to all the parties below including the Clerk of Court

Alan Sheppard
462 Commonwealth Road
Mount Pleasant, SC 29466

Pro Se Plaintiff

John J. Pringle, Jr., Esq.
Ellis, Lawhorne & Sims, P.A.
P.O. Box 2285
Columbia, SC 29202

John Lynn McCants, Esq.
P.O. Box 2025
Mt. Pleasant, SC 29465

Ellis R. Lesemann
Email: ellis@hvlawsc.com
HARVEY & VALLINI, LLC
497 Bramson Court, Suite 201
Mount Pleasant, South Carolina 29464
Phone: (843) 388-8883
Fax: (843) 388-8884

**ATTORNEYS FOR RUSSELL BENNETT, RONALD
OWENS, CHARLES P. DARBY, AND KLAWAH
RESORT ASSOCIATES, L.P.**

FILED

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

2013 FEB -8 PM 12:54

IN THE CIRCUIT COURT

JULIE J. ARMSTRONG
CLERK OF COURT

6TH JUDICIAL CIRCUIT

Plaintiff

Sheppard

Vs.

Defendant

Higgins Et A

BY

MOTION AND AFFIDAVIT
TO PROCEED IN FORMA
PAUPERIS

2011-CP-100-4537

I, *Alan Sheppard*, being duly sworn, state that I am the plaintiff and that I do not have the funds available to pay for the cost of filing this action.

[Signature]
Signature of the plaintiff

Sworn to and subscribed before me this
8 day of *February*, 20*13*

[Signature]

Notary Public for South Carolina

My commission expires: *Nov 1 2017*

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2013 FEB 27 PM 12:14

FILED

ORDER

Leave is (granted) (denied) to proceed in forma pauperis

Date: *2/19/13*

[Signature]
Circuit Court Judge

2011 CB 1004537

Alan Sheppard
462 Commonwealth
Mt Pleasant SC 29466

I Alan Sheppard have applied to the Court that I have \$0 Funds coming in and that my Financial Status has been in a struggling state since the aggressive actions of the Defendants in this Action.

Further in the first week of Jan. 2013 an accident left me w/ a broken back that sent my Financial status to a halt. I had started a Furniture building business in mid Dec ²⁰¹² and made \$500.00 around Christmas before the accident.

Please find this a genuine PRAYER to Proceed in Forma Pauperas

Alan Sheppard

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011- CP-10-4537

Alan Sheppard

William Higgins

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff	<input type="checkbox"/> Defendant
	or	
	<input type="checkbox"/> 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.
- 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

JULIE J. ARMSTRONG
 CLERK OF COURT
 2012 OCT 22 PM 3:59
FILED

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: **Court advised case dismissed per Attorney**

ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk :

←
 OAD ea
 wa/s election

INFORMATION FOR ENROLLMENT	
Complete this section below when the judgment amount should be enrolled. If there is no judgment information, leave blank.	
Judgment in Favor of (List name(s) below)	Judgment Amount (List amount)
N/A	
If applicable, describe the property, including tax parcel number:	

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.

Alan Sheppard
Circuit Court Judge

2128

Judge Code

10/17/12
Date

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
COUNTY OF Charleston)
CASE NO 09-CP-10- 5838

Alan Sheppard, Ed Sheppard, Randy Bates)
Eddie White, and Dan Radovanick)
individually and as members of)
Wando River, LLC,)

Plaintiff,)
v.)

Order for Reference

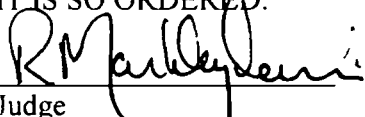
William Higgins, Clay McCullough)
And Trenholm Walker)

Defendants.)
_____)

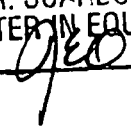
BY _____
JULIE J. ARMSTRONG
CLERK OF COURT
2010 JAN 29 PM 3:43

FILED

Therefore, on Motion of Plaintiff, it is ORDERED that this action be and the same hereby referred to the Honorable Judge Scarborough, Master-in-Equity for Charleston County, to take testimony, to determine the issues and to make appropriate findings of fact and conclusions of law to this Court, and to report any special matters with leave to enter a final judgment herein the foregoing Order being supported under Circuit court Rule 53 (b) and (c) with finality and appeal to the Supreme Court.

IT IS SO ORDERED.

Judge
Charleston County, South Carolina

Dated: January 25, 2010

PAID
DATE 11-09-09
AMOUNT \$ 50.00
MIKELL R. SCARBOROUGH
MASTER IN EQUITY
BY: 

CAMPBELL-KELLY LAW, LLC

802-B Johnnie Dodds Blvd. * Mt. Pleasant, SC 29464
Telephone: (843) 884-4064 * Fax (843) 884-1214
E-Mail: amycklaw@aol.com

AMY CAMPBELL KELLY**

Attorney

**Certified Civil Litigation Mediator

June 23, 2010

The Honorable R. Mikell Scarborough
Master-in-Equity for Charleston County
100 Broad Street, Suite 266
Charleston, SC 29401

via facsimile 843-958-5077

Re: Sheppard v. Higgins et al.
Case No.: 09-CP-10-5838
My File No.: 10-00740

Dear Judge Scarborough:

Enclosed is the proposed Order recusing you from this case. Since I will be out of the office tomorrow and Friday, I am copying Dawes and Page and ask that they contact you if they have any objections or revisions to this Order by Friday.

I will send in the Order by mail, along with a self-addressed, stamped envelope in which you can return it to me if it is approved.

With warmest regards,

Amy Campbell Kelly

Enclosure

cc: Wando River, LLC via e-mail
M. Dawes Cooke, Jr., Esquire via
John T. Lay, Jr, Esquire, via facsimile

2009
Recusal
by MIE

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 Alan Sheppard, Ed Sheppard,)
 Randy Bates, Eddie White,)
 Dan Radovanick, individually and as)
 members of Wando River, LLC,)
)
 Plaintiff,)
)
 vs.)
)
 William O. Higgins, Trenholm Walker)
 and Clay McCullough,)
)
 Defendants.)

Master in Equity
 IN THE FAMILY COURT
 CASE NO.: 09-CP-10-5838

FILED
 2010 JUN 23 PM 12:43
 JULIE J. HANSHIR
 CLERK OF COURT

ORDER

This matter came before me for a telephonic hearing on June 21, 2010. Present for this meeting were Amy Campbell Kelly, Attorney for Plaintiffs, M. Dawes Cook, Jr. and Alissa DeCarlo, Attorneys for Defendants, Trenholm Walker and Clay McCullough, and Page M. Kalish, Attorney for Defendant William O. Higgins.

At this meeting, the Judge disclosed that he was being represented by one of the Defendants in a Federal Court matter and announced that he believed he should recuse himself due to this conflict of interest. No Party objected to this recusal.

IT IS THEREFORE ORDERED that Judge ^{R.} Mikell Scarborough is hereby recused as the presiding Judge in this case, and this case shall be restored to the Common Pleas docket for further proceedings.

AND IT IS SO ORDERED.

[Signature]
 Honorable R. Mikell Scarborough
 Master-in-Equity for Charleston County

Charleston, SC
 13 day of June, 2010.

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

C/A NUMBER: 2009-CP-10-5838

Alan Sheppard, Ed Sheppard, Randy)
Bates, Eddie White and Dan)
Radovanick, Individually and as)
Members of Wando River, L.L.C. v.)
William O. Higgins, Trenholm Walker)
and Clay McCullough)

**ORDER GRANTING DEFENDANT
WILLIAM O. HIGGINS MOTION TO
DISMISS**

Plaintiff(s),)

v.)

William O. Higgins, Trenholm Walker)
and Clay McCullough)

Defendant(s).)

BY _____
JULIE J. ARMSTRONG
CLERK OF COURT
2011 JAN 21 PM 4:51

FILED

Pursuant to Rules 12(b)(5) and 12(b)(6) of the South Carolina Rules of Civil Procedure, Defendant William O. Higgins, by and through his counsel, moved this Court for an Order dismissing the causes of action set forth in Plaintiffs' Complaint. A hearing on this motion took place on December 9, 2010 before the Honorable Roger Young, wherein counsel for all parties appeared and presented their respective arguments. For the reasons stated herein, the Complaint is dismissed as to William O. Higgins.

FACTS

On September 15, 2009, Plaintiffs filed this action sounding in legal malpractice against Defendant William O. Higgins arising out of transaction from September of 2006 involving real property located at Detyens Lamb Lane in Mt. Pleasant, South Carolina. Plaintiffs selected the box for legal malpractice on the Civil Action Coversheet that was

filed with the Complaint. On January 14, 2010 the Summons and Complaint was hand-delivered to Mary Conn at Ellis, Lawhorne & Sims, P.A., who is the legal assistant to Higgins. More than 120 days elapsed from the time the Summons and Complaint was filed and service of the same was attempted. Mary Conn is an employee of Ellis, Lawhorne, and Sims, P.A. and she serves as legal secretary to Higgins. As stated in Ms. Conn's affidavit, which is attached to Defendant's Motion to Dismiss, a gentleman gave her a copy of the Summons and Complaint at the offices of Ellis, Lawhorne, and Sims, P.A. Further, Ms. Conn states that she is not authorized by appointment or by law to receive service on behalf of Higgins.

After this attempted service, Plaintiffs have not attempted to serve William O. Higgins. To date, William O. Higgins has neither been personally served with the Summons and Complaint nor has anyone left copies of the Summons and Complaint at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, nor has anyone delivered a copy of the Summons and Complaint to an agent authorized by appointment or by law to receive service of process.

LAW/ANALYSIS

I. SERVICE OF THE SUMMONS AND COMPLAINT WAS IMPROPER.

Plaintiffs' case must be dismissed pursuant to SCRPC 12(b)(5) because service was improper so it was not accomplished as to Higgins. SCRPC 4(d)(1) allows service to be made as follows:

Upon an individual other than a minor under the age of 14 years or an incompetent person, by delivering a copy of the summons and complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing

A handwritten signature in black ink, consisting of a large, stylized initial 'P' followed by a horizontal line and a short vertical stroke.

therein, or by delivering a copy to an agent authorized by appointment or by law to receive service of process.

While the Supreme Court of South Carolina has "never required exacting compliance with the rules to effect service of process." Roche v. Young Bros., 318 S.C. 207, 456 S.E.2d 897, 899 (1995), the must be sufficient compliance with the service rules. See also Langley v. Graham, 322 S.C. 428, 472 S.E.2d 259, 259-60 (App.1996) (noting that process was addressed to defendant at his private residence, but defendant's sister signed for the process). In Roche, the Supreme Court ruled that the Plaintiff must only show compliance with the rules. Id. at 211. The person in Roche who signed the certified mailing slip was an officer of the defendant company that was sued and the defendant failed to show that the officer was not authorized to accept service. In the present case, Ms. Conn's affidavit proves that she was not authorized to accept service.

Plaintiffs completely failed to comply with SCRCP 4(d)(1) regarding service of process. Service was only attempted upon an employee of Ellis, Lawhorne, and Sims, P.A. who was not authorized by appointment or by law to receive service of process. Ms. Conn is not an agent for Higgins, rather she is an employee of the law firm. Plaintiffs have provided no testimony to contradict this statement or to show that proper service was attempted by the other methods outlined in SCRCP 4(d)(1). Rather, Plaintiffs rely upon hearsay and conclusory statements when stating in their brief that the "Defendant was in his office when service was being made upon him, and his secretary indicated to the process server that she could take the papers for him." The statement must be excluded because Plaintiffs have provided no proof of service or testimony from the process server to support this allegation. There is no evidence that the process server



asked Ms. Conn to confirm that she was authorized to accept service or that she sign a document or an affidavit confirming service.

Plaintiffs also rely upon Mull v. Ridgeland Realty, LLC, 387 S.C. 479, 693 S.E.2d 27 (Ct.App. 2010) for the propositions that they sufficiently complied with the service rules such that Defendant had notice of the action and the Court has personal jurisdiction of Defendant. In Mull, the sole issue was whether the defendant was properly served at the registered agent's address that was on file with the South Carolina Secretary of State. The plaintiff's attorney served the complaint via certified mail at the registered agent's South Carolina address and sent a copy of the complaint via certified mail to the registered agent's address in New York. The registered agent signed the return receipt, contacted plaintiff's counsel, and sought an extension to respond, but never responded to the complaint. In Mull, the registered agent had notice and interacted with plaintiff's counsel, but chose to not participate in the litigation. The Mull Court ultimately ruled that service was proper under the statute dealing with service of a corporation through its registered agent.

That is not the case in the present action. Higgins did not answer and instead has filed a Motion to Dismiss to challenge the service of the Summons and Complaint, which was not proper as to an individual pursuant to the South Carolina Rules of Civil Procedure. The court lacks personal jurisdiction over Higgins because service was not proper. Further, in the Mull case, and the others cited by Plaintiffs, service was attempted upon a corporate entity rather than an individual. Corporations must be notified through an agent because they must operate through their agents and employees. In this case,

A handwritten signature in black ink, consisting of a large, stylized initial 'P' followed by a cursive 'M'.

Plaintiffs sued Higgins as an individual rather than a corporate entity. Plaintiffs failed to properly serve William O. Higgins so the Complaint is dismissed.

II. SERVICE WAS NOT TIMELY.

Plaintiffs failed to commence the action against William O. Higgins. Even if this Court finds that Plaintiffs substantially complied with the service rules, the Summons and Complaint were untimely so this lawsuit has not commenced and must be dismissed. SCRPC 3(a)(2) requires:

A civil action is commenced when the summons and complaint are filed with the clerk of court if:

....

(2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.

(emphasis supplied). Until an action is commenced, there is no proceeding pending and, thus, nothing to refer. Chabek v. Nationwide Mut. Fire Ins. Co., 303 S.C. 26, 397 S.E.2d 786 (Ct.App. 1990); cf. State v. McQuillan, 252 Mo. 334, 338-9, 158 S.W. 652, 653 (1913) (“Before there can be a reference there must be an action pending.”). In Chabek, the case was referred to a Master before the Summons and Complaint was filed and served in the prior related action. Therefore, the Court had nothing to refer.

The statute of limitations for legal malpractice claims is three years. S.C. Code § 15-3-530(5). The transaction at issue in this matter took place in September of 2006 so the Summons and Complaint had to be served by September of 2009 to avoid the rule found in SCRPC 3(a)(2), which requires service not later than 120 days after the Summons and Complaint are filed if they are not served prior to the expiration of the statute of limitations. Service was not attempted until January 14, 2010, after the expiration of the



statute of limitations, so SCRCP 3(a)(2) is applicable such that the Summons and Complaint must be served within the required 120 days of filing to commence the action. Plaintiffs filed the Summons and Complaint on September 15, 2009 so these must be served by January 13, 2010, which was the 120th day after filing. Plaintiffs attempted service of the Summons and Complaint on January 14, 2010, which was the 121st day after the Summons and Complaint were filed. Therefore, this action was not commenced.

Plaintiffs state that the Plaintiffs were filing the case pro se so the rules of procedure should not strictly apply in their case because they were trying to comply. However, there is only one set of procedural rules in civil court that apply to represented and unrepresented parties who choose to proceed in the Court of Common Pleas. In this matter, the Summons and Complaint is dismissed as to William O. Higgins because it was not timely commenced.

III. ALAN SHEPPARD LACKED STANDING TO BRING THIS ACTION ON BEHALF OF WANDO RIVER, LLC.

Wando River, LLC was not represented by an attorney at the time that Alan Sheppard filed the action pro se. Wando River, LLC must be dismissed from this action because Alan Sheppard did not have standing to bring this action on behalf of the corporate entity. Defendant requests that this Court take judicial notice that Alan Sheppard is not a member of the South Carolina Bar and is not authorized to practice law in this State. In Renaissance Enterprises, Inc. v. Summit Teleservices, Inc., 334 S.C. 649, 515 S.E.2d 257 (1999), the Supreme Court held that a non-lawyer may not represent a corporation in circuit or appellate courts. In later action, the United States District Court relied upon the reasoning in Renaissance Enterprises when it dismissed claims, without prejudice, that were brought on behalf of a corporate entity that was not represented by

A handwritten signature or set of initials, possibly 'Ry', written in black ink at the bottom right of the page.

counsel on the grounds that the non-lawyer did not have standing to bring claims on behalf of the corporation. See Penland Financial Services, Inc. v. Select Financial Services, LLC, 2008 WL 5279638 (D.S.C. 2008). For this reason, the claims asserted by Wando River, LLC against William O. Higgins are not properly before this Court and are dismissed.

IV. PLAINTIFFS FAILED TO COMPLY WITH STATUTORY REQUIREMENTS PRIOR TO BRINGING A PROFESSIONAL MALPRACTICE ACTION.

S.C. Code §15-36-100(B) requires that “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. This requirement is applicable to legal malpractice actions via S.C. Code §15-36-100 (G)(2). The proper result for failure to file the required expert affidavit is dismissal and is governed by S.C. Code §15-36-100(F) of this statute states in relevant portion that:

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.

Plaintiffs have not provided an expert affidavit, specifying the acts or omissions, contemporaneously with filing the complaint that alleges professional negligence against Defendant William O. Higgins. Plaintiff did not file an expert affidavit prior to or with the filing of the Summons and Complaint, nor any time since.

A handwritten signature or set of initials, possibly 'B', written in black ink.

S.C. Code §15-36-100(C) provides an exception to the contemporaneous filing requirement. The statute states in relevant part:

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.

Plaintiffs have not filed an expert affidavit in this matter at any time so the exception is not applicable in this case.

The appellate courts in South Carolina have not applied these statutory provisions in a legal malpractice context. In the recent opinion, Rotureau v. Chaplin, 2009 WL 5195968 (D.S.C.), the United States District Court dismissed the legal malpractice claim, without prejudice, for failure to state a claim because the plaintiff did not provide an affidavit from an attorney that stated a single negligent act or omission. The Rotureau court held that the requirement was substantive law of South Carolina rather than merely procedural. In this case, Plaintiffs allege in Paragraph 4 of their Complaint that Higgins:

was required to exercise the same legal skill as a reasonably competent attorney and to use reasonable care in determining and implementing a strategy to be followed to achieve the Plaintiff's legal goals. As a fiduciary of Plaintiff, Defendant was obligated to treat all information relating to a Plaintiff's representation as confidential and to zealously represent the



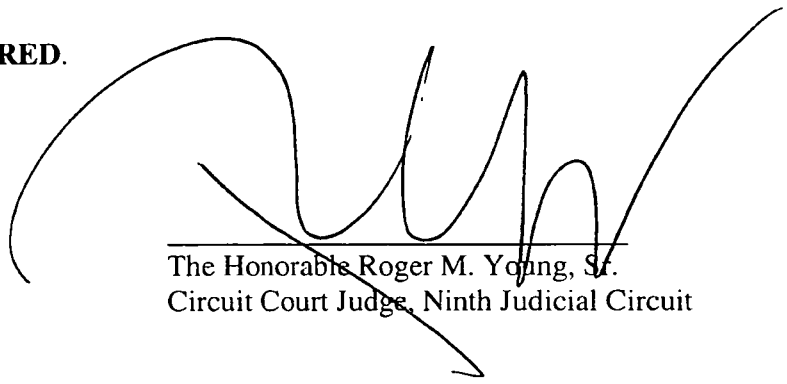
Plaintiff's interests, including the disclosure of any conflicts of interest that might impair the Defendant's ability to represent the Plaintiff.

Allegations such as those stated above require the affidavit of an expert to establish the duty and the breach thereof. Further, Plaintiffs allege in Paragraph 6(c) that Higgins failed "to provide Plaintiff with the minimum standard of care." Again, an expert affidavit is required for this allegation regarding the standard of care. These allegations are a complex amalgam of ethical rules, which require an expert affidavit to establish. For this reason, Plaintiffs' Complaint is dismissed against William O. Higgins.

CONCLUSION

For the reasons set forth above, the Complaint is dismissed with prejudice as to Defendant William O. Higgins.

AND IT IS SO ORDERED.



The Honorable Roger M. Young, Sr.
Circuit Court Judge, Ninth Judicial Circuit

Columbia, South Carolina
11/16, 2011

LETTER ORDERING TRANSCRIPT FROM COURT REPORTER

FEBRUARY 22, 2013

Amanda Haffenden
PO Box 424
Summerville, South Carolina 29484
Phone: (843) 958-5000

copy

RE: SHEPPARD VS HIGGINS ET ALL.., Case No. 2009-CP-100-5838
Dear _____:

On **December 6**, 2010, the above case had a hearing before the Honorable Roger Young, Circuit Court Judge, in Charleston County. My records indicate that you were the court reporter for this case.

I request that you provide me with a transcript of the proceedings. Please transcribe the entire record

I agree to pay the per page charge for this transcript as provided by Rule 607, SCACR.

FEBRUARY 22, 2013

s/ *Alan Sheppard*
ALAN SHEPPARD,
462 Commonwealth Rd.
Charleston, South Carolina 29466
(843) 224-9169
Appellant

CC; John Pringle,
Ellis Lesemann
Lynn McCants
S.C. Court Administration
Clerk, Court of Appeals [Supreme Court]

* Unless all the parties to the appeal agree, a transcript of the entire proceedings must be ordered. Form 10 contains a sample agreement to order less than the entire transcript.

Ellis R. Lesemann
Email: ellisr@hvlawsc.com
HARVEY & VALLINI, LLC
497 Bramson Court, Suite 201
Mount Pleasant, South Carolina 29464
Phone: (843) 388-8883

RECEIVED
MAR 07 2013
SC Court of Appeals

**ATTORNEYS FOR RUSSELL BENNETT, RONALD
OWENS, CHARLES P. DARBY, AND KIAWAH
RESORT ASSOCIATES, L.P.**

John J. Pringle, Jr., Esq.
Ellis, Lawhorne & Sims, P.A.
P.O. Box 2285
Columbia, SC 29202

Phone 803-343-1270
Attorney for William O Higgins

John Lynn McCants, Esq.
P.O. Box 2025
Mt. Pleasant, SC 29465

Phone: 843.884.9394
Attorney for Himself/ J Lynn McCants

▲

LETTER ORDERING TRANSCRIPT FROM COURT REPORTER

FEBRUARY 22, 2013

Copy

Phyllis H. Norton
100 Broad Street, Suite 106
Charleston, South Carolina 29401-2258
Phone: (843) 958-5000

RE: SHEPPARD VS HIGGINS ET ALL., Case No. 2011-CP-100-4537

Dear _____:

On **APRIL 25**, 2012, the above case had a hearing before the Honorable Stephanie McDonald, Circuit Court Judge, in Charleston County. My records indicate that you were the court reporter for this case.

I request that you provide me with a transcript of the proceedings. Please transcribe the entire record

I agree to pay the per page charge for this transcript as provided by Rule 607, SCACR.

FEBRUARY 22, 2013

s/ *Alan Sheppard*
ALAN SHEPPARD,
462 Commonwealth Rd.
Charleston, South Carolina 29466
(843) 224-9169
Appellant

CC; Honorable Stephanie McDonald
John Pringle,
Ellis Lesemann
Lynn McCants
S.C. Court Administration
Clerk, Court of Appeals [Supreme Court]

* Unless all the parties to the appeal agree, a transcript of the entire proceedings must be ordered. Form 10 contains a sample agreement to order less than the entire transcript.

RECEIVED

MAR 07 2013

SC Court of Appeals

Respondents' and Respondent's Counsel contact information;

Ellis R. Leseemann
Email: ellisr@hvlawsc.com
HARVEY & VALLINI, LLC
497 Bramson Court, Suite 201
Mount Pleasant, South Carolina 29464
Phone: (843) 388-8883

***ATTORNEYS FOR RUSSELL BENNETT, RONALD
OWENS, CHARLES P. DARBY, AND KIAWAH
RESORT ASSOCIATES, L.P.***

John J. Pringle, Jr., Esq.
Ellis, Lawhorne & Sims, P.A.
P.O. Box 2285
Columbia, SC 29202

Phone 803-343-1270

Attorney for William O Higgins

John Lynn McCants, Esq.
P.O. Box 2025
Mt. Pleasant, SC 29465

Phone: 843.884.9394

Attorney for Himself/ J Lynn McCants