THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2012-213726
Lower Case No. 2012-CP-22-01056

Erika Fabian. . . . . Appellant,

vs.

Ross M. Lindsay, III, and
LINDSAY & LINDSAY, LLC. . . . . Respondents.

RECORD ON APPEAL

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012CP2201056

Erika Fabian	Ross M Lindsay III Lindsay & Lindsay LLC
PLAINTIFF(S)	DEFENDANT(S)
Submitted by: Clerk of Court	Attorney for: ☐ Plaintiff ☐ Defendant ☐ 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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

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

IT IS ORDERED AND ADJUDGED: ☑ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:
Motion To Dismiss By Attorney Dowling Granted; See Attached Order

ORDER INFORMATION

This order ☑ ends ☐ does not end the case.

Additional Information for the Clerk:

FILED
GEORGETOWN COUNTY, S.C.
2012 DEC 17 PM 2:59
ALICIA A. WHITE
CLERK OF COURT

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	Judge Code	Date
[signature]	2148	12/6/2012

For Clerk of Court Office Use Only

This judgment was entered on **December** 7, **2012**, and a copy mailed first class or placed in the appropriate attorney's box on **December** 7, **2012**, to attorneys of record or to parties (when appearing pro se) as follows:

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Alma Y. White - Clerk of Court

Court Reporter ***Grace Hurley***

CPFORM4M
SCCA SCRCP Form 4C (Revised 12/2011)

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	IN THE COURT OF COMMON PLEAS
Erika Fabian, Plaintiff, v. Ross M. Lindsay, III, and Lindsay and Lindsay, LLC, Defendants.	Civil Action No. 2012-CP-22-01056 **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS WITH PREJUDICE**

FILED
GEORGETOWN COUNTY, S.C.
2012 DEC -7 PM 2:59
CLERK OF COURT

This matter came before me on December 6, 2012, for a hearing on a Motion to Dismiss filed by the Defendants. After carefully reviewing the pleadings, the legal memoranda submitted by the parties, and the applicable law, and after considering the arguments of counsel, I hereby grant the motion.

FACTUAL BACKGROUND

According to the Amended Complaint, the Defendants drafted a Trust Agreement for Dr. Denis Fabian (the "Decedent") which was executed on May 25, 1990. Dr. Fabian's wife, Marilyn, was to be the life beneficiary. Dr. Fabian also had one living brother, Eli, at the time the instruments were executed. The Plaintiff is the daughter of the Decedent's other brother, Zoltan, who predeceased the Decedent in 1945. The Decedent died on February 5, 2000 and his brother Eli died a few weeks later.

The Plaintiff alleges that the Decedent and his wife told her that she was to be provided for in his estate plan. She asserts that at the time of the Decedent's death, his widow, his two nieces, and the Defendants were all under the impression that half of the

estate would pass to the nieces upon the widow's death in the future.[1] Upon the Decedent's death, the Trust was funded with a value at that time of approximately Thirteen Million Dollars ($13,000,000.00).

The Defendants mailed the Plaintiff a letter on or about July 30, 2001, which included certain pages from the Trust instrument and informed her that she would not be receiving any funds because the share that would have been distributed to her as described in the Trust would now be distributed to Eli's estate upon Marilyn's death in the future. Eli left a child, Miriam, as his only heir. Miriam became the beneficiary of the share that was to go to Eli's estate.

The subject provision in the Trust agreement reads:

> Upon or after the death of the survivor of my said spouse and me, my Trustee shall divide this Trust as then constituted into two (2) separate shares so as to provide One (1) share for the children of Marilyn K. Fabian and One (1) share for my brother, Eli Fabian. If either of my wife's children predeceases (sic) her, the predeceased child's share shall be distributed to his of her issue per stirpes. If my said brother, Eli Fabian, predeceases me, then one half of his share shall be distributed to his daughter, Miriam Fabian, or her issue per stirpes, and the other half of his share shall be distributed to my niece, Erica Fabian, or her issue per stirpes.

Because the Decedent's spouse is still living, and because Eli survived his brother but not Marilyn, the third sentence is inapplicable and the Plaintiff receives nothing from the Trust. The Plaintiff alleges the Decedent's intent was defeated by "accidentally" disinheriting her.

The Plaintiff subsequently filed this lawsuit against the Defendants as the drafters of the Trust in which she claims to hold an intended beneficial interest. The Amended Complaint asserts causes of action against the Defendants for legal malpractice and

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[1] The other half was to be distributed to Marilyn's children from a prior marriage.

breach of contract. The Defendants moved to dismiss the Amended Complaint on the grounds that it fails to state facts sufficient to constitute a cause of action.

STANDARD OF REVIEW

Under Rule 12(b)(6), SCRCP, a defendant's motion to dismiss for failure to state facts sufficient to constitute a cause of action must be granted if, viewing the evidence in the light most favorable to the plaintiff, the facts alleged in the complaint and inferences reasonably deducible therefrom do not entitle the plaintiff to relief on any theory. Chewning v. Ford Motor Co., 346 S.C. 28, 32-33, 550 S.E.2d 584, 586 (Ct. App. 2001).

ANALYSIS

A plaintiff in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship; (2) a breach of a duty by the attorney; (3) damage to the client; and (4) proximate causation of the client's damages by the breach. Smith v. Haynsworth, Marion, McKay & Geurard, 322 S.C. 433, 435, 472 S.E.2d 612, 613 n.2 (1996); Ellis v. Davidson, 358 S.C. 509, 523, 595 S.E.2d 817, 824 (Ct. App. 2004); Hall v. Fedor, 349 S.C. 169, 174, 561 S.E.2d 654, 656 (Ct. App. 2002). The first element is critical. "Before a claim for malpractice may be asserted, there must exist an attorney-client relationship." Am. Fed. Bank, FSB v. No. One Main Joint Venture, 321 S.C. 169, 174, 467 S.E.2d 439, 442 (1996); see also Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006) ("[A]n attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client.") (quoting Gaar v. N. Myrtle Beach Realty Co., 287 S.C. 525, 528, 339 S.E.2d 887, 889 (Ct. App. 1986)). Indeed, the Supreme Court reiterated as recently as 2009 that "existing law . . . imposes a privity requirement as a

condition to maintaining a legal malpractice claim in South Carolina." Rydde v. Morris, 381 S.C. 643, 650, 675 S.E.2d 431, 435 (2009).

The Amended Complaint fails to allege that the Plaintiff ever had an attorney-client relationship with the Defendants and appears to acknowledge that no such relationship ever existed because it alleges the Plaintiff was merely an intended beneficiary of the Trust. See, e.g., Amended Complaint ¶ 24. It alleges the Defendants breached a duty to the Plaintiff by failing to adequately advise the Decedent. Amended Complaint ¶ 28. However, as set forth above, South Carolina law recognizes no such duty. Because the Amended Complaint does not allege that an attorney-client relationship has ever existed between the Plaintiff and the Defendants, the Plaintiff may not assert a cause of action against the Defendants for legal malpractice.

For largely the same reasons, the Plaintiff also may not assert a cause of action against the Defendants for the alleged breach of a contract to which she was not a party. South Carolina law is clear that "an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client." Pye, 369 S.C. at 564, 633 S.E.2d at 509 (citations and quotations omitted). Moreover, no South Carolina court has ever recognized a breach of contract cause of action by an alleged intended beneficiary of estate planning documents. To the contrary, the Supreme Court has characterized such a cause of action as merely one of a variety of theories which fall under the umbrella of "legal malpractice," which requires privity. Rydde, 381 S.C. at 645, 675 S.E.2d at 433-34 ("Appellants filed this legal malpractice action under various theories, all of which are premised on the

imposition of a duty on [the Defendant] in favor of the non-client prospective beneficiaries.").[2]

The bottom line is that it does not matter how many causes of action are asserted or how they are labeled. South Carolina law "imposes a privity requirement as a condition to maintaining a legal malpractice claim" (which includes breach of contract), and thus any lawsuit which seeks to hold an attorney liable to a party with whom he or she lacks privity must be dismissed. Rydde, 381 S.C. at 650, 675 S.E.2d at 435.

IT IS, THEREFORE, ORDERED that the Defendants' Motion to Dismiss is **GRANTED.**

IT IS FURTHER ORDERED that this matter is **DISMISSED WITH PREJUDICE.**

AND IT IS SO ORDERED.

Benjamin H. Culbertson
Resident Circuit Judge
Fifteenth Judicial Circuit

Dec. 6, 2012
Georgetown, South Carolina

[2] In Rydde, the plaintiff asserted a breach of contract cause of action which is virtually identical to the breach of contract cause of action in the Amended Complaint.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CIVIL ACTION: 2012-CP-22-01056
Erika Fabian,	)	
	)	
Plaintiff,	)	
	)	
v.	)	COMPLAINT
	)	
Ross M. Lindsay, III, and Lindsay & Lindsay, LLC	)	(Jury Trial Demanded)
	)	
Defendants.	)	

COMES NOW the Plaintiff, through her undersigned counsel, alleging as follows:

PARTIES AND JURISDICTION

1. The plaintiff is a citizen and resident of the State of California.

2. The defendant Ross M. Lindsay, III is a citizen and resident of Georgetown County, South Carolina. Defendant Lindsay & Lindsay, LLC is a South Carolina limited liability corporation owned by defendant Ross M. Lindsay, III which maintains offices in Georgetown County. Both are referred to herein as "defendant".

3. This Court has jurisdiction over these parties and the subject matter herein and venue is proper in this County.

FACTUAL BACKGROUND

4. On May 25, 1990, Dr. Denis Fabian, a successful and wealthy surgeon, executed a Trust Agreement that had been drafted by defendant. Dr. Fabian was married to Marilyn Fabian at the time he executed these trusts and they had been married since 1973. Dr. Fabian was about eighty (80) years old at the time he executed these instruments and his wife Marilyn, who would be the life beneficiary, was

about twenty years his junior and in good health. Dr. Fabian had one living brother at the time, Eli Fabian, and Eli was about the same age as Dr. Fabian and in relatively poor health. Marilyn Fabian had two adult daughters from a prior marriage. Dr. Fabian had two living nieces, Miriam Fabian, born to Dr. Fabian's brother Eli and plaintiff Erika Fabian, who was born to Dr. Fabian's brother Zoltan Fabian, who predeceased Dr. Fabian, in the Nazi concentration camp Bergen Belsen in 1945. Erika's mother died in 1968 and Dr. Fabian was well aware of his niece Erika's loss of both her father and mother at an early age.

5. Dr. Fabian died on February 5th of 2000, his brother Eli died a few weeks later, thus Eli survived Dr. Fabian, but not Dr. Fabian's wife Marilyn, the life beneficiary of the Trust corpus and income.

6. Plaintiff Erika Fabian had been told by her uncle and his wife Marilyn that she was being provided for in Dr. Fabian's estate plan. The Trust reflects Dr. Fabian's intent to provide for his nieces if his brother did not survive so as to be able to receive his share.

7. At the time of Dr. Fabian's death, everyone involved in this matter, from the widow life beneficiary, Marilyn, to the two cousins and drafting lawyer were under the impression that one half of Dr. Fabian's estate was going to pass to his nieces Miriam and Erika upon Marilyn's death in the future, Marilyn enjoying the corpus and income for her life, with the other half to be distributed to Marilyn's children from her prior marriage. There was no reason to think otherwise, the only other named beneficiary, brother Eli, had also just died.

8. On July 30, 2001, defendant mailed plaintiff Erika Fabian a letter enclosing

a couple of pages from Dr. Fabian's trust and informed her, for the first time, that since Eli had survived his brother by a few weeks, that she would be getting nothing from this trust. The share that would have been distributed to Erika as described in the Trust, would now be distributed to Eli's estate upon Marilyn's death some day in the future. Cousin Miriam was the only heir to her father Eli's estate and thus she would now be the beneficiary of both the share Dr. Fabian intended to leave to her as well as the share Dr. Fabian intended to leave to Erika.

9. This bizarre and unexpected outcome came as a surprise to all of the parties, including the widow and drafting lawyer, a windfall to one cousin, Miriam, and as devastating news to the other, Erika.

10. Defendant informed Erika Fabian, per his July 31st letter, that she was no longer a beneficiary of her uncle's Trust by the operation of this language in the trust. This will hereinafter be referred to as the "subject provision".

> "Upon or after the death of the survivor of my said spouse and me, my Trustee shall divide this Trust as then constituted into two (2) separate shares so as to provide One (1) share for the children of Marilyn K. Fabian and One (1) share for my brother, Eli Fabian. If either of my wife's children predceases (sic) her, the predeceased child's share shall be distributed to his or her issue per stirpes. If my said brother, ELI FABIAN, predeceases me, then one half of his share shall be distributed to his daughter, MIRIAM FABIAN, or her issue per stirpes; and the other half of his share shall be distributed to my niece, ERICA FABIAN, or her issue per stirpes" (Emphasis added)

11. While the opening sentence of this trust paragraph plans the first division of the Trust corpus to occur "upon or after the death of the survivor or my said spouse and me", something that still has not occurred since Dr. Fabian's spouse is still living, it then in sentence three (3) creates the problem that has resulted in years of litigation and which effectively defeated the Settlor's intent by accidentally disinheriting cousin Erika.

The problem is that the Trust language failed to contemplate or plan for the most probable situation, whereby Eli survives his brother but not his brother's wife, who was twenty years younger. Had that third sentence in the subject provision simply read, "If my said brother, ELI FABIAN, predeceases us", instead of "me", this trust would have succeeded in carrying out the intent of the Settlor. The first sentence did exactly that, it planned the distribution which was to occur after the death of the wife to the time "upon or after the death of the survivor of my said spouse and me".

12. There is no reasonable doubt as to the following:

a. Defendant knew that plaintiff was an intended beneficiary of the Trust, as he drafted documents naming her as a beneficiary;

b. There were only three individuals identified by name in the Trust other than Dr. Fabian's wife, those being plaintiff Erika Fabian, her cousin Miriam Fabian, both living as of the date of this filing, and Dr. Fabian's brother Eli, who was in poor health and in his 70's when the trust documents were drafted;

c. Defendant knew that a substantial financial interest was being created by the Trust Agreement he was drafting by virtue of his conversations with the Settlor and his wife, and by the fact that on April 6th of 1990 defendant placed a value on Dr. Fabian's estate at $4,500,000.00 in his engagement letter to Dr. Fabian and his wife;

d. Defendant knew that Dr. Fabian intended for his wife Marilyn to receive the benefit of the Trust Corpus and income for her lifetime, as it is stated in the Trust Agreement;

e. Defendant knew that Dr. Fabian intended for half of his remaining trust corpus to go his wife's daughters upon her death as it is stated in the Trust Agreement;

f. Defendant knew that Dr. Fabian intended for the other half of his remaining trust corpus to go to this brother Eli, if Eli survived to take his share, as it is stated in the Trust Agreement;

g. Defendant knew that Dr. Fabian did not intend to leave anything from his Trust to his brother Eli, if Eli was deceased at the time of distribution;

h. Defendant knew that Dr. Fabian had no intention of leaving anything to

a deceased brother;

i. Defendant knew that Dr. Fabian wanted Eli's share of his estate to pass to his two named nieces, Erika and Miriam, if Eli was not alive to receive his share as that is the logical conclusion from the wording of the Trust Agreement since no distribution to anyone would occur until the death of Dr. Fabian's spouse Marilyn. There is no other distribution language for a plan if Eli survived Dr. Fabian but predeceased the spouse;

j. Defendant knew or should have known that the wording of the subject provision of the trust agreement failed to contemplate the most likely event, that Eli might survive Dr. Fabian, but not Dr. Fabian's wife Marilyn, a woman twenty years younger than either Eli or her husband;

k. Eli Fabian survived Dr. Fabian by several weeks. Dr. Fabian died on February 5th, 2000 and Eli passed away on March 12, 2000. This made no difference to the Trust as no further distributions were to be made until Marilyn passed away. It made a difference worth millions of dollars to Miriam and Erika;

l. The named life beneficiary of the Trusts drafted by defendants, Marilyn, Dr. Fabian's wife of 27 years at his death, is alive and well some twenty-two years after the drafting and execution of Dr. Fabian's estate planning instruments;

m. In an action brought by Erika to reform the subject provision, defendant took the position that the Trust Agreement was not ambiguous and did not need to be corrected, a position contrary to that of Dr. Fabian's wife and Dr. Fabian's accountant and business advisor, in defendant's effort to prevent the Trust he had drafted from being found to be ambiguous;

n. At least two South Carolina Courts have found the subject provision to be ambiguous;

o. One Court found that the subject provision contradicted what Dr. Fabian told his wife and family that he intended and that it created an "absurd result";

p. Upon Dr. Fabian's death in February of 2000, the Trust he created was funded with a value at that time of approximately Thirteen Million ($13,000,000.00) Dollars;

q. By virtue of the wording in the trust language, which defeated her uncle's stated intent, Erika would be entitled to nothing. Her cousin Miriam would receive both her share and Erika's; and,

r. Plaintiff Erika Fabian was first informed that she did not have any remaining beneficial interest in her uncle's Trust per a letter from Defendant Lindsay mailed to her on July 30, 2001.

PROCEDURAL HISTORY

13. Plaintiff Erika Fabian brought an action in the Georgetown County Probate Court (Civil Action 2004-GC-22-21) seeking to reform the subject provision, correct this error, effectuate the Settlor's intent and mitigate her damages. This action would have also had the effect of mitigating or eliminating the damages for which defendant could be held responsible.

14. To avoid having to bring an action against Defendant to toll the statute of limitations, which would have arguably run on or after July 31st, 2004, three years after plaintiff could have first become aware of defendant's negligence, plaintiff and defendant entered into a series of Tolling Agreements, which expressly stated that:

> "The parties believe that the voluntary extension of the statute of limitations will eliminate any time deadline pressure with the goal of resolving all issues without litigation."

15. Had the parties not entered into these Tolling Agreements, plaintiff would have been compelled to bring her action against Mr. Lindsay or lose her right to do so thus forcing litigation against the drafting lawyer before trying to correct the mistake he had made. The parties have executed subsequent tolling agreements as the years of litigating the reformation passed and, following the trial of the reformation case in June of 2010, they continued to do so in an attempt to resolve this matter without litigation. The last tolling agreement extended the statute of limitations through October 10th, 2012. This action is being brought within that stated period.

16. Cousin Miriam Fabian removed the reformation action from Probate Court to Circuit Court on May 10th, 2007. Motions were filed and hearings were held on the issue.

17. Trustees Marilyn Fabian and Walter Pikul filed a Declaratory Judgment action in December of 2008 asking the Court for guidance on the applicability of the new Probate Code section to the issues in the reformation case. Miriam Fabian removed that action, motions were filed and hearings were held.

18. Miriam Fabian filed Motions to strike the testimony of plaintiff's experts and that of Marilyn Fabian, those motions were denied and motions to reconsider filed.

19. Miriam Fabian moved for Summary Judgment, hearings were held, the Motion denied and a Motion to Reconsider was filed and denied.

20. Before the reformation action was called for trial for the first time in June of 2010, cousin Miriam Fabian filed two lawsuits against the Trust and the Trustees. In her first action (Miriam Fabian v. Marilyn K. Fabian and Walter Pikul, Civil Action 2010-CP-22-512), Miriam sought to be awarded her attorneys fees over the decision by trustees Marilyn Fabian and Walter Pikul to concur in the reformation case that the subject trust was ambiguous and should be reformed. That case was tried before the Honorable Larry B. Hyman, Jr. in August of 2011 and the Court denied Miriam's relief and ordered that she pay the attorney's fees incurred by the defendants Marilyn and Walt Pikul.

21. After losing that first "attorney's fees" case, Miriam filed a motion to reconsider, that motion was denied and Judge Hyman awarded additional fees to Marilyn and Walt Pikul.

22. In April of 2010, Miriam filed another action against Marilyn Fabian, individually and against all of the trustees of the trust (Miriam Fabian v. Marilyn Fabian, et al, Civil Action 2010-CP-22-531) alleging, essentially, that Marilyn Fabian was spending too much of Miriam's future inheritance, among many other claims

presumably. That case has, upon information and belief, just been resolved and a settlement approval hearing is set for October 25th, 2012. Upon information and belief, cousin Miriam Fabian has leveraged her position as future beneficiary of half of the estate presently held by Marilyn to receive an advance in satisfaction of her future claim to the trust.

ALLEGATIONS OF NEGLIGENCE

23. Plaintiff realleges all prior allegations and incorporates them herein by reference.

24. Plaintiff Erika Fabian was one of only three beneficiaries identified by name, other than the wife, in the Trust drafted by defendant. Defendant knew that it was his client's intent to provide a share for Erika Fabian, he was aware of his client's wealth and the financial significance to this plaintiff of the legacy he was creating.

25. Defendant owed a duty to this beneficiary to draft the subject trust in a competent manner that would carry out the express intent of the Settlor, an intent that was known to the defendant at the time he was drafting the subject trust.

26. Defendant owed a duty to this beneficiary to counsel and advise her uncle as to the drafting and language of the subject trust in a competent manner that would carry out the express intent of the Settlor, an intent that was known to the defendant at the time he was drafting the subject trust.

27. Defendant breached that duty by drafting a trust provision that was ambiguous, defective, led to an absurd result, and did not carry out the intent of the Settlor and those actions and inactions were beneath the applicable standard of care for an attorney practicing in the area of estate planning.

28. Defendant breached that duty by failing to counsel, advise, explain and provide guidance to Dr. Fabian about a trust provision that was ambiguous, defective, would lead to an absurd result, and did not carry out his stated intent and that failure was a breach of the standard of care for an attorney practicing in the area of estate planning.

29. Plaintiff is informed and believes that she is entitled to judgment against defendants for actual damages she has suffered, damages which were proximately caused by the defendants negligence in the drafting of and counsel of the Settlor of the Trust, negligence which resulted in the drafting of an ambiguous trust provision that, by virtue of its failure to contemplate the most likely distribution scenario, would work to completely divest plaintiff of her future share of her uncle's estate and thereby defeat his stated intent to provide for this niece.

DAMAGES

30. Plaintiff realleges all prior allegations and incorporates them herein by reference.

31. Plaintiff has suffered actual, foreseeable, financial damages as a proximate result of defendants' negligence in the drafting of, and in his negligent counsel of the settlor in the drafting and execution of, the subject Trust such that defendants' negligence has defeated the settlor's stated intent to provide for this specifically identified beneficiary resulting in plaintiff's exclusion from her uncle's trust.

32. Plaintiff has spent years attempting to mitigate the damages caused by defendants' negligence through her efforts to reform the subject trust to correct the error

caused by defendants. In that action to reform the trust, two of the three Trustees, Mrs. Marilyn Fabian and Walter Pikul, the Settlor's long time business advisor, agreed with plaintiff that the Trust Agreement contained a mistake that thwarted the settlor's intent and they concurred that the Trust should be reformed and thus corrected to reflect that intent, they also concurred that the error made the Trust language ambiguous.

33. Cousin Miriam Fabian, who stood to reap the windfall of defendants' negligence by being the accidental beneficiary of both her share and her cousin Erika's share fought the reformation every conceivable step of the way. According to filings in one of the several actions that Miriam Fabian has brought to enforce her claim to her double-share interest in this Trust corpus, she expended more than $220,000.00 solely in her efforts to defeat the reformation of the Trust.

34. In the Trust reformation case, Defendants chose to take a completely contrary position to that taken by the Settlor's business advisor and the person who knew him and his estate plan the best, his wife, and argued that the Trust was not ambiguous and should not be reformed, thus defendant fought plaintiff's attempt to reform the trust and mitigate the damages she would suffer.

35. At the outset of the trial of the reformation action in June of 2010, the Honorable Thomas W. Cooper, Jr. ruled as a matter of law in pretrial motions that the subject provision of the Trust Agreement was ambiguous and thus extrinsic evidence would be admissible to find the Settlor's intent under the Amended Probate Code. That Amended Probate Code Section, while allowing for the admission of extrinsic evidence, also provided a substantially heightened burden of proof for the party seeking to reform the Trust.

36. As a result of mounting costs, the increased burden of proof, the certainty that even if Erika had prevailed and reformed the Trust that her cousin Miriam, who had already spent $220,000.00 fighting her, would appeal any decision and the fact that the drafting attorney and trustee, defendant Lindsay, had testified against and would continue to fight the reformation of the Trust, plaintiff Erika Fabian agreed to end her claim to reform the Trust and accept a settlement paid by the Trust and end that case without reforming the Trust. At conclusion of that case, it was stipulated between all parties, including defendant Lindsay, that Erika Fabian's decision to end her six year battle to reform the Trust DID NOT include the release of any claim she had against defendant Lindsay or his law firm in their capacity as estate planning attorneys who had drafted and counseled the Settlor in his creation of the subject Trust.

37. As a direct and proximate result of defendants' negligence, plaintiff was "disinherited" from her uncle's Trust, in a manner that defeated Dr. Fabian's stated intent, and intent admittedly known to defendant Lindsay.

38. As a direct and proximate result of defendants' negligence, plaintiff's cousin Miriam Fabian became the unintended beneficiary of both her share and her cousin Erika's share of the Trust.

39. Upon information and belief, cousin Miriam Fabian successfully leveraged her enhanced (doubled) claim to her uncle's Trust estate and has recently received, or is about to receive, a substantial advance in satisfaction of her interest as a beneficiary of the Fabian Trust.

40. As a direct and proximate cause of defendants' professional negligence, plaintiff Erika Fabian, a beneficiary expressly designated and named by the Settlor, lost

the entire legacy that her uncle had promised her. His intent is clearly revealed in the Trust Agreement and supported by the sworn testimony of the person closest to the Settlor and knowledgeable of his intent, his wife, and it was frustrated in its entirety as to one of Dr. Fabian's primary beneficiaries.

SOUTH CAROLINA CODE §15-36-100 CERTIFICATION

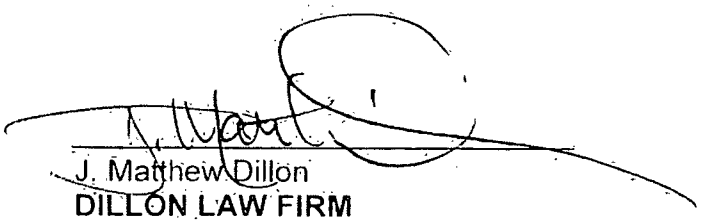
41. Pursuant to South Carolina Code §15-36-100 (C)(1), an affidavit from a expert specifying the negligent acts or omissions of the defendants is not being filed contemporaneously herewith as the statute of limitations, as stipulated between the parties by tolling agreement, will expire on October 10th, 2012, within ten days of the date of filing and that because of said time constraints an affidavit could not be prepared to be filed herewith but an affidavit meeting the requirements of the cited code section will be filed along with an Amended Pleading within the forty-five day period set forth in Section (C)(1) unless otherwise stipulated between the parties and their counsel.

WHEREFORE, the plaintiff hereby prays for the relief as requested above and:

a. For an award and judgment against the defendants in an amount to be determined by this Court but that is at least equal to the damages plaintiff has suffered as a result of losing her entire share in her uncle's trust;

b. For a trial by jury on all issues; and,

b. For such other relief as this Court may deem just and proper.



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ATTORNEY FOR THE PLAINTIFF
ERIKA FABIAN

Dated: October 1st, 2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CIVIL ACTION: 2012-CP-22-01056
Erika Fabian,	)	
	)	**AMENDED**
Plaintiff,	)	**COMPLAINT**
	)	
v.	)	(Jury Trial Demanded)
	)	
Ross M. Lindsay, III, and Lindsay & Lindsay, LLC,	)	(Professional Negligence) (Breach of Contract)
	)	
Defendants.	)	
	)	

COMES NOW the Plaintiff, through her undersigned counsel, amending her complaint, first filed and served October 1, 2012, as follows:

PARTIES AND JURISDICTION

1. The plaintiff is a citizen and resident of the State of California.

2. The defendant Ross M. Lindsay, III is a citizen and resident of Georgetown County, South Carolina. Defendant Lindsay & Lindsay, LLC is a South Carolina limited liability corporation owned by defendant Ross M. Lindsay, III which maintains offices in Georgetown County. Both are referred to herein as "defendant".

3. This Court has jurisdiction over these parties and the subject matter herein and venue is proper in this County.

FACTUAL BACKGROUND

4. On May 25, 1990, Dr. Denis Fabian, a successful and wealthy surgeon, executed a Trust Agreement that had been drafted by defendant. Dr. Fabian was married to Marilyn Fabian at the time he executed these trusts and they had been

married since 1973. Dr. Fabian was about eighty (80) years old at the time he executed these instruments and his wife Marilyn, who would be the life beneficiary, was about twenty years his junior and in good health. Dr. Fabian had one living brother at the time, Eli Fabian, and Eli was about the same age as Dr. Fabian and in relatively poor health. Marilyn Fabian had two adult daughters from a prior marriage. Dr. Fabian had two living nieces, Miriam Fabian, born to Dr. Fabian's brother Eli and plaintiff Erika Fabian, who was born to Dr. Fabian's brother Zoltan Fabian, who predeceased Dr. Fabian, in the Nazi concentration camp Bergen Belsen in 1945. Erika's mother died in 1968 and Dr. Fabian was well aware of his niece Erika's loss of both her father and mother at an early age.

5. Dr. Fabian died on February 5th of 2000, his brother Eli died a few weeks later, thus Eli survived Dr. Fabian, but not Dr. Fabian's wife Marilyn, the life beneficiary of the Trust corpus and income.

6. Plaintiff Erika Fabian had been told by her uncle and his wife Marilyn that she was being provided for in Dr. Fabian's estate plan. The Trust reflects Dr. Fabian's intent to provide for his nieces if his brother did not survive so as to be able to receive his share.

7. At the time of Dr. Fabian's death, everyone involved in this matter, from the widow life beneficiary, Marilyn, to the two cousins and drafting lawyer were under the impression that one half of Dr. Fabian's estate was going to pass to his nieces Miriam and Erika upon Marilyn's death in the future, Marilyn enjoying the corpus and income for her life, with the other half to be distributed to Marilyn's children from her prior marriage. There was no reason to think otherwise, the only other named

beneficiary, brother Eli, had also just died.

8. On July 30, 2001, defendant mailed plaintiff Erika Fabian a letter enclosing two pages from Dr. Fabian's trust and informed her for the first time that since Eli had survived her uncle by a few weeks that she would be getting nothing from this trust. The share that would have been distributed to Erika would be distributed to Eli's estate upon Marilyn's death some day in the future. Cousin Miriam was the only heir to her father Eli's estate and thus she would now be the beneficiary of both shares.

9. This bizarre and unexpected outcome came as a surprise to all of the parties, including the widow and drafting lawyer, a windfall to one cousin, Miriam, and as devastating news to the other, Erika.

10. Defendant informed Erika Fabian, per his July 31st letter, that she was no longer a beneficiary of her uncle's Trust by the operation of this language in the trust. This will hereinafter be referred to as the "subject provision".

> "Upon or after the death of the survivor of my said spouse and me, my Trustee shall divide this Trust as then constituted into two (2) separate shares so as to provide One (1) share for the children of Marilyn K. Fabian and One (1) share for my brother, Eli Fabian. If either of my wife's children predceases (sic) her, the predeceased child's share shall be distributed to his or her issue per stirpes. If my said brother, ELI FABIAN, predeceases me, then one half of his share shall be distributed to his daughter, MIRIAM FABIAN, or her issue per stirpes; and the other half of his share shall be distributed to my niece, ERICA FABIAN, or her issue per stirpes" (Emphasis added).

11. While the opening sentence of this trust paragraph plans the first division of the Trust corpus to occur "upon or after the death of the survivor or my said spouse and me", something that still has not occurred since Dr. Fabian's spouse is still living, it then in sentence three (3) creates the problem that has resulted in years of litigation and which effectively defeated the Settlor's intent by accidentally disinheriting cousin Erika.

The problem is that the Trust language failed to contemplate or plan for the most likely situation, that where Eli survives his brother but not his brother's wife, who was twenty years younger. Had that third sentence in the subject provision simply read, "If my said brother, ELI FABIAN, predeceases us", instead of "me", this trust would have succeeded in carrying out the intent of the Settlor. It does not. The wording drafted by defendant ignores the stated requirement that both the settlor and his wife be dead before any distributions are made.

12. There is no reasonable doubt as to the following:

a. Defendant knew that plaintiff was an intended beneficiary of the Trust, as he drafted documents naming her as a beneficiary;

b. There were only three individuals identified by name in the Trust other than Dr. Fabian's wife, those being plaintiff Erika Fabian, her cousin Miriam Fabian, both living as of the date of this filing, and Dr. Fabian's brother Eli, who was in poor health and in his 70's when the trust documents were drafted;

c. Defendant knew that a substantial financial interest was being created by the Trust Agreement he was drafting by virtue of his conversations with the Settlor and his wife, and revealed by the fact that on April 6th of 1990 defendant placed a value on Dr. Fabian's estate of $4,500,000.00 in his engagement letter to Dr. Fabian and his wife;

d. Defendant knew that Dr. Fabian intended for his wife Marilyn to receive the benefit of the Trust Corpus and income for her lifetime, as it is stated in the Trust Agreement;

e. Defendant knew that Dr. Fabian intended for half of his remaining trust corpus to go his wife's daughters upon her death as it is stated in the Trust Agreement;

f. Defendant knew that Dr. Fabian intended for the other half of his remaining trust corpus to go to this brother Eli, if Eli survived to the time of distribution to take his share, as it is stated in the Trust Agreement;

g. Defendant knew that Dr. Fabian did not intend to leave anything from his Trust to his brother Eli, if Eli was deceased at the time of distribution;

h. Defendant knew that Dr. Fabian had no intention of leaving anything to a deceased brother;

i. Defendant knew that Dr. Fabian wanted Eli's share of his estate to pass to his two named nieces, Erika and Miriam, if Eli was not alive to receive his share as that is the logical conclusion from the wording of the Trust Agreement since no distribution to anyone would occur until the death of Dr. Fabian's spouse Marilyn. There is no other distribution language for a plan if Eli survived Dr. Fabian but predeceased the spouse;

j. Defendant knew or should have known that the wording of the subject provision of the trust agreement failed to contemplate the most likely event, that Eli might survive Dr. Fabian, but not Dr. Fabian's wife Marilyn, a woman twenty years younger than either Eli or her husband;

k. Eli Fabian survived Dr. Fabian by several weeks. Dr. Fabian died on February 5th, 2000 and Eli passed away on March 12, 2000. This made no difference to the Trust as no distributions would be made until Marilyn passed away. It made a difference worth millions of dollars to Miriam and Erika;

l. The named life beneficiary of the Trusts drafted by defendants, Marilyn, Dr. Fabian's wife of 27 years at his death, is alive and well some twenty-two years after the drafting and execution of Dr. Fabian's estate planning instruments;

m. In an action brought by Erika to reform the subject provision, defendant took the position that the Trust Agreement was not ambiguous and did not need to be corrected, a position contrary to that of Dr. Fabian's wife and Dr. Fabian's accountant and business advisor, in defendant's effort to prevent the Trust he had drafted from being found to be ambiguous;

n. At least two South Carolina Courts have found the subject provision to be ambiguous;

o. One Court found that the subject provision contradicted what Dr. Fabian told his wife and family that he intended and that it created an "absurd result";

p. Upon Dr. Fabian's death in February of 2000, the Trust he created had a value of approximately Thirteen Million Dollars ($13,000,000.00);

q. By virtue of the wording in the trust language, which defeated her uncle's stated intent, Erika would be entitled to nothing. Her cousin Miriam would receive both her share and Erika's; and,

r. Plaintiff Erika Fabian was first informed that she did not have any remaining beneficial interest in her uncle's Trust per a letter from Defendant Lindsay mailed to her on July 30, 2001.

UNDERLYING PROCEDURAL HISTORY

13. Plaintiff Erika Fabian brought an action in the Georgetown County Probate Court (Civil Action 2004-GC-22-21) seeking to reform the subject provision, correct this error, effectuate the Settlor's intent and mitigate her damages. This action would have also had the effect of mitigating or eliminating the damages for which defendant could be held responsible.

14. To avoid having to bring an action against Defendant to toll the statute of limitations, which would have arguably run on or after July 31st, 2004, three years after plaintiff could have first become aware of defendant's negligence, plaintiff and defendant entered into a series of Tolling Agreements, which expressly stated that:

> "The parties believe that the voluntary extension of the statute of limitations will eliminate any time deadline pressure with the goal of resolving all issues without litigation."

15. Had the parties not entered into these Tolling Agreements, plaintiff would have been compelled to bring her action against Mr. Lindsay or lose her right to do so thus forcing litigation against the drafting lawyer before trying to correct the mistake he had made. The parties have executed subsequent tolling agreements as the years of litigating the reformation passed and, following the trial of the reformation case in June of 2010, they continued to do so in an attempt to resolve this matter without litigation. The last tolling agreement extended the statute of limitations through October 10th, 2012. This action is being brought within that stated period.

16. Cousin Miriam Fabian removed the reformation action from Probate Court to Circuit Court on May 10th, 2007 and that action became Civil Action 2007-CP-22-01225. Motions were filed and hearings were held on the removal issues.

17. Trustees Marilyn Fabian and Walter Pikul filed a Declaratory Judgment action in December of 2008 asking the Court for guidance on the applicability of the new Probate Code section to the issues in the reformation case. Miriam Fabian removed that action, motions were filed and hearings were held.

18. Miriam Fabian filed Motions to strike the affidavits and testimony of Marilyn Fabian and plaintiff's experts, hearings were held, those motions were denied and motions to reconsider filed and denied.

19. Miriam Fabian moved for Summary Judgment, hearings were held, the Motion denied and a Motion to Reconsider was filed and denied.

20. Before the reformation action was called for trial for the first time in June of 2010, cousin Miriam Fabian filed two lawsuits against the Trust and the Trustees. In her first action (Miriam Fabian v. Marilyn K. Fabian and Walter Pikul, Civil Action 2010-CP-22-512), Miriam sought to be awarded her attorneys fees over the decision by trustees Marilyn Fabian and Walter Pikul to concur in the reformation case that the subject trust was ambiguous and should be reformed. That case was tried before the Honorable Larry B. Hyman, Jr. in August of 2011 and the Court denied Miriam's relief and ordered that she pay the attorney's fees incurred by the defendants Marilyn and Walt Pikul.

21. After losing that first "attorney's fees" case, Miriam filed a motion to reconsider, that motion was denied and Judge Hyman awarded additional fees to Marilyn and Walt Pikul.

22. In April of 2010, Miriam filed another action against Marilyn Fabian, individually and against all of the trustees of the trust (Miriam Fabian v. Marilyn Fabian, et al, Civil Action 2010-CP-22-531) alleging, essentially, that Marilyn Fabian was

spending too much of Miriam's future inheritance, among many other claims presumably. That case has, upon information and belief, just been resolved and a settlement approval hearing was set for October 25th, 2012. Upon information and belief, cousin Miriam Fabian has leveraged her position as future beneficiary of half of the estate presently held by Marilyn to receive an advance in satisfaction of her future claim to the trust.

FOR A FIRST CAUSE OF ACTION
(Professional Negligence)

23. Plaintiff realleges all prior allegations and incorporates them herein by reference.

24. Plaintiff Erika Fabian was one of only three beneficiaries identified by name, other than the wife, in the Trust drafted by defendant. Defendant knew that it was his client's intent to provide a share for Erika Fabian, he was aware of his client's wealth and the financial significance to this plaintiff of the legacy he was creating.

25. Defendant owed a duty to this beneficiary to draft the subject trust in a competent manner that would carry out the express intent of the Settlor, an intent that was known to the defendant at the time he was drafting the subject trust.

26. Defendant owed a duty to this beneficiary to counsel and advise her uncle as to the drafting and language of the subject trust in a competent manner that would carry out the express intent of the Settlor, an intent that was known to the defendant at the time he was drafting the subject trust.

27. Defendant breached that duty by drafting a trust provision that was ambiguous, defective, led to an absurd result, and did not carry out the intent of the Settlor and those actions and inactions were beneath the applicable standard of care for

an attorney practicing in the area of estate planning.

28. Defendant breached that duty by failing to counsel, advise, explain and provide guidance to Dr. Fabian about a trust provision that was ambiguous, defective, would lead to an absurd result, and did not carry out his stated intent and that failure was a breach of the standard of care for an attorney practicing in the area of estate planning.

29. In addition to the finding by two different Courts that the subject provision drafted by defendant was ambiguous, this Trust Agreement has been reviewed by an expert in the area of Trusts, an expert whose qualifications exceed the requirements of South Carolina Code Section 15-36-100, and that expert has rendered an opinion that the subject provision of the Trust was not drafted within the expected standard of care of an estate planning attorney, that defendant was negligent and that defendant breached the duties owed plaintiff as set forth in greater detail in the Affidavit of Susan A. Teschner, Esq, attached hereto as Exhibit "A" and incorporated herein in its entirety. This attached expert affidavit sets forth the specific acts of negligence committed by the defendant as required by §15-36-100, which include but are not limited to, defendant's negligent drafting of Trust language which resulted in "nonsensical conflicting dispositions" and the defeat of the settlor's intent, defendant's negligence in his counseling of the settlor over the drafting of this critical provision and defendant's negligent failure to take action to "correct these profound errors", all of which was beneath the normal standard of care.

30. Plaintiff is informed and believes that she is entitled to a judgment against defendants for actual damages she has suffered, damages which were proximately

caused by the defendant's negligence in the drafting of the Trust, the counseling of the Settlor and the defendant's failure to take action to correct these errors if indeed he contends these were scriveners errors, negligence which resulted in an ambiguous trust provision that, by virtue of its failure to contemplate the most likely distribution scenario, worked to completely divest plaintiff of her future share of her uncle's estate and thereby defeat his stated intent to provide for this niece.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract / Intended Third-Party Beneficiary)

31. Plaintiff realleges all prior allegations and incorporates them herein by reference.

32. Defendants entered into a contract with Dr. Fabian, the terms of which defendants agreed and contracted to provide competent and prudent legal services with regard to preparing and supervising the execution of a trust for Dr. Fabian to accomplish Dr. Fabian's intent, including his specific intent to provide a share for plaintiff.

33. Dr. Fabian fulfilled all necessary preconditions of the contract with defendants.

34. Plaintiff was one of the intended third-party beneficiaries of Dr. Fabian's contractual relationship with defendants.

35. One of the purposes of Dr. Fabian's contract with defendants was to prepare a trust for the direct benefit of his wife while she was living and after her death, for the direct benefit of his two nieces, one of whom was the plaintiff, and his wife's two daughters from a prior marriage.

36. Defendants had certain contractual duties to perform competent and prudent legal services as would an ordinary and reasonable lawyer practicing law in

South Carolina.

37. Defendants had a contractual duty to prepare and supervise the execution of a trust that would accomplish Dr. Fabian's intent with the same skill, knowledge, and diligence with which all other legal tasks are pursued.

38. Defendants had a contractual duty to prepare a trust that would satisfy Dr. Fabian's intent to provide effectively twenty-five percent of the trust corpus to plaintiff after the death of Dr. Fabian's wife.

39. Defendants had a contractual duty to take actions after the death of Dr. Fabian to assist in accomplishing Dr. Fabian's express intentions.

40. Defendants had a contractual duty to provide and exercise the reasonable care, skill, diligence and competence possessed by an ordinary lawyer practicing law in South Carolina under similar circumstances.

41. Defendants had contractual duties to plaintiff because, among other things, defendants knew that Dr. Fabian intended as one of the primary objectives of the representation that defendants' services benefit plaintiff.

42 Defendants had contractual duties to plaintiff because, among other things, that Defendants' duties to plaintiff would not significantly impair Defendants' performance of their obligations to Dr. Fabian.

43. Defendants had contractual duties to plaintiff because, among other things, it was foreseeable that the absence of such duties to plaintiff would make enforcement of the Defendants' obligations to Dr. Fabian unlikely or very difficult.

44. Defendants breached the contract by failing to prepare and supervise the execution of a trust that would accomplish Dr. Fabian's intent with the same skill,

knowledge, and diligence with which all other legal tasks are pursued.

45. Defendants breached the contract by failing to prepare a trust that would satisfy Dr. Fabian's intent to provide effectively twenty-five percent of the trust corpus to plaintiff after the death of Dr. Fabian's wife.

46. Defendants breached the contract by failing to provide and exercise the reasonable care, skill, diligence and competence possessed by an ordinary lawyer practicing law in South Carolina under similar circumstances.

47. As a direct and proximate result of defendants' breach of contract, plaintiff has been actually, specially, incidentally, and consequentially damaged in an amount to be more specifically determined at trial.

DAMAGES

48. Plaintiff realleges all prior allegations and incorporates them herein by reference.

49. Plaintiff has suffered actual, foreseeable, financial damages as a proximate result of defendants' negligence in the drafting of, and in his negligent counsel of the settlor in the drafting and execution of, the subject Trust such that defendants' negligence has defeated the settlor's stated intent to provide for this specifically identified beneficiary resulting in plaintiff's exclusion from her uncle's trust.

50. Plaintiff has spent years attempting to mitigate the damages caused by defendant's negligence through her efforts to reform the subject trust to correct the defect and ambiguity caused by defendants. In that action to reform the trust, two of the three Trustees, Mrs. Marilyn Fabian and Walter Pikul, the settlor's long time business advisor, agreed with plaintiff that the Trust Agreement contained a mistake that thwarted

the settlor's intent and they concurred that the Trust should be reformed and thus corrected to reflect that intent, they also concurred that the error made the Trust language ambiguous.

51. Cousin Miriam Fabian, who stood to reap the windfall of defendants' negligence by being the accidental beneficiary of both her share and her cousin Erika's share fought the reformation every conceivable step of the way. According to filings in one of the several actions that Miriam Fabian has brought to enforce her claim to her double-share interest in this Trust corpus, she expended more than $220,000.00 solely in her efforts to defeat the reformation of the Trust.

52. In the Trust reformation case, Defendants chose to take a completely contrary position to that taken by the settlor's business advisor and the person who knew him and his estate plan the best, his wife, and argued that the Trust was not ambiguous and should not be reformed, thus defendant fought plaintiff's attempt to reform the trust and mitigate the damages she would suffer. Defendant had a duty to seek a reformation of the trust to correct errors caused by his negligence in the drafting of the subject provision or by his negligence in his counsel and advice to the settlor in the wording of the subject language. Defendant breached that duty.

53. At the outset of the trial of the reformation action in June of 2010, the Honorable Thomas W. Cooper, Jr. ruled as a matter of law in pretrial motions that the subject provision of the Trust Agreement was ambiguous and thus extrinsic evidence would be admissible to find the Settlor's intent under the Amended Probate Code. That Amended Probate Code Section, while allowing for the admission of extrinsic evidence, also provided for a substantially heightened burden of proof for plaintiff.

54. As a result of mounting costs, the increased burden of proof, the certainty that even if Erika had prevailed and reformed the Trust that her cousin Miriam, who had already spent $220,000.00 fighting her, would appeal any decision and the fact that the drafting attorney and trustee, defendant Lindsay, had testified against and would continue to fight the reformation of the Trust, plaintiff Erika Fabian agreed to end her claim to reform the Trust and accept a settlement paid by the Trust and end that case without reforming the Trust. At conclusion of that case, it was stipulated between all parties, including defendant Lindsay, that Erika Fabian's decision to end her six year battle to reform the Trust DID NOT include the release of any claim she had against defendant Lindsay or his law firm in their capacity as estate planning attorneys who had drafted and counseled the settlor in his creation of the subject Trust.

55. As a direct and proximate result of defendant's negligence, plaintiff was "disinherited" from her uncle's Trust, in a manner that defeated Dr. Fabian's stated intent, an intent admittedly known to defendant Lindsay.

56. As a direct and proximate result of defendant's negligence, plaintiff's cousin Miriam Fabian became the unintended beneficiary of both her share and her cousin Erika's share of the Trust.

57. Upon information and belief, cousin Miriam Fabian successfully leveraged her enhanced (doubled) claim to her uncle's Trust estate and is about to receive a substantial payment in satisfaction of her interest as a beneficiary of the Fabian Trust.

58. As a direct and proximate cause of defendant's professional negligence, plaintiff Erika Fabian, a beneficiary expressly designated and named by the settlor, lost the entire legacy that her uncle had promised and specifically intended to devise to her.

His intent is clearly revealed in the Trust Agreement and supported by the sworn testimony of the person closest to the settlor and knowledgeable of his intent, his wife, and it was frustrated in its entirety as to one of Dr. Fabian's primary beneficiaries.

SOUTH CAROLINA CODE §15-36-100 CERTIFICATION

59. Pursuant to South Carolina Code §15-36-100 (C)(1), an affidavit from a expert specifying the negligent acts or omissions of the defendants is attached hereto as Exhibit "A" and has been fully incorporated herein by reference.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Erika Fabian prays for judgment against Defendants Ross M. Lindsay, III, and Lindsay & Lindsay, LLC, for actual, special, incidental, and consequential damages in an amount to be more specifically proven at trial, and the costs of this action, and for such other and further relief as this Honorable Court may deem just and proper.

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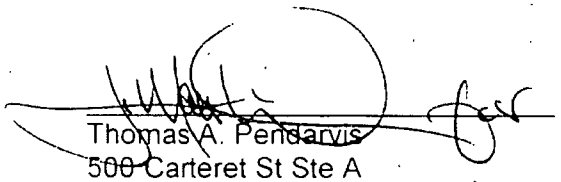
PENDARVIS LAW OFFICES, P.C.



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Thomas@Pendarvis Law.com

ATTORNEYS FOR THE PLAINTIFF

Dated: October 29th, 2012

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **Amended Complaint,** along with the attached Exhibit A (expert Affidavit) has been served by US MAIL upon the defendants, defendants who have already accepted service of the original Complaint at their offices below on October 1st, 2012 and for whom there has not yet been an appearance of counsel, on this the 29th day of October, 2012.

Ross M. Lindsay, III
Lindsay & Lindsay, LLC
4707 Oleander Drive,
Myrtle Beach, SC 29577

J. Matthew Dillon

FILED
GEORGETOWN COUNTY, S.C.
2012 OCT 29 PM 3:44
ALMA Y. WHITE
CLERK OF COURT

Exhibit A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN	)	CASE NO. 2012-CP-22-01056
	)	
	)	
Erika Fabian,	)	
	)	
Plaintiff,	)	
	)	
v.	)	AFFIDAVIT OF SUSAN A. TESCHNER, ESQ.
	)	
Ross M. Lindsay, III and	)	
Lindsay & Lindsay, LLC	)	
	)	
Defendant.	)	
	)	

PERSONALLY appeared before me Susan A. Teschner, Esq., who, being duly sworn, deposes and states:

1. I am a licensed attorney in the State of South Carolina since 1996, practicing in Charleston and adjacent counties. I am also a licensed attorney in the State of North Carolina. My legal practice focuses on trusts, estates, taxation and business law. Since 1996, I have performed legal services related to complex estate, trust, taxation and business issues. I have provided legal advise for cases argued in the Court of Common Pleas, Tax Court and Probate Court related to the legal and interpretation of legal documents and the administration of companies, trusts and estates are accordance with the terms of applicable documents governing such actions.

2. Prior to becoming an attorney, I was a Certified Public Accountant licensed in the State of California. My accounting career included experience as an auditor and a tax professional for large and complex clients of Ernst & Whinney and its successor company, Ernst & Young. I was also a co-controller of a multinational law firm that had complex business, accounting and tax issues.

3. I have been hired by Dillon Law Firm (attorney for Ms. Fabian) to assist in the review of legal documents for the above-captioned matter related to the Trust Agreement executed the 25th day of May, 1990, between Denis Fabian, as Settlor and as Trustee (the "Trust") and provide an expert opinion in accordance with South Carolina Code §15-36-100 as set forth herein.

4. The Plaintiff was a named contingent remainder beneficiary of the Trust.

5. I have been asked to render an analysis of the errors in the drafting of the final disposition of the Trust assets as provided for in Article VII(2) of the Trust agreement. In addition, I have been asked to render an opinion of the standard of care in the preparation of estate documents, specifically trust agreements.

6. I reviewed the Trust Agreement dated May 25, 1990 and executed between Denis Fabian as Settlor and Denis Fabian as Trustee.

7. The Trust Agreement provides that until the Settlor and the Settlor's spouse die, there are no beneficiaries of the Trust other than the Settlor and Settlor's spouse. The Trust Agreement includes Article VII(2) which directs the final disposition of the Trust assets upon the death of the survivor of the Settlor and the Settlor's spouse.

8. Article VII(2) provides "Upon the death of the survivor of my said spouse and me, my Trustee shall divided this Trust as then constituted into two (2) separate shares so as to provide One (1) share for the children of [my surviving spouse] and One (1) share for my brother, Eli Fabian. If either of my said wife's children predecease her, the predeceased child's share shall be distributed to his or her issue per stirpes. If my said brother, Eli Fabian, predeceases me, then one half of his shall be distributed to his daughter, Miriam Fabian, or her issue per stripes; and the other half of his share shall be distributed to my niece, Erica Fabian, or her issue per stirpes."

9. Because Article VII(2) does not come into effect until after the death of both the Settlor and the Settlor's spouse, the standard of care in drafting such a dispositive provision would be to consider what happens to the assets only after the stated event, i.e., both people have died. Article VII(2) of the Trust Agreement, as drafted, fails to do this. For example, Article VII(2) of the Trust provides that if a child of the Settlor's spouse dies before the Settlor's spouse but survives the Settlor, the language of Article VII(2) of the Trust document provides that the Settlor's spouse's issue take, per stirpes; however, if the same child survives the Settlor's spouse but predeceases the Settlor, the issue of the deceased child are effectively disinherited because the Article VII did not address this possible sequence of events. This omission results in conflicting provisions regarding the disposition of the trust assets depending upon whether the wife's children dies before both the Settlor and the Settlor's spouse or just the Settlor's spouse.

10. In addition, although Article VII(2) affirmatively addresses the sequential possibility of the Settlor's brother predeceasing the Settlor, it does not address the possibility of the Settlor's brother surviving the Settlor but predeceasing the Settlor's spouse. This omission in Article VII(2) leads to the nonsensical result that if the Settlor's brother predeceases the Settlor, the Settlor's niece takes; however, if the Settlor's brother survives the Settlor, but not the Settlor's spouse, the Settlor's niece is effectively disinherited because Article VII did not address this possible sequence of events.

11. It is my understanding that the Settlor's wife was healthy at the time of the execution of the Trust document and significantly younger than both the Settlor and the Settlor's brother. In such a situation, where statistically, the Settlor's spouse would outlive both of the Settlor and the Settlor's brother, it is not within the standard of care of an estate planning attorney to omit dispositive provisions affirmatively addressing the possibility that the Settlor's significantly younger wife would survive both the Settlor and the Settlor's brother.

12. Article VII(2), in part, ignores that the prerequisite to the final disposition of the Trust assets is the death of both the Settlor and the Settlor's spouse. In determining the final disposition of the trust assets, the estate planning attorney drafted a provision that considers the death of one and ignores the requirement that the other also be dead.

13. If the provisions of Article VII(2) stated the alternative dispositions were to occur if the "wife's children predecease *us*" (rather than "her") and "if my said brother, Eli Fabian, predeceases *us*" (rather than "me"), the Article VII(2) would have resulted in consist dispositions that one would expect to see in a final disposition to occur upon the death of the Settlor and the Settlor's spouse.

14. Where the final disposition of the trust estate depends upon both the Settlor and the Settlor's spouse, the failure to address only the contingencies in existence at the death of the survivor of the Settlor and his spouse, results in nonsensical conflicting dispositions based upon not the prequisite of both the Settlor and the Settlor's spouse's death, but the timing of another contingent beneficiary's death.

15. Where nonsensical or unusual results occur because of a client's initial thought process, it is the standard of care that the estate planning attorney review the unusual results with the client to ensure that the nonsensical or unusual results match the client's desire. Where the results are so unusual as they are in the instant case, the standard of care is to place notations within the client's file to confirm that the results were reviewed with the client and the reasoning of the conflicting provisions.

16. It is my opinion that Article VII(2) was not drafted within the normal standard of care of an estate planning attorney and Article VII(2) of the Trust document was either drafted either negligently and/or with scrivener's errors and if these were scrivener's errors, it was outside of the applicable standard of care not to take action to inform and advise the client, and correct these profound errors.

17. It is my expert opinion, held to a reasonable degree of professional certainty that the complaint alleges facts establishing that the defendants breached the applicable standard of care, committed acts of professional negligence and violated the duties owed to plaintiff as a named contingent beneficiary of the subject Trust.

18. I am familiar with the standard of care of a reasonably prudent attorney in providing legal services in drafting of and advising in the drafting of Wills and trusts such as

the subject Trust. I am familiar with the breaches of the standard of care which can occur and result in harm to a beneficiary in situations similarly to this matter involving plaintiff.

19. My expert opinions are based upon the allegations of the complaint and the review of the subject Trust Agreement and these opinions are, therefore, subject to expansion and modification as further evidence of issues develop.

20. This affidavit is given in compliance with South Carolina Code of Laws §15-36-100, which does not require me to state all negligent acts, omissions, or wrongdoing by the defendants.

FURTHER THE AFFIANT SAYETH NOT!

Susan A. Teschner, Esq.
SC Bar No. 13635

SWORN TO and subscribed before me

this 23rd day of October, 2012.

Notary Public for South Carolina
My Commission Expires: 03/12/18

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	IN THE COURT OF COMMON PLEAS
Erika Fabian, Plaintiff, v. Ross M. Lindsay, III, and Lindsay and Lindsay, LLC, Defendants.	Civil Action No. 2012-CP-22-01056 **DEFENDANTS' MOTION TO DISMISS**

TO: THE PLAINTIFF AND HER ATTORNEY, J. MATTHEW DILLON, ESQUIRE

YOU WILL PLEASE TAKE NOTICE that the Defendants, Ross M. Lindsay, III and Lindsay and Lindsay, LLC, by and through their undersigned attorney, will move before the Presiding Judge of the Georgetown County Court of Common Pleas, at the Georgetown County Judicial Center, to be heard on the tenth (10) day after service or as soon thereafter as counsel may be heard, for an Order dismissing the Plaintiff's Complaint and her claims against the Defendants.

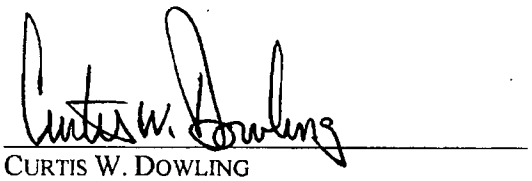
The specific grounds for this Motion include the following:

1. The Complaint fails to state facts sufficient to constitute a cause of action against the Defendants. The Defendants did not form an attorney-client relationship with the Plaintiff as reflected by the Complaint. Because there is not and has never been an attorney-client relationship between the Plaintiff and the Defendants, the Plaintiff may not assert a cause of action against the Defendants for legal malpractice.

2. The Plaintiff failed to file with the Complaint an expert affidavit specifying at least one negligent act or omission, and the factual basis for each such claim, as it relates to the Defendants. The Plaintiff's failure to file an expert affidavit mandates dismissal of this action pursuant to S.C. Code § 15-36-100(C)(1).

This motion is made pursuant to Rule 12(b)(6), SCRCP, S.C. Code § 15-36-100, any other applicable rules or law, relevant statutes and case authority, any submitted memoranda, and any other authority that the court may find acceptable.

No consultation pursuant to Rule 11, SCRCP was held because none is required with respect to a motion to dismiss.



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Attorney for the Defendants

October 29, 2012

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	IN THE COURT OF COMMON PLEAS
Erika Fabian, Plaintiff, v. Ross M. Lindsay, III, and Lindsay and Lindsay, LLC, Defendants.	Civil Action No. 2012-CP-22-01056 **DEFENDANTS' MOTION TO DISMISS**

TO: THE PLAINTIFF AND HER ATTORNEY, J. MATTHEW DILLON, ESQUIRE AND THOMAS A. PENDARVIS, ESQUIRE

YOU WILL PLEASE TAKE NOTICE that the Defendants, Ross M. Lindsay, III and Lindsay and Lindsay, LLC, by and through their undersigned attorney, will move before the Presiding Judge of the Georgetown County Court of Common Pleas, at the Georgetown County Judicial Center, to be heard on the tenth (10) day after service or as soon thereafter as counsel may be heard, for an Order dismissing the Plaintiff's Amended Complaint and her claims against the Defendants.

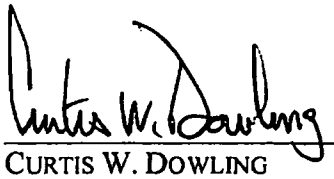
The specific grounds for this Motion include the following:

1. The Amended Complaint fails to state facts sufficient to constitute a cause of action for professional negligence against the Defendants. Because there is not and has never been an attorney-client relationship between the Plaintiff and the Defendants, such a cause of action is not viable under South Carolina law.

2. The Amended Complaint fails to state facts sufficient to constitute a cause of action for breach of contract against the Defendants. South Carolina law does not recognize such a cause of action by an alleged intended beneficiary of estate planning documents.

This motion is made pursuant to Rule 12(b)(6), SCRCP, any other applicable rules or law, relevant statutes and case authority, any submitted memoranda, and any other authority that the court may find acceptable.

No consultation pursuant to Rule 11, SCRCP was held because none is required with respect to a motion to dismiss.



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Attorney for the Defendants

November 9, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2012-213726
Lower Case No. 2012-CP-22-01056

Erika Fabian. . . . . Appellant,

vs.

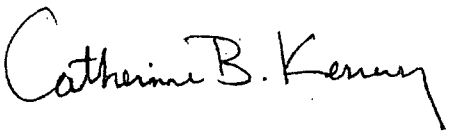
Ross M. Lindsay, III, and
LINDSAY & LINDSAY, LLC. . . . . Respondents.

Certificate of Counsel

Pursuant to Rule 210(g) of the South Carolina Appellate Court Rules, the undersigned, as counsel for Appellant, hereby certifies that, to the best of my knowledge and belief, the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.



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Attorneys for Appellant, Erika Fabian

April 2, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2012-CP-22-01056

Erika Fabian. . . . . Appellant,

vs.

Ross M. Lindsay, III, and
LINDSAY & LINDSAY, LLC. . . . . Respondents.

PROOF OF SERVICE

I, Catherine B. Kerney, a lawyer with PENDARVIS LAW OFFICES, P.C., certify that I have served one (1) copy of the RECORD ON APPEAL and CERTIFICATE OF COUNSEL on counsel for Respondents: Ross M. Lindsay, III, and LINDSAY & LINDSAY, LLC by depositing a copy of the same in the United States Mail, postage prepaid, on the 2nd day of April, 2013 addressed to Curtis W. Dowling, J.D., BARNES, ALFORD, STORK & JOHNSON, LLP, P.O. Box 8448, Columbia, SC 29202.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.

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Lawyers for Appellant, Erika Fabian

Beaufort, South Carolina

April 2, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2012-213726
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Erika Fabian. . . . . Appellant,

vs.

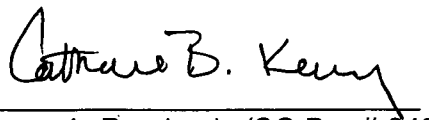
Ross M. Lindsay, III, and
LINDSAY & LINDSAY, LLC. . . . . Respondents.

Certificate of Counsel

Pursuant to Rule 210(g) of the South Carolina Appellate Court Rules, the undersigned, as counsel for Appellant, hereby certifies that, to the best of my knowledge and belief, the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.



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April 2, 2013