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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Benjamin H. Culbertson, Circuit Judge

Appellate Case No. 2019-000413

Karl & Terri Hager; Robert Singleton & Teresa Singleton; Jay & Susan Welborn; Erik Arnold;
and Bowers Caravelle LLC; derivatively on behalf of Caravelle Resort Association, Inc and on
behalf of themselves and those similarly situated,.....Appellants,

v.

McCabe, Trotter & Beverly, P.C. and Gold Crown Management Company, Defendants;

Of which McCabe, Trotter & Beverly, P.C. is the.....Respondent.

SUPPLEMENTAL RECORD ON APPEAL

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Transcript of Jan. 22, 2019, hearing Supp. 1

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY)	2018-CP-26-02974
Karl Hager, et al.,)	
Plaintiffs,)	Transcript of Record
vs.)	January 22, 2019
McCabe Trotter & Beverly, P.C.,)	
et al.,)	
Defendants.)	

B E F O R E:

Honorable Benjamin H. Culbertson
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

Brian C. Gambrell, Esquire
Attorney for Plaintiffs

Andrew W. Countryman, Esquire
Attorney for Defendant,
McCabe Trotter & Beverly, PC

Dominic Allen Starr, Esquire
Attorney for Defendant,
Gold Crown Management Company, Inc.

Grace L. Hurley, CVR-CM-M
Circuit Court Reporter

1 (There were no exhibits marked during the hearing.)

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1 (On the record, January 22, 2019.)

2 THE COURT: All right. Next on my roster is 2018-CP-26-
3 2974, Karl and Terri Hager and others versus McCabe Trotter
4 and Beverly, P.C., and Gold Crown Management, Inc. According
5 to my roster the matter is before the Court on a -- well,
6 let's see, a motion to reconsider, a motion to dismiss and a
7 motion for sanctions.

8 Please give the court reporter your names and who you
9 represent.

10 MR. STARR: Your Honor, I'm Dominic Starr. I'm here
11 representing Gold Crown Management Company and I'm, I'm the
12 one who has the motion to dismiss that's currently pending.

13 THE COURT: All right.

14 MR. COUNTRYMAN: Your Honor, I'm Andy Countryman. I
15 represent the Defendant, McCabe Trotter and Beverly, and it's
16 my motion for sanctions pending before the Court today.

17 THE COURT: All right.

18 MR. GAMBRELL: And I'm Brian Gambrell and I have the
19 motion to reconsider, Your Honor.

20 THE COURT: All right. Well, let me hear from you, I
21 guess, first, Mr. Gambrell, on your motion to reconsider.

22 MR. GAMBRELL: Thank you Your Honor.

23 This Court had arguments on our -- on Mr. Countryman's
24 motion to dismiss on multiple grounds and Your Honor on a Form
25 4 granted the Defendant's motion to dismiss under 12(b)(6).

1 However, the Form 4 does not or there was no subsequent order
2 stating the grounds for the dismissal. Also under 12(b)(6),
3 12(b)(6) can either be granted with prejudice or without
4 prejudice, and so for the purposes of error preservation and
5 also for an appeal, I, I have to have reasons under the record
6 or at least some basis to argue what the ruling was based on,
7 and so without belaboring the point or beating this horse to
8 death, I can either reargue the original motion, my defense to
9 that or just briefly summarize why we believe the Court erred
10 in the first place.

11 THE COURT: All right. So what does -- how do you think
12 I erred?

13 MR. GAMBRELL: Well, Your Honor, we believe you erred
14 because it was a 12(b)(6) motion, and a 12(b)(6) motion
15 basically goes to the four corners of the complaint, did we
16 allege what we've said we allege, and then if we, if we did,
17 in other words if the allegations are sufficient to put the
18 Defendants on notice as to the allegations that were contained
19 within the complaint, then a 12(b)(6) motion should be denied.
20 The courts -- there's --

21 THE COURT: Even if it's based upon something that you're
22 not entitled to relief?

23 MR. GAMBRELL: Now, that goes to the, to the various
24 legal theories that we then argued regarding his argument
25 regarding attorney malpractice and then conversion. There

1 were, there were causes of action within the complaint that
2 were not specifically argued either in motion, in his motion
3 or his memorandum or before you regarding breach of fiduciary
4 duty, aiding and abetting, breach of fiduciary duty. Those
5 causes of actions were just simply no one ever mentioned them
6 and they were never argued to you, but his motion sought to
7 dismiss the entire complaint. Without -- also, we believe
8 that we are -- what we did when we filed the complaint we
9 argued that there was a derivative cause of action from the
10 owners because they have a -- they are the third-party
11 beneficiary of any relationship entered into by the
12 association with its attorneys or its management company, and
13 so because of that any harm that's done to the association
14 they are, in essence, they are the association. They own a
15 percentage interest by -- according to the master deed of the
16 condominium. So in other words, any, any damage suffered by
17 the condominium -- the association is really damage to
18 themselves. There is no -- I think Mr. Countryman argued that
19 there was some sort of assignment issue. There is no
20 assignment. This is a, a non-profit corporation of which they
21 are the shareholders. They suffer any loss, in fact, they
22 suffer the loss in proportion to their percentage interest.
23 So, in essence, what the Court would have you -- have us do is
24 sue the association -- basically sue themselves in order to
25 sue the attorneys or their management company for any harm

1 done to the association which is not -- which, in essence,
2 they would be paying themselves to sue themselves.
3 Furthermore, we also allege a direct contractual relationship
4 assumed by McCabe Trotter and Beverly toward a third-party.
5 Essentially, Your Honor, what happened is Hurricane Matthew
6 hit. Each of the individual homeowners had an HO-6 policy
7 which is an insurance policy to, to insure the interior of the
8 condominiums, in other words between the floor and the ceiling
9 and the walls -- between the walls of their personal goods.

10 As a result of the hurricane, some of the units were
11 damaged, but not all the units. A decision was made by
12 someone to have all the units vacate -- have all the units,
13 have all the belongings removed, what we allege in a violation
14 of the master deed, and all the belongings were placed in the
15 garage of the association, and then this decision was then --
16 after it was done was communicated to the owners. The owners
17 said, "Hey, we can come get our stuff." There are
18 communications between Gold Crown and the, and the attorneys
19 directly to the members saying, "No. You can't come get your
20 own belongings." Furthermore, we alleged in the complaint
21 that McCabe Trotter was then communicating directly with the
22 HO-6 carrier, which is Lloyd's of London regarding policy
23 decisions and regarding coverage decisions and also regarding
24 payment for the removal and the storage.

25 McCabe Trotter -- the policy, the HO-6 policy is not a

1 policy of the association. It's a policy owned by the
2 individual members. The association is not even a named
3 insured, but McCabe Trotter undertook that duty to directly
4 communicate, and attached to the complaint are several
5 examples of those letters. So the, the owners whose
6 belongings were then subsequently lost and destroyed argue in
7 their complaint -- that we argue, excuse me, that McCabe
8 Trotter voluntarily undertook representation of the owners
9 individually because the association had no personal property
10 in the garage. Everything that was covered by the HO-6 policy
11 was purely owned by the members in their individual
12 capacities, and so any communication between McCabe Trotter
13 and the -- and Lloyd's of London was never on the benefit or
14 on the behalf of the association, was on behalf of the
15 individual members. The owner took this duty, and they ended
16 up, we argue, that because of their representations between
17 them and Lloyd's of London my clients were then subsequently
18 hurt. Each owner roughly suffered somewhere between 10 and
19 \$15,000 worth of damage as their personal belongings were
20 exposed, exposed to humidity, moisture and theft, and so it's
21 our allegation that under the complaint that there's basically
22 two theories of attorney malpractice. It's theory one, which
23 is the derivative cause of action which no law was submitted
24 to you saying that you can't do a derivative cause of action
25 for an attorney malpractice, only that it was an assignment.

1 Nothing has been assigned at all, and then the second was a
2 direct cause of action by the, by the owners, by the members
3 themselves against McCabe Trotter for their involvement with
4 the, the Lloyd's of London HO-6 policy, and then because the
5 association -- there were -- then also representations made
6 about how the goods were going to be kept and how the goods
7 were going to be stored that -- and then the disallowance it
8 was in a direct communication between McCabe Trotter and the
9 owners that they could not disclaim any protection, they could
10 not -- the association was saying you can't come get your
11 belongings because it's quote, "an active worksite". We
12 dispute that it was an active worksite, and we dispute that
13 why shouldn't the owners have been allowed to come get their
14 own personal belongings, but, in essence, that communication
15 was sent by McCabe Trotter who theoretically was representing
16 these people in regards to their own personal belongings as it
17 related to it -- to their own HO-6 carrier, but they weren't
18 allowed to come get their belongings in order to either
19 mitigate their damages or to protect their belongings from
20 damage or theft, and so that is why we asserted a conversion
21 cause of action because McCabe Trotter -- McCabe Trotter
22 engaged in an act of conversion when they exercised dominion
23 and control either directly or by and through its nominal
24 client, which is the association.

25 As, as I point out -- pointed out in my initial

1 memorandum, Your Honor, that the -- there's black letter law
2 saying that a -- an attorney can be held liable for conversion
3 done in a -- in conjunction or in connection with its client.
4 If my recollection serves there were essentially two points
5 you raised directly with me. Point one was the issue of how
6 and when a party could become an attorney, in other words, did
7 it require some sort of expressed or I hesitate to use the
8 word meaningful, but was there a, an affirmative act by McCabe
9 Trotter to establish the attorney-client relationship, and the
10 existence of an attorney-client relationship is an issue of
11 fact in South Carolina. It is not a matter of law. So even
12 if you doubt whether that's possible, a jury could find that
13 that's happened. There were letters that were attached to the
14 complaint as exhibits which clearly show that there was
15 communication by and from McCabe Trotter to Lloyd's of London
16 that was on the behalf of the owners. In other words, that
17 we, we allege that Mr. Oates, who is an attorney and a partner
18 with McCabe Trotter, was affirmatively communicating with
19 Lloyd's of London regarding its own policy and its policy
20 decisions toward the owners over which the association had
21 zero relationship. The only thing the association did in
22 relation to the HO-6 policy was it gathered the money from the
23 owners as part of its assessment payments and then wrote a
24 joint check or wrote a collective check, if you will, from all
25 the owners to pay for the policy. It is -- but whether that's

1 -- whether it is or it had some position in -- within the HO-6
2 policy is itself a matter of fact which, of course, would be
3 subject to discovery. So, in other words, did we allege it
4 and is it alleged to the point sufficiently to put the
5 Defendant on notice of whether he had -- of what it is he's
6 being accused and has to defend himself, and under 12(b)(6),
7 we would argue yes, and also to deal with Your Honor's
8 question of the conversion action, like I said, there is a --
9 there is a discussion of -- in -- if you'll bear with me, Your
10 Honor. My -- I'm cold and my fingers are cold.

11 And I, I submitted this on Sunday, and it was approved,
12 but yesterday was a holiday, but that the Supreme Court in
13 Stiles v. Onorato, which is a 1995 decision, has ruled that an
14 attorney can be sued for conversion and for affirmative
15 misrepresentations done on behalf of a client, and that is
16 exactly what we alleged as it relates to the, the goods owned
17 by the owners. If you'll -- in the complaint, in particular
18 in several paragraphs we talk about the, the owners'
19 belongings, and in particular paragraphs 59, 60, 64, 65, 66,
20 67 and 68 we talk about that McCabe Trotter and Gold Crown was
21 affirmatively communicating with the owners that their items
22 were lost or destroyed, I mean, that their items were
23 contaminated, and so therefore, therefore, are ineligible to
24 be returned to their units, which would then, of course, be
25 required to be replaced under the HO-6 policy. As we allege

1 in the complaint, the owners found their belongings up for
2 sale on various -- on various websites, including one that's,
3 I think, Myrtle Beach Furniture, Hotel Furniture.com, in which
4 the items that were supposedly so contaminated they couldn't
5 be returned --

6 THE COURT: Excuse me for interrupting, but this argument
7 was made at the initial motion hearing?

8 MR. GAMBRELL: It was, Your Honor. It was made in my, my
9 memorandum and also, and also to you.

10 THE COURT: As I recall, the initial motion hearing it
11 had to do with the, the assessment that they charged that came
12 on the letterhead. I don't -- I'll be the first to admit, I
13 don't recall any argument ever being made that McCabe Trotter
14 took furniture and sold it on eBay.

15 MR. GAMBRELL: Well, Your Honor, it's, it's in the
16 complaint, and we discussed and I, I know I specifically
17 argued, Your Honor, that there was these two derivative --
18 there was these two causes of action, that under the attorney
19 malpractice there's a derivative cause of action and there's a
20 direct cause of action.

21 THE COURT: For selling the unit owners' property that
22 they claimed was damaged, that they took it, sold it on eBay
23 and did what with the funds?

24 MR. GAMBRELL: We don't know. That those --

25 THE COURT: See, I don't recall that argument ever being

1 made. I may --

2 MR. COUNTRYMAN: That's the first I've heard of that,
3 Your Honor. It's not in the complaint.

4 MR. GAMBRELL: It is in the complaint, Your Honor, that
5 the items --

6 THE COURT: Well, no, I mean, but we, we appeared for the
7 motion hearing and are you arguing something new that you did
8 not argue at the first motion hearing because I don't recall
9 that. If you made that argument at the first motion hearing,
10 I apologize because I have never heard that argument before,
11 and I have never seen an allegation that says McCabe Trotter
12 took furniture, told the owners that it was damaged and then
13 turned and sold it on eBay.

14 MR. GAMBRELL: Your Honor, we, we did argue it, and it is
15 -- and I made copious references to the complaint regarding
16 the communications that were made by McCabe Trotter to the
17 owners regarding the status of their policy. That led into
18 the assessment charge. This assessment charge that we talked
19 about is the, the charge for storing the goods, in other words
20 --

21 THE COURT: I remember that argument.

22 MR. GAMBRELL: So this was the, this was the --

23 THE COURT: But this is something different. You're
24 telling me they took the stored -- they charged them an
25 assessment for storing the furniture and then they sold their

1 furniture on eBay and kept the money.

2 MR. GAMBRELL: It, it is in the complaint, Your Honor.

3 MR. COUNTRYMAN: What paragraph, Brian?

4 THE COURT: Yeah.

5 MR. COUNTRYMAN: I don't see that anywhere in here.

6 MR. GAMBRELL: Unfortunately, I don't have a copy of the
7 complaint.

8 THE COURT: Well, right here. Let's see. Would it be
9 under the conversion?

10 MR. GAMBRELL: It, it would be in and around --

11 THE COURT: Conversion.

12 MR. GAMBRELL: Look at paragraph 67 and 68 in our -- do
13 you mind if I sit down just for a moment?

14 THE COURT: No. That'll be 67 and 68, that's for the
15 negligence.

16 MR. GAMBRELL: But all of these causes of action are
17 incorporated.

18 THE COURT: 67, McCabe Trotter assumed a duty towards the
19 owners by actively negotiating on the owner's behalf with
20 Lloyd's of London. 68, McCabe Trotter failed to monitor or
21 take such action as was necessary to protect the association
22 and owners from Delta's conduct in regards to the storage of
23 the belongings. 69, McCabe Trotter also advised the
24 association to illegal assert claims for content manipulation
25 and/or soft goods as assessments. I don't see anything about

1 taking the properties and selling them. Let me look down in
2 the, in the conversion.

3 MR. COUNTRYMAN: Your Honor, counsel may be referring to
4 the amended complaint. I just wanted to make sure the
5 record's clear on that. Paragraph 68 references what Delta
6 allegedly did or did not do.

7 THE COURT: Okay. I was looking at the complaint. Let
8 me look at the amended complaint.

9 MR. COUNTRYMAN: It's on page 15 of the amended
10 complaint, the paragraphs that counsel referenced, Your Honor.

11 THE COURT: Let's see. Amended summons and complaint,
12 okay. I apologize. I was looking at the original. All
13 right. It's on what page?

14 MR. COUNTRYMAN: Page 15, Your Honor.

15 MR. GAMBRELL: Paragraphs, particularly 67 and 68, which
16 get into the very specific allegations in which I was just
17 referring to.

18 THE COURT: All right. 67 saying that they failed to
19 properly safeguard and protect the belongings, Delta returned
20 some items to certain owners' units. Gold Crown and McCabe
21 Trotter without permission required Delta to remove the items
22 from the owners' units to either throw away, recycle or resell
23 the items.

24 MR. GAMBRELL: Then that next paragraph.

25 THE COURT: I mean, you're saying, I, I get that you're

1 saying they failed to properly protect the items, but I'm
2 looking to see where you say that they took them, they sold
3 them and they kept the proceeds. All right. Go ahead.

4 MR. GAMBRELL: But essentially, Your Honor, we -- even if
5 -- and I know there's a specific allegation regarding the
6 Myrtle Beach Furniture .com because I remember fighting with
7 the -- with Word when I made the site to their website, but
8 essentially, Your Honor, that's, that's the basis for the
9 conversion cause of action, that essentially that someone made
10 the decision that these -- that and communicated to the owners
11 that these goods were contaminated and they should not be
12 allowed back in their units and that was communicated to the
13 owners by both McCabe Trotter and by Gold Crown, not to jump
14 necessarily ahead, but then the owners after this HO-6 policy
15 payments were made found out and it's alleged in the complaint
16 that these items were not contaminated and that they could
17 have been returned but just either they had been lost, some of
18 them had been stolen and the rest of it had been sold. So for
19 12(b)(6) it's not necessary at this juncture for the Court to
20 believe if I could ever prove it, is did I allege it, and
21 right there, Your Honor, is where I allege the specific, the
22 specific factual predicates, in particular for the conversion
23 cause of action, which, Your Honor, I know we specifically
24 discussed the conversion cause of action.

25 THE COURT: Yeah. But I'm looking at the complaint.

1 MR. GAMBRELL: Go back to --

2 THE COURT: I'm looking under your conversion cause of
3 action, sixth cause of action.

4 MR. GAMBRELL: Can I sit down just for a moment, Your
5 Honor?

6 THE COURT: All right. All right. And I don't -- I
7 mean, I basically -- the -- all right. Which paragraph do you
8 want me to look at?

9 MR. GAMBRELL: Go into 59, starting at 59.

10 THE COURT: All right. Go ahead.

11 MR. GAMBRELL: Of -- but essentially, Your Honor, this is
12 -- this begins the, the description of -- the factual
13 description, the allegation regarding their exercise of
14 dominion and control over the goods of -- that the owner -- of
15 the owners' goods, and so then, I mean, that -- even if under
16 12(b)(6), I mean, one of the -- it can be without prejudice,
17 Your Honor, in allowing us -- if you don't believe I've
18 adequately alleged it, then I can go and re-edit the complaint
19 in order to make those allegations sufficient for Your Honor
20 to clearly understand what it is we're alleging. In other
21 words, the Form 4 that we had didn't say with prejudice,
22 without prejudice. If it's without prejudice, obviously, that
23 gives me the opportunity to make these allegations even more
24 clear, which I believe they are, I mean, I think they're,
25 they're detailed and clear about what it is we're alleging

1 McCabe Trotter had done wrong, and I mean, they're -- all the
2 facts that we alleged are in there.

3 So, Your Honor, so, I mean, that's the -- what I believe
4 you got wrong was that we had two different theories. One was
5 a direct kind of voluntary undertaking by McCabe Trotter, if
6 you will, as it relates to Lloyd's of London and also the
7 derivative cause of action for its misconduct or its bad
8 advice to the association which caused the association to then
9 exercise power and authority over the owners' individual
10 goods. So, and so the association has damage as well as the
11 owners. We -- one of the features of the amended complaint
12 was to make clear that we are separating, that the owners'
13 goods damages relates to the individual cause of action and
14 that the association itself has suffered separate damages as
15 well. So, Your Honor, that's why under the rule -- under --
16 we filed this motion for reconsideration so that we at least
17 can either move forward with the complaint or understanding
18 the basis of the ruling so that we can move forward with an
19 appeal.

20 THE COURT: All right. All right. Mr. Starr, any
21 argument one way or the other?

22 MR. STARR: Not on this motion, Your Honor.

23 THE COURT: Okay. All right, sir, Mr. Countryman.

24 MR. COUNTRYMAN: May it please the Court, Your Honor?
25 Again, Andy Countryman. I represent McCabe Trotter and

1 Beverly.

2 I'm a little bit taken aback by this allegation that I've
3 heard for the first time today that my client, a reputable law
4 firm, stole and resold someone's items on eBay. That is
5 certainly not in the complaint, it was never argued before and
6 I've never heard that before today, and I frankly think that
7 it's outrageous to make that accusation in your courtroom
8 today.

9 I do want to address briefly some of his arguments, even
10 though this is essentially rehashing what we argued back in
11 July, there are two theories that Plaintiffs' counsel
12 espouses, one is a direct theory by these individuals against
13 McCabe Trotter. As we discussed at the hearing in July these
14 folks don't have a basis to make that allegation against
15 McCabe Trotter. They can't bring a claim against the lawyers
16 for things the lawyers did while the lawyers were representing
17 their clients, and we went over this in detail at the first
18 hearing. If Your Honor looks at the language in the complaint
19 and the amended complaint, neither one alleges that McCabe
20 Trotter represented these individuals. There's creative
21 language that takes great lengths to say, well, someone could
22 have reasonably believed that, that McCabe Trotter represented
23 these owners, but who cares about that? The only thing that
24 matters is whether McCabe Trotter actually represented them or
25 if those folks believed McCabe Trotter represented them and

1 the complaint doesn't allege that. The expert affidavit filed
2 with the complaint, and again filed with the amended
3 complaint, also doesn't allege that. It says that McCabe
4 Trotter represented Caravelle, the board, the HOA. It never
5 says McCabe Trotter represented these individuals. So we can
6 throw out theory one. There's no theory on which this firm
7 can be liable based on representing these individuals because
8 they didn't. There's nothing based on legal malpractice that
9 can hold water because there's no allegation in the complaint
10 that McCabe Trotter represented these individuals. That
11 allegation could have easily been made because I moved to
12 dismiss the initial complaint. That was one of the grounds.
13 In the amended complaint that wasn't corrected, but I'm sure
14 it can be corrected because McCabe Trotter good and well
15 represented the HOA. Everyone knew that, and while these
16 folks may be unhappy with what happened, they knew McCabe
17 Trotter didn't represent them.

18 As to the second theory, the derivative action, we talked
19 in detail about how the basis of a derivative claim is when an
20 organization will not bring a claim against someone for
21 damages that the organization incurred, and therefore,
22 individuals who are members of the organization who make a
23 claim on the organization's behalf for those damages. Well,
24 we talked about how all the damages at issue in this case are
25 the individual owners' loss of personal property. There's no

1 damage to the association. Now, that was made clear in my
2 motion to dismiss the complaint, and it wasn't clarified in
3 the amended complaint. There's some creative language it
4 throws in there, well, this caused damage to the association
5 and maybe the association had to incur legal fees. Well,
6 that's because Plaintiffs brought this lawsuit. The damages
7 that are at issue in this case are the individual owner's loss
8 of their personal property. They're upset that the HOA,
9 through the management company, took their property out of
10 their damaged units and stored it in this storage facility,
11 then it was damaged, they didn't have it back, whatever issues
12 happened there were certainly things that happened, but that's
13 the crux of the case, these folks are upset that they lost
14 their personal property. That doesn't create the basis for a
15 derivative action. There's no allegation that holds any water
16 whatsoever that the association incurred any damages. Those
17 are the two main reasons as I recall correctly Your Honor
18 dismissed the amended complaint back in July. You did issue a
19 Form 4 order. I submitted a proposed formal order and am
20 happy to do so, again, that details all the points of law on
21 which I think the decision should be based and that details
22 all the things that we discussed at the hearing.

23 Another thing I want to briefly point out that I think
24 was important and I discussed this at our initial hearing is
25 that all these allegations against McCabe Trotter and

1 specifically the ones under the conversion cause of action,
2 they don't say that McCabe Trotter did something. They don't
3 say McCabe Trotter took these folks' property, gained the
4 benefit of it, maintained the property, sold it, got the
5 money. The amended complaint generically says Gold Crown
6 and/or McCabe Trotter. It throws out this allegation in a
7 generic sense, which is insufficient, and it's also
8 insufficient because it does not allege that McCabe Trotter
9 retained the benefit of this material, of these goods. These
10 folks are upset that they didn't have access to their
11 material, their goods. Well, the amended complaint doesn't
12 say that McCabe Trotter prevented them from doing that. It
13 says Delta or Gold Crown through the direction of McCabe
14 Trotter, and then it says, well, there's conversion because
15 these folks couldn't get to their material. Well, it doesn't
16 say that McCabe Trotter took the material because it didn't,
17 and that's an outrageous allegation to accuse a law firm of
18 essentially stealing and lying, and I think it's, frankly, not
19 worthy of even being discussed in this court, but since I need
20 to address it again I will turn the Court's attention to the
21 lack of specificity in the amended complaint detailing facts
22 sufficient to maintain a conversion cause of action against
23 McCabe Trotter, and that same analysis applies to probably
24 every one of Plaintiffs' causes of action which generically
25 reference McCabe Trotter and/or Gold Crown. "We these owners

1 aren't happy with something that happened to us. We know that
2 Gold Crown was involved because they were our point of
3 contact. We think McCabe Trotter was involved, too. So we're
4 just going to sue everyone and make a generic allegation," and
5 that doesn't stand the sufficiency test even of Rule 12(b)(6).
6 Again, we talked about all these things in detail at our
7 hearing back in July, and unless Your Honor has any more
8 questions for me, I'll rest.

9 THE COURT: All right. Anything in reply?

10 MR. GAMBRELL: Your Honor, I would, I would point you
11 specifically to like, for example, paragraph 58 which talks
12 about on August 9, 2017, J. Ryan Oates mailed a letter
13 directly to the owner claiming that all soft goods had been
14 tested and deemed contaminated. Oates further states the
15 contaminated items were disposed of by Delta. However,
16 Oates assured that the owners that the hard goods would be
17 cleaned and returned to the owners' units, but it also
18 reiterates that the owners would not be allowed onto the
19 property to inspect their own belongings. This letter is
20 incorporated by reference and attached herein as on Exhibit
21 Eight. That on, on -- kind of moving down to discuss
22 specifically what on paragraph 60 Gold Crown informed the
23 owners that the local moving company refused to handle owners'
24 remaining hard goods because of fear of contamination, and
25 that all other local moving companies had refused to move the

1 hard goods for the same reason. Gold Crown gave the owners a
2 deadline of February 3rd whether to decide to dispose or remove
3 their belongings, and then under paragraph 62, the owners
4 could reasonably construe the letters of J. Ryan Oates to the
5 owners as rendering personal legal advice to the owners in
6 addition to stating the position of the association. The
7 owners could reasonably construe the letters from J. Ryan
8 Oates to Lloyd's as representing the personal legal interests
9 of the owners, at 64 that Delta and Delta's employees were
10 allowed by Gold Crown and/or McCabe Trotter to sort through
11 the owners' belongings, to take what they wanted instead of
12 returning the items to the owners. The items were -- the
13 items unwanted by Delta or Delta's employees were then
14 disposed of by Delta without the permission of the owners,
15 that Gold Crown and McCabe Trotter concealed from the owners
16 the true condition of the belonging, that neither Gold Crown
17 nor McCabe Trotter performed testing to determine whether the
18 owners' belongings were contaminated despite numerous
19 representations by Gold Crown or McCabe Trotter that the
20 owners' belongings were, were unsafe due to, due to
21 contamination and failure to safeguard that you've already
22 referred to and, then, I mean, so I don't know how much more
23 specifically we can allege the various cause of actions under
24 12(b)(6) regarding what McCabe Trotter did as it relates to
25 the owners' personal belongings that were then disposed of

1 without their permission or consent, and reminding the Court
2 this is a 12(b)(6) motion, not a summary judgment motion. I
3 mean, there's no, there's no weighing of whether these facts
4 are provable, whether there's any quantum of evidence, just
5 simply whether the Court finds that there was a sufficient
6 allegation to put the Defendants on notice to defend
7 themselves, and that's what I argued before. It's what I'm
8 arguing now, that essentially that the complaint sets this
9 out, this chain of events, that the owners were represented by
10 McCabe Trotter or that -- and that McCabe Trotter represented
11 the owners' interests to a third-party, which is then Lloyd's
12 of London. That's specifically alleged in the complaint. So
13 that's why we believe, Your Honor, that the 12(b)(6) motion
14 was granted in error and should be -- the complaint should
15 allowed -- to, to be -- go forward. If the Court believes
16 that the complaint is still not sufficiently alleging or if
17 the owner -- I believe Mr. Countryman mentioned regarding the,
18 the affidavit of Mr. Pendarvis, that Mr. Pendarvis be allowed
19 to somewhat make clear his belief regarding the allegations in
20 the complaint as well. We believe Mr. Pendarvis' affidavit
21 clearly sets out the professional standard, his knowing of the
22 professional standard and how McCabe Trotter violated that
23 professional standard as it relates to the individuals and to
24 the association. So, in essence, what I'm asking the Court
25 for some understanding of where the Court wants us to go next

1 and that's the basis of our 59(e) motion.

2 THE COURT: All right. All right. I'm going to deny the
3 motion to reconsider. However, I do see the need for a more
4 elaborate order rather than the Form 4 order. So, Mr.
5 Countryman, if you would prepare the order, and I did get one
6 from you, but I thought better to have the hearing in open
7 court rather than just going ahead and doing that --

8 MR. COUNTRYMAN: Sure.

9 THE COURT: -- that way from the prior one because -- and
10 I can't remember in what fashion I got that order in, as in
11 whether or not it, it, it evidenced my prior ruling, and I
12 think what the reason I held off is because of the pending
13 motion to reconsider. So if you could adjust it to say that
14 it's being issued after this motion to reconsider, that I
15 guess the motion to reconsider, even though I'm denying the
16 relief sought by the Plaintiffs, I am granting their request
17 to formalize my ruling with a written order.

18 MR. COUNTRYMAN: Yes, sir. And, and I think that's how I
19 initially styled it --

20 THE COURT: Okay.

21 MR. COUNTRYMAN: -- was something to the effect of motion
22 denying substantively but granting it to the extent he's
23 asking for a formal order in particular.

24 THE COURT: Yeah. And we'll do it that way.

25 MR. COUNTRYMAN: Seven days acceptable?

1 THE COURT: Yeah. That'll be fine. Yes, sir.

2 MR. GAMBRELL: Now, now it comes to the point of, Your
3 Honor, is this a motion under 12(b)(6) is it with or without
4 prejudice because without prejudice you're saying I haven't
5 alleged something, I have the opportunity under 12(b)(6) to go
6 back.

7 THE COURT: Well, I guess it would be without prejudice
8 because it all says and/or, you know, and there's no real
9 clear allegation. I mean, I -- I'd -- I agree. Just put it's
10 without prejudice.

11 MR. COUNTRYMAN: I would remind the Court, Your Honor,
12 that this is a -- this complaint has already been amended one
13 time, and I would, for the record, at least ask that the Court
14 grant the dismissal with prejudice.

15 THE COURT: Well, he's going to have to seek a motion to
16 amend it a third time. So we'll address it at that time.
17 Hold for a second. Let me look at this. Go ahead and make
18 it, make it with prejudice.

19 MR. COUNTRYMAN: Thank you, Your Honor.

20 THE COURT: This conversion was the only thing that was
21 giving me pause, but the allegations in here do say that Delta
22 and/or Delta's employees disposed of the items without the
23 owners' permission. So go ahead and make it with --

24 MR. COUNTRYMAN: Thank you, Your Honor.

25 THE COURT: -- with prejudice. All right.

1 MR. GAMBRELL: So, so to make sure that I understand the
2 Court's ruling, you're saying that there's no theory under
3 which I could ever allege and/or prove that McCabe Trotter
4 directly represented the owners as it relates to the Lloyd's
5 insurance policy?

6 THE COURT: I'm saying your complaint does not make those
7 sufficient allegations and, yeah, that's what I'm saying with
8 prejudice. All right.

9 MR. GAMBRELL: So that I, I -- there's no --

10 THE COURT: Just get the order. When you get the order
11 appeal what you want to.

12 MR. GAMBRELL: Thank you, Your Honor.

13 THE COURT: All right. All right. Let me hear -- let's
14 hear the motion to dismiss.

15 MR. STARR: Thank you, Your Honor, Dominic Starr for Gold
16 Crown, and Your Honor, I'll be able to skip a number of the,
17 of the background facts related to the filing of this lawsuit
18 because Your Honor obviously heard the before and you heard
19 the majority of those again today.

20 Gold Crown is the property management company that was
21 working for the board at the time that all of this happened.
22 Gold Crown's basis for its motion to dismiss is largely
23 similar, although a couple causes of action are different and
24 I'll address those with Your Honor but largely similar to
25 those that Mr. Countryman made on behalf of his client McCabe

1 Trotter and Beverly. The problem with Plaintiffs' complaint
2 in this case, Your Honor, is that essentially this is a
3 disguised lawsuit against the board of directors, yet he
4 didn't name the board of directors as a party. All of these
5 allegations, specifically those that are asserted against Gold
6 Crown, are allegations of things that the board did that in
7 the complaint because the board is not named as a party Mr.
8 Gambrell references them as things that Gold Crown did. Gold
9 Crown didn't do anything. Gold Crown only sent letters on
10 behalf of the board or, or communicated on behalf of the board
11 like every property management company does, and Your Honor,
12 if I could just give you one example of that, there's -- it's
13 throughout the, the complaint, but if Your Honor looks at
14 paragraph 53, for example, it references -- it has an Exhibit
15 Number Four that it references in that paragraph, and what it
16 says in that paragraph, Your Honor, is on April 20th, 2017,
17 Gold Crown sent a letter to the owners wherein Gold Crown
18 represented to the owners that the board or the association
19 was the insurance trustee, etcetera. So that letter, Your
20 Honor, is a letter that is on Caravelle Board letterhead and
21 is signed sincerely the Board of Directors of Caravelle Resort
22 Owners Association, and it references those things that in
23 the, in the complaint says that Gold Crown did this. Well,
24 Gold Crown merely mailed this letter on behalf of the board
25 like it does with everything else on behalf of the board. I

1 would refer also, Your Honor, in other filings that Mr.
2 Gambrell has made various other letters have been attached,
3 and the same kind of, of reference. There is -- one of those
4 question and answer sessions, this was filed on July 2nd with
5 the court, Your Honor, and it's a letter to Caravelle
6 Homeowners dated February 6th, 2017, by and, and it, and it
7 references at the end of it the board, the board throughout
8 this process, I'm sorry, the board of directors relies on the
9 advice of legal counsel and trade experts to make decisions
10 that are in the best interest of the association. The board
11 is bound by recommendations and advice of its insurance
12 adjuster and policy carriers. Gold Crown Management assists
13 -- assisted in facilitating decisions made by the board. Gold
14 Crown has not and will not ever make decisions on the board's
15 behalf, and there are numerous similar letters that went to
16 the homeowners over this process, and it, and it's just
17 simple, Your Honor, that Gold Crown does what the board
18 decides it's going to do, mail, mail this letter to the
19 owners, tell the homeowners this, and as, as a result Gold
20 Crown does those things, but they're all signed by the board
21 or on behalf of the board as referenced in the complaint.

22 THE COURT: But now the complaint does make certain
23 allegations against Gold Crown.

24 MR. STARR: Yes. And --

25 THE COURT: Yeah.

1 MR. STARR: -- and we'll address those in just a second,
2 Your Honor. So there are five causes of action against Gold
3 Crown. The first three are derivative causes of action and
4 should be dismissed pursuant to 12(b)(6) on, on their face for
5 two primary reasons, and those, those, by the way, Your Honor,
6 are the third, fourth and seventh causes of action, breach of
7 fiduciary duty is the third, aiding and abetting breach of
8 fiduciary duty is the fourth, and negligence is the seventh.

9 Your Honor, these fail to meet the Rule 23 requirements
10 as derivative actions. As Mr. Countryman mentioned earlier
11 and in his previous argument before the Court back in July,
12 derivative actions are actions that are being brought for
13 damage or harm to the corporate entity, not to individuals,
14 and there is a long line of cases, and we've cited them in our
15 brief, Your Honor, that, that state over and over again that
16 individual harm or damage to a member of a corporation, in
17 this case a homeowner under an HOA, cannot be brought as
18 derivative actions. They must be brought as individual
19 actions because those individual damages have nothing to do
20 with damage to the, to the corporate entity in this case the
21 HOA in its -- in and of itself.

22 Further, Your Honor, Rule 23 requirements are heightened
23 and particularized pleading requirements that have a higher
24 threshold than Rule 12(b)(6), and we cite, for example, In Re:
25 Morgan Stanley Derivative Litigation by the U.S. District

1 Court in New York which addresses that in detail, but also,
2 Your Honor, Latimer v. Richmond, which is a South Carolina
3 case that we cite and others that say that that standard is
4 even harder to and, and a, and a heightened standard over
5 12(b)(6) to make derivative claims. These are potential
6 claims that could be made individually certainly, and they
7 could be made by whatever -- against whatever entity those
8 individuals believe caused their harm, but as derivative
9 causes of action not only must they fail because they're not
10 based on harm to the corporation, but they must fail against,
11 against Gold Crown because Gold Crown is not the board, and
12 Gold Crown merely acted at the direction of the board. That
13 is stated in the, in the language of the contract itself, Your
14 Honor, between Gold Crown and the Caravelle Association, and
15 that is, Your Honor, in paragraph two where it, where it says
16 pursuant to article two of the management services agreement
17 between the Caravelle Board and Gold Crown, quote, [as read],
18 "The role of the managing agent Gold Crown is to implement
19 decisions and policies established by the board of directors
20 of the association, nothing more than that."

21 Your Honor, in addition to those three derivative causes
22 of action, Plaintiffs have asserted two individual causes of
23 action against Gold Crown in the same way that they were
24 asserted against the law firm. The, the fifth cause of action
25 which is fraud, and the seventh -- I'm sorry, and the sixth

1 cause of action, which is conversion. Again, Your Honor,
2 these are actions that are asserted against what, what are
3 characterized in the complaint as either McCabe Trotter and
4 Beverly did this or Gold Crown did this, when, in fact, all of
5 these references that are made to those actions are actions
6 that were taken by the board. Gold Crown, and there, there is
7 no allegation similar to what Mr. Countryman said, that Gold
8 Crown did anything with that -- with the property, that they
9 converted that property other than the actual assertion of
10 that conversion cause of action. Again, preventing owners
11 from removing and securing their belongings, those were, those
12 were issued, those were issued by the board of directors,
13 merely mailed by Gold Crown telling the individual unit owners
14 they couldn't access the area to look at or remove their,
15 their property, and so, again, because Gold Crown merely acted
16 at the direction of the board, these claims against Gold Crown
17 are not proper.

18 Your Honor, the simple fix to all of this is that Mr.
19 Gambrell on behalf of his clients can sue the board, can sue
20 the HOA. That's -- that is a cause of action available to
21 them, and they chose not to do it. They're not, they're not
22 prevented from doing it now, but bringing this cause of action
23 -- these, these causes of action in this lawsuit against Gold
24 Crown and, and formerly prior to Your Honor's ruling against
25 McCabe Trotter and Beverly, are simply ways to get around

1 suing their board of directors for whatever reason that they
2 have made that decision. The board, the board of directors
3 are insured. They have, they have coverage available if there
4 are viable claims, but all of the causes of action in this
5 lawsuit as pled are based on decisions made by the board of
6 directors and/or the insurance carriers that were providing
7 coverage and payments for these losses, all, all of those that
8 are referenced, the HO-6 policy, all of those things, but
9 rather than suing the board and those carriers, the decision
10 was made to sue McCabe Trotter and Beverly and Gold Crown, who
11 did, who did none of these things on their own, and my client,
12 in particular, gave no independent advice, provided nothing,
13 simply acted out what the board decided to do, and it's not a
14 proper lawsuit against Gold Crown for those reasons, both
15 derivatively and individually. Thank you.

16 THE COURT: All right. All right. Mr. Countryman, any
17 argument one way or another to this one?

18 MR. COUNTRYMAN: No, Your Honor.

19 THE COURT: All right. All right, sir, Mr. Gambrell.

20 MR. GAMBRELL: Your Honor, basically what is being argued
21 is essentially summary judgment motion in saying that there's
22 no way I can prove the allegations in the complaint that Gold
23 Crown undertook these actions independent of their duties of
24 the board, and that's kind of I've, I've alleged that. I've
25 alleged that, that essentially these -- that Gold Crown was

1 doing things independent that's alleged contractual obligation
2 to the board. For one, any reference to the contract is
3 outside the four corners of the complaint. I'm, I'm alleging
4 that Gold Crown itself did certain things that was without,
5 without authority. In other words, they were telling the
6 board on, on one particular instance that the board had the
7 power to do it when it didn't, and then they assume -- Gold
8 Crown was who was supposed to be watching the property and
9 managing the property and protecting everyone's belongings and
10 then failing to do that. In other words, Your Honor, I -- we
11 have alleged it. It's in the complaint. They may not like
12 the allegation, but that's not a proper basis for a 12(b)(6)
13 motion. Your Honor, the, the complaint alleges, and in
14 relation to the corporation's damages in paragraph, in
15 paragraph 83, for example, Gold Crown and McCabe Trotter were
16 also in receipt of \$523,000 from the owners for content
17 manipulation, and \$1,231,000 for soft goods while expending
18 \$327,000 for content manipulation and 1,104,000 for soft
19 goods, and then the paragraph before that, in particular Gold
20 Crown and McCabe Trotter expended funds for services that were
21 unnecessary or unused. For example, the association paid
22 \$50,000 fee to an unknown person for HO-6 administration,
23 52,000 for cable television and 17,000 for internet and all
24 that was while the -- in paragraph 81 talks about the fact
25 that was while the building was being gutted. In other words,

1 there was no one there and why is, you know, why are people
2 incurring \$50,000 worth of cable TV charges and \$17,000 worth
3 of telephone services? So in other words, we've made the
4 allegation and under 12(b)(6) and most of his argument
5 consists of not that it wasn't alleged, just that I can't
6 prove it because of either because of the role of the -- the
7 role of the management company isn't to do certain things, but
8 we've alleged that they took on a role that goes beyond just
9 merely being a conduit of the association but in actively
10 doing things and actively engaging in practices that far
11 exceeded the scope of the contract that's frankly not, not a
12 part of the complaint and is kind of asking you to review a
13 contract that's not properly before you anyway.

14 So, Your Honor, and then his, his discussion of the fraud
15 complaint, for example, says, well, you know, we didn't
16 sufficiently allege the fraud complaint. Well, but if Your
17 Honor looks at the complaint we, we set forth all the items
18 that we say they fraudulently misrepresented to the owners.
19 As an example of that, for example, the, the fraud -- I mean,
20 the, the mold contamination of their -- of the owners'
21 belongings. These belongings were never in the possession of
22 the owners. They're always under the control and custody of
23 Gold Crown because Gold Crown was actively still physically on
24 the site. So to the extent that they're misrepresenting what
25 the condition of the belongings are, that certainly goes

1 beyond the scope of whatever alleged duties or -- that it had
2 or didn't have to the board. It's something that they were
3 doing that's outside the scope of that authority.

4 As to the derivative cause of action, we've, we've
5 alleged that there's damage both to the -- we've alleged that
6 there's damage to the association. We don't have to set forth
7 in the complaint dollars and cents as specific --

8 THE COURT: What is the damage to the association?

9 MR. GAMBRELL: That the, the damage to the association
10 represents, for example, this \$50,000 for HO-6 administration.
11 The HO-6 policy is not the policy of the association. It's a
12 policy owned by the individual members.

13 THE COURT: So what is the association's damages?

14 MR. GAMBRELL: That it paid \$50,000 to Gold Crown to do
15 something that it wasn't supposed to do. In other words, the
16 HO-6 policy was never, was never -- never belonged to the
17 association.

18 THE COURT: So what is the association's damages?

19 MR. GAMBRELL: That it paid \$50,000 to, to Gold Crown.

20 THE COURT: Wait a minute. See, the money came out of
21 the association's bank account.

22 MR. GAMBRELL: Correct, and paid Gold Crown for a service
23 that Gold Crown wasn't entitled to charge for and because the
24 HO-6 policy was never owned by the association. The HO-6 --

25 THE COURT: Okay. I see what you're saying. Okay. All

1 right.

2 MR. GAMBRELL: The, the association's was essentially the
3 piggybank.

4 THE COURT: Okay.

5 MR. GAMBRELL: So, I mean, the allegations are there
6 regarding specific communications that we allege were
7 fraudulent, specific actions that even if the Court considers
8 the contract, goes well beyond the contract and that the
9 allegations are sufficiently pled both in a derivative
10 fashion, damage to the corporation and also the damage to the
11 individual owner's goods that Gold Crown said that they would
12 protect. So, I mean, the allegations are there for a 12 -- to
13 deny the 12(b)(6) motion.

14 THE COURT: Okay. Anything in reply?

15 MR. STARR: Your Honor, don't -- just, just very briefly,
16 Your Honor, the only thing that I would say is what, what Mr.
17 Gambrell's arguing to you is that the complaint alleges Gold
18 Crown did these things, but the exhibits and, and I gave you
19 the one as reference, but every one of those that are relevant
20 to Gold Crown that are attached to this complaint the
21 allegation is that Gold Crown did this, then when you pull up
22 that exhibit it's a letter from the board of directors that
23 was simply mailed by Gold Crown. So, Your Honor, it's not
24 accurate and it's not legally sufficient to say that the
25 allegations are there. The allegations aren't there. I mean,

1 the allegation is there, but the support for that allegation
2 in the complaint itself clearly shows that it's not Gold
3 Crown. It's from the board, and that's what Gold Crown did
4 throughout, Your Honor.

5 Again, what, what Mr. Gambrell is saying is that there
6 are claims potentially that they have against the board that
7 the board did things. If the board did something that it
8 wasn't supposed to do with this property, with instructing
9 Gold Crown, then that's, that's all available to these
10 Plaintiffs on behalf of -- through a lawsuit against the
11 board, but the allegations are not sufficient in this, in this
12 complaint because what is said in a paragraph and referenced
13 -- the evidence referenced in the exhibit don't match and, and
14 a simple review of that it doesn't require any legal analysis.

15 THE COURT: Well, it's not going to be a simple review
16 because there's 160 allegations.

17 MR. STARR: Well, I understand. What I, what I mean,
18 Your Honor --

19 THE COURT: And I don't know how many exhibits attached
20 to the complaint. It's one of the most voluminous complaints
21 out there.

22 MR. STARR: I agree. I agree, but what I mean by that,
23 Your Honor, is when it says Gold Crown sent this letter and
24 you look at that exhibit, it's a letter from the board. It
25 was simply mailed by Gold Crown, which is what a property

1 management company does, and I, and I didn't reference the
2 contract with the property management company to give you
3 outside evidence but merely to, to point out to the Court that
4 Gold Crown's role in this case is just like every property
5 management company for a board of directors, which is, "You do
6 what we tell you to do," and that's exactly what was done in
7 this case, and we don't think it's sufficient to survive
8 12(b)(6) and certainly not in the derivative causes of action
9 to survive the heightened Rule 23(b)(1) requirements. Thank
10 you, Your Honor.

11 THE COURT: Okay. All right. I'm going to take this
12 under advisement. I'm going to tell you, it's such a
13 voluminous complaint and there are so many exhibits attached
14 to the complaint, I want each attorney to submit a proposed
15 order, Mr. Gambrell, yours where I deny the motion to dismiss
16 and specifically reference in your order the allegation and
17 the corresponding exhibit that shows that it was an action
18 individually by Gold Crown and not acting on behalf of the
19 board of directors. Conversely, Mr. Starr, you're going to
20 have to go through each and every exhibit to show where every
21 exhibit he attached to his complaint that's referenced in the
22 complaint shows an action by the board because, like I say,
23 there's so many exhibits --

24 MR. STARR: Will do.

25 THE COURT: -- and so many allegations in the complaint.

1 MR. GAMBRELL: Your, Your Honor, and, and to make sure
2 that I've told you right now, there are a lot of those
3 exhibits where it says it's from the board, but in actuality
4 these are decisions made by Gold Crown.

5 THE COURT: But that's not what you're --

6 MR. GAMBRELL: I, I, I will, Your Honor.

7 THE COURT: -- you show me in your complaint where that
8 says where you say notwithstanding the attached exhibit --

9 MR. GAMBRELL: Right.

10 THE COURT: -- that says they act on behalf of the board,
11 that it was their individual and show where your complaint
12 supports that.

13 MR. GAMBRELL: I will.

14 THE COURT: Okay. All right. Let me hear the motion for
15 sanctions.

16 MR. COUNTRYMAN: Yes, sir, Your Honor, Andy Countryman
17 again for McCabe Trotter. This is my motion for sanctions.
18 It's based on Code Section 15-36-10 which discusses the --
19 basically the prevailing party can be entitled to recover
20 sanctions in a case like this. It references directed
21 verdict, summary judgment, etcetera. Those things in my view
22 are akin to a dismissal with prejudice. Understand there may
23 be an argument to the contrary, but I think the statute is
24 pretty clear and at least in this situation a dismissal with
25 prejudice is even more of a basis to award sanctions, but I

1 think with this one, Your Honor, the issue for me at least is
2 a little bit different. If Your Honor will recall Plaintiffs'
3 counsel sought a temporary injunction and a restraining order
4 through the summer months of 2018. Back in May 2018 he filed
5 a -- and if I get the order of things incorrect, I apologize,
6 but he filed a motion for a temporary injunction seeking to
7 preclude McCabe Trotter from being able to essentially
8 disconnect or turn off individuals' utilities in the event
9 they failed to pay the association certain monies. In
10 response to that, which wasn't served on me or McCabe Trotter
11 but we found it, I wrote a letter to the Court, Judge Seals,
12 copied Plaintiffs' counsel saying, "Hey, this is not something
13 McCabe Trotter could or would do. You need to withdraw this
14 motion. It's not necessary and all it could do is bring bad
15 publicity to the law firm."

16 Plaintiffs' counsel ignored that, and we had to have a
17 hearing in May, I believe, on that issue. About a week before
18 the hearing I submitted a brief to the Court. Plaintiffs'
19 counsel had a copy of it. That brief contained an affidavit
20 of the primary lawyer at McCabe Trotter who handled this file,
21 Ryan Oates. Ryan in his affidavit testified that he would not
22 -- McCabe Trotter would not, could not, didn't have the
23 ability to turn off the residents' utilities as was sought
24 protection from in Plaintiffs' motion.

25 Well, Plaintiffs' counsel proceeded with the hearing and

1 I had to come up here for another hearing, charge my client
2 more money. They've now paid over \$10,000 out of pocket at
3 least for their deductible having to defend these claims.

4 Now, at that hearing I brought my client, Stephanie
5 Trotter, here with me and we both represented to the Court
6 that there was no need to have this issue before it because
7 McCabe Trotter wasn't going to take the action that
8 Plaintiffs' counsel sought to preclude. Well, Your Honor I
9 think correctly under the rules issued a 10-day temporary
10 restraining order and allowed the parties to further
11 investigate the issue. During that time more of the same, I
12 filed an affidavit of the HOA president saying that McCabe
13 Trotter could not, would not, didn't have the ability to take
14 the action that Plaintiffs' counsel was trying to preclude it
15 from taking. Despite that, we had to come back for another
16 hearing and that was in July when we had to argue the motion
17 to dismiss as well.

18 I'm still befuddled as to why Plaintiffs' counsel and why
19 Plaintiffs continue to push that issue with McCabe Trotter
20 when we've promised over and over again my representations, my
21 client's representations, affidavits from the HOA, affidavits
22 from my client that McCabe Trotter is not going to turn off
23 the residents' utilities. McCabe Trotter isn't even the
24 lawyers for the board anymore. McCabe Trotter couldn't do
25 that and the board had not asked McCabe Trotter to do that.

1 So I am seeking sanctions here under Rule 11 regarding the
2 pursuit of the temporary injunction, the temporary restraining
3 order and the injunction, and there's case law that
4 essentially what it says is if a lawyer during the course of
5 litigation learns new facts that change the basis of a claim
6 he has a duty to act accordingly and to not do so could
7 subject that lawyer to sanctions or the party pursuing the
8 case, not necessarily the lawyer, but here that's certainly
9 the situation, Your Honor, multiple times, time and time again
10 since May 2018 we've represented in the most formal way as
11 possible that McCabe Trotter is not going to do these terrible
12 things that the Plaintiff is saying, "We don't want McCabe
13 Trotter to do. We want the Court to preclude the law firm
14 from doing that." Plaintiffs' counsel and Plaintiff have
15 duties to withdraw that request at least as it related to the
16 law firm at that point. They haven't done so. We've been
17 forced to incur fees, time, energy, expense.

18 THE COURT: So what are you seeking? What are you
19 asking?

20 MR. COUNTRYMAN: I'm seeking attorneys' fees related to
21 me having to come up here and argue these motions.

22 THE COURT: Which is what?

23 MR. COUNTRYMAN: Well, I'd have to calculate. I have to
24 break it down depending on how Your Honor were to grant the
25 motion if you're so inclined.

1 THE COURT: Well, I mean, they've got -- they're going to
2 have to know how much you're asking for. I mean, what are you
3 asking for as far as the temporary injunction, you know, the
4 motion to -- granted, I don't know that I'm going to grant
5 sanctions as to the motion to dismiss, but I -- I'm inclined,
6 but I need to know what the, the costs, the legal fees were on
7 that motion for the temporary injunction.

8 MR. COUNTRYMAN: I'd have to look at that and break that
9 down, Your Honor. Total legal fees on this case are right
10 now, I just looked, between 16 and \$20,000 depending on what
11 happens between now and a couple of weeks from now, but I
12 certainly could break that down and provide some numbers, but
13 it would be around --

14 THE COURT: But I mean, he may not want to challenge the
15 amount but he may want to challenge the amount depending on
16 what it is, and that's why I need to know. All right. Go
17 ahead. Let me hear from you on that.

18 MR. GAMBRELL: Your Honor, essentially I'm being asked
19 for sanctions on a motion that you -- on, on a, a motion that
20 you granted, I mean, that --

21 THE COURT: No. No.

22 MR. GAMBRELL: Well, he --

23 THE COURT: He's talking about -- I granted the TRO and
24 had you come back 10 days later and that's where he said,
25 "Look, I don't know why they're pursuing this. I don't know

1 why they sought a TRO because McCabe Trotter cannot turn off
2 the utilities, won't turn off the utilities, does not have the
3 authority to turn off the utilities, but yet they're seeking a
4 temporary injunction to keep us from turning off the
5 utilities."

6 MR. GAMBRELL: Your Honor, if you remember the, the issue
7 that kind of intertwines in all of this but both the
8 complaint, the motion to dismiss is this idea that because the
9 association took possession of the owners' belongings, the
10 owners' belongings were then stored at a cost to the
11 association. The association then levied a fee to the owners
12 called the content manipulation fee and that content
13 manipulation fee was not a fee that was contained within the
14 master deed, there was no authority to do it under the master
15 deed, and what they were doing was representing that owners
16 owed this content manipulation fee. They sent a letter --
17 Gold Crown actually sent the letter saying that if the owners
18 didn't pay this content manipulation fee by X date then they
19 were going to terminate the utilities, and that content
20 manipulation fee relates to charges that were associated with
21 the storage of their belongings.

22 THE COURT: And I understand that.

23 MR. GAMBRELL: And, and so --

24 THE COURT: But you were seeking a permanent, I mean, a
25 temporary restraining order to prohibit McCabe Trotter from

1 turning off the utilities for nonpayment of the manipulation
2 fee, but they gave abundant proof that not only would they not
3 do that, they could not do that and there was no way they
4 could legally do that even if they wanted to do that.

5 MR. GAMBRELL: I understand, Your Honor, and then I'm,
6 I'm sitting here trying to pull up because this is not the
7 motion that he filed. The motion for sanctions was related to
8 the motion to dismiss. There was nothing in the -- in this
9 motion that referenced the TRO process. It only referenced --
10 it --

11 MR. COUNTRYMAN: That's totally not true, Your Honor.
12 I've got the motion right here.

13 THE COURT: Well, I'm going to give you -- you're going
14 to have an opportunity to reply. Go ahead.

15 MR. COUNTRYMAN: I'm sorry.

16 MR. GAMBRELL: But, but essentially, Your Honor, as it,
17 as it relates to the motion to -- if I can argue the second
18 part and then come back around, the motion to dismiss in
19 related to -- Your Honor, I have three basis for that if, if
20 the Court wants to listen to those arguments as well. The
21 argument one is that the motion for sanctions under the
22 statute refers to a conclusion of a trial after a verdict or a
23 verdict against damages have been rendered for a case that had
24 been dismissed by a directed verdict, which is a specific
25 rule, rule of civil procedure, summary judgment, which is a

1 specific rule of civil procedure, or a judgment
2 notwithstanding a verdict, which is a separate rule of civil
3 procedure. Upon the motion of a prevailing party the Court
4 shall proceed to determine whether the claim or defense was
5 frivolous. Under the statute, which is what he moved under, a
6 Rule 12(b)(6) is not any of these specifically enumerated
7 provisions under the statute. A 12(b)(6) can be granted
8 without prejudice as we've discussed this morning. It could
9 be -- so it's just simply not covered under the statute, and
10 under the statute, additionally, they have to prove under the
11 Frivolous Proceedings Act statute that no reasonable attorney
12 would have brought the action, and Mr. Pendarvis supplied the
13 -- an affidavit attesting to the various malpractice actions
14 that he found in his determination, which conclusively shows
15 that at least one other attorney in this state believed that
16 there was a legitimate cause of action against McCabe Trotter
17 for attorney malpractice. So and there's a specific Supreme
18 Court case, I mean, a specific Court of Appeals case In re:
19 Beard, that talks about the existence of an affidavit
20 precludes any motion for sanctions on -- in this particular
21 circumstance because I submitted an affidavit of an attorney
22 attesting to in his opinion what the allegations -- in support
23 of the allegations of malpractice, and so that's upon that
24 basis. I also in the -- I understand in the TRO there was an
25 allegation regarding, regarding whether -- about the

1 electricity. The motion for -- and that was the TRO. For the
2 motion for a permanent injunction, I mean, a temporary
3 injunction the allegations of the temporary injunction were
4 changed to reference collection actions by -- that were
5 certainly within McCabe Trotter's purview as the attorney for
6 the association, in other words attempting to, to initiate
7 foreclosures.

8 THE COURT: But at that time at the motion hearing they
9 said they were no longer representing the management company
10 and could not seek collection.

11 MR. GAMBRELL: At the time that the TRO was -- at the
12 time the motion was --

13 THE COURT: We're talking -- he's talking about after
14 that. He, he agrees. He acknowledges when I got the request
15 for a TRO based upon the affidavits I was right in issuing a
16 ten-day restraining order. Now, we're talking about when you
17 came and argued the motion for permanent -- I mean, motion for
18 temporary injunction to prohibit them from seeking collection,
19 they said, "We can't, we don't represent them anymore, we
20 don't represent Crown Management. We can't seek collection of
21 this fee. We can't turn off the power. We are -- were an
22 attorney at that time. We are no longer the attorney for them
23 now. Why they have us named in the lawsuit I don't know
24 because we don't represent Crown Management or the board or
25 anybody anymore."

1 MR. GAMBRELL: At the time I filed the motion they still
2 did, and --

3 THE COURT: But when you got to the hearing and you
4 argued that they should continue to be restrained, why did you
5 continue with your action? You still sought a temporary
6 injunction against them from seeking collection and turning
7 off the power when they said, "We can't turn off the power, we
8 can't collect because we don't represent them anymore"?

9 MR. GAMBRELL: Your Honor, if I'm not mistaken, and I'd
10 have to go back and look at the timing, the timing was very
11 close. I mean, we're not talking about like I had months or
12 weeks. I think the matter of who they still represented and
13 when they're represented and whether there were ongoing
14 actions was still, was still ongoing. I'd have to, I'd have
15 to research that, and so but they were the attorney that were
16 -- was handling the collection actions, and the motion for
17 temporary, the motion for temporary restraining order did not
18 -- and we keep using this about turning the power off, those
19 allegations were changed in the temporary injunction not to
20 reference the power being turned off but more especially the
21 collection actions.

22 THE COURT: All right. Anything in reply?

23 MR. COUNTRYMAN: Beg the Court's indulgence, Your Honor.
24 I'm trying to look at the motion itself, and frankly, I'd
25 normally take a dismissal and be on my way, but my client

1 really wants me to pursue this. They're really upset about
2 being sued multiple times by this lawyer and being the subject
3 of this pursuit of the restraining order. I would just remind
4 the Court that the timeline is pretty clear. Plaintiffs'
5 counsel had numerous opportunities to withdraw the motion as
6 it related to McCabe Trotter, refused to do so. There's never
7 been any legitimate basis or any basis at all presented to me
8 or the Court as to why he didn't do that, and I would ask for
9 sanctions on that basis, and I -- it's a little bit befuddling
10 as to why Plaintiffs' counsel said that the TRO issue wasn't
11 in my motion for sanctions. That's pretty much all that pages
12 three through seven discuss, and it goes through the entire
13 timeline because that, again, was the focus of the motion, and
14 I think it's the most reasonable basis for sanctions here, and
15 again, I still don't have any explanation as to why they
16 continued to pursue it, pursue it against a law firm under
17 these circumstances.

18 THE COURT: All right. And I understand your argument,
19 Mr. Countryman. I ordinarily -- I would be inclined to grant
20 your motion for sanctions, but I don't -- I think you're only
21 entitled to it as to the cost on the, the temporary
22 injunction, and without having that dollar amount I think it's
23 improper to come back at a later time, submit an affidavit at
24 a later time with hours or whatever you're seeking without
25 giving the Plaintiff an opportunity to dispute or challenge

1 the amount. So while I would have granted your motion for
2 sanctions, I'm denying it due to the fact that you have not
3 presented me with the amount for that. I don't know that
4 you're entitled -- well, that's going to be my ruling, that I
5 don't have a clear-cut amount. So I'm going to deny it.

6 MR. COUNTRYMAN: Thank you, Your Honor.

7 THE COURT: But I, but I'll agree to me when you came in
8 and you said, "Look, we're not involved in this case anymore,
9 we don't represent them anymore, I don't know why they're
10 seeking release -- relief or an injunction against us," I
11 agree, they should have dropped it at that time. All right.
12 But I'm just -- will a Form 4 denying the motion for sanctions
13 be sufficient?

14 MR. COUNTRYMAN: Yes, sir.

15 THE COURT: Okay. All right. All right. That's all on
16 this case.

17 MR. COUNTRYMAN: Thank you, Your Honor.

18 THE COURT: Thank you.

19 (Adjourned.)

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C E R T I F I C A T E

I, the undersigned, Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the Hearing held in the case of Karl Hager, et al. versus McCabe Trotter & Beverly, et al., held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on January 22, 2019.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.

Grace L. Hurley, CVR-CM-M
Official Reporter

March 27, 2019.