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THE STATE OF SOUTH CAROLINA
In the Court of Common Pleas

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Charles B. Simmons, Circuit Court Judge

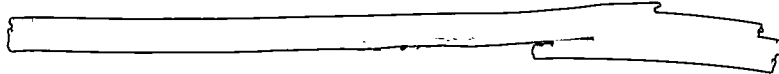
Appellate Case No. 2012-21191

Bill J. Vernon and Sandra Vernon, Respondents,

v.

Landmarc Constructors, In., d/b/a Landmarc Custom Homes, Marcus Dunn, and Yoder's
Building Supply, Inc., Defendants,

Of whom Landmarc Constructors, Inc. d/b/a Landmarc Custom Homes, is Appellant.



Yoder's Building Supply, Inc., Third-Party Plaintiff,

v.

Sandra Ann Vernon and Billie James Vernon, Jr. Trustees, or their
Successors in trust, under the Sandra Ann Vernon Living Trust, Dated June
12, 2000, and as thereafter amended, Gary Dunn, Individually, and Kerri Dunn,
individually, Third-Party Defendants.

BRIEF OF RESPONDENTS BILL J. VERNON AND SANDRA VERNON

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE..... 1

STATEMENT OF FACTS..... 2

STANDARD OF REVIEW 6

ARGUMENT..... 6

**1. THE TRIAL COURT WAS CORRECT IN FINDING APPELLANT
LANDMARC LIABLE FOR BREACH OF CONTRACT, FRAUD,
CONVERSION, AND APPELLANT MARCUS DUNN
PERSONALLY LIABLE FOR ACTIONS OF APPELLANT
LANDMARC..... 6**

A. Breach of Contract. 6

B. Fraud..... 9

C. Conversion..... 11

**D. Dunn’s Status as a Corporate Officer Does Not Shield Him from
Personal Liability..... 12**

CONCLUSION 12

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MAR 20 2013
SC Court of Appeals

TABLE OF AUTHORITIES

CASES

Castell v. Stephenson Finance Co., 224 S.C. 45, 135 S.E.2d 311 (1964) 11

Fuller v. Eastern Fire Casualty Ins. Co., 240 S.C. 75, 124 S.E.2d 602, 610
(1962)..... 6

Hunt v. Rabon, 275 S.C. 475, 272 S.E.2d 643 (1980)..... 12

Jeffries v. Phillips, 316 S.C. 523, 451 S.E.2d 21 (Ct. App. 1994)..... 6

Kahn Cons. Co. v. S.C. Nat’l Bank of Charleston, 275 S.C. 381, 271 S.E.2d 414
(1980)..... 10

Kiriakides v. Atlas Food Sys. & Servs, Inc., 343 S.C. 587, 541 S.E.2d 257 (2001)..... 6

Plowman v. Bagnal, 316 S.C. 283, 450 S.E.2d 36(1994)..... 12

Roberts v. Gaskins, 327 S.C. 478, 486 S.E.2d 771 (Ct. App. 1997)..... 6

Rowe v. Hyatt, 321 S.C. 366, 468 S.E.2d 649 (1996)..... 12

Steele v. Victory Savings Bank, 295 S.C. 290, 368 S.E.2d 91 (Ct. App. 1988)..... 11

STATEMENT OF ISSUES ON APPEAL

- I. WAS THE TRIAL COURT CORRECT IN FINDING APPELLANT LANDMARC LIABLE FOR BREACH OF CONTRACT, FRAUD AND CONVERSION AND APPELLANT MARCUS DUNN PERSONALLY LIABLE FOR ACTIONS OF APPELLANT LANDMARC?

STATEMENT OF THE CASE

Respondents Bill and Sandra Vernon (“Vernons”) commenced this action on January 22, 2010 when they filed a Complaint against Appellants Landmarc Constructors, Inc., (“Landmarc”) and Marcus Dunn, (“Dunn”), alleging fraud and deceit, breach of contract, breach of contract accompanied by a fraudulent act, conversion, violation of the Unfair Trade Practices Act, accounting, contractual indemnity, equitable indemnity, declaratory relief and injunctive relief. (R. p. 31, Complaint). Yoder’s Building Supply, (“Yoder’s”) was also named as a defendant due to the mechanic’s lien it had filed on the subject property.

On February 24, 2010, Yoder’s filed its Answer, counterclaims and third-party complaint in response to the Vernons. (R. p. 57, Yoder’s Answer). Landmarc and Dunn filed its Answer and Counterclaim against the Vernons on March 15, 2010 along with a mechanic’s lien on the subject property. (R., p. 79, Landmarc and Dunn Answer). The Vernons filed their Reply on March 23, 2010. (R. p. 98, Vernon Reply). All parties agreed to refer this case to the Master-in-Equity for Greenville County and this was accomplished by order dated May 18, 2011.

This case was tried on November 15-16, 2011 before the Honorable Charles B. Simmons, Master-in-Equity for Greenville County. After the conclusion of the trial,

Judge Simmons instructed the Vernons' counsel to draft an order. For several months counsel worked on the order and several telephone conferences were held with Judge Simmons and all counsel of record to discuss the proposed order. On March 7, 2012, Judge Simmons signed the Order and judgment was entered on March 28, 2012. (R., p. 1 Order).

In the Order the Court awarded judgment to the Vernons under the breach of contract and conversion causes of action in the amount of \$154,855.74 for actual damages against Landmarc and Dunn. The Vernons were also awarded punitive damages in the amount of \$77,427.87 arising out of the fraud action against Landmarc and Dunn. Prior to the filing of the Order, the Vernons and Yoder's agreed to settle for \$50,000, which the Court found the Vernons could recover from Landmarc and Dunn. No party was awarded interest. The total amount of judgment for the Vernons against Landmarc and Dunn is \$282,283.61. Neither Landmarc nor Dunn asked the Court to reconsider its ruling. On April 27, 2012, Landmarc and Dunn filed its Notice of Appeal.

STATEMENT OF FACTS

On August 11, 2008 Respondents Bill and Sandra Vernon ("Vernons") entered into a construction agreement for a new home to be built on Lot 44, Cliffs at Mountain Park in Greenville County, South Carolina. (R. p. 1095, Contract, TT, Plaintiffs' Ex. 1). The agreement called for Appellant Landmarc Constructors ("Landmarc"), of which Appellant Marcus Dunn ("Dunn") is president, to build the home in exchange for an estimated cost of \$903,629 based on an estimated cost of \$785,765 plus a 15% overhead and profit fee. The Vernons negotiated this contract with Marcus Dunn. During the construction of the Vernon home Landmarc Constructors had three employees working

for it: Marcus Dunn, President of Landmarc, Kerri Dunn, Dunn's wife, who was the bookkeeper at Landmarc, and Gary Dunn, Dunn's father, who did general labor on the site and who later quit work when he developed Alzheimer's disease. The Vernons communicated with Dunn and Kerri Dunn throughout the construction project and relied on Dunn's representations concerning the work done by Landmarc.

During construction, Dunn provided the Vernons with partial lien waivers which stated that all charges, except for retainage, would be paid in full upon receipt of funding. (R. p. 1124-1134, Partial Lien Waivers, TT, Plaintiffs' Ex. 3). The partial lien waivers also represented to the Vernons that all persons who furnished labor or materials would be paid for all amounts to which they were entitled. Landmarc agreed to hold Plaintiffs harmless against all liability, cost or expense including attorney's fees and court and other costs from any claim action by Landmarc or any subcontractor/supplier. Marcus Dunn, as President of Landmarc, signed each lien waiver.

Towards December of 2009, the Vernons learned that several suppliers and subcontractors had not been paid, despite Landmarc's partial lien waivers, signed by Dunn, assuring the Vernons that payments to the suppliers and subcontractors had been made. Four of the suppliers and subcontractors to the project later filed mechanic's liens on the subject property¹. The Vernons also discovered that they had been billed for more than was actually paid to suppliers and subcontractors while Landmarc kept the remainder of the money. (R., p. 1033, TT, Plaintiffs' Ex. 6 and testimony of Brian Johnson, R. p. 172-210).

¹ Yoder's Building Supply, one of the suppliers who filed a mechanic's lien, was the Defendant/Third Party Plaintiff in this action. The other suppliers were Marathon Lighting, Clayton Tile and Ferguson Enterprises, Inc.

In addition to the discrepancies in the accounting, the Vernons discovered Landmarc had performed the work on the project in an unworkmanlike manner, to-wit:

- a. The entry steps to the front porch failed to meet code and needed to be rebuilt;
- b. In constructing the rear deck in a defective manner, resulting in warping due to standing moisture;
- c. In failing to properly budget, plan for and construct retaining walls;
- d. In failing to finish the garage doors, voiding the warranty;
- e. In failing to timely stain exterior siding;
- f. In failing to properly design and construct the chimney, causing it to be rejected by the Cliffs Architectural Review Board, and in causing damage to the roof and other building components;
- g. In constructing the floor of the screen porch in a manner which does not drain, resulting in standing water and causing damages to the floor and its components;
- h. In installing incorrect exterior light back plates;
- i. In failing to construct the master bath countertops in a good and workmanlike manner;
- j. In incorrectly wiring the basement heat pump;
- k. In incorrectly locating the gas shut off valve for the main fireplace;
- l. In improperly finishing all wood floors;
- m. In improperly installing carpet;
- n. In failing to connect an attic gas vent;

- o. In improperly selecting or installing the kitchen stove hood;
- p. In failing to properly install the icemaker;
- q. In improperly locating the dryer vent;
- r. In failing to properly paint the interior;
- s. In improperly installing of the interior stair handrail;
- t. In improperly ordering and storing of material to be used for the project;
- u. And, in failing to seal the tops and bottoms of interior doors. (R. p. 8-9, Complaint and Testimony of Brian Johnson, R. 172-210).

In December 2009, the Vernons fired Landmarc and Dunn from the project. The Vernons enlisted the aid of their son-in-law Bryan Johnson, who is also a contractor, to investigate why suppliers and subcontractors had not been paid. Mr. Johnson testified at trial that the Vernons had been overbilled for payments made to ten suppliers, with Landmarc keeping the difference. (R. p. 172-202, Testimony of Bryan Johnson, TT pgs. 63-93). Mr. Johnson also discovered that Dunn paid himself, his wife, his father and his attorney from funds the Vernons paid for the construction of their home. (R. p. 199-202, Testimony of Bryan Johnson, TT, pgs. 90-92.)

The Vernons filed their Complaint on January 22, 2010 against Landmarc and Marcus Dunn, principal of Landmarc Constructors, alleging fraud and deceit, breach of contract, breach of contract accompanied by a fraudulent act, conversion, violation of the Unfair Trade Practices Act, accounting, contractual indemnity, equitable indemnity, and declaratory relief concerning the mechanic's lien filed by Defendant/Third-Party Plaintiff Yoders Building Supply. On February 24, 2010, Defendant/Third-Party Plaintiff Yoders Building Supply filed its third party action against the Vernons, Landmarc and Dunn.

STANDARD OF REVIEW

Breach of contract, conversion and fraud are actions at law. An appellate court's scope of review in cases of fraud, where the proof must be by clear, cogent and convincing evidence, is limited to determining whether there is any evidence reasonably supporting the circuit court's findings. *Kiriakides v. Atlas Food Sys. & Servs, Inc.*, 343 S.C. 587, 541 S.E.2d 257 (2001).

In an action at law, referred to a master or special referee for final judgment, the appellate court will correct any error of law, but must affirm the master's or referee's factual findings unless there is no evidence that reasonably supports those findings. *Roberts v. Gaskins*, 327 S.C. 478, 486 S.E.2d 771 (Ct. App. 1997); *Jeffries v. Phillips*, 316 S.C. 523, 451 S.E.2d 21 (Ct. App. 1994).

ARGUMENT

1. THE TRIAL COURT WAS CORRECT IN FINDING APPELLANT LANDMARC LIABLE FOR BREACH OF CONTRACT, FRAUD, CONVERSION, AND APPELLANT MARCUS DUNN PERSONALLY LIABLE FOR ACTIONS OF APPELLANT LANDMARC.

A. Breach of Contract.

The elements of breach of contract are 1.) a binding contract entered into by the parties, 2.) breach or unjustifiable failure to perform the contract, and 3.) damage suffered by the plaintiff as a direct and proximate result of the breach. *Fuller v. Eastern Fire Casualty Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602, 610 (1962). The Vernons entered into a contract with Landmarcon August 18, 2008, (R. p. 1095-1100, Contract, Plaintiffs' Ex. 1), which was executed by Dunn in his capacity as President of Landmarc. Paragraph 5 of the contract stipulated that Landmarc would submit periodic requests for payment with

cost backup. This paragraph also states that Landmarc would provide lien waivers to the Vernons. The lien waivers stated to the Vernons that suppliers and subcontractors would be paid in full during the payment period and that Landmarc would indemnify and hold harmless the Vernons from any claim made by a supplier or subcontractor. (R., p. 1124-1134, Partial Lien Waivers, Plaintiffs' Ex. 3). The trial court correctly found that the first element of the breach of contract cause of action had been met.

Testimony from the Vernons' witness Bryan Johnson established to the trial court's satisfaction that Landmarc and Dunn breached the contract. The breach occurred in two areas. First, it became clear to the Vernons that the suppliers and subcontractors had not been paid in full as represented by Landmarc and Dunn when four subcontractors, Yoder's Building Supply, Ferguson Enterprises, Clayton Tile, and Marathon Lighting, filed mechanic's liens against the subject property². Second, when Bryan Johnson investigated the project, he found that Landmarc and Dunn had overcharged the Vernons for payments made to suppliers and subcontractors with Landmarc and Dunn keeping the difference between what was really owed and what the Vernons paid based on Landmarc and Dunn's representations. During trial Bryan Johnson testified that Landmarc and Dunn had overcharged the Vernons for payments made to Yoder's Building Supply, Ferguson Enterprises, Glenco Fireplaces, Matt Lynn Custom Carpentry, Southern Gutter & Siding as well as to various electrical, tile and painting subcontractors. Bryan Johnson also testified that the Vernons had been overcharged for the building permit and payments made to utilities. Mr. Johnson's backup for his testimony was part of a three-ring binder which constituted Plaintiffs' Exhibit 6. (R. p. 494-1094, Plaintiffs' Ex. 6). Based on Mr. Johnson's testimony and

² Only Yoder's Building Supply and Ferguson Enterprises perfected their liens.

documentation entered on the trial record, the trial court correctly found that the second element of breach of contract had been met.

The third element of breach of contract is damage suffered by the plaintiff as a direct and proximate result of the breach. The trial court in paragraph 10, page 6 of its Order (R. p. 8, Order, p. 6) found that Landmarc and Marcus Dunn in multiple instances included amounts over the true costs, even though the contract called for payment of actual costs. The trial court further found in paragraph 10 that testimony from Landmarc and Dunn concerning the discrepancies was not credible. In paragraph 14, p. 7 of the Order (R., p. 9, Order) the trial court found the testimony of Bryan Johnson to be “particularly credible” based on his experience as a contractor, his familiarity with the project and his meticulous review and detailed presentation of his opinions during the trial. Based on Mr. Johnson’s testimony and his presentation set out in Plaintiffs’ Exhibit 6, (R. p. 172-202, TT pgs. 63-93 and Plaintiffs’ Ex. 6), the trial court correctly found the Vernons had overpaid \$118,416.99 to Landmarc and Dunn and were entitled to damages based on the breach of the contract. (R., p. 13, Order, p. 11).

Landmarc and Dunn made no evidentiary objections to Plaintiffs’ Exhibit 6 or indeed to any of the Plaintiffs’ exhibits. They also made no evidentiary objections to Mr. Johnson’s testimony. Further, Landmarc and Dunn did not make any directed verdict motions concerning any of the Plaintiffs’ causes of action. The trial court based its finding concerning breach of contract on testimony and exhibits from the trial and it cited portions from the record to show all elements had been proven. (R. p. 12-13, Order pages 10-11. The trial court’s findings concerning breach of contract is correct and supported

by the trial transcript and exhibits, therefore Landmarc and Dunn's argument is without merit.

B. Fraud

The Vernons' fraud cause of action is based on the fraudulent partial lien waivers submitted by Landmarc and Dunn. Paragraph 5 of the Contract (R., p.1097, Contract, Plaintiffs' Ex. 1) states, "Thereafter, periodic requests for payment will be submitted by Contractor in satisfactory itemized format and cost back-up along with acceptable Lien Waivers for the work to be paid and in place to date." This clause is important for two reasons. One, it establishes that Landmarc and Dunn had a contractual duty to provide the lien waivers. Two, the lien waivers were for work to be paid and in place to date, that is, actual costs, not the estimates Marcus Dunn claimed in his trial testimony were part of the lien waivers. Further, the lien waivers were for actual work, not for worker's compensation insurance that Marcus and Kerri Dunn testified were part of the payments submitted to the Vernons.

The partial lien waivers (R. p. 1124-1134, Partial Lien Waivers, Plaintiffs' Ex. 3) state, "Affiant swears individually and on behalf of Landmarc Custom Homes that the following statements are true and within the personal knowledge of Affiant", affiant being Marcus Dunn. In each of the lien waivers that Dunn, on behalf of Landmarc, submitted to the Vernons, he swore individually and on behalf of Landmarc that all charges for labor performed and material furnished would be paid once the Vernons submitted funds to Landmarc called for in the lien waiver. The Vernons paid all but one of the lien waivers³, thinking all subcontractors and suppliers would be paid in full.

³ The Vernons did not pay the final lien waiver submitted in December 2009 because they fired Landmarc by then.

When the four mechanic's liens were filed on their property it became apparent that Landmarc and Dunn had not done what was represented by the partial lien waivers. Further, Bryan Johnson's investigation, as set forth in Plaintiffs' Ex. 6, (R. p. 494-1094) showed that Landmarc and Dunn had overcharged the Vernons and kept the surplus for themselves.

In its Order on pages 11-13, (R., p. 13-15, Order, pgs. 11-13) the trial court found that the nine elements of fraud as set out in *Kahn Cons. Co. v. S.C. Nat'l Bank of Charleston*, 275 S.C. 381, 271 S.E.2d 414 (1980) had been proven by the Vernons. The trial court found that the partial lien waivers were representations made by Landmarc and that Dunn was not insulated from liability for his tortious conduct because his signature appeared on each and every partial lien waiver. Further, Dunn swore individually and for Landmarc that the partial lien waivers were true. The falsity of the partial lien waivers was proven by testimony from Bryan Johnson, who testified as to how Landmarc and Dunn overcharged the Vernons and by the four mechanic's liens filed by suppliers who obviously had not been paid, despite the representations of the partial lien waivers. The representations were material because the Vernons were expected to pay the amounts called for in the partial lien waivers. Mr. Johnson's testimony and the evidence in Plaintiffs' Exhibit 6, established that Landmarc and Dunn knew the representations were false and that they intended for the Vernons to act on the false representations. The testimony of both Bill Vernon and Bryan Johnson establish that they had no reason to suspect the representations were false and that they relied on the representations until the mechanic's liens were filed, when they began their investigation. Because the contract price of the subject home construction was based on actual costs plus 15% retainage, the

Vernons had a right to rely on the representations. Finally, the trial court found the Vernons had suffered an injury as established by the four mechanic's liens and the fraudulent overpayments in the amount of \$118,416.99. The evidence contained in the testimony of Bill Vernon and Bryan Johnson as well as the documents in Plaintiffs' Exhibit 6 support the trial court's finding that Landmarc and Dunn committed fraud and deceit against the Vernons, therefore, Landmarc and Dunn's arguments concerning the finding of fraud are without merit.

C. Conversion

Conversion is the unauthorized assumption and exercise of the right of ownership over the goods or personal chattels of another, to the exclusion of the owner's rights. *Castell v. Stephenson Finance Co.*, 224 S.C. 45, 135 S.E.2d 311 (1964); *Steele v. Victory Savings Bank*, 295 S.C. 290, 368 S.E.2d 91 (Ct. App. 1988). Bryan Johnson testified (R., p. 172-202, TT pgs. 63-93) that Landmarc and Dunn appropriated the Vernons' monies for their own use. Landmarc and Dunn maintained a checking account for each project they were working on. Funds paid by the Vernons went into a checking account designated for their project and Landmarc and Dunn would use funds from this account to pay subcontractors and suppliers working on the Vernon project. However, as evidenced by Bryan Johnson's testimony and Tabs 12 and 19 of Plaintiffs' Ex. 6 (R., p. 195-197, TT p. 86-88, Plaintiffs' Ex. 6), monies from this account also went to other Landmarc accounts having nothing to do with the Vernon project. Further, both Marcus and Kerri Dunn wrote checks to themselves, which was not allowed under the contract. (R., p. 86-88, TT, Plaintiffs' Ex. 6, Tabs 12, 13, 14 and 15). The trial court found that the Vernons were entitled to a credit of \$36,438.75 for the wrongfully converted bank funds. (R., p. 15-16, Order, pgs. 13-14). The trial court's findings are based on evidence and

trial testimony, which Landmarc and Dunn has not challenged in its brief, thus the argument concerning the trial court's findings of conversion is without merit.

D. Dunn's Status as a Corporate Officer Does Not Shield Him from Personal Liability.

Landmarc and Dunn cite *Rowe v. Hyatt*, 321 S.C. 366, 468 S.E.2d 649 (1996) to support their argument that Dunn is not personally liable for actions committed by Landmarc, however, their reliance on this case is misplaced. First, the facts in *Rowe* were that the plaintiffs did not have direct contact with Hyatt, the sole shareholder and president of Imperial Chrysler-Plymouth, Inc. Dunn, however, had direct contact with the Vernons from the execution of the contract until Landmarc was fired from the project. He met with the Vernons to discuss the project, executed the contract on behalf of Landmarc, met with the Vernons to discuss concerns with the project and signed the partial lien waivers. In *Rowe*, the South Carolina Supreme Court stated, "To incur liability, the officer, director, or controlling person must ordinarily be shown to have in some way participated in or directed the tortious act." See also *Plowman v. Bagnal*, 316 S.C. 283, 450 S.E.2d 36(1994); *Hunt v. Rabon*, 275 S.C. 475, 272 S.E.2d 643 (1980). The trial court found that Bill Vernon's testimony, Bryan Johnson's testimony, the documents in Plaintiffs' Exhibit 6, and the partial lien waivers signed by Marcus Dunn all show that Dunn participated in fraud and conversion and that he therefore could not shield himself from personal liability. *Rowe* further supports the trial court's finding that Dunn is personally liable for acts committed by Landmarc.

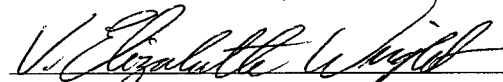
CONCLUSION

The trial court found that Landmarc and Dunn were liable for breach of contract, fraud and conversion based on testimony and exhibits cited in the trial transcript.

Landmarc and Dunn raised no evidentiary objections during trial and did not make any directed verdict motions. Further, South Carolina case law supports the trial court's finding that Dunn was personally liable for his tortious acts. For these reasons the trial court's decision should be affirmed.

Respectfully submitted.

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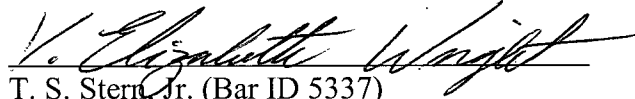
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.



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And Yoder's Building Supply, Inc. is Respondent.

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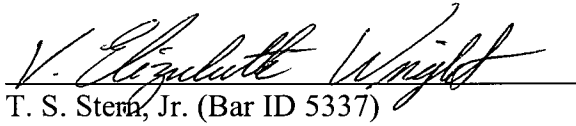
PROOF OF SERVICE

I certify that I have served *Respondents' Final Brief and Certificate of Counsel*
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29601, by depositing it into the U.S. Mail, first class postage prepaid on **March 19, 2013**.

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