

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Allison Renee Lee, Circuit Court Judge

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SC Court of Appeals

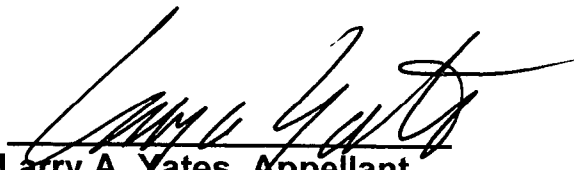
Docket No: 08-CP-40-0009

Larry A. Yates.....Appellant,

v.

The Estate of Alvin Yates.....Respondent.

BRIEF OF APPELLANT

  
Larry A. Yates, Appellant  
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|                                             |          |
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STATEMENT OF QUESTIONS ON APPEAL

1. DID THE MOTION COURT ERR IN USING THE "SOUND DISCRETION OF THE REVIEWING JUDGE" AS ITS STANDARD OF REVIEW FOR A RULE 60(b)(4) MOTION?
2. DID THE MOTION COURT ERR IN ITS FAILURE TO DETERMINE THAT THE TRIAL COURT'S FINDING FOR THE DEFENDANT (RESPONDENT) VIOLATED THE PLAINTIFF'S (APPELLANT'S) DUE PROCESS RIGHTS TO A FAIR TRIAL, BECAUSE THE RECORD SHOWS THAT ALL THE SUBSTANTIAL EVIDENCE PRESENTED AT TRIAL, SUPPORTED A FINDING FOR THE PLAINTIFF (APPELLANT)?
3. DID THE MOTION COURT ERR IN ITS FAILURE TO DETERMINE THAT THE TRIAL COURT'S ORDER OF JUDGMENT WAS A VOID JUDGMENT BECAUSE IT IS BASED ON CLEARLY ERRONEOUS SUPPOSITIONS THAT ARE NOT FOUND AS PART OF THE TRIAL RECORD?

### STATEMENT OF THE CASE

- Jan 3,'08 Appellant (Plaintiff) Yates filed suit (Case No. 08-CP-40-0009) challenging the Estate of Alvin Yates' Respondent (Defendant) claim against his and his deceased cousin's (Alvin Yates) Partnership's property. Complaint (R.pp.186-190)
- Jul 13,'09 A non-jury trial was held in Circuit Court, before Circuit Court Judge, J. Michelle Childs, on July 13, 2009. Trial Transcript (R.pp.52-121)
- Oct 26,'09 Judge Childs issued her October 26, 2009, Order of Judgment, denying the existence of any partnership between Appellant (Plaintiff) Yates' and his cousin, Alvin Yates. Appellant (Plaintiff) Yates was served with a copy of the Order, on November 2, 2009. (R.pp.35-47)
- Nov30,'09 Appellant (Plaintiff) Yates filed his "Motion to Reconsider" and "Memorandum in Support of Plaintiff's Motion to Reconsider" on November 30, 2009.
- Mar10,'10 Judge Childs issued her March 10, 2010, Order denying Appellant (Plaintiff) Yates' Motion for Reconsideration. The Motion was denied on grounds that the Motion was not filed within 10 days after receipt of this Court's October 26, 2009 Order of Judgment.
- Mar15,'10 Appellant (Plaintiff) Yates filed his Notice of Appeal with the SC Court of Appeals, for a review of Judge Childs' October 26, 2009, Order of Judgment, denying the existence of Appellant (Plaintiff) Yates' Partnership with his cousin, Alvin Yates.
- Mar 29,'10 Respondent (Defendant), the Estate of Alvin Yates filed its Motion to Dismiss Appellant (Plaintiff) Yates' Appeal of Judge Childs' October 26, 2009, Order of Judgment, denying the existence of Appellant (Plaintiff) Yates' Partnership with his cousin, Alvin Yates.
- Apr28,'10 The SC Court of Appeals issued its Order "Granting" the Respondent's, March 29, 2010, Motion to Dismiss Appellant (Plaintiff) Yates' Appeal of Judge Childs' October 26, 2009, Order of Judgment. The March 15, 2010 Appeal was Dismissed because the March 15, 2010, filing date was too late to file, because Plaintiff Yates' Motion to

Reconsider was filed late, and therefore did not stay the time for filing Appellant (Plaintiff) Yates' Notice of Appeal.

Dec 15,'11 Appellant (Plaintiff) Yates filed his Rule 60(b) Motion for Relief from Judge Childs' October 26, 2009, Order of Judgment. (R.pp.32-34)

Mar 9, '12 Appellant (Plaintiff) Yates filed his Memorandum in Support of his Rule 60(b) Motion for Relief from Judge Childs' Order of Judgment. Memorandum (R.pp.20-31)

Mar 9, '12 Appellant (Plaintiff) Yates' Rule 60(b) Motion for Relief from Judge Childs' October 26, 2009, Order of Judgment was heard by Circuit Court Judge, Allison Renee Lee on March 9, 2012.

Jun 7, '12 Judge Lee issued her June 7, 2012, Order denying Appellant (Plaintiff) Yates' Motion for Relief from Judge Childs' October 26, 2009 Order of Judgment. Appellant (Plaintiff) Yates was served Judge Lee's June 7, 2012 Order on June 14, 2012. Order (R.pp.14-19)

Jun 22,'12 Appellant (Plaintiff) Yates filed his Motion to Amend Judge Lee's June 7, 2012, Order based on grounds of Hearing Court's error in its standard of review for determining the Hearing Court's finding for denial of Appellant (Plaintiff's) December 15, 2011, Motion to Set-aside Judge Childs' October 26, 2009 Order of Judgment. (R.pp.6-13)

Jun 27,'12 Judge Lee issued her June 27, 2012, Order denying Appellant (Plaintiff) Yates' June 22, 2012, Motion to Amend. Order (R.p.5)

July 26,'12 Appellant (Plaintiff) Yates filed his Notice of Appeal with the SC Court of Appeals on July 26, 2012.

Dec 28,'12 After receipt of transcript of non Jury trial and receipt of two (2) Orders of this Court granting enlargements of time for filing Appellant's Initial Brief and designation of matter, this Appellant herewith files his Initial Brief and designation of matter, on December 28, 2012.

## ARGUMENT NO. 1

### THE MOTION COURT ERRED IN USING THE "SOUND DISCRETION OF THE REVIEWING JUDGE" AS ITS STANDARD OF REVIEW FOR A RULE 60(b)(4) MOTION.

As properly stated in the "Standard of Review" paragraph of Judge Lee's Motion Court's Order of June 7, 2012, in order for a judgment to be void under Rule 60(b)(4), it must be one that, from its inception, is a complete nullity and is without legal effect. In relevant part, void judgments are judgments rendered by courts which failed to provide proper due process. From Judge Lee's Order of June 7, 2012:

*Rule 60(b), SCRCP requires the moving party to show one of the five enumerated reasons before the court may grant relief from an order. Patterson v. McNeill & Associates, Inc., 312 S.C. 471, 472, 441 S.E.2d 328, 329 n.2 (Ct. App. 2005). A Motion for Relief from an Order is appropriate pursuant to Rule 60(b)(4), SCRCP, where a party shows "the judgment is void." Tri-County Ice and Fuel v. Palmetto Ice Co., 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990). In order for a judgment to be void under Rule 60(b)(4), it must be one that , "from its inception, is a complete nullity and is without legal effect." Universal Benefits, Inc. v. McKinney, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct.App. 2002) In relevant part, void judgments are judgments rendered by courts "which failed to provide proper due process . . . ." Id. Order (R.p.16.¶.2)*

However, Judge Lee was mistaken when she determined that the proper "standard of review in deciding whether to grant or deny a Rule 60(b)(4) motion lies within the sound discretion of the reviewing judge." (R.p.16.¶.2) In her June 7, 2012, Order she inappropriately cited Perry v. Heirs at Law of Gadsden, 357 S.C. 42, case law for a Rule 60(b)(3) Motion as a justification of her standard of review for this Appellant's (Plaintiff's) Rule 60(b)(4) Motion. Order (R.p.16.¶.2) In her June 27, 2012, Order she inappropriately cited Tobias v. Rice, 379 S.C. 357, case

law for a Rule 60(b)(1) Motion as a justification of her standard of review for this Appellant's (Plaintiff's) Rule 60(b)(4) Motion. Order (R.p.5)

Although, some of the five enumerated reasons for the court to grant relief under Rule 60(b), could properly be determined within the sound discretion of the reviewing judge; relief under Rule 60(b)(4) is properly reviewed de novo<sup>1</sup>.

Following a bench trial, the reviewing (Motion Court) judge reviews the trial court's legal determinations de novo, and its factual findings for clear error. Furthermore, reviewing court reviews de novo a trial court's ruling upon a Rule 60(b)(4) motion to set-aside a judgment as void, because the question of the validity of a judgment is a legal one. (Lexis 9808 & 7886) Court reviews de novo<sup>1</sup> a ruling on a request for relief under Rule 60(b)(4). Carter v. Fenner, 136 F.3d 1000, 1005 (5th Circuit. 1988) Also, relevant is; Rutherford v. Rutherford, 307 S.C. 199, 414 S.E.2d 157 (1992)

Judge Lee, the motion court judge, was compelled to vacate the October 26, 2009, judgment against the Appellant (Plaintiff), because a de novo review of the trial record would have confirmed the trial judge's failure to consider the "substantial<sup>2</sup> evidence" Plaintiff's Exhibits (R.pp.122-181) for the Appellant (Plaintiff), was a violation of the Appellant's (Plaintiff's) constitutional right to due process and the right to a fair trial. A judgment taken in violation of a Plaintiff's constitutional rights afforded him by the Fifth and Fourteenth amendments of the U.S. Constitution, is a void judgment. A void judgment is a legal nullity and a court considering a motion to vacate has no discretion in determining whether it

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1. De Novo. The court gives no deference to the lower court's decision and applies the same standard as the district court. Whatley v. CNA Ins. Co., 189 F.3d 1310, 1313 (11th Cir. 1999).

2. Substantial Evidence. Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971).

should be set aside." J. Moore, Moore's Federal Practice, para. 60.25[2] at 301 (2d ed. 1973). The issue of whether the Plaintiff was denied due process involves a constitutional question of law that Judge Lee should have reviewed, de novo. In re Center Wholesale, Inc., 759 F.2d 1440, 1445 (9th Cir. 1985).

In American Federal Court systems, "de novo" can also refer to a Standard of review for courts of appeal. Sometimes, particularly potent issues are brought before an appeals court, such as a constitutional determination made by a lower court, or summary judgment granted by a lower court. When this sort of issue is on appeal, the court of appeals will review the lower court decision "de novo" or from the beginning. In this process, the panel of judges for the court of appeals will review the lower court's reasoning and fact-finding from the beginning, based in the trial record. This is a high level of scrutiny that is more likely to result in reversal or remand of an issue.

We review the denial of a Rule 60(b)(4) motion de novo. See Burke v. Smith, 252 F.3d 1260, 1263 (11th Cir. 2001). We can affirm on any ground supported by the record. See 28 U.S.C. § 2111; Collins v. Seaboard Coastline R.R. Co., 681 F.2d 1333, 1335 (11th Cir. 1982).

In law, the expression trial de novo means a "new trial" by a different tribunal (de novo is a Latin expression meaning "afresh", "anew", "beginning again", hence the literal meaning "new trial"). A trial de novo is usually ordered by an appellate court when the original trial failed to make a determination in a manner dictated by law.

## ARGUMENT NO. 2

THE MOTION COURT ERRED IN ITS FAILURE TO DETERMINE THAT THE TRIAL COURT'S FINDING FOR THE RESPONDENT (DEFENDANT) VIOLATED THE APPELLANT'S (PLAINTIFF'S) DUE PROCESS RIGHTS TO A FAIR TRIAL, BECAUSE THE RECORD SHOWS THAT THE SUBSTANTIAL EVIDENCE PRESENTED BY THE APPELLANT (PLAINTIFF) AT TRIAL DEMANDED A FINDING FOR THE APPELLANT (PLAINTIFF).

At trial, Appellant (Plaintiff) Yates gave in-court testimony, offered affidavit testimony exhibits, and introduced document exhibits and case law exhibits into evidence. Trial Exhibits (R.pp.122-181) All of this evidence was left uncontested, in that the Respondent (Defendant) did not offer a defense. Trial Transcript (R.p.114.lines 7-15) (emphasis added)

Without objection by the Respondent (Defendant), the Appellant (Plaintiff) introduced fifteen (15) exhibits into evidence, each exhibit included partnership documents, partnership case law and affidavit testimony by Appellant (Plaintiff) Larry A. Yates. Each exhibit confirmed the existence of a partnership between Larry Yates and Alvin Yates. Trial Exhibits (R.pp.122-181)

Appellant's (Plaintiff's) Exhibit # 1 (R.pp.122-124) was the "Project Partnership Agreement" dated July 5, 2003, and executed by Larry Yates and Alvin Yates, setting forth their agreements regarding the construction of a modular building system home on a lot of land located at 400 Grover Wilson Road in Blythewood, South Carolina.

Appellant (Plaintiff), Larry Yates' testimony concerning Exhibit # 1 was as follows: "*I am familiar with the facts and circumstances involving the Partnership*

that existed between partners Larry A. Yates and Alvin Yates and with the financing and construction of the partnership property located at 400 Grover Wilson Road, in Blythewood, South Carolina, a picture (R.p.177) of which is shown on the cover sheet of this document, as it was in 2007), and I hereby certify that the copy of the "Project Partnership<sup>3</sup> Agreement" under which the home was constructed, as evidenced herein as Exhibit 1, is a true copy of the Partnership Agreement that was entered into on July 5, 2003, between Alvin Yates and Larry A. Yates.

Some of the specifics of this Partnership<sup>4</sup> Agreement included:

1. Plans to purchase a 4 Br / 3-1/2 Bath modular building systems home from Signature Building Systems, Inc. located in St. George, SC.
2. Plans to construct the home on a permanent brick foundation on a lot of land located in N.E. Richland County at 400 Grover Wilson Road, in Blythewood, SC.
3. Plans to pay approximately \$79,000 for the pre-fabricated home including delivery for the house and garage packages and dry-in set for the house.
4. Plans for obtaining financing for the purchase of the home and payment of all necessary on-site material, equipment and labor to complete the home for occupancy.
5. Plans for the marketing and sale of the completed home.
6. Plans for partner Larry Yates to keep and report a full and accurate accounting of all project expenditures.
7. Plans for the proceeds of the sale of the property to first be applied to the payment of the partnership debt and lastly to the payment of profits to the partners." Trial Transcript (R.p.65.Ln15-p.66.Ln23)

<sup>3</sup> Partnership laws for the State of South Carolina, provide in part that, "[w]here parties to a contract, by their acts, conduct, or agreement show that they intend to combine their property, labor, skill and experience, or some of such elements on one side and some on the other, to carry on, as principals or co-owners, a common business, trade, or venture as a commercial enterprise, and to share, either expressly or by implication, the profits and losses or expenses that may be incurred, there is a partnership." (Stephens v. Stephens, 50 S.E.2<sup>nd</sup> 577, 213 S.C. 525)

<sup>4</sup> Also, "[w]here parties to a contract, by their acts, conduct, or agreement show that they intend to combine their property, labor, skill and experience, or some of such elements on one side and some on the other, to carry on, as principals or co-owners, a common business, trade, or venture as a commercial enterprise, and to share, either expressly or by implication, the profits and losses or expenses that may be incurred, such parties are partners." (Moore v. Moore, 599 S.E.2<sup>nd</sup> 467, 460 S.C. 241) Furthermore, a partnership agreement may be implied and without express intention. One of the most important tests as to the existence of a partnership, is the intention of the parties.

Appellant's (Plaintiff's) Exhibit # 2 (R.pp.125-130) was a "Prime Equity Line of Credit Note" that was signed by Larry Yates and Alvin Yates, for borrowing \$139,100 from Wachovia Bank.

Appellant (Plaintiff), Larry Yates' testimony concerning Exhibit # 2 was as follows: *"The partners did apply for and receive a "Prime Equity Line of Credit" secured by residential property, belonging to Alvin Yates, located at 612 Ashwood Circle, in West Columbia, South Carolina, in an amount of \$139,100 from Wachovia Bank, for the expressed purpose of purchasing partnership property<sup>5</sup>, that would become 400 Grover Wilson Road home and property. That the Note securing this Prime Equity Line of Credit was executed and signed by both partners, Larry A. Yates and Alvin Yates, on July 21, 2003, as evidenced by Exhibit No. 2, which I hereby certify to be a true copy of the "Wachovia Bank, National Association's Prime Equity Line of Credit Agreement & Disclosure Statement." Trial Transcript (R.p.67.Ln23-p.68.Ln11)*

Appellant's (Plaintiff's) Exhibit # 3 (R.pp.131-132) was a "Final Invoice" from Signature Building Systems, Inc." in the amount of \$75,762.29 less \$8,000.00 previously paid for a balance due of \$67,762.29 for the purchase of modular building system home.

Appellant (Plaintiff), Larry Yates' testimony concerning Exhibit # 3 was as follows: *"The partnership did use the partnership funds<sup>5</sup> secured from Wachovia Bank, for the intended purpose of purchasing partnership property<sup>5</sup> consisting of a 4BR / 3-1/2 Bath modular building systems home, from Signature Building Systems, Inc, of St. George, South Carolina, as evidenced by Exhibit No. 3, which I hereby certify to be a true copy of the "Final Invoice" dated August 5, 2003, from Signature Building Systems, in the amount of \$75,762.29." Trial Transcript (R.p.69.Ln25-p.70.Ln10)*

Appellant's (Plaintiff's) Exhibit # 4 (R.pp.133-134) was a "Official Check" from Wachovia Bank, dated 8/18//03 and made payable to Signature Building

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<sup>5</sup> Property bought with partnership funds, belongs to partnership. (Stephens v. Stephens. (50 S.E.2nd 577, 213 S.C. 525)

Systems, Inc. in the amount of \$67,762.29 and showing remitters as "Larry and Alvin Yates."

Appellant (Plaintiff), Larry Yates' testimony concerning Exhibit # 4 was as follows: *"The partnership did use the partnership funds secured from Wachovia Bank, for the payment of Signature Building Systems' "Final Invoice"<sup>5</sup> by way of a wire transfer advance payment of \$8,000 as a production deposit and by way of a \$67,762.29 Wachovia Bank, Official Check No. 354081369 made payable to Signature Building Systems, Inc., with remitter as Larry and Alvin Yates, as evidenced by Exhibit No. 4, which I hereby certify to be a true copy of Wachovia Bank's Official Check, dated August 18, 2003, in the amount of \$67,762.29. Trial Transcript (R.p.72.Ln7-Ln21)*

Appellant's (Plaintiff's) Exhibit # 5 (R.pp.135-137) was a warranted deed, dated October 28, 2003, from D.L Wilson to Alvin Yates<sup>6</sup>, in consideration of \$21,200.00, for the lot of land to be known as 400 Grover Wilson Road, Blythewood, SC.

Appellant (Plaintiff), Larry Yates' testimony concerning Exhibit # 5 was as follows: *"The partnership did use partnership funds<sup>5</sup> secured from Wachovia Bank, for the purchase of a parcel of land containing 1.217 acres, from D.L. Wilson, daughter of partner Larry A. Yates, for which the partnership paid \$5,000 for the transfer of the property into partner Alvin Yates' name<sup>6</sup> in exchange for cash payment of \$5,000 and promise of payment of an additional \$16,200 from the proceeds of the sale of the partnership property, as evidenced by Exhibit No. 5, which I certify to be a true copy of the Title To Real Estate where D.L. Wilson transferred title to 400 Grover Wilson Road Property to Alvin Yates<sup>6</sup> even though she had not been paid the balance of the \$16,200, which still remains unpaid."* Trial Transcript (T.p.73.Lns12-25)

Exhibits # 6 thru 10 were various invoices for construction materials or labor for 400 Grover Wilson Road, Blythewood, SC, which were paid with checks

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<sup>6</sup> Property bought with partnership funds, in name of a single partner, belongs to partnership. (Stephens v. Stephens. (50 S.E.2nd 577, 213 S.C. 525))

drawn on Wachovia Bank from account named, "Alvin Yates & Larry Yates Construction Account."

Appellant (Plaintiff), Larry Yates' testimony concerning Exhibit # 6 (R.pp.138-139) was as follows: *"The partnership did use partnership funds secured from Wachovia Bank, for the intended purpose of "Clearing of Land for House and Yard" by Robert Hildreth Land Clearing Company, as evidenced by Exhibit No. 6, which I certify to be a true copy of "Service Contract and Invoice" of July 14, 2003 in the amount of \$900.00 and of payment of same by "Al Yates & Larry Yates Construction Account" check No. 0093, dated July 17, 2003, and made payable to Robert Hildreth Land Clearing Company in the amount of \$900.00."* Transcript (R.p.76.Ln4-Ln15)

Appellant (Plaintiff), Larry Yates' testimony concerning Exhibit # 7 (R.pp.1140-142) was as follows: *"The partnership did use partnership funds secured from Wachovia Bank, for the intended purpose of purchasing "Concrete Block Products" as evidenced by Exhibit No. 7, which I certify to be a true copy of "Sales Ticket" of Southeastern Concrete Products, dated July 29, 2003, in the amount of \$642.60 and of "Payment Receipt" of same by "Al Yates & Larry Yates Construction Account" check No. 0098, dated July 28, 2003, and made payable to Southeastern Concrete Products in the amount of \$642.60."* Trial Transcript (R.p.77.Ln20-p.78.Ln5)

Appellant (Plaintiff), Larry Yates' testimony concerning Exhibit # 8 (R.pp.143-146) was as follows: *"The partnership did use partnership funds secured from Wachovia Bank, for the intended purpose of purchasing various other materials for the preparation of brick and block foundation, which included the following; 20.93 tons of stone costing \$329.65 and one load of masonry sand costing \$150.00, from Cripple Creek Corporation with respective payments by way of "Al Yates & Larry Yates Construction Account" checks No. 0099 & 1001; and invoice "Acknowledgement" from Carolina Ceramics for brick & mortar costing \$1,057.77; and Hardaway Concrete Company for pre-mixed concrete costing \$926.10 and paid by "Al Yates & Larry Yates Construction Account" check No. 1027, each of which I certify to be true copies."* Trial Transcript (R.p.78.Ln15-p.79.Ln4)

Appellant (Plaintiff), Larry Yates' testimony concerning Exhibit # 9 (R.pp.147-149) was as follows: *"The partnership did use partnership funds secured from Wachovia Bank, for the intended purpose of "Crane Rental" from White Crane Company for unloading and setting various sections of the pre-fabricated home that the partnership purchased from Signature Building Systems as evidenced by White Crane Company Work Order No. 002034, Revised Invoice #6293 dated August 22, 2003, for an adjusted price of \$900.00; and payment by "Al Yates & Larry Yates Construction Account" check No. 1020, dated August 29, 2003, which I certify to be true copies of the "Work Order", "Revised Invoice" and "Al Yates and Larry Yates Construction Account Check No. 1020"."* Trial Transcript (R.p.79.Ln13-p.80.Ln1)

Appellant (Plaintiff), Larry Yates' testimony concerning Exhibit # 10 (R.pp.150-151) was as follows: *"The partnership did use partnership funds secured from Wachovia Bank, for the intended purpose of "Vinyl Siding Installation" by Steve McAtee as evidenced by Fax Message from Larry A. Yates, L.A. Yates & Associates accounting for labor amount due and payment thereof by "Al Yates & Larry Yates Construction Account" check No. 1025, dated September 6, 2003, in the amount of \$212.00, which I certify to be true copies of the "Fax Message" & "Check No. 1025"."* Trial Transcript (R.p.80.Ln13-Ln23)

Appellant's (Plaintiff's) Exhibit # 11 was an accounting of the expenditures for the "on-site" construction associated with the modular building system home, that was purchased from Signature Building Systems and erected on site of 400 Grover Wilson Road, Blythewood, SC. According to testimony by Larry Yates, this accounting was done by him and shared with Alvin Yates at weekly breakfast meetings, that they had each week.

Appellant (Plaintiff), Larry Yates' testimony concerning Exhibit # 11 (R.pp.152-163) was as follows: *"As required by Item No. 6 of the Partnership Agreement between Alvin Yates and Larry Yates, partner Larry Yates did keep a full and accurate accounting of all project expenditures as evidenced by Exhibit No. 11 which includes a summary sheet with 25 itemized account numbers and names, and estimates of expected costs and spent-to-date totals as calculated*

*from lists of individual invoices on the following pages, all of which I hereby certify to be a true accounting of the use of partnership funds for the construction of the partnership property located a 400 Grover Wilson Road, in Blythewood, South Carolina." Trial Transcript (R.p.81.Ln7-Ln20)*

Appellant's (Plaintiff's) Exhibit # 12 was an accounting of the expeditors of Alvin Yates' expenses associated with his day to day participation in the construction of the modular building system home.

Appellant (Plaintiff), Larry Yates' testimony concerning Exhibit # 12 was as follows: *"Partner Alvin Yates did take an active part in the day to day operation of the partnership as evidenced by invoice charges to "Alvin Yates Miscellaneous" under accounting Code No. 24 and individual invoices listed under accounting Code No 24, including expenses for weekly breakfast meetings held at the Lizard's Thicket Restaurants and Dinner meetings held at the Macaroni Grill for the purpose of discussing partnership business and various charges for gas for traveling to and from the partnership job site at 400 Grover Wilson Road in Blythewood, South Carolina which I hereby certify to have been true business expenses charged to the Alvin Yates Miscellaneous Account."* Trial Transcript (R.p.82.Ln6-Ln19)

Appellant's (Plaintiff's) Exhibit # 13 was an accounting of reimbursements for personal monies that Alvin Yates had contributed to the "Alvin Yates & Larry Yates Construction Account." This reimbursement was for \$4,566.81 and was paid by "Alvin Yates & Larry Yates Construction Account" check # 1053 on April 29, 2004.

Appellant (Plaintiff), Larry Yates' testimony concerning Exhibit # 13 was as follows: *"The partnership did use partnership funds secured from Wachovia Bank, for reimbursing partner Alvin Yates for personal money's that he had contributed to the partnership construction account, as evidenced by partner Larry Yates' April 29, 2004 letter of accounting which itemizes various contributions totaling \$4,566.81 and payment of same to Partner Alvin Yates by "Al Yates & Larry Yates Construction Account" check No. 1053., which I certify to be true copies of the*

*April 29, 2004 "Letter of Accounting" & Al Yates & Larry Yates Construction Account Check No. 1053." Trial Transcript (R.p.84.Ln6-Ln17)*

Appellant's (Plaintiff's) Exhibit # 14 was a real estate property appraisal issued by Certified Appraisal Services, Inc., 201 Blythewood Road, Blythewood, SC, who estimated the market value of the property at 400 Grover Wilson Road, Blythewood, SC, to be \$235,000.00, as of July 20, 2004.

Appellant (Plaintiff), Larry Yates' testimony concerning Exhibit # 14 was as follows: *"The partnership did receive an evaluation appraisal of the partnership property, as of July 20, 2004, from "Certified Appraisal Services, Inc." which gave an evaluation of the value for the Partnership's property of the 4 Br / 3-1/2 Ba home and 1.2 acre lot at 400 Grover Wilson Road, Blythewood, SC to be \$235,000."* Trial Transcript (R.p.85.Ln4-Ln12)

Appellant's (Plaintiff's) Exhibit # 15 was a whole bound book of Appellant's (Plaintiff's) Exhibits # 1 thru #14, including the front cover photograph of the Partnership Property as it appeared on the date of the Bench Trial in Circuit Court before Judge Michelle Childs, on July 13, 2009. Photograph (R.p.177) Appellant's (Plaintiff's) Exhibit # 15 also included affidavit testimony by Larry Yates, as to each one of the Exhibits # 1 thru # 14. Trial Transcript (R.p.85.Ln23-p.86.Ln12)

Upon cross examination of Larry Yates, the witness for the Appellant (Plaintiff), the Respondent's (Defendant's) attorney asked the witness about a mortgage on Alvin Yates's personal residence at 612 Ashwood Circle, West Columbia, SC, that was given to Wachovia Bank and was identified by (entered into evidence as Respondent (Defendant's) Exhibit # 1) Larry Yates as security for the "Prime Equity Line of Credit Note" that was signed by Larry Yates and Alvin Yates, for borrowing \$139,000 from Wachovia Bank.

Mr. Hall also got Larry Yates to identify a "Confession of Judgment" document (entered into evidence as Respondent-Defendant's Exhibit # 2) that he had given to Alvin Yates back in 2001, but Larry Yates testified that the Confession of Judgment was a mutually agreed upon, and non-binding means of protecting the assets of Alvin Yates from a third party judgment against Larry Yates, personally, and therefore did not involve the partnership of July 5, 2003, that existed between Larry Yates and Alvin Yates.

After cross examination, the Appellant (Plaintiff) rested his case. Trial Transcript (R.p.114.Ln3-Ln5)

Respondent (Defendant) did not call any witnesses to testify, did not introduce any evidence or otherwise contradict the testimony nor dispute any of the evidence, that supported the existence of the Partnership between Larry Yates and Alvin Yates, that the Appellant (Plaintiff) had presented before the Court. Trial Transcript (R.p.114.Ln6-Ln15) (emphasis added)

### ARGUMENT NO. 3

THE MOTION COURT ERRED IN ITS FAILURE TO DETERMINE THAT THE TRIAL COURT'S OCTOBER 26, 2009, ORDER OF JUDGMENT WAS A VOID JUDGMENT BECAUSE IT IS BASED ON CLEARLY ERRONEOUS SUPPOSITIONS THAT ARE NOT FOUND AS PART OF THE TRIAL RECORD.

The standard of review pursuant to Rule 60(b)(4) is de novo. The motion court judge is compelled to vacate the October 26, 2009 judgment against the Plaintiff, because a de novo review of the trial record will confirm that the trial judge's findings set forth in the October 26, 2009 order of judgment were "clearly erroneous."<sup>7</sup>

<sup>7</sup>Clearly Erroneous. "Review under the clearly erroneous standard is significantly deferential." Concrete Pipe and Prods. v. Construction Laborers Pension Trust, 508 U.S. 602, 623 (1993). The appellate court must accept the trial court's findings unless it's left with the "definite and firm conviction that a mistake has been committed." Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 855 (1982).

There are numerous false statements, opinions and findings of fact that are found in the trial Court's October 26, 2009, Order of Judgment. These entries are not evidence, are not found as part of the trial record, but the Trial Court's Order of Judgment is mostly based on entries that are not evidence contained in the trial record.

There is no evidence in the trial record that would support the Respondent's (Defendant's) case, because the Respondent (Defendant) did not call any witnesses to testify, did not introduce any evidence or otherwise contradict the testimony nor dispute any of the evidence, that supported the existence of the Partnership between Larry Yates and Alvin Yates, that the Appellant (Plaintiff) had presented before the Court. Trial Transcript (R.p.114.Ln6-Ln15) (emphasis added)

Some examples of entries contained in the Trial Court Judge's "Order" that are not found in the trial record, are as follows:

1) There is no evidence in the trial record, that "*Decedent Alvin Yates ('Decedent') died on April 16, 2005.*" Trial Court Order (R.p.36.¶.2)

2) There is no evidence in the trial record, that "*His estate was probated in Lexington County.*" Trial Court Order (R.p.36.¶.2)

3) There is no evidence in the trial record, that "*The probate court determined that the sole asset of Decedent's estate is modular home, located at 400 Grover Wilson Road, Blythewood, South Carolina 29016.*" Trial Court Order (R.p.36.¶.2)

4) There is no evidence in the trial record, that "*Plaintiff first attempted to intervene in the probate proceedings claiming that the 400 Grover Wilson Road property was owned by a partnership entered into by him and the decedent on or about July 3, 2005,*" Trial Court Order (R.p.36.¶.2)

5) There is no evidence in the trial record, that "*The probate judge refused to hear the matter determining that the probate court lacked jurisdiction.*" Trial Court Order (R.p.36.¶.2)

6) There is no evidence in the trial record, that “*Probate administration of the Decedent’s estate has since closed.*” Trial Court Order (R.p.37.¶.1)

7) There is no evidence in the trial record, that “*Prior to April 12, 2000, Decedent made various loans to Plaintiff on which the Plaintiff defaulted.*” Trial Court Order (R.p.37.#.1)

8) There is no evidence in the trial record, that an April 12, 2000, “Confession of Judgment” had any relevance with regard to weighing the preponderance of evidence for determining the existence of the July 5, 2003 partnership. Trial Court Order (R.p.37.#2) (Trial Trans.Pg111)

9) There is evidence in the trial record, that “*Plaintiff’s and Decedent signed a document entitled Project Partnership Agreement and therefore did have a partnership for the purpose of the purchase and construction of a modular systems home from Signature Building Systems, Inc.*” Trial Court Order (R.p.37.#3) Plaintiff’s Exhibits (R.pp.122-181)

10) There is evidence in the trial record, that “Plaintiff and Decedent, as partners in a partnership, obtained an open-end line of credit from Wachovia Bank for purchasing partnership property....” Trial Court Order (R.p.38.#4) Plaintiff’s Exhibit # 2 (R.pp.125-130)

11) There is evidence in the trial record, that Plaintiff and “Decedent, as partners in a partnership, purchased a 4BR/ 3-1/2 bath modular building .....” Trial Court Order (R.p.38.#5) Plaintiff’s Exhibit # 3 & 4 (R.pp.131-134)

12) There is evidence in the trial record, that Plaintiff and “Decedent, as partners in a partnership, paid for the modular home....” Trial Court Order (R.p.39.#5) Plaintiff’s Exhibit # 4 (R.pp.133-134)

13) There is no evidence in the trial record, that “Decedent died on April 16, 2005. Trial Court Order (R.p.40.#13)

14) There is no evidence in the trial record, that “probate court determined that the property known as 400 Grover Wilson Road is the sole asset of Decedent’s estate. Trial Court Order (R.p.40.#14)

15) There is no evidence in the trial record, that “Defendant argues (presented any evidence) that there was never any agreement to create a partnership between the parties, and the Agreement submitted by Plaintiff contains no language creating a partnership between the parties. Moreover,

Defendant claims that Plaintiff made no contribution to the alleged partnership, and thus, the existence of a partnership cannot be implied from the conduct of the parties. Trial Court Order (R.p.40.¶.Law/Analysis)

16) Contrary to the Trial Court Judge finding otherwise, there is evidence in the trial record, that the partners were to share profits and losses. Trial Court Order (R.p.43.¶.1) Trial Transcript (R.p.66.Ln20-Ln23)

These “clearly erroneous” finding contained in the trial court judge’s October 26, 2009 order of judgment are a violation of the Plaintiff’s constitutional right to due process and the right to a fair trial.

If the July 13, 2009, trial would have been a jury trial, rather than a bench trial, the trial court judge would have instructed the jury to reach a verdict, based on a “Preponderance of the Evidence.” The trial court judge would have demonstrated a preponderance of the evidence with a tipping of the “scales of justice” example. With all of the trial evidence weighing on the Appellant’s (Plaintiff’s) side of the proverbial scales of justice, and nary a tiny bit of evidence for the Respondent (Defendant), the jury would have reached a verdict for the Appellant (Plaintiff) in about the time required to write “We Find For The Plaintiff” on the verdict form.

However, instead of weighing all of the evidence, as a bench trial judge should have done, and declaring a judgment that, “The Court Finds For The Plaintiff” as a jury would have done, the trial court judge, surprisingly decided to “Look Through The Entire File And Then We’ll Send You A Written Decision.”

How hard is it for a Circuit Court Judge to decide a 45 minute trial, where the Plaintiff provides the Court with all the evidence, and the Defendant provides the Court with no evidence (Defense did not present a case)?

Instead of deciding the case a trial, as would have been expected of a jury, this trial court judge waited more than three (3) months to issue "A Written Decision." Instead of the written decision being six (6) words, "The Court Finds For The Plaintiff," as it should have been, the trial court judge issued a twelve (12) page Order, (R.pp.35-47) which was effectively a decision of "The Court Finds For The Defendant."

As set forth above, the trial court judge's Order was filled with statements, finding of facts and arguments that are nowhere to be found in the July 13, 2009, trial record. The Order and the decision therein was taken in violation of this Appellant's (Plaintiff's) constitutional rights afforded him by the Fifth and Fourteenth amendments of the U.S. Constitution, and therefore is a void judgment. A void judgment is a legal nullity and a court considering a motion to vacate has no discretion in determining whether it should be set aside." J.Moore, Moore's Federal Practice, para. 60.25[2] at 301 (2d ed. 1973). The issue of whether the Plaintiff was denied due process involves a constitutional question of law that this hearing judge reviews de novo. In re Center Wholesale, Inc., 759 F.2d 1440, 1445 (9th Cir. 1985).

### CONCLUSION

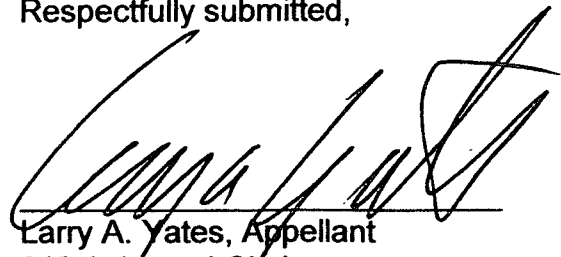
Wherefore, on multiple grounds, (as set forth above) the trial court's order of judgment issued on October 26, 2009, which was taken in violation of a Plaintiff's constitutional rights afforded him by the Fifth and Fourteenth amendments of the U.S. Constitution, is a void judgment. Under SCRCP Rule 60(b)(4) a party is entitled to relief from a judgment if it is void, thus the trial court's October 26, 2009 order of judgment should have been set aside by the Motion Court's Judge Lee, in response to the Appellant's (Plaintiff's) December 15, 2011, Motion to Set Aside.

In light of all the evidence, supporting the existence of a partnership and no evidence opposing the existence of a partnership, as recorded in the official transcript of the record of the July 13, 2009 trial, the Trial Court's October 26, 2009, Order of Judgment, finding for the Defendant is an unmistakable and egregious violation of the Plaintiff's "due process" rights, that are afforded him under the fifth and fourteenth amendments to the United States Constitution. (emphasis added)

Since the Court's October 26, 2009, Order of Judgment was taken in violation of the Plaintiff's constitutional "due process" rights to a fair trial, the Court's October 26, 2009, Order of Judgment, is void. Under Rule 60(b)(4), a party is entitled to relief from a judgment, if it is void.

Therefore the Plaintiff is entitled to relief from the Trial Court's October 26, 2009, Order of Judgment, and this Appellant Court should vacate and/or remand if appropriate, and fair and just.

Respectfully submitted,



Larry A. Yates, Appellant  
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July 26, 2013

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

\_\_\_\_\_  
APPEAL FROM RICHLAND COUNTY

Allison Renee Lee, Circuit Court Judge

\_\_\_\_\_  
Docket No: 08-CP-40-0009

RECEIVED

JUL 24 2013

SC Court of Appeals

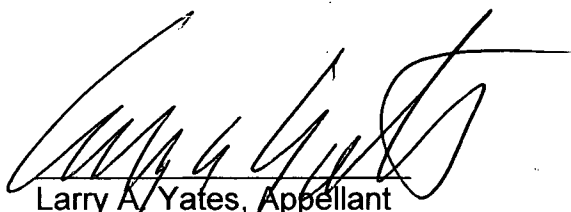
Larry A. Yates.....Appellant,

v.

The Estate of Alvin Yates.....Respondent.

\_\_\_\_\_  
\_\_\_\_\_

I certify that this Brief complies with the requirements of Appellant Court  
Rule 211(b).

  
\_\_\_\_\_  
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July 24, 2013

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Allison Renee Lee, Circuit Court Judge

Docket No: 08-CP-40-0009

RECEIVED

JUL 24 2013

SC Court of Appeals

Larry A. Yates Appellant,

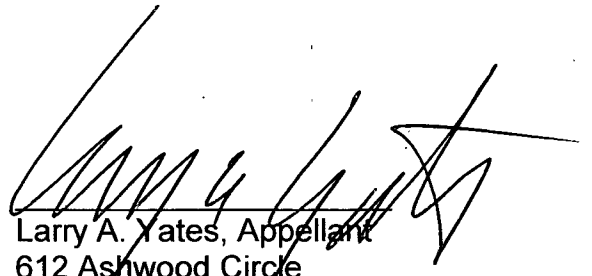
v.

The Estate of Alvin Yates Respondent.

PROOF OF SERVICE

I certify that I have served the "Brief of Appellant" on the Respondent, by depositing copies in the United States Mail, postage prepaid, on July 26, 2013, to the attorney of record, addressed as follows:

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