

HENRIKSON LAW FIRM, L L C
ATTORNEYS AT LAW

RECEIVED

JUN 4 2012

POST OFFICE BOX 26554
GREENVILLE, SOUTH CAROLINA 29616

SC SUPREME COURT

MATTHEW H. HENRIKSON
mhenrikson@henriksonlaw.com
864 672 7106 (direct)

1164 WOODRUFF ROAD
GREENVILLE SC 29607
864 235 4399 (facsimile)

May 31, 2012

The Honorable Daniel E. Shearhouse
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina

RE RFT Management Co., LLC v. Tinsley & Adams, LLP and Welborn D
Adams
Case No. **2010155606**

Dear Mr. Shearhouse:

The Respondents are in receipt of a letter from counsel for the Appellant to you dated May 29, 2012 in which the Appellant purports to advise the court of "significant authorities" which have now come to his attention. Counsel for the Appellant states he is submitting these authorities in accordance with SCACR 208(b)(7).

Rule 208(b)(7) governs initial briefs. This rule sets forth the procedure that a party can use to bring significant authorities to the attention of the court that subsequent to the filing of the initial brief. There is no similar rule relating to submissions after the filing of the final briefs or oral argument. Respondents submit that this Rule does not exist to allow a party to respond post oral argument to questions raised in oral argument for which it was unprepared to answer.

If the clerk determines Rule 208(b)(7) to be properly invoked in this instance, Respondents submit that the issue Appellant's authorities present is not an issue raised by Appellant on appeal. Appellant does respond in his reply brief that the Respondents' evidence, including the testimony of their expert, was insufficient to avoid judgment as a matter of law, however, the precise issues set forth in the supplemental case law were not raised before the court below and were only addressed generally with regard to the insufficiency of Respondents' case as a whole.

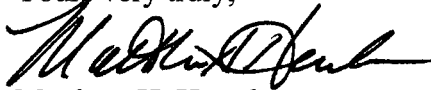
Appellant's additional authorities all address the issue of whether a court can disregard the testimony of an expert when other facts in the record render the opinion unreasonable. Appellant did not raise this issue in his initial brief. Furthermore,

Appellant states he is “submitting this authority because Justice Hearn asked me at the hearing whether I had objected at trial to the admission of Respondent’s expert testimony ” Appellant concedes that Appellant’s appeal does not raise any ruling by the trial judge as to admissibility of Respondent’s expert testimony The cases Appellant now present do not address Justice Hearn’s question, but attempt to develop a wholly new argument subsequent to oral argument in this case

For the reasons stated herein, Respondents request that the clerk disregard the supplementation of authority from the Appellant

With kindest regards, I remain

Yours very truly,

A handwritten signature in black ink, appearing to read "Matthew H. Henrikson", written in a cursive style.

Matthew H Henrikson

/ns

cc Harry A Swagart, III, Esq

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MAY 30 2012

S C SUPREME COURT

HARRY A SWAGART III, PC
LAWYER
WWW.HARRYSWAGART.COM

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TELEPHONE 803 779 0770
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EMAIL HARRY@HARRYSWAGART.COM

May 29, 2012

The Honorable Daniel E Shearhouse
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re RFT Management Co , LLC v Tinsley & Adams, LLP and Welborn D Adams,
Case No 2010155606

Dear Mr Shearhouse

Pursuant to SCACR 208(b)(7), Appellant hereby advises you that the following significant authorities have come to counsel's attention following oral argument in the above case on Wednesday, May 23, 2012

In re Silberkraus, 336 F 3d 864, 871 (9th Cir 2003)

Cleveland v Viacom Inc , 73 Fed Appx 736, 741 n 8, 2003 WL 22014776
at *3 & n 8 (5th Cir 2003)

Concrete Works of Colorado Inc v City and County of Denver, 321 F 3d 950,
988 (10th Cir 2003) ("speculative and self-serving expert testimony"
insufficient to support verdict)

Concord Boat Corp v Brunswick Corp , 207 F 3d 1039, 1057 (8th Cir 2000)

Seabury Management Inc v PGA of America Inc , 52 F 3d 322 (Table), 1995
WL 241379 at *4 (4th Cir 1995)

Sullivan v Nat Football League, 34 F 3d 1091, 1105 (1st Cir 1994)

Abarca v Franklin Cty Water Dist , 812 F Supp 2d 1199, 1204 (E D Cal 2011)

Lynn v Amoco Oil Co , 459 F Supp 2d 1175, 1191 (M D Ala 2006)

City of Keller v Watson, 168 S W 3d 802, 812 (Tex 2005)

Each of these cases are consistent with the position of the United States Supreme Court that even properly admitted expert testimony will not support a verdict “when indisputable record facts contradict or otherwise render the opinion unreasonable ” *Brooke Group, Ltd v Brown & Williamson Tobacco Corp* , 509 U S 209 242 (1993)

These cases are also consistent with South Carolina law As the Supreme Court explained in *Young v Tide Craft Inc* , 270 S C 453, 470, 242 S E 2d 671, 679, 1 A L R 4th (1978)

Having failed to establish an underlying factual basis taking into consideration the material facts necessary to the formation of an intelligent opinion, Fowler’s testimony is devoid of probative value and cannot support a verdict Otherwise, the verdict “would be allowed to rest on speculation and conjecture, which is prohibited ” (Citation omitted)

See, also, Watson v Ford Motor Company, 389 S C 434, 455, 699 S E 2d 169, 150 (2010) (finding expert testimony insufficient to support a verdict where the only *reasonable* inference from all of the evidence was that plaintiff failed to prove an essential element of its case) And, as recently explained by the Court, unless there is “evidence”, direct or circumstantial, which reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced ”, it would be improper for an appellate court to find that the case was properly submitted to the jury *State v Senter*, 396 S C 547, 552, 722 S F 2d 233 236 (2011)

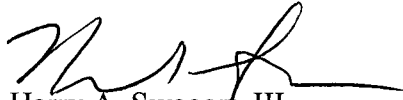
I am submitting this authority because Justice Hearn asked me at the hearing whether I had objected at trial to the admission of Respondents’ expert’s testimony¹ This question took me completely by surprise because Appellant’s appeal does not raise any rulings by the trial judge regarding the *admissibility* of any of the expert’s testimony Rather, Appellant’s argument was that the expert’s testimony was devoid of probative value, did not “fairly and logically” support the verdict, incorrectly stated the law, and, therefore, could not reasonably support the jury’s verdict *See* Reply Brief of Appellant at 2-3, 6-7, 11-12 Because the issue on a motion for JNOV is only as to the *sufficiency* of all of the evidence (to include the expert testimony) to

¹ I answered that I did not recall but believed that I had objected to portions of it After the hearing I reviewed the transcript and found one instance during which I did object Tr at p 866, lines 6 25 I objected to the expert testifying that Adams did not deviate from standard of care in any respect resulting in injury to Appellant

The Honorable Daniel E Shearhouse
May 29, 2012
Page 3

support the verdict and not to the *admissibility* of the evidence, the presence or absence of a trial objection would not appear to be relevant

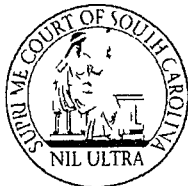
Yours truly,



Harry A Swagart, III

HASIII ssm

cc Matthew H Henrikson, Esquire (via U S Mail & Email)



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

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May 03, 2012

Harry A. Swagart, III
RFT Management Company, LLC
PO Box 7787
Columbia SC 29202-7787

Matthew Holmes Henrikson
Tinsley & Adams, LLP & Welborn D. Adams
PO Box 26554
Greenville SC 29616

Re RFT Management v. Tinsley & Adams
Appellate Case No. 2010-175606

Dear Counsel,

This case is scheduled for oral argument at 10:30 a.m. on Wednesday, May 23, 2012. The following oral argument times have been allocated:

Appellant 15 minutes

Respondent 15 minutes

Appellant in Reply 5 minutes

Very truly yours,

ADMINISTRATIVE ASSISTANT

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MAR 27 2012

S.C. SUPREME COURT

HENRIKSON LAW FIRM, L L C
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864 235 4399 (facsimile)

March 27, 2012

Via Facsimile (803-734-1499)
Honorable Daniel E Shearouse
Clerk of the Supreme Court of South Carolina
P O Box 11330
Columbia, South Carolina 29211

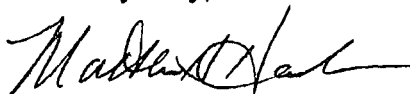
Re RFT Management Co , LLC v Tinsley & Adams, LLP
Case No 2010175606

Dear Mr Shearouse

In response to your letter of March 21, 2012, please be advised that I am available to attend oral argument in the above case on any of the days tentatively set aside by the Court (May 1, 2, 3, 22, and 23)

With kindest regards, I remain

Yours very truly,



Matthew H Henrikson

/vlm

cc Harry A Swagart, III, Esq (via e-mail)

HARRY A SWAGART III, PC
LAWYER
WWW.HARRYSWAGART.COM

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EMAIL HARRY@HARRYSWAGART.COM

March 22, 2012

VIA FAX & U S MAIL
(734-1499)

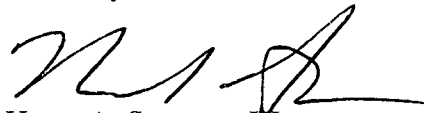
The Honorable Daniel E Shearouse
Clerk of Court
The South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re RFT Management Co , LLC v Tinsley & Adams, LLP,
Case No 2008-CP-24-01221

Dear Mr Shearouse

In compliance with your letter of March 21, 2012, please be advised that I am available to attend oral argument in the above case on any of the days tentatively set aside by the Court (May 1, 2, 3, 22, and 23), and have those days reserved on my calendar

Sincerely,



Harry A Swagart, III

HASIII ssm

cc Mr David E Roatch (via email)
Matthew H Henrikson, Esquire (via email)

RECEIVED

MAR 28 2012

S.C. SUPREME COURT



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

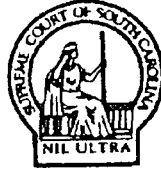
P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To Harry A. Swagart III, Esquire
From Daniel E. Shearouse
Date March 21, 2012
RE May Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the May 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of May 1, 2, 3, 22, and 23. Please notify this office in writing prior to March 28, 2012, as to any scheduling conflicts for the May term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

RFT Management v. Tinsley & Adams



The South Carolina Supreme Court

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734 1080

To Matthew H. Henrikson Esquire
From Daniel E. Shearouse
Date March 21, 2012
RE May Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules, this is to advise that the following case(s) will probably be reached for hearing at the May 2012 term of the South Carolina Supreme Court. Our records indicate that you are counsel of record in one or more of these case(s).

Court will meet the days of May 1, 2, 3, 22, and 23. Please notify this office in writing prior to March 28, 2012, as to any scheduling conflicts for the May term and any changes or additions of counsel that should be made to the record for the purpose of argument. If you do have a scheduling conflict, please advise as to the specific nature of the conflict.

RFT Management v. Tinsley & Adams

The Supreme Court of South Carolina

RFT Management Co LLC, Appellant,

v

Tinsley and Adams LLP &
Welborn D Adams,
Individually,

Respondents

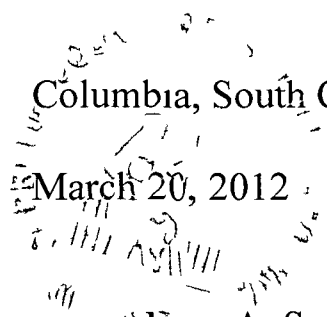
The Honorable Jeff D Griffith, Jr
Greenwood County
Trial Court Case No 2008-CP-24-01221

ORDER

Pursuant to Rule 204(b) of the South Carolina Appellate Court Rules,
this appeal is hereby certified for review by the South Carolina Supreme
Court Upon receipt of this order, the Court of Appeals is hereby directed to
forward the case file, all records and briefs and any exhibits on file to this
Court

IT IS SO ORDERED


C J
FOR THE COURT



Columbia, South Carolina

March 20, 2012

cc Harry A Swagart, III, Esquire
Matthew H Henrikson, Esquire
The Honorable Jenny Kitching

HENRIKSON LAW FIRM, L L C
ATTORNEYS AT LAW

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December 23, 2011

The Honorable Tanya Gee
Clerk of Court of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

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DEC 28 2011

SC Court of Appeals

ATTN Seth

Re RFT Management Co , LLC v Tinsley & Adams, LLP, et al
Tracking No 2010175606

Dear Ms Gee

Enclosed please find a replacement set of fifteen copies of the Final Brief of Respondent which conform to the Rules I apologize for initially submitting briefs in the incorrect form Please call if you have any questions

With kind regards, I remain

Yours very truly,



Matthew H Henrikson

/ns

cc Harry A Swagart, III, P C (via email)



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

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December 8, 2011

Matthew H Henrikson, Esquire
Henrikson Law Firm, LLC
P O Box 26554
Greenville, SC 29616

Re RFT Management v Tinsley & Adams
Case #2010175606

Dear Counsel

We have received the Final Brief of the Respondents in the above matter. Upon review, the case tracking number is on the cover of the Final Briefs. The tracking number is to be used only in correspondence with the Court and not on the cover of the Final Briefs.

Also, a red back cover was not included with the unbound original and all bound copies of the Final Brief of the Respondents in accordance with Rule 211 of the South Carolina Appellate Court Rules.

Therefore, within ten (10) days of the date of this letter, you must come to the first floor of the Edgar A Brown Building located at 1205 Pendleton Street, Columbia, to provide a red back cover and place labels on the original and all copies of the Final Brief of the Respondents. The labels must be appropriately sized and must not cover any other information than that which they are intended to correct.

Please call prior to your arrival so that the briefs can be made available without delay.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/jt
cc Harry A Swagart, III, Esquire



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

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December 8, 2011

Harry A Swagart, III, Esquire
Swagart, Walker, Martin
& Reibold, P A
P O Box 7787
Columbia, SC 29202

Re RFT Management v Tinsley & Adams
Case #**2010175606**

Dear Counsel

We have received the Record on Appeal, the Appendix to the Record on Appeal and Final Briefs for the above matter. However, the caption shown on the Record on Appeal and the Appendix to the Record on Appeal is incorrect and should be shown as follows:

RFT Management Co LLC,

Appellant,

v

Tinsley and Adams LLP & Welborn D
Adams, Individually,

Respondents

Also, the Record on Appeal, the Appendix to the Record on Appeal, the Final Brief of the Appellant, and Final Reply Brief of the Appellant all have the case tracking number of **2010175606** included on the cover and not the lower court case # of **2008-CP-24-01221**. Please be advised that the tracking number is to be used only in correspondence with the Court and not on the cover of the briefs and Record on Appeal.

Therefore, within ten (10) days of the date of this letter, you must come to the first floor of the Edgar A. Brown Building located at 1205 Pendleton Street, Columbia, and place labels on the covers of the original and all copies of the Record on Appeal, the Appendix to the Record on Appeal, the Final Brief of the Appellant and Final Reply Brief of the Appellant. The labels must

be appropriately sized and must not cover any other information that which they are intended to correct

Please call prior to your arrival so that the Record and the Final Briefs can be made available without delay

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/jt

cc Matthew H. Henrikson, Esquire

HENRIKSON LAW FIRM, L L C
ATTORNEYS AT LAW

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December 5, 2011

The Honorable Tanya Gee
Clerk of Court of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re RFT Management Co , LLC v Tinsley & Adams, LLP, et al
Case No 2010175606

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SC Court of Appeals

Dear Ms Gee

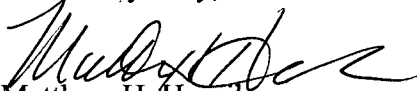
I represent the Respondents in the above-referenced matter This is to advise that I have new contact information as set forth below This appears on the Final Brief of Respondents

Matthew H Henrikson
Henrikson Law Firm, LLC
Post Office Box 26554
Greenville, South Carolina 29616
864-672-7106
864-235-4399 (fax)
mhenrikson@henriksonlaw.com

By copy of this letter via email I am advising counsel of record Please advise if I need to do anything else in order to complete this change or if a change of counsel order is necessary Thank you for your assistance

With kindest regards, I remain

Yours very truly,


Matthew H Henrikson

/ns

cc Harry A Swagart, III, Esq

HENRIKSON LAW FIRM, L L C

ATTORNEYS AT LAW

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November 17, 2011

The Honorable Tanya Gee
Clerk of Court of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re RFT Management Co , LLC v Tinsley & Adams, LLP, et al NOV 18 2011
Case No 2010175606

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SC COURT OF APPEALS

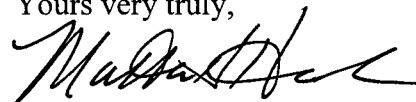
Dear Ms Gee

Enclosed please find the original unbound Final Brief of Respondents, Rule 211(b) certification, and Certificate of Service along with fourteen (14) bound copies of the same for filing with the Court in the above-referenced matter

By copy of this letter I am serving three (3) bound copies on counsel for the Appellant

With kind regards, I remain

Yours very truly,

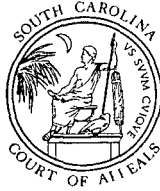


Matthew H Henrikson

/ns

Enclosures

cc Harry A Swagart, III, Esq
P O Box 7787
Greenville, SC 29202



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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October 18, 2011

Harry A. Swagart, III, Esquire
Swagart, Walker, Martin & Reibold, P.A.
P.O. Box 7787
Columbia, SC 29202

Re RFT Management v. Tinsley & Adams
2010175606

Dear Counsel,

All parties are advised that the originals of all records on appeal and final briefs filed with the appellate courts are scanned. Therefore, in accordance with the May 1, 2008 Amendments to the South Carolina Appellate Court Rules, DO NOT staple, spiral bind, velobind, or otherwise permanently bind the ORIGINALS of these documents. The original brief(s) and record on appeal should still have front and back covers in compliance with Rule 267(e) of the South Carolina Appellate Court Rules, but should not be bound. You may secure the originals with paper clips, binder clips, rubber bands, by placing them in large envelopes, or by any other similar means that will keep the pages together without binding or hole-punching. All COPIES of the record on appeal and final briefs should be bound as specified in the South Carolina Appellate Court Rules.

If you have any questions, please do not hesitate to contact this office.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ma

cc Matthew H. Henrikson, Esquire

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Eugene C Griffith, Jr , Circuit Court Judge

Case No 2010175606

RFT MANAGEMENT CO , LLC

Appellant,

v

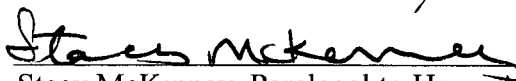
TINSLEY & ADAMS, LLP, &
WELBORN D ADAMS, INDIVIDUALLY,

Respondents

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OCT 12 2011
SC Court of Appeals

PROOF OF SERVICE

I certify that I have served the Initial Reply Brief of Appellant and Designation of Additional Matter to be Included in the Record on Appeal on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on October 12, 2011, addressed to the attorney of record, Matthew H Henrikson, Clarkson, Walsh, Terrell & Coulter, PA, at his Post Office Box 6728, Greenville, South Carolina 29606 on October 12, 2011


Stacy McKinney, Paralegal to Harry A Swagart, III
HARRY A SWAGART, III, P C
Post Office Box 7787
Columbia, South Carolina 29202-7787
Tel 803-779-0770

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Eugene C Griffith, Jr , Circuit Court Judge

Case No 2010175606

RFT MANAGEMENT CO , LLC,

Appellant,

v

TINSLEY & ADAMS, LLP, &
WELBORN D ADAMS, INDIVIDUALLY,

Respondents

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OCT 12 2011
SC COURT OF APPEALS

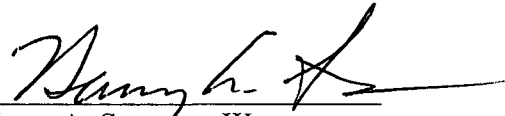
APPELLANT'S DESIGNATION OF ADDITIONAL MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Pursuant to Rule 209(a), SCACR, Appellant RFT Management Co , LLC, hereby designates the following matter for inclusion in the Record on Appeal in connection with the filing of its Reply Brief

1 Portions of the Trial Transcript

227
228
653
654
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660
668
669
873

Respectfully submitted,



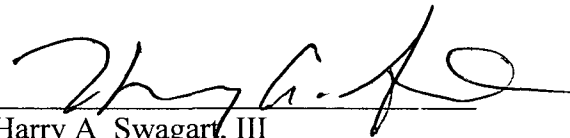
Harry A Swagart, III
HARRY A SWAGART, III, P C
Post Office Box 7787
Columbia, South Carolina 29202-7787
Tel 803-779-0770
Fax 803-779-0771
Email has@complexlaw net

Columbia, South Carolina
October 12, 2011

ATTORNEY FOR APPELLANT

CERTIFICATION

The undersigned attorney for the Appellant hereby certifies that Appellant's Designation of Additional Matter to Be Included in the Record on Appeal contains no matter which is irrelevant to the Appeal



Harry A Swagart, III

Date October 12, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Eugene C Griffith, Jr , Circuit Court Judge

Case No 2010175606

RFT MANAGEMENT CO , LLC

Appellant,

v

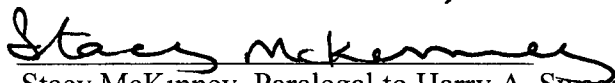
TINSLEY & ADAMS, LLP, &
WELBORN D ADAMS, INDIVIDUALLY,

Respondents

RECEIVED
OCT 12 2011
SC Court of Appeals

PROOF OF SERVICE

I certify that I have served the Initial Reply Brief of Appellant and Designation of Additional Matter to be Included in the Record on Appeal on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on October 12, 2011, addressed to the attorney of record, Matthew H Henrikson, Clarkson, Walsh, Terrell & Coulter, PA, at his Post Office Box 6728, Greenville, South Carolina 29606 on October 12, 2011


Stacy McKinney, Paralegal to Harry A Swagart, III
HARRY A SWAGART, III, P C
Post Office Box 7787
Columbia, South Carolina 29202-7787
Tel 803-779-0770

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Eugene C Griffith, Jr , Circuit Court Judge

Case No 2010175606

RFT MANAGEMENT CO , LLC,

Appellant,

v

TINSLEY & ADAMS, LLP, &
WELBORN D ADAMS, INDIVIDUALLY,

Respondents

INITIAL REPLY BRIEF OF APPELLANT

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SC Court of Appeals

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Argument and Citation of Authority

Appellant, RFT Management Co , LLC (“RFT”) hereby respectfully submits its Reply Brief in response to the Brief of Respondents, Tinsley & Adams, LLP, and Welborn D Adams (collectively referred to as “T&A” herein)

I THE TRIAL COURT ERRED IN NOT GRANTING RFT’S MOTION FOR JNOV OR FOR A NEW TRIAL ON THE CONFLICT OF INTEREST CLAIM

Based on undisputed, uncontradicted evidence in the record and upon apposite case law, RFT argued in its main Brief that T&A committed malpractice by representing RFT while subject to a conflict of interest which had not been adequately disclosed or waived RFT will explain below that there is nothing in the record or in T&A’s brief which would support a contrary conclusion

A Evidence in the Record Establishes Beyond Dispute That T&A Was Subject to a Conflict of Interest

During argument on the parties’ motions for directed verdicts on the malpractice cause of action, the trial court viewed as very critical RFT’s contention that the existence of a “conflict was not contradicted factually”¹ In fact, the court asked counsel for both parties whether the issue of the existence of a conflict of interest presented a factual question or a legal question² Attorneys for both parties responded that it presented a legal question and not a factual question³ Indeed, T&A’s counsel confirmed that he wanted the court to “rule as a matter of law whether or not a conflict existed”⁴ He thereupon admitted that “[t]here is always an inherent conflict

¹ Tr at p 901, line 8 to line 12, R at _____

² *Id* at p 898, lines 13-24, R at _____

³ *Id* at p 898, line 25 to p 899, line 2, R at _____

⁴ *Id* at p 901, line 24 to p 902, line 4, R at _____

when one lawyer represents more than one person ,” and the trial court agreed ⁵ Nonetheless, based upon some unidentified case, T&A’s attorney then reversed his position and argued that the issue was factual ⁶ T&A’s problem is that regardless of whether the issue as to the existence of a conflict of interest may in some circumstances be factual in nature, T&A admitted that the facts essential to the existence of an inherent conflict of interest (an attorney simultaneously representing two clients) were present As T&A states in its brief,

The testimony of Respondent Adams and his expert, Tighe, support the Respondents’ position that there was no conflict of interest in this transaction *other than the inherent conflict in representing a buyer and a seller*, and that conflict was addressed in the disclosure reviewed and executed by RFT

Respondents’ Brief at 17 (emphasis added) This admission is critical because it confirms the existence of the conflict of interest, with the result that if the conflict was not adequately disclosed and validly waived, T&A’s liability for malpractice would have been established without factual dispute, and the jury should have been so instructed

B T&A Did Not Adequately Disclose Its Conflict of Interest

In its main brief, RFT cited directly on-point South Carolina case law and RPC 1.7(b)(2) and Comment 16, in order to identify the legal requirements for disclosing a conflict of interest Appellant’s Brief at 15-16 T&A basically ignored this discussion, relying entirely upon the Attorney Representation Disclosure form (“ARD”)⁷ as providing the required disclosure T&A presented no legal authority of its own At the hearing on the directed verdict motion, T&A

⁵ *Id.* at p. 902, lines 12-15, R. at _____

⁶ *Id.* at p. 912, lines 1-22, R. at _____

⁷ PX 9, R. at _____

argued that in order to pass muster, the ARD need only have advised RFT that T&A was representing two parties⁸ Mr Tighe also opined that as long as a disclosure form notified the parties “that one lawyer is doing work for both sides,” nothing else was needed⁹ T&A’s argument and Mr Tighe’s opinion make no sense If the only disclosure required at a real estate closing is that both parties be informed that they are being represented by the same attorney, without more, the *McNair* and *Bankers Trust* cases and Comment [16] to RPC 1.7(b)(2) would be rendered meaningless Appellant’s Brief at 15-16 & n 31 Those authorities clearly require more in the way of disclosure Expectedly, T&A has yet to cite any authority which supports its view as to the scope of its duties in disclosing the conflict of interest

In addition, RFT also took pains to explain that, on its face, the ARD discloses nothing and that the necessary implication from the language of the document and from the fact that Mr Roatch was required to acknowledge that there was no conflict, was that T&A advised RFT that there was then no conflict Appellant’s Brief at 16 RFT chose not to respond to this contention

Finally, there is the testimony of Defendant Adams When asked whether he told Mr Roatch at the closing that T&A had a conflict of interest, he testified “I did not tell him I had a conflict of interest because I did not believe I did”¹⁰ And although Adams testified on direct that he “went over” the ARD with Mr Roatch, he recanted that testimony on cross-examination when confronted with deposition testimony in which he admitted that the ARD itself was the only communication he had had with Mr Roatch regarding conflict of interest¹¹

⁸ Tr at p 902, line 16 to p 903, line 6, R at _____

⁹ Tighe Testimony, Tr at p 845, line 24 to p 846, line 18, R at _____

¹⁰ Adams Testimony Tr at p 792, lines 17-20, R at _____

¹¹ *Id* at p 792, line 25 to p 793, line 17, R at _____

Based upon the above points, RFT respectfully submits that evidence submitted by T&A at trial was insufficient to permit a reasonable juror to conclude that T&A's admitted conflict of interest was adequately disclosed to RFT. In fact, whether the ARD, as the sole communication regarding any type of conflict, constitutes a legally adequate disclosure presents a pure question of law which the trial court should have answered in RFT's favor.

C RFT Could Not Possibly Have Waived a Conflict of Which It Was Not Aware

T&A quotes the case of *Beal v Mars Larson Ranch Corp*, 586 P 2d 1378, 1384 (Idaho 1978) for the proposition that at a real estate closing, "if the parties have already agreed to the basic terms of the agreement and the attorney acts primarily as a 'scrivener' he may normally represent both parties after obtaining their consent." Respondents' Brief at 11. T&A also states that *Beal* was relied upon by this Court in *McNair*. *Id.* at 11-12. What T&A does not disclose is that the last four words of the above quotation, "after obtaining their consent," were italicized in *McNair* for emphasis, but are not italicized in T&A's brief. See *McNair*, 330 S C at 346, 499 S E 2d at 495. The words "after obtaining their consent" were emphasized by this Court in the *McNair* opinion for the obvious purpose of stressing the importance of obtaining informed consent to the conflict of interest. Instead of quoting from the *McNair* decision containing the emphasized language, however, T&A quoted directly from the *Beal* case in which the subject words were not emphasized, and then simply mentioned that *Beal* had been relied upon by the court in *McNair*. Respondents' Brief at pp 11-12. This juxtaposition of the cases was no more than an attempt to draw the Court's attention away from the importance which our courts have placed upon obtaining informed consent to a conflict of interest, which T&A failed to do in this case.

So T&A is left with nothing but the frivolous position that by signing a form which disclosed only that T&A would represent both buyer and seller but which did not mention the term “conflict of interest” and implied that there was no conflict of interest, RFT somehow waived T&A’s conflict of interest. Additionally, Mr. Freeman testified that by signing the ARD, Mr. Roatch did not validly waive or consent to T&A’s conflict of interest.¹² There is no contrary evidence on the record. Given the undisputed facts in the record, that conclusion follows as a matter of law, even without considering Mr. Freeman’s testimony. Thus, the trial court should have directed a verdict or granted jnov in RFT’s favor based upon the conflict of interest. Alternatively, and at the very least, the trial court should have granted a new trial.

II T&A COMMITTED MALPRACTICE BY FAILING TO DISCLOSE, AND BY MISREPRESENTING, MATERIAL FACTS

In its main brief, RFT referred to numerous facts in the record of which T&A was aware at the time of the closing and which T&A either misrepresented or failed to disclose.¹³ RFT also referred to undisputed record evidence which reflected that the undisclosed and misrepresented facts were material, that they were relied upon by RFT in closing the transaction, and that, as a proximate result of the non-disclosures and misrepresented facts, RFT was damaged.¹⁴ In response, T&A did not dispute RFT’s contentions regarding materiality, reliance, and causation, and, instead, presented a number of other arguments which are not supported in the record or by applicable law. Each of those arguments is addressed below.

¹² Freeman testimony, Tr. at p. 616, lines 8-24, R. at _____

¹³ See Appellant’s Brief at pp. 19-24.

¹⁴ *Id.* at pp. 22-24.

**A The ARD Form Did Not Relieve T&A from Its Duty to Disclose
Material Facts to RFT**

Focusing on language in the ARD in which RFT acknowledges that it did not retain T&A to negotiate the terms of the contract with the seller or “to provide substantive advice about how or whether to proceed with this transaction,”¹⁵ T&A claims that RFT relieved it from any obligation to provide information relating to the transaction. In other words, T&A and Tighe did not argue that Adams did not have a duty to disclose, but that any such duty was waived in the ARD. In fact, Adams never denied that he was subject to a duty of disclosure. And as the Fourth Circuit recognized in *Schatz v. Rosenberg*, 943 F.2d 485 (1991), an attorney has a duty of full disclosure to his client, even if it requires the attorney to “tattle” on another client. *Id.* at 493 (citing *Crest Investment Trust Inc. v. Comstock*, 327 A.2d 891 (Md. App. 1974)).

More to the point, Adams admitted that there was no wording in the ARD stating that he was relieved from disclosing relevant information to Mr. Roatch.¹⁶ RFT’s expert, Mr. Freeman, testified unequivocally that T&A was subject to an absolute duty of disclosure.¹⁷ At times, T&A and its expert have unsuccessfully tried to equate “disclosing information” with “giving advice” in order to bring the failure to disclose within the coverage of the ARD’s language releasing T&A from an obligation to give advice. Mr. Freeman, however, clearly outlined the differences between the two concepts in his testimony.¹⁸ Even Mr. Tighe acknowledged that there is a

¹⁵ P X 9, R at _____

¹⁶ Adams testimony, Tr at p 795, lines 1-10, R at _____

¹⁷ Freeman testimony, Tr at p 621, line 10 to p 632, line 18, R at _____

¹⁸ *Id.*, Tr at p 622, lines 13-21, R at _____

difference¹⁹

Based upon the above uncontradicted evidence and the wording of the ARD, the only possible conclusion is that the ARD was legally ineffective to limit or to waive T&A's duty to make full disclosure to RFT of all material facts

B The Title Opinion Letter and the Deed Derivations Did Not Satisfy T&A's Disclosure Obligations

While T&A denies in its brief that it was raising as a defense an alleged failure of RFT to exercise due diligence in discovering its claims, (Respondent's Brief at 16), it then proceeds to cite certain inapposite cases *involving title disputes* for the proposition that notice of a deed and its contents constitutes notice of "whatever matters one would have learned upon the inquiry that the instrument made it one's duty to pursue" *Id* (citation omitted) While T&A's brief is far from clear on why this legal proposition was raised, RFT infers that T&A is claiming that RFT's claims are somehow barred because RFT did not follow some unidentified path of inquiry supposedly suggested by the documents²⁰ RFT's citation of the cases means nothing actually because they involve disputes between grantor and grantee and not a dispute between a party and its own attorney, and because there is no evidence in the record as to what information the documents provided notice of, as to what action T&A believes RFT should have taken in order to make inquiry, or as to what would have been learned as a result of those actions Finally, as RFT explained in its main brief, an attorney does not satisfy his professional and fiduciary duties

¹⁹ Tighe testimony, Tr at p 873, lines 8-10, R at _____

²⁰ T&A claims that Mr Roatch received copies of the closing documents on the morning prior to the closing and, then, went over these documents with the attorney hired by RFT to review the buy-back agreement RFT denies that either of these events took place, and Adams testified that he could not identify which documents Roatch received prior to the closing nor could he identify which documents were discussed with RFT's attorney Adams testimony, Tr p 788, line 3 to p 789, line 10, R at _____

of disclosure by providing a client a document full of legalize and then by gambling that the client would understand the full import of the language used Appellant's Brief at 30

C There Is No Dispute on the Record About Which Facts Were Not Disclosed or About T&A's Knowledge Thereof

In its main brief, RFT carefully chronicled through precise citations to the record each undisclosed fact in the chronological order in which it came to T&A's attention Appellant's Brief at 19-23 Having done so, RFT expected that if there were any contrary or conflicting evidence, T&A would identify such evidence and provide record citations of its own Other than citing inconsequential strongly disputed evidence regarding whether or not Mr Roatch may have been on notice that lots 28 and 31 were buy-back lots, T&A did neither Instead, T&A presented, without a single supporting reference to the record, the demonstrably erroneous and conclusory statement that "there was a disagreement among the witnesses as to what information Respondents had regarding the financial status of LGD " Respondents' Brief at 15 T&A did not identify the witnesses who had supposedly presented conflicting testimony, did not identify the supposedly conflicting testimony through citations to the record, did not explain why the testimony was conflicting, and did not relate the testimony to specific undisclosed facts The reasons why T&A elected to rely upon conclusory generalities over probative specific evidence requires no explanation

D There Is Nothing in the Record Which Prevents RFT from Arguing The Evidentiary and Legal Significance of "Flp Transactions", HUD-1's, or Deed Affidavits

(1) That T&A Had Orchestrated the Closing As an Illegal Flp Transaction Has Been a Part of this Case Since Its Inception

T&A argues that the issue of whether the closing was orchestrated as an illegal flip transaction "was never before the trial court " Respondents' Brief at 15 Contrary to this argument,

however, ¶25 of the Complaint specifically alleges the existence of

[k]nowledge by “LAW FIRM” and “ATTORNEY ADAMS” of “FLIP” transactions such as was undertaken here by “DEVELOPER” are among the most common mortgage fraud schemes and have been exposed as such²¹

Moreover, the manner and timing of the closing of this transaction has always been at the heart of this case. Thus, it is specifically alleged in great detail in the Complaint that unbeknownst to RFT, the seller (Lake Greenwood Developers) used most of the money paid by RFT for lots 28 and 31 in order to purchase those lots from their owners²². These allegations pleaded the essential elements of a “flip transaction”, defined by the Supreme Court as one “where proceeds from the second transaction are used to fund the initial transaction.” *In re Barbare*, 360 S C 560, 567-68, 602 S E 2d 382, 385-86 (2004). RFT submits that given the timing of the RFT, Robertson, and Grimshaw closings, and the false information in the HUD-1’s prepared by T&A, the transaction which was closed by T&A could only be characterized as an illegal “flip transaction” under the *In re Lathan*, *In re Barbare*, and *In re Johnson* cases cited in RFT’s brief at pp. 33-35. And as the Supreme Court noted in *In re Faysoux*, a lawyer’s “participating in a flip transaction would constitute misconduct.” 381 S C 637, 642, 675 S E 2d 428, 431 (2009).

Because of the language of the Complaint and clear case law, RFT can only assume that T&A is playing semantics with the words “flip transaction” and “illegal.” It argues apparently that if those words were not used or pled prior to trial, RFT may not rely upon the timing, arrangement, and orchestration of the closing as evidence of malpractice. The argument is frivolous. Those words are used only to describe the mechanism of the closing, flipping

²¹ Complaint at ¶25, R. at _____

²² *Id.* at ¶¶ 14-17, 30, R. at _____

property, and it is what occurred which renders T&A's conduct unethical and illegal, not the label which is used to describe the occurrence

**(2) RFT Had the Right to Rely upon the HUD-1's
and Deed Affidavits as Evidence of Malpractice**

T&A's argument that this Court should not consider the false and misleading HUD-1's and deed affidavits prepared by T&A as evidence of malpractice because they were not pled in the Complaint is based upon a misunderstanding of notice pleading requirements. The ultimate facts underlying RFT's claim are that T&A failed to disclose and misrepresented numerous material facts. The HUD-1's and affidavits were presented solely *as evidence* that certain facts had knowingly been misrepresented, or not disclosed by T&A. Even if the importance of these documents were not inferable from the allegations of the Complaint (which it clearly is), they do not constitute ultimate facts and need not have been pled. Rule 8(a) requires only "a short and plain statement of the facts showing that Plaintiff is entitled to relief." As this Court has explained

Under the rules of this state, only ultimate facts need to be pled, not all facts. At the pleadings stage, a litigant is not required to submit the evidence necessary to prove its case. "[U]nder our current pleading rules only ultimate facts are required to be stated in pleadings. Ultimate facts are those which the evidence upon trial will prove, and not the evidence which will be required to prove those facts."

Food Lion Inc. v. United Food and Comm. Workers Internat. Union, 351 S.C. 65, 79, 567 S.E.2d 251, 258 (Ct. App. 2003) (citation omitted). In any event, the HUD-1 presented to RFT by T&A was attached to the Complaint as Exhibit F and referenced therein. R. at _____

E The HUD-1's and Deed Affidavits Were False and Misleading

T&A chose not to directly contest RFT's contentions as to why the HUD-1's and deed affidavits were improper, but instead argued that the HUD-1's complied with a closing attorney's standard of care, relying totally upon Tighe's conclusory opinion, and claiming generally that they were accurate

(1) The HUD-1's Were Not Prepared in Compliance with the Standard of Care

RFT submits that the *Barbare* and *Lathan* cases refute conclusively Tighe's opinion that the preparation of HUD-1's which fail to accurately show where sale proceeds are going and fail to disclose a flip transaction complies with a closing attorney's standard of care Tighe's bald "expert" opinion that the HUD-1's complied with that standard should therefore be ignored As, the United States Supreme Court noted in affirming the trial court's granting of judgment as a matter of law following a multi-million dollar jury verdict

When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or *when indisputable record facts contradict or otherwise render the opinion unreasonable it cannot support a jury's verdict* (emphasis added)

Brooke Group Ltd v Brown & Williamson Tobacco Corp, 509 U S 209, 242 (1993), *see also*, *Price v City of Charlotte N C*, 93 F 3d 1241, 1248-49 (4th Cir 1996) (vague, conclusory opinion evidence should not be considered in determining the sufficiency of the evidence to support a verdict), *City of San Antonio v Pollock*, 284 S W 3d 809, 816 (Tex 2009), *Integra Lifesciences I Ltd v Merck K GaA*, 496 F d3d 1334, 1342 (Fed Cir 2007) ("when an expert witness's statement of the law is incorrect, that view of the law cannot be relied upon to support the verdict ") (citing *Brooke Group Ltd* 509 U S at 242) *Hynix Semiconductor Inc v Rambus*

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Inc , 2008 WL 73681 at *5 (N D Cal 2008) (“a reasonable jury cannot credit testimony that fails to reflect reality”)

Moreover, T&A’s attempt to establish the accuracy of the HUD-1’s is unavailing. It argues that the HUD-1’s were not false or misleading because it retained the proceeds of sale in its trust account for LGD’s benefit and because LGD controlled disposition of the funds. This type of argument has been flatly rejected by the Supreme Court. Thus, in *In re Johnson*, the attorney actually disbursed all of the funds directly to the developer, rather than keeping them in his trust account. This difference did not save the attorney’s license because, as the Supreme Court held, he “should have known that the short amount of time between [defendant’s] purchase and sale enabled [defendant] to fund his purchase of the property in the first transaction.” 375 S C at 503 n 2, 654 S E 2d at 274 n 2. So, too, here should T&A be charged with the same knowledge. Indeed, because of its other knowledge of LGD’s money problems, T&A knew for a fact that LGD had to use RFT’s monies to satisfy the Grimshaw and Robertson buy-backs.

T&A’s unsupported conclusion that RFT cannot establish as a matter of law that it was injured by the phony HUD-1’s can be, and is, refuted by the record in this case. First, in proving proximate cause a party need not relate specific damages to each one of numerous nondisclosures and misrepresentations. Thus, proximate causation can be shown to have resulted from the combined effect of all of those acts and omissions. At page 24 of its main brief, RFT cites testimony by Mr. Roatch to the effect that if he had had knowledge of any of the plethora of undisclosed or misrepresented facts (to include facts which would have been disclosed by an accurate HUD-1), he would not have closed the purchases of lots 28 and 31. This testimony is undisputed on the record, and, therefore, establishes reliance and proximate causation as a matter of law.

**(2) Deed Affidavits Prepared by T&A Were False and
Caused Inflation of Appraisals Submitted to RFT**

At pages 37-38 of its main brief, RFT explains that the deed affidavits for Grimshaw, Robertson, and others were demonstrably false because while they purportedly showed what was paid in money or money's worth, they reflected that amount as the list price of \$235,000 00, instead of the actual true cash consideration of \$211,500 00²³ Blithely ignoring the language of the affidavits, T&A argues that the statute, S C Code Ann § 12-24-30(A)(2000), allows fair market value to be used as a surrogate for actual cash consideration, and that Adams used fair market value T&A made no attempt to explain the difference between what Adams says he did and what actually appears on the affidavits which he prepared In other words, if Adams had actually drafted the affidavits to reflect that consideration was determined by fair market value, he would have checked the appropriate place on the form Instead, he checked "money or money's worth" In addition, Adams testified that he did not use actual fair market value as determined by an appraisal, but instead substituted the listing price as fair market value (Adams testimony, Tr at p 789, line 22 to p 790, line 15, R at ____) The "listing price" is not the measure of fair market value

With respect to the causation issue, RFT cited expert testimony establishing that falsely inflated deed affidavits result in later appraisals also being inflated RFT then explained how the earlier inflated deed affidavit for lot 26 was used as a comparable in the later appraisals for lots 28 and 31 See Appellant's Brief at 38 T&A did not contest this evidence in its brief, and the evidence remains undisputed and uncontradicted T&A did not present expert appraisal evidence of its own, most likely because it was unobtainable

²³ Grimshaw deed, PX 35, R at ____, Adair deed, PX 47, R at ____, Adair Contract, PX 46, R at ____

II RFT DID NOT CONSENT TO THE COURT'S DECISION TO NOT SUBMIT THE BREACH OF FIDUCIARY DUTY CLAIM TO THE JURY

T&A claims that RFT waived the breach of fiduciary duty claim because it did not object to the merger of the causes of action and because it did not object to the charge and verdict form which omitted breach of fiduciary duty. These purported grounds are based upon erroneous characterizations of what is in the record. During oral argument on directed verdict motions made at the close of RFT's evidence, its attorney argued to the Court that a jury could return a verdict on breach of fiduciary duty but not on malpractice, and vice versa,²⁴ because those claims are not based on all of the same legal principles.²⁵

At the close of all the evidence, the trial court denied RFT's motion for a directed verdict on the fiduciary duty cause of action.²⁶ RFT's counsel then repeated RFT's position that the jury could return a verdict on one cause of action but not the other.²⁷ T&A's counsel argued that the case of *Doe v. Howe*, 367 S.C. 432, 626 S.E.2d 25 (Ct. App. 2005), required that only the legal malpractice claim could be submitted to the jury.²⁸ At that point, the trial court commented that combining the two causes of action would simplify things for the jury.²⁹ RFT's counsel then responded that he could not "off hand" think of a circumstance which differentiated a malpractice claim from a breach of fiduciary duty claim, only to have his argument cut short

²⁴ Tr. at p. 653, line 1 to p. 654, line 14, R. at ____

²⁵ *Id.*

²⁶ *Id.* at p. 923, lines 3-5, R. at ____

²⁷ *Id.* at p. 923, lines 10-14, R. at ____

²⁸ *Id.* at p. 923, lines 15-19, R. at ____

²⁹ Tr. at p. 923, line 20 to p. 924, line 5, R. at ____

Having denied RFT's motion for a directed verdict, the trial court decided to charge only legal malpractice³⁰ At no point during the entire discussion did RFT's attorney consent to there being no charge on breach of fiduciary duty

Because the trial court had denied RFT's directed verdict motion and had definitively ruled that there would be no charge on breach of fiduciary duty, RFT had no obligation to object to the verdict form or the jury charge for excluding that which the court had already excluded *See Thomasko v Poole*, 349 S C 7, 10-11, 561 S E 2d 597, 598-99 (2002), (where there has been a denial of a directed verdict motion, there is no need to object to subsequent jury instructions in order to protect the record) T&A also argues that even if the fiduciary duty claim had not been waived, it was not error to exclude it from the jury because it was based on the same operative facts as the malpractice claim RFT has searched diligently for case law supporting the trial court's election to merge the two causes of action, and it has found none The only instance in which a court can elect not to charge a cause of action that RFT is aware of occurs where a directed verdict has been granted, which was not done in this case Thus, the merger of the causes of action was error, particularly in view of RFT's objection that both claims be submitted to the jury

Finally, in its brief, RFT discussed several reasons why the fiduciary duty claim was not necessarily factually duplicative of the malpractice claim Appellant's Brief at pp 40-41 T&A ignored that discussion and has not contradicted it in any respect

III T&A PROVIDES NO MERITORIOUS GROUNDS FOR DENYING RFT A NEW TRIAL ON THE SECURITIES LAW CLAIM

T&A asks the Court to uphold the trial court's denial of a new trial on the Fourth Cause

³⁰ Tr at p 924, line 14 to p 925, line 27, R at _____

of Action for aiding and abetting a violation of the South Carolina Uniform Securities Act. The trial court directed a verdict on that claim on the sole ground that the transaction between RFT and the seller, LGD, did not constitute a security.³¹ T&A claims that the trial court's direction of a verdict on the securities cause of action was proper because of the absence of strict vertical commonality, because T&A had, if anything, only an ethical duty to provide disclosure, and because there was no evidence that T&A had actual knowledge of securities fraud or that it rendered substantial assistance to LGD.

A T&A's Argument that There Is No Evidence Establishing Strict Vertical Commonality Is Contrary to the Record

T&A failed at the close of RFT's case³² and at the close of all the evidence³³, to make the argument that the evidence was insufficient to establish the commonality element of an investment contract. Therefore, that ground was not the basis for the trial court's decision. Notwithstanding that failure, however, T&A's argument is refuted in RFT's brief at pp. 45-47, where RFT explains that evidence on the record establishes the existence of an investment contract, even under strict vertical commonality, and that, in any event, a sale of a security through "evidences of indebtedness" was present. Appellant's Brief at 45-46. T&A did not directly address either of these arguments.

³¹ Tr. at p. 896, lines 7-17, R. at _____

³² Tr. at 659, line 8 to p. 660, line 14, p. 668, line 19 to p. 669, line 23, R. at _____

³³ Tr. at p. 884, line 20 to p. 886, line 13, R. at _____

RFT therefore submits that there was undisputed evidence on the record from which the trial court should have decided that the transaction involved the sale of a security³⁴

B There Was Sufficient Evidence from Which the Jury Could Have Concluded that T&A Aided and Abetted a Violation of the Securities Act

RFT disputes T&A's contention that there is no evidence that it aided and abetted LGD's violation of S C Code Ann §35-1-501 (Cum Supp 2010). T&A in its brief at p 22 n 8 does correctly cite *Andrews v Fitzgerald*, 823 F Supp 356 (M D N C 1993) for the proposition that in order to prove aider and abettor liability,

“Plaintiffs must establish three elements (1) a primary violation by another person, (2) the aider and abettor's knowledge of the primary violations, and (3) substantial assistance by the aider and abettor in the achievement or consummation of the primary violation.”

Id at 381 (*citing Schatz v Rosenberg*, 943 F 2d 485, 495 (4th Cir 1991), *cert denied*, 503 U S 936 (1992)). Only the last two elements are at issue in this appeal, and, as to them, there is sufficient evidence to support submitting them to the jury.

In order to show T&A's knowledge of the primary violation, it is not necessary to show *both* that T&A was aware of LGD's fraudulent course of conduct *and* that it knew that the course of conduct constituted a violation of §35-1-501. Rather,

a defendant's general awareness of its overall role in the primary violator's illegal scheme is sufficient knowledge for aiding and abetting liability. Such knowledge may be proved by and inferred from

³⁴ Both parties mistakenly agreed that the issue of whether the sale of a security was involved presented an issue of law to be decided by the court. Tr at p 893, lines 14-23, R at _____. See e.g. *State v Ribadeneira*, 817 P 2d 1105, 1110 (Ka App 1991), *Kaplan v Boston Investors Fund*, 1993 WL 818619 at *2 (Mass 1993), *Consol Mgt Gp LLC v Dept of Corp*, 75 Cal Rept 3d 795, 804 (Ct App 2008).

circumstantial evidence, including facts available to the defendant's employees "Knowledge may be shown by circumstantial evidence, or by reckless conduct, but the proof must demonstrate actual awareness of the party's role in the fraudulent scheme"

Ahmed v Poster, 2009 WL 2581615 at *20 (W D N C 2009) (*quoting K&S Partnership v Continental Bank N A*, 952 F 2d 971, 977 (8th Cir 1991)) In the following testimony, Stephen Gilbert testified about PX 20 for identification, an email which he "guessed" that he drafted and which explained LGD's 100% financing marketing scheme

Q Did you draft this email?

A I guess I don't remember drafting it I don't know who Ron Delk is

Q Do you deny drafting it?

A No

Q Okay Would you read it for the jury, please?

A "This is just a quick update to let you know we only have three lots remaining in our guaranteed return program In order to generate some immediate cash flow for cutting in the roads and the Town Center and finishing out the infrastructure on page two we're offering the following lots, lots 26 through 31, priced at 235,000 at a 10 percent discount, \$211,500 for a quick closing This comes from the fact Lake Greenwood Developers will guarantee they will purchase the lot back from you in one year if you desire for 250,000, a return of almost 20 percent *With the 10 percent discount you can get a 90 percent lot loan from the bank and not have to come out of pocket with any cash* We see this as a win, win situation because we feel the lots will appreciate more than that over the next year with this model home going on an adjacent lot and the interest we're getting in the Town Center If this

is of interest to you or someone you know please
advise Thank you I look forward to hearing from
you soon ”³⁵ (Emphasis added)

RFT also showed that T&A was aware that LGD was inflating contract prices in HUD-1's and consideration paid in deed affidavits and that the HUD-1's did not accurately show to whom the money was actually being paid It was inferable that T&A knew that the HUD-1 given to RFT was falsified in order to prevent disclosure of the details of LGD's purchases of the Grimshaw and Robertson lots Similarly, T&A was aware that the sale to RFT was structured as a flip transaction and why it was set up that way, facts that were being concealed by LGD from RFT Based on the foregoing evidence there was a clear jury issue as to whether T&A was aware of LGD's fraudulent business dealings

That LGD could not have consummated the sale to RFT without T&A's assistance is also clear First, T&A had knowledge of, and failed to disclose to RFT, numerous facts regarding the transaction, knowledge of which by RFT would unquestionably have killed the deal Second, it is inferable that Gilbert chose T&A to close the transaction for obvious reasons, that T&A chose to represent both parties even though subject to a conflict of interest, and that T&A did not advise RFT to obtain separate counsel, all because Gilbert knew he could trust T&A to protect LGD's interests and because an ethical, competent outside attorney would have exposed the fraudulent nature of the deal Third, T&A prepared the false HUD-1 which did not show money going to the Grimshaws or the Robinsons or how much money went to each Fourth, as a real estate attorney with many years of experience, Adams is chargeable with knowledge of the

³⁵ S Gilbert testimony, Tr at p 227, line 4, to p 228, line 17 Adams' secretary, Ms Lester, admitted receiving that email Tr at p 511, lines 18-23, R at ____ She also admitted that it was the type of email which she would have regularly forwarded to Mr Adams Tr at p 511, line 24, to p 512 line 3 R at ____ See also PX 63 R at ____ Adams admitted being aware of the contents of PX 63 Tr at p 817 line 18 to p 819 line 11 R at ____ In PX 63 the sales price is confirmed at \$211 500 00

Barbare and Nathan decisions and of the fact that inflated affidavits would lead to inflated appraisals and inflated property values, yet, he prepared false inflated affidavits and misleading HUD-1's on repeated occasions. Given these facts, RFT submits that it was at least a jury issue, if not an established undisputed fact, that the sale to RFT could not possibly have taken place without T&A's knowing assistance.

T&A cites *Schatz v Rosenberg*, 943 F.2d at 492, for the legally irrelevant proposition that an "ethical duty of disclosure does not create a corresponding legal duty under the federal securities laws." What T&A has failed to glean from *Schatz* was that the plaintiff in that case was not a client of the defendant attorneys. The cases reviewed by the Fourth Circuit in *Katz*, however, make clear that where, as in this case, the plaintiff is a client of the attorney who is alleged to be an aider and abettor, a fiduciary relationship exists which imposes a duty of full disclosure on the attorney under the securities laws, even if it requires the attorney to "tattle" on another client. See 943 F.2d at 493 (citing *Crest Investment Trust Inc v Comstock*, 327 A.2d 891 (Md App 1974)).

Finally, Professor Freeman did not opine on whether or not the transaction between Plaintiff and LGD was a security. Instead, he opined that it was in fact an evidence of indebtedness and an investment contract, and he recited the evidentiary facts which supported these ultimate facts. His testimony is not contradicted by other record evidence.

IV UNETHICAL REAL ESTATE CLOSINGS CAN VIOLATE THE UNFAIR TRADE PRACTICES ACT

A T&A's Conduct Did Not Constitute the Sale of Securities

T&A abruptly changes course and argues that the sale of lots 28 and 31 to RFT constituted the sale of a security, and was therefore exempt from the UTPA under S.C. Code

Ann 39-5-40(a)(1985) It ignores the fact that RFT is not asserting claims against T&A for selling securities It sued T&A because it committed malpractice while practicing law Nothing in the Uniform Securities Act purports to regulate or supervise attorneys in the provision of legal services, even if those services did aid and abet the sale of securities *by other parties* Thus, T&A cannot escape liability under the UTPA by mischaracterizing its malpractice in closing a real estate investment as a securities transaction In addition, until it is definitively decided that T&A was subject to supervision under the Securities Act and that the sale of a security was involved, dismissal of the UTPA claim would clearly be inappropriate

B Supervision by the Supreme Court Does Not Exempt the Legal Profession from the UTPA

In its main brief, RFT argued that decisions in *Taylor v Medenica*, 324 S C 200, 217, 479 S E 2d 35 (1996), and in *Camp v Springs Mtg Corp*, 307 S C 283, 285, 414 S E 2d 784 (Ct App 1991), establish that the UTPA applies to the legal profession Appellant's Brief at 42 RFT also argued that the only time court supervision could possibly exempt attorney conduct from the UTPA under S C Code Ann § 39-5-40(a)(1985) was where that conduct was specifically permitted or allowed by the Supreme Court Not the case here *Id* (citing *Dema v Tenet Physician Serv – Hilton Head Inc*, 383 S C 115, 123 n 6, 678 S E 2d 430, 434 n 6 (2009)) In its brief, T&A failed to offer any authority from any jurisdiction from which it could be concluded that the legal profession was exempt from the UTPA

C Adams Was the Primary, If Not Only, Perpetrator of the UTPA Violations

The evidence in this case establishes that Adams was directly responsible for the preparation of the phony HUD-1's and deed affidavits, for the organization and the timing of the simultaneous closings which concealed the "flip" transaction from RFT, for the many disclosures

which should have been, but were not, made, and for assisting LGD in the implementation of the plan to obtain 10% financing through the use of inflated deed affidavits and misleading HUD-1's. Abundant, uncontradicted evidence appears on the record which requires imposition of liability on Adams jointly and severally with his law firm. T&A discusses no contrary evidence in its brief. It does not offer any reason why Adams cannot be held liable personally for all damages, and it cites no case authority which supports the position that under the facts of this case, Adams cannot be held personally liable.

D The Public Interest Requirement Is Conclusively Satisfied by Undisputed Evidence

T&A argues that there is no evidence of unfair or deceptive acts or practices. RFT submits, however, that T&A's non-disclosures, falsified HUD-1's, and falsified deed affidavits constitute deceptive acts and practices as a matter of law. *See Ward v. Dick Dyer & Assoc., Inc.*, 304 S.C. 152, 158, 24-29, 403 S.E.2d 310, 313 (Ct. App. 1991) (holding a nondisclosure constituted a "deceptive act" within the meaning of the UTPA). Moreover, included within the definition of unfair acts and practices is conduct which is "unethical." *Bessinger v. Bi-Lo, Inc.*, 366 S.C. 426, 432, 622 S.E.2d 564, 567 (Ct. App. 2005) ("An act is 'unfair' when it is unethical"). As reflected by the above discussion, there is voluminous evidence of unethical conduct in this case. Indeed, the mere fact that T&A participated in the falsification of deed affidavits which are relied upon by appraisers and in setting property taxes conclusively establishes an adverse impact on the public interest.

Notwithstanding these undisputed facts and standing settled UTPA precedent on its head, T&A argues that proof that its conduct has been repeated or has the potential for repetition is not enough to establish an adverse effect upon the public interest. It could not be more wrong. The

public interest element of a UTPA claim was explained by the South Carolina Supreme Court as follows

Plaintiffs must allege and prove that the defendant's action adversely affected the public interest *Daisy Outdoor Adver Co Inc v Abbott*, 322 S C 489, 493, 473 S E 2d 47, 49 (1996) (citations omitted) *An impact on the public interest may be shown if the acts or practices have the potential for repetition* *Crary v Djebelli*, 329 S C 385, 387, 496 S E 2d 21, 23 (1998) (citation omitted) The potential for repetition may be shown in either of two ways (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence, or (2) by showing the company's procedures created a potential for repetition of the unfair and deceptive acts *Id* at 388, 496 S E 2d at 23 (citation omitted)

Singleton v Stokes Motors Inc, 358 S C 369, 379, 595 S E 2d 461, 466 (2004) (emphasis added), *see also* *Hollman v Wolfson*, 384 S C 571, 683 S E 2d 495 (2009), *Estate of Carr ex rel Bolton v Circle S Enterprises Inc*, 379 S C 31, 664 S E 2d 83 (Ct App 2008) The repetitive nature of T&A's conduct was established in this case in a number of ways

First, RFT has shown that in addition to the HUD-1 provided to it, T&A prepared false HUD-1's for the Grimshaws and the Robertsons Second, RFT showed that it was T&A's regular practice to falsely inflate actual cash consideration in deed affidavits, causing inflated appraisals and property values Third, T&A also failed to disclose material facts to the Robertsons, to include how much was actually paid for their lot and by whom

E T&A's Bizarre, Novel Collateral Estoppel Theory Is Not Properly Before the Court And, in Any Event, Makes No Sense

T&A argues that since the same acts allegedly underlie the malpractice claim upon which the jury found for T&A as underlie the UTPA claims, T&A could not possibly be liable under the UTPA This argument is based upon pure speculation that because of the jury verdict, "there

would be no factual support for a SCUTPA claim, since surely an attorney who has committed unfair and deceptive trade practices toward a client would be liable for malpractice” Respondent’s Brief at 27 Just why T&A chose to place this argument in its brief defies understanding T&A provides no authority for the contention, and does not request the Court to uphold the trial court based on the argument

Perhaps one reason for the absence of such a request is that the first time this argument has surfaced in this case was in T&A’s appellate brief, with the result that the Court could choose to ignore it *I on LLC v Town of Mount Pleasant*, 338 S C 406, 421, 526 S E 2d 716, 724 (2000) Moreover, nothing in the verdict form explains the jury’s reasoning in finding for T&A on the malpractice claim³⁶ Conceivably, the jury could have found that T&A committed all of the acts claimed to be unfair or deceptive acts and practices, but that those acts did not constitute malpractice Or, again conceivably, the jury could have credited the testimony of T&A’s malpractice expert, but not RFT’s Or, the jury could have accepted the legally erroneous testimony of T&A’s expert that the ARD satisfied its disclosure duties under an attorney’s standard of care

The point is that the jury verdict does not necessarily exclude all possibility that if submitted to them, the jury could have entered a verdict on the UTPA claim in RFT’s favor Proof of the UTPA claim did not require expert testimony, nor did it require proof of, or compliance with, an attorney’s standard of care Thus, for example, the jury could have accepted Tighe’s non-probative opinion that the HUD-1’s and deed affidavits complied with the standard of care, notwithstanding the fact that they were misleading or contained inaccurate information

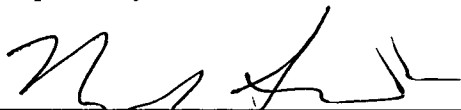
³⁶ Verdict Form, R at _____

In any event, T&A's estoppel argument not only is legally unavailable, it is based upon pure speculation about why the jury found for T&A

Conclusion

Based upon the points and authorities discussed above and in RFT's main brief, RFT submits that the trial court erred by not granting RFT's motion for judgment notwithstanding the verdict on the first cause of action for malpractice. RFT therefore requests the Court of Appeals to reverse the trial court and to remand this case with directions to enter judgment in favor of RFT on the malpractice claim. Alternatively, in the event that the Court does not reverse the trial court's denial of JNOV, RFT requests the Court to reverse the trial court's denial of RFT's motion for a new trial on the malpractice cause of action. RFT also requests the Court to reverse the trial court's denial of its motion for new trials on the breach of fiduciary duty, securities, and UTPA causes of action.

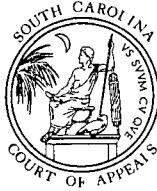
Respectfully submitted,



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Columbia, South Carolina
October 12, 2011

ATTORNEY FOR APPELLANT



The South Carolina Court of Appeals

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October 5, 2011

Harry A Swagart, III, Esquire
Swagart, Walker, Martin
& Reibold, P A
P O Box 7787
Columbia, SC 29202

Re RFT Management v Tinsley & Adams
Case #2010175606

Dear Counsel

The following Order has been endorsed on your Motion for an Extension in the above entitled case on appeal

"Granted

John Cannon Few C J
For the Court

By s/ V. Claire Allen
Deputy Clerk

October 04, 2011 "

Please be advised the Appellant's Initial Reply Brief must be served and filed by October 14, 2011

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/jt
cc Matthew H Henrikson, Esquire

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Greenwood County Court of Common Pleas
Eugene C Griffith, Jr , Circuit Court Judge

Case No 2010175606

RFT MANAGEMENT CO , LLC,

Appellant,

v

TINSLEY & ADAMS, LLP and
WELBORN D ADAMS, individually,

Respondents

RECEIVED
SEP 22 2011
SC Court of Appeals

APPELLANT'S MOTION FOR EXTENSION
OF TIME TO FILE THEIR INITIAL REPLY BRIEF

PLEASE TAKE NOTICE that, pursuant to Rule 263(b), SCACR, the Appellant RFT Management Co, LLC, by and through its undersigned counsel, and with the email consent of counsel for the Respondents, Matthew H Henrikson, Esq , hereby moves the South Carolina Court of Appeals for an Order granting an extension of time to file the Initial Reply Brief of Appellant which is due on September 26, 2011 As grounds upon which this motion is based, Counsel for the Appellant would state as follows

1 On September 14, 2011, Respondent served by regular mail its Initial Brief That brief is over twenty-seven pages long and contains numerous additional grounds for sustaining

the district court's judgment Those grounds require Appellant's counsel to conduct a further review of the extensive record in this case, to conduct further legal research, and then to respond fully to those grounds in Appellants' Initial Reply Brief

2 Up until this date, Appellant's counsel has been involved in drafting an extensive brief in the United States Fourth Circuit Court of Appeals *See Boland v Consolidated Multiple Listing Service*, Case No 11-1541 (4th Circuit) (brief filed on 9/22/11) The due date for the brief in federal court left counsel with insufficient time in which to prepare and file Appellant's Initial Reply Brief in this Court

3 Based upon the foregoing, Appellant respectfully requests the Court to extend the time for filing Appellant's Initial Reply Brief until October 14, 2011

GRANTED
JOHN C. ANGLIM, III
FOR THE COURT

By V. Claire Allen
(Clerk) (Deputy Clerk)

FILED

Clarter 10/5/11

Columbia, South Carolina
September 22, 2011

Respectfully submitted,

Harry A. Swagart, III

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ATTORNEY FOR APPELLANT

CERTIFICATION

I hereby certify that this Motion is meritorious and is not intended for delay I further certify that I have made contact with Respondents' counsel, Matthew H Henrikson, Esquire, and that he consented via email to this request for an extension of time

Harry A. Swagart, III
Harry A Swagart, III

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Greenwood County Court of Common Pleas
Eugene C Griffith, Jr , Circuit Court Judge

Case No 2010175606

RFT MANAGEMENT CO , LLC,

Appellant,

v

TINSLEY & ADAMS, LLP and
WELBORN D ADAMS, individually,

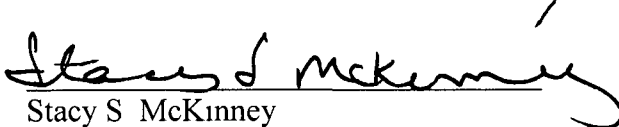
Respondents

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SEP 22 2011
SC Court of Appeals

CERTIFICATE OF SERVICE

Counsel for the Appellant, Harry A Swagart, III, hereby certifies that a copy of the Appellant's Motion for Extension of Time to File Their Initial Reply Brief and Memorandum of Law in Support of that Motion has been served on all parties of record by regular U S mail, postage prepaid, on this 22nd day of September, 2011, addressed as follows

Matthew H Henrikson, Esquire
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Post Office Box 6728
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Stacy S McKinney
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Appellant,

v

TINSLEY & ADAMS, LLP and
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Respondents

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APPELLANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION
FOR EXTENSION OF TIME IN WHICH TO FILE INITIAL REPLY BRIEF

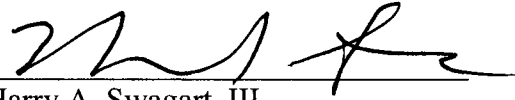
Appellant herby respectfully submits its Memorandum of Law in Support of its Motion for an Extension of Time in which to File its Initial Reply Brief

Grounds for the motion are fully stated in the motion itself Because of an earlier deadline for filing a brief in federal court and because Respondent's have raised numerous additional grounds for sustaining the trial court's judgment, Appellant is unable to prepare and serve its reply brief by the September 26, 2011, deadline

Rule 263(b), SCACR, provides that "[t]he time prescribed for performing any act may be extended or shortened by the Appellant court, or by any judge or justice thereof"

Based upon the foregoing, Appellant submits that good cause exists for granting an extension until October 14, 2011, in which to file its Initial Reply Brief

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'H. A. Swagart, III', written over a horizontal line.

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Columbia, South Carolina
September 22, 2011

ATTORNEY FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Greenwood County Court of Common Pleas
Eugene C Griffith, Jr , Circuit Court Judge

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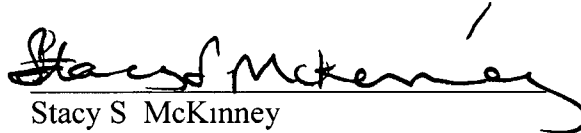
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SC Court of Appeals

CERTIFICATE OF SERVICE

Counsel for the Appellant, Harry A Swagart, III, hereby certifies that a copy of the Appellant's Motion for Extension of Time to File Their Initial Reply Brief and Memorandum of Law in Support of that Motion has been served on all parties of record by regular U S mail, postage prepaid, on this 22nd day of September, 2011, addressed as follows

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VIA HAND DELIVERY

RECEIVED
SEP 22 2011
SC Court of Appeals

September 22, 2011

The Honorable Tanya Gee
Clerk of Court of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

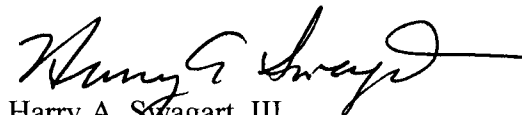
Re RFT Management Co v Tinsley & Adams, LLP, et al
Case No 2010175606

Dear Ms Gee

Enclosed please find the original and six (6) copies of the Appellant's Motion for Extension of Time to File Its Initial Reply Brief, Memorandum in support thereof, and Proof of Service of same. We have also enclosed our firm's check in the amount of \$25.00 representing the filing fee for this motion.

Thank you for your assistance in this matter. Should you have any questions or concerns regarding the contents of this letter or the enclosed documents, please feel free to contact me.

Sincerely,


Harry A Swagart, III

HASIII:ssm
Enclosure

cc Matthew H. Henrikson, Esquire (via email & U.S. Mail)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Greenwood County Court of Common Pleas
Eugene C Griffith, Jr , Circuit Court Judge

Case No 2010175606

RECEIVED

SEP 15 2011

SC Court of Appeals

RFT MANAGEMENT CO , LLC,

Appellant,

v

TINSLEY & ADAMS, LLP and
WELBORN D ADAMS, individually,

Respondents

RESPONDENTS' DESIGNATION OF MATTERS
TO BE INCLUDED IN THE RECORD IN THE RECORD ON APPEAL

The Respondents, Tinsley & Adams, LLP and Welborn D Adams, individually, pursuant to SCACR 209, hereby designate the following matters for inclusion in the Record on Appeal

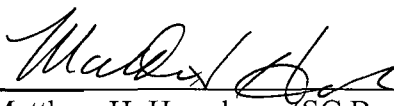
- 1 Pleadings
 - A Verdict Form
 - B Defendant's Memorandum in Opposition to Plaintiff's Post-Trial Motions (dated August 3, 2010)
- 2 Trial Exhibits
 - A Defendants' Exhibit #2
 - B Defendants' Exhibit #3
- 3 The following pages of the trial transcript

146-195
207-216
218-222
236-237
259
261-262
265-266
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845-850

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876
882-887
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896
922-925
1043-1046
1057-1065
1074-1086

I certify that this designation contains no matter which is irrelevant to this appeal

September 14, 2011



Matthew H Henrikson (SC Bar #07897)
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Attorneys for Respondents

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Greenwood County Court of Common Pleas
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RFT MANAGEMENT CO , LLC,

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v

TINSLEY & ADAMS, LLP and
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Respondents

SC Court of Appeals

CERTIFICATE OF SERVICE

Counsel for the Respondents, Matthew H Henrikson, hereby certifies that a copy of the Respondents' Designation of Matters to be Included in the Record on Appeal has been served on all parties of record by regular U S mail, postage prepaid, on this 14th day of September, 2011, addressed as follows

Harry A Swagart, III
Harry A Swagart, III, P C
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Greenwood County Court of Common Pleas
Eugene C Griffith, Jr , Circuit Court Judge

Case No 2010175606

RFT MANAGEMENT CO , LLC,

Appellant,

v

TINSLEY & ADAMS, LLP and
WELBORN D ADAMS, individually,

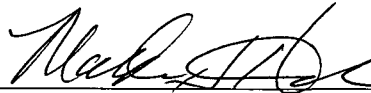
Respondents

RECEIVED
SEP 15 2011
SC Court of Appeals

CERTIFICATE OF SERVICE

Counsel for the Respondents, Matthew H Henrikson, hereby certifies that a copy of the Brief of Respondents has been served on all parties of record by regular U S mail, postage prepaid, on this 14th day of September, 2011, addressed as follows

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ATTORNEYS AT LAW

Matthew H Henrikson

September 14, 2011

The Honorable Tanya Gee
Clerk of Court of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RECEIVED

SEP 15 2011

SC Court of Appeals

Re RFT Management Co , LLC v Tinsley & Adams, LLP, et al
Case No 2010175606

Dear Ms Gee

Enclosed please find Respondent's Designation of Matters to be Included in Record on Appeal, Brief of Respondent, and Certificates of Service in the above-referenced matter

With kind regards, I remain

Yours very truly,

Matthew H Henrikson

Matthew H Henrikson

/vjk

cc Harry A Swagart, III, P C (w/enclosure)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Eugene C Griffith, Jr , Circuit Court Judge

Case No 2010175606

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SEP 15 2011

SC Court of Appeals

RFT MANAGEMENT CO , LLC,

Appellant,

v

TINSLEY & ADAMS, LLP and
WELBORN D ADAMS, individually,

Respondents

INITIAL BRIEF OF RESPONDENT

Dated September 14, 2011



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STATEMENT OF ISSUES ON APPEAL

1 DID THE TRIAL COURT CORRECTLY SUBMIT THE APPELLANT'S CLAIM FOR LEGAL MALPRACTICE TO THE JURY?

2 DID THE APPELLANT'S FAILURE TO OBJECT TO THE COURT INCORPORATING ITS CLAIM FOR BREACH OF FIDUCIARY DUTY INTO ITS CLAIM FOR LEGAL MALPRACTICE BAR CONSIDERATION BY THIS COURT OF THE ISSUE ON APPEAL?

3 DID THE TRIAL COURT CORRECTLY DIRECT A VERDICT AGAINST THE APPELLANT ON ALL CLAIMS UNDER THE SOUTH CAROLINA UNIFORM SECURITIES ACT?

4 DID THE TRIAL COURT CORRECTLY DIRECT A VERDICT AGAINST THE APPELLANT ON ALL CLAIMS UNDER THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT?

STATEMENT OF THE CASE

On October 20, 2008, RFT Management Co , LLC ("RFT") brought this suit against Welborn D Adams and his firm Tinsley & Adams, LLP("the firm") alleging legal malpractice, breach of fiduciary duty, violation of state securities law and violation of the Unfair Trade Practices Act. The case was tried before the Hon Eugene Griffith in the Court of Common Pleas for Greenwood County from June 28 until July 2, 2010. At the conclusion of the Respondents' case, the Respondents moved for a directed verdict on all claims and alternatively argued that any claim for breach of fiduciary duty should be submitted to the jury as part of the malpractice claim. The court denied the Respondents' motions for directed verdict as to the malpractice claim and the breach of fiduciary duty claim, ruled that the breach of fiduciary duty claim would be submitted to the jury as part of the malpractice claim and granted the Respondents' motions for directed verdict as to the Appellant's claims for violations of the South Carolina Uniform Securities Act and

the South Carolina Unfair Trade Practices Act. The jury returned a verdict in favor of the Respondents on the Appellant's claim for malpractice.

The court allowed the Appellant 30 days to file his post trial motions. The Plaintiff filed motions for Judgment Not Withstanding the Verdict and New Trial on July 15, 2010. The court issued its order denying those motions October 6, 2010. The Appellant filed his notice of intent to appeal on October 22, 2006.

FACTS

On September 25, 2007, David Roatch principal of Appellant RFT Management Co., LLC ("RFT") agreed to purchase lots 28 and 31 in the Planters Row subdivision on Lake Greenwood from the developer Lake Greenwood Developers ("LGD") (Tr. Ex. 5 and 6). At the time of the agreement to sell, LGD did not own either lot. LGD had previously sold lot 28 to the Grimshaws and lot 31 to the Robertsons with a side agreement to buy back the lots at the expiration of a certain time at the option of the purchaser (Tr. p. 412-413, 416-418 ex. 36, 37, 43, 44). Both the Robertsons and Grimshaws had notified LGD that they wished to exercise the buy back options and sell the lots to LGD prior to LGD's agreement to sell the lots to RFT (Tr. P. 688). RFT was also given a similar option to sell the lots back to LGD after the expirations of two years for a higher price than the purchase paid (Tr. Ex. 7). This agreement was negotiated between RFT and LGD and sent to RFT's attorney Joe Maddox for review (Tr. p. 484). The buy-backs were to have returned in twenty-four (24) months, a staggering nearly thirty percent (30%) on the purchase price (Tr. p. 213), a giddy prospect that would become the shining star that guided Roatch and RFT through all of the decisions made and risks taken in the purchase of this property.

RFT retained Maddox, an attorney in Spartanburg, to advise it regarding the purchase of the lots and the buy-back agreement (Tr p 176) At the suggestion of attorney Maddox, RFT requested that LGD give it a second mortgage on the remaining lots in the Planter's Row to insure payment in the event RFT exercised its rights under the buyback LGD agreed to these terms (Tr p 179)

RFT retained Welborn D Adams of the firm of Tinsley and Adams, Respondents, to serve as closing attorneys for the purchase of the two lots by RFT from LGD Adams is a 1992 graduate of the University of South Carolina Law School and has practiced in the field of real estate since he graduated from law school He is currently a partner in the firm of Tinsley & Adams, LLP (Tr p 729, 730)

While Adams had closed other sales in Planter's Row, his only representation of LGD other than those closings had been to prepare the documents establishing the Homeowner's Association for Planter's Row (Tr p 752) and a one-time revision of LGD's operating agreement (Tr p 752) The Respondents did not at any time serve as corporate counsel for LGD (Tr p 443, 468) The Respondents were not privy to financial information regarding LGD (Tr p 483)

At the request of RFT, Adams negotiated the subordination of LGD's mortgage with the first mortgagee (Tr p 757) and prepared the subordination agreement (Tr p 758, Tr Ex 8) Adams did not prepare the buyback agreement between LGD and RFT¹ (Tr p 766) The closing took place on October 30, 2007

¹ At the closing, RFT and LGD made changes to the buy-back agreement Adams was not part of those negotiations and made no revisions to that agreement on behalf of either party (Tr p 482, 742)

Adams served as attorney for the seller, LGD, and purchaser, RFT, during the closing. As part of the closing Adams required the LGD and RFT to sign an attorney representation and disclosure form disclosing his representation of both parties (Trial exhibit 9). The attorney representation and disclosure form used by Adams was one he had received as part of a real estate continuing legal education seminar put on by the South Carolina Bar (Tr p 738). This disclosure was signed by RFT and LGD prior to closing and stated as follows:

The undersigned Purchaser and Seller acknowledge that Tinsley & Adams, LLP, is acting as attorney for both parties, the Lender, if any, and as agent for the Title Insurer relative to the Sale and Purchase of the real property along with all improvements thereon located at Lots 28 and 31, Planters Row at Palmetto Crossing.

The undersigned acknowledge that they have not retained the Law Firm to negotiate the terms of the contract nor are they relying on the Law Firm to provide substantive advice about how or whether to proceed with this transaction. Rather, the undersigned acknowledge that the Law Firm has been retained to close the transaction, prepare a Deed of Conveyance and perform the ministerial act associated with real estate closings.

* * * *

If we prepare the Deed for the Seller at Seller's expense, we will consider ourselves as also representing the Seller to that extent.

Therefore, should a controversy arise between the Buyer and the Lender, the Title Insurance Company and/or the Seller, during or after the closing we well (sic) be precluded from representing the Buyer, Seller, Lender or Title Insurance Company in that controversy unless the Buyer, Lender, Title Insurance Company or the Seller as appropriate consent to our representation.

The Purchaser and Seller consent to said Attorney representing both parties, the Lender and the Title Insurer in this matter. The undersigned understand that they have the right to seek independent counsel in this transaction and that TINSLEY & ADAMS, L L P, will withdraw from representing both the Seller and Purchaser if any actual conflict arises between the parties. The parties hereby acknowledge there is no conflict and agree to inform the Attorneys should any conflict arise (Emphasis in the original).

The HUD-1 settlement statement from the closing indicates that RFT paid the firm of Tinsley & Adams, LLP \$275 in attorney's fees for the closing and LGD paid the firm \$150 for document preparation. Adams reviewed the disclosure with RFT prior to closing (Tr p 747). Mr. Roatch, RFT's representative, had no questions about the disclosure, nor did he request separate counsel (Tr p 747). Both Mr. Roatch on behalf of RFT, and William Gilbert on behalf of the seller LGD, signed the disclosure.

Adams also prepared a title opinion letter regarding the two lots RFT purchased (Trial Exhibit 11). This title opinion letter sets forth the requirements LGD had to meet to convey marketable title as well as potential exceptions to the title opinion. With regard to the requirements LGD must meet, the letter noted that LGD did not own the properties for sale and would have to purchase them from the individuals stated to convey good title to RFT.

- (1) Proper execution and recordation of a good and sufficient general warranty Deed from Douglas W. Robertson vesting fee simple title to the Lot 31 in Lake Greenwood Developers, LLC.
- (2) Proper execution and recordation of a good and sufficient general warranty Deed from Christopher W. Grimshaw and Susan M. Grimshaw vesting fee simple title to Lot 28 in Lake Greenwood Developers, LLC.

RFT was provided with copies of the closing documents prior to the closing to review with its attorney Joe Maddox. RFT informed Adams that he reviewed the attorney disclosure document and title letter with his Spartanburg attorney prior to closing (Tr p 748, 759). Adams' representation of LGD at the closing was limited to preparation of the Deeds of Sale (Tr p 745). Both deeds include in the derivation clause that the lots were those purchased back from the Robertsons and Grimshaws with the date

of LGD's repurchase represented on each deed (Tr pp 755, 756 and Trial exhibit 12) RFT was given written documentation prior to closing via the title opinion letter and deed that the lots it was purchasing were lots purchased by LGD from Robertson and Grimshaw and the date LGD purchased those lots

Although some other lot purchasers in Planter's Row received developer discounts, RFT did not receive a discount on its purchase price (Tr P 773) The affidavit of true consideration represented the purchase price of the properties

The HUD-1 prepared by Adams at the closing reflects the sale of both lots 31 and 28, showing a combined amount due from RFT of \$570,000 (Trial ex 11) The HUD-1 indicates that after deductions for commissions and taxes, \$547,530¹¹ was the amount of cash available to LGD as seller The funds were paid by RFT into Tinsley and Adams trust account (Tr P 777) At the request of LGD, the money owed them from the sale was not paid to them directly, but instead was used to pay Robertson and Grimshaw for the purchase of their lots by LGD, with the remainder paid to LGD directly (Tr P 777)

At trial the Defendants called attorney Michael Tighe as an expert witness in the field of the practice of real estate closing and title law Mr Tighe testified that the attorney representation form and disclosure used by Adams in this closing met the standard of care for a real estate closing attorney to accomplish communicating potential conflicts and what would happen in the event of a conflict (Tr p 846) Mr Tighe opined that the attorney representation form and disclosure used by Adams effectively limited the scope of Adams' representation of RFT to preparing and reviewing the loan documents, issuing a title opinion, ordering a survey if required, and making sure Adams

complied with disbursement instructions, concluding that the form effectively limited Adams' responsibility to giving RFT good title (Tr p 847)

Tighe also testified that the title opinion letter provided by Adams met the standard of care in communicating what needed to be done for good and marketable title to be delivered to RFT (Tr P 849-850) After a review of all the closing documents, Tighe concluded that Adams had no conflict of any kind in the RFT closing Tighe testified that the HUD-1 and the affidavit of true consideration were prepared in accordance with the standard of care

LEGAL STANDARDS

Directed Verdict and JNOV

A reviewing court will uphold a trial court's denial of a directed verdict motion if supported by any evidence Moore v Moore, 360 S C 241, 599 S E 2d 467 (Ct App 2004) When reviewing the denial of a motion for directed verdict or judgment notwithstanding the verdict, the appellate court applies the same standard as the trial court Elam v S C Dep't of Transp 361 S C 9, 27-28, 602 S E 2d 772, 782 (2004) The court must view the evidence and inferences that reasonably can be drawn there from in the light most favorable to the nonmoving party Sabb v S C State Univ 350 S C 416, 427, 567 S E 2d 231, 236 (2002) The appellate court will only reverse the trial court's ruling when there is no evidence to support the ruling or when the ruling is controlled by an error of law Steinke v S C Dep't of Labor, Licensing & Regulation, 336 S C 373, 386, 520 S E 2d 142, 148 (1999), Manios v Nelson, Mullins, Riley & Scarborough, LLP, 389 S C 126, 697 S E 2d 644 (Ct App 2010)

If the evidence as a whole is susceptible to only one reasonable inference, no jury issue is created” and a directed verdict motion is properly granted Bloom v. Ravoira, 339 S C 417, 422, 529 S E 2d 710, 713 (2000) A directed verdict is warranted when the case presents only questions of law and should be allowed only if the evidence would not be legally sufficient to sustain a verdict for the opposite party McEntire v. Mooregard Exterminating Servs Inc., 353 S C 629, 578 S E 2d 746 (Ct App 2003), Estate of Haley ex rel Haley v Brown, 370 S C 240, 252-253, 634 S E 2d 62, 69 (Ct App 2006)

New Trial

Upon review, a trial judge's order granting or denying a new trial will be upheld unless the order is “wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law ” South Carolina State Highway Dep't v Clarkson, 267 S C 121, 226 S E 2d 696 (1976), Norton v Norfolk Southern Ry Co., 350 S C 473, 478, 567 S E 2d 851, 854 (2002) In South Carolina, a trial judge may grant a new trial following a jury verdict under the “Thirteenth Juror” doctrine, which entitles the judge to sit, in essence, as the thirteenth juror when he finds the evidence does not justify the verdict, and then to grant a new trial based solely upon the facts Lane v Gilbert Const Co., Ltd., 383 S C 590, 681 S E 2d 879 (2009) The court possesses broad, inherent authority to grant a new trial for any prejudicial errors committed during the trial as a matter of fundamental fairness See Howard v State Farm Mut Auto Ins Co., 316 S C 445, 449, 450 S E 2d 582, 584-85 (1994) (holding the court may order a new trial based upon the erroneous admission of testimony when the record shows error and prejudice) Ex parte Kent, 379 S C 633, 640-641, 666 S E 2d 921, 925 (Ct App 2008)

ARGUMENTS

I THE TRIAL COURT DID NOT ERR IN PRESENTING THE APPELLANT'S CLAIM FOR LEGAL MALPRACTICE TO THE JURY

In an action for legal malpractice, the claimant must prove four elements (1) the existence of an attorney-client relationship, (2) breach of a duty by the attorney, (3) damage to the client, and (4) proximate causation of the client's damages by the breach Smith v Haynsworth, Marion, McKay & Guerard, 322 S C 433, 435 n 2, 472 S E 2d 612, 613 n 2 (1996), Manios v Nelson, Mullins, Riley & Scarborough, LLP, 389 S C 126, 697 S E 2d 644 (Ct App 2010) Plaintiff introduced the testimony of its expert John P Freeman² in support of its claim that Defendant Adams had breached the requisite standard of care Defendants countered with their own expert, attorney Michael Tighe, who has practiced as both a closing attorney and a trial attorney litigating real estate matter for clients for over 30 years Mr Tighe testified that plaintiff Adams had not violated the standard of care in his representation of RFT warranting submission of the issues of legal malpractice to the jury

A similar case with differing experts was before the court in Manios v Nelson, Mullins, Riley & Scarborough, LLP, 389 S C 126, 697 S E 2d 644 (Ct App 2010) During the Manios trial, each side presented expert testimony substantiating their position The appellate court held in light of the conflicting expert testimony, the trial court did not err in denying Plaintiff's motion for directed verdict on the legal malpractice claim

² Despite a distinguished career as a law school professor, Freeman admitted that he had never been retained to close a real estate transaction for a client (Tr P 593-594)

Appellant, in support of his position, points to the testimony of his expert John Freeman that Adams violated various rules of professional conduct in with regard to his dual representation of the buyer and seller in the real estate closing in issue. Failure to comply with the Rules of Professional Conduct is not negligence per se, but merely one circumstance that may be considered along with other facts and circumstances in determining whether an attorney acted with reasonable care. Smith v Haynsworth, Marion, McKay & Guerard, 322 S C 433, 472 S E 2d 612, 613 (1996). Respondent Adams and Respondents' expert, Tighe, disputed Mr. Freeman's conclusions, however, even if uncontroverted, any violation of the rules of Professional Conduct would be but one piece of evidence to be considered by the jury, not a basis for directed verdict or judgment notwithstanding the verdict.

Furthermore, Appellant's argument ignores the evidence from which the jury could infer that the scope of Respondent Adams' representation was limited to the closing of the real estate transaction. Roatch, RFT's representative, testified that he retained a separate attorney in Spartanburg to advise him regarding his purchase of the lots subject to this action. With regard to Mr. Adams and his firm, the attorney representation agreement signed by Mr. Roatch states as follows:

The undersigned acknowledge that they have not retained the Law Firm to negotiate the terms of their contract nor are they relying on the Law Firm to provide substantive advice about how or whether to proceed with this transaction. Rather, the undersigned acknowledge that the law Firm has been retained to close the transaction, prepare a Deed of Conveyance and perform the ministerial act associated with real estate closings (Trial Ex 9).

While Appellant appears to argue that Adams was Appellant's attorney for all matters existing in Heaven and Earth, the agreement in evidence specifically limits the

representation to the real estate closing Appellant's expert's testimony³ regarding non-waivable conflicts was offered in the context that Adams was negotiating the transaction between LGD and RFT The disclosure agreement, combined with RFT's testimony that it retained separate counsel to review the terms of the business arrangement between RFT and Lake Greenwood Properties, constitutes evidence from which a jury could infer that Plaintiff knowingly agreed to limit the scope of Mr Adams' representation to matters solely connected to transferring of record title to the lots to Plaintiff such that Mr Adams was merely the closing attorney³

Appellant argues that the form its representative executed was ineffective because the conflicts presented were non-waivable While a portion of the representation agreement contains an informed consent waiver, the agreement also limits the scope of representation Clearly an attorney can represent a buyer and seller in a closing In light of the testimony that Respondent's representation of both parties was limited to conveying marketable title, any conflict was waivable Appellant presented no testimony creating any issue of fact as to the validity of this portion of the agreement Appellant reviewed the agreement with Respondent Adams prior to closing and had no questions for Adams about the agreement (Tr p 747)

"While in many situations an attorney's representation of both a buyer and seller in a real estate transaction may create a conflict of interest, if the parties have already agreed on the basic terms of the agreement and the attorney acts primarily as a 'scrivener' he may normally represent both parties after obtaining their consent" Beal v Mars Larsen Ranch Corp., 99 Idaho 662, 586 P 2d 1378, 1384 (1978) (emphasis added), relied

³ It is undisputed that the closing was done properly and title legally transferred to the plaintiff

upon by the court in McNair v Rainsford, 330 S C 332, 346, 499 S E 2d 488, 495 (Ct App 1998) There is ample evidence from which a jury could infer that Respondents' representation was limited to closing the transaction and transferring marketable title and their representation as such was done properly

Appellant's reliance on State v Buyers Service Co., Inc 292 S C 426, 357 S E 2d 15 (1987) to support its position that a conflict existed in this transaction is misplaced That case addresses the unauthorized practice of law by a title company not the issue in this case Appellant now attempts to argue for the first time that there were errors in the title opinion letter Appellant also attempts to argue for the first time that the buy-back agreement he negotiated with LGD under the advice of his Spartanburg counsel constitutes a cloud on his title "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review " Wilder Corp v Wilke, 330 S C 71, 76, 497 S E 2d 731, 733 (1998) Appellant argues that Respondents failed to disclose material information This argument is based on Appellant's conjecture that Respondent's knew that LGD was in financial trouble Appellant's argument ignores that the Respondents deny any such knowledge and that Appellant has no evidence beyond speculation of any such knowledge Also, Appellant's unfounded arguments in this regard proceed from the faulty premise that LGD was insolvent and that Respondents *must* have somehow had that knowledge What knowledge Respondents did have in this regard was that four months prior to the RFT closing, LGD closed a loan for \$1 75 million dollars to refinance an existing loan and to continue construction of the development's amenities (a fact known to Appellant prior to the closing (Tr p 162)) and that LGD had approximately

that same amount in unencumbered lot inventory Like any land developer, there was always more dirt than cash

The issues Appellant argues regarding the HUD-1 and affidavits of true consideration were not pled as the basis of any cause of action in Appellant's complaint Appellant did not move to amend his complaint with this regard, nor was leave of court granted to allow amendment Even if these issues were properly before the jury, there would be an issue of material fact as to whether Respondents breached any duty to Appellant, or if any duty was breached whether that breach proximately caused injury to the Plaintiff The evidence produced by the Respondents was that the HUD-1s were in fact accurate, reflecting payment of the money to the seller LGD which occurred when the funds were deposited in Respondents' escrow account and could not be moved by Respondents without direction by the seller, whose money the funds became immediately upon deposit⁴ While Appellant argues this establishes a violation of the standard of care, it cannot establish as a matter of law that the violation of the specific standard he alleges proximately caused his damages

Appellant received no discounts with regard to the lots he purchased The affidavit of true consideration generated in his closing reflects the purchase price he paid Appellant complains about affidavits of true consideration that Respondents drafted for persons not party to this litigation "Generally, 'an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client '" Pye v Estate of Fox, 369 S C 555, 564,

⁴ While Appellant cites to a footnote in In re Johnson, 375 S C 499, 654 S D 2d 272 (2007) in support of its position that the HUD-1 was not prepared correctly, the court in Johnson does not conclude that to be an ethical violation

633 S E 2d 505, 509 (2006) (quoting Gaar v N Myrtle Beach Realty Co , Inc 287 S C 525, 528, 339 S E 2d 887, 889 (Ct App 1986)) Argoe v Three Rivers Behavioral Center and Psychiatric Solutions, 388 S C 394, 400, 697 S E 2d 551, 554 (2010) See also, Rydde v Morris, 381 S C 643, 675 S E 2d 431 (2009) (Decedent's attorney, who failed to execute certain requested estate plan documents, did not have a duty to prospective beneficiaries of decedent's nonexistent will)

Appellant never testified that he reviewed affidavits prepared in other transactions Appellant introduced no testimony indicating that those affidavits had any impact on the appraised prices of his lots Appellant completely ignores the testimony at trial that the affidavits of true consideration reflected fair market value of the properties (there was uncontroverted testimony that fair market value could in any given instance be higher than the actual amount paid for the property) as allowed by the statute specifically providing that when determining what amount to include on the Affidavit, "Taxpayers may elect to use the fair market value of the realty being transferred in determining fair market value of the consideration under this section S C Code Ann 12-24-30(A) and (C)

In his post-trial motions, Appellant argues for the first time that the transactions were illegal flip transactions⁵ Our courts have defined an illegal flip transaction as follows

⁵ Appellant's reliance on In Re Barbare, 360 S C 560, 602 S E 2d 382 (2004) is in error While one of the complaints regarding Barbare involved a "flip transaction," it was not the "flip transaction" that was unethical, but Barbare's misrepresentations to the lenders on the HUD-1s as to who was paying for the property being sold The HUD-1s prepared by Barbare misrepresented to the lenders what portion of the purchase was being paid by the purchaser

In an illegal property flip, the seller enters into a sales contract with Buyer A. Prior to the commencement of that sale, Buyer A enters into a contract to sell the same property at a higher price to Buyer B. Buyer B uses this contract to obtain financing. Buyer A obtains no financing. The conveyances are then made concurrently, with Buyer A using the loan proceeds obtained by Buyer B to purchase the property from Seller. The flip transaction is illegal when the information to the lender, including the information stated on the HUD-1 settlement statement, fails to disclose that the property is being conveyed in two transactions. Often documents have to be pre-dated or post-dated to mislead the lender. Title commitments, seller's affidavits or confirmations, and closing attorney certifications must contain false information. Often, neither Seller nor Buyer B is aware of the other's involvement. In those cases, Buyer A retains the excess loan proceeds. Buyer B then has a loan on the property that far exceeds the property value. In other cases, Buyer B is in collusion with Buyer A and they share the excess loan proceeds and leave the lender with property insufficient to cover its loan.

In re Brown, 361 S. Ct. 347, 605 S. E. 2d 509 (2004)

Nothing in this transaction remotely resembles an illegal flip transaction. Appellant's expert did not testify that the transaction in issue was an illegal flip transaction. There is no testimony in the record supporting the Appellant's position in this regard. Furthermore, the issue, like so many others now argued by Appellant, was never before the trial court.

Appellant argues that Respondents committed malpractice as a matter of law by failing to disclose material information to RFT. In the instant case, there was a disagreement among the witnesses as to what information Respondents had regarding the financial status of LGD, even if Respondents were obligated to disclose such information. All of the issues raised by the Appellant regarding the malpractice issue are factual and were properly resolved by the jury. Appellant's reliance upon the argument that Mr. Roatch was unaware that LGD was purchasing Lots 28 and 31 immediately prior to closing is misplaced. The facts viewed in a light most favorable to the Respondents

indicate that RFT was presented with a title opinion letter prior to closing, reviewed with its Spartanburg attorney which clearly stated LGD had to acquire the lots as a prerequisite to conveying good title. The derivation clauses of the deeds include the dates LGD acquired those lots, with one deed indicating LGD acquired the lot the day of the closing. Appellant's own expert testified that the information given to Roatch prior to closing was sufficient put him on notice the lots in question were repurchased prior to sale (Tr p 644). Elaine Lester gave a copy of the deeds from LGD to RFT to Jan Bradshaw, RFT's real estate agent and witnessed Adams discussing the deeds, mortgage and title opinion letter with Roatch at the closing (Tr P 533-534). Moreover, Jan Bradshaw testified that she had a conversation with Roatch at the property site wherein she advised him that each lot was being repurchased by LGD on existing buy-back agreements which was why those two lots were available (Tr p 687 - 688), and further that she gave a package of the closing documents including the deeds to Roatch the morning of the closing (Tr p 693-697). As the jury concluded, RFT had ample notice and knowledge of the fact that the lots that he was purchasing were subject to being bought back by LGD prior to his being able to purchase them.

Contrary to Appellant's assertions, Respondents have not presented a "due diligence defense." However, the law is clear that notice of a deed is notice of its entire contents and whatever matters one would have learned upon the inquiry that the instrument made it one's duty to pursue. Binkley v Rabon Creek Watershed Conservation Dist 348 S C 58, 71 558 S E 2d 902 909 (Ct App 2001). The law imputes to a purchaser of real property notice of the recitals contained in the written instruments forming the purchaser's chain of title and charges him with the duty of making such reasonable

inquiry and investigation as is suggested by the recitals and references therein contained McDonald v Welborn, 220 S C 10, 16, 66 S E 2d 327, 330 (1951), LoPresti v Burry, 364 S C 271, 276, 612 S E 2d 730, 732-33 (Ct App 2005), see also S Ry , Carolina Div v Howell, 79 S C 281, 286, 60 S E 677, 679 (1908) (finding the equivalence of notice in circumstances where one has knowledge of such facts as were sufficient to put one on inquiry, which, if pursued with due diligence, would have led to the knowledge of one's rights), Frierson v Watson, 371 S C 60, 68, 636 S E 2d 872, 876 (Ct App 2006)

The testimony of Respondent Adams and his expert, Tighe, support the Respondents' position that there was no conflict present in this transaction other than the inherent conflict in representing a buyer and seller, and that conflict was addressed in the disclosure reviewed with and executed by RFT Respondents disputed any knowledge of Appellant's speculation and "inferences" from his reconstruction of the facts, and the jury soundly rejected these unfounded conclusory accusations

II THE APPELLANT CONSENTED TO THE COURT INCORPORATING ITS CLAIM FOR BREACH OF FIDUCIARY DUTY INTO ITS CLAIM FOR LEGAL MALPRACTICE

At the conclusion of the Appellant's case, Respondents moved for a directed verdict on the Plaintiff's claims for both legal malpractice and breach of fiduciary duty These motions were denied by the court which ruled both issues would go to the jury (Tr p 923) This ruling was followed by discussion between the court and counsel as to whether the remaining claims would go to the jury as one claim or two Counsel for Appellant then conceded he could not think of circumstances that differentiate the two claims Counsel for Appellant then represented he had no authority to present to the court that the claims needed to be submitted separately The parties then agreed that

Appellant's counsel would argue the breach of fiduciary duty claims before the jury as part of the malpractice claim (Tr p 925) Appellant's counsel concurred with the jury form which submitted the case only on malpractice, only questioning the language regarding punitive damages (Tr p 1044) During the court's charge on legal malpractice, the court specifically instructed the jury regarding a lawyer's fiduciary duty to his client (Tr P 1064) The Appellant made no objection to the court's charge with regard to legal malpractice or breach of fiduciary duty (Tr pp 1057-1085) Appellant did not object to the verdict form consolidating the claims prior to its submission to the jury (Tr p 1086-1087)

To preserve an issue for appellate review, an appellant must object at his first opportunity State v Sullivan, 310 S C 311, 314, 426 S E 2d 766, 768 (1993), Wright v Hiester Const Co., Inc., 389 S C 504, 524-525, 698 S E 2d 822, 833 (Ct App 2010) See Holy Loch Distribs., Inc v Hitchcock, 340 S C 20, 531 S E 2d 282 (2000) (to preserve issue for appellate review, issue must have been raised to and ruled upon by trial court), and also Bensch v Davidson, 354 S C 173, 179-180, 580 S E 2d 128, 131 (2003) (issue not preserved where appellants did not object to the trial court's charge on the verdict form or the actual verdict form itself) Johnson v Hoechst Celanese Corp., 317 S C 415, 421, 453 S E 2d 908, 912 (Ct App 1995) ("The landowners did not call any purported error to the court's attention until after the liability verdict was rendered Because they did not raise the alleged error at the first opportunity, we hold the landowners failed to preserve any issue regarding the court's exhibit and verdict form ")

The trial court denied Respondents' motion for a directed verdict on the breach of fiduciary duty claim The parties argued the attorneys breach of fiduciary duty and the

court charged the law regarding an attorney's fiduciary duty Appellants did not object to the "merger" of the causes of action, the judge's charge with this regard, nor the verdict form Appellant has failed to preserve any aspect of this argument for appellate review

Even if the issue were preserved, the court correctly included the Appellant's claim for breach of fiduciary duty within the parameters of its claim for legal malpractice In a breach of fiduciary case, the plaintiff is entitled to damages for harm caused by the breach of a fiduciary duty owed to him or her Moore v Moore, 360 S C 241, 253, 599 S E 2d 467, 473 (Ct App 2004) In this instance, the Respondents' fiduciary duties to the Appellant arose out of the attorney client relationship The duties from Respondents to Appellant giving rise to both the legal malpractice and breach of fiduciary duty claim all arise from Welborn Adams' legal representation of the Plaintiff Any duties breached arose from that relationship Appellant's claim for legal malpractice includes the same elements as its claim for breach of fiduciary duty This premise was recognized by the court in Southeastern Housing Foundation v Smith, 380 S C 621, 647, 670 S E 2d 680, 694 (Ct App 2008) Plaintiff has not produced any evidence of any other fiduciary relationship between the parties aside from the attorney-client relationship Therefore, the Court correctly ruled the breach of fiduciary duty claim was encompassed in the legal malpractice claim submitted to the jury in this case

As stated by the court in Doe v Howe, 367 S C 432, 626 S E 2 d 25 (Ct App 2006), "[W]hen the same operative facts support actions for legal malpractice and breach of fiduciary [duty] resulting in the same injury to the client, the actions are identical and the later should be dismissed as duplicative" 367 S C 432, 448 at n 27,

626 S E 2nd 25, 33 at n 27⁶ In the case at bar, the Appellant had a full trial to develop its case and tried the case without distinguishing the legal malpractice claim from the breach of fiduciary duty claim because the same operative facts and the same arguments of proximate cause and injury were identical and flowed from the same single transaction where the representation lasted less than an hour There was no lawyer-client relationship between Defendants and Plaintiff outside of the closing for any additional fiduciary duty to exist The court in Smith v Hastie, 367 S C 410, 420, 626 S E 2^d 13, 18 (Ct App 2007) correctly states that an ethical violation is not a prerequisite for breach of fiduciary duty That however has no bearing on the issue at hand In arguing that a jury could find a breach of fiduciary duty in the absence of malpractice, Appellant presumes that the standard of care for an attorney a lower standard than fiduciary duty That is simply not the case The duties owed to the Plaintiff as to each cause of action are the same, and under the facts of this case it was proper to go to the jury on only one of the two identical causes of action

III THE TRIAL COURT CORRECTLY DIRECTED A VERDICT AGAINST THE APPELLANT ON ALL CLAIMS UNDER THE SOUTH CAROLINA UNIFORM SECURITIES ACT

Appellant argues that the transaction subject to this action - Appellant's purchase of two lots at Lake Greenwood with accompanying buy back agreements - constitutes a security for purposes of the South Carolina Uniform Securities Act ("SCUSA") A security is defined as an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others Lawler v Gilham, 569 F 2d 1283 (4th Cir 1978), South Carolina Nat'l Bank v

⁶ While Doe has been overturned this point is still good law The Doe court simply remanded for an explanatory Order following a summary judgment hearing

Darmstadter, 622 F Supp 226 (D S C 1985), Crim v E F Hutton, Inc, 298 S C 448, 381 S E 2d 492 (1989) South Carolina courts employ a “strict vertical commonality” test to determine whether the common venture element is met The courts have eschewed “broad vertical commonality” test wherein the fortunes of the investors need be linked only to the efforts of the promoter, (See Long v Shultz Cattle Co , Inc 881 F 2d 129, 140-41 (5th Cir 1989) for the “strict vertical commonality” requiring the fortunes of investors be tied to the fortunes of the promoter Majors v South Carolina Securities Com'n, 373 S C 153, 165, 644 S E 2d 710, 717 (2007)

In this instance it was completely possible for Appellant’s real estate to increase in value due to market conditions, while LGD failed due to other issues Appellant is no more an “investor” in LGD than any purchaser is in a commercial enterprise from which he makes a purchase Appellant’s position is no different than a consumer purchasing a vehicle with an accompanying extended warranty While the seller may use the purchaser’s money in furtherance of his business objectives, if the seller’s business fails and he his unable to honor the warranty, the purchaser is not considered an investor in the car dealership

In his complaint, Appellant alleges that Respondents are liable as agents of LGD At trial Appellant, argued that Respondents were liable to the plaintiff as “aiders or abettors” under the following statutory provisions

a person who, with actual knowledge that a person is committing acts sufficient to violate Sections 35-1-501 and 35-1-502, nonetheless intentionally furthers the violation with actual awareness that the person is rendering substantial assistance to the person committing the violation of Sections 35-1-501 and 35-1-502, thereby becomes an aider and abettor of the violation, and is therefore jointly and severally liable with and to the same extent as the assisted person who engaged in the fraudulent activity, provided, however, this subsection (5) does not require any due diligence

investigation nor impose liability for failure to perform any due diligence
investigation otherwise required
S C Code Ann § 35-1-509

Appellant therefore must establish that LGD, in connection with the offer, sale, or purchase of a security, directly or indirectly either (1) employed a device, scheme, or artifice to defraud, (2) made an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or (3) to engaged in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person South Carolina Code Ann § 35-1-501⁷

Even assuming this transaction involved the sale of a security and that Appellant had invested in common venture as defined by the strict vertical commonality test and that LGD had committed securities fraud, Appellant would still have to have evidence that the Respondents had actual knowledge that LGD was committing securities fraud and that Appellants rendered substantial assistance to Lake Greenwood in furtherance of their violation⁸ There is nothing in the record beyond the Plaintiff's rank speculation and conjecture reiterated by their "expert" which supports this contention Furthermore,

⁷ While S C Code Ann §35-1-502 may also constitute a basis for violation it applies to investment advisors and Plaintiff has not raised it as a basis of any claim in this case

⁸ See, Andrews v Fitzgerald, 823 F Supp 356, 381 (M D N C , 1993), wherein the court in interpreting a similar statute held that in order to be successful under an "aider and abettor" theory, Plaintiffs must establish three elements (1) a primary violation by another person or entity, (2) the aider and abettor's knowledge of the primary violation, and (3) substantial assistance by the aider and abettor in the achievement or consummation of the primary violation

statutorily the respondents in an “aider and abettor” claim are not required to do any due diligence investigation

In interpreting aider and abettor liability under federal securities law, the Fourth Circuit has held that an ethical duty of disclosure does not create a corresponding legal duty under the federal securities laws noting that courts have consistently refused to use ethical codes to define standards of civil liability for lawyers Schatz v Rosenberg, 943 F 2d 485, 492 (4th Cir 1991) More specifically, courts have refused to base a legal duty of disclosure for section 10(b) on a disciplinary rule Schatz v Rosenberg, 943 F 2d 485, 492 (4th Cir 1991) See, e.g. Bickel v Mackie, 447 F Supp 1376, 1383-84 (N D Iowa), aff'd mem 590 F 2d 341 (8th Cir 1978), Merritt-Chapman & Scott Corp v Elgin Coal, Inc., 358 F Supp 17, 22 (E D Tenn 1972), aff'd mem 477 F 2d 598 (6th Cir 1973)

Appellant relies heavily on the testimony and conclusions of his expert, John P Freeman, that the transaction in question constitutes a security However, whether or not a transaction constitutes a security is a question of law for the court Majors v South Carolina Securities Com'n, 373 S C 153, 165, 644 S E 2d 710, 717 (2007) An expert may not opine as to applicable law without usurping the authority of the court Therefore, arguably Respondents’ objections to that portion of Mr Freeman’s testimony should have been sustained and that testimony excluded The testimony of Mr Freeman was offered to establish a conclusion of law within the exclusive province of the court and thus would be properly excluded 32 C J S Evidence s 453, 31 Am Jur 2d Expert and Opinion Evidence s 69, O’Quinn v Beach Associates, 272 S C 95, 107, 249 S E 2d 734, 740 (S C , 1978) An expert’s testimony as to conclusions of law provides no basis of support for Plaintiff’s SCUSA claim

LGD sold the Appellant two lots, not securities. Appellant and LGD negotiated a buy-back agreement with regard to the lots without any involvement or assistance of the Respondents. Appellant, upon the advice of his attorney, Joe Maddox, requested that LGD issue him a second mortgage to insure compliance with the buy-back contracts. Respondents did not negotiate the agreement for the second mortgage. Nothing in these facts gives rise to a cause of action against Respondents under SCUSA.

IV THE TRIAL COURT CORRECTLY DIRECTED A VERDICT AGAINST THE APPELLANT ON ALL CLAIMS UNDER THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT

To prove a violation of the South Carolina Unfair Trade Practices Act (“SCUTPA”), the Appellant must prove an ascertainable loss of money or property as a result of the use or employment of another person of an unfair or deceptive method, act or practice in the conduct of trade or commerce. S.C. Code Ann. §39-5-10(a). Appellant argues that this transaction is subject to the SCUTPA. Appellant also has argued that this transaction involves the sale of a security and is subject to SCUSA. Our courts have joined the vast majority of jurisdictions in holding that securities transactions remain exempt from claims under the SCUTPA. Ward v. Dick Dyer and Associates, Inc., 304 S.C. 152, 155, 403 S.E.2d 310, 312 (1991).

Section 39-5-40 provides that the SCUTPA does not apply to certain specified practices and transactions. Subsection (a) provides that the Act does not apply to “[a]ctions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina state law.” Ward v. Dick Dyer and Associates, Inc., 304 S.C. 152, 154, 403 S.E.2d 310, 311 (S.C. 1991). The legal

profession constitutionally is subject to the governance of the Chief Justice of the Supreme Court South Carolina Constitution Article V Section 4 thus rendering the practice of law exempt from the SCUTPA ⁹ While the Camp v Springs Mortgage Corp., 307 S C 283, 414 S E 2d 784 (Ct App 1991) case does state in dicta that legal services may constitute commerce, the court in Camp was called to address whether it was an unfair trade practice for a mortgage company to deny a specific attorney the right to represent mortgagee's in a closing The case was not decided in the context of legal service provided by a lawyer to a client

Perhaps this issue is best addressed by the court in State v Buyers Service Co., Inc., 292 S C 426, 434, 357 S E 2d 15, 19 (1987) In this case the court held that a title search company could not engage in closing home loans In requiring that closings been done by an attorney, the court stated

We are convinced that real estate and mortgage loan closings should be conducted only under the supervision of attorneys, who have the ability to furnish their clients legal advice should the need arise and fall under the regulatory rules of this court Again, protection of the public is of paramount concern
Id at 434

There could be no clearer statement from our court that the closings of home loans fall under "the regulatory rules of the court," and that this system exists to protect the public

Therefore, the case of Taylor v Medenica, 324 S C 200, 479 S E 2d 35(1996) is easily distinguishable In Taylor, the court held the SCUTPA applied to a medical lab

⁹ Respondents do not take the position that attorneys are exempt from a claim for unfair trade practices Certainly attorneys may engage in conduct with a client that is not within the scope of governance by the South Carolina Supreme Court However, in this instance Appellants allegations are limited to the method by which the Respondents practice law

that overcharged its client and charged for services not performed. The court did not apply the SCUTPA to allegations regarding the quality of professional services. The court specifically held that the medical lab was not subject to the degree of government regulation to exempt it from the act. Furthermore, the court noted that the actions of the Defendants giving rise to separate claims of professional negligence were based on different facts than the allegations giving rise to the claims for unfair trade practices.

The court's opinion in Dema v. Tenet Physician Serv. Hilton Head, Inc., 383 S.C. 115, 679 S.E. 2d 430 (2009) is also inapplicable to the facts of this case. The footnote cited by the Appellant stands for the proposition that the regulatory exemption for SCUTPA does not apply when a party is engaged in conduct unauthorized by the regulatory body whose protection it seeks to use as a shield from liability. Appellant is not alleging that the Respondents' actions were outside the practice of law. In fact, it alleges and argues the opposite, that Respondents violated their duties of care that existed as attorneys. Appellant argues throughout this brief that his damages are caused by Respondents' failure to abide by the regulations of its governing body, the Rules of Professional Conduct.

Even if the Respondents are subject to the strictures of the SCUTPA, the Appellant failed to create an issue of fact with regard to violation of the act. Appellant failed to introduce any evidence that the Respondents used in unfair or deceptive acts with regard to the closing of its real estate transaction. Furthermore, with regard to the firm of Tinsley and Adams, LLP, under the Unfair Trade Practices Act, directors and officers are not liable for the corporation's unfair trade practices unless they personally commit, participate in, direct, or authorize the commission of a violation of the Unfair

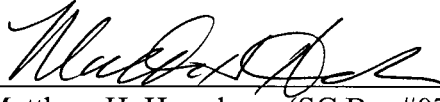
Trade Practices Act S C Code Ann §39-5-10(a), Plowman v Bagnal, 316 S C 283, 450 S E 2d 36 (1994)

Most importantly, SCUPTA is unavailable to redress private wrongs if the public interest is unaffected. For the SCUTPA to apply, the conduct must be shown to have had an adverse effect on the public. Daisy Outdoor Advertising Co., Inc. v. Abbott, 451 S E 2d 394 (Ct. App. 1994), Ardis v. Cox, 314 S C 512, 431 S E 2d 267 (Ct. App. 1993). An unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the Act's embrace. Unfair or deceptive acts or practices have an impact upon the public interest if the acts or practices have the potential for repetition. Merely offering evidence that shows a wrongful act has the potential for repetition or that it occurs in the course of business is not enough to establish a violation of the SCUTPA if the conduct adversely affects only the parties involved.

The absence of deceptive or unfair practices is implicit in the juries' finding that Respondents did not violate the standard of care. The allegations in the complaint supporting the claims for legal malpractice and breach of fiduciary duty are the same as those alleged with regard to violation of the SCUTPA. Appellant's theory throughout the case was that if it had known that LGD was in financial trouble or if it had known how LGD planned to use the proceeds from its property purchase, Appellant would have bought the lots. Appellant speculated without proving that Respondents knew that LDG was in financial trouble and failed to tell him. If proven, Appellant would have prevailed on his claim for malpractice. His failure on that claim indicates there would be no factual support for a SCUTPA claim since surely an attorney who has committed unfair and deceptive trade practices toward a client would be liable for malpractice.

CONCLUSION

For the reasons stated herein, the verdict of the jury and the rulings of the court should be upheld



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The South Carolina Court of Appeals

RFT Management Co LLC,

Appellant,

v

Tinsley and Adams LLP & Welborn D
Adams, Individually,

Respondents

The Honorable Jeff D Griffith, Jr
Greenwood County
Trial Court Case No 2008-CP-24-01221

ORDER

For good cause having been shown, the time for serving and filing the Respondents' Initial Brief and Designation of Matter in the above entitled matter is hereby extended until September 14, 2011

IT IS SO ORDERED

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY *V. Claire Allen, Deputy*
CLERK

Columbia, South Carolina

cc Harry A Swagart, III, Esquire
Matthew H Henrikson, Esquire

FILED
8/8/11 *WMA*

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Greenwood County Court of Common Pleas
Eugene C Griffith, Jr , Circuit Court Judge

Case No 2010175606

RFT MANAGEMENT CO , LLC,

Appellant,

v

TINSLEY & ADAMS, LLP and
WELBORN D ADAMS, individually,

Respondents

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AUG 02 2011
SC Court of Appeals

**RESPONDENTS' MOTION FOR EXTENSION
OF TIME TO FILE THEIR INITIAL BRIEF**

PLEASE TAKE NOTICE that, pursuant to Rule 263(b), SCACR, the Respondents, TINSLEY & ADAMS, LLP and WELBORN D ADAMS, individually, by and through their undersigned counsel, and with the verbal consent of counsel for the Appellant, Harry A Swagart, III, Esq , hereby move the South Carolina Court of Appeals for an Order granting an extension of time to file the Initial Brief of Respondents which, pursuant to the Order of this Court filed on April 5, 2011, is due on August 15, 2011 As grounds upon which this motion is based, counsel for the Respondents would state as follows

1 In late April or early May of 2011, Respondents' counsel began having back pain which he tried to resolve through over-the-counter medications However, that

8-15-11
2-14/11

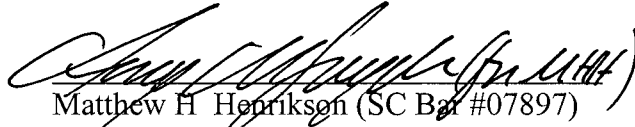
did not resolve the back pain which became even more severe in early June 2011 Respondents' counsel was seen by a neurosurgeon, and an MRI was ordered which showed that the nerve was most probably being aggravated by scar tissue from a previous back surgery Counsel was then placed on prescription pain medications and muscle relaxers, and a series of three epidural injections was ordered The first injection took place on June 20, 2011, and provided a few days of relief By the evening of July 1, however, the low back pain became disabling, forcing counsel to stay in bed until July 11 when the second epidural injection was given That injection provided approx one week of relief before the pain again became disabling At that time the neurosurgeon ordered a lumbar myelogram which took place on July 22 On July 25, the neurosurgeon diagnosed a ruptured disc at the L4-5 level, and a decision was made to proceed with surgery to repair the disc which occurred on July 28 Counsel is not expected to return to work until August 15, 2011

2 Since Respondents' counsel has been dealing with severe pain and has been treated with narcotics and other pain medications since early June 2011 and is likely to continue on such pain medication well into August, it is necessary to request an additional 30 days within which to prepare and file the Initial Brief of Respondents As such, the Respondents respectfully request that the Court grant their Motion for Extension of Time and extend the date for filing the Brief of Respondents to September 14, 2011

I hereby certify that this Motion is meritorious and not intended merely for delay I further certify that I have made contact with Appellant's counsel, Harry A Swagart, III, Esq , and he has verbally consented to this request for an extension of time

RFT Management v Tinsley & Adams
Case No 2010175606

Respectfully submitted this 1st day of August, 2011

A handwritten signature in black ink, appearing to read "Matthew H. Henrikson", is written over a horizontal line.

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THE STATE OF SOUTH CAROLINA
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v

TINSLEY & ADAMS, LLP and
WELBORN D ADAMS, individually,

Respondents

RESPONDENTS' MEMORANDUM IN SUPPORT OF MOTION
FOR EXTENSION OF TIME TO FILE THEIR INITIAL BRIEF

In support of their Motion for Extension of Time to File Initial Brief, the Respondents, TINSLEY & ADAMS, LLP and WELBORN D ADAMS, individually, by and through their undersigned counsel, would show unto the Court as follows

In late April or early May of 2011, counsel began having back pain which he tried to resolve through over-the-counter medications. However, that did not resolve the back pain which became even more severe in early June 2011. Respondents' counsel was seen by a neurosurgeon, and an MRI was ordered which showed that the nerve was most probably being aggravated by scar tissue from a previous back surgery. Counsel was then placed on prescription pain medications and muscle relaxers, and a series of three epidural injections was ordered. The first injection took place on June 20, 2011, and provided a few days of relief. By the evening of July 1, however, the low back pain became disabling, forcing counsel to stay in bed until July 11 when the second epidural

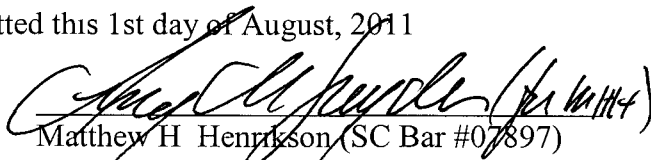
injection was given. That injection provided approx one week of relief before the pain again became disabling. At that time the neurosurgeon ordered a lumbar myelogram which took place on July 22. On July 25, the neurosurgeon diagnosed a ruptured disc at the L4-5 level, and a decision was made to proceed with surgery to repair the disc which occurred on July 28. Counsel is not expected to return to work until August 15, 2011.

Since Respondents' counsel has been dealing with severe pain and has been treated with narcotics and other pain medications since early June 2011 and is likely to continue on such pain medication well into August, it is necessary to request an additional 30 days within which to prepare and file the Initial Brief of Respondents. As such, the Respondents respectfully request that the Court grant their Motion for Extension of Time and extend the date for filing the Brief of Respondents to September 14, 2011.

Respondents' counsel has made contact with Appellant's counsel, Harry A Swagart, III, Esq., and he has verbally consented to this request for an extension of time.

This motion is based on South Carolina Appellate Court Rule 263, which provides in part that "the time prescribed by these Rules for performing any act except the time for serving the notice of appeal may be extended or shortened by the appellate court, or by any judge or justice thereof."

Respectfully submitted this 1st day of August, 2011



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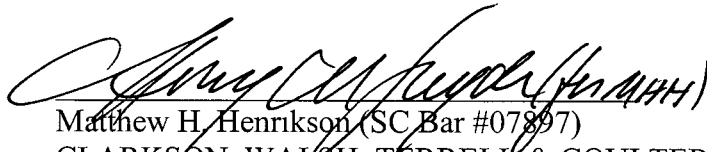
TINSLEY & ADAMS, LLP and
WELBORN D ADAMS, individually,

Respondents

CERTIFICATE OF SERVICE

Counsel for the Respondents, Matthew H Henrikson, hereby certifies that a copy of the Respondents' Motion for Extension of Time to File Their Initial Brief has been served on all parties of record by regular U S mail, postage prepaid, on this 1st day of August, 2011, addressed as follows

Harry A Swagart, III
Harry A Swagart, III, P C
Post Office Box 7787
Columbia, South Carolina 29202



Matthew H Henrikson (SC Bar #078997)
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ATTORNEYS AT LAW

Matthew H Henrikson

August 1, 2011

The Honorable Tanya Gee
Clerk of Court of the South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re RFT Management Co v Tinsley & Adams, LLP, et al
Case No 2010175606

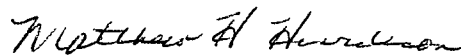
Dear Ms Gee

Enclosed please find the original and six (6) copies of the Respondents' Motion for Extension of Time to File Their Initial Brief, Memorandum in support thereof, and Proof of Service of same. We have also enclosed our firm's check in the amount of \$25 00 representing the filing fee for this motion.

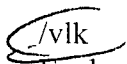
Thank you for your assistance in this matter. Should you have any questions or concerns regarding the contents of this letter or the enclosed documents, please feel free to contact me.

With kind regards, I remain

Yours very truly,



Matthew H Henrikson



Enclosures

cc Harry A Swagart, III, Esq (w/enclosures)

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Respondents

APPELLANT'S DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Pursuant to SCACR 209, Appellant RFT Management, Co , LLC, hereby designates the following matter for inclusion in the Record on Appeal

1 Order dated October 6, 2010, denying Appellant's post-trial motions for JNOV and/or for a new trial,

2 Judgment with attached Jury Verdict Form granting judgment in favor of Defendants on Plaintiff's First Cause of Action

3 Oral orders dated July 2, 2010, granting a directed verdict in favor of Respondents
on Plaintiffs' Second (Tr at 924 14 to 925 24), Third (Tr at 927 22 to 923 2), and Fourth Causes
of Action (Tr at 896 7-17), denying a directed verdict in favor of Defendant on Plaintiff's First
Cause of Action, and denying Plaintiff's motion for a directed verdict (Tr at 923 3-5)

4 Appellant's motion for a directed verdict Tr at p 673 line 22 to p 675 line 1, p
887 line 23 to p 925 line 24

5 Appellant's motion for JNOV and for a new trial

6 Appellant's memorandum of law in support of motions for JNOV and a new trial

7 Appellant's supplemental memorandum of law in support of post-trial motions

8 Complaint with attachments

9 Answer

10 Trial Exhibits

A Plaintiff Exhibit Nos

- 1 Larkins on the Lake brochure
- 2 Sales brochure
- 3 Bradshaw to Roach email
- 4 Bradshaw to Roach email
- 5 Sales contract
- 6 Sales contract
- 7 Buy-back agreement
- 8 Subordination agreement
- 9 Representation disclosure
- 10 Title opinion
- 11 Closing statement
- 17 Grimshaw to Adams letter
- 18 Gilbert to Lester email
- 27 Gilbert to Furman email
- 34 Sales contract
- 35 Deed
- 36 Buyback agreement
- 37 Extension agreement
- 38 Closing statement
- 41 Purchase contract
- 42 Deed

43 Addendum to contract
44 Extension agreement
46 Sales contract
47 Deed
63 Gilbert to Lester email
72 Appraisal
75 Freeman Resume
79 Marketing brochure

B Defendant Exhibit No

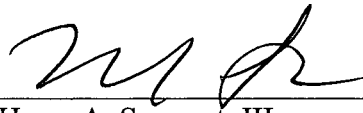
1 (PX 12) RFT Deed

10 Portions of Trial Transcript

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827-830

Respectfully submitted,



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ATTORNEY FOR APPELLANT

Columbia, South Carolina
June 1, 2011

CERTIFICATION

The undersigned attorney for the Appellant hereby certifies that Appellant's Designation of Matter to Be Included in the Record on Appeal contains no matter which is irrelevant to the Appeal

A handwritten signature in black ink, appearing to read "H. A. Swagart, III", written over a horizontal line.

Harry A Swagart, III

Date June 1, 2011

THE STATE OF SOUTH CAROLINA
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Respondents

PROOF OF SERVICE

I certify that I have served the Appellant's Designation of Matter to be Included in the Record on Appeal on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on June 1, 2011, addressed to the attorney of record, Matthew H Henrikson, Clarkson, Walsh, Terrell & Coulter, PA, at his Post Office Box 6728, Greenville, South Carolina 29606 on June 1, 2011

June 1, 2011



Harry A Swagart, III
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THE STATE OF SOUTH CAROLINA
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[INITIAL] BRIEF OF APPELLANT

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JUN 01 2011
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ATTORNEY FOR APPELLANT

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Statement of Issues Presented on Appeal

I DID THE TRIAL COURT ERR BY FAILING TO GRANT JNOV OR A NEW TRIAL IN FAVOR OF APPELLANT ON THE ISSUE OF WHETHER RESPONDENT ENGAGED IN MALPRACTICE BY REPRESENTING BOTH APPELLANT AND THE SELLER AT THE CLOSING IN SPITE OF THE PRESENCE OF AN UNWAIVABLE CONFLICT OF INTEREST?

II DID THE TRIAL COURT ERR BY FAILING TO GRANT JNOV OR A NEW TRIAL IN FAVOR OF APPELLANT ON THE ISSUE OF WHETHER RESPONDENT ENGAGED IN MALPRACTICE BY FAILING TO DISCLOSE MATERIAL FACTS TO APPELLANT, BY PREPARING AND SUBMITTING FALSE AND MISLEADING DOCUMENTS TO PLAINTIFF, AND/OR BY ARRANGING AND ORCHESTRATING THE CLOSING AS AN UNLAWFUL “FLIP TRANSACTION”?

III DID THE TRIAL COURT ERR BY MERGING APPELLANT’S SECOND CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY INTO THE FIRST CAUSE OF ACTION FOR LEGAL MALPRACTICE AND, BASED THEREUPON, BY FAILING TO CHARGE THE JURY ON BREACH OF FIDUCIARY DUTY?

IV DID THE TRIAL COURT ERR BY DIRECTING A VERDICT IN FAVOR OF RESPONDENTS ON APPELLANT’S THIRD CAUSE OF ACTION FOR VIOLATION OF THE SOUTH CAROLINA UNFAIR TRADE PRACTICE ACT (“SCUTPA”) ON THE GROUND THAT SCUTPA DOES NOT APPLY TO THE LEGAL PROFESSION?

V DID THE TRIAL COURT ERR BY DIRECTING A VERDICT IN FAVOR OF RESPONDENTS ON APPELLANT’S FOURTH CAUSE OF ACTION FOR VIOLATION OF THE SOUTH CAROLINA UNIFORM SECURITIES ACT ON THE GROUND THAT THE SALE OF INVESTMENT REAL ESTATE TO APPELLANT DID NOT INVOLVE THE SALE OF A SECURITY?

Statement of the Case

This case is primarily a legal malpractice case arising from Respondents' (hereinafter collectively referred to as "T&A") representation of the Appellant (hereinafter referred to as "RFT") during the closing of two investment real estate lots situated in a subdivision in Greenwood County. The Complaint was filed on October 20, 2008. Therein, RFT alleged in the First Cause of Action two basic types of malpractice: (1) T&A's representation of both parties at the closing while subject to a conflict of interest and (2) T&A's misrepresentation of, and failure to disclose, material facts relating to the developer (hereinafter referred to as LGD) of the subdivision and to the timing of various aspects of the closing. RFT also alleged claims for breach of fiduciary duty, violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), and aiding and abetting a violation of the South Carolina Uniform Securities Act ("Securities Act"). After having been granted an extension of time in which to respond to the Complaint, T&A timely filed their Answer on January 21, 2009. Therein, they denied the material allegations of the Complaint and asserted affirmative defenses alleging the unconstitutionality of punitive damages, failure to state sufficient facts to constitute a cause of action as to each of RFT's causes of action, and comparative negligence.

The case was tried to a jury from June 28, 2010, through July 2, 2010. At the close of all of the evidence on July 2, 2010, the trial court denied RFT's motion for a directed verdict and T&A's motion for a directed verdict on the First Cause of Action for legal malpractice. The trial court then held that RFT's Second Cause of Action for breach of fiduciary duty was entirely duplicative of the First Cause of Action for legal malpractice, merged the Second Cause of Action into the First Cause of Action, and did not charge the jury on breach of fiduciary duty.

T&A's motion for a directed verdict on the Third Cause of Action under SCUTPA was granted by the trial judge based upon his decision that legal profession is exempt from SCUTPA. The trial judge also directed a verdict on the Fourth Cause of Action upon the ground that the sale of lots to RFT did not constitute the sale of a security.

On July 2, 2010, the jury returned a verdict in favor of T&A on the sole cause of action before them, the malpractice cause of action, finding specifically that T&A's conduct was not negligent. Following the jury's rendering of their verdict, RFT requested, and was granted, an additional ten (10) days in which to move for judgment notwithstanding the verdict and/or for a new trial. RFT timely filed post-trial JNOV and new trial motions on July 15, 2010. By order filed October 6, 2010, the trial judge denied both motions. Because judgment had been rendered on the jury's verdict in favor of T&A, there is no monetary award at stake in this appeal. The notice of appeal was timely served on T&A on October 22, 2010. RFT was granted an extension until June 1, 2011, in which to file its Initial Brief and Designation of Matter to Be Included in the Record on Appeal.

Argument and Citation of Authority

In lieu of providing a single Statement of Facts relating to this appeal, Appellant (hereinafter “RFT”) will set forth separate statements for each of the issues presented for review. RFT will then discuss why those facts, when considered in light of relevant precedent, require reversal of the Order below.

I T&A COMMITTED MALPRACTICE AS A MATTER OF LAW BY REPRESENTING BOTH THE RFT AND THE SUBDIVISION DEVELOPER AT THE CLOSING (Issue I)

In order to prevail on its First Cause of Action for legal malpractice, RFT was required to prove the following elements:

- (1) the existence of an attorney-client relationship, (2) breach of duty by the attorney, (3) damage to the client, and (4) proximate causation of client’s damage by the breach.

Holy Lock Distributors Inc v R L Hitchcock, 340 S C 20, 26, 531 S E 2d 282, 285 (2000)

The existence of an attorney-client relationship between RFT and T&A is not in dispute, as T&A have admitted that they represented at the closing both the RFT, as buyer, and the developer, Lake Greenwood Developers, LLC, as seller.¹ Thus, in answering the first two questions on appeal, this brief will address the final three elements of a legal malpractice cause of action.

A Standards for Decision

In this appeal the Court is requested to grant jnov on the First Cause of Action for Legal Malpractice or, in the alternative, to grant RFT a new trial on that claim. RFT also requests the Court to reverse the trial court’s order improperly merging the Second Cause of Action for Breach of Fiduciary Duty into the First Cause of Action, to reverse the trial court’s orders

¹ Adams testimony p 792 lines 9-13 R at _____ Attorney Representation Disclosure Form Plaintiff’s Exhibit (“PX”) 9 R at _____

directing verdicts on the Third Cause of Action for violation of SCUTPA and on the Fourth Cause of Action for Aiding and Abetting Securities Fraud, and to grant a new trial on these claims

1 Failure to Grant RFT's Motion for Judgment Notwithstanding the Jury's Verdict

RFT understands that in connection with its motion for JNOV, if there are conflicting legal inferences arising from the evidence any such conflict must be resolved in favor of the non-moving party *Burns v Universal Health Services Inc* , 361 S C 221, 232, 603 S E 2d 605, 611 (Ct App 2004) Thus, a “motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict ” *Id* The appellate court will reverse a trial court's denial of JNOV “only when there is no evidence to support the ruling or the ruling is controlled by an error of law ” *Id* (citing *Hinkle v Nat Cas Ins Co* , 354 S C 92, 579 S E 2d 616 (2003))

In the discussion which follows, RFT will show that the record is devoid of any evidence which directly or inferentially can support the trial court's denial of the JNOV motion and that the ruling is controlled by errors of law

2 New Trial Motion

The standard to be applied by an appellate court in reviewing a trial court's denial of a motion for a new trial is, with one exception, the same as the standard governing the denial of a motion for JNOV Thus, an order denying a new trial to RFT may only be reversed upon a finding that the order is “wholly unsupported by the evidence or the conclusion reached was controlled by an error of law ” *Folkens v Hunt*, 300 S C 251, 254-55, 387 S E 2d 265, 267 (1990) An exception to the general rule just stated exists under the “thirteenth juror” doctrine which

entitles the trial judge to sit, in essence, as the thirteenth juror when he finds “the evidence does not justify the verdict,” and then to grant a new trial based solely “upon the facts ”

Norton v Norfolk Southern Reg Co , 350 S C 473, 478, 567 S E 2d 851, 854 (2002) (*quoting Folkens*, 300 S C at 254, 387 S E 2d at 267)) Thus, under the thirteenth juror doctrine, a new trial can be granted if the trial judge believes that the jury’s verdict is contrary to a preponderance of the evidence 350 S C at 482 & n 7, 567 S E 2d at 856 & n 7

RFT respectfully contends that in this case, the jury’s verdict was “wholly unsupported” by the facts and that, even if it were possible to inferentially establish material factual conflicts (which it wasn’t), the evidence weighs overwhelmingly in favor of RFT The trial court therefore erred by not granting a new trial on the malpractice cause of action

3 Orders Granting Directed Verdicts

RFT also requests the Court to review orders of the trial court which effectively granted directed verdicts in favor of T&A on the Second, Third, and Fourth Causes of Action RFT believes that the trial court’s orders disposing of those Causes of Action were all controlled by errors of law Absent such errors, however, the Court will review “the evidence and the inferences that can reasonably be drawn therefrom in the light most favorable to the non-moving party ,” and will reverse a lower court when the evidence reveals factual issues *O Leary-Payne v R R Hilton Head II, Inc* , 371 S C 334, 347, 638 S E 2d 96, 100 (Ct App 2006) Thus, the Court will reverse an order directing a verdict only when there is no evidence to support the trial court’s ruling that there were no factual disputes *Id*

RFT believes that the orders granting directed verdicts and merging causes of action were all infected by errors of law and that, in any event, it was impossible to find that there were no disputes as to the facts based on the trial record

B Statement of Facts Relating to Conflict of Interest Issue

RFT contracted to purchase Lot Nos 28 and 31 in a subdivision known as Planters Row for a total purchase price for the two lots of \$570,000.00² Planters Row was being developed by Lake Greenwood Developers, LLC (“LGD”), which was managed by William Gilbert (“Gilbert”) Mr Gilbert handled all of the negotiations between LGD and RFT,³ and it was he who selected T&A to close the transaction Prior to the closing, Gilbert had done business with Respondent Adams for over twenty years, and Adams and whichever law firm he was with at the time had done most, if not all, of the many closings in which Gilbert had been involved⁴ In fact, T&A performed the vast majority of closings in Planters Row, as well as a number of loan closings for LGD⁵

The closing which T&A performed was a very complicated one In fact, Respondent Adams characterized it as a “very rare” transaction⁶ Not only were T&A charged with the preparation of the deed, HUD-1, and other normal closing documents, they prepared a second mortgage granted by LGD to RFT on 21 other lots,⁷ a mortgage subordination agreement,⁸ and other forms to be signed by RFT in order to release lots from its second mortgage as they were sold⁹ T&A were required at the closing to explain to RFT’s manager, David Roatch (“Roatch”),

² HUD 1 Settlement Statement PX 1 R at _____

³ Gilbert testimony, p 370, line 10 to p 371 line 13, R at _____

⁴ *Id* p 371 lines 14-20, R at _____ p 373 lines 5-11, R at _____

⁵ *Id*

⁶ Adams testimony p 796 lines 8-11 R at _____

⁷ *Id* p 811 lines 8-16 R at _____

⁸ PX 8 R at _____

⁹ *Id* p 822 lines 1-8 R at _____

how the second mortgage operated in conjunction with the mortgage subordination agreement and the lot release forms which had been signed ¹⁰ In addition, the actual contracts which were being signed were unique in that they provided for a separate buy-back agreement which gave LGD the right to re-purchase the lots under certain circumstances, and which gave RFT the right to require LGD to re-purchase the lots after the first year or after the second year, at RFT's election, at prices which greatly exceeded the original purchase prices ¹¹ During the closing, it became necessary for RFT and LGD to renegotiate the buy-back agreement, and Respondent Adams was present for those negotiations ¹²

Further complicating T&A's duties at this closing was the fact that, unbeknownst to RFT, LGD did not then own the two lots which it had contracted to sell ¹³ Those lots were owned by third parties, the Grimshaws and the Robertsons, who had purchased the lots 18 months earlier subject to buy-back agreements ¹⁴ When they elected to exercise their buy-backs, LGD was financially unable to perform ¹⁵ In order to assist LGD in selling the lots to RFT, T&A organized a "flip transaction,"¹⁶ pursuant to which LGD's purchases from Grimshaw and Robertson were closed simultaneously with the sale of the same lots to RFT The simultaneous

¹⁰ In addition Adams advised Roatch that the mortgage subordination was no big deal and to go ahead and sign it Roatch Testimony p 119 lines 7 10 R at _____

¹¹ Buy back Agreement PX 7 R at _____

¹² Adams testimony p 821 lines 21 25, R at _____

¹³ Roatch testimony p 106, lines 4 14, R at _____, p 123 lines 16 25 R at _____ Grimshaw deeds PX 35 R at _____ Robertson deed PX 4 R at _____, W Gilbert testimony p 387, line 25 to p 388, line 4

¹⁴ Grimshaw Buy Back PX 36 R at _____ Robertson Buy Back PX 43 R at _____

¹⁵ W Gilbert testimony, P 504 lines 2 17, R at _____

¹⁶ According to the Supreme Court a flip transaction [is one] where proceeds from the second transaction are used to fund the initial transaction ' In re *Barbare* 360 S C 560 567 68 602 S E 2d 382 385 86 (2004)

closings¹⁷ were necessary to allow LGD to use RFT's \$570,000.00 in order to re-purchase the lots from the owners, thereby enabling LGD to deed the lots to RFT.¹⁸ None of these facts relating to the simultaneous closings, the "flip" transaction, or uses of RFT's funds were disclosed to RFT.¹⁹

Because of how the closing was structured, T&A necessarily knew that the closing effectively substituted RFT for the Grimshaws and Robertsons into buy-back obligations on which LGD had already once defaulted. Thus, T&A were aware that the closing created a situation in which RFT and LGD potentially, if not probably, would be in conflict with each other.

When the closing did take place, the sole communication between T&A and RFT which mentioned the word "conflict" was the Attorney Representation Disclosure form ("ARD")²⁰ which Mr. Roatch was required to sign on behalf of RFT in order for the closing to proceed. While the ARD did use the word "conflict" twice, it never used the term "conflict of interest," nor could it have possibly been read as an acknowledgement by RFT that any conflict of interest to which T&A may have been subject was waived. Thus, by stating that "*should a controversy arise between the Buyer and the Seller during or after closing*," the ARD did not address *attorney conflicts of interest* and reflected a clear implication that no controversy (and, thus, no conflict) then existed. Similarly, language in the ARD which states that T&A "will withdraw from representing both the Seller and the Purchaser if any actual conflict arises between the parties" again referred only to *party* conflicts and not to attorney conflicts and implied that

¹⁷

¹⁸ W. Gilbert testimony p. 504, lines 2-17; R. at _____

¹⁹ Roatch testimony p. 123, line 20 through p. 124, line 11; R. at _____

²⁰ PX 9; R. at _____

no conflict existed on the closing date. Finally, the ARD stated that the parties “acknowledge that there is no conflict.” This acknowledgement, of course, does not reflect which type of conflict — party or attorney — which was referred to, and necessarily assumed that a non-lawyer would be able to recognize a *lawyer’s* conflict of interest without guidance or explanation from the lawyer.

Respondent Adams, on the other hand, testified that he did not advise Mr. Roatch about conflicts because, in Adams’ view, there were none.²¹ Thus, Adams never took the time to explain to Mr. Roatch what an attorneys’ conflict was nor to explain the potential effects of a conflict upon an attorney’s loyalty, upon confidentiality, upon the attorney-client privilege, or upon the lawyer’s independent personal judgment in behalf of each client at the closing.²² Deprived of any meaningful information about the existence of a potential conflict or about the effects which a conflict can have upon the lawyer’s representation of the client, there was no possible way for Mr. Roatch to have waived or consented to Respondent’s conflict in behalf of RFT. And while Mr. Roatch may have acknowledged in the ARD that he was unaware of any conflict *between RFT and LGD*, he clearly did not acknowledge that T&A were not subject to a conflict of interest by virtue of their representation of both parties during a complicated, non-garden-variety closing. Thus, undisputed facts in this case establish that T&A were subject to a conflict of interest by virtue of their dual representation of RFT and LGD at the closing, that this conflict of interest was never disclosed, and that it was not consented to.

²¹ Adams testimony p. 792 lines 17-20, R. at _____

²² *Id.* at p. 793 lines 10-17 R. at _____. The ARD contains no explanations of any nature. See PX 9 R. at _____

As RFT argues below, these facts entitled it as a matter of law to JNOV or a new trial on the issue of whether T&A engaged in malpractice by representing both RFT and LGD while subject to a conflict of interest

**C T&A Engaged in Malpractice by
Representing Both RFT and LGD at the Closing
While Subject to an Unwaivable Conflict of Interest**

RFT submits that T&A could not have ethically represented both LGD and it at the closing because T&A were subject to an unwaivable conflict of interest and because, even assuming the conflict could have been waived, it was neither disclosed nor consented to

1 T&A Had a Conflict of Interest

In *State v Buyer's Service Co , Inc* , 292 S C 426, 432, 357 S E 2d 15, 18 (1987), the South Carolina Supreme Court recognized that conflicts of interest are “inherent” in real estate closings because “the adverse interests in real estate transactions make it extremely difficult for the attorney to maintain a proper professional posture toward each party ” Similarly, the Court of Appeals quoted approvingly from S C Bar Ethics Advisory Opinion No 94-08 for the proposition that “it is clear that in real estate transactions the Purchaser, Seller, and Lender often have competing, if not directly conflicting, interests ” *McNair v Rainsford*, 330 S C 332, 345, 499 S E 2d 488, 495 (Ct App 1998) These pronouncements do no more than to state the obvious

South Carolina courts are not the only ones to recognize that a conflict of interest is inherent in a real estate closing where the attorney represents both parties *See, e g State Bar of Arizona v Ariz Land Title & Trust Co* , 366 P 2d 1, *after rehearing*, 371 P 2d 1020 (Ariz 1962), cited by the Court in *Buyer s Service, Crest Investment Trust Inc v Comstock*, 327 A 2d 891,

905 (Md App 1974), *In re Camp*, 40 N J 588, 194 A 2d 236, 239-41 (1963) As explained in the latter case

Since respondent represented both buyer and seller, a conflict of interest as defined by Canon 6 immediately appeared. Even within the limited area of marketable title, a situation may exist which casts doubt on the advisability of accepting title. The buyer's attorney would be under a duty to request the seller to correct the situation, whereas the seller might properly contend that the title was marketable, notwithstanding the buyer's assertion. It would certainly be most difficult for one attorney under such circumstances to represent both clients "with undivided loyalty."

194 A 2d at 239-40 The same court also noted that

"(A) clandestine conflict of interest exists when an attorney employed by a seller prepares all legal instruments, certifies and closes title, without advising the purchaser fully of the relationship which exists, and that his interests might be better protected by his engagement of independent counsel."

Id. at 240 (*quoting* New Jersey Ethics Advisory Opinion No. 7, 86 N J L J 405 (1963)) Finally, the South Carolina Court of Appeals also explicitly recognized in the *McNair* case that a closing attorney is subject to a conflict of interest in representing both buyer and seller.

In this case, T&A did not explain in the Title Opinion Letter that in order for good title to be conveyed, mortgages on each of the properties needed to be satisfied, and the letter did not call attention to the existence of those mortgages.²³ In addition, RFT's buy-back agreement gave LGD the option to repurchase the properties under certain circumstances,²⁴ and that option

²³ PX 10 R at _____

²⁴ Adams testimony p. 812 lines 1-11

constituted a cloud on the title²⁵ The presence and effect of the option were also not disclosed in the title opinion letter As a result, there was a potential dispute between RFT and LGD which should have been disclosed and explained, but was not

RFT therefore submits that under the above authorities and reasoning, T&A were subject to a conflict of interest as a matter of law In addition, Plaintiff's expert, John Freeman, also unequivocally confirmed the presence of the conflict²⁶ The only real issue was as to whether T&A committed malpractice by continuing to represent the RFT notwithstanding the conflict

2 T&A's Conflict of Interest Was Not Waivable

Where, as in this case, a lawyer is subject to a "concurrent" conflict of interest,²⁷ she may not undertake concurrent representation of two or more clients unless she reasonably believes that she will be able to provide competent and diligent representation to each affected client RPC 1.7(b)(1) The question becomes one of determining how to assess whether the lawyer could reasonably believe that the conflict of interest will not affect her ability to provide proper unbiased representation to each client The courts of South Carolina have not yet articulated a test for making this determination The Court of Special Appeals of Maryland, however, accepted a definition of unwaivable conflict as one "which a disinterested lawyer would advise a client not to waive" *Fairfax Savings F S B v Weinberg and Green*, 112 Md App 587, 637, 685 A 2d 1189, 1213 (Ct Spec App 1996) (citation omitted) The court further instructed that "the hypothetical disinterested lawyer must use an objective test and not base his or her decision on

²⁵ *Maupin v Hunn* 678 S W 2d 180, 182 (Tex App 1984) ('option agreement created cloud on plaintiff's title') *Kile v Int'l Truck & Eng Corp*, 399 F Supp 2d 829 833 34 (M D Tenn 2005) ("option hampered property's marketability")

²⁶ Freeman testimony p 606 line 16 to p 613 line 17 R at _____

²⁷ A concurrent conflict of interest exists if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client Rule 407 SCACR Rule of Professional Conduct 1.7(a)(2) (hereinafter referred to as "RPC ____")

his subjective belief as to the fairness of a particular lawyer ” 112 Md App at 637, 685 A 2d at 1214 The same court later quoted the following language with approval

“ “[W]hen a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent ” ”

Klupt v Krongard, 126 Md App 179, 210, 728 A 2d 727, 742 (Ct Spec App 1999) (citation omitted), *see, also*, RPC 1.7(b), cmt [12] (also recognizing that “some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation based on the client’s consent ”)

RFT submits that under the circumstances of this case, no disinterested lawyer could have possibly concluded that RFT should have agreed to the dual representation As will be discussed in more detail below, every lawyer is subject to a strict duty to disclose to her clients all material information regarding the subject of the representation Both before and during the closing, T&A were aware of LGD’s financial problems that led to the necessity for employing the “flip” transaction²⁸ RFT submits that since such information would unquestionably have been material to its decision to proceed with the closing, T&A owed a duty to RFT, as a matter of law, to disclose the flip transaction and the reasons for its use T&A also should have disclosed that they had a long-standing business relationship with Gilbert²⁹ On the other hand, because the disclosure of such information would have undoubtedly killed the deal, T&A had a duty *to LGD* not to disclose the information, thereby creating an unwaivable conflict

²⁸ Adams awareness of LGD’s financial problems is discussed in detail below at pages 16-21

²⁹ *See McNair*, 330 S.C. at 348-499 S.E.2d at 496 (explaining that ‘a lawyer who has represented one or more clients for a long period of time might have difficulty being impartial between that client and one to whom the lawyer has only been recently introduced’) W. Gilbert Testimony p. 371, line 20 through p. 373 line 11 R. at

RFT therefore submits that no disinterested lawyer could possibly have recommended to RFT that it consent to or waive T&A's conflict of interest, thereby confirming that the conflict was not waivable. That being the case, T&A committed malpractice by asking RFT to consent to the conflict, by failing to advise RFT to obtain separate counsel,³⁰ and by representing RFT while they were subject to the conflict of interest. *Matter of Harper*, 326 S C 186, 193, 485 S E 2d 380 (1997) (attorneys have a duty to "take every possible precaution to ensure that clients are fully aware of the need for independent and objective advice"). The trial court therefore erred by not granting JNOV to RFT on that issue.

3 T&A Failed to Disclose the Conflict

The law is also clear on the point that before an attorney may lawfully represent both buyer and seller in a real estate closing, he must make full disclosure of the conflict to both parties, to include "the implications of common representation and the advantages and risks involved." *McNair v Rainsford*, 330 S C 332, 344, 499 S E 2d 488, 494 (Ct App 1998), accord *Bankers Trust of South Carolina v Bruce*, 283 S C 408, 419, 323 S E 2d 523 (Ct App 1984) (requiring "full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment in behalf of each client"), Rule of Professional Conduct 1.7, Cmt [16] ("possible effects [of dual representation] on loyalty, confidentiality and the attorney-client privilege"). The concept that a conflict along with all potential effects and risks must be fully disclosed is not a new one to the law. As the Supreme Court of New Jersey explained almost one-half a century ago:

Full disclosure requires the attorney not only to inform the prospective client of the attorney's relationship to the seller, but also to explain in detail the pitfalls that may arise in the course of the transaction which would make it desirable that the buyer have independent counsel. The full

³⁰ Freeman testimony p 620 line 3 to p 621 line 23 R at _____

significance of the representation of conflicting interests should be disclosed to the client so that he may make an intelligent decision before giving his consent

In re Camp, 194 A 2d at 240 In his testimony, Respondent Adams admitted that he never disclosed any conflict of interest to Mr Roatch because, according to him, he did not think there was one This testimony is uncontradicted by any other evidence or inferences that may be drawn from the trial record

T&A attempted to prove that the ARD form was all that was needed in the way of disclosure However, as explained above, there is not a single word in that form which can be read as stating that T&A had a conflict In fact, the form spoke only of T&A's duty to withdraw from representing both parties "were a dispute to arise", and thereby inferred that there was no conflict Moreover, Mr Roatch was required to sign the ARD as an acknowledgment that there was no conflict³¹

In fact, the term "conflict of interest" appeared nowhere on the entire document While it does mention conflicts *between the parties*, it says nothing about whether or not T&A had a conflict of interest as a result of their representation of both parties Thus, it is indisputable that no conflict of interest was disclosed and, thus, that potential risks and adverse effects of a conflict were not discussed A jury could not rationally have reached any other conclusion

4 Plaintiff Never Validly Consented to the Dual Representation

Under the version of RPC 1.7 which was in effect when Plaintiff purchased its investment in Planters Row, a lawyer could undertake dual representation only if "each affected

³¹ How could a non lawyer possibly know that a lawyer had no conflict of interest? Indeed [a] client is not responsible for recognizing the conflict In re SRC Holdings Corp 364 B R 1 47 48 (D Minne 2007) (*citing Manoir Electroalloys Corp v Amalloy Corp* 711 F Supp 188 195 (D N J 1989))

client gives informed consent confirmed in writing ” RPC 1 7(b)(4) (emphasis added) And as explained by the Court of Appeals

each client must consent to the representation after full disclosure of the possible effect of such representation on the exercise of the lawyer’s independent professional judgment in behalf of each client The consent obtained from each client after full disclosure of the possible effect of multiple representation must be an informed consent

Bankers Trust of South Carolina v Bruce, 283 S C at 419, 323 S E 2d at 530 (Ct App 1984)

Informed consent, in turn, requires disclosure by the lawyer to the client of all of the potential risks and implications of the representation Although South Carolina appellate courts have not addressed exactly what is subsumed by the phrase “informed consent”, many other courts have Thus, it has been recognized that the lawyer

must explain to [the clients] the nature of the conflict of interest in such detail so that they can understand the reasons why it may be desirable for each to have independent counsel

Image Tech Servs , Inc v Eastman Kodak Co , 820 F Supp 1212, 1216-17 (N D Cal 1993), accord *Unified Sewerage Agency Etc v Jelco Inc* , 646 F 2d 1359, 1345-46 (9th Cir 1981), *In re SRC Holding Corp* , 364 B R 1, 47-48 (D Minne 2007), *Florida Insurance Guaranty Ass n Inc v Corey Canada Inc* , 749 F Supp 255, 259 (S D Fla 1990) As well, the “lawyer bears the duty to recognize the legal significance of his or her actions in entering a conflicted situation and fully share that legal significance with clients ” *SRC Holding Corporation*, 364 B R at 48

Respondent’s contention that the ARD fully satisfied their disclosure obligations is frivolous Indeed, it is simply not possible to infer from Mr Roatch’s acknowledgment that there was no conflict *between RFT and LGD* that Roatch was also acknowledging that T&A did not have any actual or potential conflict Knowing nothing of T&A’ relationship with LGD or

all of the legal ramifications of the document he was about to sign, Mr Roatch could not possibly have known if Defendants had a conflict of interest or if a conflict potentially could arise *A fortiori*, he could not have consented to that which had not been disclosed to him and about which he knew nothing This is another conclusion that a rational, unbiased jury would have had to have reached

**D RFT Suffered Losses Which Were Proximately Caused
By T&A's Undertaking Dual Representation While
Subject to a Conflict**

By representing RFT and LGD at the closing T&A placed themselves in a position in which they could not make disclosures of material facts to RFT which, as explained below, they were under a duty to make, without damaging the interests of LGD Their knowledge and their duty of disclosure dictated that they decline to represent RFT, but they did not do so Instead, they remained in the case and assisted LGD, to RFT's detriment, by orchestrating the unethical "flip transaction " Had T&A respected their conflict of interest and resigned, RFT would have been in a position to hire separate counsel and thereby to ferret out the details of the flip transaction and the existence of certain material facts which would have counseled against going forward with the lot purchases Thus viewed, T&A' ignoring of the conflict and proceeding with dual representation was a *sine qua non* to consummation of a closing which resulted in a loss to Plaintiff in excess of \$400,000 00

**II T&A COMMITTED MALPRACTICE AS A MATTER OF LAW
BY FAILING TO DISCLOSE MATERIAL INFORMATION TO RFT,
BY PROVIDING FALSE AND MISLEADING DOCUMENTATION TO
RFT, AND BY CLOSING A DECEPTIVE FLIP TRANSACTION (Issue II)**

It is RFT's position that the trial court should have granted a directed verdict or JNOV in its favor on RFT's claim that T&A committed malpractice by failing to disclose material information to RFT, by creating and disseminating false and misleading documents relating to

the closing, and by structuring the closing in the form of a “flip” transaction, a form which the Supreme Court has recognized as being unlawful. As the following Statement of Facts will show, these wrongful acts were proved by evidence which is uncontradicted.

A Statement of Facts Relating to T&A’s Nondisclosures, False and Misleading Documents, and Employment of a Flip Transaction

In early 2006, nearly one year after beginning operations, LGD found itself in dire need of working capital because it did not have sufficient funding to complete subdivision infrastructure and amenities.³² After initial sales in 2005 to friends and relatives of LGD’s management and owners, there were few, if any, sales of lots in Planters Row until 2006. In order to stimulate sales, LGD concocted a scheme wherein certain lots would be listed for sale for \$235,000.00.³³ In order to stimulate interest at that price, however, Gilbert and LGD were forced to provide other incentives.³⁴ Thus, LGD informed prospective purchasers that if they purchased one of the lots, they would receive a 10% discount from the developer, making the actual net sales price \$211,500.00, all of which could be financed with no down payment.³⁵ Lenders would be informed that the contract price was \$235,000.00, however.³⁶ The final loan amount would be \$211,500.00, which LGD would then accept in full payment for the lot.³⁷ By means of this trick, LGD was able to offer and to provide 100% financing to purchasers without

³² W. Gilbert Testimony p. 374 line 17 to p. 375, line 6, R. at _____

³³ *Id.* at p. 373 line 23 to p. 374 line 8 R. at _____

³⁴ *Id.*

³⁵ Email from W. Gilbert to Elaine Lester dated _____ PX 63 R. at _____

³⁶ *Id.*

³⁷ S. Gilbert Testimony p. 233 lines 7-24, R. at _____ discussing PX 63

alerting lenders who had provided financing under the mistaken belief that the loan-to-value ratio was 90%, not 100%

As reflected by emails which they received from Gilbert and his son, T&A were fully aware of LGD's deceptive tactics³⁸ In fact, T&A's assistance was necessary in order to make the scheme work Thus, T&A prepared HUD-1 Settlement Statements which falsely showed the contract price to be the \$235,000 00 listing price, instead of the actual \$211,500 00 net sales price³⁹ In addition, T&A prepared affidavits of consideration which were filed along with deeds to the lots and falsely reflected cash consideration of \$235,000 00⁴⁰

The deceptive provision of 100% financing was not enough, by itself, to stimulate sales in Planters Row As a result, as a further incentive, LGD offered to make such sales subject to buy-back agreements whereby, after one year, a purchaser could require LGD to repurchase her lot for \$250,000 00, thereby providing her with a \$38,500 00, or 18%, profit on the actual selling price of \$211,500 00⁴¹ Again, T&A had been made fully aware of the buy-back program

In the early part of 2006, LGD's 100% financing and "guaranteed" buy-back program resulted in only six (6) additional sales of lots in Planters Row,⁴² most of which were closed by T&A Other than these six sales, there were virtually no other lot sales during the remainder of 2006 and into early 2007⁴³ It was at this time that Gilbert's scheme started to unravel

³⁸ Adams Testimony, p 817 line 18 to p 19 line 20 R at _____ discussing PX 63, R at _____

³⁹ *Id* at p 815 line 4 to p 821 line 20, R at _____

⁴⁰ *Id*

⁴¹ E g Grimshaw Buy Back PX 36 R at _____ Robertson Buy Back PX 43 R at _____

⁴² W Gilbert Testimony p 372 line 14 to p 393 line 16 discussing an email dated April 17 2007 to Courtney Furman PX 27 R at _____

⁴³ Courtney Furman testified that he did not believe that LGD had any sales in 2007, p 348 line 21 to page 349 line 1 In addition in an email from W Gilbert to Furman dated April 17 2007 Gilbert states that there were six buy back lots in 2006 P 393 to lines 4 12 R at _____, discussing PX 27 R at _____

Three of the six purchasers elected to exercise their buy-backs⁴⁴ LGD did manage to perform under one of the buy-back agreements, but was unable to perform the other two, which related to the sales to Grimshaw and Robertson of Lot Nos 28 and 31 in Planters Row⁴⁵ Those were the same lots ultimately sold to Plaintiff at the closing orchestrated by T&A

Closings were scheduled for LGD's repurchases of Lots 28 and 31, and T&A were chosen by Gilbert to perform those closings When LGD proved unable to perform the buy-backs,⁴⁶ the closings were postponed In order to avoid being sued by Grimshaw and Robertson, LGD was forced to enter into extension agreements with them⁴⁷ The Grimshaw extension provided that in the event LGD did not repurchase the Grimshaw lot by October 30, 2007, LGD would suffer a \$25,000 00 penalty against the re-purchase price The Robertson extension similarly provided that if LGD did not repurchase the Robertson lot by November 14, 2007, LGD would be required to pay Robertson an additional six month's finance charge By the time of the closing of RFT's purchase of Lots 28 and 31, T&A were fully aware of why the closings of the Grimshaw and Robertson re-purchases were cancelled back in the spring, of the extension agreements, of the deadlines, and of the penalties for LGD's non-performance⁴⁸

⁴⁴Gilbert testimony p 393 lines 4 16 R at _____

⁴⁵Gilbert testimony p 411 line 7 to p 413 line 2 R at _____, discussing PX 37 R at _____ p 416 line 15 to p 419 line 19 discussing PX 44 R at _____

⁴⁶Furman testimony, p 305 line 2 to p 306 line 4, R at _____

⁴⁷Grimshaw Extension Agreement PX 37 R at _____ Robertson Extension Agreement PX 44 at p 3 ¶9(a), R at _____

⁴⁸Adams either directly or through his paralegal had received a letter and emails advising him that if the buy back s were not satisfied by the deadlines set forth in the extension agreements LGD would incur substantial monetary penalties and that LGD could not meet the deadlines without RFT's money PX 17 R at _____ Gilbert testimony p 389 lines 15 24 PX 18 R at _____ Gilbert testimony p 390 line 25 to p 391 line 12 R at _____, Adams p 814 18 to 815 3 R at _____

By August 2007, the financial picture for LGD was worsening. A fourth lot purchaser, the Carrs, elected to exercise their buy-back agreement⁴⁹. Again without the funds to perform, LGD was required to borrow \$225,000.00 in order to repay the Carrs. T&A closed both the loan from the bank to LGD and the repurchase by LGD of the Carrs' lot⁵⁰. So, LGD's position in the autumn of 2007 was that it was out of cash and facing deadlines on the Robertson and Grimshaw buy-backs.

Unfortunately for RFT, it was at about this time that Mr. Roatch began to seriously consider investing in Planters Row. Having no reason to believe that Planters Row or LGD were in any trouble,⁵¹ Mr. Roatch began discussions with a sales agent, Jan Bradshaw, and Gilbert regarding such an investment.⁵² After several weeks, it was agreed that RFT would purchase lots 28 and 31 from LGD at agreed purchase prices of \$290,000.00 for Lot 28⁵³ and \$280,000.00 for Lot 31.⁵⁴ In addition, RFT received a buy-back agreement pursuant to which it could require LGD to repurchase the lots for \$640,000.00 after one year and for \$700,000.00 after two years.⁵⁵ RFT was to receive one \$40,000.00 "interest" payment at closing, and another one at the end of the first year. Finally, RFT was to receive a second mortgage on 21 other lots owned by LGD in order to secure LGD's performance of the buy-back.⁵⁶ LGD and Bradshaw characterized the

⁴⁹ Adams testimony p. 813 line 12 to p. 814 line 5 R at _____. Gilbert testimony p. 388 lines 5-10.

⁵⁰ Adams testimony, p. 813 line 16 to p. 814 line 5 R at _____.

⁵¹ Roatch testimony p. 114 lines 16-20, R at _____, p. 116 lines 2-4, R at _____.

⁵² *Id.* at p. 93 line 16 to p. 100 line 8 R at _____.

⁵³ Contract of Sale dated September 25, 2007 PX 5 R at _____.

⁵⁴ Contract of Sale dated September 25, 2007 PX 6 R at _____.

⁵⁵ PX 7, R at _____.

⁵⁶ *Id.*

deal offered to Mr Roatch as one with little risk and “guaranteed” buy-backs and with an exceptional return on RFT’s investment ⁵⁷

After several communications between T&A and others in which the importance of the October 30, 2007, deadline was stressed, a closing was scheduled for that day at T&A’s office. Again, T&A served as closing attorneys.

The closing did take place on October 30, 2007, as scheduled. Mr Roatch was unaware that any other transactions were dependent upon RFT’s closing on Lots 28 and 31 ⁵⁸. He was not told that RFT’s funds would be used to satisfy the Robertson and Grimshaw buy-backs, ⁵⁹ nor was he informed of the financial problems being experienced by LGD ⁶⁰. Nothing in the record indicates that T&A informed him of the extensive business dealings they had had in the past with Gilbert and LGD. Indeed, other than at various civic events, Mr Roatch had never even seen Adams prior to the closing. Roatch testimony at p 160 lines 15-20, R at _____

T&A’s orchestration of the closing was masterful. They held a signed deed from Grimshaw conveying the property to LGD, ⁶¹ and they arranged to obtain a signed deed from Robertson on the day of RFT’s closing ⁶². Mr Roatch presented a cashier’s check in the amount of

⁵⁷ Email from Bradshaw to Roatch dated September 21, 2007. PX 3. R at _____. Bradshaw to Roatch email dated September 26, 2007. PX 4. R at _____.

⁵⁸ Roatch testimony, page 123 line 16 to p 124 line 11, R at _____.

⁵⁹ Roatch testified that he did not become aware of the Grimshaw and Robertson closings until August 7, 2008. P 199 lines 15-24. R at _____ p 132 line 20 to p 133 line 1, R at _____. Adams testimony, p 800 lines 6-11, R at _____.

⁶⁰ *Id.* page 114 lines 5-20. R at _____.

⁶¹ See Grimshaw deed dated _____ PX 35. R at _____. Adams testimony p 761 lines 8-24. R at _____.

⁶² See Robertson deed dated _____ PX 42. R at _____. Adams testimony, p 761 line 25 to p 762 line 4. R at _____.

\$570,000 00 at the closing,⁶³ which T&A deposited in their escrow account⁶⁴ They then disbursed \$250,000 00 to Grimshaw and his lender⁶⁵ and \$250,000 00 to Robertson and his lender⁶⁶ The HUD-1 which T&A prepared for RFT, however, showed the entire proceeds of the check going to LGD, instead of showing that Grimshaw and Robertson were getting \$500,000 00 of the \$570,000 00⁶⁷ Similarly, the Grimshaw and Robertson HUD-1's both falsely reflected that the buy-back monies were coming from LGD⁶⁸ This "flip transaction" was effectively concealed by the false HUD-1's

Mr Roatch testified very clearly that if he had known of LGD's financial history and problems, of LGD's insolvency and resulting inability to perform the Grimshaw and Robertson buy-backs,⁶⁹ of T&A' use of RFT's funds in order to cure LGD's defaults on those buy-backs,⁷⁰ or of T&A' orchestration of a "flip transaction" as part of their efforts on behalf of LGD, he certainly would not have completed the purchases of Lots 28 and 31⁷¹ Expert testimony reflected that, the lots were worth a total of only \$109,500 00 on the date of trial⁷² Mr Roatch valued the lots at only \$25,000 00 each based on a foreclosure sale P 138, lines 1-8, R at

⁶³ Lester testimony, p 514 lines 14 20

⁶⁴ *Id*

⁶⁵ Grimshaw HUD 1 PX 38 R at ____ Adams testimony, p 784 lines 3 14

⁶⁶ Adams testimony p 821 lines 2 20, R at ____ W Gilbert testimony, p ____ line ____, R at ____

⁶⁷ RFT HUD 1 PX 11 R at ____

⁶⁸ See fn 59 60 supra

⁶⁹ Roatch testimony page 114 lines 5 20, R at ____

⁷⁰ *Id* at p 166 line 23 to p 167 line 6 R at ____

⁷¹ *Id* at p 167 lines 7-14 R at ____ p 167 line 22 to p 168 line 22 R at ____

⁷² Report of Martin and Associates at PX 72 at p 38 R at ____

**B T&A Violated their Duty to Truthfully Disclose
 Material Facts**

The authorities discussed in this section stand for two elementary legal principles (1) that a lawyer is subject to a duty to his client to make a full and complete disclosure of all material information relating to the subject of the representation and (2) that an incomplete or partial disclosure does not satisfy the duty of full disclosure, nor does it create any duty of due diligence on the part of the client

1 The Duty of Full Disclosure

Legal analysis of T&A's duty of disclosure begins with recognition of the fact that

[t]he relationship between an attorney and a client is *highly* fiduciary in its nature and of a *very* deliberate, exacting and confidential character, requiring *a high degree* of fidelity and good faith

Ellis v Davidson, 358 S C 509, 521, 595 S E 2d 817, 823 (Ct App 2004) (emphasis added)

Once a fiduciary relationship has been established, all information which is significant and material must be disclosed *Moore v Moore*, 360 S C 241, 251, 599 S E 2d 467, 472 (2004)

Thus, as a fiduciary, a lawyer is subject to "a duty of full disclosure of all material facts known to [her] that might affect [the client's] rights" *Montgomery v Kennedy*, 669 S W 2d 309, 313

(Tex 1984) The great breadth of a lawyer's duty of disclosure was made clear by the Supreme Court in the following words

In view of the trust placed in attorneys by their clients and attorneys' often superior expertise in complicated financial matters, *attorneys must take every possible precaution to ensure that clients are fully aware of the risks inherent in a proposed transaction* and of the need for independent and objective advice

Matter of Harper, 326 S C at 193, 485 S E 2d at 380 (emphasis added)

RFT submits that there is no issue as to whether T&A owed a duty to disclose material facts to them. T&A's expert, Mr. Tighe, did not testify that they were not subject to a duty of disclosure. Respondent Adams did not deny that he had such a duty.⁷³ RFT's expert, Mr. Freeman, testified unequivocally that T&A were subject to an absolute duty of disclosure.⁷⁴ Thus, the only real issues were as to whether the facts which were not disclosed were material, whether T&A met their duty of disclosure, and whether some lack of due diligence by the RFT somehow excused T&A from their duty to make disclosures.

2 The Facts Which Were Not Disclosed, Individually and Collectively, Were Material

In *Anthony v Padmar, Inc.*, this Court defined the term "material fact" as follows

a fact is considered material if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information available."

320 S.C. 436, 450, 465 S.E.2d 745, 752 (Ct. App. 1995) (*quoting Shell Petroleum, Inc. v. Smith*, 606 A.2d 112, 114 (Del. 1992)). The Court explained further that in order for information to be material,

it need not be shown that [disclosure] would have changed the way [plaintiffs] voted on the sale or their overall view of the transaction, rather, it is enough to show that the fact in question would have been relevant to [plaintiffs] in making a decision."

Id. RFT submits that the undisclosed facts in this case were indisputably material to its decision to invest in Planters Row.

⁷³ In fact, Adams testified that nothing in the ARD form states that he was relieved from disclosing relevant information to Mr. Roach. Page 795 lines 1-10. R. at _____.

⁷⁴ Page 621 line 10 to page 632 line 18. R. at _____.

Quite obviously, information which indicates that LGD was not able to pay its debts when they became due would have been relevant to any prospective investor. One does not take \$570,000.00 in funds held in trust for his or her mother⁷⁵ and gamble them on a developer with shaky finances. Similarly, anyone contemplating the purchase of investment lots from a developer for \$280,000 and \$290,000 would consider the following facts to be important to their decision: that the developer had sold those same lots *with buy-backs* less than 18 months earlier for only \$211,500 each, that the developer was purchasing those same lots for \$250,000.00 each on the same day it was selling them for \$280,000 and \$290,000, and that the only reason the developer was paying \$250,000 for each lot was because it was liable for that amount on buy-back agreements with the sellers. Indeed, the fact that the prior owners wanted out of Planters Row and were willing to accept substantially less for their lots than RFT was paying would have alerted RFT that it was not getting such a good deal and that lots in Planters Row were not all that desirable as investments. Additionally, RFT, as would have any reasonable investor, considered *very* material the fact that its money was being used to pay an indebtedness that LGD could not afford to pay, instead of being used to enhance Planters Row in some way.

The fact that RFT's purchase had to be consummated on or before October 30, 2007, in order to enable LGD to avoid penalties to be paid to the sellers would also have been important to any investor. Obviously, had that fact been disclosed, it would have informed him that LGD did not have the funds needed in order to avoid the penalties and was desperate for RFT's funds for that purpose. More importantly, it would have informed him that LGD had twice defaulted on similar types of buy-back agreements into which RFT was about to enter.

⁷⁵ Mr. Roatch testified that RFT was charged with managing trust assets in order to produce income for his mother who is the trustee of the trust. Page 88 line 6 to page 89 line 14. R. at _____

Knowledge as to the history and amount of previous legal services provided by Adams to Gilbert and LGD over a twenty-year period would also have raised obvious questions as to T&A's ability to be totally impartial in the transaction⁷⁶

Mr Roatch testified that had he received full disclosure of the facts surrounding the transaction, RFT would not have made the investment. On the other hand, not a single witness testified that the undisclosed facts discussed above would not "have changed the total mix of information" available to Mr Roatch nor that they would not have been relevant to his decision. Mr Freeman testified unequivocally that T&A violated their standard of care by not making those disclosures.

Thus, absent some defense excusing T&A from making the disclosures, the only conclusion possible from the evidence is that T&A breached their standard of care by not doing so.

3 T&A's Due Diligence Defense

Rather than trying to prove that it adequately disclosed all of the material facts discussed above, T&A argued without supporting authority instead that it disclosed sufficient facts to put RFT on notice of the undisclosed and misleading facts, thereby imposing a duty of due diligence upon RFT. T&A then attempted to argue that if RFT had exercised due diligence, it somehow would have learned all of the true facts. There are several problems with this defense.

First, it ignores the fact that under South Carolina law, a client has no duty to exercise diligence in order to discover facts which her attorney has a duty to disclose to her. Stated differently, a client has an absolute right to trust that her attorney is doing his job properly with a view to protecting her interests. Thus, in *Epstein v Howell*, this Court held that parties have a

⁷⁶ Gilbert's selection of T&A to close this transaction was certainly not coincidental, random, or without purpose.

right to expect a fiduciary to perform his duty of full disclosure notwithstanding the facts that they did not trust the fiduciary and that “they might have ascertained the falsity of the representation had they investigated ” 308 S C 528, 531, 419 S E 2d 379, 382 (Ct App 1992) Thus, a client has a right to rely upon his attorney to faithfully perform her duties “without fear the attorney is not acting in the client’s best interests ” *True v Montieth*, 327 S C 116, 120, 489 S E 2d 615, 617 (1997) And, as Mr Freeman recognized in his testimony, partial and misleading disclosures are no substitutes for full disclosure and cannot impose a duty of due diligence on the clients⁷⁷ T&A’s second problem with its due diligence defense is that even assuming *arguendo* that RFT had a duty of due diligence, they offered no evidence tending to prove that the exercise of due diligence would have uncovered any of the true material facts They offered no evidence or law reflecting which actions Mr Roatch should have undertaken, as to what he would have discovered had he done those things, nor as to how the newly discovered information should have or could have impacted his decision There was a total failure of proof which would have rendered the due diligence defense irrelevant, even if it had been legally available

Third, T&A’s argument that they made RFT aware of sufficient facts to relieve them of their disclosure duties is based upon an abject misunderstanding of what those duties actually were They base this argument on two documents which they say they provided to Mr Roatch prior to the closing (and which Mr Roatch denied receiving)⁷⁸ – a copy of the deed to be signed at closing and T&A’s title opinion letter The deed contained a derivation which reflected that the Robertson lot was conveyed to LGD on October 30, 2007, the date of the RFT closing and

⁷⁷ Freeman testimony p 622 line 22 to p 627 line 15, R at ____ The duty owed by lawyers and other fiduciaries is to fully disclose all known information that is significant and material *Anthony v Padmar Inc* 320 S C at 449 465 S E 2d at 752

⁷⁸ Roatch testimony p 117 line 9 to p 118 line 22

that the Grimshaw lot was conveyed on October 26, 2007⁷⁹ The title opinion letter merely referred to the fact that in order for LGD to have conveyed good title to RFT, LGD must have “good and sufficient general warranty deeds” which had been properly executed and recorded⁸⁰

T&A apparently believed that all they had to do in order to satisfy their duty of disclosure was to present these documents to Mr Roatch and then to gamble that prior to the closing he would study them, fully understand them, draw all of the inferences which were properly deducible therefrom, and, then, based on the documents and those inferences be able to connect the dots which would then lead him to discover all of the other undisclosed material facts not mentioned in those documents Based upon this view of their alleged duties, T&A essentially take the position that if Mr Roatch did not read or understand these legal documents, or did not make the correct inferences, or did not connect all of the dots, it was not their fault

Needless to say, there is no way to square T&A’s position with their duty of full disclosure First, RFT submits that as *its* attorney at the closing, T&A had a duty to explain all of the documents which were being signed and to insure that Mr Roatch fully understood all of the implications of those documents If important facts should have been inferred from those documents, T&A had a duty to insure that Mr Roatch made all of the proper inferences and accurately connected the dots T&A did not attempt to do any of those things Finally, as Mr Freeman testified, the deed derivation and title opinion letter were nothing more than misleading partial disclosures which no lay person could reasonably be expected to fully comprehend without the help of a lawyer⁸¹

⁷⁹ RFT Deed DX 1 and PX 12 R at _____

⁸⁰ PX 10 R at _____

⁸¹ Freeman testimony p 626 line 2 to p 627 line 15 R at _____

For any closing attorney to expect a lay client to discover all material facts regarding a transaction simply by reading a deed and a title opinion letter is unreasonable as a matter of law. Moreover, no lay client should be charged with a duty to correctly infer negative facts from documents prepared *by his lawyer*. Indeed, the title opinion letter and deed are precisely the types of things which would have been studied by an independent lawyer had T&A performed its duty to affirmatively advise Mr. Roatch to hire one.

For all of the above reasons, RFT submits that even assuming that there were evidence on the record which would establish an absence of diligence on its part in investigating the transactions prior to closing, such evidence could not legally serve as a defense to T&A's failure to perform its duty of full disclosure.

4 The ARD Form Did Not Relieve T&A from their Duty of Disclosure

T&A argued at trial that language in the ARD form stating that they were not hired to give substantive advice, but were hired to paper and to conduct the closing, relieved them of any affirmative duty of disclosure. There are several serious flaws in this argument.

First, while the ARD states that T&A were not hired in order to negotiate or to provide substantive advice, that is exactly what they did. Adams negotiated with LGD's lender regarding the terms of a subordination agreement to be signed by RFT. At the closing, a section of the buy-back agreement was negotiated and changed. He advised Mr. Roatch as to the meaning and effect of the subordination agreement, and recommended that he sign it. He advised Mr. Roatch as to the meaning and effect of the lot release forms which he prepared and had Mr. Roatch sign in advance.

Second, while the ARD form arguably might be appropriate for use in a garden-variety residential closing, it certainly was not appropriate in this complicated investment real estate

transaction which Respondent Adams himself characterized as “very rare ” This was not a simple transaction in which one party received a deed and the other received cash and after which neither had further responsibilities to the other In addition, there was the buy-back agreement which provided rights to, and imposed duties upon, both parties to be exercised and performed both during *and after* the closing There were also the second mortgage securing LGD’s performance of the buy-back, the subordination agreement subordinating RFT’s mortgages to the lien of LGD’s first mortgage lender, and the lot releases which allowed LGD to sell lots consistently with the requirements of the first mortgage Finally, there was the undisclosed “flip transaction” which could not have occurred without T&A’s timing and orchestration skills For T&A to even suggest that the ARD form shielded them from rendering advice or making disclosures in connection with this “very rare” transaction is ludicrous T&A, in short, were far more than mere scriveners *See McNair*, 330 S C at 348-49, 499 S E 2d at 496-97

Third, the fact that the ARD mentions certain tasks which RFT believed, at the time of signing the form, would not be performed and then provides a *non-exclusive* list of tasks which would be performed in no way limits T&A’s duty to make disclosures Indeed, providing advice and providing information are separate and distinct activities⁸² Providing advice involves advising a person on how to do something Providing information, on the other hand, is just that – making information available to that person and then leaving it totally up to that person to decide how to use the information Not one word in the ARD addresses T&A’s duty to disclose material information

⁸² Freeman testimony p 622 lines 13 21 R at _____

Fourth, fiduciary duties are normally not waivable, especially in dealings between lawyer and client. Thus, for T&A to take the position that the ARD form relieved them from their fiduciary duty to make full disclosure makes no sense. Even if the form stated in clear language that the client relieved the attorney of any duty of disclosure (which T&A's form did not), it would be legally incapable of imposing a waiver on the clients especially where, as in this case, there had been no attempt to advise the client as to the nature of an attorney's fiduciary responsibilities or to explain the meaning or effect of the form.

Fifth, even if the form were effective in relieving T&A from their duty of disclosure (which it wasn't), it would not relieve them from affirmative inaccuracies in the HUD-1's and the deed affidavits.

For the above five reasons, RFT submits that T&A's ARD form was ineffective to relieve them of any of the duties which RFT claims to have been violated.

**C T&A Committed Malpractice by Drafting and
Signing False and Misleading HUD-1 Settlement
Statements And Affidavits of True Consideration**

The HUD-1 Settlement Statement which T&A prepared for Plaintiffs is, on its face, false and misleading. In addition, Adams admitted that affidavits of true consideration which he prepared did not state the true cash consideration paid for Lots in Planters Row but stated what T&A claimed was the fair market value, which was actually just the original list price of the property. Under settled statutory and case law, the preparation of both the HUD-1's and the affidavits violated the Rules of Professional Conduct and constituted malpractice.

**1 Preparation of False and Misleading
HUD-1's Constituted Malpractice**

As explained above, T&A prepared false and misleading HUD-1's for LGD's purchases of the lots from Grimshaw and Robertson and for RFT's simultaneous purchase of those lots.

from LGD. The South Carolina Supreme Court has provided clear notice to closing attorneys in this state of the need to insure accuracy in HUD-1 Settlement Statements. A perfect example comes in the Supreme Court's opinion in *In re Barbare*, 360 S.C. 560, 602 S.E.2d 382 (2004), which was decided three years before the subject closing. In that case, the attorney closed two transactions on the same day, which simultaneous closings the Court described as "a 'flip transaction' where proceeds from the second transaction are used to fund the initial transaction." 360 S.C. at 567-68, 602 S.E.2d at 385-86. The Court took pains to explain that the HUD-1 in the first transaction was inaccurate because it improperly showed cash coming from borrower (buyer) when actually it should have shown the cash coming from "other than borrower" in the 200 column of the HUD-1 form. 360 S.C. at 568, 602 S.E.2d at 386. Identically in this case, the Robertson and Grimshaw HUD-1's showed all of the cash coming from LGD, rather than showing it coming from a source other than LGD in the 200 column of the HUD-1. In *Barbare*, the Court also found the HUD-1 in the second transaction in which the developer sold the lots it had just purchased to be inaccurate because it reflected all of the proceeds of sale going to the developer, instead of most of the proceeds going to the party from which the developer had just bought the real estate. *Id.* Again, these facts in the *Barbare* case are identical to those in this case.

In *Barbare*, the Court found that the lawyers' conduct violated a number of the Rules of Professional Conduct, to include Rule 4.1(a) (knowingly making a false statement of material fact to a third person), Rule 4.1(b) (failing to disclose facts when necessary to avoid assisting a fraudulent act by a client), and Rule 8.4(d) (lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). 360 S.C. at 572, 602 S.E.2d at 388. The

continued careless and intentional preparation of HUD-1's was of such great concern to the Supreme Court that it admonished the Bar as follows

The Court is troubled by the recent number of real estate transactions which have been the subject of misleading, fraudulent, and/or criminal schemes. Inaccurate HUD-1 Settlement Statements and other closing documents contribute to these deceptive activities. Respondent's misconduct derives principally from his inaccurate representations on HUD-1 Settlement Statements. These misrepresentations have subjected respondent to both federal criminal penalties and the current disciplinary action by this Court.

* * * *

According to the parties in this matter, a large number of attorneys are not passing closing funds through their trust accounts and, at the same time, not identifying the funds as paid outside of closing on closing documents. Not only does this practice fail to accurately record the actual transaction for the buyer and seller, but it is misleading to lenders. In an attempt to eliminate this and other deceptive practices, we emphasize that costs and credits in connection with a real estate transaction must be shown on the settlement statement and that the settlement statement must reflect all amounts paid, by whom paid, and to whom paid. Any charges or amounts paid outside of the closing must be reflected as such on the settlement statement (i.e., "POC").

360 S.C. at 573-74, 602 S.E.2d at 388-89. These warnings were repeated by the Court in *In re Lathan*, 360 S.C. 326, 338, 600 S.E.2d 902, 908-09 (2004). RFT submits that as experienced closing attorneys, T&A are charged with knowledge of the *Barbare* and *Nathan* decisions.

Leaving no doubt that Defendants' preparation of false and misleading HUD-1's violated their standard of care is the Supreme Court's decision in *In re Johnson*, 375 S.C. 499, 654 S.E.2d 272 (2007). There, the attorney was again involved in closing a "flip transaction." The Court described the inadequacies in the HUD-1 as follows:

Specifically, the HUD-1 Settlement Statement did not show a concurrent transaction in which Hoy purchased the same property. In essence, there was a transaction between Hoy and the seller of foreclosed properties (usually the bank that had foreclosed on the property) and, concurrently, a transaction where Hoy was selling the same property to a third party buyer. While Hoy paid for his purchase with a business check drawn on his corporate account, respondent should have known that the short amount of time between Hoy's purchase and his sale enabled Hoy to use the same incoming funds from the second transaction to fund his purchase of the property in the first transaction. Respondent acknowledges that the HUD-1 Settlement Statement in the sales transaction by Hoy should have reflected that the funds from the sale were being applied to the initial acquisition by Hoy and the "due seller" line should have been reduced by a like amount.

375 S.C. at 503 n.2, 654 S.E.2d at 274 n.2. It is also significant that numerous persons have suffered felony convictions under 18 U.S.C. §1014 for making false statements in HUD-1's. *See, e.g., U.S. v. Allen*, 2010 WL 125467 at *4 (11th Cir. 2010) (HUD-1 falsely reflected that all of buyer's monies were being paid to Seller), *U.S. v. Gemmill*, 2007 WL 2032927 at *11 (E.D. Pa. 2007) ("All seller financial assistance to buyer must be revealed and disclosed on the HUD-1 settlement sheet forms _____, and seller must be identified as source of funds.") *U.S. v. Gisham*, 146 F.3d 6 (1st Cir. 1998), *U.S. v. Behenna*, 1995 WL 3731 (1st Cir. 1995).⁸³ RFT submits that in light of this federal precedent and of the Supreme Court's clear warnings in the *Barbare*, *Nathan*, and *Johnson* opinions, it could hardly be more clear that T&A violated their standard of care by preparing false and misleading HUD-1's.⁸⁴

⁸³ 18 U.S.C. §1014 prohibits persons from knowingly mak[ing] any false statement or report _____ for the purpose of influencing in any way the action of _____ any institution the accounts of which are insured by the Federal Deposit Insurance Corporation _____ upon any application _____ or loan _____. Defendants submitted HUD-1's to lenders in connection with the sales by LGD to the Grimshaws and the Robertsons.

⁸⁴ In addition, Mr. Freeman emphasized the importance of accuracy in HUD-1's and opined clearly that T&A violated their standard of care by authoring false and misleading HUD-1's. Freeman testimony, p. 628 line 10 to p. 631 line 17. R. at _____.

2 Defendants Committed Malpractice by Drafting False and Misleading Affidavits of True Consideration

Section 12-24-10 et seq of the South Carolina Code of Laws imposes a recording fee on deeds reflecting the sale of real estate, the amount of the fee to be based upon the “value” of the real estate as determined pursuant to §12-24-30 That section, in turn, provides that “the term ‘value’ means the consideration paid in money or money’s worth for the realty ” The statute also provides that in lieu of using the amount of money or the “money’s worth” in determining the consideration paid, taxpayers may elect to use the fair market value of the realty being transferred Obviously, when the consideration paid is all in money, there is no reason to use surrogates such as the fair market value of the money’s worth or of the property being transferred in order to determine how much was actually paid for the real estate Once the value (consideration paid) for the real estate is determined, §12-24-70 requires that a “responsible person connected with the transaction” must sign an affidavit showing the “value” of the property as determined under §12-24-30 Section 4 of the standard affidavit of consideration used in South Carolina requires the person signing the affidavit under oath to check whether the deed recording fee “(a) is computed on the consideration paid or to be paid in money or money’s worth of \$_____” or “(b) is computed on the fair market value of the realty which is \$_____”⁸⁵ Regarding the affidavits flowing from the Grimshaw and Robertson purchases of Lots 28 and 31 in 2006, T&A entered the list prices of \$235,000 00 for each lot as the consideration paid in money or money’s worth, and not the actual consideration paid in money of \$211,500 00

⁸⁵ See e g Grimshaw Deed PX 35, R at _____

Respondent Adams testified at trial that rather than using cash consideration, he used the fair market values of the lots to determine the amount of the recording fee. That testimony is demonstrably false. For example, on the Grimshaw affidavit⁸⁶ §4(a), “money or money’s worth” is checked and \$235,000 is typed in the blank space for the dollar amount. Section 4(b), the fair market value of the realty, was not checked and no dollar amount was inserted. Thus, the deed affidavit shows that the fair market value of the land was *not* used and, thus, that the deed falsely overstated the money consideration actually paid by Grimshaw, which was \$211,500.00 and not \$235,000.00.

Regarding harm caused by the inflated deed affidavits, RFT introduced undisputed expert testimony that falsified deed affidavits resulted in subsequent appraisals also being inflated.⁸⁷ Evidence in the record showed that the appraisals of lots 28 and 31 were based in part upon the value of Lot 26 for which the deed affidavit reflected the list price of \$235,000 as the cash consideration,⁸⁸ not the actual selling price which was \$23,500.00 less.⁸⁹ The phony deed affidavit inflated the appraisals of the lots which were performed for RFT and, therefore, caused RFT to pay more than it would have paid had there been an accurate affidavit for the lot used as a comparable.

RFT therefore submits that undisputed and uncontradicted evidence on the record establishes that T&A engaged in malpractice by preparing and notarizing false deed affidavits.

⁸⁶ *Id*

⁸⁷ Wright testimony p. 253 line 19 to p. 255 line 8

⁸⁸ Adair Deed PX 47 R at _____

⁸⁹ Adair Contract PX 46 R at _____

**D T&A Committed Malpractice by Closing
A “Flip Transaction” Without Disclosing All
Facts Relating to the Transaction to RFT**

“Flip transactions” are presumptively unethical under *In re Latham*, *In re Barbare*, and *In re Johnson*, discussed above, at least where they are not fully disclosed to and consented to by all parties. In a more recent case, the Supreme Court also directly recognized that “participating in a flip transaction would constitute misconduct.” *In re Faysoux*, 381 S.C. 637, 642, 675 S.E.2d 428, 431 (2009).

The “flip transaction” in this case was the mechanism by which T&A concealed from RFT how its funds would be used by LGD, how much LGD paid for the lots which were resold to RFT, and the fact that LGD needed RFT’s funds to pay debts which it could not afford to pay.

**E RFT Suffered Damages Which Were Proximately
Caused by T&A’s Conduct**

RFT made a decision to invest \$570,000.00 in Planters Row. That decision was induced by Respondent’s non-disclosure of material facts about LGD’s financial condition, by their preparation of a false and misleading HUD-1 which misrepresented how RFT’s money would be paid out and which did not disclose other relevant facts about how the closing was structured, and by a failure to communicate T&A’s long business relationship with LGD and Gilbert. But for these acts and omissions of T&A, RFT would not have consummated a transaction whereby it entrusted \$570,000.00 to a company which was, unknown to RFT, experiencing serious financial difficulties. That LGD might fail in the not-too-distant future following the closing certainly could have been foreseen by T&A, given LGD’s past defaults on similar contracts.

As a proximate and foreseeable result of T&A’s breaches of duty, RFT lost \$570,000.00 less the current values of the lots of \$25,000.00 each (testimony of Mr. Roatch as landowner, p.

138 lines 2-8, R at ____), for a total loss of \$520,000 00 plus pre-judgment interest at 8 75% per annum

**III THE TRIAL COURT ERRED BY MERGING
THE SECOND CAUSE OF ACTION INTO
THE FIRST CAUSE OF ACTION (Issue III)**

The trial court decided that RFT's Second Cause of Action for Breach of Fiduciary Duty was identical to, and thus redundant of, the First Cause of Action for Malpractice. Based upon that decision, the court merged the Second Cause of Action into the First Cause of Action and refused to charge the jury on breach of fiduciary duty. In effect, the trial court directed a verdict on the Second Cause of Action, which was error.

No South Carolina appellate court has *ever* held that breach of fiduciary duty claims are always entirely duplicative of legal malpractice claims. This Court recognized in *Doe v. Howe* that there is a split of authority in other jurisdictions. 367 S.C. 432, 448 n.27, 626 S.E.2d 25, 33 n.27 (2006). Nonetheless, by sending the case back for further factual development, the Court also recognized that there may be situations in which a fiduciary duty claim is not totally subsumed by a malpractice claim. Moreover, in *Smith v. Hastie*, 367 S.C. 410, 420, 626 S.E.2d 13, 18 (Ct. App. 2007), the Court reversed the trial court's dismissal of claims for breach of fiduciary duty and legal malpractice in part upon its finding that "even in the absence of any unethical conduct, Hastie failed to fulfill his fiduciary responsibilities to Smith."

Thus, it is possible, for example, for a jury to find for the defendant on a malpractice claim because it did not believe the plaintiff's expert, but still find for plaintiff on fiduciary duty claim for which expert testimony was not required. Similarly, not all acts of negligence will violate fiduciary duties. An unintentional, innocent error in drafting a document may constitute professional negligence but not a breach of fiduciary duty. On the other hand, a lawyer who

performs legal and non-legal services for a client is in a fiduciary relationship with the client because of the lawyer-client relationship, however, while malfeasance of the non-legal services may give rise to a breach of fiduciary duty, it might *not* constitute legal malpractice

Regarding this case, it was within the realm of possible outcomes that the jury could have found in favor of T&A on the malpractice claim, but against them on the fiduciary duty claim, and vice versa. One big difference between the two causes of action is that while a malpractice claim normally requires expert testimony as to the lawyer's standard of care and breach thereof, a breach of fiduciary duty claim requires no expert testimony. Thus, conceivably, a jury could disbelieve RFT's experts, and yet still find in favor of the RFT on the fiduciary duty claim. Similarly, while the Rules of Professional Conduct do constitute admissible evidence of the standard of care in a legal malpractice claim, they often do not constitute evidence of fiduciary duties. Thus, while evidence of a violation of the RPC, such as was present in this case, might support a verdict for legal malpractice, it would not necessarily constitute evidence of a breach of fiduciary duty.

For the above reasons, the merging of the First and Second Causes of Action and the failure to charge the jury on breach of fiduciary duty require a reversal of the trial court and remand for a new trial on that cause of action.

IV SCUTPA APPLIES TO THE LEGAL PROFESSION (Issue IV)

The trial court granted a directed verdict on RFT's Third Cause of Action for violation of SCUTPA, S.C. Code Ann. §39-5-20(a) (1985) on the sole ground that the legal profession was exempt from coverage thereunder and, then, based upon that holding, denied RFT's Motion for a New Trial. The defense that the legal profession was exempt from coverage was not pleaded in

T&A's Answer As a result, it should not have served as a ground for a directed verdict, and the trial court should be reversed for that reason

More importantly, the reasoning for the trial court's order was in direct conflict with appellate decisions which are controlling on the issue Thus, in *Taylor v Medemica*, 324 S C 200, 217, 479 S E 2d 35 (1996), the Supreme Court held that the "provision of *any* service constitutes commerce within the meaning of the UTPA The statute does not exclude professional services from its definition" (emphasis in original) Similarly, this Court, in referring to the coverage of the SCUTPA, pronounced that "[t]here is no question but [t]hat legal services come within the definition of this statute" *Camp v Springs Mortgage Corp* , 307 S C 283, 285, 414 S E 2d 784 (Ct App 1991)

In its order denying RFT's post-trial motions, the trial court explained that it believed the legal profession to be exempt from SCUTPA because it was supervised by the Supreme Court⁹⁰ This finding directly conflicts with other cases holding that mere supervision is not enough to support the exemption under S C Code Ann § 39-5-40(a) (1985), but that the conduct involved must be permitted or allowed by the government agency *Unauthorized* conduct is not covered *Dema v Tenet Physician Serv-Hilton Head Inc* , 383 S C 115, 123 n 6, 678 S E 2d 430, ___n 6 (2009)

RFT therefore respectfully submits that the trial court's orders granting a directed verdict in favor of Defendant⁹¹ and denying a new trial on the Third Cause of Action⁹² should be reversed and that claim remanded for a new trial

⁹⁰ Order dated October 6 2010, R at _____

⁹¹ Oral Order dated July 2 2010, Tr at p 924 line 14 to p 925 line 24 R at _____

⁹² See fn 90 supra

**V THE SALES OF INVESTMENT REAL ESTATE
IN PLANTERS ROW TO RFT INVOLVE
THE SALES OF SECURITIES (Issue V)**

The trial court directed a verdict on RFT's Fourth Cause of Action for aiding and abetting a securities violation because the court did not believe RFT's investment in Planters Row constituted a security. A new trial was denied based on that reasoning.⁹³ The trial court made this ruling despite uncontradicted testimony from Professor John P. Freeman, an expert in securities transactions, that the sale involved the sale of an investment contract and an evidence of indebtedness, both of which fall within the definition of a "Security" stated in §35-1-102(29) of the Securities Act.⁹⁴

In his testimony, Mr. Freeman explained that evidence in the trial record established that the investment in Planters Row was an investment contract. He noted that the lots were marketed and sold as investments.⁹⁵ He also noted that RFT invested \$570,000.00 which Mr. Roatch understood would be used in order to improve Planters Row along with monies of the developer, and that Mr. Roatch expected profits in the form of an increase in the value of the lots resulting solely from the success of LGD in developing Planters Row.⁹⁶ These facts meet all of the factual pre-requisites for an "investment contract" under the test articulated by the South Carolina Supreme Court as follows:

⁹³ Order dated October 6, 2010. R. at _____. The trial court treated the issue of whether the sale of a security was involved as a question of law. As RFT has since learned, this too was error. See e.g., *State v. Ribadeneira*, 817 P.2d 1105, 110 (Ka App. 1991), *Consolidated Management Group LLC v. Dept. of Corp.*, 75 Cal. Rept. 3d 795, 804 (Ct. App. 2008). The issue was one for the jury.

⁹⁴ Section 35-1-102(29) reads in pertinent part as follows: "Security means any evidence of indebtedness investment contract." S.C. Code Ann. § 35-1-102(29) (Cum. Supp. 2010). Freeman testimony p. 232 line 19 to p. 636 line 5. R. at _____.

⁹⁵ *Id.* see also PX 3. R. at _____. PX 79. R. at _____.

⁹⁶ Freeman testimony p. 635 lines 12-20. R. at _____.

an investment contract exists where there has been (i) an investment of money, (ii) in a common enterprise, (iii) with an expectation of profits garnered solely from the efforts of others See *Teague v Bakker*, 35 F 2d 978, 986 (4th Cir 1994) The test is a flexible one, “capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits” *Howey*, 328 U S at 299, 66 S Ct 1100

Majors v South Carolina Securities Commission, 373 S C 153, 163, 644 S E 2d 710, 716 (2007) (quoting *Securities and Exchange Commission v W J Howey Co* , 328 U S 223, 298-99 (1946))

The United States Court of Appeals for the Tenth Circuit found that a transaction nearly identical to the one at issue in this case constituted an investment contract and, thus, a security under the same test applied by our Supreme Court in *Majors McCown v Heidler*, 527 F 2d 204 (10th Cir 1975)

We note that without the substantial improvements pledged by Heidler Corporation and Timberlake the lots would not have a value consistent with the price which purchasers paid See *Continental Marketing Corp v SEC*, 10 Cir , 387 F 2d 466, 470-71, cert denied 391 US 905, 88 S Ct 1655, 20 L Ed 2d 419 The utilization of purchase money accumulated from lot sales to build the promised improvements brings the scheme within the ‘common enterprise’ definition We also note that in applying the second test of the *Howey* case, ‘reliance of the investor solely upon the efforts of the promoter,’ it has been widely held that this reliance of the investor on the promoter need not be total The Ninth Circuit in *SEC v Glenn W Turner Enterprises, Inc* held the test to be

(Whether the efforts made by those other than the investor are undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise

It may be, in the instant case, that an investor who purchased a Timberlake lot, not to build thereon but to hold solely as an investment, could be relying upon the managerial efforts of Heidler Corporation and Timberlake for the management and appreciation of this investment. That other lot purchasers may be interested solely in obtaining a site on which to build their home merely indicates the duality of this 'investment/ownership package

Id at 211 (citations omitted)

RFT is aware that in order to satisfy the second element of an investment contract, an investment in a common enterprise, the South Carolina Supreme Court, unlike the Fourth Circuit, requires a showing of "strict vertical commonality." *Majors*, 373 S C at 165, 644 S E 2d at 717. Strict vertical commonality requires that the fortunes of RFT and of LGD be tied to each other. *Id*. In this case, RFT's and LGD's fortunes were clearly intertwined. At trial, there was testimony which indicated that success of RFT's investment was virtually totally dependent upon LGD's ability to complete the infrastructure and amenities in Planter's Row and that, indeed, LGD's own success was dependent upon its attainment of those objectives. In addition, RFT received second mortgages on 21 lots which T&A claimed to have been worth over \$3,000,000.00. It is at least inferable that, if RFT's lots did not appreciate as expected due to LGD's failures and if RFT foreclosed on its second mortgage, LGD's opportunity to recover additional profits from Planter's Row would come to an end. In addition, LGD's success in Planter's Row was contingent upon RFT's not exercising the buy-back agreement, given that without additional time to generate sales, an additional \$600,000 to \$700,000 in obligations would likely put LGD out of business. At the same time, RFT's ability to recover on the buy-back agreement was dependent upon the successful completion of Planter's Row. In short, LGD

could not have been successful unless RFT was successful, and vice versa. Strict vertical commonality was therefore present, and the sales to RFT were investment contracts.

In addition, the buy-back agreement and the second mortgage on 21 other lots also constituted “evidences of indebtedness” within the meaning of §35-1-102(29) of the Securities Act.⁹⁷ As explained by the Supreme Court of Texas while interpreting similar language in that state’s Blue Sky Law

“Evidence of indebtedness” is another term taken from the Federal Securities Act of 1933, 15 U S C s 77b(1) (1971). It has been defined to mean “all contractual obligations to pay in the future for consideration presently received.” *United States v Austin*, 462 F 2d 724, 736 (10th Cir), cert denied, 409 U S 1048, 93 S Ct 518, 34 L Ed 2d 501 (1972).

Searcy v Comm Trading Corp, 560 S W 2d 637, 641-42 (Tex 1978) (interpreting Vernon’s Ann Tex Civ St Art 581-4(A)). The *Searcy* court continued by explaining

Although the market fluctuations determined the amount to be paid or whether an amount was due, the options were represented as an obligation of CTC to pay money on certain contingencies. The automatic repurchase feature converted CTC’s obligation from one to buy or sell futures contracts to one to pay a monetary return at some future time. We hold that this brings the commodity options within the definition of an “evidence of indebtedness.” *King Commodity Co of Texas v State*, 508 S W 2d 439, 445 (Tex Civ App Dallas 1974, no writ), Long, *The Naked Commodity Option Contract As A Security*, 15 Wm & Mary L Rev 211, 240-41 (1973).

Id. at 642. The buy-backs in this case, like the automatic repurchase feature in *Searcy*, converted LGD’s obligation “to one to pay money at some future time.” Thus, the transactions at issue in

⁹⁷ Freeman testimony p 636 lines 9-25. R. at _____

this case involved the sale of an evidence of indebtedness, and, thus, the sale of a security whether an investment contract was present or not

RFT therefore contends that the trial court erred by directing a verdict on the Fourth Cause of Action because there were two types of securities involved – an investment contract and an evidence of indebtedness. RFT therefore believes that it is entitled to a new trial on the securities cause of actions, particularly in view of the fact that the issue of whether the sale of a security was involved was for the jury.

Conclusion

Based upon the above Argument and Citation of Authority and the entire Record on Appeal, Appellant RFT Management Company, LLC, requests the Court to grant the following relief:

A Reversing the trial court's order denying Appellant's Motion for JNOV on the First Cause of Action for Legal Malpractice, entering judgment in favor of Appellant in the amount of \$520,000.00, and remanding the case to the trial court for computation of pre-judgment interest.

B Alternatively reversing the trial court's order insofar as it denied Appellant's Motion for a New Trial on the First Cause of Action for Legal Malpractice,

C Reversing the trial court's order denying Appellant's Motion for a New Trial on the Second, Third, and Fourth Causes of Action, and remanding those claims to the trial court for re-trial

Respectfully submitted,



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Tel (803) 779-0770
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ATTORNEY FOR APPELLANT

Columbia, South Carolina
June 1, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Eugene C Griffith, Jr , Circuit Court Judge

Case No 2010175606

RFT MANAGEMENT CO , LLC

Appellant,

v

TINSLEY & ADAMS, LLP, &
WELBORN D ADAMS, INDIVIDUALLY,

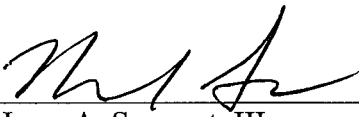
Respondents

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JUN 01 2011
SC Court of Appeals

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on June 1, 2011, addressed to the attorney of record, Matthew H Henrikson, Clarkson, Walsh, Terrell & Coulter, PA, at his Post Office Box 6728, Greenville, South Carolina 29606 on June 1, 2011

June 1, 2011



Harry A Swagart, III
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Post Office Box 7787
Columbia, South Carolina 29202-7787
Tel 803-779-0770
Attorney for Appellant

The South Carolina Court of Appeals

RFT Management Co LLC,

Appellant,

v

Tinsley and Adams LLP & Welborn D
Adams, Individually,

Respondents

The Honorable Jeff D Griffith, Jr
Greenwood County
Trial Court Case No 2008-CP-24-01221

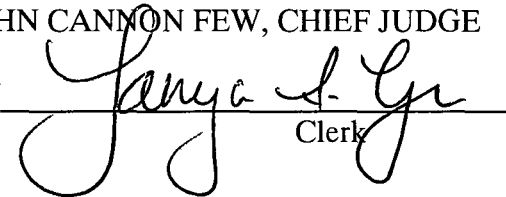
ORDER

Pursuant to a telephone conference with the parties, the Appellant's Initial Brief and Designation of Matter are due on June 1, 2011. The Respondent's Initial Brief and Designation of Matter are due August 15, 2011, and the Appellant's Initial Reply Brief is due thirty days thereafter.

IT IS SO ORDERED

JOHN CANNON FEW, CHIEF JUDGE

BY


Clerk

Columbia, South Carolina

cc Harry A Swagart, III, Esquire
Matthew H Henrikson, Esquire

FILED

4/5/11



The South Carolina Court of Appeals

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V CLAIRE ALLEN
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March 23, 2011

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Matthew H Henrikson, Esquire
Clarkson, Walsh, Rheney
& Terrell, PA
P O Box 6728
Greenville, SC 29606

Re RFT Management v Tinsley & Adams
2010175606

Dear Counsel

This letter is to advise all parties that the conference call has been rescheduled to April 4, 2011 at 9 00

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/mpm



The South Carolina Court of Appeals

TANYA A GEE
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March 14, 2011

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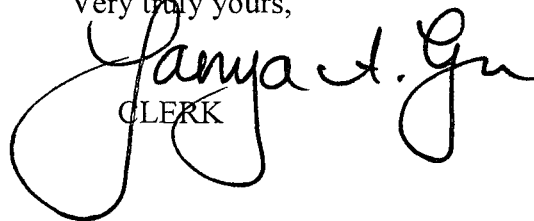
Re RFT Management v Tinsley & Adams
2010175606

Dear Counsel

This letter follows your telephone conversation with a member of my staff in the above case. All parties are advised that the Appellant's Initial Brief was granted an extension until April 25, 2011 instead of March 24, 2011. The conference call will take place on Friday, April 1, 2011 at 9:00.

We apologize for any misunderstanding.

Very truly yours,


CLERK

TAG/mpm
cc Matthew H. Henrikson, Esquire



The South Carolina Court of Appeals

JOHN CANNON FEW
CHIEF JUDGE

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March 10, 2011

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Re RFT Management v. Tinsley & Adams
2010175606

Dear Counsel

This letter serves as an Order granting Appellant's request for an extension of time in which to file the Appellant's Initial Brief and Designation of Matter. I have extended the due date until March 24, 2011. I realize that this extension may not give you all the time you need to complete the Appellant's Initial Brief and Designation of Matter. I have set a conference call for 9:00 a.m. on Friday, April 1, 2011, to discuss an overall approach to setting due dates for all filings in this appeal. **The Appellant is responsible for initiating the conference call by getting all parties on the phone at the allotted time.** The call should last less than ten minutes. The participants in the call will include counsel for all parties and me. In preparation for the call, please consider the other time commitments you have in the near future so we can discuss a suitable timeframe for all parties to complete their briefs. If the time scheduled for the conference call creates a conflict, please contact the Clerk's Office at 734-1890 with all counsel on the phone. We will reschedule the call to suit you.

I look forward to talking to you on Friday, April 1, 2011.

Sincerely yours,

John Cannon Few, by Tanya L. G.
John Cannon Few
Clerk

JCF/mpm

FILED

3/11/11

HARRY A SWAGART III, PC
LAWYER

WWW.COMPLELAW.NET

February 22, 2011

VIA FAX & U S MAIL
(734-1839)

The Honorable Jeanette Barber
Clerk, South Carolina Court of Appeals
P O Box 11629
Columbia, South Carolina 29211

Re RFT Management Company, LLC v Tinsley & Adams et al
Case No 2008-CP-24-1221

Dear Ms Barber

I am the attorney for the Appellant in the above-referenced case. On February 22, 2011, we received the transcript of record for this case. Because the transcript is **1,093** pages long, it will take me an extremely long time to review it prior to preparation of the initial brief for the court. In addition, I am in trial in Baltimore, Maryland from March 7-11, 2011. Because of these circumstances and other deadlines, I request an extension of 30 days until April 22, 2011, in which to file Appellant's Initial Brief.

I thank the Court for its attention to this request.

Sincerely,



Harry A Swagart III

HASIII:ssm

cc Matthew H Henrikson Esquire (via fax)

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RFT Management Company, LLC
v
Tinsley & Adams, et al

Paid Harry A. Swygart

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SC Court of Appeals



The South Carolina Court of Appeals

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March 1, 2011

Harry A Swagart, III, Esquire
Swagart, Walker, Martin
& Reibold, P A
P O Box 7787
Columbia, SC 29202

Re RFT Management v Tinsley & Adams
2010175606

Dear Mr Swagart

We have received your Extension Request in the above case. However, a \$25.00 filing fee was not included. Please provide this Court with a \$25.00 filing fee within ten (10) days of the date of this letter.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/mpm
cc Matthew H. Henrikson, Esquire

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February 22, 2011

VIA FAX & U S MAIL
(734-1839)

The Honorable Jeanette Barber
Clerk South Carolina Court of Appeals
P O Box 11629
Columbia, South Carolina 29211

Re RFT Management Company, LLC v Tinsley & Adams, et al ,
Case No 2008-CP-24-1221

Dear Ms Barber

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I thank the Court for its attention to this request

Sincerely,



Harry A Swagart, III

HASIII ssm

cc Matthew H Henrikson Esquire (via fax)

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FEB 23 2011
SC Court of Appeals

03/24/11 12
04/25/11

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February 22, 2011

VIA FAX & U.S. MAIL
(734-1839)

The Honorable Jeanette Barber
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Columbia, South Carolina 29211

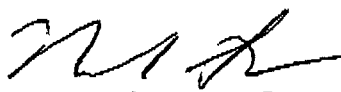
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Case No 2008-CP-24-1221

Dear Ms Barber

I am the attorney for the Appellant in the above-referenced case. On February 22, 2011, we received the transcript of record for this case. Because the transcript is 1,093 pages long, it will take me an extremely long time to review it prior to preparation of the initial brief for the court. In addition, I am in trial in Baltimore, Maryland, from March 7-11, 2011. Because of these circumstances and other deadlines, I request an extension of 30 days until April 22, 2011, in which to file Appellant's Initial Brief.

I thank the Court for its attention to this request.

Sincerely,



Harry A Swagart, III

HASIII ssm

cc Matthew H Henrikson, Esquire (via fax)

RECEIVED
FEB 22 2011
SC COURT OF APPEALS

HARRY A SWAGART, III, P C
LAWYER
www.complexlaw.net

1722 Main Street, Suite 220
Columbia South Carolina 29201

Mail Post Office Box 7787
Columbia South Carolina 29202

Telephone 803 779-0770
Facsimile 803 779 0771

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DATE

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SC Court of Appeals

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TO	COMPANY	FAX NUMBER	PHONE NUMBER
Honorable Jeanette Barber, Clerk	SC Court of Appeals	734-1839	734-1890
FROM	FAX NUMBER	EMAIL	NUMBER OF PAGES
Harry A Swagart, III	803-779-0771	has@complexlaw.net	2
OUR FILE NUMBER	PRIORITY		

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☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS

Warning! The information contained in this transmission is subject to attorney-client privilege and/or attorney work product privilege. This confidential information is intended only for the use of the addressee. Any distribution or copy made of the information contained in this communication is strictly prohibited. If you have received this facsimile message in error, please call the sender by telephone immediately and return the original faxed page(s) and cover sheet to us at the above address via U S Mail. Thank you.



The Supreme Court of South Carolina

(RFT Management
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TITLE OF (V 08-CP-24-12214
CASE (
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(
(Tinsley & Adams
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JAN 21 2011

SC Court of Appeals

Notice

Upon request and for good cause shown, Henry Young, Court Reporter, is hereby granted an extension up to and including February 12, 2011 to prepare and deliver the Transcript of Record in the above case

Desiree Allen
Court Services Manager
South Carolina Court Administration

Columbia, South Carolina
01/14/2011

cc Harry Swagart, Esq
Matthew Henrikson, Esq
Henry Young

HARRY A SWAGART III, PC
LAWYER
WWW.COMPLEXLAW.NET

1722 MAIN STREET SUITE 220
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TELEPHONE 803 779 0770
FAX 803 779 0777
EVAL HAS(COMPLEX LAW)

October 27, 2010

VIA EMAIL & U S MAIL
(hyoung@sccourts.org)

Mr Henry P Young
11 Roxanna Drive
Ninety Six, South Carolina 29666

Re RFT Management Co , LLC v Tinsley & Adams, LLP,
Docket No 2008-CP-24-1221
Court of Appeals Case Tracking No 2010175606

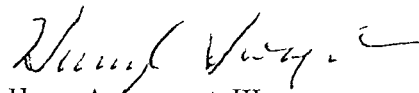
Dear Mr Young

I represent the Appellant RFT Management Co , LLC, in the above matter. The case was tried in Greenwood during the week of June 28, 2010.

Pursuant to South Carolina Rule of Appellate Procedure 207(a), I hereby order a copy of the trial transcript. You may submit your invoice to me for payment. If you have any other requirements, please let me know.

If you have any questions or require additional information, please let me know.

Sincerely,



Harry A. Swagart, III

HASIII smg

cc Matthew H. Henrikson Esquire (via email and U S Mail)
Honorable Jeanette Barber Clerk of the South Carolina Court of Appeals
Rosalyn W. Frierson Director, S C Court Administration

RECEIVED

OCT 28 2010

SC Court of Appeals



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
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1015 SUMTER STREET
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TELEPHONE (803) 734 1890
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October 25, 2010

Harry A Swagart, III, Esquire
HARRY A SWAGART, III, P C
P O Box 7787
Columbia, SC 29202

Re RFT Management v Tinsley & Adams
Case Tracking # 2010175606

Dear Mr Swagart

We have received your Notice of Appeal in the case noted above. This case will be docketed in the Court of Appeals and all communications concerning this case, including motions and petitions, initial and final briefs, and the Record on Appeal, should be directed to and filed in this Court. For all filings, please note the requirements of Rule 267(a) of the South Carolina Appellate Court Rules, and be further advised that Court of Appeals policy requires the firm name of any counsel shown must be included in his or her address.

We suggest that large parcels such as copies of final briefs and the Record On Appeal be sent directly to the Court via the street address 1015 Sumter Street, Columbia, S C 29201. Thank you for your attention to this. Failure to file in the proper court may result in the dismissal of your appeal.

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten (10) days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the

notification requirements of Rule 207(a)(5), SCACR, also, please advise the Court in writing upon receipt of the transcript

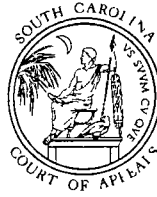
NOTE If you believe this case has been improperly filed in the Court of Appeals, by reason of the limitations set forth in S C Code Ann Section 14-8-200(b)(1998), as amended June 1, 1999, notify the Clerk's office of the Court of Appeals immediately. The cited Code Section prohibits the Court of Appeals from hearing appeals in seven classes of cases

- 1) any final judgment from the circuit court which includes a sentence of death,
- 2) any final judgment from the circuit court setting public utility rates pursuant to Title 58,
- 3) any final judgment involving a challenge on state or federal grounds to the constitutionality of a state law or county or municipal ordinance where the principal issue is the constitutionality of the law or ordinance,
- 4) any final judgment from the circuit court involving the authorization, issuance, or proposed issuance of general obligation debt, revenue, institutional, industrial, or hospital bonds of the state, its agencies, political subdivisions, public service districts, counties, and municipalities or any other indebtedness now or hereafter authorized by Article X of the Constitution of this state,
- 5) any final judgment from the circuit court pertaining to elections and election procedure,
- 6) any order limiting an investigation by a State Grand Jury under S C Code Ann Section 14-7-1630,
- 7) any order of the family court relating to an abortion by a minor under S C Code Ann Section 44-41-33

Very truly yours,
Tanya A. Gee
CLERK

vd
TAG/khh

cc Matthew H. Henrikson, Esquire



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

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October 25, 2010

Harry A Swagart, III, Esquire
HARRY A SWAGART, III, P C
P O Box 7787
Columbia, SC 29202

Re RFT Management v Tinsley & Adams
Case Tracking # 2010175606

Dear Mr Swagart

This office has received your Notice of Appeal in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/khh

cc Matthew H Henrikson, Esquire

PM —
POS 10/22/10

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Eugene C Griffith, Jr , Circuit Court Judge

Docket No 2008-CP-24-1221

RFT MANAGEMENT COMPANY, LLC

Appellant,

v

TINSLEY & ADAMS, LLP, &
WELBORN D ADAMS

Respondents,

NOTICE OF APPEAL

RFT Management Company, LLC, appeals the order of the Honorable Eugene C Griffith, Jr , dated October 1, 2010 Appellant received written notice of entry of this order on October 7, 2010 A true and correct copy of the order from which appeal is taken is attached

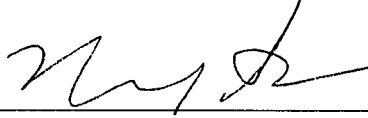
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OCT 22 2010

SC Court of Appeals

hereto as Exhibit A

Respectfully submitted,



Harry A Swagart, III
HARRY A SWAGART, III, P C
Post Office Box 7787
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Tel (803) 779-0770
Fax (803) 779-0771
Email has@complexlaw.net

Attorney for the Appellant

Columbia, South Carolina
October 22, 2010

Other Counsel of Record

Matthew H Henrikson, Esquire
Clarkson Walsh Terrell & Coulter, PA
Post Office Box 6728
Greenville, South Carolina 29606
Tel (864) 672-7106
Fax (864) 235-4399
Email mhenrikson@clarksonwalsh.com

Attorney for Respondents

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Eugene C Griffith, Jr , Circuit Court Judge

Docket No 2008-CP-24-1221

RFT MANAGEMENT COMPANY, LLC

Appellant,

v

TINSLEY & ADAMS, LLP, &
WELBORN D ADAMS

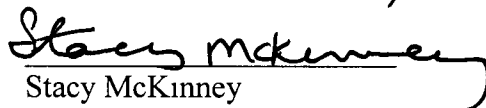
Respondents,

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Tinsley & Adams, LLP, and Welborn D Adams, by depositing a copy of it in the United States Mail, postage prepaid, on October 22, 2010, addressed to their attorney of record, Matthew H Henrikson, Esquire, Post Office Box 6728, Greenville, South Carolina 29606

October 22, 2010

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OCT 22 2010
SC Court of Appeals


Stacy McKinney
HARRY A SWAGART, III, P C
Post Office Box 7787
Columbia, South Carolina 29202
(803) 779-0770
Paralegal to Harry A Swagart, III

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

JUDGMENT IN A CIVIL CASE
CASE NO 2008CP2401221

Rft Management Llc vs Tinsley & Adams Llp

CHECK ONE

- ☐ JURY VERDICT This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON) ☐ Rule 12(b) SCRPC ☐ Rule 41(a)
SCRPC (Vol. Nonsuit) ☐ Rule 43(k) SCRPC (Settled) ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON) ☐ Rule 40(j) SCRPC ☐ Bankruptcy
☐ Binding a arbitration subject to right to restore to confirm vacate or modify arbitration award
☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)
☐ Affirmed ☐ Reversed ☐ Remanded
☐ Other _____

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

IT IS ORDERED AND ADJUDGED

☒ See attached order

☐ Statement of Judgment by the Court

Order

Dated at Greenwood South Carolina this 1st day of October 2010

Court Reporter

S/ Eugene C Griffith Jr
PRESIDING JUDGE Eugene C Griffith Jr

This judgment was entered on the 6th day of October 2010 and a copy mailed first class this 6th day of October 2010 to attorneys of record or to parties (when appearing pro se) is follows

Albert M Sparrow Jr Attorney at Law P O Box
3244 Greenwood SC 29645

Matthew Holmes Henderson Christensen & Wals
Tenell & Coulter PA P O Box 6725 Greenville SC

HENRY A. SWANSON III HENRY A. SWANSON III P.C.
P.O. Box 7787 Columbia, SC 29202

ATTORNEY(S) FOR THE PLAINTIFF(S)

29606

ATTORNEY(S) FOR THE DEFENDANT(S)

Ingram B. Moon

Ingram B. Moon Clerk of Court

STATE OF SOUTH CAROLINA)

COUNTY OF GREENWOOD)

RFT Management Co LLC)

Plaintiff,)

vs)

Tinsley and Adams LLP &)
Welborn D Adams, Individually,)

Defendants)

IN THE COURT OF COMMON PLEAS
C A No 08-CP-24-1221

ORDER

FILED
CLERK OF COURT
JUL 11 2008

THIS MATTER COMES by way of Plaintiff's RFT Management LLC Motions for Judgment Not with standing the Verdict, for Reconsideration and for New Trial timely filed with the court. After carefully considering the arguments and law submitted by both parties, this Court respectfully issues this Order.

Regarding Plaintiff's Motion to grant Judgment Notwithstanding the Verdict on the Legal Malpractice cause of action, this court respectfully denies this motion. Both the counsel for the Plaintiff and the counsel for the Defendants agreed that the issue of negligence was a factual question. This court submitted the factual issue to the jury regarding this cause of action. The jury properly considered the issue and reached a unanimous verdict.

Regarding Plaintiff's Motion to grant New Trial on the Legal Malpractice cause of action, this Court respectfully denies this motion.

Regarding Plaintiff's Motion under Rules 50 and 59 SCRPC to reconsider its granting of the Directed Verdict motions for the causes of action for Breach of Fiduciary Duty, Violation of the Unfair Trade Practices Act, and Aiding and Abetting a Violation of



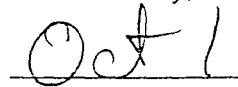
the Securities Act, this Court respectfully denies these three motions

AND IT IS SO ORDERED



Eugene C. Griffith, Jr.
Circuit Judge

At Newberry, South Carolina

 _____ 2010

