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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
MIKELL R. SCARBOROUGH, CIRCUIT COURT JUDGE

Appellate Case No.: 2024-000947

Vicki Lynn Vergeldt, individually and as
Successor Trustee of the John Vergeldt, Jr.
Revocable living Trust dated September 27, 1978, ...Respondent,

v.

John Edward Vergeldt and
Teresa Shaw-Vergeldt, Defendants,

Of whom John Edward Vergeldt is the, ...Appellant.

**RECORD ON APPEAL
VOLUME II OF II**

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Harvey M. Watson III (S.C. Bar No. 74053)
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ATTORNEYS FOR RESPONDENT

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Certificate of Counsel

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2021-CP-10-04257

Vicki Lynn Vergeldt, Individually, and as)
Successor Trustee of the John Vergeldt, Jr.)
Revocable Living Trust dated September)
27, 1978,)

**AMENDED NOTICE OF MOTION AND
AMENDED MOTION TO AMEND
COMPLAINT**

Plaintiff,)

vs.)

John Edward Vergeldt and Teresa A. Shaw-)
Vergeldt,)

Defendants.)

**TO: DESA BALLARD, ESQ. and HALEY A. HUBBARD, Esq., BALLARD & WATSON
ATTORNEYS FOR JOHN EDWARD VERGELDT**

**F. MILES ADLER, ESQ., ADLER LAW FIRM, LLC
ATTORNEYS FOR TERESA A. SHAW-VERGELDT**

YOU WILL PLEASE take notice that Plaintiff Vicki Lynn Vergeldt, Individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 (“Plaintiff”), by and through the undersigned, will move before this Honorable Court ten (10) days after service hereof or as soon thereafter as counsel may be heard for an Order granting Plaintiff leave to amend her Complaint filed in this matter pursuant to Rule 15(a), SCRCP, and Rule 15(d), SCRCP, to set forth transactions that have occurred since the filing of this matter and to assert additional causes of action that have accrued as a result.

As grounds for Motion, Plaintiff would show Defendant John Edward Vergeldt (“John”) transferred all of his right, title and/or interest in real property located in the County of Charleston, State of South Carolina having Charleston County TMS #: 312-11-00295 and commonly referred to as 1523 Star Flower Alley, Johns Island, South Carolina 29455 (“Property”) to his wife,

Defendant Teresa A. Shaw-Vergeldt (“Terry”) (John and Terry are sometimes collectively referred to herein as “Defendants”), by Quit Claim Deed dated June 26, 2019 and recorded in the Office of the Register of Deeds for Charleston County on July 11, 2019 in Book 0807 at Page 426, a copy of which is attached hereto as **Exhibit A** and incorporation by reference. Prior to the execution of the Quit-Claim Deed, Defendants held title to the Property as join tenants with rights of survivorship as shown on a deed from Southeastern Recapitalization Group, LLC dated April 15, 2019 and recorded on April 24, 2019 in the Office of the Register of Deeds for Charleston County in Book 0791 at Page 290, a copy of which is attached hereto as **Exhibit B**.

Plaintiff is informed and believes John transferred his interest in the Property to Terry to avoid any judgment that may have been awarded her in the case of Vicki Lynn Vergeldt, Individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 v. John Edward Vergeldt (Case No.: 2016-CP-46-00820) that was pending in the Court of Common Pleas for York County (“York County Case”) at the time of the transfer. Plaintiff was ultimately granted judgment against John in the amount of Three Hundred Sixty-One Thousand Ninety-Two and 88/100 (\$361,092.88) Dollars (“Judgment”) by Final Order of the Honorable Teasa Kay Weaver, Master-in-Equity for York County, filed February 2, 2021. The Judgment has been transcribed in the Court of Common Pleas for Charleston County under C/A No.: 2021-CP-10-0640.

Plaintiff has alleged John’s transfer of his interest in the Property to Terry should be declared invalid, null, and void as a fraudulent conveyance and as being violative of S.C. Code Ann. §27-23-10 *et. seq.* (1976), as amended, and that the Judgment should attach thereto pursuant to S.C. Code Ann. §15-35-810 (1976), as amended. Plaintiff’s Complaint also made allegations related to an action for separate maintenance and support and divorce filed by Terry against John

on July 12, 2021 in the Charleston County Family Court having C/A No.: 2021-DR-10-02081 (“Family Court Case”).

Subsequent to the Complaint’s filing and during the pendency of this matter, Terry then transferred a one-half (1/2) interest in the Property to back to John by Title to Real Estate dated June 6, 2022 and recorded in the Office of the Register of Deeds for Charleston County on June 7, 2022 in Book 1114 at Page 880, as shown on the attached **Exhibit C** and which is incorporated by reference. The Family Court Case was resolved by Final Order Lifting Stay and Approving Agreement (“Family Court Order”)¹ executed by the Honorable Daniel E. Martin, Family Court Judge for the Ninth Judicial Circuit, and filed May 26, 2023. As a result of the Family Court Order, Terry transferred all of her right, title and/or interest in the Property by Title to Real Estate recorded in the Office of the Register of Deeds for Charleston County on May 26, 2023 in Book 1182 at Page 278. A copy of said Title to Real Estate is attached hereto as **Exhibit D** and incorporated herein by reference.

Due to transfers of the interest in the Property back to John, Plaintiff would show the Judgment, as transcribed in Charleston County, constitutes a lien thereon pursuant to S.C. Code Ann. §15-35-810 (1976), as amended. Plaintiff would similarly show that a cause of action to foreclose the lien has accrued and Plaintiff is entitled to have the Property sold at public auction according to the customs and procedure of this Court and to have the proceeds resulting from said sale applied toward the satisfaction of the Judgment. A copy of Plaintiff’s proposed amended pleadings are attached hereto as **Exhibit E** and incorporated herein by reference.

Additionally, Plaintiff would show amendment of the pleadings is proper considering, “Rule 15(a) provides that when a party asks to amend his pleading, ‘leave should be freely given

¹ Plaintiff was allowed to intervene in the Family Court Case and equitable division was stayed by Order Granted Motion to Intervene and Stay filed September 22, 2022.

when justice so requires and does not prejudice any other party’. Rule 15(a), SCRCP. ‘This rule strongly favors amendments, and the court is encouraged to freely grant leave to amend.’” Patton v. Miller, 420 S.C. 471, 489, 804 S.E. 2d 252, 261 (2017) (internal citations omitted). Also,

If the underlying facts and circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claims on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith, or dilatory motive on the part of the movant....undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be “freely given.” Id. 420 S.C. at 490, 804 S.E. 2d at 262 (2017) (citing Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L.Ed. 2d 222, 226 (1962)).

“The prejudice that Rule 15 envisions is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it.” Collins Entertainment, Inc. v. White, 363 S.C. 546, 562, 611 S.E. 2d 262, 270 (Ct. App. 2005). Additionally, Plaintiff would show that the party opposing the motion has the burden of establishing prejudice. See Harvey v. Strickland, 350 S.C. 303, 566 S.E. 2d 529 (2002).

In light of the facts alleged and the exhibits filed in support hereof, Plaintiff is informed and believes Defendants, in particular, John, are and/or were aware and/or should have been on notice Plaintiff would seek to amend her pleadings to foreclose the lien represented by the Judgment and to otherwise seek the sale of the Property to satisfy same. Plaintiff is additionally informed and believes Defendants will be unable to show prejudice as a result.

Plaintiff further bases the Motion on such other and further memorandum and/or affidavits that maybe filed in this matter, case law, statutory law, and such other and further argument of counsel as may be appropriate.

The undersigned certifies, pursuant to Rule 11, SCRCPP, that he has communicated, orally and/or in writing, in an attempt to reach a good faith resolution to the Motion; however, no resolution could be reached.

Respectfully Submitted,

HARRELL, MARTIN & PEACE, P.A.

/s/ Taylor A. Peace, Esq.
TAYLOR A. PEACE, ESQ., SC Bar 100206
JAMIE ANNA WELLER, ESQ., SC Bar 105548
135 Columbia Avenue (Physical Address)
P.O. Box 1000 (Mailing Address)
Chapin, South Carolina 29036
Phone: (803) 345-3353
Fax: (803) 345-9171
tpeace@hmp-law.com
ATTORNEYS FOR PLAINTIFF

July 6, 2023
Chapin, South Carolina

Exhibit A



BP0807426

PGS:

4

The Donaldson Law Firm, LLC
ATTORNEYS AT LAW
317 Wingo Way, Ste. 305
Mt. Pleasant, SC 29464



STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

19-0544

QUIT CLAIM DEED

KNOW ALL MEN BY THESE PRESENTS, that **John Edward Vergeldt** (hereinafter referred to as Grantor) for and in consideration of the sum of FIVE AND 00/100 (\$5.00) DOLLARS, to Grantor in hand paid at and before the sealing of these presents by **Teresa A. Shaw-Vergeldt** (hereinafter referred to as Grantee), in the State aforesaid, (the receipt of which is hereby acknowledged) has remised, released and forever quit-claimed, and by these presents does remise, release and forever quit-claim unto the Grantee, her successors, heirs and assigns, the following described real property:

All that certain piece, parcel, or lot of land, situate, lying and being located on Johns Island, Charleston County, South Carolina, Phase 2B, The Garden at Whitney Lake, shown and designated as Lot 2B-48, as shown on a plat entitled, "FINAL SUBDIVISION PLAT SHOWING 51 LOTS AND 3 HOA AREAS LOCATED IN THE GARDENS AT WHITNEY LAKE, PHASE 2B, JOHNS ISLAND, CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA, OWNED BY SOUTHEASTERN RECAPITALIZATION GROUP, LLC", dated May 20, 2016, last revised June 29, 2016, Job No. 2015-097, prepared by Associates Surveyors and recorded in the RMC Office for Charleston County on August 29, 2016 in Plat Book L16, at Page 0410. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

BEING the same property conveyed to John Edward Vergeldt and Teresa A. Shaw-Vergeldt by Deed of Southeastern Recapitalization Group, LLC, dated April 15, 2019 and recorded on April 24, 2019 in the RMC Office for Charleston County, SC in Book 0791, at Page 290.

TMS NO.: 312-11-00-295

Grantee's Address: 1523 Star Flower Alley, Johns Island, SC 29455

This conveyance is made subject to easements and/or restrictions of record and otherwise affecting the property.

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said Premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said premises before mentioned unto the said, Grantee, her successors, heirs and assigns, forever so that neither the said Grantor nor her heirs, nor any other person or persons claiming under her shall at any time hereafter, by any way or means, have, claim or demand any right or title to the aforementioned premises or appurtenances, or any part of parcel thereof.

ROA 00490

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IN WITNESS WHEREOF, the said Grantor has hereunto set my Hand and Seal, this 26
day of June, 2019.

**SIGNED SEALED AND DELIVERED
IN THE PRESENCE OF:**


Witness No. 1

Witness No. 2


John Edward Vergeldt

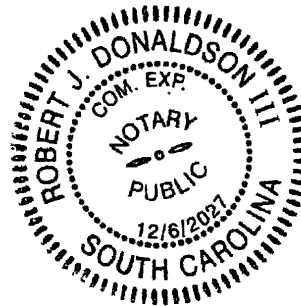
STATE OF SOUTH CAROLINA)
) PROBATE
COUNTY OF CHARLESTON)

Personally appeared before me, the undersigned witness and made oath that s/he saw the within named Grantor sign, seal, and as his/her act and deed, deliver the within written Deed; and that he/she, with the other witness subscribed above witnessed the execution thereof.

Witness No. 1

Sworn to before me this 26 day of June, 2019.


Notary Public for South Carolina
My commission expires: 12/6/2027



STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON) AFFIDAVIT FOR TAXABLE OR EXEMPT TRANSFERS

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this affidavit and I understand such information.

2 The property being transferred is located at ADDRESS, bearing County Tax Map Number 312-11-00-295, was transferred by John Edward Vergeldt to Teresa A. Shaw-Vergeldt on June 26, 2019.

3. Check one of the following: The deed is

- (a) ☐ subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
(b) ☐ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
(c) ☒ exempt from the deed recording fee because (See Information section of affidavit): #1 Family Transfer

(If exempt, please skip items 4 - 7, and go to item 8 of this affidavit.)

If exempt under exemption #14 as described in the Information section of this affidavit, did the agent and principal relationship exist at the time of the original sale and was the purpose of this relationship to purchase the realty? Check Yes ☐ or No ☐

4. Check one of the following if either item 3(a) or item 3(b) above has been checked (See Information section of this affidavit.):

- (a) The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of _____.
(b) The fee is computed on the fair market value of the realty which is _____.
(c) The fee is computed on the fair market value of the realty as established for property tax purposes which is _____

5. Check Yes ☐ or No ☐ to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. (This includes, pursuant to Code Section 12-59-140(E)(6), any lien or encumbrance on realty in possession of a forfeited land commission which may subsequently be waived or reduced after the transfer under a signed contract or agreement between the lien holder and the buyer existing before the transfer.) If "Yes," the amount of the outstanding balance of this lien or encumbrance is: _____.

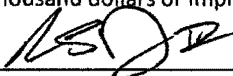
6. The deed recording fee is computed as follows:

- (a) Place the amount listed in item 4 above here: _____
(b) Place the amount listed in item 5 above here: _____
(If no amount is listed, place zero here.)
(c) Subtract Line 6(b) from Line 6(a) and place result here: _____

7. The deed recording fee due is based on the amount listed on Line 6(c) above and the deed recording fee due is:

8. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: Legal Representative

9. I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.


Responsible Person Connected with the Transaction

Robert J. Donaldson IV
Print or Type Name Here

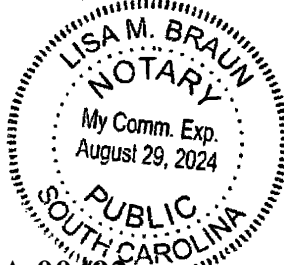
SWORN to and subscribed before me this
26th day of June 2019

Notary Public for South Carolina

My Commission Expires: 08/29/2024

Notary (L.S.): Lisa M Braun

Notary (printed name): Lisa M Braun



ROA 00492

RECORDER'S PAGE

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Michael Miller, Register
Charleston County, SC

MAKER:

VERGELDT JOHN E

Note:

RECIPIENT:

SHAW-VERGELDT TERESA A

of Pages: 4

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State Fee	<EXEMPT>
County Fee	<EXEMPT>
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Peter J. Tecklenburg

Charleston County Auditor

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Exhibit B



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WHEREAS, at a meeting of the Managers and/or Members of Southeastern Recapitalization Group, LLC, duly called and held, it was unanimously resolved that the property hereinbelow described be conveyed to the Grantee(s) herein for the consideration hereinafter shown and that Jason Long, as the Authorized Agent of Southeastern Recapitalization Group, LLC, be and is authorized to execute this deed of conveyance on behalf of the said LLC as its act and deed.

STATE OF SOUTH CAROLINA)

TITLE TO REAL ESTATE

COUNTY OF CHARLESTON)

KNOW ALL MEN BY THESE PRESENTS, that, **SOUTHEASTERN RECAPITALIZATION GROUP, LLC**, (hereinafter whether singular or plural the "Grantor") in the State aforesaid, for and in consideration of the sum of **FOUR HUNDRED THOUSAND TWO HUNDRED TWENTY-FIVE AND 88/100 (\$400,225.88) DOLLARS**, and subject to the restrictions, exceptions and limitations, if any, as hereinafter set forth, to the Grantor paid by **JOHN EDWARD VERGELDT AND TERESA A. SHAW-VERGELDT**, (hereinafter whether singular or plural the "Grantee") have granted, bargained, sold and released, and, by these presents, do grant, bargain, sell and release unto the said **JOHN EDWARD VERGELDT AND TERESA A. SHAW-VERGELDT, as Joint Tenants with Rights of Survivorship and NOT as Tenants in Common**, their Heirs and Assigns, forever, in fee simple, the following described real property, to-wit:

All that certain piece, parcel, or lot of land, situate, lying and being located on Johns Island, Charleston County, South Carolina, Phase 2B, The Garden at Whitney Lake, shown and designated as Lot 2B-48, as shown on a plat entitled, "FINAL SUBDIVISION PLAT SHOWING 51 LOTS AND 3 HOA AREAS LOCATED IN THE GARDENS AT WHITNEY LAKE, PHASE 2B, JOHNS ISLAND, CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA, OWNED BY SOUTHEASTERN RECAPITALIZATION GROUP, LLC", dated May 20, 2016, last revised June 29, 2016, Job No. 2015-097, prepared by Associates Surveyors and recorded in the RMC Office for Charleston County on August 29, 2016 in Plat Book L16, at Page 0410. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

BEING a portion of the same property conveyed to Southeastern Recapitalization Group, LLC by Deed of Mikell R. Scarborough, as Master in Equity for Charleston County, dated April 6, 2010 and recorded on April 19, 2010 in the RMC Office for Charleston County, SC in Book 0117, at Page 702.

**Grantee's Address: 1523 Star Flower Alley
Johns Island, SC 29455**

TMS No.: 312-11-00-295

Together with all and singular the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the said premises before mentioned unto the said **JOHN EDWARD VERGELDT AND TERESA A. SHAW-VERGELDT, as Joint Tenants with Rights of Survivorship and NOT as Tenants in Common**, and their Heirs and Assigns forever.

And the Grantor does hereby bind the Grantor and the Grantor's Successors and/or Assigns, to warrant and forever defend all and singular the said premises unto the said Grantee(s) hereinabove named and the Grantees' Heirs and Assigns against the Grantor and the Grantor's Successors and or Assigns, and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof.

Weeks & Irvine, LLC
8086 Rivers Ave. 2nd Floor
North Charleston, SC 29406

19-020892 Vergeldt 4/19

ROA 00495

WITNESS my hand and seal this 15 day of April in the year of our Lord, Two Thousand and Nineteen (2019) and in the Two Hundred Forty Third (243rd) year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

Blake Smit
Witness No. 1
Andria M. J.
Witness No. 2

Southeastern Recapitalization Group, LLC

BY: JL
Jason Long, Its Authorized Agent

NAMES MUST BE SIGNED EXACTLY AS THEY ARE TYPED

ACKNOWLEDGMENT	
STATE OF GEORGIA	
COUNTY OF RICHMOND	
Before me personally appeared Southeastern Recapitalization Group, LLC by Jason Long, Its Authorized Agent on this the <u>15th</u> day of April, 2019 and acknowledged the due execution of the foregoing instrument.	
<u>Andria M. J.</u> Notary Public	
My Commission Expires: <u>5-3-20</u>	
(SEAL)	

STATE OF SOUTH CAROLINA

Date of Transfer of Title

) AFFIDAVIT

April 15, 2019

COUNTY OF CHARLESTON

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this Affidavit and I understand such information.
2. The property being transferred is located at 1523 Star Flower Alley, Johns Island, SC 29455, bearing County Tax Map Number 312-11-00-295, was transferred by Southeastern Recapitalization Group, LLC TO John Edward Vergeldt and Teresa A. Shaw-Vergeldt on April 15, 2019.

3. Check one of the following: The deed is:

a. X subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.

b. subject to the deed recording fee as a transfer between a corporation, a partnership or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.

c. EXEMPT from the deed recording fee because . (Explanation, if required: n/a if exempt, please skip items 4-6 and go to Item No. 7 of this affidavit.

If exempt under exemption #14, did the agent and principal relationship exist at the time of the original sale and was the purpose of this relationship to purchase the realty? Check Yes or No . This realty was purchased with the funds of the principal.

4. Check one of the following if either item 3(a) or item 3(b) above has been checked.

a. X The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of \$400,225.88.

b. The fee is computed on the fair market value of the realty, which is \$.

c. The fee is computed on the fair market value of the realty as established for property tax purposes which is \$.

5. Check YES ☐ or NO ☒ to the following: A lien or encumbrance existed on the land, tenement or realty before the transfer and remained on the land, tenement or realty after the transfer. (This includes, pursuant to Code Section 12-59-140(E)(6), any lien or encumbrance on realty in possession of a forfeited land commission which may subsequently be waived or reduced after the transfer under a signed contract agreement between the lien holder and the buyer existing before the transfer.) If "YES", the amount of the outstanding balance of this lien or encumbrance is \$.

6. The DEED Recording Fee is computed as follows:

a. Place the amount listed in item 4 above here: \$400,225.88

b. Place the amount listed in item 5 above here: \$0.00

(If no amount listed, place zero here.)

c. Subtract line 6(b) from line 6(a) and place result here: \$400,225.88

7. The deed recording fee due is based on the amount listed on Line 6(c) above and the deed recording fee due is: \$1,481.85.

8. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as Grantee.

9. I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year or both.

SWORN to before me this the 15 day of April, 2019.

[Signature]
Notary Public

My Commission Expires:
(SEAL)



[Signature]
John Edward Vergeldt
Print or Type Name Here

RECORDER'S PAGE

NOTE: This page MUST remain
with the original document



Filed By:

WEEKS & IRVINE LLC

RECORDED

Date: April 24, 2019

Time: 8:51:53 AM

<u>Book</u>	<u>Page</u>	<u>DocType</u>
0791	290	Deed

Michael Miller, Register
Charleston County, SC

MAKER:

SOUTHEASTERN RECAP ETC

Note:

RECIPIENT:

VERGELDT JOHN E AL

of Pages: 4

Recording Fee	\$ 10.00
State Fee	\$ 1,041.30
County Fee	\$ 440.55
Extra Pages	\$ -
Postage	\$ -
Chattel	\$ -
TOTAL	\$ 1,491.85

Original Book:

Original Page:

AUDITOR STAMP HERE

RECEIVED From ROD

May 06, 2019

Peter J. Tecklenburg

Charleston County Auditor

PID VERIFIED BY ASSESSOR

REP RJB

DATE 05/07/2019

36

DRAWER Drawer 1
CLERK KLH



0791
Book



290
Page



04/24/2019
Recorded Date



4
Pgs



Original Book



Original Page



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Doc Type



08:51:53
Recorded Time

Exhibit C



BP1114880

PGS:

4

PREPARED BY:

DONALDSON LAW FIRM, LLC
317 WINGO WAY, SUITE 305
MOUNT PLEASANT, SC 29464

SPACE ABOVE THIS LINE RESERVED FOR RECORDING INFORMATION

STATE OF SOUTH CAROLINA

)

TITLE TO REAL ESTATE

COUNTY OF CHARLESTON

)

KNOW ALL MEN BY THESE PRESENTS, That, I, **Teresa A. Shaw-Vergeldt**, herein referred to as the Grantor, for and in consideration of the sum of **FIVE AND 00/100 DOLLARS (\$5.00)** to me paid by **John Edward Vergeldt**, hereinafter Grantee, in the State aforesaid, the receipt and sufficiency whereof are hereby acknowledged, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said Grantee, his heirs, successors and assigns forever, **an undivided one half (1/2) interest**, in and to, the following described property, to wit:

All that certain piece, parcel, or lot of land, situate, lying and being located on Johns Island, Charleston County, South Carolina, Phase 2B, The Garden at Whitney Lake, shown and designated as Lot 2B-48, as shown on a plat entitled, "FINAL SUBDIVISION PLAT SHOWING 51 LOTS AND 3 HOA AREAS LOCATED IN THE GARDENS AT WHITNEY LAKE, PHASE 2B, JOHNS ISLAND, CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA, OWNED BY SOUTHEASTERN RECAPITALIZATION GROUP, LLC", dated May 20, 2016, last revised June 29, 2016, Job No. 2015- 097, prepared by Associates Surveyors and recorded in the RMC Office for Charleston County on August 29, 2016 in Plat Book L16, at Page 0410. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

BEING the same property conveyed to Teresa A. Shaw-Vergeldt by Deed of John Edward Vergeldt dated June 26, 2019 and recorded in the RMC Office for Charleston County, South Carolina in Book 0807 at Page 426.

TAX MAP NUMBER: 312-11-00-295

GRANTEES' ADDRESS: 1523 Star Flower Aly, Charleston SC 29455

TITLE NOT EXAMINED BY DONALDSON LAW FIRM, LLC

1

ROA 00500

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging, or in any wise incident appertaining.

TO HAVE AND TO HOLD, all and singular the said premises before mentioned unto the said Grantee, his heirs, successors and assigns forever.

AND THE GRANTOR does hereby bind Grantor and Grantor's heirs, executors and administrators, to warrant and forever defend all and singular the said premises unto the said Grantee, her/his/its heirs, successors and assigns, against the Grantor and Grantor's heirs and against every person whomsoever lawfully claiming or to claim, the same or any part thereof.

WITNESS my Hand and Seal this 6 day of June, 2022.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF

Witness #1

Witness #2

Teresa A. Shaw-Vergeldt
Teresa A. Shaw-Vergeldt

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

ACKNOWLEDGMENT

The foregoing instrument was acknowledged before me this 6 day of June, 2022, by the Grantor, Teresa A. Shaw-Vergeldt.

SWORN to before me this 6 day of June, 2022.

[Signature]
Notary Public for South Carolina
Commission Expires: _____

(SEAL)



TITLE NOT EXAMINED BY DONALDSON LAW FIRM, LLC

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

AFFIDAVIT FOR TAXABLE OR EXEMPT TRANSFERS

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this affidavit and I understand such information.

2 The property being transferred is located at 1523 Star Flower Aly, Johns Island, South Carolina 29455, Charleston County, bearing County Tax Map Number 312-11-00-295, was transferred by Teresa A. Shaw-Vergeldt to John Edward Vergeldt on June 6, 2022.

3. Check one of the following: The deed is

- (a) ☐ subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
(b) ☐ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as a distribution to a trust beneficiary.
(c) ☒ exempt from the deed recording fee because (See Information section of affidavit): #1 Family Transfer

(If exempt, please skip items 4 - 7, and go to item 8 of this affidavit.)

If exempt under exemption #14 as described in the Information section of this affidavit, did the agent and principal relationship exist at the time of the original sale and was the purpose of this relationship to purchase the realty? Check Yes ☐ or No ☐

4. Check one of the following if either item 3(a) or item 3(b) above has been checked (See Information section of this affidavit.):

- (a) The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of N/A
(b) The fee is computed on the fair market value of the realty which is: N/A.
(c) The fee is computed on the fair market value of the realty as established for property tax purposes which is: N/A

5. Check Yes ☐ or No ☒ to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. (This includes, pursuant to Code Section 12-59-140(E)(6), any lien or encumbrance on realty in possession of a forfeited land commission which may subsequently be waived or reduced after the transfer under a signed contract or agreement between the lien holder and the buyer existing before the transfer.) If "Yes," the amount of the outstanding balance of this lien or encumbrance is: _____.

6. The deed recording fee is computed as follows:

- (a) Place the amount listed in item 4 above here:
(b) Place the amount listed in item 5 above here: _____
(If no amount is listed, place zero here.)
(c) Subtract Line 6(b) from Line 6(a) and place result here:

7. The deed recording fee due is based on the amount listed on Line 6(c) above and the deed recording fee due is:

8. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as: **Legal Representative.**

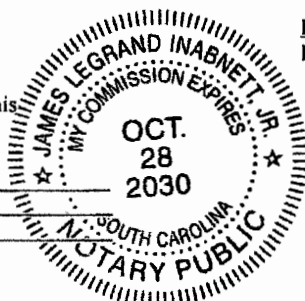
9. I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

Responsible Person Connected with the Transaction

Robert J. Donaldson
Print or Type Name Here

SWORN to and subscribed before me this 6 day of June, 2022.

Notary Public for SOUTH CAROLINA
My Commission Expires: _____



TITLE NOT EXAMINED BY DONALDSON LAW FIRM, LLC

RECORDER'S PAGE

NOTE: This page MUST remain
with the original document



Filed By:

DONALDSON LAW FIRM LLC (BOX)

RECORDED

Date: June 7, 2022

Time: 12:34:28 PM

Book	Page	DocType
1114	880	Deed

Michael Miller, Register
Charleston County, SC

MAKER:

SHAW-VERGELDT TERESA A

Note:

RECIPIENT:

VERGELDT JOHN E

of Pages: 4

Recording Fee	\$ 15.00
State Fee	<EXEMPT>
County Fee	<EXEMPT>
Extra Pages	\$ -
Postage	\$ -
Chattel	\$ -
TOTAL	\$ 15.00

Original Book:

Original Page:

DRAWER	Drawer 2
CLERK	SLW

AUDITOR STAMP HERE

RECEIVED From ROD

Aug 09, 2022

Peter J. Tecklenburg

Charleston County Auditor

PID VERIFIED BY ASSESSOR

REP JBA

DATE 08/10/2022



1114
Book



880
Page



06/07/2022
Recorded Date



4
Pgs



Original Book



Original Page



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Doc Type



12:34:28
Recorded Time

Exhibit D



BP1182278

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SPACE ABOVE THIS LINE RESERVED FOR RECORDING INFORMATION

STATE OF SOUTH CAROLINA

)

TITLE TO REAL ESTATE

)

COUNTY OF CHARLESTON

)

KNOW ALL MEN BY THESE PRESENTS, That, I, **Teresa A. Shaw-Vergeldt**, herein referred to as the Grantor, for and in consideration of the sum of **FIVE AND 00/100 DOLLARS (\$5.00)** to me paid by **John Edward Vergeldt**, hereinafter Grantee, in the State aforesaid, the receipt and sufficiency whereof are hereby acknowledged, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said Grantee, his heirs, successors and assigns forever, the full ownership interest, in and to, the following described property, to wit:

All that certain piece, parcel, or lot of land, situate, lying and being located on Johns Island, Charleston County, South Carolina, Phase 2B, The Garden at Whitney Lake, shown and designated as Lot 2B-48, as shown on a plat entitled, "FINAL SUBDIVISION PLAT SHOWING 51 LOTS AND 3 HOA AREAS LOCATED IN THE GARDENS AT WHITNEY LAKE, PHASE 2B, JOHNS ISLAND, CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA, OWNED BY SOUTHEASTERN RECAPITALIZATION GROUP, LLC, dated May 20, 2016, last revised June 29, 2016, Job No. 2015- 097, prepared by Associates Surveyors and recorded in the RMC Office for Charleston County on August 29, 2016 in Plat Book LI 6, at Page 0410. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

BEING the same property conveyed to John Edward Vergeldt and Teresa A. Shaw-Vergeldt by Deed of Southeaster Recapitalization Group, LLC dated April 15, 2019 and recorded on April 24, 2019 in the RMC Office for Charleston County in Book 0791, at page 290.

BEING the same property conveyed to Teresa A. Shaw-Vergeldt by Deed of John Edward Vergeldt dated June 26, 2019 and recorded in the RMC Office for Charleston County, South Carolina in Book 0807 at Page 426.

BEING the same property of which 50% interest was conveyed to John Edward Vergeldt by Deed of Teresa A. Shaw-Vergeldt dated June 6, 2022 and recorded in the ROD Office for Charleston County, South Carolina in Book 1114 at Page 880.

TAX MAP NUMBER: 312-11-00-295

Grantee's Address: 1523 Star Flower Aly, Charleston SC 29455

TITLE NOT EXAMINED BY CONDON FAMILY LAW & MEDIATION

ROA 00505

ELECTRONICALLY FILED - 2023 Jul 07 9:16 AM - CHARLESTON - COMMON PLEAS - CASE#2021CP1004257

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging, or in any wise incident appertaining.

TO HAVE AND TO HOLD, all and singular the said premises before mentioned unto the said Grantee, his heirs, successors and assigns forever.

AND THE GRANTOR does hereby bind Grantor and Grantor's heirs, executors and administrators, to warrant and forever defend all and singular the said premises unto the said Grantee, her/his/its heirs, successors and assigns, against the Grantor and Grantor's heirs and against every person whomsoever lawfully claiming or to claim, the same or any part thereof.

WITNESS my hand and seal this 25th day of May, 2023.

SIGNED, SEALED, AND DELIVERED
IN THE PRESENCE OF

[Signature]
Witness 1

Teresa A. Shaw-Vergeldt
Teresa A. Shaw-Vergeldt

[Signature]
Witness 2

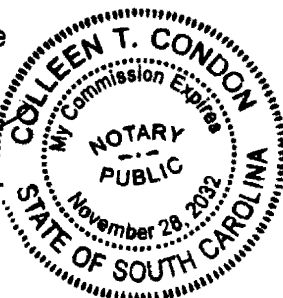
STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

ACKNOWLEDGMENT

The foregoing instrument was acknowledged before me this 25th day of May, 2023 by the Grantor Teresa A. Shaw-Vergeldt.

SWORN and SUBSCRIBED before me
This 25th day of May 2023

[Signature]
Notary Public Colleen Condon



TITLE NOT EXAMINED BY CONDON FAMILY LAW & MEDIATION

ROA 00506

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON) AFFIDAVIT FOR TAXABLE OR EXEMPT TRANSFERS

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. I have read the information on this affidavit and I understand such information.
2. The property was transferred by Teresa Shaw-Vergeldt 50%
to John Vergeldt on 5/25/2023.
3. Check one of the following: The deed is
 - (A) _____ subject to the deed recording fee as a transfer for consideration paid or to be paid in money or money's worth.
 - (B) _____ subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or is a transfer to a trust or as distribution to a trust beneficiary.
 - (C) ☒ exempt from the deed recording fee because (See Information section of affidavit): #1 Transfer to equitable dist./spouse (explanation required)
(If exempt, please skip items 4-7, and go to item 8 of this affidavit.)

If exempt under exemption #14 as described in the Information section of this affidavit, did the agent and principal relationship exist at the time of the original sale and was the purpose of this relationship to purchase the realty?

Check Yes ☒ or No _____

4. Check one of the following if either item 3(a) or item 3(b) above has been checked. (See Information section of this affidavit):
 - (A) _____ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of _____
 - (B) _____ The fee is computed on the fair market value of the realty which is _____
 - (C) _____ The fee is computed on the fair market value of the realty as established for property tax purposes which is _____
5. Check YES ___ or NO ___ to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "YES," the amount of the outstanding balance of this lien or encumbrance is _____.
6. The deed recording fee is computed as follows:
 - (A) Place the amount listed in item 4 above here: _____
 - (B) Place the amount listed in item 5 above here: _____
(If no amount is listed, place zero here.)
 - (C) Subtract Line 6(b) from Line 6(a) and place the result here: _____

7. The deed recording fee is based on the amount listed on Line 6(c) above and the deed recording fee due is _____.
8. As required by Code Section '12-24-70, I state that I am a responsible person who was connected with the transaction as grantor.
9. I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

Teresa A. Shaw-Vergeldt
Responsible Person Connected with the Transaction

Teresa A Shaw - Vergeldt
Print or Type Name Here

Sworn this 25th day of May 2023
Notary Public for South Carolina
My Commission Expires: 11/28, 2032



RECORDER'S PAGE

NOTE: This page **MUST** remain
with the original document

**Filed By:**

CONDON LAW FIRM
4840 CHATEAU AVE

NORTH CHARLESTON, SC 29405

RECORDED

Date: May 26, 2023

Time: 10:12:19 AM

<u>Book</u>	<u>Page</u>	<u>DocType</u>
1182	278	Deed

Karen Hollings, Register of Deeds
Charleston County, SC

MAKER:

SHAW-VERGELDT TERESA A

Note:

RECIPIENT:

VERGELDT JOHN E

of Pages: 5

Recording Fee	\$ 15.00
State Fee	<EXEMPT>
County Fee	<EXEMPT>
Extra Pages	\$ -
Postage	\$ -
Chattel	\$ -
TOTAL	\$ 15.00

Original Book:

Original Page:

DRAWER **Drawer 2**
CLERK **SLW**

AUDITOR STAMP HERE

RECEIVED From ROD

Jun 12, 2023

Peter J. Tecklenburg

Charleston County Auditor

PID VERIFIED BY ASSESSOR

LMC

REP

06/13/2023

DATE



1182
Book



278
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05/26/2023
Recorded Date



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Original Book



Original Page



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Recorded Time

Exhibit E

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) CIVIL ACTION NO.: 2021-CP-10-04257

Vicki Lynn Vergeldt, Individually, and as
Successor Trustee of the John Vergeldt, Jr.
Revocable Living Trust dated September
27, 1978,

Plaintiff,

vs.

John Edward Vergeldt and Teresa A. Shaw-
Vergeldt,

Defendants.

AMENDED COMPLAINT

NOW COMES Plaintiff Vicki Lynn Vergeldt, Individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 ("Plaintiff"), who, complaining of Defendant John Edward Vergeldt ("John") and Defendant Teresa A. Shaw-Vergeldt ("Terry"), respectfully alleges and will show unto this Honorable Court as follows:

GENERAL ALLEGATIONS

1. Plaintiff is a citizen and resident of Birmingham, Michigan and is a qualified beneficiary of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 ("Trust") and is the Successor Trustee thereof.
2. Upon information and belief, John is a citizen and resident of the County of Charleston, State of South Carolina.
3. Upon information and belief, Terry is a citizen and resident of the County of Charleston, State of South Carolina.
4. John and Terry were married as husband and wife at all times relevant herein, and they remain lawfully married to this day.

5. Plaintiff is informed and believes this Court has jurisdiction over the subject matter and parties, and venue is proper as most events described herein took place in Charleston County and Defendants reside in the same.

6. Heretofore, on February 1, 2016, Plaintiff filed a Summons and Petition for Removal of Trustee and Related Relief ("Petition") against John, individually, and in his capacity as Successor Trustee of the Trust, in the York County Probate Court ("York County Lawsuit") seeking an accounting, injunctive relief, and John's removal as Successor Trustee of the Trust resulting from his, then, perceived improprieties related to the Trust which included but were not limited to his failure to account and act impartially toward the Trust's beneficiaries, his abusive actions toward Plaintiff, and the concealment of his activities as Successor Trustee. At the time it was filed, the York County Case was captioned as Vicki Lynn Vergeldt v. John Edward Vergeldt, Individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 and given Case No.: 2016-GC-46-00018.

7. Plaintiff was not seeking money damages or other similar relief when she filed the Petition.

8. The York County Lawsuit was subsequently removed to the Court of Common Pleas for York County, was given C/A No.: 2016-CP-4-00820 and was referred to the Master-in-Equity for York County.

9. Plaintiff is informed and believes that, at the time she filed the York County Case, Defendants maintained their residence at real property located in Charleston County commonly referred to as 12 Transom Court, Charleston, South Carolina 29407 and owned the same as joint tenants with rights of survivorship and not as tenants in common.

10. During the course of the York County Case, Plaintiff discovered that John had, failed to act impartially toward her as one of the Trust's beneficiaries, used the Trust's assets and

income for his own personal benefit and gain, and distributed more Trust assets to himself than other Trust beneficiaries which was in violation of the Trust's distributive provisions. Plaintiff also discovered that John failed to keep appropriate records of the Trust's activities which were intended to conceal the same from Plaintiff to her detriment.

11. On March 29, 2019, John delivered to Plaintiff a Resignation of Successor Trustee indicating that he was resigning as Successor Trustee of the Trust, and his resignation would become effective as of April 30, 2019. At or around the same time, John filed a Notice of Motion and Motion to Dismiss the York County Case.

12. On April 15, 2019, Defendants purchased real property located in Charleston County commonly referred as 1523 Star Flower Alley, Johns Island, South Carolina 29455 ("Property") for the price of Four Hundred Thousand Two Hundred Twenty-Five and 88/100 (\$400,225.88) Dollars. Plaintiff has filed a *Lis Pendens* against the Property in the Clerk of Court for Charleston County, South Carolina.

13. On the same day, Defendants executed a Mortgage granting First Citizens Bank and Trust Company a purchase money mortgage over the Property in the amount of Three Hundred Five Thousand Five Hundred Thirty-Four and 00/100 (\$305,534.00) Dollars. The Mortgage was recorded in the Office of the Register of Deeds for Charleston County on April 24, 2019 in Book 791 at Page 294.

14. On May 14, 2019 and based upon the information discovered during the course of the York County Case, Plaintiff filed a Notice of Motion and Motion to Amend Petition ("Amended Petition") in which she sought to amend the Petition to allege entitlement to money damages.

15. About a month later, Defendants, on June 12, 2019, sold and transferred all of their right, title and/or interest in 12 Transom Court to Casa Del Palma, LLC for the sum of Five Hundred Ninety-Five Thousand and 00/100 (\$595,000.00) Dollars.

16. The same day, Defendants sold and transferred all their right, title, and interest in property known as Dock Unit E-18, Sunset Cay Marina Horizontal Regime for Thirty-Three and 00/100 (\$33,000.00) Dollars.

17. By Order dated June 13, 2019 (the day after 12 Transom Court sold), the Honorable Teasa Kay Weaver, as Master-In-Equity for York County, denied John's Motion to Dismiss and allowed Plaintiff to amend the Petition to assert claims for monetary damages.

18. Plaintiff filed the Amended Petition for Removal of Trustee and Other Related Relief on June 20, 2019.

19. Six (6) days later, on June 26, 2019, John made, executed, and delivered Terry a Quit Claim Deed transferring all of his right, title, and/or interest in the Property to Terry for exactly Five and 00/100 (\$5.00) Dollars and no other consideration, said Quit Claim being recorded in the Office of the Register of Deeds for Charleston County in Book 807 at Page 426.

20. The Mortgage was satisfied by instrument dated July 11, 2019 and recorded in the Office of the Register of Deeds on August 9, 2019 in Book 0815 at Page 284. Plaintiff is informed and believes that the Property is free and clear of all mortgages, liens, charges and/or encumbrances.

21. A final hearing took place in the York County Lawsuit on January 30, 2020, and Judge Weaver issued her Final Order ("Judgment") in the York County Lawsuit on February 2, 2021 granting Plaintiff judgment and damages against John in the original principal sum of Three Hundred Sixty-One Thousand Ninety Two and 88/100 (\$361,092.88) Dollars as well other relief granted therein.

22. John filed a Motion to Reconsider on February 12, 2021 which Judge Weaver denied by Order Denying Motion to Reconsider filed July 2, 2021.

23. Terry filed an action for separate maintenance and support against John ten (10) days later on July 12, 2021 in the Charleston County Family Court, said action having C/A.: 2021-DR-10-02081 ("Family Court Case").

24. John is appealing the Judgment and other interlocutory orders in the York County Lawsuit.

25. Subsequent to the institution of this matter, Terry transferred a one-half (1/2) interest in the Property to John by virtue of a Deed dated June 6, 2022 and recorded in the Office of the Register of Deeds for Charleston County on June 7, 2022 in Book 1114 at Page 880.

26. The Family Court Case was resolved by Final Order Lifting Stay and Approving Agreement of the Honorable Daniel E. Martin, Family Court Judge for the Ninth Judicial Circuit, filed May 26, 2023 which provided Terry was to deed all of her interest in the Property to John.

27. By Tile to Real Estate recorded in the Office of the Register of Deeds for Charleston County on May 26, 2023, Terry transferred her full ownership in the Property to John.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment-S.C. Code Ann. §27-23-10)

28. Plaintiff incorporates the previous allegations of this Amended Complaint as if repeated herein verbatim.

29. Plaintiff is informed and believes that, at all times relevant prior to the issuance of the Judgment and during the course of their marriage, Defendants owned and held property and/or properties jointly and/or as joint tenants with rights of survivorship and not as tenants in common.

30. Plaintiff is informed and believes Defendants changed and/or altered their course of dealing and business, marital or otherwise, because Judge Weaver allowed Plaintiff to amend the Petition and in preparation for Plaintiff obtaining the Judgment.

31. At the time the Quit Claim Deed was executed and the Mortgage satisfied, Plaintiff is informed and believes John was on notice: (1) of Plaintiff's claims against him, (2) that Plaintiff claimed he owed her a debt, and (3) that he, in fact, owed her a debt as shown by the discovery performed in the York County Lawsuit. In other words, John believed and/or knew himself to be indebted to Plaintiff at the time the Quit Claim Deed was executed, and his actions were intended to avoid her efforts to collect same.

32. Plaintiff is informed and believes Terry is and/or was fully aware of the claims made by Plaintiff against John in the York County Lawsuit, that John executed the Quit Claim Deed transferring his interest in the Property to her and that the Mortgage was satisfied in anticipation of Plaintiff obtaining judgment and damages against John.

33. Plaintiff is informed and believes John's transfer of his interest in the Property to Terry is and/or was voluntary and not based on valuable consideration.

34. Plaintiff is informed and believes that the transfer of John's interest in the Property to Terry was made with the actual intent to hinder and/or delay any attempt by Plaintiff to collect on any judgment she may have and/or has obtained in the York County Case.

35. Plaintiff is informed and believes the Quit Claim Deed is not the only time John has taken action to divest himself of assets and property since Plaintiff was given leave to file the Amended Petition to avoid any damages and/or judgment she may have and/or was given in the York County Case.

36. To the extent John has otherwise taken action to transfer assets, property, and funds to Terry since Plaintiff was granted leave to file the Amended Petition, Plaintiff is informed and

believes that the transfer of said property, assets, and/or funds should be declared fraudulent, set aside, and any and all of John's right, title, and/or interest therein be restored so that Plaintiff can proceed with execution against the Judgment and/or collection of the damages awarded in the York County Case.

37. To the extent Terry has already disposed of and/or divested herself of assets, property and/or funds that were fraudulently conveyed to her by John, Plaintiff is informed and believes that the Court should issue a judgment against Terry in the amount of the Judgment plus all accrued interest thereon.

FOR A SECOND CAUSE OF ACTION
(Conversion)

38. Plaintiff incorporates the previous allegations of this Complaint as if repeated herein verbatim.

39. Plaintiff is informed and believes that John and/or Defendants, jointly and severally, have divested themselves of property, funds and/or assets since Plaintiff was granted leave to file the Amended Petition to divest themselves of same in an effort to avoid and/or frustrate Plaintiff's attempts to collect any damages she may have been and/or was granted.

40. Plaintiff is informed that she has an interest in the Property and other assets, property, and funds which John, individually, and/or Defendants have diverted and/or divested to frustrate Plaintiff's attempts to collect damages she has and/or was given by virtue of the Judgment.

41. Plaintiff is informed and believes that John's and/or Defendants' actions constitute conversion.

42. Plaintiff is informed and believes Defendants' actions described herein were and/or are intentional, willful, wanton, reckless, and with conscious disregard for Plaintiff's rights.

43. As a direct and proximate result of Defendants' conversion of assets, property, and funds in which she has an interest by virtue of her Judgment, Plaintiff is informed and believes she has suffered damages and is entitled to judgment against Defendants, jointly and severally, in the amount of her actual damages to be more fully proven at the trial of this case, said amount being the value of the property, assets, and funds Defendants converted to Defendants' own use, plus consequential damages to be more fully proven at the trial of this case, plus pre-judgment interest, plus post judgment interest, plus punitive damages.

FOR A THIRD CAUSE OF ACTION
(Constructive Trust)

44. Plaintiff incorporates the previous allegations of this Complaint as if repeated herein verbatim.

45. As more fully set forth herein, John has transferred to Terry and/or they have retained funds, assets, and property in which Plaintiff has or maintains an interest that they cannot withhold from her as she is beneficially entitled to same by virtue of her executing on the Judgment.

46. Plaintiff is informed and believes Defendants have retained and/or obtained the property, assets and/or funds through fraud, bad faith, and/or concealment which gives rise to an obligation to make restitution to Plaintiff.

47. Plaintiff is informed and believes she is entitled to the imposition of a constructive trust over the Defendants' property, funds, and assets of a value up to the amount of the Judgment, plus post-judgment interest at the published rate.

FOR A FOURTH CAUSE OF ACTION
(Civil Conspiracy)

48. Plaintiff incorporates the previous allegations of this Complaint as if repeated herein verbatim.

49. As more fully set forth hereinabove, John and/or Defendants have acted in an attempt to prohibit and/or frustrate Plaintiff's ability to collect the damages that she was awarded in the York County Case.

50. Plaintiff is informed and believes Defendants actions described above constitute a combination or agreement of two or more persons to commit an unlawful act or lawful act by unlawful means.

51. Plaintiff is also informed and believes that Defendants' actions described herein constitute an overt act in furtherance of their agreement to prohibit Plaintiff from collecting damages from John to which Plaintiff is entitled.

52. Plaintiff is informed and believes Defendants' actions described above were willful, wanton, reckless, and in conscious disregard to Plaintiff's rights.

53. As a direct and proximate result of Defendants' civil conspiracy, Plaintiff is informed and believes she has suffered actual and consequential damages to be fully proven at the trial of this case.

54. Plaintiff is informed and believes she is entitled to judgment against Defendants in the amount of her actual and consequential damages to be more fully proven at the trial of this case, plus pre-judgment interest, plus post-judgment interest, plus punitive damages, and such other and further relief as this Court deems just and proper.

FOR A FIFTH CAUSE OF ACTION
(Injunctive Relief-Temporary Injunction)

55. Plaintiff incorporates the previous allegations of this Complaint as if repeated herein verbatim.

56. As more fully set forth herein, Plaintiff is informed and believes that John and/or Defendants, jointly and severally, have taken actions to frustrate Plaintiff's attempt and/or attempts to collect the damages Plaintiff was awarded in the York County Case.

57. Plaintiff is informed and believes that Defendants are currently and/or may continue to take actions to frustrate Plaintiff's ability to collect the amounts due under the Judgment.

58. Plaintiff is also informed and believes she will suffer irreparable harm if Defendants are able to continue to divest themselves of and/or divert property, funds, and assets pending a final hearing on this matter.

59. Plaintiff is further informed and believes that she is likely to succeed on the merits of the case based on the above.

60. Additionally, Plaintiff is informed and believes she has an inadequate remedy at law if Defendants are allowed to divest themselves of and/or divert assets, funds, and property pending a final hearing on this matter as money damages will not compensate her for Defendants' actions described above.

61. Plaintiff is informed and believes that she is entitled to a temporary injunction prohibiting Defendants from transferring, selling, mortgaging, placing a lien upon, or otherwise divesting themselves of any right, title, and/or interest in and to any property, asset, or fund in which they may have an interest or diverting the same, ordinary expenses excepting, pending a final hearing in this matter.

FOR A SIXTH CAUSE OF ACTION
(Foreclosure)

62. Plaintiff incorporates the previous allegations of this Amended Complaint as if repeated herein verbatim.

63. As noted hereinabove and as a result of the various transfers, John holds the entirety of the interest in and to the Property which is more fully described as:

All that certain piece, parcel or lot of land, lying and being located on Johns Island, Charleston County, South Carolina, Phase 2B, The Garden at Whitney Lake, shown and designated as Lot 2B-48, as shown on plat entitled, "FINAL SUBDIVISION PLAT SHOWING 51 LOTS AND 3 HOA AREAS LOCATED IN THE GARDENS AT WHITNEY LAKE, PHASE 2B, JOHNS ISLAND, CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA, OWNED BY SOUTHEASTERN RECAPITALIZATION GROUP, LLC", dated May 20, 2016 last revised June 29, 2016, Job No. 2015-097, prepared by Associates Surveyors and recorded in the RMC Office for Charleston County on August 29, 2016 in Plat Book L16, at Page 0410. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

This being the same property conveyed to John Edward Vergeldt and Teresa A. Shaw-Vergeldt by Deed of Southeastern Recapitalization group, LLC dated April 15, 2019 and recorded on April 24, 2019 in the RMC Office for Charleston County, SC in Book 0791, at Page 290. Thereafter John Edward Vergeldt conveyed his interest to Teresa A. Shaw-Vergeldt by deed dated June 26, 2019 and recorded in the RMC Office for Charleston County, South Carolina in Book 0807 at Page 426. Thereafter, Teresa A. Shaw-Vergeldt conveyed a one-half (1/2) interest to John Edward Vergeldt by deed dated June 6, 2022 and recorded in the RMC Office for Charleston County, South Carolina in Book 1114 at Page 880.

TMS#: 312-11-00-295

Property Address: 1523 Star Flower Aly, Charleston, South Carolina 29455

64. Plaintiff is informed and believes, pursuant to S.C. Code Ann. §15-35-810 (1976), as amended, there is attached thereto a judgment lien in the original principle amount of Three Hundred Sixty One Thousand Ninety Two and 88/100 (\$391,092.88) Dollars plus post judgment interest from February 2, 2021.

65. As John has failed to pay amount of the Judgment and/or the judgment lien, Plaintiff is informed and believes she entitled to have the same foreclosed, have the equity of redemption

barred, and have the Property sold at the public sale at a later date with the proceeds resulting therefrom being applied:

- a. First: to the costs, including court costs and statutory commissions, of this action;
- b. Second: to John's homestead exemption, if any, as allowed by law;
- c. Third: to Plaintiff, the value of John's remaining interest and/or share of the Property up to the Judgment amount.

66. In the event the proceeds of the sale are insufficient to pay the Judgment in full, Plaintiff requests that the Judgment be reduced but otherwise remain of record and be permitted to collect the same by other means and methods from other sources.

67. In the event the proceeds of the sale are not anticipated to satisfy the Judgment in full, Plaintiff request that the sale remain open for an additional thirty (30) days, as may be allowed by law, to allow for upset bids and/or to continue her collection efforts against John and/or Teresa, as may be appropriate.

68. In connection with the foreclosure of the lien, Plaintiff is informed and believes she is entitled to an order authorizing the Court to execute a deed to the successful bidder and/or purchaser resulting from the public sale as well as an order that directs and empowers the Sheriff of Charleston County to place the successful purchaser in possession of the Property should the same become necessary.

WHEREFORE, having set forth her Amended Complaint against Defendants, Plaintiff prays that the Court issue an order that:

A. Determines the Judgment and the amount thereof is a first lien on John's interest in the Property;

B. Forecloses the judgment lien and orders the sale of the Property at public auction by foreclosure, with the equity of redemption barred, and the proceeds therefrom be distributed as follows:

- a. First: to the costs, including court costs of this action and statutory commissions;
- b. Second: to John's homestead exemptions, if any, as allowed by law and determined by this Court;
- c. Third: to Plaintiff, the value of John's remaining interest and/or share of the Property up to the Judgment amount; and

C. Allows bidding to remain open for thirty (30) days to allow for upset bids in the event the public foreclosure sale does not satisfy the Judgment amount;

D. Allows the Court to execute a deed to the successful bidder and/or purchaser resulting from a public or private sale;

E. Directs and empowers the Sheriff of Charleston County to place the successful purchaser in possession of the Property should the same become necessary;

F. Declares any transfer of property, assets, and/or funds from John to Terry since the filing of the Amended Petition to be a fraudulent transfer, that the same be declared null and void, and all of John's right, title and/or interest in said property, assets and/or funds be restored to him;

G. To the extent Terry has disposed of any property, assets and/or funds John fraudulently conveyed to her, grants Plaintiff judgment against Terry in the amount of the value thereof up to the amount of the Judgment plus any and all post judgment interest accrued;

H. Grants Plaintiff injunctive relief against Defendants prohibiting them selling, transferring, mortgaging, hypothecating, allowing a lien to be placed upon, or taking such other and further action to divest and/or divert any other right, title and/or interest they may have in any asset, fund, or property they currently have or in which they become entitled other than the same being paid toward the satisfaction of Plaintiff's Judgment;

I. Awards actual and consequential damages to be more fully proven at the trial of this case, plus pre-judgment interest and post judgment interest;

J. Awards Plaintiff her attorneys' fees and costs;

K. Awards punitive damages; and

L. Awards such other and further relief as this Court deems just and proper.

Respectfully Submitted,

HARRELL, MARTIN & PEACE, P.A.

/s/

TAYLOR A. PEACE, ESQ. #100206
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Attorneys for Plaintiff

July 6, 2023
Chapin, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Case No. 2021-CP-10-04257

Vicky Lynn Vergeldt, Individually,
and as Successor Trustee of the John
Vergeldt, Jr. Revocable Living Trust
Dated September 27, 1978,

Plaintiff)

vs.)

John Edward Vergeldt and Teresa A.
Shaw-Vergeldt,

Defendants.

**DEFENDANT'S
MEMORANDUM IN OPPOSITION
TO PLAINTIFF'S MOTION TO AMEND
COMPLAINT**

Defendant John E. Vergeldt submits the following memorandum in opposition to Plaintiff's Motion to Amend Complaint in advance of the hearing currently scheduled for Monday, August 7, 2023.

The case in which Plaintiff obtained the judgment against Mr. Vergeldt, Case No. 2016-CP-46-00820, is currently on appeal to the South Carolina Court of Appeals with oral arguments tentatively scheduled for the November 2023 term of court. Despite the underlying case being on appeal Plaintiff seeks to have Mr. Vergeldt's primary residence, 1523 Star Flower Alley, Johns Island, SC 29455 (hereafter "Star Flower Alley"), sold at public auction so that the proceeds from the sale may be applied towards the judgment. However, pursuant to S.C. Code Ann. § 18-9-130(A)(2), Plaintiff is required to post a bond twice the amount of value of the property or twice the amount of the judgement before she can seek to enforce a sale of the property.

On May 13, 2022, Plaintiff filed a Petition for Supplemental Proceedings to identify any and all of Mr. Vergeldt's assets and property that can be applied towards the judgment. Since that time, there has been no order determining that Star Flower Alley is an asset that can be used to

satisfy the judgment. Star Flower Alley is Mr. Vergeldt' s primary residence, as such, it is exempt from attachment, levy, and sale pursuant to S.C. Code Ann. § 15-41-30(A)(1)(a). Additionally, the Plaintiff has yet to post a bond or prove her ability to post a bond twice the amount of either the judgment or Mr. Vergeldt' s property that Plaintiff seeks to have sold as she is required to do so by law. Thus, until the court determines that the Star Flower Alley property is a property subject to the judgment and Plaintiff posts or proves she can post the necessary bond, Plaintiff cannot enforce the sale of the property as she seeks to through her proposed Amended Complaint. Accordingly, Mr. Vergeldt respectfully requests an order from this court denying Plaintiff's Motion to Amend Complaint.

Respectfully submitted,

s/ Desa Ballard

Desa Ballard (SC Bar No. 498)
Harvey M. Watson III (SC Bar No. 74053)
Haley Hubbard (SC Bar No. 103195)

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ATTORNEYS FOR DEFENDANT
JOHN EDWARD VERGELDT

August 4, 2023

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2021-CP-10-04257

Vicki Lynn Vergeldt, Individually, and as)
Successor Trustee of the John Vergeldt, Jr.)
Revocable Living Trust dated September)
27, 1978,)

Plaintiff,)

vs.)

John Edward Vergeldt and Teresa A. Shaw-)
Vergeldt,)

Defendants.)

**STIPULATION OF DISMISSAL AS TO
TERESA A. SHAW-VERGELDT
(without prejudice)**

Plaintiff Vicki Lynn Vergeldt, Individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 (“Plaintiff”), Defendant Teresa A. Shaw-Vergeldt (“Terry”), and Defendant John Edward Vergeldt (“John”), by and through their undersigned counsel, hereby stipulate to Terry’s dismissal from the above-captioned matter without prejudice pursuant to Rule 41(a)(1)(B), SCRPC. This matter shall continue as to Plaintiff and John.

HARRELL, MARTIN & PEACE, P.A.

ADLER LAW FIRM, LLC

/s/ Taylor A. Peace, Esq.
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TERESA A. SHAW-VERGELDT

August 4, 2023
Chapin, South Carolina

August 4, 2023
Pawley’s Island, South Carolina

{SIGNATURES CONTINUE ON NEXT PAGE}

BALLARD & WATSON

/s/ Desa Ballard, Esq.

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August 4, 2023

Chapin, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) CIVIL ACTION NO.: 2021-CP-10-04257

Vicki Lynn Vergeldt, Individually, and as
Successor Trustee of the John Vergeldt, Jr.
Revocable Living Trust dated September
27, 1978,

Plaintiff,

vs.

John Edward Vergeldt and Teresa A. Shaw-
Vergeldt,

Defendants.

AMENDED COMPLAINT

NOW COMES Plaintiff Vicki Lynn Vergeldt, Individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 (“Plaintiff”), who, complaining of Defendant John Edward Vergeldt (“John”), respectfully alleges and will show unto this Honorable Court as follows:

GENERAL ALLEGATIONS

1. Plaintiff is a citizen and resident of Birmingham, Michigan and is a qualified beneficiary of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 (“Trust”) and is the Successor Trustee thereof.

2. Upon information and belief, John is a citizen and resident of the County of Charleston, State of South Carolina and is married to Teresa A. Shaw-Vergeldt (“Teresa”).

3. Plaintiff is informed and believes this Court has jurisdiction over the subject matter and parties, and venue is proper as most events described herein took place in Charleston County, the Property subject of this matter is located John resides in same.

4. Heretofore, on February 1, 2016, Plaintiff filed a Summons and Petition for Removal of Trustee and Related Relief (“Petition”) against John, individually, and in his capacity as Successor Trustee of the Trust in the Probate Court for York County (“York County Lawsuit”) seeking an accounting, injunctive relief, and his removal as Successor Trustee of the Trust resulting from his, then, perceived improprieties related to the Trust which included but were not limited to his failure to adhere to all of the distributive provisions of the Trust, and to account and act impartially toward the Trust’s beneficiaries, his abusive actions toward Plaintiff, including the extensive destruction of Trust property, and the concealment of his activities as Successor Trustee. At the time it was filed, the York County Lawsuit was captioned as Vicki Lynn Vergeldt v. John Edward Vergeldt, Individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 and given Case No.: 2016-GC-46-00018.

5. When the Petition was filed, Petitioner was not seeking money damages.

6. The York County Lawsuit was subsequently removed to the Court of Common Pleas for York County, was given C/A No.: 2016-CP-4-00820 and was referred to the Master-in-Equity for York County.

7. During the York County Lawsuit, Plaintiff discovered John had, indeed, failed to act impartially toward her as one of the Trust’s beneficiaries, used the Trust’s assets and income for his own personal benefit and gain, and distributed more Trust assets to himself than other Trust beneficiaries in violation of the Trust’s distributive provisions. Plaintiff also discovered John failed to accurately report the activities of the Trust and to keep appropriate records of the Trust’s activities which were intended to conceal the same from Plaintiff to her detriment.

8. On March 29, 2019, John delivered to Plaintiff a Resignation of Successor Trustee indicating he was resigning as Successor Trustee of the Trust, and his resignation would become

effective as of April 30, 2019. At or around the same time, John filed a Notice of Motion and Motion to Dismiss the York County Lawsuit.

9. On April 15, 2019, Defendant and Teresa purchased real property located in Charleston County commonly referred as 1523 Star Flower Alley, Johns Island, South Carolina 29455 (“Property”) for the price of Four Hundred Two Hundred Twenty-Five Thousand and 88/100 (\$400,225.88) Dollars, which they took title to as joint tenants with rights of survivorship. Plaintiff filed a *Lis Pendens* against the Property in the Clerk of Court for Charleston County, South Carolina on August 26, 2021 and the same was given *Lis Pendens* No. 2021-CP-10-0480.

10. On May 14, 2019 and based upon the information discovered during the York County Lawsuit, Plaintiff filed a Notice of Motion and Motion to Amend Petition (“Amended Petition”) in which she sought to amend the Petition to allege entitlement to money damages.

11. By Order dated June 13, 2019, the Honorable Teasa Kay Weaver, as Master-In-Equity for York County, denied John’s Motion to Dismiss and allowed Plaintiff to amend the Petition to assert claims for monetary damages.

12. Plaintiff filed the Amended Petition for Removal of Trustee and Other Related Relief on June 20, 2019.

13. Six (6) days later, on June 26, 2019, John made, executed, and delivered Teresa a Quit Claim Deed (“Quit Claim”) transferring all of his right, title, and/or interest in the Property to Teresa for exactly Five and 00/100 (\$5.00) Dollars and no other consideration, said Quit Claim being recorded in the Office of the Register of Deeds for Charleston County in Book 807 at Page 426.

14. A final hearing took place in the York County Lawsuit on January 30, 2020, and Judge Weaver issued her Final Order (“Judgment”) in the York County Lawsuit on February 2, 2021 granting Plaintiff judgment and damages against John in the original principal sum of Three

Hundred Sixty-One Thousand Ninety-Two and 88/100 (\$361,092.88) Dollars as well other relief granted therein. The Judgment was transcribed in the Office of the Clerk of Court for Charleston County on August 6, 2021 under Charleston County Judgment Roll No. 2021-CP-10-03640.

15. John filed a Motion to Reconsider on February 12, 2021 which Judge Weaver denied by Order Denying Motion to Reconsider filed July 2, 2021.

16. John is appealing the Judgment and other interlocutory orders in the York County Lawsuit.

17. As of the date of the filing of this matter, John has made no payments toward the amount due under the Judgment.

18. Teresa filed an action for separate maintenance and support and divorce against John ten (10) days later on July 12, 2021 in the Charleston County Family Court, said action having C/A.: 2021-DR-10-02081 ("Family Court Case").

19. Subsequent to the institution of this matter and the Family Court Case, Terry transferred a one-half (1/2) interest in the Property to John by virtue of a Deed dated June 6, 2022 and recorded in the Office of the Register of Deeds for Charleston County on June 7, 2022 in Book 1114 at Page 880.

20. The Family Court Case was resolved by Final Order Lifting Stay and Approving Agreement ("Family Court Order") of the Honorable Daniel E. Martin, Family Court Judge for the Ninth Circuitry, filed May 26, 2023; however, Defendant and Terry remain married.

21. As a result of the Family Court Order, Terry transferred the remainder of her right, title and/or interest in and to the Property to John by deed dated May 25, 2023 and recorded in the Office of the Register of Deeds for Charleston County on May 26, 2023 in Book 1182 at Page 278.

FOR A FIRST CAUSE OF ACTION
(Foreclosure)

22. Plaintiff incorporates the previous allegations of this Amended Complaint as if repeated herein verbatim.

23. Based on the transfers above, Plaintiff is informed and believes John is the sole fee simple titleholder in and to the Property and the same is free and clear of encumbrances, liens, or other charges.

24. The Property is more fully described as:

All that certain piece, parcel or lot of land, lying and being located on Johns Island, Charleston County, South Carolina, Phase 2B, The Garden at Whitney Lake, shown and designated as Lot 2B-48, as shown on plat entitled, "FINAL SUBDIVISION PLAT SHOWING 51 LOTS AND 3 HOA AREAS LOCATED IN THE GARDENS AT WHITNEY LAKE, PHASE 2B, JOHNS ISLAND, CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA, OWNED BY SOUTHEASTERN RECAPITALIZATION GROUP, LLC", dated May 20, 2016 last revised June 29, 2016, Job No. 2015-097, prepared by Associates Surveyors and recorded in the RMC Office for Charleston County on August 29, 2016 in Plat Book L16, at Page 0410. Said lot having such size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

This being the same property conveyed to John Edward Vergeldt and Teresa A. Shaw-Vergeldt by Deed of Southeastern Recapitalization group, LLC dated April 15, 2019 and recorded on April 24, 2019 in the RMC Office for Charleston County, SC in Book 0791, at Page 290. Thereafter John Edward Vergeldt conveyed his interest to Teresa A. Shaw-Vergeldt by deed dated June 26, 2019 and recorded in the RMC Office for Charleston County, South Carolina in Book 0807 at Page 426. Thereafter, Teresa A. Shaw-Vergeldt conveyed a one-half (1/2) interest to John Edward Vergeldt by deed dated June 6, 2022 and recorded in the RMC Office for Charleston County, South Carolina in Book 1114 at Page 880. Teresa A. Shaw-Vergeldt transferred the remainder of her right, title and/or interest in and to the Property to John Edward Vergeldt by deed dated May 25, 2023 and recorded in the Office of the Register of Deeds for Charleston County on May 26, 2023 in Book 1182 at Page 278

TMS#: 312-11-00-295

Property Address: 1523 Star Flower Aly, Charleston, South Carolina 29455.

25. Plaintiff is informed and believes, pursuant to S.C. Code Ann. §15-35-810 (1976), as amended, there is attached to the Property a judgment lien in the original principle amount of Three Hundred Sixty One Thousand Ninety Two and 88/100 (\$361,092.88) Dollars plus post

judgment interest from February 2, 2021, plus attorney fees and costs, which secures the amounts due and owing under the Judgment..

26. Plaintiff is informed and believes the Judgement constitutes a valid judgment lien against John's interest in the Property.

27. As John has failed to pay amount of the Judgment and/or the amount of the attached judgment lien, Plaintiff is informed and believes she entitled to have the same foreclosed, have the equity of redemption barred, and have the Property sold at the next available public sale with the proceeds resulting therefrom be paid and/or disbursed according to the prayer herein, according to the law of the State of South Carolina, and/or the customs of this Court.

28. In the event the proceeds of the sale of the Property are insufficient to pay the Judgment in full, Plaintiff requests the Judgment otherwise remain of record and Plaintiff be permitted to collect the same by other means and methods and from other sources.

29. Also, in the event the proceeds of the sale are not anticipated to satisfy the Judgment in full, Plaintiff requests that the sale remain open for an additional thirty (30) days, as may be allowed by law, to allow for upset bids and/or to continue her collection efforts against John as may be appropriate.

30. In connection with the foreclosure of the judgment lien, Plaintiff is informed and believes she is entitled to an order authorizing the Court to execute a deed to the successful bidder and/or purchaser resulting from the public sale as well as an order that directs and empowers the Sheriff of Charleston County to place the successful purchaser in possession of the Property should the same become necessary.

WHEREFORE, having set forth her Amended Complaint, Plaintiff prays that the Court issue an order:

- A. That determines and ascertains the amount due and owing under Judgment with any post-judgment interest and attorney's fees and costs of this action;
- B. Awards Plaintiff a judgment of foreclosure for the amount found to be due and owing to Plaintiff together with post-judgment interest and attorney's fees and costs of this action;
- C. That the Property be sold pursuant to the Order of this Court, that Defendant's equity of redemption be barred, and the proceeds of the sale be first applied to the costs and expenses of this action, with the remaining proceeds to be paid to Plaintiff, with any amount in excess be held by the Court under further ordered;
- D. That Defendant and all persons whomsoever claiming by or through him be forever barred of all right, title, and interest in and to the Property, and each and every part thereof;
- E. That any unpaid balance on the Judgment after applying proceeds for the sale remain as a personal judgment against Defendant; and
- F. For such other and further relief as this Court deems just and proper.

Respectfully Submitted,

HARRELL, MARTIN & PEACE, P.A.

/s/ Taylor A. Peace, Esq.

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Attorneys for Plaintiff

October 13, 2023
Chapin, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
	)	Case No. 2021-CP-10-04257
Vicky Lynn Vergeldt, Individually,	)	
and as Successor Trustee of the John	)	
Vergeldt, Jr. Revocable Living Trust	)	MOTION TO STAY PROCEEDINGS
Dated September 27, 1978,	)	
	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
John Edward Vergeldt and Teresa A.	)	
Shaw-Vergeldt,	)	
Defendants.	)	

Please take notice that Respondent John Edward Vergeldt (“Mr. Vergeldt”), by and through his undersigned counsel will move before this Court for an order staying the collections proceedings in this matter. This motion is based upon the foregoing authority and the following:

1. On or about March 16, 2016, Plaintiff filed an action against Mr. Vergeldt, Case No. 2016-CP-46-00820 in York County (hereinafter “underlying action”) seeking equitable relief only, *i.e.*, removal of Defendant John Vergeldt as successor trustee of the trust of the parties’ late father. This 2016 action followed an earlier action, Case No. 2014-CP-46-01956, in which Plaintiff sought and received only equitable relief in an order in which the trial judge remarked on how odd it was that Plaintiff requested only equitable relief. (Order of Judge S. Jackson Kimball dated August 28, 2015, attached hereto as **Exhibit A**. (“No finding or conclusion probable cause to challenge the Successor Trustee’s performance of his duties is made, as such issue is not presented in this action. Such

determination is preserved for such time as Plaintiff challenges the actions of John while acting as Successor Trustee”).¹

2. Obviously missing Judge Kimball’s clear prompt that time was running, when the current action was filed, it again sought only equitable relief. The filing of the instant action was in probate court of York County, and it sought only removal of Defendant John Vergeldt as successor trustee. The probate judge removed Case 2016-GC-46-00018 to circuit court by order dated March 10, 2016, where it was reassigned Case No. 2016-CP-46-0820. More than four years after filing this, her second lawsuit for equitable relief, Plaintiff filed a motion on May 19, 2020 to amend her complaint to **seek damages for the first time.** The order was granted on August 31, 2020, in the midst of the Covid-19 crisis. The case was tried in January, 2021, resulting in the order on appeal filed February 2, 2021. The final order in this case awarded damages, over objection to the untimely request to amend, which issue is pending on appeal at present, along with other issues).
3. In this second action, Plaintiff recovered a judgment against Mr. Vergeldt in the amount of Three Hundred Sixty-One Thousand Three Hundred Ninety-Two and 88/100 (\$361,092.88) Dollars, which judgment was recorded in the Office of the Clerk of Court of York County on February 2, 2021.
4. Following proper post-trial motions, on or about August 2, 2021, Mr. Vergeldt filed a Notice of Appeal seeking to appeal the judgment issued in the underlying action. This appeal is currently pending before the South Carolina Court of Appeals with oral arguments scheduled for November 8, 2023.

¹ Of equal import is Judge Kimball’s finding that Defendant Vergeldt did not undertake responsibilities for handling his father’s affairs until March 6, 2013. *Id.* p. 8.

5. On or about September 14, 2021, Plaintiff filed the instant action against Mr. Vergeldt for allegedly transferring assets subject to the judgment, specifically real property located at 1523 Star Flower Alley, Johns Island, SC 29455.
6. Plaintiff also filed an action for supplemental proceedings on or about May 13, 2022, seeking to ascertain any property and assets belonging to Mr. Vergeldt that can be applied towards the judgment despite the underlying case and judgment having been appealed.
7. Both these actions were consolidated pursuant to consent order dated August 19, 2022.
8. Plaintiff seeks to have Mr. Vergeldt's primary residence, 1523 Star Flower Alley, Johns Island, SC 29455 (hereafter "Star Flower Alley"), sold at public auction so that the proceeds from the sale may be applied towards the judgment.
9. In doing so, Plaintiff has requested that Mr. Vergeldt make the house available for appraisal, which request was granted by the Court pursuant to Order dated September 28, 2023.
10. Mr. Vergeldt agreed to make Star Flower Alley available for appraisal on October 24, 2023, at 9:00 am. The appraiser to be used was selected by Plaintiff.
11. Mr. Vergeldt retained a professional to attend and monitor the appraisal, which professional was on site at 9:00 am.
12. At 9:43 a.m., Plaintiff's counsel contacted defense counsel to advise that the appraiser was late and had been "sitting in traffic for an hour." Plaintiff's counsel indicated that he received a message from the appraiser about a minute before he contacted defense counsel.
13. The professional retained by Mr. Vergeldt was released at 9:45 am after the Plaintiff's appraiser failed to appear.

14. When the appraiser finally arrived at approximately 9:56 am, the appraiser walked past Mr. Vergeldt, who was standing in the front yard with his dog, and entered the house as if he owned it. Mr. Vergeldt instructed him to leave after the appraiser entered Mr. Vergeldt's home without permission.
15. The appraiser selected by Plaintiff made no effort to contact Mr. Vergeldt or undersigned counsel directly to advise of the delay, and Mr. Vergeldt is informed and believes that Plaintiff failed to provide the appraiser with Mr. Vergeldt's contact information so that he could be promptly notified in the event of a delay.²
16. Plaintiff has requested that Mr. Vergeldt make his residence available again for the same appraiser to conduct the appraisal, however. Mr. Vergeldt is informed and believes that the appraiser is now biased and incapable of providing an accurate appraisal.
17. This motion is precipitated by the failure of Plaintiff's appraiser to arrive at the agreed-upon time to conduct the appraisal, and Plaintiff's subsequent threat to move for sanctions against Mr. Vergeldt for failure to complete the appraisal. Sanctions against Mr. Vergeldt are not appropriate as the failure to complete the appraisal is entirely Plaintiff's fault.
18. Plaintiff's attempt to move forward with the collections proceedings despite the pending appeal has caused an unnecessary burden on Mr. Vergeldt necessitating a stay in the collections proceedings.
19. As previously stated, oral arguments for the appeal are confirmed and scheduled for November 8, 2023, precisely two weeks from the filing of this motion.

² This is a typical scenario of Rule 4.2 requiring the lawyers to handle even the most mundane issues when the parties, as they are here, hate one another for reasons that do not matter to the Court.

20. Staying the collections proceedings until a decision on the appeal is rendered is appropriate and reasonable considering that there is a likelihood that the judgment is reversed. Further, Plaintiff will not be prejudiced by such a stay.
21. Pursuant to Rule 11, SCRCP, the undersigned certifies that consultation with Plaintiff's counsel to resolve this matter would serve no useful purpose, therefore no consultation was had prior to the filing of this motion.

Wherefore, Defendant John Edward Vergeldt respectfully requests that this Court issue an order staying the proceedings until the underlying action is resolved by the South Carolina Court of Appeals.

Respectfully submitted,

s/ Desa Ballard

Desa Ballard (S.C. Bar No. 498)

Harvey M. Watson III (S.C. Bar No. 74053)

Haley Hubbard (S.C. Bar No. 103195)

BALLARD & WATSON

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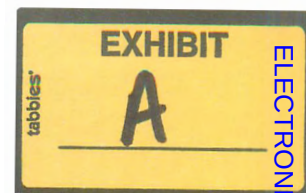
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ATTORNEYS FOR DEFENDANT
JOHN EDWARD VERGELDT

October 25, 2023



STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS

VICKI LYNN VERGELDT,)
)
Plaintiff,)

vs.)

ORDER

JOHN EDWARD VERGELDT,)
Individually and as former Co-Trustee)
and current Successor Trustee of the)
John Vergeldt, Jr. Revocable Living)
Trust dated September 27, 1978, as)
Amended; and PATTI VERGELDT)
DOWNEY, as a Qualified Beneficiary of)
the John Vergeldt, Jr. Revocable Living)
Trust dated September 27, 1978, as)
amended,)
)
Defendants.)

Case No. 2014CP46-00012

This matter came before me on July 27 and 28, 2015, for a trial. Representing the parties at the hearing were Adam T. Silvernail for Plaintiff, and John P. Gettys for Defendants. Also present were the parties. Both sides presented witnesses and exhibits, and counsel for the parties presented arguments and briefs for the Court's consideration. Based on the testimony, exhibits, and arguments of counsel, I make the following findings of fact and conclusions of law.

BACKGROUND

This is a declaratory judgment action brought by Plaintiff, requesting that the court interpret certain provisions of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978, that became irrevocable upon the death of the Settlor, John Vergeldt, Jr. ("Mr. Vergeldt"). Specifically, Plaintiff's Second Amended Complaint seeks a declaration of the Defendant's duties as the Successor Trustee under the Michigan Trust Code, which governs interpretations of the Trust, and Paragraphs FIFTH, FOURTEENTH A, and FOURTEENTH B of the Trust Agreement. Additionally, Plaintiff seeks a judicial determination of the date on which Settlor became mentally incapacitated, such that he was no longer capable of handling his own affairs, and ceased to be a trustee of the Trust.

Defendants John Edward Vergeldt ("John"), Patti Vergeldt Downey ("Patti"), and

Plaintiff Vicki Vergeldt ("Vicki") are the children of Mr. Vergeldt. On September 27, 1978, Mr. Vergeldt, as Settlor, entered into a revocable trust agreement with himself as Trustee, which he subsequently amended seven times. Then, on July 29, 2009, Settlor executed an eighth amendment and complete restatement of the trust agreement, in which he also appointed John as Co-Trustee. The trust was subsequently amended a ninth and tenth time on February 5, 2010, and March 7, 2011, respectively; however, these amendments only changed specific provisions of the trust without completely restating it.

Defendant asserts that he did not become the Successor Trustee until Mr. Vergeldt's death on July 9, 2013. He further asserts that prior to the Settlor's death, he had no obligation to furnish trust information or accountings to Plaintiff according to the terms of the Trust, since no one became a "current beneficiary" of the Trust until that event.

FINDINGS OF FACT

The following are findings of fact, presented in narrative format, which I find to be based on all the evidence, and after consideration of any applicable burden of proof. I have also considered the credibility of the witnesses in reaching these findings.

For the purposes of determining the mental condition of Mr. Vergeldt, the evidence presented begins in 2005, and continues through Mr. Vergeldt's death on July 9, 2013. Based on the relief sought in Plaintiff's Complaint, these findings are limited to those necessary to declare the meaning and application of the Michigan Trust Code and the Trust documents to the facts of this case. I make no finding relating to the liability of any party, or the lack thereof, as no claim is stated for breach of any duty, and no relief is sought from the court to compel the Trustee to perform any duties that may be required by the Michigan Trust Code. With this limitation, and correlating and balancing all of the testimony and documents presented, I find the following.

In 2005-2006, Mr. Vergeldt had begun to show signs of deterioration due to age and the symptoms brought on by Parkinson's disease. In the early time period spanned by this discussion, those symptoms primarily related to his physical condition. There were issues with ambulation and coordination that necessarily affected his ability to care for himself. Predictably, the symptoms increased in severity, imposing increasing limitations on his ability to function normally, both physically and mentally, until his death. He likely became unable to manage or conduct his own affairs sometime between the late Fall of 2012, and March, 2013, when Defendant initiated a guardianship proceeding in the York County Probate Court. Due to opposition by Vicki, that proceeding was not completed prior to Mr. Vergeldt's death. The date

of the likely onset of incapacity was early, 2013. Nevertheless, it was not until May 6, 2013, that his primary physician rendered a medical opinion of legal incapacity, which "triggered" certain provisions of the Trust.

In 2005, Teresa Petersen, a college student, stayed in Mr. Vergeldt's home, and assisted him with some of his daily needs. After she left in 2006, Mr. Vergeldt continued to live alone until he moved to a retirement village, where he lived independently until January, 2010. In 2010, Mr. Vergeldt moved to Vicki's home, to be cared for there. He lived with Vicki until October, 2011, when he went to live with Patti. In January, 2012, Mr. Vergeldt moved to South Carolina to live with John.

During the period from 2005 to his death, Mr. Vergeldt received assistance with the handling of his personal business and finances. At various times, both Vicki and John rendered such assistance. During the early periods, this assistance was mostly ministerial, due to physical limitations associated with Parkinson's disease, but later became managerial as Mr. Vergeldt's health declined, both physically and mentally. In the later time period, John became the sole manager of Mr. Vergeldt's personal business and financial affairs until Mr. Vergeldt's death on July 9, 2013. It is important to note that John was also appointed Mr. Vergeldt's attorney-in-fact under a durable power of attorney executed December 4, 2009, and the validity of that document has never been challenged. During the time John handled Mr. Vergeldt's affairs, and after Mr. Vergeldt's death, he provided a modicum of information concerning the status of the Trust to Vicki and Patti.

It is apparent that the parties have a poor and strained relationship. Their communications foster acrimony and suspicion. In the course of dealing with Mr. Vergeldt's affairs, Vicki has questioned John's handling of Mr. Vergeldt's affairs, and demanded accountings. John has responded by minimal communications and unnecessary assertions of authority that have contributed to Vicki's questions concerning John's handling of Mr. Vergeldt's affairs as Successor Trustee. This unfortunate set of circumstances has led to the present action, but I find that in the posture presented by Vicki's prayer for relief, she has not directly challenged John's actions as Successor Trustee. Her prayer only seeks an interpretation of the applicable Michigan statutes and the often-amended Trust agreement.

CONCLUSIONS OF LAW

Based on the findings of fact herein, I make the following conclusions of law. In so doing, I follow two fundamental principles. The first is that "[i]f a statute's language is plain,



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unambiguous, and conveys a clear meaning, 'the rules of statutory interpretation are not needed and the court has no right to impose another meaning.' *Sloan Constr. Co. v. Southco Grassing, Inc.*, 395 S.C. 164, 170, 717 S.E.2d 603, 606 (2011), (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 582 (2000)). An "inclusion in [a] statute of certain specified exclusions leaves the inference that the Legislature intended no other exclusions from the exemption." *W. Va. Pulp & Paper Co. v. Riddock*, 225 S.C. 283, 288, 82 S.E.2d 189, 190 (1954). "The issue of interpretation of a statute is a question of law for the court." *Bostic v. American Home Mortg. Servicing, Inc.*, 375 S.C. 143, 147, 650 S.E.2d 479, 481 (Ct.App. 2007).

The second principle is that "[w]here an agreement is clear and capable of legal interpretation, the courts only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct.App.2004) (quoting *Heins v. Heins*, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct.App.2001)). As with statutory construction or interpretation, construction and interpretation of a contract is a question of law to be decided by the court. *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 493 S.E.2d 875 (Ct.App. 1997).

A. Michigan Trust Code and the Trust Agreement.

Paragraph FOURTEENTH E of the Trust Agreement states that the Trust, including any trusts created under the Trust Agreement, must be administered and construed in accordance with Michigan Law. Paragraph FOURTEENTH A of the Trust Agreement incorporates the statutory duties imposed on a Trustee. However, according to § 700.7105(2) of the Michigan Trust Code, the terms of a Trust Agreement generally take precedence over the provisions of the Michigan Trust Code, with the exception of certain non-waivable provisions. Two such provisions pertinent to this case are §§ 700.7814(2)(a), and (4), which deal principally with a trustee's duty of reporting.

§700.7814(2)(a) requires that trustees make certain disclosures to beneficiaries, including, "[u]pon the reasonable request of a trust beneficiary, [the trustee must] promptly furnish to the trust beneficiary a copy of the terms of the trust that describe or affect the trust beneficiary's interest and relevant information about the trust property." Mich. Comp. Laws Ann. § 700.7814(2)(a). §700.7103(l)(i) of the Michigan Trust Code defines a "trust beneficiary" as a person who "... has a present or future beneficial interest in a trust, vested or contingent." Thus, Vicki is a trust beneficiary, and is entitled to the information specified by the statute.

§700.7814(2)(a) clearly conflicts with the provision in Paragraph FOURTEENTH B of

the Trust Agreement, as amended, which states that the Successor Trustee “. . . shall not provide any account statements or information about the trust to any other beneficiary . . .”, other than Settlor during Settlor’s lifetime. Since § 700.7814(2)(a) is a non-waivable provision, I conclude that the statute trumps the phrase “. . . or information about the trust . . .” in Paragraph FOURTEENTH B. Therefore, any Trustee under the subject Trust agreement does have a statutory duty to provide the beneficiaries with “. . . a copy of the terms of the trust that describe or affect the trust beneficiary’s interest and relevant information about the trust property.”

Based upon the plain language of the statute, I further conclude that the duty to provide the specified information arises upon any “reasonable request” by any trust beneficiary. Further, concerning the scope of production, I conclude that any records “. . . that describe or affect the trust beneficiary’s interest and relevant information about the trust property. . . .” must be provided, without limitation as to time. I make no finding or conclusion concerning the application of this provision to the facts of this case, as that goes beyond the scope of Plaintiff’s prayer for relief.

The second non-waivable provision potentially implicated in this case is § 700.7814(4). Subsection (4) states that “[i]f the terms of a trust direct that accounts and information be provided to less than all qualified trust beneficiaries, at the court’s discretion, the trustee shall provide statements of account and other information to persons excluded under the terms of the trust” (Emphasis added.) When a person becomes a “qualified beneficiary” is determined “. . . on the date the trust beneficiary’s qualification is determined” (Michigan Trust Code, §700.7103(g). Vicki became a qualified beneficiary upon Mr. Vergeldt’s death. At that time, she was not excluded from receiving statements of account or other information, and the Trust agreement does not exclude anyone from receiving information after Mr. Vergeldt’s death.

Therefore, although § 700.7814(4) grants the Court discretion to require the Successor Trustee to provide account statements to additional beneficiaries, that provision does not have application in this case. Further, no action seeking relief from a competent court requesting such information available under subsection (4) has ever been brought by any beneficiary. As such, nothing in the Trust Agreement conflicts with §700.7814(4), and such provision has no bearing on the present case.

Clearly, the foregoing discussion presupposes that the Trustee has a duty, both by statute and under the Trust Agreement, to keep and maintain adequate records of transactions and the administration of the Trust. The relief requested by Plaintiff does not require a determination of

whether John has breached those duties.

As to Paragraph FIFTH of the Trust agreement, it is apparent that the Settlor intended to provide for forgiveness of loans or advances made to potential beneficiaries prior to the EIGHTH amendment to the Trust, which was executed on July 29, 2009. After that date, it appears that his intent was to assure a balancing of distributions among beneficiaries.

This balancing would be accomplished by reducing a beneficiary's distribution to the extent the beneficiary received gifts or advances from the Trust prior to the Settlor's death that exceeded gifts or advances to other beneficiaries. Specifically, Paragraph FIFTH provides that a beneficiary's share of the trust shall be reduced by the amount of any gifts or advances he or she receives in excess of what any other beneficiary received in gifts or advances from the Settlor during his lifetime. It is implicit in the paragraph that the Successor Trustee would be responsible for calculating any balancing of entitlements.

Carrying out the provisions of the paragraph is subject to the final proviso that any reductions are to be made "... only to the extent there has not been a full reduction ..." under Mr. Vergeldt's Will. In other words, if the Will makes a complete reduction in a beneficiary's entitlement, taking into account prior gifts or advances, Paragraph FIFTH will not be used to further reduce what the beneficiary will receive.

Beyond this, there are no rights specifically or impliedly granted to trust beneficiaries under Paragraph FIFTH. Because Plaintiff seeks only a declaration of the meaning of the paragraph, I make no finding or conclusion concerning whether John, as Successor Trustee, has correctly applied the language of Paragraph FIFTH.

Paragraph EIGHTEENTH A of the Trust, in the TENTH AMENDMENT to the Trust agreement provides for forfeiture of a beneficiary's entitlement under the Trust if the beneficiary challenges the Successor Trustee's performance of his duties. However, Paragraph EIGHTEENTH D of the Trust, avoids such forfeiture if there is probable cause for asserting a challenge. The paragraph provides that probable cause exists if "... there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful." As this action does not directly challenge the actions of the Successor Trustee, I make no declaration concerning probable cause to make such a challenge.

B. Successor Trustee's duties.

No party disputes that John had a fiduciary duty to Trust beneficiaries, as specified by



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statute and the Trust agreement, in carrying out his responsibilities as Co-Trustee and Successor Trustee. Except for the provision of information discussed above, I conclude that those duties to Vicki, as a beneficiary, did not arise prior to his becoming Successor Trustee. The Trust agreement clearly provides that Mr. Vergeldt, as Settlor and primary Trustee, retained complete control over the Trust so long as he remained as Trustee. Further, until Mr. Vergeldt's death, the Co-Trustee's duty was entirely to the Settlor. (See paragraphs THIRD, FOURTH A., and SIXTH A., B., and E., of the Trust agreement.)

This is in conformity with § 700.7603 of the Michigan Trust Code, which provides:

700.7603. Powers of settlor; exceptions; settlor as incapacitated individual; powers of withdrawal; actions by predecessor trustee

(1) Subject to subsection (2), while a trust is revocable, rights of the trust beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor. . . . (Emphasis added.)

In order to be a "current trust beneficiary", a named beneficiary in the Trust agreement had to have a current right to receive any distribution of income or principal of the Trust. (See paragraph SECOND R. of the Trust agreement.) So long as Mr. Vergeldt, as Settlor, was living, only "a current trust beneficiary" had a right to receive a statement of account of the Trust, and the Successor Trustee was instructed not to provide such statements to one not a current beneficiary. (See paragraph FOURTEENTH B. of the Trust agreement.) Thus, John's duty, as Successor Trustee, to provide statements of account to Vicki and Patti did not arise until Mr. Vergeldt's death on July 9, 2013. As to that duty when it arose, the Trust agreement provides that "[n]o particular format or formality is required . . ." for a statement or report, unless a court specifies otherwise. (See paragraph FOURTEENTH B. of the Trust agreement.) There has been no such specification to date, and the relief requested in this declaratory action does not require such a specification.

C. Mr. Vergeldt's incapacity.

The inquiry into the date of Mr. Vergeldt's incapacity is pertinent to the relief requested in this action for two purposes: first, for a determination of when John, as Co-Trustee under the Trust agreement, became the sole functioning Trustee; and, second, insofar as it establishes when John became the Successor Trustee under the Trust agreement. The factual findings in this regard serve separate purposes. The first is relevant to the question not answered in this order, namely, the propriety of John's management of trust assets and affairs prior to becoming the Successor Trustee. The second is relevant to his actually becoming the Successor Trustee under

the terms of the Trust agreement, and his performance of the duties and functions imposed thereby. As to when John became Successor Trustee, it is necessary to look only to the language of the Trust agreement to determine how incapacity must be established.

At paragraph THIRD E., the Trust specifies two circumstances whereunder the Successor Trustee succeeds the Settlor as Trustee, if the Settlor is still living. The first is the appointment of a guardian for Mr. Vergeldt. The second is a written opinion by Mr. Vergeldt's primary care physician that Mr. Vergeldt "... has become incapacitated to the extent that Settlor is unable to act in Settlor's own behalf." (See also paragraph SECOND Q.)

Although John sought to have incapacity established by appropriate judicial proceeding, Mr. Vergeldt died prior to completion of that process. However, in a "Final Report" dated May 6, 2013, Dr. Jason Brancato, Mr. Vergeldt's primary care physician, rendered his medical opinion that Mr. Vergeldt was an "incapacitated person." He opined that Mr. Vergeldt "... lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person or property." Thus, I conclude that under the terms of the Trust agreement, John became Successor Trustee on May 6, 2013.

As to when John, as Co-Trustee, became the sole acting Trustee, a precise determination of a date cannot be made due to the conflicting evidence. Such a determination is further complicated by the fact that Mr. Vergeldt's Parkinson's disease rendered him physically, but not necessarily mentally, incapable of performing as the primary Trustee. Nevertheless, the preponderance of the testimony indicates that Mr. Vergeldt was mentally incapacitated as early as the Fall of 2012, but certainly by early March, 2013, when John commenced guardianship proceedings. However, I conclude that this finding is not determinative of the rights and duties of the parties, since, as referenced above, John's duty was entirely to Mr. Vergeldt until Mr. Vergeldt's death. Further, John was already functioning as Mr. Vergeldt's attorney-in-fact. (See Plaintiff's Exhibit 15.)

D. Attorneys' fees and costs.

S.C. Code Ann. § 62-7-1004 (1976, as amended) provides:

In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.

As pleaded by Plaintiff, this action does not involve, or challenge, the administration of the Trust; rather, it seeks declaratory relief to establish the rights and duties of the parties. I conclude that the statute does not afford an award of fees and costs for pursuit of such relief. In

any event, under the facts and circumstances of this case, I find and conclude that the equities of the parties, and justice, mitigate against an award of fees and costs to either party in this action.

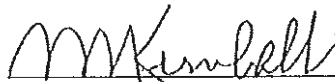
ORDER OF THE COURT

Based on the findings of fact and conclusions of law herein, I make the following declarations as the order of the court.

1. Mr. Vergeldt likely became mentally incapacitated in fact in early March, 2013.
2. Mr. Vergeldt was determined to be mentally incapacitated on May 6, 2013, and became incapacitated under the terms of the Trust, and as a matter of law, on that date.
3. John became Co-Trustee on July 29, 2009, and Successor Trustee on May 6, 2013.
4. John has a duty to provide to all beneficiaries "... a copy of the terms of the trust that describe or affect the trust beneficiary's interest and relevant information about the trust property." (Michigan Trust Code § 7814(2)(a).) That duty encompasses all available information relevant to the Trust property without time limitation. He further has a duty to provide statements of account at least annually to current trust beneficiaries, and to permit inspection of the financial records of the Trust, from the date of Mr. Vergeldt's death. No particular format for the presenting statements of account is prescribed.
5. No declaration concerning probable cause to challenge of the Successor Trustee's performance of his duties is made, as such issue is not presented in this action. Such determination is preserved for such time as Plaintiff challenges the actions of John while acting as Successor Trustee.
6. No finding or conclusion in this order shall be deemed to be a determination of compliance, or non-compliance, with applicable law, or the terms of the Trust agreement. Further, no finding or conclusion in this order shall be deemed to establish the amount of any entitlement of any beneficiary under the terms of the Trust agreement.
7. No party is entitled to an award of attorneys' fees and costs in this action pursuant to § 62-7-1004.

AND IT IS SO ORDERED.

August 28, 2015


S. Jackson Kimball
Special Circuit Court Judge
York County

#9

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
	)	Case No. 2021-CP-10-04257
	)	
Vicky Lynn Vergeldt, Individually,	)	
and as Successor Trustee of the John	)	
Vergeldt, Jr. Revocable Living Trust	)	
Dated September 27, 1978,	)	MOTION TO DISMISS AND
	)	ANSWER TO AMENDED COMPLAINT
	)	
Plaintiff,	)	
vs.	)	
	)	
John Edward Vergeldt and Teresa A.	)	
Shaw-Vergeldt,	)	
Defendants.	)	

Defendant John Edward Vergeldt (hereafter “Defendant”), responding by motion and, reserving his rights, answering the amended complaint of the Plaintiff Vicky Lynn Vergeldt, Individually, as successor Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 (hereafter “Plaintiff”) would show unto the Court:

MOTION TO DISMISS

1. This action should be dismissed pursuant to Rule 12(b)(6), SCRCP, in that it is premature because the matter is on appeal and Plaintiff has not offered to nor attempted to post a bond as required by S.C. Code Ann. § 18-9-130(A)(1), removing any standing Plaintiff might otherwise have to pursue collection against Defendant.
2. Further, while it is not his issue to raise, he is informed and believes that Defendant Teresa A. Shaw-Vergeldt has previously been dismissed from this action, and Plaintiff’s attempt to reinstitute proceedings against her is in bad faith.
3. Reserving all rights under his Motion to Dismiss set forth herein, Defendant John Edward Vergeldt (Defendant), responds to the allegations of the amended complaint as follows:

ANSWER

4. Each and every allegation of the Amended Complaint filed October 13, 2023 not expressly admitted herein is denied and strict proof thereof is demanded.
5. Paragraph 1 is admitted on information and belief.
6. Paragraph 2 is admitted, but irrelevant. Further answering Paragraph 2, Defendant would show that he and Defendant Teresa Vergeldt (hereafter “Teresa”) separated and family court proceedings have concluded to fully and finally separate their property interests from one another.
7. Paragraph 3 is admitted, with the exception of any status conferred upon the parties in the York County lawsuit, in which some of the proceedings were barred by res judicata.
8. Paragraphs 4, 5 and 6 accurately describe in summary fashion the relief sought by Plaintiff in the York County lawsuit, but as described above, Defendant is informed and believes that any orders in the York County lawsuit are a nullity. Defendant is currently pursuing an appeal of order issued in the York County lawsuit and oral argument is scheduled to occur in less than 10 days. *See* Appellate Case No. 2021-000816. At no time has Plaintiff sought to or established sufficient means to collect the judgment pending appeal, as required by S.C. Code § 18-9-130(A)(1), making these proceedings premature.
9. Defendant has moved to stay the proceedings currently pending before this Court.
10. Paragraph 7 is denied. By way of further response, Defendant incorporates his responses above and asserts that some or all orders issued in the York County lawsuit are a nullity and unenforceable.

11. Answering Paragraphs 8, 9 and 10, Defendant craves reference to the documents identified therein. Any allegations not established by the documents are specifically denied.
12. Answering Paragraphs 11, 12 and 13, Defendant craves reference to the documents identified therein. Any allegations not established by the documents are specifically denied.
13. Answering Paragraph 14, Defendant admits there were further proceedings on January 30, 2020 in the York County lawsuit, but denies the Court had any authority to grant relief in that action base on res judicata.
14. Answering Paragraph 15, Defendant craves reference to the documents identified therein. Any allegations not established by the documents are specifically denied.
15. Paragraph 16 is admitted.
16. Paragraph 17 is admitted insofar as it states that Defendant has made no payments toward the amount due under the judgment referenced because such judgment is void and of no force and effect.
17. Answering Paragraphs 18, 19, 20 and 21, Defendant craves reference to the documents identified therein. Any allegations not established by the documents are specifically denied.
18. Paragraph 22 does not require a specific response, but Defendant incorporates his responses to the corresponding paragraphs set forth above.
19. Paragraph 23 is denied.
20. Paragraph 24 does not require a specific response.

21. Paragraphs 25 and 26 are denied. Further answering, Defendant is informed and believes that any judgment Plaintiff holds against him is void and unenforceable, rendering null and void any judgment lien attached to property owned by the Defendant.
22. Paragraph 27 is admitted insofar as it states that Defendant has made no payments toward the amount due under the judgment referenced because such judgment is void and of no force and effect. However, the remaining allegations in Paragraph 27 are denied and strict proof thereof is demanded.
23. Paragraphs 28, 29 and 30 are denied.

Wherefore, having fully set forth his answer, Defendant moves for entry of an order:

- A. Dismissing this action without prejudice pursuant to Rule 12(b)(6) in that Plaintiff lacks standing to pursue this action at the present time;
- B. Staying this action as previously requested by Defendant in his Motion to Stay Proceedings filed October 25, 2023, the contents of which are incorporated herein by reference as fully as if repeated herein verbatim;
- C. Denying any relief to the Plaintiff;
- D. Awarding him the costs of this action as permitted by contract or statute; and
- E. For such other and further relief as the Court deems just and proper.

Respectfully submitted,

s/ Desa Ballard
Desa Ballard (S.C. Bar No. 498)
Harvey M. Watson III (S.C. Bar No. 74053)
Haley Hubbard (S.C. Bar No. 103195)

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ATTORNEYS FOR DEFENDANT
JOHN EDWARD VERGELDT

October 30, 2023

STATE OF SOUTH CAROLINA) **IN THE COURT OF COMMON PLEAS**
)
COUNTY OF CHARLESTON) **CIVIL ACTION NO.: 2021-CP-10-04257**

Vicki Lynn Vergeldt, Individually, and as)
 Successor Trustee of the John Vergeldt, Jr.)
 Revocable Living Trust dated September)
 27, 1978,)

Plaintiff,)

vs.)

John Edward Vergeldt and Teresa A. Shaw-)
 Vergeldt,)

Defendants.)

**NOTICE OF MOTION AND
 MOTION FOR CONTEMPT AND
 FOR SANCTIONS**

**TO: DESA BALLARD, ESQ., BALLARD & WATSON
 ATTORNEYS FOR DEFENDANT JOHN EDWARD VERGELDT**

YOU WILL PLEASE take notice that Plaintiff Vicki Lynn Vergeldt, Individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 (“Plaintiff”), will move before this Honorable Court ten (10) days after service hereof or as soon thereafter as counsel may be heard for an order holding Defendant John Edward Vergeldt in contempt for violating Order Granting Motion to Compel by filed by this Court on September 28, 2023 or frustrating the purpose of same and for sanctions as this Court deems just and proper to include but not be limited an award of attorney’s fees and costs be assessed against Defendant for bringing this Motion.

As grounds for the Motion, Plaintiff would show as follows:

1. That the Court entered an Order Granting Motion to Compel on September 28, 2023 that required Defendant to make the real property at 1523 Star Flower Alley, Johns Island, South Carolina (“Property”) available to an agreed upon South Carolina

licensed real estate appraiser or home inspector at a date and time convenient to the designated real estate appraiser/home inspector and the same should be completed within forty-five (45) days;

2. That, thereafter, Plaintiff and Defendant agreed that Kevin Lowry with Lowcountry Real Estate Appraisals, Inc. was acceptable to appraise the Property, or, at a minimum, Defendant did not object to the same;
3. That Defendant agreed to make the Property available for appraisal on October 24, 2023 at 9:00 A.M., and the same was communicated to Mr. Lowry;
4. That, on October 24, 2023, at approximately 9:39 A.M., Mr. Lowry informed Plaintiff's counsel that he was delayed by approximately one (1) hour due to traffic caused by a disabled vehicle in the Mount Pleasant area;
5. That Plaintiff's counsel communicated same to Defendant's counsel at approximately 9:41 A.M along with the message that Mr. Lowry would be arriving in approximately ten (10) minutes;
6. That Defendant, apparently only after being informed of Mr. Lowry's delay, decided he was done waiting;
7. That Mr. Lowry proceeded to the Property where he was met by Defendant;
8. That Defendant proceeded to yell and swear at Mr. Lowry, informed Mr. Lowry that could not access the Property, and was instructed to leave;
9. That Mr. Lowry then observed Defendant leave on foot to walk his dog;
10. That, because of Defendant's lack of cooperation to accommodate for circumstances beyond Mr. Lowry's control, Mr. Lowry has been unable to view the and inspect the interior of the Property;

11. That Plaintiff's counsel has requested Defendant provide additional dates and times that the interior and exterior of the Property can be made available for Mr. Lowry to view same to comply with the Order Granting Motion to Compel; however, Defendant has failed and refused to provide same making it difficult if not impossible for the parties to comply with the Order Granting Motion to Compel;
12. Plaintiff is informed and believes Mr. Lowry stands ready, willing, and able to go to the Property to continue the work needed to comply with the Court's Order to provide the appraisal allowed by the Order Granting Motion to Compel;
13. That Defendant's actions after being informed Mr. Lowry was delayed by circumstances beyond his control were willful, intentional, and purposefully taken to prohibit Mr. Lowry from viewing the interior of the Property thereby willfully violating the Order Granting Motion to Compel without just cause, or, at a minimum, to frustrating its purpose;
14. That, rather than providing Plaintiff's counsel with additional dates and times by which the interior of the Property may be made available so Mr. Lowry can perform the appraisal, Defendant has filed a Motion to Stay Proceedings, to which Plaintiff expressly reserves the right to file a reply, and which, based on what has been provided herein and when read in conjunction with this Motion, indicate Defendant's intent to frustrate the Order Granting Motion to Compel.

Accordingly, Plaintiff requests the Court issue an Order holding Defendant in contempt for violating the Order Granting Motion to Compel and for sanctions as this Court deems just and appropriate to include but not be limited to assessing Plaintiff's attorneys fees and costs for having to bring this Motion against him and for any fees and costs of Mr. Lowry or any other appraiser that may be used to comply with the Order Granting Motion to Compel.

Pursuant to Rule 11, SCRCF, the undersigned certifies he has consulted with Defendant's counsel and no resolution could be reached prior to the filing of this Motion.

Respectfully Submitted,

HARRELL, MARTIN & PEACE, P.A.

/s/ Taylor A. Peace, Esq
TAYLOR A. PEACE, ESQ., S.C. Bar #100206
135 Columbia Avenue (Physical Address)
P.O. Box 1000 (Mailing Address)
Chapin, South Carolina 29036
Phone: (803) 345-3353
tpeace@hmp-law.com
ATTORNEYS FOR PLAINTIFF

November 3, 2023
Chapin, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
	)	Case No. 2021-CP-10-04257
	)	Case No. 2021-CP-10-03640
Vicky Lynn Vergeldt, Individually,	)	
and as Successor Trustee of the John	)	
Vergeldt, Jr. Revocable Living Trust	)	MOTION TO RECONSIDER
Dated September 27, 1978,	)	
	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
John Edward Vergeldt and Teresa A.	)	
Shaw-Vergeldt,	)	
Defendants.	)	

Pursuant to Rule 59(e), SCRCPP, defendant John Edward Vergeldt, (“Mr. Vergeldt”), seeks reconsideration of this Court’s Order granting Plaintiff’s Motion for Contempt and/or Sanctions and Denying Defendant’s Motion to Dismiss and Motion to Stay Proceedings, entered on February 2, 2024 (“the Order”).

In particular, Mr. Vergeldt respectfully requests that Judge Scarborough revisit and reconsider his ruling and permit a rehearing on the motions because Ms. Ballard, counsel for Mr. Vergeldt, was unable to be present for the hearing on January 8, 2024, due to an unforeseen medical emergency that occurred prior to or while she was traveling to Charleston for the hearing. Counsel for Mr. Vergeldt has previously submitted to the Court a report from Ms. Ballard’s doctor confirming her medical treatment.¹ Ms. Ballard’s absence was not intended or anticipated, and had she been able to attend the hearing as planned, she was prepared to present arguments for each motion taken up by the Court on January 8, 2023. For that reason, Mr. Vergeldt respectfully

¹ Should the Court need additional information, Ms. Ballard is prepared to submit her sworn affidavit detailing the events of January 8, 2024, and her medical treatment thereafter upon the Court’s request.

requests a rehearing on all three motions so that he and his counsel may be afforded the opportunity to be heard.

In support of the instant Motion for Reconsideration, Mr. Vergeldt will show:

1. The Court erred in proceeding with the hearing on Defendant's Motion to Dismiss Plaintiff's Amended Complaint and Motion to Stay Proceedings in the absence of defense counsel.
2. The Court erred in denying Defendant's Motion to Dismiss on the grounds that Mr. Vergeldt has failed to comply with the provisions of Rule 241, SCACR and S.C. Code Ann. § 18-9-130(A).
3. The Court erred in denying Defendant's Motion to Dismiss and failing to grant relief pursuant to Rule 12(b)(6), SCRCP.
4. The Court erred in denying Defendant's Motion to Stay Proceedings.
5. The Court erred in proceeding with the hearing on Plaintiff's Motion for Contempt and/or Sanctions in the absence of defense counsel. "Once the party seeking a contempt finding makes prima facie showing by pleading the order and demonstrating noncompliance, the burden shifts to the respondent to establish his defense and inability to comply." *Noojin v. Noojin*, 417 S.C. 300, 789 S.E.2d 769 (Ct. App. 2016). Because the Court proceeded with the contempt hearing in the absence of defense counsel, Mr. Vergeldt was unable to establish or even present a defense before a finding of contempt was made against Mr. Vergeldt.
6. The Court erred in considering and admitting the Affidavit of Kevin Lowry in support of Plaintiff's Motion for Contempt and/or Sanctions when the Affidavit was not timely filed pursuant to Rule 6(d), SCRCP.

7. The Court erred in finding that Mr. Vergeldt willfully violated the Court's order dated September 28, 2023, and further finding Mr. Vergeldt to be in contempt. "A willful act is defined as one done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say with bad purpose either to disobey or disregard the law." *State v. Bevilacqua*, 316 S.C. 122, 129, 447 S.E.2d 213, 217 (Ct. App. 1994) (citing *Spartanburg County Dep't of Social Services v. Padgett*, 296 S.C. 79, 370 S.E.2d 872 (1988)). Mr. Vergeldt would show that he did not willfully violate the Court's order, nor did he have the specific intent to violate the Court's order requiring an appraisal of his home. As explained in his Affidavit, timely filed pursuant to Rule 6(d), SCRCF, on January 5, 2024, the appraisal was unable to go forward as scheduled on October 24, 2023, due to the fact that the appraiser arrived between 9:50 am and 10:00 am, almost an hour after the scheduled time for the appraisal, and Mr. Vergeldt needed to leave to make 10:30 am appointment. Further, had Mr. Vergeldt's counsel been able to present a defense during the hearing, she would have demonstrated and presented evidence that Mr. Vergeldt took measures to comply with the Court's order after the failed appraisal on October 24, 2023.
8. The Court erred in finding that Mr. Vergeldt has taken no other steps to comply with the Court's order dated September 28, 2023 that would have mitigated his alleged violation of the Court's order. After the failed appraisal on October 24, 2023, Mr. Vergeldt informed Plaintiff's counsel that he was willing to make his property available for another appraisal so long as he had input on the appraiser and Plaintiff agreed to pay for the subsequent appraisal. This request was denied by the Plaintiff, who insisted on using Mr. Lowry's services and would not agree to cover the cost of a future appraisal. On

December 21, 2023, Mr. Vergeldt retained Burk Y. Herrin, Jr. to conduct an appraisal of the real property located at 1523 Star Flower Alley Johns Island, SC 29455. A copy of the appraisal report is attached hereto as **Exhibit A**. Mr. Vergeldt paid for this appraisal in full at a cost of \$650.00 as indicated by the attached receipt and check for the same. **Exhibit B**. While Mr. Vergeldt ultimately objects to using Mr. Lowry's services for a future appraisal in light of the fact that he has taken it upon himself to pay for a subsequent appraisal, Mr. Vergeldt is willing to provide access to his property in the event another appraisal is required by the Court as indicated by his affidavit attached hereto as **Exhibit C**.

For the reasons set forth above, Mr. Vergeldt respectfully requests a hearing on the instant Motion for Reconsideration of the Court's order dated February 2, 2024, and a rehearing on all three motions that were before the Court on January 8, 2024, so that Mr. Vergeldt and his counsel can be afforded the opportunity to be heard.

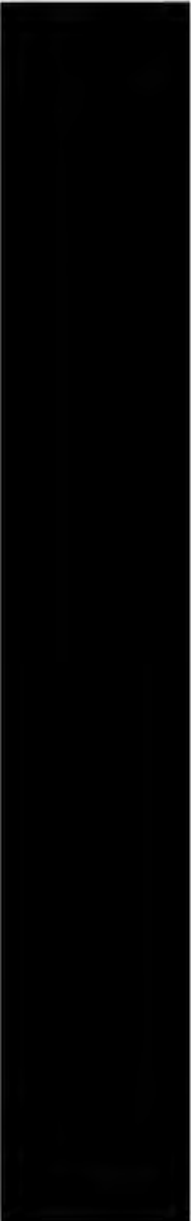
Respectfully submitted,

s/ Haley Hubbard
Desa Ballard (S.C. Bar No. 498)
Harvey M. Watson III (S.C. Bar No. 74053)
Haley Hubbard (S.C. Bar No. 103195)

BALLARD & WATSON
226 State Street
West Columbia, South Carolina 29169
Telephone 803.796.9299
desab@desaballard.com
harvey@desaballard.com
haley@desaballard.com

ATTORNEYS FOR PLAINTIFF

February 12, 2024



APPRAISAL REPORT

OF THE REAL PROPERTY LOCATED AT

1523 Star Flower Alley
Johns Island, SC 29455-3160

for

John Vergeldt
1523 Star Flower Alley
Johns Island, SC 29455

as of

12/21/2023

by

Burk Y. Herrin, Jr
21 GAMECOCK AVENUE, SUITE C
CHARLESTON, SC 29407

SASS, HERRIN & ASSOCIATES, INC.

ADDITIONAL COMMENTS
Page 1

Intended User	John Vergeldt		
Property Address	1523 Star Flower Alley		
City	Johns Island	County	Charleston
State	SC	Zip Code	29455-3160
Client	John Vergeldt		

Highest and Best Use

2- Physical- the subject is in an established residential neighborhood and has all of the necessary features to be used as a residential lot such as size, utilities, access to a public street and elevation. The subject improvements are currently configured as a residential home. 3- Economically Feasible- The use as a residential home creates a financial return sufficient to be economically feasible. 4- Maximally Productive- The use as a residential home creates the greatest financial return of any possible uses, making residential development the Highest and Best Use.

The Highest and Best Use of the subject is residential because it meets the four criteria for this use. 1- Legal- The zoning for the subject allows residential use. 2- Physical- the subject is in an established residential neighborhood and has all of the necessary features to be used as a residential lot such as size, utilities, access to a public street and elevation. The subject improvements are currently configured as a residential home. 3- Economically Feasible- The use as a residential home creates a financial return sufficient to be economically feasible. 4- Maximally Productive- The use as a residential home creates the greatest financial return of any possible uses, making residential development the Highest and Best Use.

ROA 00564

ELECTRONICALLY FILED - 2024 Feb 12 12:12 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1004257

File # C312032Y

The purpose of this summary appraisal report is to provide the client with an accurate, and adequately supported, opinion of the market value of the subject property.

Legal Description Lot 48, Block 2B, Whitney Lakes

Intended Use: Legal Settlement

Report data source(s) used, offering price(s), and date(s). N/A

I ☐ did ☐ did not analyze the contract for sale for the subject purchase transaction. Explain the results of the analysis of the contract for sale or why the analysis was not performed. N/A

If Yes, report the total dollar amount and describe the items to be paid: This is not a sale, so this does not apply.

The subject is very attractive and fits in well in this neighborhood.

Uniform Residential Appraisal Report

File # C312032Y

There are 2 comparable properties currently offered for sale in the subject neighborhood ranging in price from \$ 499,000 to\$ 615,000

There are 16 comparable sales in the subject neighborhood within the past twelve months ranging in sale price from \$ 512,000 to\$ 626,000

FEATURE	SUBJECT	COMPARABLE SALE # 1				COMPARABLE SALE # 2				COMPARABLE SALE # 3			
1523 Star Flower Alley		1505 Star Flower Alley				3040 Sweet leaf Ln				2945 Water leaf Rd			
Address Johns Island, SC 29455-3160		Johns Island, SC, 29455				Johns Island, SC, 29455				Johns Island, SC, 29455			
Proximity to Subject		0.06 miles NW				0.06 miles SE				0.10 miles W			
Sale Price		\$ N/A		\$ 590,000		\$ 555,000		\$ 589,000					
Sale Price/Gross Liv. Area \$		sq. ft. \$ 266.49		sq. ft.		\$ 314.27		sq. ft. \$ 248.73		sq. ft.			
Data Source(s)		CTMLS#23014340				CTMLS#23023896				CTMLS#22024479			
Verification Source(s)		Courthouse Records				Courthouse Records				Courthouse Records			
VALUE ADJUSTMENTS	DESCRIPTION	DESCRIPTION	+(-)\$ Adjustment		DESCRIPTION	+(-)\$ Adjustment		DESCRIPTION	+(-)\$ Adjustment				
Sale or Financing		Conventional			VA			Conventional					
Concessions		None			None			None					
Date of Sale/Time		08/01/2023	+2,295		11/20/2023	+471		12/28/2022	+5,777				
Location	Whitney Lake	Whitney Lake			Whitney Lake			Whitney Lake					
Leasehold/Fee Simple	Fee Simple	Fee Simple			Fee Simple			Fee Simple					
Site	0.10 ac	0.1 ac			0.1 ac			0.1 ac					
View	Lake View/Gd	Lake View/Gd			Lake View/Gd			Lake View/Gd					
Design (Style)	Contemp/Gd	Contemp/Gd			Contemp/Gd			Contemp/Gd					
Quality of Construction	Slab/Cemplk/Gd	Slab/Cemplk/Gd			Slab/Cemplk/Gd			Slab/Cemplk/Gd					
Actual Age	5	6 Years			5 Years			10 Years					
Condition	Very Good	Very Good			Very Good			Very Good					
Above Grade	Total Bdrms. Baths	Total Bdrms. Baths	+10,000		Total Bdrms. Baths	+10,000		Total Bdrms. Baths	+10,000				
Room Count	8 4 3.00	7 3 2.10	+5,000		7 3 2.10	+5,000		7 3 2.10	+5,000				
Gross Living Area	2,241 sq. ft.	2,214 sq. ft.	+2,160		1,766 sq. ft.	+38,000		2,368 sq. ft.	-10,160				
Basement & Finished Rooms Below Grade	0 sq. ft.	0 sq. ft.			0 sq. ft.			0 sq. ft.					
Functional Utility	Good	Good			Good			Good					
Heating/Cooling	Central	Central			Central			Central					
Energy Efficient Items	Good	Good			Good			Good					
Garage/Carport	2 Car Gar	2 Car Gar			2 Car Gar			2 Car Gar					
Porch/Patio/Deck	2 Large Por, Por, Patio	2 Porches,Por,Patio	+6,000		Porch, Stoop,None	+15,000		2 Porches,Por,Patio	+6,000				
Fireplace	None	1 Fireplace	-2,000		None			None					
Features	Generator	None	+3,000		None	+3,000		None	+3,000				
Features	Upgrades	Inferior	+5,000		Inferior	+5,000		Inferior	+5,000				
Net Adjustment (Total)		☒ + ☐ -	\$ 31,455		☒ + ☐ -	\$ 76,471		☒ + ☐ -	\$ 24,617				
Adjusted Sale Price of Comparables		Net Adj. 5.33 %			Net Adj. 13.78 %			Net Adj. 4.18 %					
		Gross Adj. 6.01 %	\$ 621,455		Gross Adj. 13.78 %	\$ 631,471		Gross Adj. 7.63 %	\$ 613,617				
I ☒ did ☐ did not research the sale or transfer history of the subject property and comparable sales. If not, explain I researched the history of the subject and each comparable in the courthouse records for prior transactions.													
My research ☐ did ☒ did not reveal any prior sales or transfers of the subject property for the three years prior to the effective date of this appraisal.													
Data Source(s) Online County Deed Transfers/MLS													
My research ☐ did ☒ did not reveal any prior sales or transfers of the comparable sales for the prior year to the date of sale of the comparable sale.													
Data Source(s) Online County Deed Transfers/MLS													
Report the results of the research and analysis of the prior sale or transfer history of the subject property and comparable sales (report additional prior sales on page 3).													
ITEM	SUBJECT		COMPARABLE SALE # 1		COMPARABLE SALE # 2		COMPARABLE SALE # 3						
Date of Prior Sale/Transfer													
Price of Prior Sale/Transfer													
Data Source(s)	Public Records		Public Records		Public Records		Public Records						
Effective Date of Data Source(s)	12/30/2023		12/30/2023		12/30/2023		12/30/2023						
Analysis of prior sale or transfer history of the subject property and comparable sales The subject has not sold in the past three years. None of the comps have prior sales within a year of the reported sale above.													
Summary of Sales Comparison Approach I found eight sales of similar homes with water views in Whitney Lakes to compare with the subject. The adjustments are minimal because the comps are all so similar in location, view, style, size and features. I made a Market Change (Time) adjustment of 1% annually applied monthly for the slight amount of appreciation that has occurred in the past year. My opinon of value exceeds all of the unadjusted sales prices of the eight comps I used in this analysis because the subject has more features than any of the eight comps used in this appraisal and probably in the entire Whitney Lakes. My opinion of value of \$630,000 is in the middle of the range of adjusted indications and supported by this analysis.													
Indicated Value by Sales Comparison Approach \$ 630,000													
REASONING	Indicated Value by: Sales Comparison Approach \$ 630,000 Cost Approach (if developed) \$ N/A Income Approach (if developed) \$ N/A												
	The most weight was placed on the Sales Comparison Approach because it better reflects the attitudes of the typical buyer and seller in the market place. The Cost Approach was given less consideration. The Income Approach was not used because homes in the subject's area are not typically bought and sold based on their rental utility.												
	This appraisal is made ☒ "as is," ☐ subject to completion per plans and specifications on the basis of a hypothetical condition that the improvements have been completed, ☐ subject to the following repairs or alterations on the basis of a hypothetical condition that the repairs or alterations have been completed, or ☐ subject to the following required inspection based on the extraordinary assumption that the condition or deficiency does not require alteration or repair: This appraisal is based on the assumption that the mechanical systems are in working order.												
	Based on a complete visual inspection of the interior and exterior areas of the subject property, defined scope of work, statement of assumptions and limiting conditions, and appraiser's certification, my (our) opinion of the market value, as defined, of the real property that is the subject of this report is \$ 630,000 , as of 12/21/2023 , which is the effective date of this appraisal.												

Uniform Residential Appraisal Report

File # C312032Y

ADDITIONAL COMMENTS

ELECTRONICALLY FILED - 2024 Feb 12 12:12 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1004257

This report has been prepared in accordance with the Uniform Appraisal Dataset (UAD) from Fannie Mae & Freddie Mac. The UAD requires the appraiser to use standardized responses that include specific formats, definitions, abbreviations & an acronyms. The appraiser attempted to obtain an adequate amount of information in the normal course of business regarding the subject and comparable properties. Some of the standardized responses required by the UAD, especially those that the appraiser did not measure, could mistakenly imply greater precision and reliability than is typical in the normal course of business. Examples could include quality and condition ratings of the subject and comparables. Not every element was viewable and comparable property data was generally obtained from the MLS. Consequently, this information should be considered an estimate unless otherwise noted in the appraisal. SCOPE OF WORK- The appraiser will inspect the subject property to note relevant characteristics to it's valuation, investigate market data in a sales comparison approach, and if appropriate, the cost and income approaches. This investigation may include tax records & MLS data. At the appraiser's discretion, some data will be used without personal verification of the data appears to be reliable. The appraiser will rely on visual inspection to identify apparent easement, encroachments or restrictions. The appraiser will prepare a report in accordance with USPAP as directed by the Appraisal Foundation. The report will include photos, tax map, descriptions of the neighborhood, lot, improvements, zoning, a highest & best use analysis, a summary of the most pertinent sales and listings, a reconciliation, a conclusion and maps. Other information may not be included in the report but retained in the file. I have not performed any services regarding the subject property within the 3 years prior to this assignment and I have no prospective interest in the subject properties or the parties involved.The enclosed sketch is based on ANSI Z765-2021. The GLA measurements & calculations contained within the sketch file were created by onsite measurement. The measurements are reported to the nearest tenth of a foot (or nearest inch) and rounded to the nearest whole square foot.

The term "Inspection", as used in this report, is not the same level of inspection that is required for a "Professional Home Inspection". The appraiser does not fully inspect the electrical system, plumbing system, mechanical systems, foundation system, floor structure, or subfloor. The appraiser is not an expert in construction materials & the purpose of the appraisal is to make an economic valuation of the subject property. If the client needs a more detailed inspection of the property, a home inspection, by a Professional Home Inspector, is suggested.

The appraiser certifies and agrees that this appraisal was prepared in accordance with the requirements of Title XI of the Financial institutions, Reform, Recovery, and Enforcement Act (FIRREA) of 1989, as amended (12 U.S.C. 331 et seq.), and any applicable implementing regulations in effect at the time the appraiser signs the appraisal certification.

COST APPROACH TO VALUE

Support for the opinion of site value (summary of comparable land sales or other methods for estimating site value)

I did not complete the Cost Approach in this analysis because it is most applicable to new construction homes for bank appraisals so they can determine the amount of insurance necessary.

ESTIMATED	☐	REPRODUCTION OR	☐	REPLACEMENT COST NEW	OPINION OF SITE VALUE..... = \$			
Source of cost data					Dwelling	Sq. Ft. @ \$	= \$ 0	
Quality rating from cost service Effective date of cost data						Sq. Ft. @ \$	= \$ 0	
Comments on Cost Approach (gross living area calculations, depreciation, etc.)								
I did not complete the Cost Approach because the subject is a 37 year old home. The total amount of depreciation from all causes can only be measured by the Sales Comparison Approach or by a detailed home inspection and contractor estimates that are above the scope of this appraisal.					Garage/Carport	Sq. Ft. @ \$	= \$ 0	
					Total Estimate of Cost-New = \$ 0			
					Less	Physical	Functional	External
					Depreciation			= \$(
					Depreciated Cost of Improvements..... = \$ 0			
					'As-is' Value of Site Improvements..... = \$			
Estimated Remaining Economic Life (HUD and VA only) 68 Years					Indicated Value By Cost Approach..... = \$ N/A			

INCOME APPROACH TO VALUE

Estimated Monthly Market Rent \$ N/A X Gross Rent Multiplier N/A = \$ N/A Indicated Value by Income Approach

Summary of Income Approach (including support for market rent and GRM) The subject has been an owner occupied home and the neighborhood is predominantly owner occupied, so the GRM approach is not applicable.

PROJECT INFORMATION FOR PUDs (if applicable)

Is the developer/builder in control of the Homeowners' Association (HOA)? ☐ Yes ☒ No Unit type(s) ☒ Detached ☐ Attached

Provide the following information for PUDs ONLY if the developer/builder is in control of the HOA and the subject property is an attached dwelling unit.

Legal name of project

Total number of phases Total number of units Total number of units sold

Total number of units rented Total number of units for sale Data Source(s)

Was the project created by the conversion of existing building(s) into a PUD? ☐ Yes ☐ No If Yes, date of conversion

Does the project contain any multi-dwelling units? ☐ Yes ☐ No Data Source(s)

Are the units, common elements, and recreation facilities complete? ☐ Yes ☐ No If No, describe the status of completion.

Are the common elements leased to or by the Homeowners' Association? ☐ Yes ☐ No If Yes, describe the rental terms and options.

Describe common elements and recreational facilities

This report form is designed to report an appraisal of a one-unit property or a one-unit property with an accessory unit; including a unit in a planned unit development (PUD). This report form is not designed to report an appraisal of a manufactured home or a unit in a condominium or cooperative project.

This appraisal report is subject to the scope of work, intended use, intended user, definition of market value, statement of assumptions and limiting conditions, and certifications. The Appraiser may expand the scope of work to include any additional research or analysis necessary based on the complexity of this appraisal assignment.

SCOPE OF WORK: The scope of work for this appraisal is defined by the complexity of this appraisal assignment and the reporting requirements of this appraisal report form, including the following definition of market value, statement of assumptions and limiting conditions, and certifications. The appraiser must, at a minimum: (1) perform a visual inspection of the subject property, (2) inspect the neighborhood, (3) research, verify, and analyze data from reliable public and/or private sources, and (4) report his or her analysis, opinions, and conclusions in this appraisal report.

DEFINITION OF MARKET VALUE: The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, knowledgeably and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby: (1) buyer and seller are typically motivated; (2) both parties are well informed or well advised, and each acting in what he or she considers his or her own best interest; (3) a reasonable time is allowed for exposure in the open market; (4) payment is made in terms of cash in U. S. dollars or in terms of financial arrangements comparable thereto; and (5) the price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions* granted by anyone associated with the sale.

*Adjustments to the comparables must be made for special or creative financing or sales concessions. No adjustments are necessary for those costs which are normally paid by sellers as a result of tradition or law in a market area; these costs are readily identifiable since the seller pays these costs in virtually all sales transactions. Special or creative financing adjustments can be made to the comparable property by comparisons to financing terms offered by a third party institutional lender that is not already involved in the property or transaction. Any adjustment should not be calculated on a mechanical dollar for dollar cost of the financing or concession but the dollar amount of any adjustment should approximate the market's reaction to the financing or concessions based on the appraiser's judgment.

STATEMENT OF ASSUMPTIONS AND LIMITING CONDITIONS: The appraiser's certification in this report is subject to the following assumptions and limiting conditions:

1. The appraiser will not be responsible for matters of a legal nature that affect either the property being appraised or the title to it, except for information that he or she became aware of during the research involved in performing this appraisal. The appraiser assumes that the title is good and marketable and will not render any opinions about the title.
2. The appraiser has provided a sketch in this appraisal report to show the approximate dimensions of the improvements. The sketch is included only to assist the reader in visualizing the property and understanding the appraiser's determination of its size.
3. The appraiser has examined the available flood maps that are provided by the Federal Emergency Management Agency (or other data sources) and has noted in this appraisal report whether any portion of the subject site is located in an identified Special Flood Hazard Area. Because the appraiser is not a surveyor, he or she makes no guarantees, express or implied, regarding this determination.
4. The appraiser will not give testimony or appear in court because he or she made an appraisal of the property in question, unless specific arrangements to do so have been made beforehand, or as otherwise required by law.
5. The appraiser has noted in this appraisal report any adverse conditions (such as needed repairs, deterioration, the presence of hazardous wastes, toxic substances, etc.) observed during the inspection of the subject property or that he or she became aware of during the research involved in performing this appraisal. Unless otherwise stated in this appraisal report, the appraiser has no knowledge of any hidden or unapparent physical deficiencies or adverse conditions of the property (such as, but not limited to, needed repairs, deterioration, the presence of hazardous wastes, toxic substances, adverse environmental conditions, etc.) that would make the property less valuable, and has assumed that there are no such conditions and makes no guarantees or warranties, express or implied. The appraiser will not be responsible for any such conditions that do exist or for any engineering or testing that might be required to discover whether such conditions exist. Because the appraiser is not an expert in the field of environmental hazards, this appraisal report must not be considered as an environmental assessment of the property.
6. The appraiser has based his or her appraisal report and valuation conclusion for an appraisal that is subject to satisfactory completion, repairs, or alterations on the assumption that the completion, repairs, or alterations of the subject property will be performed in a professional manner.

APPRAISER'S CERTIFICATION: The Appraiser certifies and agrees that:

- 1. I have, at a minimum, developed and reported this appraisal in accordance with the scope of work requirements stated in this appraisal report.
- 2. I performed a visual inspection of the interior and exterior areas of the subject property. I reported the condition of the improvements in factual, specific terms. I identified and reported the physical deficiencies that could affect the livability, soundness, or structural integrity of the property.
- 3. I performed this appraisal in accordance with the requirements of the Uniform Standards of Professional Appraisal Practice that were adopted and promulgated by the Appraisal Standards Board of The Appraisal Foundation and that were in place at the time this appraisal report was prepared.
- 4. I developed my opinion of the market value of the real property that is the subject of this report based on the sales comparison approach to value. I have adequate comparable market data to develop a reliable sales comparison approach for this appraisal assignment. I further certify that I considered the cost and income approaches to value but did not develop them, unless otherwise indicated in this report.
- 5. I researched, verified, analyzed, and reported on any current agreement for sale for the subject property, any offering for sale of the subject property in the twelve months prior to the effective date of this appraisal, and the prior sales of the subject property for a minimum of three years prior to the effective date of this appraisal, unless otherwise indicated in this report.
- 6. I researched, verified, analyzed, and reported on the prior sales of the comparable sales for a minimum of one year prior to the date of sale of the comparable sale, unless otherwise indicated in this report.
- 7. I selected and used comparable sales that are locationally, physically, and functionally the most similar to the subject property.
- 8. I have not used comparable sales that were the result of combining a land sale with the contract purchase price of a home that has been built or will be built on the land.
- 9. I have reported adjustments to the comparable sales that reflect the market's reaction to the differences between the subject property and the comparable sales.
- 10. I verified, from a disinterested source, all information in this report that was provided by parties who have a financial interest in the sale or financing of the subject property.
- 11. I have knowledge and experience in appraising this type of property in this market area.
- 12. I am aware of, and have access to, the necessary and appropriate public and private data sources, such as multiple listing services, tax assessment records, public land records and other such data sources for the area in which the property is located.
- 13. I obtained the information, estimates, and opinions furnished by other parties and expressed in this appraisal report from reliable sources that I believe to be true and correct.
- 14. I have taken into consideration the factors that have an impact on value with respect to the subject neighborhood, subject property, and the proximity of the subject property to adverse influences in the development of my opinion of market value. I have noted in this appraisal report any adverse conditions (such as, but not limited to, needed repairs, deterioration, the presence of hazardous wastes, toxic substances, adverse environmental conditions, etc.) observed during the inspection of the subject property or that I became aware of during the research involved in performing this appraisal. I have considered these adverse conditions in my analysis of the property value, and have reported on the effect of the conditions on the value and marketability of the subject property.
- 15. I have not knowingly withheld any significant information from this appraisal report and, to the best of my knowledge, all statements and information in this appraisal report are true and correct.
- 16. I stated in this appraisal report my own personal, unbiased, and professional analysis, opinions, and conclusions, which are subject only to the assumptions and limiting conditions in this appraisal report.
- 17. I have no present or prospective interest in the property that is the subject of this report, and I have no present or prospective personal interest or bias with respect to the participants in the transaction. I did not base, either partially or completely, my analysis and/or opinion of market value in this appraisal report on the race, color, religion, sex, age, marital status, handicap, familial status, or national origin of either the prospective owners or occupants of the subject property or of the present owners or occupants of the properties in the vicinity of the subject property or on any other basis prohibited by law.
- 18. My employment and/or compensation for performing this appraisal or any future or anticipated appraisals was not conditioned on any agreement or understanding, written or otherwise, that I would report (or present analysis supporting) a predetermined specific value, a predetermined minimum value, a range or direction in value, a value that favors the cause of any party, or the attainment of a specific result or occurrence of a specific subsequent event.
- 19. I personally prepared all conclusions and opinions about the real estate that were set forth in this appraisal report. If I relied on significant real property appraisal assistance from any individual or individuals in the performance of this appraisal or the preparation of this appraisal report, I have named such individual(s) and disclosed the specific tasks performed in this appraisal report. I certify that any individual so named is qualified to perform the tasks. I have not authorized anyone to make a change to any item in this appraisal report; therefore, any change made to this appraisal is unauthorized and I will take no responsibility for it.

Uniform Residential Appraisal Report

File # C312032Y

ELECTRONICALLY FILED - 2024 Feb 12 12:12 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1004257

20. I identified the client in this appraisal report who is the individual, organization, or agent for the organization that ordered and will receive this appraisal report.

21. I am aware that any disclosure or distribution of this appraisal report by me or the client may be subject to certain laws and regulations. Further, I am also subject to the provisions of the Uniform Standards of Professional Appraisal Practice that pertain to disclosure or distribution by me.

22. If this appraisal report was transmitted as an "electronic record" containing my "electronic signature," as those terms are defined in applicable federal and/or state laws (excluding audio and video recordings), or a facsimile transmission of this appraisal report containing a copy or representation of my signature, the appraisal report shall be as effective, enforceable and valid as if a paper version of this appraisal report were delivered containing my original hand written signature.

SUPERVISORY APPRAISER'S CERTIFICATION: The Supervisory Appraiser certifies and agrees that:

1. I directly supervised the appraiser for this appraisal assignment, have read the appraisal report, and agree with the appraiser's analysis, opinions, statements, conclusions, and the appraiser's certification.

2. I accept full responsibility for the contents of this appraisal report including, but not limited to, the appraiser's analysis, opinions, statements, conclusions, and the appraiser's certification.

3. The appraiser identified in this appraisal report is either a sub-contractor or an employee of the supervisory appraiser (or the appraisal firm), is qualified to perform this appraisal, and is acceptable to perform this appraisal under the applicable state law.

4. This appraisal report complies with the Uniform Standards of Professional Appraisal Practice that were adopted and promulgated by the Appraisal Standards Board of The Appraisal Foundation and that were in place at the time this appraisal report was prepared.

5. If this appraisal report was transmitted as an "electronic record" containing my "electronic signature," as those terms are defined in applicable federal and/or state laws (excluding audio and video recordings), or a facsimile transmission of this appraisal report containing a copy or representation of my signature, the appraisal report shall be as effective, enforceable and valid as if a paper version of this appraisal report were delivered containing my original hand written signature.

APPRAISER

Signature
Name Burk Y. Herrin, Jr

Company Name SASS, HERRIN & ASSOCIATES, INC.

Company Address 21 GAMECOCK AVENUE, SUITE C

CHARLESTON, SC 29407

Telephone Number 843-766-7500

Email Address Bherrin@sassherrin.com

Date of Signature and Report 12/31/2023

Effective Date of Appraisal 12/21/2023

State Certification # 39

or State License #

or Other

State SC

Expiration Date of Certification or License 06/30/2024

ADDRESS OF PROPERTY APPRAISED

1523 Star Flower Alley

Johns Island, SC 29455-3160

APPAISED VALUE OF SUBJECT PROPERTY \$ 630,000

CLIENT

Company Name John Vergeldt

Company Address 1523 Star Flower Alley

Johns Island, SC 29455

Email Address

☐ Did not inspect subject property

☐ Did inspect exterior of subject property from street

☐ Did inspect interior and exterior of subject property

☐ Did not inspect exterior of comparable sales from street

☐ Did inspect exterior of comparable sales from street

Date of Inspection

COMPARABLE SALES

☐ Did not inspect subject property

☐ Did inspect exterior of subject property from street

☐ Did inspect interior and exterior of subject property

Date of Inspection

SUBJECT PROPERTY

Signature

Name

Company Name

Company Address

Telephone Number

Email Address

Date of Signature

State Certification #

or State License #

State

Expiration Date of Certification or License

SUPERVISORY APPRAISER (ONLY IF REQUIRED)

PHOTOGRAPH ADDENDUM				
Intended User John Vergeldt				
Property Address 1523 Star Flower Alley				
City Johns Island	County Charleston	State SC	Zip Code 29455-3160	
Client John Vergeldt				
		FRONT VIEW OF SUBJECT PROPERTY		
		REAR VIEW OF SUBJECT PROPERTY		
		STREET SCENE OF SUBJECT PROPERTY		
ROA 00573				

PHOTOGRAPH ADDENDUM				
Intended User John Vergeldt				
Property Address 1523 Star Flower Alley				
City Johns Island	County Charleston	State SC	Zip Code 29455-3160	
Client John Vergeldt				
 Front & Left Side  Front & Right Side  Parking area & Garage  Garage Interior  Rear Porch/Breezeway  Rear & Left Side				

PHOTOGRAPH ADDENDUM				
Intended User		John Vergeldt		
Property Address		1523 Star Flower Alley		
City	Johns Island	County	Charleston	State SC Zip Code 29455-3160
Client		John Vergeldt		



Water Heater



Water reverse osmosis system



Emergency Generator



Breezeway & Patio

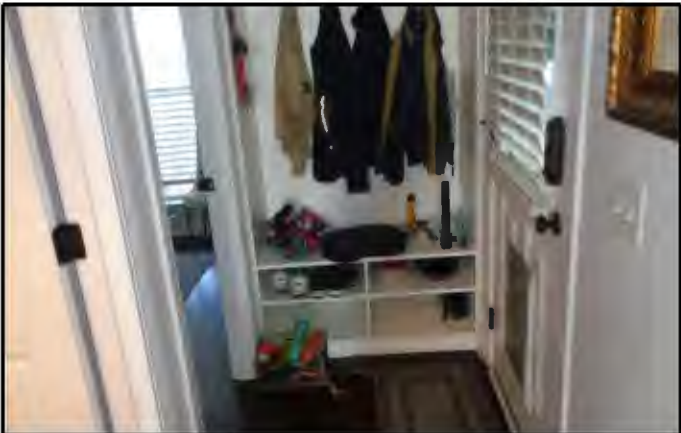
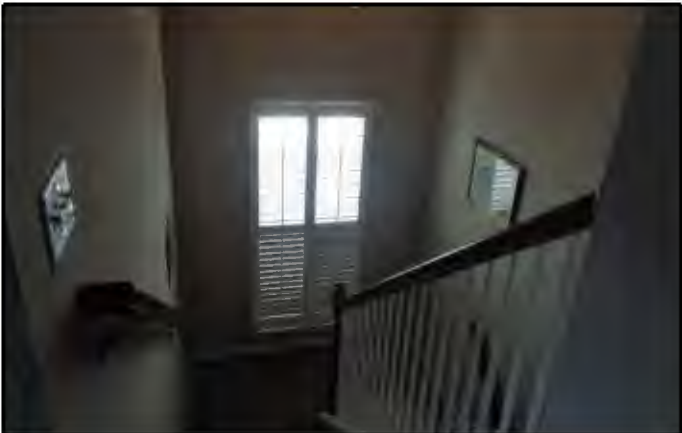
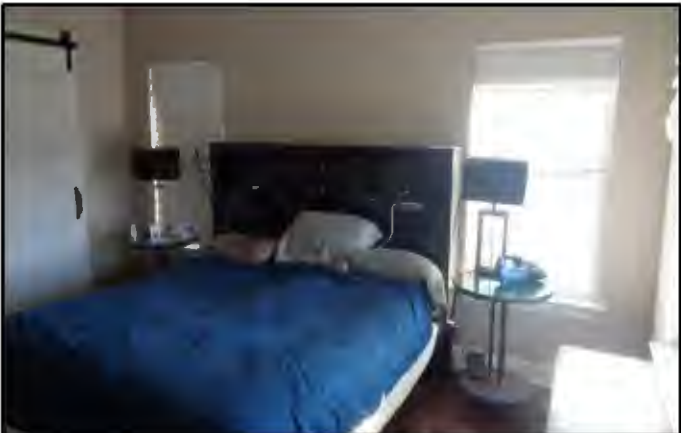
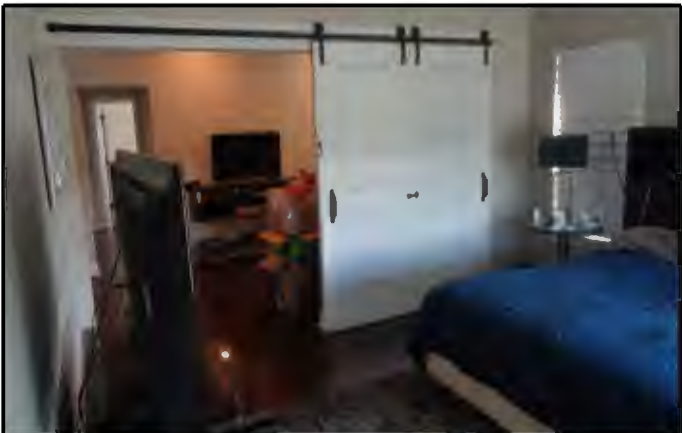


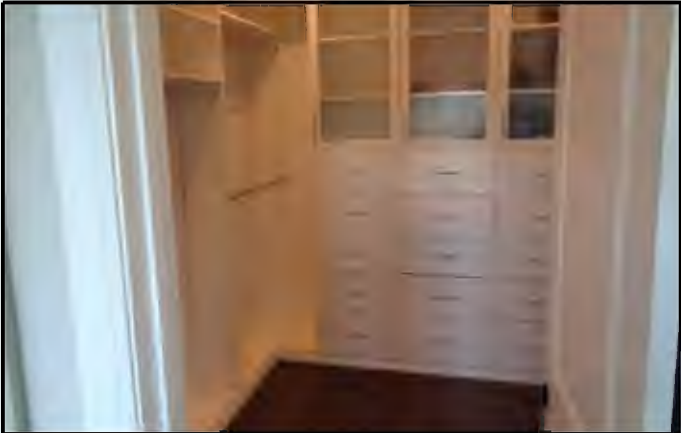
Upper porch



Kitchen

PHOTOGRAPH ADDENDUM				
Intended User John Vergeldt				
Property Address 1523 Star Flower Alley				
City Johns Island	County Charleston	State SC	Zip Code 29455-3160	
Client John Vergeldt				
 Kitchen Island  Kitchen View #2  Kitchen View #3  Laundry Room  Living Room  Dining Room				

PHOTOGRAPH ADDENDUM					
Intended User		John Vergeldt			
Property Address		1523 Star Flower Alley			
City	Johns Island	County	Charleston	State	SC
				Zip Code	29455-3160
Client		John Vergeldt			
 Bedroom-1st floor  Bathroom- 1st floor  Hall Closet  Stairs  Primary Bedroom  Primary Bedroom View #2					

PHOTOGRAPH ADDENDUM					
Intended User		John Vergeldt			
Property Address		1523 Star Flower Alley			
City	Johns Island	County	Charleston	State	SC
				Zip Code	29455-3160
Client		John Vergeldt			
 Primary Bath  Primary Bath View #2  Primary Bath View #3  Primary Closet  Primary Closet 					

PHOTOGRAPH ADDENDUM

Intended User	John Vergeldt		
Property Address	1523 Star Flower Alley		
City	Johns Island	County	Charleston
		State	SC
		Zip Code	29455-3160
Client	John Vergeldt		



COMPARABLE #4

2953 Water leaf Rd
Johns Island, SC, 29455

Price	\$563,000
Price/SF	\$251.79
Date	06/02/2023
Age	10 Years
Room Count	7-3-2.10
Living Area	2,236
Value Indication	\$593,516



COMPARABLE #5

2951 Water leaf Rd
Johns Island, SC, 29455

Price	\$575,000
Price/SF	\$310.98
Date	10/16/2023
Age	10 Years
Room Count	7-3-2.1
Living Area	1,849
Value Indication	\$639,440



COMPARABLE #6

3031 Sweet leaf Ln
Johns Island, SC, 29455

Price	\$599,000
Price/SF	\$299.50
Date	12/07/2023
Age	5 Years
Room Count	7-3-2.1
Living Area	2,000
Value Indication	\$627,530

ROA 00579

PHOTOGRAPH ADDENDUM

Intended User	John Vergeldt		
Property Address	1523 Star Flower Alley		
City	Johns Island	County	Charleston
		State	SC
		Zip Code	29455-3160
Client	John Vergeldt		



COMPARABLE #1

1505 Star Flower Alley
Johns Island, SC, 29455

Price	\$590,000
Price/SF	\$266.49
Date	08/01/2023
Age	6 Years
Room Count	7-3-2.10
Living Area	2,214
Value Indication	\$621,455



COMPARABLE #2

3040 Sweet leaf Ln
Johns Island, SC, 29455

Price	\$555,000
Price/SF	\$314.27
Date	11/20/2023
Age	5 Years
Room Count	7-3-2.10
Living Area	1,766
Value Indication	\$631,471



COMPARABLE #3

2945 Water leaf Rd
Johns Island, SC, 29455

Price	\$589,000
Price/SF	\$248.73
Date	12/28/2022
Age	10 Years
Room Count	7-3-2.10
Living Area	2,368
Value Indication	\$613,617

ROA 00580

PHOTOGRAPH ADDENDUM

Intended User	John Vergeldt		
Property Address	1523 Star Flower Alley		
City	Johns Island	County	Charleston
		State	SC
		Zip Code	29455-3160
Client	John Vergeldt		



COMPARABLE #7

1529 Star Flower Alley
Johns Island, SC, 29455

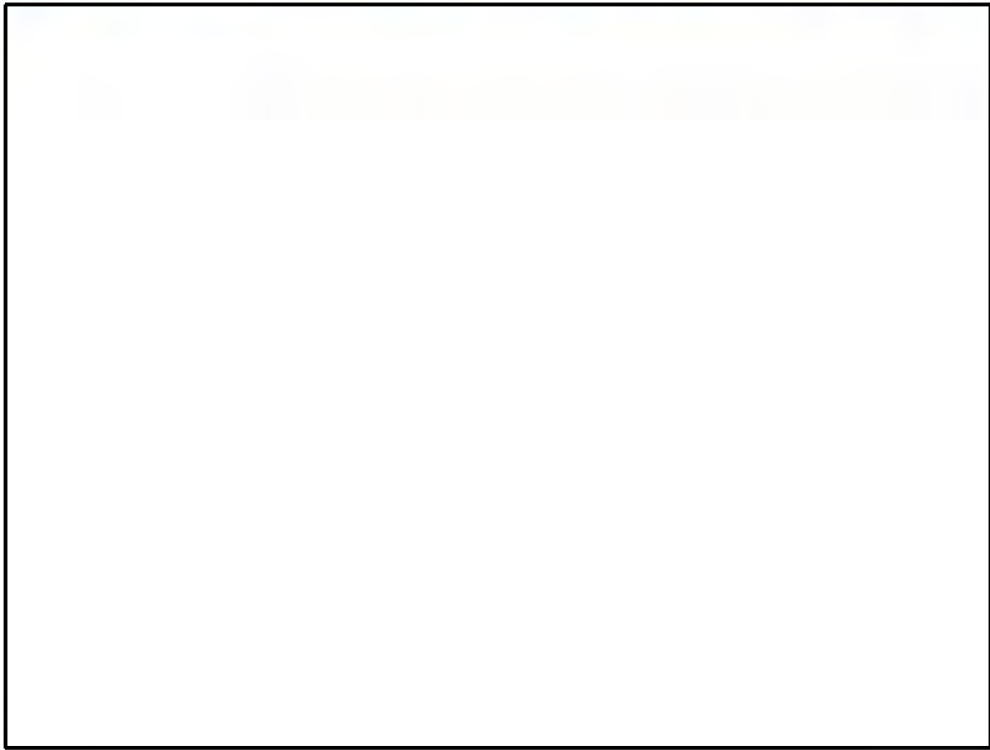
Price	\$610,000
Price/SF	\$269.08
Date	11/14/2022
Age	5 Years
Room Count	7-4-2.1
Living Area	2,267
Value Indication	\$632,113



COMPARABLE #8

1527 Star Flower Alley
Johns Island, SC, 29455

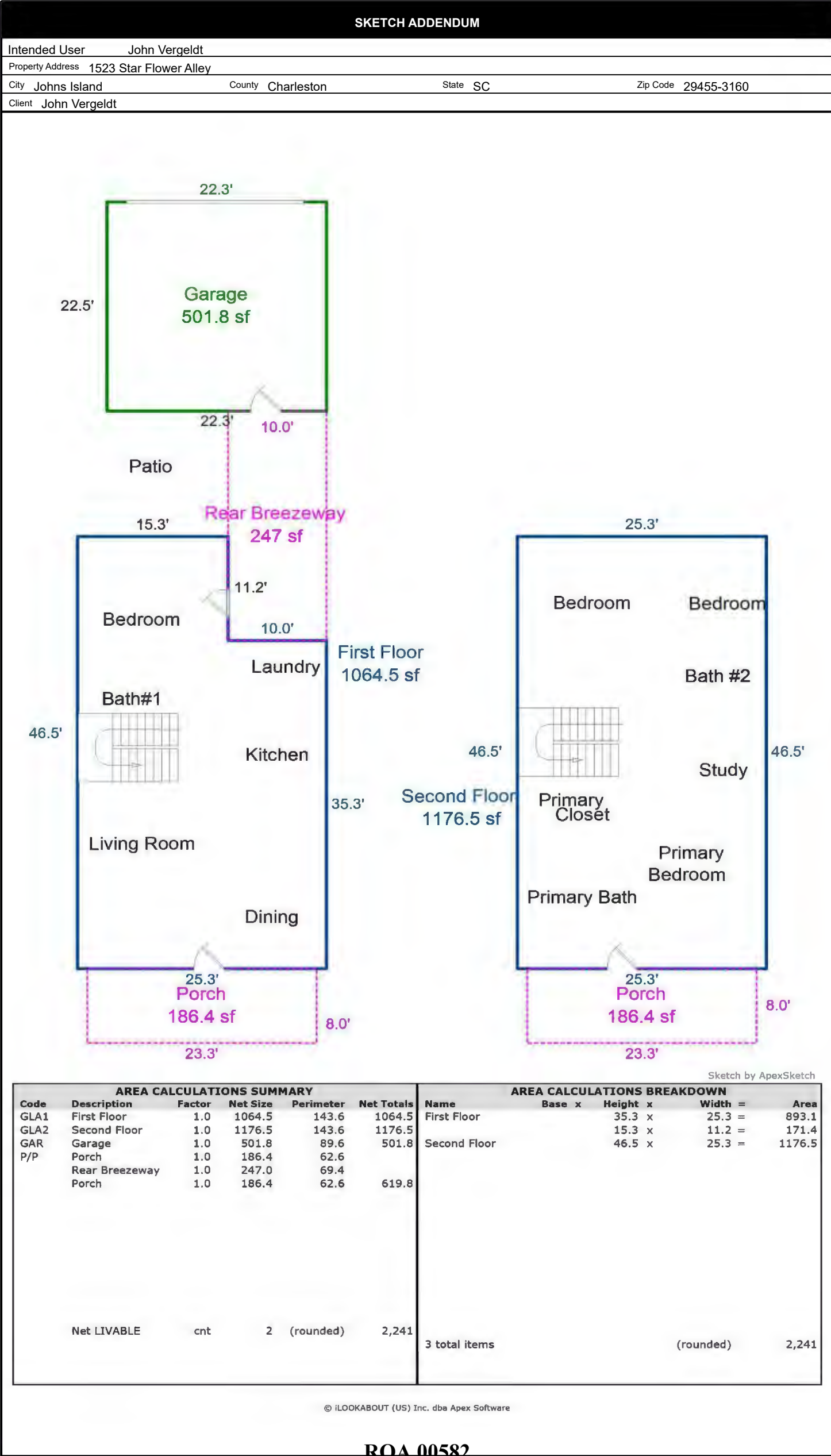
Price	\$619,000
Price/SF	\$266.24
Date	10/10/2022
Age	5 Years
Room Count	7-4-2.1
Living Area	2,325
Value Indication	\$635,711



COMPARABLE #9

Price	
Price/SF	
Date	
Age	
Room Count	
Living Area	
Value Indication	

ROA 00581



SITE PLAN

Intended User	John Vergeldt		
Property Address	1523 Star Flower Alley		
City	Johns Island	County	Charleston
State	SC	Zip Code	29455-3160
Client	John Vergeldt		



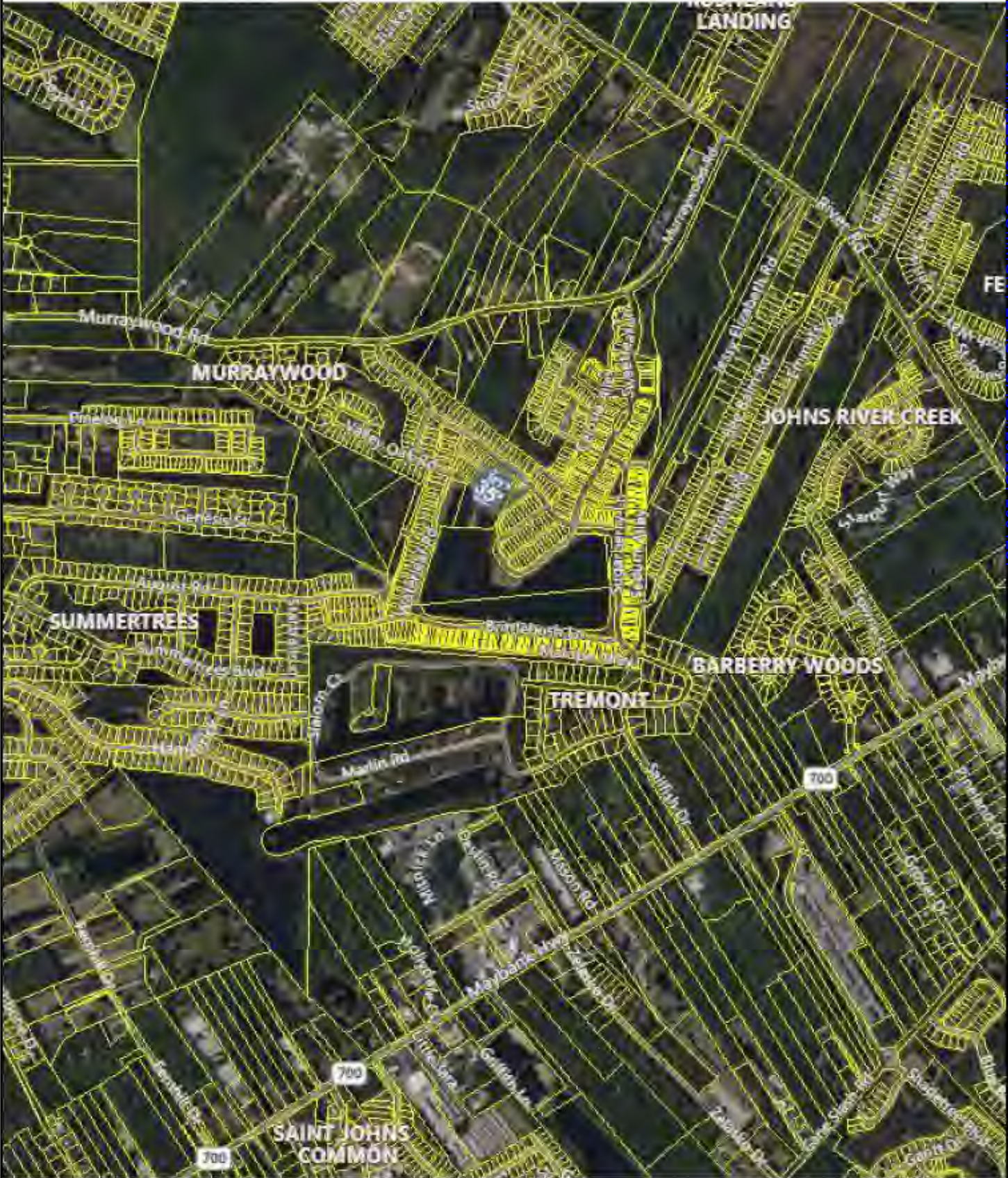
ROA 00583

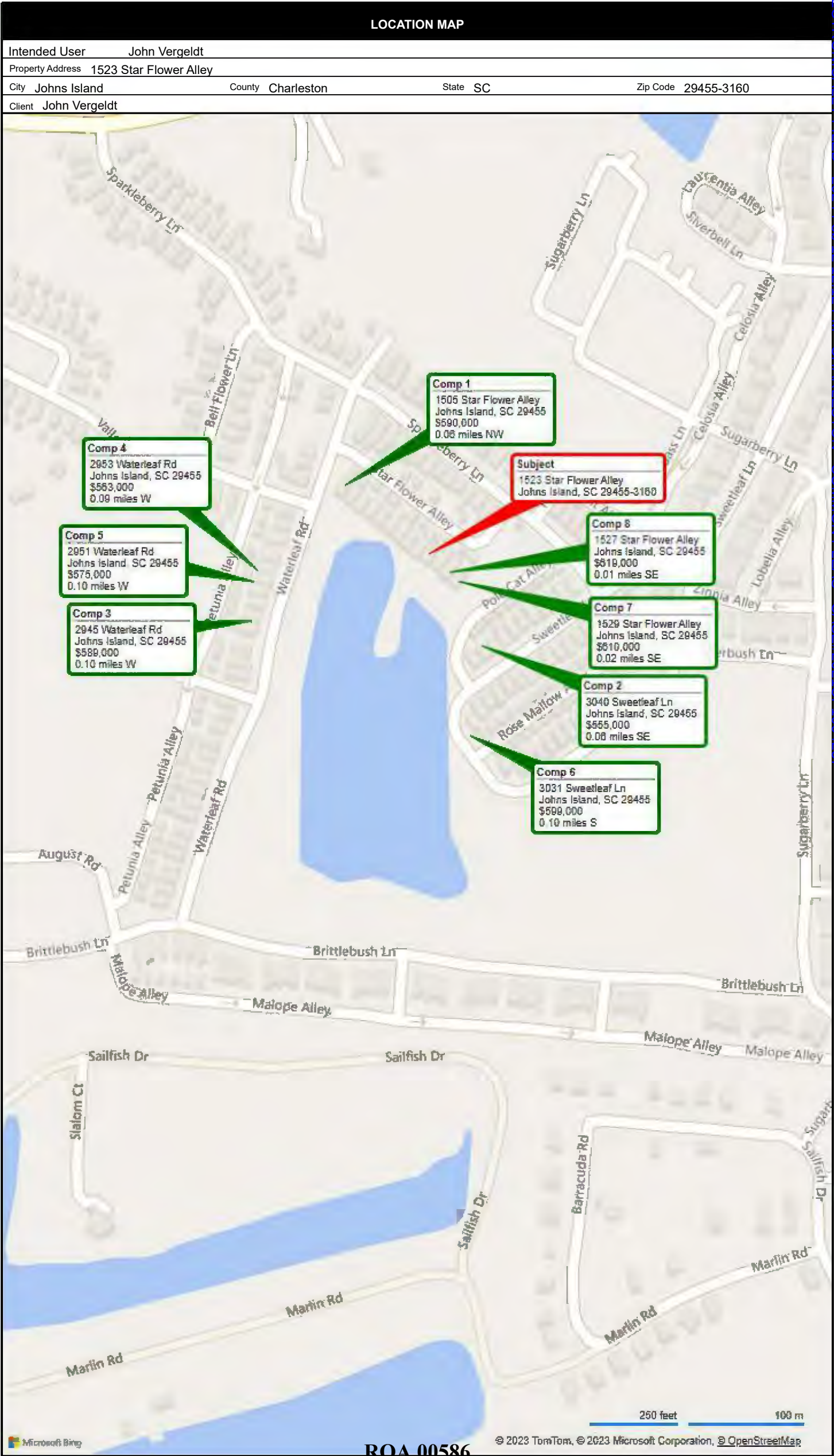
Intended User	John Vergeldt				
Property Address	1523 Star Flower Alley				
City	Johns Island	County	Charleston	State	SC
				Zip Code	29455-3160
Client	John Vergeldt				



ROA 00584

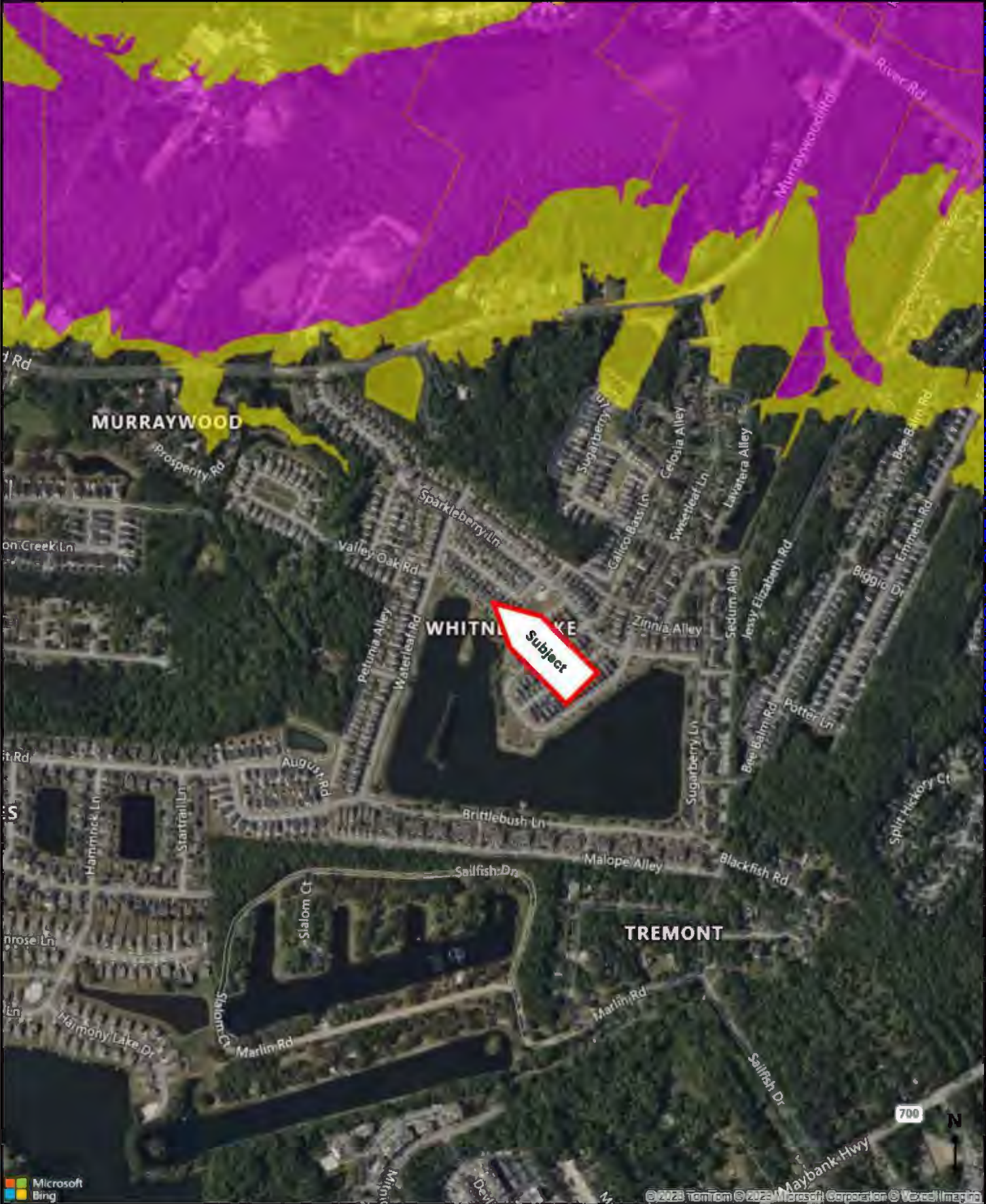
Intended User	John Vergeldt			
Property Address	1523 Star Flower Alley			
City	Johns Island	County	Charleston	State SC Zip Code 29455-3160
Client	John Vergeldt			





FLOOD MAP

Intended User	John Vergeldt		
Property Address	1523 Star Flower Alley		
City	Johns Island	County	Charleston
State	SC	Zip Code	29455-3160
Client	John Vergeldt		



Flood Zones

- Areas inundated by 100-year flooding
- Areas inundated by 500-year flooding
- Areas of undetermined but possible flood hazards

- Floodway areas with velocity hazard
- Floodway areas
- COBRA zone

Flood Zone Determination

Latitude: 32.746330
Longitude: -80.054640
Community Name: CHARLESTON, CITY OF
Community: 455412
SFHA (Flood Zone): No
Within 250 ft. of multiple flood zones: No
Zone: X
Panel: 0656K
FIPS Code: 45019
Map #: 45019C0656K
Panel Date: 01/29/2021
Census Tract: 21.07

This Report is for the sole benefit of the Customer that ordered and paid for the Report and is based on the property information provided by that Customer. That Customer's use of this Report is subject to the terms agreed to by that Customer when accessing this product. No third party is authorized to use or rely on this Report for any purpose. THE SELLER OF THIS REPORT MAKES NO REPRESENTATIONS OR WARRANTIES TO ANY PARTY CONCERNING THE CONTENT, ACCURACY OR COMPLETENESS OF THIS REPORT, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. The seller of this Report shall not have any liability to any third party for any use or misuse of this Report.

ROA 00587



Parcel Number	Alternate Number	Property Type
3121100295	312934	Real
Owner Information		
Current Owner: VERGELDT JOHN EDWARD 1523 STAR FLOWER ALY JOHNS ISLAND, SC 29455		
Location Information		
Physical Address: 1523 STAR FLOWER ALY CHARLESTON SC 29412		
TAG# 5-2 CITY OF CHARLESTON		
Legal Description		
PolTwp MapPlatB L16 MapPlatP 0410 SubdivisionName THE GARDENS AT WHITNEY LAKE PHASE 2B Block Lot 2B-48 GovLot Tract		

Tax Bills								
PERIOD	DUE DATE	TAX	PENALTY	INTEREST	FEES	TOTAL PAID	AMOUNT DUE	STATUS
2023	1/16/2024	\$2,231.05	\$0.00	\$0.00	\$0.00	\$0.00	\$2,231.05	PAY
2022	1/17/2023	\$1,740.37	\$0.00	\$0.00	\$0.00	(\$1,740.37)	\$0.00	Paid
2021	1/18/2022	\$2,070.72	\$0.00	\$0.00	\$0.00	(\$2,070.72)	\$0.00	Paid
2020	1/15/2021	\$2,146.75	\$0.00	\$0.00	\$0.00	(\$2,146.75)	\$0.00	Paid

USPAP Compliance Addendum

File No. C312032Y

Borrower/Client John Vergeldt			
Property Address 1523 Star Flower Alley			
City Johns Island	County Charleston	State SC	Zip Code 29455-3160
Lender/Client John Vergeldt			

APPRAISAL AND REPORT IDENTIFICATION

This Appraisal Report is one of the following types:

- ☒ **Appraisal Report** This report was prepared in accordance with the requirements of the Appraisal Report option of USPAP Standards Rule 2-2(a).
- ☐ **Restricted Appraisal Report** This report was prepared in accordance with the requirements of the Restricted Appraisal Report option of USPAP Standards Rule 2-2(b). The intended user of this report is limited to the identified client. This is a Restricted Appraisal Report and the rationale for how the appraiser arrived at the opinions and conclusions set forth in the report may not be understood properly without the additional information in the appraiser's workfile.

Scope of Work - I rely on public records to identify the subject and determine the amount of wetlands (if any) present. I am not a surveyor, nor can I detect the presence of wetlands or hazardous substances. I perform an inspection of the property, walking the site if possible. I research the local MLS, public records, and national databases for comparable sales. When possible, each is verified with a party knowledgeable of the transaction.

ADDITIONAL CERTIFICATIONS

- I certify that, to the best of my knowledge and belief:
- The statements of fact contained in this report are true and correct.
 - The report analyses, opinions, and conclusions are limited only by the reported assumptions and are my personal, impartial, and unbiased professional analyses, opinions, and conclusions.
 - I have no (or the specified) present or prospective interest in the property that is the subject of this report and no (or specified) personal interest with respect to the parties involved.
 - I have no bias with respect to the property that is the subject of this report or the parties involved with this assignment.
 - My engagement in this assignment was not contingent upon developing or reporting predetermined results.
 - My compensation for completing this assignment is not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value opinion, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of this appraisal.
 - My analyses, opinions, and conclusions were developed and this report has been prepared, in conformity with the Uniform Standards of Professional Appraisal Practice.
 - This appraisal report was prepared in accordance with the requirements of Title XI of FIRREA and any implementing regulations.

PRIOR SERVICES

- ☒ I have **NOT** performed services, as an appraiser or in any other capacity, regarding the property that is the subject of the report within the three-year period immediately preceding acceptance of this assignment.
- ☐ I **HAVE** performed services, as an appraiser or in another capacity, regarding the property that is the subject of this report within the three-year period immediately preceding acceptance of this assignment. Those services are described in the comments below.

PROPERTY INSPECTION

- ☐ I have **NOT** made a personal inspection of the property that is the subject of this report.
- ☒ I **HAVE** made a personal inspection of the property that is the subject of this report.

APPRAISAL ASSISTANCE

Unless otherwise noted, no one provided significant real property appraisal assistance to the person signing this certification. If anyone did provide significant assistance, they are hereby identified along with a summary of the extent of the assistance provided in the report.

No assistance was provided with this assignment.

ADDITIONAL COMMENTS

Additional USPAP related issues requiring disclosure and/or any state mandated requirements: -My analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the Uniform Standards of Professional Appraisal Practice.

MARKETING TIME AND EXPOSURE TIME FOR THE SUBJECT PROPERTY

- ☒ A reasonable marketing time for the subject property is 30 day(s) utilizing market conditions pertinent to the appraisal assignment.
- ☒ A reasonable exposure time for the subject property is 30 day(s).

APPRAISER

SUPERVISORY APPRAISER (ONLY IF REQUIRED)

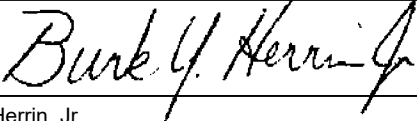
Signature 	Signature _____
Name Burk Y. Herrin, Jr	Name _____
Date of Signature 12/31/2023	Date of Signature _____
State Certification # 39	State Certification # _____
or State License # _____	or State License # _____
State SC	State _____
Expiration Date of Certification or License 06/30/2024	Expiration Date of Certification or License _____
Effective Date of Appraisal 12/21/2023	Supervisory Appraiser Inspection of Subject Property: ☐ Did Not ☐ Exterior-only from Street ☐ Interior and Exterior

Exhibit B

John Vergeldt, has paid \$650 in Full for
the appraisal of 1523 Star Flower Aly on
Johns Island, SC.

Burk Herrin
CG 39

SASS HERRIN

REAL ESTATE APPRAISERS

Burk Y. Herrin, Jr, CRP
SC CG 39

21-C Gamecock Ave.
Charleston, SC 29407
Bherrin@sassherrin.com

Phone: (843) 766-7500
Fax: (843) 571-6170
Cell: (843) 270-7545

Exhibit C

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
	)	Case No. 2021-CP-10-04257
Vicky Lynn Vergeldt, Individually,	)	Case No. 2021-CP-10-03640
and as Successor Trustee of the John	)	
Vergeldt, Jr. Revocable Living Trust	)	
Dated September 27, 1978,	)	
	)	AFFIDAVIT OF JOHN E. VERGELDT
	)	
Plaintiff,	)	
vs.	)	
	)	
John Edward Vergeldt and Teresa A.	)	
Shaw-Vergeldt,	)	
Defendants.	)	
	)	

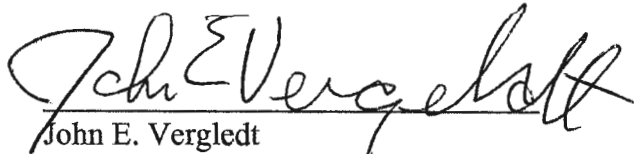
PERSONALLY APPEARED BEFORE ME, **John E. Vergeldt**, who first being duly cautioned and sworn, deposes and states as follows:

1. I am over the age of 21 and am presently of sound mind; I have read the information in this affidavit and I understand such information to be true and correct to the best of my ability, except for those matters which are stated as an opinion herein, or stated as based upon information and belief, and as to those matters, I believe them to be true and correct in all respects, to the best of my knowledge.
2. The Plaintiff requested that I make my home located at 1523 Star Flower Alley, Johns Island, SC 29455 available for appraisal, which request was granted by the Court pursuant to Order dated September 28, 2023.
3. An appraisal of my property was scheduled for October 24, 2023, which was ultimately not completed.
4. After the scheduled appraisal did not go forward and no agreement could be reached between myself and the Plaintiff to reschedule it, I retained an appraiser on my own who

conducted an appraisal of my property on or about December 21, 2023. The appraisal report and receipt for payment are attached to Defendant's Motion to Reconsider as **Exhibits B and C**.

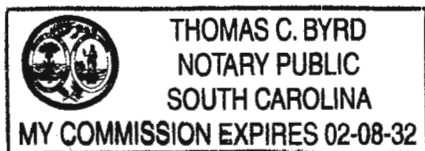
5. On or about January 8, 2024, a hearing was held to address Defendant's Motions to Dismiss and to Stay Proceedings, and Plaintiff's Motion for Contempt and/or Sanctions. This hearing was held in the absence of my attorney as she experienced a medical emergency while she was traveling to the hearing, which prevented her from attending the hearing as she had originally planned.
6. It is my understanding that pursuant to the Court's order dated February 2, 2024, that I must make my home available for another appraisal to be completed by Mr. Lowry at a time and date convenient to him.
7. While I do object to a subsequent appraisal by Mr. Lowry, if the Court does require that another appraisal be done after considering Defendant's Motion for Reconsideration or allowing a rehearing on the parties' motions, I am willing and able to provide access to the outside and inside of my property on a date convenient for an appraiser agreed upon by myself and the Plaintiff.

Further Affiant sayeth naught.


John E. Vergledt
Affiant

SWORN to before me this
12 day of February, 2024.

Thomas C. Byrd
Notary Public for South Carolina
My Commission Expires: 02-08-32



RECEIVED

Feb 29 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
TEASA K. WEAVER, MASTER-IN-EQUITY

Appellate Case No.: 2021-000816

Vicki Lynn Vergeldt, individually and as
Successor Trustee of the John Vergeldt, Jr.
Revocable living Trust dated September 27, 1978, ...Respondent,

v.

John Edward Vergeldt, ...Appellant.

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Appellant John Edward Vergeldt hereby petitions the Court for rehearing of its Opinion filed February 14, 2024.

1. The Court of Appeals erred in finding that Appellant’s argument that the doctrine of res judicata barred Vicki from amending her petition to seek damages was not preserved for appellate review, and further erred in concluding that Appellant raised the issue of res judicata for the first time in his Motion for Reconsideration when the record indicates that Appellant raised this issue before the trial court. In order to be preserved for appellate review, “an issue must be raised to and ruled upon by the trial judge.” *Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011) (citing *Wilder Corp v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)). However, “a party is not required to use the exact name of a

legal doctrine in order to preserve the issue.” *Id.* (citing *State v. Russell*, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001)). “The issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge. *Id.* In *State v. Russell*, this Court found an issue to be preserved even though the defendant did not use the exact term “corpus delicti” in his request for a directed verdict. 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). Similarly in the instant matter, while Appellant did not use the term “*res judicata*,” he did expressly assert to the trial court that the issues raised in Vicki’s Amended Petition had already been addressed and ruled on in prior litigation from 2014. (R. pp. 619-622, ¶¶ 13-24). Appellant specifically objected on the record, “So anything prior to that, it’s already been ruled, my father was in charge of. So a lot of things [Vicki’s counsel] brought up are things from 2008 or 2009.” (R. p. 719, lines 14-20) (Emphasis added). Res judicata bars a second suit where there is “(1) identity of parties; (2) identity of subject matter, and (3) adjudication of the issue in the first suit.” *Judy v. Judy*, 393 S.C. 160, 167, 712 S.E.2d 408, 412 (2011). The record before the Court demonstrates that Appellant objected to Vicki’s attempts to recover damages from Appellant when the final order from the 2014 litigation explicitly excluded Vicki’s claim for damages and absolved Appellant from any mishandling of the trust assets prior to his father’s death in 2013. Appellant also pleaded that the 2014 litigation and the final order resulting from that litigation were a defense to Vicki’s Amended Petition. (R. pp. 620-624 ¶¶ 12-15, 22, 23, 36). Accordingly, the Court of Appeals erred in finding that Appellant raised the issue of *res judicata* for the first time in his Motion for Reconsideration and this issue should be addressed on the merits on appeal.

2. The Court of Appeals erred in concluding that the master-in-equity did not fail to apply the correct standard of proof as required by the Trust agreement. On review of a case tried by a master-in-equity, While the Court is not required to disregard the findings of the master-in-equity, “the Court is permitted to determine facts in accordance with the Court’s own view of the preponderance of the evidence.” *Smith v. Barr*, 375 S.C. 157, 160, 650 S.E.2d 486, 488 (Ct. App. 2007). Upon review of the Record on Appeal, there is more than sufficient evidence to establish that the master-in-equity failed to recognize or apply the heightened standard of proof required by the Tenth Amendment to the Trust agreement as dictated by the settlor. The Tenth Amendment provides, “An individual Successor Trustee’s liability is limited to an act or omission committed in bad faith or with reckless indifference to the purpose of the trust or the interests of the beneficiaries.” (R. pp. 1266-1267). As set forth in Appellant’s briefing, it appears that the Tenth Amendment is consistent with settlor’s understanding of the family dynamic and relationship between Appellant and Vicki that he established a heightened burden of proof to determine whether the Trustee could be held liable for acts or omissions related to the administration of the Trust. See *Epworth Children’s Home v. Beasley*, 365 S.C. 157, 166, 616 S.E.2d 710, 715 (2005) (“The primary consideration in construing a trust is to discern the settlor’s intent.”). It’s likely that the settlor, Appellant and Vicki’s father, included the Tenth Amendment in the Trust agreement to prevent the very outcome which occurred in this matter. Despite this provision and heightened standard of proof, the master-in-equity specifically found Appellant liable in his capacity as Successor Trustee when there was no evidence in the record that any failures in the administration of the Trust after Appellant became Successor Trustee were made in bad faith or reckless indifference to the purpose of the

trust of the interests of the beneficiaries. (R. pp. 35-39). Following the hearing on Appellant's Motion for Reconsideration, the master found that Appellant "has cited not case or statutory law requiring a higher standard of proof, so the court finds and concludes that the applicable standard of proof is indeed the preponderance of evidence standard." This finding was clear error when the language of the trust, which set forth the standard of proof, was controlling. Accordingly, the Court of Appeals erred in finding that the master-in-equity applied the correct standard of proof.

For the reasons set forth above, Appellant John Vergeldt respectfully requests that this Court grant this Petition for Rehearing and reverse the decision of the trial court.

Respectfully submitted,

s/ Desa Ballard

Desa Ballard (S.C. Bar No.498)

Harvey M. Watson III (S.C. Bar No. 74053)

Haley Hubbard (S.C. Bar No. 103195)

BALLARD & WATSON

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ATTORNEYS FOR APPELLANT

February 29, 2024

Mar 15 2024

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

**APPEAL FROM YORK COUNTY
TEASA KAY WEAVER, MASTER IN EQUITY**

**Appellate Case No. 2021-000816
Lower Case No. 2016-CP-46-000820**

Vicki Lynn Vergeldt, individually, and as
Successor Trustee of the John Vergeldt, Jr.
Revocable Living Trust dated
September 27, 1978.....Petitioner/Respondent,

v.

John Edward Vergeldt.....Respondent/Appellant.

RETURN TO PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR and as requested, Respondent Vicki Lynn Vergeldt, individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 (“Respondent”), submits this Return to Petition for Rehearing and states as follows:

1. The Court of Appeals properly ruled Appellant John Edward Vergeldt (“Appellant”) was barred from arguing *res judicata* prohibited Respondent from amending her petition to assert damages as the same was not preserved for appellate review since it was not raised to and ruled upon by the trial court. See S.C. Dep’t of Transp. V. First Carolina Corp. of S.C., 372 S.C. 295, 301-02, 641 S.E. 2d 903, 907 (2007) (explaining that to be preserved for review, an issue must have been “(1) raised and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity”

(quoting Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002))). As previously argued, Appellant failed to plead *res judicata* in his Answer and Counterclaim as well as in his Response to the Amended Petition for Removal of Trustee and Related Relief. (R. pp. 396-404; 619-629). While Appellant claims he raised *res judicata* by virtue of mentioning the 08.31.2015 Order issued in the first litigation between the parties at the trial of this case and in his responsive pleadings, he mischaracterizes the findings and conclusions of the trial court in said order¹. (R. pp. 3-11; 719, lns 14-20). Specifically, Appellant claims the trial judge found Appellant was not liable for actions in a previous case for which the master-in-equity found him liable. Id.; (R. pp. 31-45). These statements cannot be construed to raise a defense previously waived under Rule 8(c), SCRCP. Rule 8(c), SCRCP; RIM Associates v. Blackwell, 359 S.C. 170, 597 S.E. 2d 152 (Ct. App. 2004). Similarly, it cannot be argued these statements and/or responsive pleadings were specific enough to inform the trial court that it was being raised. Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E. 2d 731, 734 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, it must have been raised to and ruled upon by the trial judge to be preserved for review.....Moreover, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector”). As a result, the first time the defense of *res judicata* was raised with any particularity was in the Motion for Reconsideration and Amended Motion for Reconsideration (R. p. 631-639). Accordingly, it was improper for the trial court to consider the defense of *res judicata* on the Motion for Reconsideration, and it would have been improper for the Court of Appeals to consider same. See Patterson v. Reid, 318 S.C. 183, 456 S.E. 2d 436 (Ct. App. 1995); Miller Construction Co., LLC v. P.C. Construction of Greenwood, 418

¹ Specifically, Appellant’s responsive pleadings, generally, contain his denials and admissions that records concerning the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 (“Trust”) had been previously provided to Respondent. The turnover of these records was the result of the previous three (3) years of litigation between the parties.

S.C. 186, 791 S.E. 2d 321 (Ct. App. 2016). Assuming *arguendo* that the issue of *res judicata* was properly raised, the same is not applicable in this matter. “Res Judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of prior action between those parties.” Plott v. Justin Enterprises, 374 S.C. 504, 511, 649 S.E. 2d 92, 95 (Ct. App. 2007). Under the doctrine of *res judicata*, “[a] litigant is barred from raising issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.” Judy v. Judy, 393 S.C. 160, 172, 712 S.E. 2d 408, 414 (2011). (citing Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E. 2d 106, 109 (1999)). In order for *res judicata* to operate as a bar to a lawsuit, the following elements need to be proven: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issues in the former suit. Plum Creek Development Co., Inc. v. City of Conway, 334 S.C. 30, 34, 512 S.E. 2d 106, 109 (1999). “Because the determination of whether *res judicata* precludes a subsequent suit cannot be reduced to a formulaic process, we decline to adopt or attempt to define a single standard.” Judy v. Judy, 393 S.C. 160, 172, 712 S.E. 2d 408, 414 (2011) (internal citations omitted). “However, simply seeking a different remedy in the second lawsuit for the same cause of action does not negate the identical nature of the subjects of the two actions where the cause of action is not simply the form of the action in which a claim is asserted, but rather the cause of action is the underlying facts combined with the law giving the party a right to a remedy of one form or another based thereon.” Id. *Res judicata* does not bar a second action for damages and other relief where it follows a first action that seeks a declaratory judgment. See Robison v. Asbill, 328 S.C. 450, 492 S.E. 2d 400 (Ct. App. 1997). As applied to this matter, the issue of damages related to Appellant’s actions as co-trustee and/or successor trustee was not raised in the first litigation, which consisted of declaratory relief, nor was it ruled upon. In fact, the issue of liability

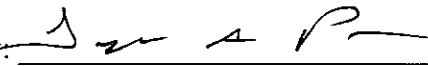
and damages was specifically excluded (R. 3-11). As a result, there was no identity of the subject matter nor was the issue adjudicated between the first litigation between the parties and the present one. Similarly, since the first litigation and during the present one, Appellant resigned his position as successor trustee vesting Respondent with said powers as successor trustee altering the position of the parties. *Res judicata* did not prohibit the Master-in-Equity from allowing amending the pleadings to assert damages as a result.

2. The Court of Appeals correctly found that Master-in-Equity applied the correct standard of proof. As previously argued and briefed, Appellant, did not set forth a specific standard of review for the Court to apply in this matter; however, the Court of Appeals properly determined that it could determine facts in accordance with its own view of the preponderance of the evidence. See Smith v. Barr, 375 S.C. 157, 160, 650 S.E. 2d 486, 488 (Ct. App. 2007). The Court of Appeals also properly determined that the primary consideration in construing a trust is to discern the settlor's intent which is to be determined from the language of the trust instrument if it is perfectly plain and capable of legal construction. Bowles v. Bradley, 319, 377, 461, S.E. 2d 811, 813 (1995) ("The primary consideration in construing a trust is to discern the settlor's intent."); Holcombe-Burdette v. Bank of Am., 371 S.C. 648, 658, 640 S.E. 2d 480, 485 (Ct. App. 2006) ("In ascertaining the settlors intent if the language of the trust instrument is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument."). In such an event, the language determines the force and effect of the instrument. Holcombe-Burdette v. Bank of Am., 371 S.C. 648, 658 (Ct. App. 2006). As applied to this matter, Respondent did not raise any ambiguity in the Tenth Amendment to the Trust during the course of this matter, so it is improper for Appellant to raise the same on appeal. Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E. 2d 731, 734 (1998) Even if it had been properly raised, the record reflects that neither party presented

settlor's intent to create a higher standard of proof by virtue of the language of the Tenth Amendment of the Trust based on family dynamic and, as a result the argument made by Appellant related thereto amounts to speculation². Accordingly, the language of the Tenth Amendment must be considered to limit liability to actions taken by a co-trustee and/or successor trustee to those taken in bad faith and reckless indifference to the purposes of the Trust as set forth in the Tenth Amendment. This would result in a finding and/or conclusion rather than the application of a higher standard of proof. As a result, it was not error for the Court of Appeals to make this determination as to the standard of proof and the record is replete with evidence of Appellant acting in bad faith and in reckless indifference to the purposes of the Trust and Respondent's interest in same.

For the foregoing reasons, the Petition for Rehearing should be denied and the Court of Appeal's decision in this matter affirmed.

HARRELL, MARTIN & PEACE, P.A.

By: 

TAYLOR A. PEACE, ESQ.
135 Columbia Avenue (Physical Address)
P.O. Box 1000 (Mailing Address)
Chapin, South Carolina 29036
Phone: (803) 345-3353
tpeace@hmp-law.com

Attorneys for Respondent Vicki Lynn Vergeldt,
Individually, and as Successor Trustee of the
John Vergeldt, Jr. Revocable Living Trust dated
September 27, 1978

March 15, 2024
Chapin, South Carolina

² However, it is interesting that Respondent's testimony indicated the relationship between her siblings was cooperative due to everyone's concerns about their father, the settlor, until Respondent began questioning Appellant's actions. (R. 794-800).

RECEIVED

Mar 15 2024

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
TEASA KAY WEAVER, MASTER-IN-EQUITY

Appellate Case No. 2021-000816
Lower Case No. 2016-CP-46-000820

Vicki Lynn Vergeldt, individually, and as
Successor Trustee of the John Vergeldt, Jr.
Revocable Living Trust dated
September 27, 1978.....Petitioner/Respondent,

v.

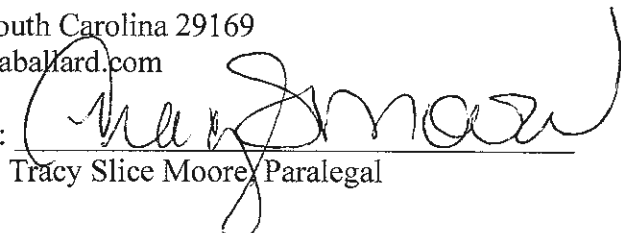
John Edward Vergeldt.....Respondent/Appellant.

PROOF OF SERVICE

I, Tracy Slice Moore, an employee with the firm of Harrell, Martin & Peace, P.A., do hereby certify that on March 15, 2024, I served a copy of the Return to Petition for Rehearing of Respondent Vicki Lynn Vergeldt, Individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust Dated September 27, 1978 in the above captioned case on the following individuals by electronic mail and regular first class mail using their email address and mailing address listed in the Attorney Information System, addressed as follows:

Desa Ballard
Ballard & Watson
226 State Street
West Columbia, South Carolina 29169
desab@desaballard.com

By:


Tracy Slice Moore, Paralegal

March 15, 2024
Chapin, South Carolina

ROA 00606



HARRELL, MARTIN
& PEACE, P.A.
ATTORNEYS AT LAW

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Mar 15 2024

SC Court of Appeals

L.K. "Trey" Harrell, III
Jeremy C. Martin
M. Alan Peace **
Taylor A. Peace
Erik T. Norton
Jamie Anna Weller
George "Mick" Lusk, III

Robert W. Dibble, Jr. *
William Jennings (Bill) Buchanan *
Donald W. Tyler *
Thomas B. Jackson, III **

*Of Counsel
**Certified Mediator/Arbitrator

March 15, 2024

VIA EMAIL to: ctappfilings@sccourts.org
AND REGULAR, FIRST-CLASS MAIL

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Vicki Lynn Vergeldt, et al. v. John Edward Vergeldt
Appellate Case No.: 2021-000816
Our File No: 3490.00001/TAP

Dear Ms. Kitchings:

Enclosed for filing please find the original and one (1) copy of the Return to the Petition for Rehearing of Respondent Vicki Lynn Vergeldt, Individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust Dated September 27, 1978 for the above referenced case. As evidenced by the enclosed Proof of Service (with one copy of filing), these documents have been served electronically upon counsel for Appellant as well as by regular first-class mail.

Thank you for your time and attention in this matter. If you have any questions, please do not hesitate to contact our office at the phone number below.

Sincerely,

HARRELL, MARTIN & PEACE, P.A.

Taylor A. Peace, Esq.

Enclosures

cc: Desa Ballard, Esq (w/ enclosures)

Mailing Address: Post Office Box 1000, Chapin, South Carolina 29036
Physical Address: 135 Columbia Avenue, Chapin, South Carolina 29036
Telephone: 803-345-3353 • Fax: 803-345-9171
harrellmartinpeace.com

ROA 00607

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Case No. 2021-CP-10-04257

Vicky Lynn Vergeldt, Individually,
and as Successor Trustee of the John
Vergeldt, Jr. Revocable Living Trust
Dated September 27, 1978,

Plaintiff)

vs.)

John Edward Vergeldt and Teresa A.
Shaw-Vergeldt,

Defendants.)

**DEFENDANT’S
MEMORANDUM IN OPPOSITION
TO PLAINTIFF’S MOTION FOR
CONTEMPT OR SANCTIONS**

Defendant John E. Vergeldt (hereinafter “Defendant”), by and through his undersigned counsel, submits the following in opposition to Plaintiff’s Motion for Contempt or Sanctions in advance of the hearing currently scheduled for Thursday, March 28, 2024.

STANDARD OF REVIEW

“Contempt results from the willful disobedience of an order of the court.” *Bigham v. Bigham*, 264 S.C. 101, 104, 212 S.E.2d 594, 596 (1975); *Smith v. Smith*, 359 S.C. 393, 396, 597 S.E.2d 188, 189 (Ct.App.2004). “A willful act is defined as one done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say with bad purpose either to disobey or disregard the law.” *State v. Bevilacqua*, 316 S.C. 122, 129, 447 S.E.2d 213, 217 (Ct. App. 1994) (citing *Spartanburg County Dep’t of Social Services v. Padgett*, 296 S.C. 79, 370 S.E.2d 872 (1988)). “Before a court may find a person in contempt, the record must clearly and specifically reflect the contemptuous conduct.” *Widman v. Widman*, 348 S.C. 97, 119, 557 S.E.2d 693, 705 (Ct.App.2001).

ARGUMENT

Plaintiff is requesting that this Court hold Defendant in contempt for failing to comply with the Court's order requiring Defendant to make his home available for an appraisal. Specifically, Plaintiff faults Defendant for not allowing the appraiser, Mr. Lowry, to perform the appraisal after arriving almost an hour after the agreed-upon time. However, Defendant would show that he did not willfully violate the Court's order.

It is undisputed that all parties agreed that the appraisal would take place at 9:00 am on October 24, 2023. As set forth in Defendant's affidavit filed January 5, 2024, Defendant was available and waiting for Mr. Lowry to arrive at his home starting at 8:45 am. When Mr. Lowry still had not arrived at 9:15 am, Defendant contacted his counsel to inform her that the appraiser had not shown up or attempted to contact Defendant. Defendant's counsel was then notified via email, a copy of which is attached and incorporated as **Exhibit A**, at 9:43 am that Mr. Lowry was running late due to him being stuck in traffic.¹ From that email it appears that Plaintiff's counsel had only been notified of Mr. Lowry's delay about a minute before, sometime between 9:41-9:42 am. Therein lies the problem; Mr. Lowry failed to communicate his delay in a timely manner. The appraisal was scheduled for 9:00 am, yet Mr. Lowry did not notify anyone of his delay until over forty (40) minutes after he was due to arrive. This should have been communicated to Plaintiff's counsel when Mr. Lowry realized that he would not arrive by 9:00 am. Furthermore, Mr. Lowry acknowledged in his affidavit filed on January 5, 2024,² that U.S. Highway 17 is a "main and heavily trafficked thoroughfare" and that travel on Hwy 17 "is frequently slowed, delayed and/or

¹ To this date, neither Plaintiff nor Mr. Lowry has provided an incident report or official documentation of the traffic conditions on the morning of the appraisal which caused the delay.

² Defendant makes reference to Mr. Lowry's Affidavit solely to highlight the contradictory statements contained therein, however Defendant objects to Mr. Lowry's Affidavit being admitted as it was not timely filed pursuant to Rule 6(d), SCRCP.

halted due to traffic accidents” based on his own experience and knowledge of the area. (See Affidavit of Kevin Lowry, ¶¶ 10-11). Such knowledge would necessitate that Mr. Lowry factor in possible traffic delays in his departure time to ensure that he arrived at the appointment on time. It is not reasonable for Plaintiff or Mr. Lowry to expect that such a significant delay, whether anticipated or not, would not impact Defendant’s schedule or ability to proceed with the appraisal that morning.

As explained in his affidavit, Defendant had a doctor’s appointment that morning at 10:30 am which was 20-25 minutes away. After speaking with Defendant about Mr. Lowry’s delay, the undersigned notified Plaintiff’s counsel that Defendant would not wait any longer and that the parties would need to reschedule the appraisal so long as Plaintiff would assume the cost for the next appraisal. See **Exhibit B**. Plaintiff did not agree to this proposition, and Mr. Lowry arrived at Defendant's home at approximately 9:50 am, at which time he informed Mr. Lowry that he could not conduct the appraisal and would need to reschedule. The situation giving rise to the failed appraisal does not constitute a willful violation of the Court’s order, nor does it indicate that Defendant had a specific intent to violate the court’s order requiring an appraisal of his home.

Defendant informed Plaintiff’s counsel that he was willing to make his property available for another appraisal so long as he had input of the appraiser and Plaintiff agreed to pay for the subsequent appraisal. Despite the fact that Plaintiff would not agree to reschedule the appraisal under those conditions, Defendant retained Burk Y. Herrin, Jr. on December 21, 2023, to conduct an appraisal of the property. Mr. Herrin’s appraisal report was previously filed with the Court on February 12, 2024. It is clear that Defendant took steps to comply with the Court’s order and mitigate any alleged violation of the Court’s order.

CONCLUSION

For the reasons set forth above, Defendant requests that the Court deny Plaintiff's Motion for Contempt or Sanctions.

Respectfully submitted,

s/ Desa Ballard

Desa Ballard (SC Bar No. 498)

Harvey M. Watson III (SC Bar No. 74053)

Haley Hubbard (SC Bar No. 103195)

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haley@desaballard.com

ATTORNEYS FOR DEFENDANT

JOHN EDWARD VERGELDT

March 26, 2024



From: Taylor Peace <tpeace@hmp-law.com>
Sent: Tuesday, October 24, 2023 9:43 AM
To: Haley Hubbard <haley@desaballard.com>
Cc: Desa Ballard <desab@desaballard.com>; Beth Cogan <Beth@desaballard.com>
Subject: RE: Appraisal

I received this from the appraiser a minute ago:

"I've been sitting in traffic for an hour. It finally let up and I should be there in 10 minutes. I'm not sure if it is unlocked or if someone is waiting on me."

Thanks,

Taylor A. Peace, Esq.
Harrell, Martin & Peace, P.A.
135 Columbia Avenue (Physical Address)
P.O. Box 1000 (Mailing Address)
Chapin, South Carolina 29036
Telephone: (803) 345-3353
Fax: (803) 345-9171
tpeace@hmp-law.com

This E-mail is covered by the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521 and is legally privileged. This transmission may also be protected under the attorney-client privilege, the attorney work product doctrine and/or other protective orders. This information is confidential and is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited.

DEBT COLLECTOR: This firm collects debts for mortgage lenders and other creditors. Any information obtained will be used for that purpose. However, if you have previously received a discharge in bankruptcy, this message is not and should not be construed as an attempt to collect a debt, but only as an attempt to enforce a lien.

ELECTRONICALLY FILED - 2024 Mar 26 4:14 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1004257



From: Desa Ballard <desab@desaballard.com>

Sent: Tuesday, October 24, 2023 9:45 AM

To: Taylor Peace <tpeace@hmp-law.com>; Haley Hubbard <haley@desaballard.com>

Cc: Beth Cogan <Beth@desaballard.com>

Subject: RE: Appraisal

Mr. Vergeldt just told me he was done waiting. He will call his own appraiser and Vicki can pay for it.

Don't shoot the messenger.

db

From: Taylor Peace <tpeace@hmp-law.com>
Sent: Tuesday, October 24, 2023 10:01 AM
To: Desa Ballard <desab@desaballard.com>; Haley Hubbard <haley@desaballard.com>
Cc: Beth Cogan <Beth@desaballard.com>
Subject: RE: Appraisal

Understood about not shooting the messenger.

Unfortunately, traffic to and from John's Island (ie: 526, 17, etc...) is not anything anyone can plan for. Mr. Vergeldt should know that. If Mr. Vergeldt is at his house, this shouldn't be an issue. I don't believe Mr. Lowry will be there very long. If Mr. Vergeldt refuses to let Mr. Lowry in based on a traffic delay, we can take that up with Judge Scarborough as the order requires us to complete the appraisal within 45 days, and I don't think an hour delay in traffic in going to be good cause to extend the time to vet and engage Mr. Vergeldt's appraiser, if he has one, find a new one, or coordinate another time.

Thanks,

Taylor A. Peace, Esq.
Harrell, Martin & Peace, P.A.
135 Columbia Avenue (Physical Address)
P.O. Box 1000 (Mailing Address)
Chapin, South Carolina 29036
Telephone: (803) 345-3353
Fax: (803) 345-9171
tpeace@hmp-law.com

This E-mail is covered by the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521 and is legally privileged. This transmission may also be protected under the attorney-client privilege, the attorney work product doctrine and/or other protective orders. This information is confidential and is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited.

DEBT COLLECTOR: This firm collects debts for mortgage lenders and other creditors. Any information obtained will be used for that purpose. However, if you have previously received a discharge in bankruptcy, this message is not and should not be construed as an attempt to collect a debt, but only as an attempt to enforce a lien.

From: Taylor Peace <tpeace@hmp-law.com>
Sent: Tuesday, October 24, 2023 10:28 AM
To: Desa Ballard <desab@desaballard.com>; Haley Hubbard <haley@desaballard.com>
Cc: Beth Cogan <Beth@desaballard.com>
Subject: RE: Appraisal

I'll have to check with my client.

Please have Mr. Vergeldt provide the name and contact information for the appraiser and other times he might be able to make the house available this week so I can pass those along to the appraiser.

Thanks,

Taylor A. Peace, Esq.
Harrell, Martin & Peace, P.A.
135 Columbia Avenue (Physical Address)
P.O. Box 1000 (Mailing Address)
Chapin, South Carolina 29036
Telephone: (803) 345-3353
Fax: (803) 345-9171
tpeace@hmp-law.com

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DEBT COLLECTOR: This firm collects debts for mortgage lenders and other creditors. Any information obtained will be used for that purpose. However, if you have previously received a discharge in bankruptcy, this message is not and should not be construed as an attempt to collect a debt, but only as an attempt to enforce a lien.

From: Desa Ballard <desab@desaballard.com>
Sent: Tuesday, October 24, 2023 10:22 AM
To: Taylor Peace <tpeace@hmp-law.com>; Haley Hubbard <haley@desaballard.com>
Cc: Beth Cogan <Beth@desaballard.com>
Subject: RE: Appraisal

Mr. Vergeldt called back and the guy showed just as Mr. Vergeldt was leaving, and Mr. Vergeldt told him he had missed his window.

I'm told Mr. Vergeldt has made preliminary contact with a different appraiser. Assuming the price is approximately the same, will you agree to pay for it?

db

From: Taylor Peace <tpeace@hmp-law.com>
Sent: Tuesday, October 24, 2023 10:17 AM
To: Desa Ballard <desab@desaballard.com>; Haley Hubbard <haley@desaballard.com>
Cc: Beth Cogan <Beth@desaballard.com>
Subject: RE: Appraisal

I know. Our folks are like oil and water in the first place and the sibling dynamic just kicks into hyper drive.

I've asked Mr. Lowry to let me know what happens when he gets there, so I'll let you know as soon as I know.

Thanks,

Taylor A. Peace, Esq.
Harrell, Martin & Peace, P.A.
135 Columbia Avenue (Physical Address)
P.O. Box 1000 (Mailing Address)
Chapin, South Carolina 29036
Telephone: (803) 345-3353
Fax: (803) 345-9171
tpeace@hmp-law.com

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) CIVIL ACTION NO.: 2021-CP-10-4257

Vicki Lynn Vergeldt, Individually, and as
Successor Trustee of the John Vergeldt, Jr.
Revocable Living Trust dated September
27, 1978,

Plaintiff,

vs.

John Edward Vergeldt and Teresa A. Shaw-
Vergeldt,

Defendants.

**PLAINTIFF’S MEMORANDUM IN
SUPPORT OF MOTION FOR
CONTEMPT AND/OR SANCTIONS AND
IN REPLY TO DEFENDANT’S
MEMORANDUM IN OPPOSITION TO
SAME**

NOW COMES Plaintiff Vicki Lynn Vergeldt, Individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 (“Plaintiff”), who, by and through the undersigned, submits this Memorandum in Support of Motion for Contempt and/or Sanctions and in Reply to Defendant’s Memorandum in Opposition in anticipation of the upcoming hearing scheduled for March 28, 2024.

FACTUAL BACKGROUND

As the Court is aware, Plaintiff filed the subject Motion for Contempt and/or for Sanctions (“Motion”) as a result of Defendant John Edward Vergeldt’s (“Defendant”) failure and refusal to comply with the Court’s Order on Plaintiff’s Motion to Compel (“Order”) filed in this matter on September 28, 2023.¹

As to the specifics, Plaintiff was required to file a Motion to Compel on May 3, 2023 after Defendant failed and refused to produce the property at 1523 Star Flower Ally, Johns Island, South

¹ Pursuant to Rule 10(c), SCRPC, Plaintiff herein adopts and incorporates by reference the various pleadings, orders, and exhibits filed in this matter that relate to the Motion unless otherwise stated or indicated. Rule 10(c), SCRPC.

Carolina 29455 (“Property”) in response to Plaintiff’s Second Set of Requests for Production. After a hearing on August 7, 2023, the Court entered the Order.

Under the Order, Defendant was, “required to make the Property and all areas of the interior and exterior of the single-family residence located thereon and other attendant and appurtenant improvements thereon available to an agreed upon South Carolina licensed real estate appraiser and/or home inspector at a date and time convenient to the designated real estate appraiser/home inspector.” See Order on Pltf’s Motion to Compel. The Order also required the appraisal and/or inspection to take place within forty-five (45) days of the entry of the Order, which time may have been extended by subsequent order upon good cause shown. Id. The Order further provides, “In the event Plaintiff and Defendant cannot agree upon a South Carolina licensed real estate appraiser and/or home inspector, the Court may appoint one by subsequent order. Id. Contrary to the Affidavit of John E. Vergeldt (“Aff. of J. Vergeldt”) filed January 5, 2024, the Court’s Order to Compel did not provide Defendant with an opportunity to “agree” to make the Property available to the agreed home appraiser and/or home inspector. See ¶3, Aff of J. Vergeldt filed January 5, 2024; Order.

To comply with the Order, Kevin Lowry with Lowcountry Real Estate Appraisals, Inc. was selected to perform the appraisal after his resume and qualifications were obtained by the undersigned and sent to Defendant. Contrary to the Aff. of J. Vergeldt, implicit consent, at a minimum, was received from Defendant to use Mr. Lowry after no object to the engagement of Mr. Lowry was presented. See ¶5, Affidavit of Kevin C. Lowry (filed January 5, 2024)² (“Aff. of K. Lowry”). It was also agreed the appraisal would take place on October 24, 2023 at 9:00 A.M., and the date and time were confirmed with Defendant. ¶8, Aff. of K. Lowry.

² Mr. Lowry’s Affidavit indicates he knows of no objection based on his communications with the undersigned. The undersigned can make the communications or lack thereof between himself and Defendant’s counsel available at the hearing if needed.

Defendant has claimed he engaged a real estate professional named Ms. Shaw to attend and monitor the appraisal without explanation of why he believed he needed same at that time or why he/they needed a comprehensive list of upgrades and local comparable properties to discuss with Mr. Lowry.³ See ¶¶3, 5, Aff. of J. Vergeldt.

It is undisputed Mr. Lowry was not present at the Property at the appointed time, that Mr. Lowry informed the undersigned at or around 9:40 A.M. that he was late due to traffic, and that the same was communicated to Defendant's counsel at or around 9:43 A.M. Defendant's affidavit indicates he and Ms. Shaw decided to "go about our day at 9:47 am". See ¶7, Aff. of J. Vergeldt; ¶¶ 9-12, Aff. of K. Lowry. This decision appears to have been made unilaterally by Defendant based on so that he could attend doctor's appointments he purportedly had 10:30 A.M. that day at a location approximately twenty to twenty-five minutes away. See ¶4, 7, 8-9, 13 Aff. of J. Vergeldt. These doctor's appointments were previously unknown to the undersigned and possibly Defendant's counsel as the correspondence between the undersigned and Defendant's counsel submitted as part of Defendant's Memorandum in Opposition to Plaintiff's Motion for Contempt or Sanctions ("Defendant's Memo") merely indicate, at 9:45 A.M. that "Mr. Vergeldt just told me his done waiting. He will call his own appraiser and Vicki can pay for it." See Exhibit B, Memo. in Opp. To Plf's Motion for Sanctions and/or Contempt. This is/was not required by the Order nor was it a term of same. It appears only then that Ms. Shaw left the Property at around 9:50 A.M. and Defendant decided to take his dogs for a short walk at around 9:55 A.M. despite the doctor's appointments. See ¶¶ 8-9, Aff. of J. Vergeldt.

³ It is worth noting Defendant does not identify Ms. Shaw by her first name. It is also worth noting that Defendant's previous co-Defendant and wife, Teresa A. Shaw-Vergeldt, is a real estate agent licensed with the State of South Carolina having License No. 93494. Mrs. Shaw-Vergeldt, before the course of this matter, sought to have an order of separate maintenance and support and hers and Defendant's property equitably subdivided in the Family Court for Charleston County under Case No.:2021-10-2081. Without further identification by Defendant, the undersigned is left to assume Ms. Shaw is the same person as Teresa A. Shaw-Vergeldt.

Both Defendant and Mr. Lowry recall Mr. Lowry arriving sometime between 9:50 A.M. and 10:00 A.M. where they met at the front porch and/or door of the house located on the Property and Defendant informed Mr. Lowry that he was too late.⁴ See ¶12 Aff. of J. Vergeldt. Defendant claims he told Mr. Lowry they would need to reschedule, which is contradictory to what he told his counsel. See Aff. of J. Vergeldt ¶12; Ex. B, Defendant's Memo. There appears to be some dispute about what subsequently occurred during the interaction between Defendant and Mr. Lowry, but, for whatever reason, Defendant denied Mr. Lowry entry into the single-family residence located on the Property or to the Property's interior. Defendant appears to find Mr. Lowry incapable of performing the appraisal based on Mr. Lowry's tardiness and purported belligerence during their encounter, which Mr. Lowry denies and attributes to Defendant. See ¶16, Aff. of J. Vergeldt; ¶¶14-20, Aff. of K. Lowry.

Thereafter, the undersigned attempted to obtain the name of Defendant's appraiser and/or to coordinate additional dates and times for Mr. Lowry to visit the Property within the forty-five (45) day window required by the Order; however, none were forthcoming. Ex. B, Defendant's Memo. Instead, Defendant filed a Motion to Stay Proceedings on October 25, 2023 seeking to stay the proceedings based on the pending appeal of the underlying judgment Plaintiff seeks to enforce in this matter. See Motion to Stay Proceedings filed October 25, 2023.

As the Court is aware, an initial hearing took place on January 8, 2024 on the Motion for Contempt and/or Sanctions, the Motion to Stay Proceedings, and Motion to Dismiss under Rule 12(b)(6) that was filed as part of Defendant's Answer to the Amended Complaint, which hearing resulted in an order filed February 2, 2024.

As the Court is also aware, a Motion to Reconsider was filed on February 12, 2024, which

included as exhibit an appraisal of the Property performed by Burk Y. Herin, Jr. on December 21, 2023. This appraisal appears to have been performed at Defendant's request, without consultation as to whether Plaintiff would agree to Mr. Herrin, and outside of the forty-five (45) day window required by the Order.

LEGAL STANDARD

"Contempt is an extreme measure; this power vested in a court is not lightly asserted". Ex parte Kent, 379 S.C. 633, 637, 666 S.E. 2d 921, 923 (Ct. App. 2008). "A party is guilty of contempt when he willfully disobeys a court order." Brantley v. Brantley, 441 S.C. 284, 299, 893 S.E. 2d 349, 358 (Ct. App. 2023) (internal citations omitted). "A willful act is one 'done voluntarily and intentionally with the specific intent....to fail to do something the law requires to be done'" Noojin v. Noojin, 417 S.C. 300, 306 789 S.E. 2d 769, 772 (Ct. App. 2016) (internal citations omitted). "Prior to invoking this power, the court must necessarily consider the ability of the defendant to comply with the order." Id. "A party seeking contempt for finding for violation of a court order must show the order's existence and establish the other party did not comply with the order." Abate v. Abate, 377 S.C. 548, 554, 660 S.E. 2d 515, 518 (Ct. App. 2008) (internal citations omitted). "Once the party seeking a contempt finding makes prima facie showing by pleading the order and demonstrating noncompliance, the burden shifts to the respondent to establish his defense and inability to comply." Noojin v. Noojin, 417 S.C. 300, 789 S.E. 2d 769 (Ct. App. 2016). "Civil contempt must be shown by clear and convincing evidence." Miller v. Miller, 375 S.C. 443, 457, 652 S.E. 2d 754, 761 (Ct. App. 2007) (internal citations omitted).

ARGUMENT

As applied to this matter, it is clear from the Order, the facts and matters contained in the Aff. of J. Vergeldt and Aff. of K. Lowry, and exhibits attached to the Defendant's Memo that Defendant should be held in contempt for violating the Order as his actions constitute willful violations of the Order.

Initially, as noted above, the Order sets out the requirements and obligations of the parties. It constitutes the Court's instructions which are plain and unambiguous on its face. Neither party contends an ambiguity exists. Accordingly, the requirements and instructions to the parties were to: 1) agree upon a licensed South Carolina real estate appraiser and/or home inspector, 2) for Defendant to make Property and the interior and exterior single family residence located thereon and other attendant and appurtenant improvements available to the agreed upon South Carolina licensed real estate appraiser for inspection and/or appraiser 3) that the availability of the Property be at a time and date convenient to the appraiser and/or inspector, and 4) that the appraisal and/or inspection would take place within forty five (45) days of the entry of the Order to Compel except upon good cause shown to the Court. Defendant willfully violated each and every one of these instructions.

I. Defendant's failure and refusal to cooperate with Plaintiff regarding the selection of a real estate appraisal was a willful violation of the Order to Compel

As to the first instruction, Defendant appears to have initially complied with its provision but subsequently failed and refused to cooperate with Plaintiff thereby willfully violating same. As mentioned above, Mr. Lowry indicates he provided his credentials to the undersigned who then forwarded the same to Defendant's counsel and he understood no objection was received. See ¶5, Aff. of K. Lowry. Defendant even went so far as to confirm the proposed date and time for the appraisal and made preparations for his arrival. See ¶8, Aff. of K. Lowry. In other words, while

Defendant claims Mr. Lowry was chosen by Plaintiff, his failure to object, silence, and subsequent actions indicate consent and agreement. See ¶¶3-5, Aff. of J. Vergeldt. However, Defendant appears to have violated this requirement in the Order when it was indicated he already had preliminary discussions with another appraiser but failed and/or refused to provide that information to Plaintiff despite requests for the same after the events of October 24, 2023⁵. See Ex. B., Defendant's Memo.

Viewed from another angle, Defendant willfully violated the Order's instruction related to agreement by not only failing and refusing to reach an agreement with Plaintiff after the events of October 24, 2023 but by engaging an appraiser, having an appraisal performed, and not disclosing it to Plaintiff until after the initial hearing on the Motion. The disclosure of this information, which Defendant had the power to do, could have been done in an effort to comply with the Order and/or could have been done to avoid the present Motion and/or make it moot indicating a willingness to violate same.⁶

II. Defendant's failure and refusal to make the Property and the interior and exterior single-family residence located thereon and other attendant and appurtenant improvements available to the agreed upon South Carolina licensed real estate appraiser for inspection and/or appraiser

As to the second requirement contained in the Order, Defendant failed and refused to make the Property, the single-family residence located thereon, its interior and exterior, and the remainder of the Property available to the agreed upon real estate appraiser and/or home inspector, namely Mr. Lowry. This is evidenced in the Aff. of J. Vergeldt and Aff. of K. Lowry as discussed

⁵ Plaintiff acknowledges the Order to Compel allowed either party to seek the Court's intervention regarding the appointment of an appraiser and/or home inspector in the event agreement could not be reached. However, up until the events of October 24, 2023, the parties operated under the belief agreement had been reached, and Defendant's failure to and refusal to disclose the identity of his appraiser prior to the filing of the Motion made it impossible for Plaintiff to know whether or not agreement could be reached on same.

⁶ The fact that Defendant waited so long to disclose the appraiser he purportedly was speaking with calls into question whether he, in fact, was speaking to another appraiser at or around the events of October 24, 2023.

above. Accordingly, the only issue regarding the violation of this requirement is whether said violation was willful and whether Defendant could have complied with the Order's instructions.

It is clear the violation was willful and Defendant could have allowed Mr. Lowry access to the Property, the interior and exterior of the single family residence located thereon, and the other areas of the Property. This is seen in the fact that Defendant appeared ready and willing to allow Mr. Lowry access the entirety of the Property at the agreed upon date and time. It was only after Defendant was informed Mr. Lowry was going to be late and of the reason for Mr. Lowry's tardiness that Defendant, unilaterally, decided to cancel the appraisal and informed his counsel he would pick his own appraiser as referenced above and refused Mr. Lowry entry and access. To the extent Defendant argues Mr. Lowry's tardiness was going to interfere with other appointments, this argument provides Defendant no relief as: a) the Order requires Defendant to make Property available at a time and date convenient to the real estate appraiser/home inspector, b) the undersigned sought additional dates and times for the Property to be made available, and c) Defendant refused to cooperate with same despite his purported statement to Mr. Lowry that he would need to reschedule. See ¶12 Aff. of J. Vergeldt; Ex. B, Defendant's Memo. In other words, the actions identified in the Aff. of J. Vergeldt and other filings in this matter indicate Defendant's failure to comply with the Court's requirement was not the result of carelessness but was active, intentional and meant to frustrate the purpose of the Order to Compel.

III. Defendant's failure and refusal to make the Property available to the agreed upon real estate appraiser and/or home inspector at a time and date convenient to the real estate appraiser and/or home inspector.

Regarding the Court's third requirement, Defendant failed and refused to make the Property available and at a time and date convenient to Mr. Lowry, the then agreed upon real estate appraiser, and said refusal is a willful violation of same.

As mentioned above, Defendant, only after learning that Mr. Lowry would be late and the reason why, unilaterally decided to cancel the appointment and/or refuse Mr. Lowry access to the Property, and, as mentioned above, he indicated his refusal and did refuse to coordinate with the undersigned and Mr. Lowry to reschedule a date and time for Mr. Lowry to appraise the Property despite his apparent statements to Mr. Lowry during their interaction. See ¶12 Aff. of J. Vergeldt.; Ex. B, Defendant's Memo. These actions indicate a clear willful violation of the Order to Compel, which are made more egregious by the fact Defendant appeared willing and able to make the Property available to Mr. Burk, the appraiser Defendant unilaterally chose after indicating his intention not to cooperate with Plaintiff in her efforts to comply with the Order to Compel.

IV. Defendant's failure and refusal to make Property available for the appraisal to Mr. Lowry or cooperate with Plaintiff caused the appraisal to not be performed within forty-five (45) days and said actions violative of the Order and willful

As more fully discussed above, Defendant's actions prohibited Mr. Lowry from conducting his work and completing the appraisal that he was engaged to perform in compliance with the Order and his failures and refusals to timely disclose who his purported appraiser is and/or was resulted in no appraisal being performed within the forty-five (45) day timeline required by the Order to Compel. These actions were intentional and willful and appear to have been taken to violate the Order or to flout its instructions and frustrate its purpose.

To the extent Defendant argues the appraisal he obtained is action taken to mitigate or remediate his violation, said argument is of minimal force and effect as the appraisal appears to have been conducted on December 21, 2023 or eighty-four (84) days from the entry of the Order. This is thirty-nine (39) days past the deadline and after the Motion was filed. The fact the appraisal was not disclosed until it was filed on January 5, 2024 makes the violation more egregious as it is further evidence of Defendant's willfulness of the violation.

CONCLUSION

For the forgoing reasons, Plaintiff's Motion should be granted and/or the Order previously entered related thereto should be affirmed.

HARRELL, MARTIN & PEACE, P.A.

/s/ Taylor A. Peace, Esq.
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tpeace@hmp-law.com
Attorneys for Plaintiff

March 27, 2024
Chapin, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
)
)
Case No. 2021-CP-10-04257
Case No. 2021-CP-10-03640
)
Vicky Lynn Vergeldt, Individually,)
and as Successor Trustee of the John)
Vergeldt, Jr. Revocable Living Trust)
Dated September 27, 1978,)
)
Plaintiff,)
vs.)
)
John Edward Vergeldt,)
Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

SUPPLEMENT TO MOTION TO STAY

Defendant John Edward Vergeldt supplements his Motion to Stay these proceedings, previously filed on October 25, 2023, with the following to apprise the Court of events that have occurred since the motion to stay was filed:

1. The Court of Appeals heard oral arguments in Appellate Case No. 2021-000816 on November 8, 2023, and took the matter under advisement.
2. By unpublished order dated February 14, 2024, the Court of Appeals ruled that issues presented on appeal were not properly preserved for oral argument. **Exhibit A.**
3. Defendant John Vergeldt (hereinafter “Mr. Vergeldt”) timely filed a Petition for Rehearing on February 29, 2024, pointing out that the issues on appeal were, in fact, properly preserved for review. A copy of the Petition is attached hereto and incorporated by reference as **Exhibit B.**
4. Pursuant to Rule 221, SCACR, no response to a petition for rehearing may be filed unless it is expressly requested by the appellate court.

5. On March 5, 2024, the Court of Appeals requested that Plaintiff Vicki Vergeldt (hereinafter "Plaintiff") submit a return to Mr. Vergeldt's Petition for Rehearing. **Exhibit C.** A request for a written response to a Petition for Rehearing from either appellate court in South Carolina is extraordinary. In the undersigned counsel's experience, she has seen returns requested in less than ten (10) cases of the hundreds of appeals she has handled in the state appellate courts.
6. Plaintiff filed a return to the Petition and Mr. Vergeldt filed a reply to the return as requested by the Court of Appeals on March 20, 2024. As of today, March 27, 2024, the appellate Court's C-track system shows the matter ready for consideration.
7. Mr. Vergeldt plans to petition the Supreme Court for review on certiorari should the Court of Appeals deny rehearing and/or otherwise permit the judgment to remain in place.

For the reasons set forth more fully in the original Motion and above, in addition to the argument to be presented by counsel at the hearing in the matter, Mr. Vergeldt respectfully requests that this Court issue an order staying the instant proceedings until the underlying action is resolved by the South Carolina Court of Appeals.

Respectfully submitted,

s/ Desa Ballard
 Desa Ballard (S.C. Bar No. 498)
 Harvey M. Watson III (S.C. Bar No. 74053)
 Haley Hubbard (S.C. Bar No. 103195)

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 haley@desaballard.com

ATTORNEYS FOR DEFENDANT

March 27, 2024

Exhibit A

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Vicki Lynn Vergeldt, Individually, and as Successor
Trustee of the John Vergeldt Jr. Revocable Living Trust
dated September 27, 1978, Respondent,

v.

John Edward Vergeldt, Appellant.

Appellate Case No. 2021-000816

Appeal From York County
Teasa Kay Weaver, Master-In-Equity

Unpublished Opinion No. 2024-UP-052
Heard November 8, 2023 – Filed February 14, 2024

AFFIRMED

Desa Ballard and Harvey M. Watson, III, both of Ballard
& Watson, Attorneys at Law, of West Columbia, for
Appellant.

Taylor Anthony Peace, of Harrell, Martin, & Peace, P.A.,
of Chapin, for Respondent.

PER CURIAM: John Vergeldt appeals the master-in-equity's order granting the
John Vergeldt, Jr. Revocable Living Trust (the Trust) a money judgment of

\$361,092.88 against him to restore trust assets and pay attorney's fees and additional expenses. On appeal, John argues the circuit court erred by (1) allowing Vicki Vergeldt to amend her petition to seek damages because damages were barred by res judicata and (2) failing to apply the standard of proof imposed by John Vergeldt, Jr.'s (the Settlor's) tenth amendment to his will. We affirm pursuant to Rule 220(b), SCACR.

1. We hold that John's argument that the doctrine of res judicata barred Vicki from amending her petition for his removal as successor trustee and other related relief was not preserved for appellate review because John first raised the argument in his motion for reconsideration. *See Skydive Myrtle Beach, Inc. v. Horry Cnty.*, 426 S.C. 175, 182, 826 S.E.2d 585, 588 (2019) ("A trial court has discretion to deny a motion to amend if the party opposing the amendment can show a valid reason for denying the motion."); *id.* at 182, 826 S.E.2d at 588 ("In rare cases . . . a trial court may deny a motion to amend if the amendment would be clearly futile."); *RIM Assocs. v. Blackwell*, 359 S.C. 170, 182, 597 S.E.2d 152, 159 (Ct. App. 2004) ("Res judicata is an affirmative defense that must be pled at trial in order to be pursued on appeal."); *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) ("[A] party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not."); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("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 [court] to be preserved for appellate review."); *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (explaining that to be preserved for appellate review, an issue must have been "(1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity" (quoting Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002))).

2. We hold the master did not fail to apply the correct standard of proof as required by the Trust agreement. *See Smith v. Barr*, 375 S.C. 157, 160, 650 S.E.2d 486, 488 (Ct. App. 2007) ("Our scope of review for a case heard by a Master permits us to determine facts in accordance with our own view of the preponderance of the evidence."); *Bowles v. Bradley*, 319 S.C. 377, 380, 461 S.E.2d 811, 813 (1995) ("The primary consideration in construing a trust is to discern the settlor's intent."); *Holcombe-Burdette v. Bank of Am.*, 371 S.C. 648, 658, 640 S.E.2d 480, 485 (Ct. App. 2006) ("In ascertaining a settlor's intent, if the language of the trust instrument is perfectly plain and capable of legal construction, such language determines the force and the effect of the instrument.").

AFFIRMED.

MCDONALD and VINSON, JJ., and BROMELL HOLMES, A.J., concur.

Exhibit B

RECEIVED

Feb 29 2024

SC Court of Appeals

ELECTRONICALLY FILED - 2024 Mar 27 5:26 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1004257

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
TEASA K. WEAVER, MASTER-IN-EQUITY

Appellate Case No.: 2021-000816

Vicki Lynn Vergeldt, individually and as
Successor Trustee of the John Vergeldt, Jr.
Revocable living Trust dated September 27, 1978, ...Respondent,

v.

John Edward Vergeldt, ...Appellant.

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Appellant John Edward Vergeldt hereby petitions the Court for rehearing of its Opinion filed February 14, 2024.

1. The Court of Appeals erred in finding that Appellant's argument that the doctrine of res judicata barred Vicki from amending her petition to seek damages was not preserved for appellate review, and further erred in concluding that Appellant raised the issue of res judicata for the first time in his Motion for Reconsideration when the record indicates that Appellant raised this issue before the trial court. In order to be preserved for appellate review, "an issue must be raised to and ruled upon by the trial judge." *Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011) (citing *Wilder Corp v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)). However, "a party is not required to use the exact name of a

legal doctrine in order to preserve the issue.” *Id.* (citing *State v. Russell*, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001)). “The issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge. *Id.* In *State v. Russell*, this Court found an issue to be preserved even though the defendant did not use the exact term “corpus delicti” in his request for a directed verdict. 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). Similarly in the instant matter, while Appellant did not use the term “*res judicata*,” he did expressly assert to the trial court that the issues raised in Vicki’s Amended Petition had already been addressed and ruled on in prior litigation from 2014. (R. pp. 619-622, ¶¶ 13-24). Appellant specifically objected on the record, “So anything prior to that, it’s already been ruled, my father was in charge of. So a lot of things [Vicki’s counsel] brought up are things from 2008 or 2009.” (R. p. 719, lines 14-20) (Emphasis added). *Res judicata* bars a second suit where there is “(1) identity of parties; (2) identity of subject matter, and (3) adjudication of the issue in the first suit.” *Judy v. Judy*, 393 S.C. 160, 167, 712 S.E.2d 408, 412 (2011). The record before the Court demonstrates that Appellant objected to Vicki’s attempts to recover damages from Appellant when the final order from the 2014 litigation explicitly excluded Vicki’s claim for damages and absolved Appellant from any mishandling of the trust assets prior to his father’s death in 2013. Appellant also pleaded that the 2014 litigation and the final order resulting from that litigation were a defense to Vicki’s Amended Petition. (R. pp. 620-624 ¶¶ 12-15, 22, 23, 36). Accordingly, the Court of Appeals erred in finding that Appellant raised the issue of *res judicata* for the first time in his Motion for Reconsideration and this issue should be addressed on the merits on appeal.

2. The Court of Appeals erred in concluding that the master-in-equity did not fail to apply the correct standard of proof as required by the Trust agreement. On review of a case tried by a master-in-equity, While the Court is not required to disregard the findings of the master-in-equity, “the Court is permitted to determine facts in accordance with the Court’s own view of the preponderance of the evidence.” *Smith v. Barr*, 375 S.C. 157, 160, 650 S.E.2d 486, 488 (Ct. App. 2007). Upon review of the Record on Appeal, there is more than sufficient evidence to establish that the master-in-equity failed to recognize or apply the heightened standard of proof required by the Tenth Amendment to the Trust agreement as dictated by the settlor. The Tenth Amendment provides, “An individual Successor Trustee’s liability is limited to an act or omission committed in bad faith or with reckless indifference to the purpose of the trust or the interests of the beneficiaries.” (R. pp. 1266-1267). As set forth in Appellant’s briefing, it appears that the Tenth Amendment is consistent with settlor’s understanding of the family dynamic and relationship between Appellant and Vicki that he established a heightened burden of proof to determine whether the Trustee could be held liable for acts or omissions related to the administration of the Trust. See *Epworth Children’s Home v. Beasley*, 365 S.C. 157, 166, 616 S.E.2d 710, 715 (2005) (“The primary consideration in construing a trust is to discern the settlor’s intent.”). It’s likely that the settlor, Appellant and Vicki’s father, included the Tenth Amendment in the Trust agreement to prevent the very outcome which occurred in this matter. Despite this provision and heightened standard of proof, the master-in-equity specifically found Appellant liable in his capacity as Successor Trustee when there was no evidence in the record that any failures in the administration of the Trust after Appellant became Successor Trustee were made in bad faith or reckless indifference to the purpose of the

trust of the interests of the beneficiaries. (R. pp. 35-39). Following the hearing on Appellant's Motion for Reconsideration, the master found that Appellant "has cited not case or statutory law requiring a higher standard of proof, so the court finds and concludes that the applicable standard of proof is indeed the preponderance of evidence standard." This finding was clear error when the language of the trust, which set forth the standard of proof, was controlling. Accordingly, the Court of Appeals erred in finding that the master-in-equity applied the correct standard of proof.

For the reasons set forth above, Appellant John Vergeldt respectfully requests that this Court grant this Petition for Rehearing and reverse the decision of the trial court.

Respectfully submitted,

s/ Desa Ballard

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ATTORNEYS FOR APPELLANT

February 29, 2024

Exhibit C



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

CATHERINE S. HARRISON
CHIEF DEPUTY CLERK

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March 05, 2024

Desa Ballard, Esquire
226 State Street
West Columbia SC 29169

Mr. Harvey M. Watson, III, Esquire
226 State St
West Columbia SC 29169

Re: Vicki Vergeldt v. John Vergeldt
Appellate Case No. 2021-000816

Dear Counsel:

This will acknowledge receipt of the Petition for Rehearing.

By copy of this letter, opposing counsel is requested to file a return no later than ten (10) days from the date of this letter. A reply may be served and filed five (5) days from the date of service of the return to the petition for rehearing.

Very truly yours,

A handwritten signature in blue ink, reading "Jenny A. Kitchings".

CLERK

cc: Taylor Anthony Peace, Esquire

ROA 00639

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
	)	Case No. 2021-CP-10-04257
	)	Case No. 2021-CP-10-03640
Vicky Lynn Vergeldt, Individually,	)	
and as Successor Trustee of the John	)	
Vergeldt, Jr. Revocable Living Trust	)	MOTION TO RECONSIDER
Dated September 27, 1978,	)	
	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
John Edward Vergeldt	)	
Defendants.	)	
	)	
	)	

Pursuant to Rule 59(e), SCRCPP, defendant John Edward Vergeldt, (“Mr. Vergeldt”), seeks reconsideration of this Court’s Order granting Plaintiff’s Motion for Contempt and/or Sanctions and Denying Defendant’s Motion to Dismiss and Motion to Stay Proceedings, entered on March 28, 2024. In support of the instant Motion for Reconsideration, Mr. Vergeldt will show:

1. The Court erred in denying Defendant’s Motion to Dismiss on the grounds that Vicki Vergeldt has failed to comply with the provisions of Rule 241, SCACR and S.C. Code Ann. § 18-9-130(A)(2) and any court-ordered appraisal¹ was therefore premature.
2. The Court erred in denying Defendant’s Motion to Dismiss and failing to grant relief pursuant to Rule 12(b)(6), SCRCPP since Plaintiff has failed to comply with a condition precedent to foreclosing on any asset of Defendant by failing to comply with S.C. Ann. § 18-9-130(A)(2).

¹ There is no order for appraisal. The court’s order dated September 28, 2023 was an order granting a motion to compel, and it required the parties to agree on an appraiser, as well as a date and time for appraisal, which was done.

3. The Court erred in denying Defendant's Motion to Stay Proceedings in light of the status of the pending appeal and the likelihood of success on the merits of the appeal.
4. The Court erred in imposing sanctions for criminal contempt in the following particulars: (1) without finding a willful, knowing and intentional violation of a court order that specified in detail that which must be done; (2) in finding that Defendant willfully violated the Court's order dated September 28, 2023 when he did precisely what was required by agreeing to an appraiser and a date and time for appraisal, but the appraiser chosen by Plaintiff failed to keep the appointment and failed to notify Plaintiff's counsel for 45 minutes after the appointment time; and (3) in failing to find that Defendant's willful and intentional violation of a court order was established beyond a reasonable doubt.
5. The Court erred in considering and admitting the Affidavit of Kevin Lowry in support of Plaintiff's Motion for Contempt and/or Sanctions when the Affidavit was not timely filed pursuant to Rule 6(d), SCRCF.
6. The Court erred in finding that Mr. Vergeldt willfully violated the Court's order dated September 28, 2023, and further finding Mr. Vergeldt to be in contempt. "A willful act is defined as one done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say with bad purpose either to disobey or disregard the law." *State v. Bevilacqua*, 316 S.C. 122, 129, 447 S.E.2d 213, 217 (Ct. App. 1994) (citing *Spartanburg County Dep't of Social Services v. Padgett*, 296 S.C. 79, 370 S.E.2d 872 (1988)). Mr. Vergeldt showed of record that he did not willfully violate the Court's order, nor did he have the specific intent to violate the Court's order requiring an appraisal of his home and

he had the advice of counsel in leaving when the appraiser did not arrive within a reasonable time after the appointment was scheduled. As explained in his Affidavit, timely filed pursuant to Rule 6(d), SCRCP, on January 5, 2024, the appraisal was unable to go forward as scheduled on October 24, 2023, due to the fact that the appraiser arrived between 9:50 am and 10:00 am, almost an hour after the scheduled time for the appraisal, and Mr. Vergeldt needed to leave to make 10:30 am appointment.

7. The Court erred in finding that Mr. Vergeldt has taken no other steps to comply with the Court's order dated September 28, 2023 that would have mitigated his alleged violation of the Court's order. After the failed appraisal on October 24, 2023, Mr. Vergeldt informed Plaintiff's counsel that he was willing to make his property available for another appraisal so long as he had input on the appraiser and Plaintiff agreed to pay for the subsequent appraisal. This request was denied by the Plaintiff, who insisted on using Mr. Lowry's services and would not agree to cover the cost of a future appraisal.
8. The court erred in considering testimony that was apparently offered during the hearing held on January 8, 2024, when Mr. Lowry apparently testified that he lived in Mt. Pleasant. That is not of record.
9. The court erred in failing to apply the proper standard of proof in assessing Defendant to be in criminal contempt of court. Because the court did not provide Defendant with a method to purge the contempt, the sanction is one for criminal contempt which required a finding that Defendant's contemptuous conduct was established beyond a reasonable doubt. There was no finding that Defendant's contempt was established beyond a reasonable doubt.²

² S.C. Code § 15-39-490 provides the authority for the Master in Equity to assess contempt. However, the burden of proof is established by common law.

Respectfully submitted,

s/ Desa Ballard
Desa Ballard (S.C. Bar No. 498)
Harvey M. Watson III (S.C. Bar No. 74053)
Haley Hubbard (S.C. Bar No. 103195)

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ATTORNEYS FOR DEFENDANT

April 8, 2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2021-CP-10-4257
	)	
Vicki Lynn Vergeldt, Individually, and as	)	
Successor Trustee of the John Vergeldt, Jr.	)	
Revocable Living Trust dated September	)	
27, 1978,	)	
	)	PLAINTIFF’S REPLY TO DEFENDANT
	)	JOHN EDWARD VERGELDT’S MOTION
Plaintiff,	)	TO RECONSIDER
	)	
vs.	)	
	)	
John Edward Vergeldt and Teresa A. Shaw-	)	
Vergeldt,	)	
	)	
Defendants.	)	
	)	

NOW COMES Plaintiff Vicki Lynn Vergeldt, Individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable living Trust dated September 27, 1978 (“Plaintiff”), who, by and through the undersigned, files Plaintiff’s Reply to Defendant John Edward Vergeldt’s Motion to Reconsider (“Motion to Reconsider”).

ARGUEMNT AND DISCUSSION

I. The Court did not err in denying the Motion to Dismiss.

A. Plaintiff has not failed to comply with Rule 241, SCACR or S.C. Code Ann. §18-9-130 (A)(2) (1976), as amended.

While Defendant John Edward Vergeldt (“Defendant”) continues to assert Plaintiff’s efforts to collect the judgment (“Judgment”) and damages granted her in the case of Vicki Lynn Vergeldt, Individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 v. John Edward Vergeldt (C/A No.: 2016-CP-46-00820) are improper due to the Judgment being on appeal, Plaintiff, under South Carolina law, is allowed to proceed with same.

Rule 241, SCACR provides, “As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court.” Rule 241(a), SCACR. “The exceptions to the rule are found in statutes, court rules, and case law. Where specific conditions must be met before the exception applies, those conditions must be strictly complied with. A list of some, but not all of those exceptions to the general rule is: (1) money judgments as provided in S.C. Code Ann. §18-9-130...” Rule 241(b), SCACR (emphasis added).

Under S.C. Code Ann. §18-9-130 (A)(1), “A notice of appeal from a judgment directing the payment of money does not stay the execution of the judgment unless the presiding judge before whom the judgment was obtained grants a stay of execution. If the presiding judge grants a stay of execution and requires a bond or other surety to guarantee the payment of the judgment pending the appeal, the amount of the bond....may not exceed the amount of the judgment or: (b) one millions dollars, whichever is less, or for all other entities or individuals.” S.C. Code Ann. §18-9-130(A)(2) provides, “A plaintiff may not enforce a sale of property after a notice of appeal is filed without given an undertaking or bond to the defendant with two good sureties, in double the appraised value of the property or double the amount of the judgment, conditioned to pay all damages the defendant may sustain by reason of the sale in case the judgment is reversed.” S.C. Code Ann. §18-9-130(A)(2) (1976), as amended (emphasis added)

In this matter, the Judgment, which Defendant has appealed, awards Plaintiff damages, and the same constitutes a debt owed Plaintiff by Defendant. In other words, the Judgment directs the payment of money, and Rule 241(a), SCACR, would stay the matters ordered in the Judgment since it is on appeal. However, Rule 241(b)(1), SCACR, explicitly excepts money judgments, like the Judgment, from the general rule. It directly craves reference to S.C. Code Ann. §18-9-130

(1976), as amended, and provides that any conditions precedent prior to the imposition of the stay must be strictly complied with. See Rule 241(b), SCACR.

With reference to S.C. Code Ann. §18-9-130 (1976), as amended, Defendant has not met the conditions of S.C. Code Ann. §18-9-130(A)(1) (1976), as amended. No stay has been issued by the Honorable Teasa Kay Weaver, the Master in Equity for York County and presiding judgment before whom the Judgment was obtained, and Plaintiff is unaware of a stay being sought. Defendant has also not posted a bond to guarantee payment of the Judgment pending the outcome of the appeal. Defendant must take these actions prior to the imposition of the stay prohibiting Plaintiff from proceeding.

However, Defendant's argument centers around S.C. Code Ann. §18-9-130 (A)(2) (1976), as amended, and the fact Plaintiff has not posted a bond for twice the fair market value of 1523 Star Flower Alley, Johns Island, South Carolina 29455 ("Property"). Plaintiff believes she has a lien against the Property up to the amount of the Judgment which she is trying to foreclose. However, S.C. Code Ann. §18-9-130 (A)(2) applies only to the enforcement of a sale of property and would only come into effect if the Court determines Plaintiff has a lien against Property represented by the Judgment, the amount of the lien, that Plaintiff is entitled to foreclose said lien and have the Property sold at a foreclosure sale, and Plaintiff seeks to enforce that order. Until then, S.C. Code Ann. §18-9-130 (A)(2) is inapplicable.

As a result, it was proper for the Court to deny the Motion to Dismiss as Plaintiff is entitled to proceed with her efforts to collect the Judgment, even if it is on appeal, as Defendant has failed and refused to comply with S.C. Code Ann. §18-9-130(A)(1) and/or S.C. Code Ann. §18-9-130 (A)(2) is currently inapplicable.

B. The Court did not err in denying the Motion to Dismiss under Rule 12(b)(6), SCRPC

The Court did not err in denying the Motion to Dismiss under Rule 12(b)(6), SCRPC.

As discussed *supra*, S.C. Code Ann. §18-9-130(A)(2) (1976), as amended, is not applicable to this matter at this point nor has Defendant complied with the provisions of S.C. Code Ann. §18-9-130(A)(1) (1976), as amended.

As a result, the question is whether the Amended Complaint fails to state a cause of action under Rule 12(b)(6), SCRPC which provides, “Every law, in fact or fact, to a cause of action in any pleading, whether a claim.....shall be asserted in the responsive pleading thereto if one is required except that the following defenses may at the option of the pleader be made by motion....(6) failure to state facts sufficient to constitute a cause of action.” Rule 12(b)(6), SCRPC. “In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on the allegations set forth in the complaint.” Doe v. Marion, 373 S.C. 390, 396, 645 S.E. 2d 245, 247 (2007). “The question is whether, in the light most favorable to the plaintiff, with every doubt resolved on his behalf, the complaint states a valid claim for relief.” Plyler v. Burns, 373 S.C. 637, 645, 647 S.E. 2d 188, 192 (2007). “If the facts alleged and inferences deducible therefrom would entitle the plaintiff to any relief on any theory of the case, then dismissal for failure to state facts sufficient to constitute a cause of action is improper.” Sloan Const. Co., Inc. v. Southco Grassing, Inc., 377 S.C. 108, 113 659 S.E. 2d 159, 161 (S.C. Ct. App. 2007). “The complaint should not be dismissed for failure of the pleading to state facts sufficient to constitute a cause of action merely because the court doubts the plaintiff will prevail in the action.” Doe, 373 S.C. 390, 396, 645 S.E. 2d 245, 248 (2007).

In this matter, it is clear the Amended Complaint states a cause of action against Defendant

for the foreclosure of Plaintiff's judgment lien that attaches to the Property. This is seen in the fact that the Amended Complaint alleges, in general: 1) that Plaintiff is the holder of the Judgment, 2) that the Judgment attaches to the Property by virtue of S.C. Code Ann. §15-35-810 (1976), as amended, 3) that Defendant has failed and refused to pay the Judgment 4) and that Plaintiff is entitled to foreclose the lien, have the Property sold, and have the resulting proceeds applied to the amounts owed under the Judgment. See Pltf's Amended Comp. ¶¶ 14, 23-30. At a minimum, the cause of action can be inferred from the allegations of the Amended Complaint when they are viewed in a light most favorable to Plaintiff when solely looking at the allegations thereof.

II. The Court did not err in denying the Motion to Stay Proceedings.

The Court also did not err in denying the Motion to Stay Proceedings.

As discussed *supra*, Rule 241, SCACR, provides Defendant with no relief regarding the stay of the proceedings considering collection of the Judgment is not subject to the general rule setting forth the stay. See Rule 241, SCACR. To the extent a stay could be imposed, any conditions prior to its imposition must be strictly complied with, which, in this case, would require Defendant to apply to the trial judge, Judge Weaver, and have her impose the stay. See Rule 241, SCACR; S.C. Code Ann. §18-9-130 (A)(1) (1976), as amended. This request would also have to be accompanied by Defendant submitting a bond equal to the amount of the Judgment while it is on appeal. Id. He has not done so, and, as a result, the Court did not err in denying the Motion to Stay Proceedings.

Concerning the status of the appeal as grounds for granting a stay, Plaintiff is not aware of any statutory authority, rule of procedure, or case law that would require a Court to stay enforcement of a judgment based on an appellant's belief that they would succeed on the merits of

the appeal, and Defendant cites to none.¹ To determine it erred on that ground, the Court would, effectively, be finding that an appeal could be stayed based upon an appellant's subjective belief they are going to succeed thereby rendering the statutory scheme moot. This could not have been the intent of the General Assembly in enacting this statutory scheme. See South Carolina Public Interest Foundation v. Calhoun County Council, 432 S.C. 492, 497, 854 S.E. 2d 836, 838 (2021) ("The primary rule of statutory construction is to ascertain the intent of the General Assembly.... 'Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.....Accordingly, courts will 'give words their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.'") (internal citations omitted).

As a result, the Court did not err in denying the Motion to Stay Proceedings.

III. The Court did not err in granting the Motion for Contempt and/or Sanctions.

The Court similarly did not err in granting the Motion for Contempt and/or Sanctions.

A. The Court sufficiently found Defendant willfully and intentionally violated the Order to Compel

As discussed at length in Plaintiff's Memorandum in Support of Motion for Contempt and Sactions filed March 27, 2024, which arguments are incorporated herein, the Order to Compel filed September 28, 2023, required Defendant to participate in four (4) separate actions. These actions were: 1) agree with Plaintiff upon a licensed South Carolina real estate appraiser and/or home inspector, 2) make the Property and the interior and exterior single family residence located thereon and other attendant and appurtenant improvements available for appraisal and/or

¹ Subsequent to the filing of Defendant's Motion to Reconsider, Plaintiff's and Defendant's counsel were informed Defendant's Petition for Rehearing had been denied by Order filed April 11, 2024.

inspection by real estate appraiser and/or home inspector, 3) make the Property available at the convenience of the appraiser and/or home inspector, and 4) that the appraisal and/or home inspection was to take place within forty five (45) days of the Order to Compel.

Regarding the first action, while Defendant claims the real estate appraiser, Mr. Lowry, was selected by Plaintiff, he cannot argue he did not agree to or did not object to the same until the events of October 24, 2023. However, the emails between Plaintiff's counsel and Defendant's counsel on October 24, 2023, indicate Defendant raised an objection to Mr. Lowry only after the events of the same day. It was also on the same day Defendant indicated he had begun preliminary discussions with another appraiser, the identity of whom was requested by Plaintiff but not disclosed until the initial Motion to Reconsider filed in this matter. If Defendant indeed had an issue or objection to Mr. Lowry or found him unqualified, he could have filed a Motion to have the Court appoint one or extend the time for compliance, which did not occur². Rather, he unilaterally, voluntarily, and willfully decided not to work within the parameters set by the Court regarding the selection of an appraiser and/or home inspector and act on his own in contravention to the Court's instructions.

As to the second and third actions required by the Order to Compel, there is no dispute Defendant appears to have initially agreed to make the Property available for appraisal by Mr. Lowry; however, the Motion to Stay Proceedings, the Affidavit of John Edward Vergeldt and the Affidavit of Kevin clearly indicate Defendant unilaterally and voluntarily chose to deny Mr. Lowry access to the Property only after he was informed Mr. Lowry would be late due to traffic and failed and refused to provide any additional dates and times for Mr. Lowry to appraise same. The willfulness of Defendant's conduct is seen in the Affidavit of John Edward Vergeldt by his denying

² Instead, Defendant chose to file the Motion to Stay on October 25, 2023 objecting to the entirety of Plaintiff's efforts to collect on the Judgment.

Mr. Lowry access while he was at the Property and, apparently, prior to taking the dogs for a walk, an action that could have been performed by the purported Ms. Shaw or in the fifteen minutes between the time Defendant was informed Mr. Lowry would be late and his arrival.³

As to the fourth action required by the Court, no appraisal happened within forty-five (45) days, and this is the direct result of Defendant's actions as discussed above. It also appears that Defendant was perfectly capable of making the Property available as he did the same to the appraiser of his own choosing without any attempt to consult or reach an agreement with Plaintiff regarding same. Defendant simply chose not to comply with the parameters of the Order to Compel and obtained his own appraisal that was conducted outside of the forty-five (45) day requirement of the Order to Compel that was not produced to Plaintiff until it was filed with the initial Motion to Reconsider, which appears to be his way of attempting to mitigate his violations but can be considered nothing but further evidence of same.

Accordingly, Defendant's actions contained in the record can only be considered to have been conducted willfully, voluntarily, and with a specific intent to violate the Order to Compel, and, as such the finding of contempt was proper.⁴

B. The Court properly applied the standard of proof in assessing Defendant to be in contempt of Court.

In light of these facts, Defendant claims the Court erred by failing to apply the proper standard of proof. However, there is enough evidence to find Defendant in contempt under the standard of proof for civil contempt or criminal contempt.

"The major factor in determining whether a contempt is civil or criminal depends on the

³ Defendant's explanation of the events of October 24, 2023 are made more confusing and/or less credible by his statements he was leaving to walk his dogs while being worried about missing doctor's appointments scheduled for soon thereafter.

⁴ See Brantley v. Brantley, 441 S.C. 284, 893 S.E. 2d 349, 358 (Ct. App. 2023); Noojin v. Noojin, 417 S.C. 300, 789 S.E. 2d 769 (Ct. App. 2016); Abate v. Abate, 377 S.C. 548, 660 S.E. 2d 515 (Ct. App. 2008)

purpose of the contempt ruling...The purpose of civil contempt is to coerce the defendant to do the thing required by the order for the benefit of the complainant. The primary purpose of criminal contempt is to preserve the court's authority and to punish for disobedience of its orders. If it is for civil contempt the punishment is remedial.... But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the Court.” Miller v. Miller, 375 S.C. 443, 456, 652 S.E. 2d 754, 761 (Ct. App. 2007) (internal citations omitted). “An unconditional penalty is criminal in nature because it is solely and exclusively punitive in nature...If the sanction is a fine, it is punitive when it is paid to the court.” Id. “If the sanction is a fine, it is remedial and civil if paid to the complainant even though the contemnor has no opportunity to purge himself of the fine....” Id., 375 S.C. at 457, 652 S.E. 2d 761 (Ct. App. 2007). The distinction between civil and criminal contempt is critical...” Civil contempt must be proved by clear and convincing evidence; however, criminal contempt must be proved beyond a reasonable doubt. Id. “Intent for purposes of criminal contempt is subjective, not objective, and must necessarily be ascertained from all the acts, words, and circumstances surrounding the occurrence.” Id. “Courts, by exercising their contempt power, can award attorney’s fees under a compensatory contempt theory....The award of attorney’s fees is not a punishment but an indemnification to the party who instituted the contempt proceeding.” In the Matter of the Estate of Combis, 439 S.C. 485, 488, 888 S.E. 2d 1, 7 (Ct. App. 2023) (citing Poston v. Poston, 331 S.C. 106, 502 S.E. 2d 86 (1988)).

In this matter, the Court correctly found Defendant to be in contempt under either standard of proof. As discussed above, there is clear and convincing evidence and it is beyond a reasonable doubt that, at one point, an agreement had been reached between Plaintiff and Defendant regarding the appraiser, and the date and time of the appraisal. There is also clear and convincing evidence and it is beyond a reasonable doubt Defendant was informed Mr. Lowry would be late, and, upon being informed of such, Defendant decided he would no longer wait, work with Plaintiff to

schedule another date and time for Mr. Lowry to come to the Property, or allow Mr. Lowry access to same. There is also clear and convincing evidence that an unpleasant interaction then occurred between Defendant and Mr. Lowry where Defendant, while he was leaving to walk his dogs in a manner that he never lost sight of Mr. Lowry, denied Mr. Lowry access to the Property and the interior and exterior of the single-family residence. Mr. Lowry's and Defendant's respective affidavits dispute the events of the actual interaction, but it is beyond a reasonable doubt Mr. Lowry was not permitted to enter the residence. The evidence is further clear and convincing and it is beyond a reasonable doubt that no additional real estate appraiser was suggested by Defendant to see if an agreement could be reached or compliance with the Order to Compel could be had. The first time a subsequent real estate appraiser and/or home inspection was mentioned was after the initial Motion for Reconsideration was filed. All of this evidence makes it clear and beyond a reasonable doubt that Defendant violated the Order to Compel when it suited him and decided to flout the Court's directives only once it became convenient for him to do so.

As a result, under any standard of proof, the Court properly found Defendant in contempt and properly evaluated same.

C. The Court did not err in considering and admitting the Affidavit of Kevin Lowry

With regard to Rule 6(d), SCRCP, the same provides, "When a motion is to be supported by affidavit, the affidavit shall be served with the motion....unless the court permits them to be served as some other time. The moving party may serve reply affidavits at any time before the hearing commences." Rule 6(d), SCRCP.

To the extent Defendant argues the Affidavit of Kevin Lowry was not timely filed, Defendant has not identified or presented any evidence that the Affidavit of Kevin Lowry was to be filed in support of the Motion for Contempt as required by Rule 6(d), SCRCP; however, even

if it was, the Court has authority to accept it and consider it. That being said, the public index and the timeline appear to indicate the Affidavit of Kevin Lowry was filed as a reply affidavit to the one filed by the Defendant, which is also permissible under Rule 6(d), SCRPC.

As a result, the Court properly considered same.

D. In considering the Affidavit of Kevin Lowry, the Court properly considered whether Mr. Lowry lived in Mount Pleasant.

At the March 28, 2023, hearing, the Court indicated Mr. Lowry testified that he lived in Mount Pleasant. Mr. Lowry reported that to the Court on January 8, 2024; however, Plaintiff's counsel does not recall with certainty whether he formally testified. However, the Affidavit of Kevin Lowry that was before the Court on January 8, 2024, and March 28, 2024, indicates Mr. Lowry lives in Mount Pleasant, and, as such, it was not err for the Court to consider same.

CONCLUSION

For the foregoing reasons, the Motion to Reconsider should be denied.

Respectfully Submitted,

HARRELL, MARTIN & PEACE, P.A.

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April 18, 2024
Chapin, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

May 13 2024

SOUTH CAROLINA SUPREME COURT

APPEAL FROM YORK COUNTY
Teasa Kay Weaver, Master-In-Equity

Unpublished Opinion No. 2024-UP-052 (S.C. Ct. App. filed February 14, 2024)
Trial Court Case No.: 2016-CP-46-00820

Vicki Lynn Vergeldt, Individually and as Successor
Trustee of the John Vergeldt Jr. Revocable Living Trust
Dated September 27, 1978,.....Respondent,
v.
John Edward Vergeldt Petitioner.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Teasa Kay Weaver, Master-In-Equity

Unpublished Opinion No. 2024-UP-052 (S.C. Ct. App. filed February 14, 2024)
Trial Court Case No.: 2016-CP-46-00820

Vicki Lynn Vergeldt, Individually and as Successor
Trustee of the John Vergeldt Jr. Revocable Living Trust
Dated September 27, 1978,.....Respondent,
v.

John Edward Vergeldt Petitioner.

**PETITION FOR
WRIT OF CERTIORARI**

Pursuant to Rule 242, SCACR, Petitioner John Edward Vergeldt (hereafter “John”) hereby petitions the Supreme Court or any two justices thereof, for a writ of certiorari to the Court of Appeals to rehear and reconsider issues ruled upon in the Court of Appeals’ decision in this matter, issued on February 14, 2024, which affirmed the master-in-equity’s order granting Vicki Vergeldt, individually and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust a money judgment (hereafter “Vicki”) against John. Petitioner sought rehearing before the Court of Appeals, which was denied by order dated April 11, 2024.

CERTIFICATE OF COUNSEL

Counsel for Petitions certifies that the Petition for Rehearing by the Court of Appeals was made and finally ruled on by the Court of Appeals on April 11, 2024.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in ruling that John did not present or preserve issues regarding the preclusive effect of Judge Kimball's order in the 2014 case, which precluded consideration of the issues on appeal in the instant case? The Court of Appeals ruling contravenes prior Supreme Court precedent regarding issue preservation.

STATEMENT OF THE CASE

John Vergeldt, Jr. deceased, created a trust with numerous amendments executed prior to his death. His revocable trust was created on September 27, 1978 and at the time of the Eighth amendment in 2009, he restated and amended his trust entirely. (R.p.3;¹ pp. 80 -133). The beneficiaries of his trust were his son, Petitioner John Edward Vergeldt, and daughters Patti Vergeldt Downey and Vicki Lynn Vergeldt. (R. p. 4). A Ninth amendment was executed in 2010, (R. pp. 136-138) and a Tenth amendment in 2011. (R. pp. 140-144). The Tenth amendment added a "no contest" clause to the trust specifically excluding as a beneficiary of the trust any person who "objects in any manner to any action taken or proposed to be taken in good faith by the Successor Trustee. . .". (R. p. 144).

The testator died on July 9, 2013. At the time of his death, Petitioner John E. Vergeldt was the co-trustee of the decedent's trust. In his later years, testator's physical agility deteriorated, but his mental acuity was not compromised until late fall of 2012, and in March 2013, Petitioner John E. Vergeldt filed a petition in York County seeking appointment of a guardian for his father. *Id.*

¹ Order of Judge Kimball filed August 31, 2015 in Case No. 2014-CP-46-1956 ("the 2014 case").

“Due to opposition by Vicki, that proceeding was not completed prior to [decedent]’s death.” *Id.* At the time of his death, decedent was living in South Carolina with Petitioner. (R. p. 5).

As found by Judge Kimball in his 2015 order, the siblings “have a poor and strained relationship. Their communications foster acrimony and suspicion.” *Id.* Vicki demanded accountings and claimed John failed to provide them. Vicki initiated an action on February 28, 2014 (“the 2014 action”) seeking limited and purely equitable relief, *i.e.*, asking the Court to determine John’s obligations under the trust since decedent’s death. In his final order, Judge Kimball repeatedly stressed the limited nature of the relief Vicki sought in the 2014 action: “Her prayer only seeks an interpretation of the applicable Michigan statutes and the often-amended Trust agreement.” *Id.*

Vicki’s complaint in the 2014 action and Judge Kimball’s final order in the 2014 included reference to all ten (10) of the trust amendments made by decedent prior to his death. (R. pp. 67-78; pp. 277-292; R. pp. 3 -11). In his final ruling, Judge Kimball struggled to answer only the claims that Vicki that asserted, because they were so limited, and, in actuality, should have included the claims she subsequently asserted in the 2016 action and amendment to the 2016 amendment.

. . . I find that in the posture of Vicki’s prayer for relief, she has not directly challenged John’s actions as Successor Trustee. Her prayer only seeks an interpretation of the applicable Michigan statutes and the often-amended Trust agreement. . . No declaration concerning probable cause of the Successor Trustee’s performance of his duties, as such issue is not presented in this action. . .

(R. pp 10-11).

Vicki filed a motion to reconsider Judge Kimball’s order, but did not appeal it. (R. pp. 392-395. Specifically included in her motion to reconsider, Vicki challenged Judge Kimball’s

express finding that John owned no duty to any beneficiary “until Mr. Vergeldt’s death.”² (R. p. 303; *see also* R. p. 9; Judge Kimball’s order). Judge Kimball’s order, therefore, became the law of the case. *Judy v. Martin*, 381 S.C. 455, 674 S.E.2d 1551 (2009), *also citing Bakala v. Bakala*, 352 S.C. 612, 576 S.E.2d 156 (2003) (holding a family court judge could not overrule the prior unappealed order of another family court judge because it became the law of the case.)

Almost two years later, Vicki filed a second action in Probate Court in York county, in her individual capacity, again seeking only equitable relief, but this time she requested the removal of John as Successor Trustee and she argued the same issue she had raised in the Motion to Reconsider in the 2014, *i.e.*, whether John owed her any duty prior to decedent’s death (R. p. 409, ¶ 15). Case No. 2016-CP-46-0820 (“the 2016 case”). John’s answer raised multiple defenses, including waiver, estoppel, laches and unclean hands and a counterclaim for abuse of process, based on the prior litigation, which was not appealed. (R. pp. 396-404; pp. 620-624, ¶¶ 12-15, 22, 23, 36). Specifically, John pleaded that the 2014 case:

[T]erminated in [John’s] favor, as it resulted in an Order declaring that [John] owed no duties as Successor Trustee of the trust until May 6, 2013, the date the Court concluded the Settlor became mentally incapacitated. . . The Court’s order in the [2014 case] determined that [John] owed no such duties. . . [Vicki] did not appeal the Order.

(R. 401, ¶¶ 52-53).

The 2016 action again sought only equitable relief, *i.e.*, removal of John as successor trustee and injunctive relief. (R. pp. 405-494). Three years later, Vicki’s counsel moved to amend

² Vicki argued in her Motion to Reconsider that “Defendant [John] can be held responsible to her, as a remainder beneficiary of the Trust, for any acts or omissions during [decedent’s] life which damaged her remainder interest in the trust.” (R. p. 393).

the 2016 action to assert a claim for damages. (R. p. 521-523).³ Over John's objection, the trial judge granted the motion, and on June 20, 2019, the 2016 action was amended to include a claim for damages against John. (R. pp. 26-30).

During trial of the 2016 action, John argued:

Judge Kimball ruled that my father became incapacitated and that he was, in fact, in charge of all of his finances until May 6th. . . 2013. So anything prior to that, it's already been ruled, my father was in charge of. So a lot of things that [Vicki's] lawyer are things from 2008 or 2009.

(R. p. 719, lines 14-20).

The expert presented by Vicki in the trial of the 2016 testified she went "as far as 2008 if I felt that was necessary; originally it was like 2009 through December 31, 2016 and I think the litigation was going on then." (R. p. 733, line 24 – p. 734, line 6). The expert's report went back to include time periods when the deceased was still alive. (R. p. 741 line 10 – 17; p. 743, line 3 – 23). The expert included analysis of a CD opened in August of 2008 for \$50,000.00, which was not included in the time frame which for which Judge Kimball has found John to be responsible. (R. p. 745, lines 12-19).⁴ The expert testified John "would have benefited from hiring a bookkeeper or an accountant to keep his information for him" and it would have cheaper than having hired her to reconstruct the accounts. (R, p. 750, lines 13-25).⁵ It was on that basis that

³ The motion to amend followed a motion by John to dismiss the action, which asserted that since John had resigned as Successor Trustee, there was no relief left to be granted. (R. pp. 515-516). Only then, six years after the death of the decedent and five years after Judge Kimball's order establishing the law of the case did Vicki assert a claim for damages against John. (R. pp. 3-11; pp. 26-30).

⁴ Mr. Vergeldt attempted to object to the expert's testimony on several occasions, but on each occasion he was chastised by the trial judge and told he would be required to limit his questioning to cross-examination. (R. p. 736, lines 9-17; p. 741, line 18 - p. 742, line 18)

⁵ As pointed out, much of the criticism of the expert related to payments made to caregivers, which included the time period before decedent died, and had been specifically ruled by Judge Kimball that John owed no fiduciary duty. (R. p. 742, line 21 – p. 746, line 23).

she testified that John “breached his duties under the trust agreement.”). (R. p. 751, lines 13- p. 752, line 7).

During cross, John attempted to point out the time period for which Judge Kimball had ruled he owed a fiduciary duty, but he was again cut off by the Court. (R. p. 757, line 1 – p. 758 line 20) (the expert testified she had considered records back to 2008). The expert confirmed her examination went back to 2008, a period of time for which John was not responsible per Judge Kimball’s order. (R. p. 760, lines 19- p. 761 line 17).

The trial judge ruled in the final order in the 2016 action (R. pp. 31-42) that John owed a fiduciary duty to Vicki well before the decedent passed away and awarded judgment in favor of Vicki against John, which was in direct contravention with Judge Kimball’s order in the 2014 action (R. pp. 3-11), which was unappealed and was therefore the law of the case.

John filed a Motion to Reconsider (R. pp. 631 – 633) and an Amended Motion to Reconsider (R. pp. 635 – 638), both of which raised multiple issues including issue preclusion based on the unappealed order in the 2014 matter. The motions to reconsider also asserted error in the 2020 order allowing an amendment to include a prayer for damages, based again on the finality of the order in the 2014 action. *Id.* Following a hearing, John’s petitions were denied. (R. pp. 46-65). The trial judge erroneously found, on rehearing, that issue preclusion and *res judicata* did not bar Vicki’s claim for damages. Among other things, the trial judge ruled that the issues were not raised in John’s answer. (R. pp. 40-50). This was clear error. As noted above, all these issues were raised in John’s answer. (R. pp. 396-404; pp. 620-624, ¶¶ 12-15, 22, 23, 36). Additionally, except when the trial judge prevented him from making objections, John objected at

trial to consideration of issues that were precluded by Judge Kimball's order in the 2014 matter. (R. p. 719, lines 14-20).

COURT OF APPEALS

On appeal, John asserted in Issue I that the trial judge had erred in allowing Vicki to amend the 2016 complaint to seek damages, when the issue was precluded by Judge Kimball's earlier order in the 2014 order. (Appellant's Final Brief pp. 16-21). After oral argument, the Court of Appeals found that the issues regarding issue preclusion were not preserved. *Vergeldt v. Vergeldt*, Unpublished Opinion No. 2024-UP-052 (Filed February 14, 2024). On rehearing, the Court of Appeals mistakenly ruled that John first raised the issue in his petition for rehearing. As demonstrated above, John has repeatedly and consistently argued during the 2016 litigation that Judge Kimball's order determined that his fiduciary duty to Vicki did not begin until the decedent died, and that John owed no fiduciary duty to Vicki until that time. At no point has John abandoned this argument.

John filed a petition for rehearing in which he pointed out that he sufficiently raised these related issues, even though he did not expressly use the words "issue preclusion" or "res judicata", citing existing Court of Appeals precedent. (Petition for Rehearing filed February 29, 2024). The Court of Appeals requested a return, which was filed on March 15, 2024, and John replied on March 20, 2024, pointing out additional specific pages to the Record on Appeal where the issue was preserved during trial. (R. pp. 1081-1082). The Petition for Rehearing was denied without comment. (Order denying rehearing dated April 11, 2024).

ARGUMENT

This Court has spoken repeatedly and explicitly on the requirements for preserving issues on appeal. *Blanding v. Long Beach Mortgage Co.*, 379 S.C. 206, 665 S.E.2d 608 (2008). "It is

well settled that an issue cannot be raised for the first time on appeal but must have been raised and ruled on by the trial judge” *Id.* While the trial judge overlooked and did not address John’s raising of the issue in his pleadings, during the litigation of the instant case, John repeatedly raised the issue of the effect of Judge Kimball’s order in the 2014 case as barring Vicki’s claim for damages against him in the instant case. *See* specific citations to the record included in the Statement of the Case.

In the Notice of Appeal, John not only appealed the trial judge’s final order and order denying rehearing in the instant case, he also expressly appealed the order that allowed the amendment of the 2016 action to include a prayer for damages. (R. pp. 658-708; Notice of Appeal filed August 2, 2021, which included an appeal of the trial court’s order dated June 19, 2019 and was an interlocutory order not appealable at that time, but is now appealed pursuant to Rule 54(b) and S.C. Code Ann. § 14-3-330(1)).

“The right of appeal arises from and is controlled by statutory law.” *Ex pargie: Capital U-Drive-It Inc.*, 369 SC 1, 6, 630 S.E.2d 464, 467 (2006). Section 14-3-330(1) expressly permits an appeal of an order which would have been interlocutory, and not immediately appealable, when issued, but when joined in appeal from a final judgment, is properly presented on appeal. The Court of Appeals violated § 14-3-330 when it refused to address the issue preclusion and *res judicata* effect of Judge Kimball’s order in the 2014 case, when it was *specifically* appealed as a separate order on appeal. Indeed, the Court of Appeals’ decision ignores the separate appeal, which was argued part-and-parcel of Issue One on appeal, as set forth in John’s brief on appeal.

Vicki argues that dicta in Judge Kimball’s order somehow preserved to her the right to bring a later action to seek damages. It is true that Judge Kimball’s order states: “I make no finding

relating to the liability of any part or the lack thereof, as no claim is stated for breach of any duty, and no relief is sought from the Court to compel the trustee to perform any duties that may be required.” (R. p. 4). Judge Kimball pointed out repeatedly the deficiencies in Vicki’s 2014 pleading, noting that he did not rule upon numerous issues because they were not raised by the pleadings: (1) liability of any party or lack thereof; (2) whether John correctly applied Paragraph Five of the Trust agreement; (3) no challenge was made to the actions of the trust or probable cause to bring this action; and (4) “the propriety of John’s management of trust assets and affairs prior to becoming Successor Trustee.” (R. p. 4; pp. 8-10).

Indeed, under the Rules of Civil Procedure, it could be argued that Vicki’s failure to bring a claim for damages in the 2014 lawsuit precluded any subsequent claim for damages that she had already allegedly sustained when the 2014 action was brought, since decedent was already deceased when the first action was filed. *Lebovitz v. Mudd*, 293 S.C. 49, 358 S.E.2d 698 (1987). *See also Oskin v. Johnson*, 400 S.C. 390, 735 S.E.2d 459 S.E.2d 459 (2012) (Hearn, J, dissenting and concurring).

The Court of Appeals’ refusal to recognize that John preserved the issue regarding the preclusive effect of Judge Kimball’s ruling in the 2014 case, where Judge Kimball went out of his way to expressly state what he was not ruling on, created a different standard of review on appeal limited to John.

This Court does not refuse to address issues under a phantom claim of failure to preserve and the Court of Appeals’ decision in this case is inconsistent with multiple prior decisions of this Court. *See Eades v. Palmetto Cardiovascular and Thoracic PA*, 422 S.C. 196, 810 S.E.2d 848 (2018) (finding that an issue is preserved for appellate review and addressing the merits of the

issue on appeal); *see also Historic Charleston Holdings LLC v. Mallon*, 381 S.C. 417, 673 S.E.2d 448 (2009) (deciding an issue that is preserved for appellate review is in the interest of judicial economy), citing *I'On LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Even if Judge Kimball intended to reserve to Vicki the ability to file a second action seeking damages, he had no authority to do so, nor did Vicki request that relief.

John respectfully asserts that the Court of Appeals erred in failing to agree that he preserved (repeatedly) the issue of the preclusive effect of Judge Kimball's order in the 2014 action where, arguably under Rule 18, SCRPC, Vicki could have asserted a claim for damages. Vicki certainly could have asserted a claim for damages in this action when it was filed, but she waited almost three (3) years to move to amend and did so only after John's counsel moved for dismissal of the action and judgment on the pleadings.

CONCLUSION

John respectfully requests that this Honorable Court grant the writ of certiorari, dispense with further briefing, and reverse the decision of the Court of Appeals, with direction to address the issue it found unpreserved. It is undisputed that John preserved this issue at every point that he could. It should not be necessary to brief this issue again. The appellate record is sufficiently complete so that the Court of Appeals can decide this issue if it will look at it on the merits. Indeed, the Court of Appeals has offered no explanation for not doing so.

[signature block next page]

Respectfully submitted,

s/ Desa Ballard

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May 13, 2024

ATTORNEYS FOR PETITIONER

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
MIKELL R. SCARBOROUGH, CIRCUIT COURT JUDGE
Case No. 2021-CP-10-04257

Vicki Lynn Vergeldt, individually and as
Successor Trustee of the John Vergeldt, Jr.
Revocable living Trust dated September 27, 1978, ...Respondent,

v.

John Edward Vergeldt, ...Appellant.

NOTICE OF APPEAL

Appellant John Edward Vergeldt (hereafter “Appellant”) appeals from the trial court’s Order on Plaintiff’s Motion for Contempt and Sanctions, Defendant’s Motion to Stay Proceedings and Defendant’s Motion to Dismiss that was filed February 2, 2024, which was received by Appellant on February 2, 2024. A copy of the order is attached hereto as **Exhibit A**. Appellant also appeals the Form 4 Order on multiple motions that was filed on March 28, 2024, and was received by Appellant on March 28, 2024. A copy of the order is attached hereto as **Exhibit B**. Lastly, Appellant appeals the Order denying the Motion for Reconsideration that was filed on May 6, 2024, and was received by Appellant on May 6, 2024. A copy of the order is attached hereto as **Exhibit C**.

[signature block next page]

Respectfully submitted,

s/ Desa Ballard

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ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) CIVIL ACTION NO.: 2021-CP-10-04257

Vicki Lynn Vergeldt, Individually, and as
Successor Trustee of the John Vergeldt, Jr.
Revocable Living Trust dated September
27, 1978,

Plaintiff,

vs.

John Edward Vergeldt and Teresa A. Shaw-
Vergeldt,

Defendants.

**ORDER ON PLAINTIFF'S MOTION FOR
CONTEMPT AND SANCTIONS,
DEFENDANT'S MOTION TO STAY
PROCEEDINGS, AND DEFENDANT'S
MOTION TO DISMISS**

RECEIVED

Jun 04 2024

SC Court of Appeals

THIS MATTER came before me on the 8th day of January, 2024 for a hearing on the Motion for Contempt and/or for Sanctions (“Motion for Contempt”) filed by Plaintiff Vicki Lynn Vergeldt, Individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 (“Plaintiff”) on November 3, 2023 in which she seeks to hold Defendant John Edward Vergeldt (“Defendant”) (Plaintiff and Defendant are sometimes collectively referred to herein as “Parties”) in contempt for violating the Court’s Order on Plaintiff’s Motion to Compel (“Order to Compel”) entered in this matter on September 28, 2023. The Court also heard Defendant’s Motion to Stay Proceedings filed October 25, 2023 (“Motion to Stay”) and Motion to Dismiss filed as part of Defendant’s Answer and Counterclaim filed October 30, 2023.

The Motions arise out of Plaintiff’s attempts to enforce a judgment in the original principal amount of \$361,092.88 (“Judgment”) Plaintiff obtained against Defendant in the case of Vicki Lynn Vergeldt, Individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 v. John Edward Vergeldt that was pending before the Honorable Teasa Kay Weaver, Master in Equity for York County, under C/A No: 2016-CP-46-00820. The

Judgement is presently on appeal with the South Carolina Court of Appeals; however, the same was transcribed in the Office of the Clerk of Court for Charleston County on August 6, 2021, was given Judgment Roll No.: 2021-CP-10-03640, and Plaintiff has instituted supplemental proceedings under said Judgment Roll No.¹ The supplemental proceedings have been consolidated into these proceedings.

In the Motion to Dismiss, Defendant seeks to have Plaintiff's Amended Complaint dismissed on the grounds the Judgment is on appeal and Plaintiff has not offered nor attempted to post a bond as required by S.C. Code Ann. §18-9-130(A)(1) (1976), as amended. Plaintiff's Amended Complaint seeks to enforce the Judgment and collect the amounts due thereunder by the foreclosure of Plaintiff's real property located in Charleston County at 1523 Star Flower Alley, Johns Island, South Carolina ("Property"). The Motion for Contempt and Motion to Stay arise out of Defendant's purported failure and refusal to allow the appraisal and/or inspection of the interior of the Property.

Present at the hearing was Plaintiff's counsel, Taylor A. Peace, Esq., and Kevin C. Lowry with Lowcountry Appraisals, Inc., who was the appraiser designated by the Parties to perform the Property's appraisal and who attempted same. Despite receiving due and proper notice of the hearing, Defendant nor his counsel appeared². From the Court's file, it appears Defendant opposed the Motion for Sanctions and supported the Motion to Stay by filing the Affidavit of John E. Vergeldt on January 5, 2024 ("Vergeldt Affidavit"), and Plaintiff filed the Affidavit of Kevin C. Lowry ("Lowry Affidavit") the same day. Plaintiff's counsel also subsequently filed an Affidavit of Attorneys Fees and Costs in support of Plaintiff's requested assessment of attorneys' fees and costs associated with the Motion for Sanctions.

¹ The Court is informed the South Carolina Court of Appeals heard argument of the appeal on November 8, 2023.

² Subsequent to the hearing, Defendant's counsel informed the Court her absence was due to a medical emergency she suffered on the way to the hearing.

This Order resolves all three pending motions, as set forth below:

I. Defendant's Motion to Dismiss

In the Answer and Counterclaim, Defendant asserts Plaintiff's Amended Complaint should be dismissed pursuant to Rule 12(b)(6), SCRCF, on the grounds Plaintiff lacks standing to bring the action as Plaintiff has not offered nor attempted to post a bond as required by S.C. Code Ann. §18-9-130(A)(1).

A. Bond Requirement under S.C. Code Ann. §18-9-130(A)(1).

Under S.C. Code Ann. §18-9-130(A)(1),

A notice of appeal from a judgment directing the payment of money does not stay the execution of the judgment unless the presiding judge before whom the judgment was obtained grants a stay of execution. If the presiding judge grants a stay of execution and requires a bond to or other surety to guarantee the payment of the judgment pending the appeal, the amount of the bond or other surety may not exceed the amount of the judgment or.... (b) one million dollars, whichever is less, for all other entities or individuals. S.C. Code Ann. §18-9-130(A)(1) (1976), as amended.

This is consistent with Rule 241, SCACR which provides,

As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters directed in the order, judgment, decree or decision on appeal and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision....The exceptions to the general rule are found in statutes, court rules, and case law Where specific conditions must be met before an exception applies, those conditions must be strictly complied with. A list of some, but not all of the exceptions to the general rules is: (1) Money judgments as provided in S.C Code Ann. §18-9-130. Rule 241, SCACR.

In this matter, Plaintiff seeks to execute on the Judgment and collect on the same through the foreclosure of the Property and the supplemental proceedings. Accordingly, Defendant is required to seek a stay of the execution of the Judgment from Judge Weaver, and it appears he has not done so. No evidence of such a request was presented at the hearing.

Accordingly, Defendant's Motion to Dismiss should be denied on the grounds he has failed to strictly comply with the provisions of Rule 241, SCACR and S.C. Code Ann. §18-9-130(A) (1976), as amended.

B. Motion to Dismiss under Rule 12(b)(6), SCRPC

While Defendant claims Plaintiff's Amended Complaint should be dismissed under S.C. Code Ann. §18-9-130(A), he also claims it should be dismissed under Rule 12(b)(6), SCRPC.

Under Rule 12(b)(6), SCRPC, "Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the option of the pleader be made by the following defenses may at the option of the pleader be made by motion....(6) failure to state facts sufficient to state a cause of action..." Rule 12(b)(6), SCRPC. "In considering a motion to dismiss a complaint on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." Doe v. Marion, 373 S.C. 390, 395, 645 S.E. 2d 245, 247 (2007). When deciding a motion to dismiss for failure to state a claim, the question is whether, in the light most favorable to the Plaintiff, with every doubt resolved in his behalf, the complaint states any valid claim for relief. Plyler v. Burns, 373 S.C. 637, 647 S.E. 2d 188 (2007). "If the facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case, then dismissal for failure to state facts sufficient to constitute a cause of action is improper." Sloan Const. Co., Inc. v. Southco Grassing, Inc., 377 S.C. 108, 113, 659 S.E. 2d 158, 161 (2008) (internal citations omitted). A decision on a Rule 12(b)(6) motion to dismiss for failure to state a claim must be based solely upon allegations set forth on fact of complaint. Burns v. Gardner, 328 S.C. 608, 614, 493 S.E. 2d 356, 359 (1997). A complaint should not be dismissed for failure of the pleading to state facts sufficient to constitute a cause of action merely because the court doubts the plaintiff will prevail in the action. Id.

In review of the Amended Complaint, Plaintiff has alleged that she has the Judgment, that it constitutes a valid judgment lien against the Property, and that Plaintiff is entitled to foreclose the lien, have the Property sold at a public sale and the proceeds distributed and applied toward the amounts owed under the Judgment. See Amended Complaint. While the Court acknowledges the Judgment is presently on appeal and the outcome may affect the underlying allegations of Plaintiff's Amended Complaint, the Court concludes the Amended Complaint states facts sufficient to constitute a cause of action for foreclosure when viewing the allegations in the light most favorable to Plaintiff and resolving all doubts in her favor. Relatedly, the Court notes Defendant indicates the Motion to Dismiss is, in part, based on Plaintiff's purported attempt to bring Teresa A. Shaw-Vergeldt back into this matter, but the Amended Complaint seeks no relief from her and/does not state a cause of action against her. See Amended Complaint.

Accordingly, the Amended Complaint states facts sufficient to state a cause of action against Defendant such that Rule 12(b)(6), SCRCF, provides no relief for Defendant and the same should be denied.

II. Motion to Stay Proceedings and Motion for Contempt and/or for Sanctions

With the denial of the Motion to Dismiss, it is proper for the Court to consider the Motion to Stay Proceedings and Motion for Contempt, which will be discussed *infra*, as they both revolve around the Order to Compel and the events stemming therefrom.

A. Factual Background

Defendant, under the Order to Compel filed September 28, 2023, was required to make the Property and all areas of the interior and exterior of the single-family residence located thereon, and other attendant and appurtenant improvements, available to an agreed upon South Carolina real estate appraiser and/or home inspector at a date and time convenient to the designated real estate appraiser/home inspector with said appraisal and/or inspection to occur within forty five

(45) days of the Order. See Order to Compel. The Parties agreed Kevin C. Lowry (a licensed South Carolina real estate appraiser with Low County Real Estate Appraisal) would appraise the Property. The affidavits filed with the Court in support of and in opposition to the Motion for Sanction and Motion to Stay indicate Mr. Lowry was initially selected as a real estate appraiser by Plaintiff and that Defendant failed to object until the events described therein. See ¶¶ 3-5, Lowry Aff.; ¶3, Vergeldt Aff. Through counsel and in coordination with Mr. Lowry, the Parties agreed Mr. Lowry would appraise the Property at 9:00 A.M. on October 24, 2023. See ¶9, Lowry Aff.; ¶4, Vergeldt Aff.

On around October 24, 2023 at 9:39, Mr. Lowry informed Plaintiff's counsel he was delayed due to traffic while travelling to the Property from Mount Pleasant, that the traffic was clearing, and that he would be arriving at the Property within approximately ten (10) minutes. See ¶12, Lowry Aff. Plaintiff's counsel communicated this information to Defendant's counsel at 9:43. See ¶12, Motion to Stay. The Vergeldt Affidavit challenges Mr. Lowry's reason for delay; however, it contains no supporting documentation of the sources cited nor does it identify when the checks of said sources occurred. See Vergeldt Aff. The Vergeldt Affidavit also indicates Defendant's counsel informed him and Ms. Shaw, a real estate professional engaged by Defendant to monitor the appraisal, were released to go about their day at 9:47. See ¶7, Vergeldt Aff. The Motion to Stay indicates Ms. Shaw was released at 9:45 A.M. The Vergeldt Affidavit and the Lowry Affidavit indicate Mr. Lowry arrived at the Property sometime between 9:50 A.M. and 10:00 A.M. See ¶ 13, Lowry Aff.; ¶ 12, Vergeldt Aff. While Defendant's Affidavit and the Lowry Affidavit contain different recitations of the facts, both indicate Defendant informed Mr. Lowry that he was too late to conduct the appraisal and that Mr. Lowry would need to leave thereby prohibiting him from performing his work required by the Order to Compel. See ¶¶ 13-14, Lowry Aff.; ¶¶ 12-15, Vergeldt Aff.

Mr. Lowry's affidavit indicates Plaintiff's counsel has requested additional times when the Property would be made available; however, none have been forthcoming to this date. See ¶ 16, Lowry Aff; ¶16, Motion to Stay. In contrast, Defendant's Affidavit states he agreed to a subsequent appraisal provided he was included in selecting the appraiser as long as Plaintiff would agree to pay for same. See ¶17, Vergeldt Aff. Defendant claims that Mr. Lowry is biased and incapable of providing an accurate appraisal without support. Id. Mr. Lowry disputes any bias.

More than forty (45) days have passed since the Order to Compel was entered and Defendant has not given Plaintiff additional dates by which the Property can be made available for appraisal, and he has not sought the Court's intervention in selecting a new appraiser. Also, there is no pending motion or other proceeding before the Court relating to any dispute between the Parties related to the selection of an appraiser to conduct the appraisal or inspection of the Property other than the Motion to Stay.

At the hearing, Mr. Lowry indicated his fees for performing the appraisal are Four Hundred Seventy-Five 00/100 (\$475.00) Dollars and that he would be willing to go back to the Property to complete his work provided counsel and/or a Charleston County Sheriff's Deputy is present. Additionally, Plaintiff has requested her attorneys' fees and costs be paid from and/or assessed against Defendant, and according to the filed Affidavit of Attorney's Fees and Costs, she has incurred Three Thousand Seventy-One and 25/100 (\$3,071.25) Dollars in attorneys' fees and Two Hundred Eleven and 74/100 (\$211.74) Dollars in costs.

B. Discussion

i. Motion to Stay Proceedings

As described in more depth, *supra*, Rule 241, SCACR, provides, as a general rule, that an order on appeal automatically stays matters decided in the order on appeal and the relief provided in said order. See Rule 241(a). It also provides that exceptions to the general rule are found in

statutes, court rules and case law and, where specific conditions must be met before the exception applies, those conditions must be strictly complied with. See Rule 241(b). Money judgments as provided in S.C. Code Ann. §18-9-130 are one of the exceptions. Id. However, S.C. Code Ann. §18-9-130 expressly states that service of a notice of appeal directing the payment of money does not stay the execution of the judgment unless the presiding judge before whom the judgment was obtained issues a stay of execution. See S.C. Code Ann. §18-9-130 (1976), as amended. If a stay of execution were to be issued and bond required, the bond could not exceed the amount of the judgment or one million dollars. Id.

In viewing the evidence before the Court, the only reason given for the requested stay is the undue burden these proceedings are having on Defendant while the Judgment is on appeal. See ¶18, Motion to Stay. This reason is not a grounds to stay execution of the Judgment or Plaintiff's attempts to collect same. Based on Rule 241, SCACR, and S.C. Code Ann. §18-9-130 (1976), as amended, Defendant would have to strictly comply with the processes described therein, and no evidence has been presented to indicate Defendant has sought a stay of execution in accordance with the terms thereof. Additionally, this Court would be without authority to issue a stay of execution as it did not issue the underlying judgment Plaintiff seeks to collect.

Accordingly, it is proper for Defendant's Motion to Stay to be DENIED.

ii. Motion for Contempt and/or for Sanctions

As to the Motion for Sanctions, "Contempt is an extreme measure; this power vested in a court is not lightly asserted". Ex parte Kent, 379 S.C. 633, 637, 666 S.E. 2d 921, 923 (Ct. App. 2008). "A party is guilty of contempt when he willfully disobeys a court order." Brantley v. Brantley, 441 S.C. 284, 299, 893 S.E. 2d 349, 358 (Ct. App. 2023) (internal citations omitted). "A willful act is one 'done voluntarily and intentionally with the specific intent....to fail to do something the law requires to be done'" Noojin v. Noojin, 417 S.C. 300, 306 789 S.E. 2d 769, 772

(Ct. App. 2016) (internal citations omitted). “Prior to invoking this power, the court must necessarily consider the ability of the defendant to comply with the order.” Id.

“A party seeking contempt for violation of a court order must show the order’s existence and establish the other party did not comply with the order.” Abate v. Abate, 377 S.C. 548, 554, 660 S.E. 2d 515, 518 (Ct. App. 2008) (internal citations omitted). “Once the party seeking a contempt finding makes prima facie showing by pleading the order and demonstrating noncompliance, the burden shifts to the respondent to establish his defense and inability to comply.” Noojin v. Noojin, 417 S.C. 300, 789 S.E. 2d 769 (Ct. App. 2016). “Civil contempt must be shown by clear and convincing evidence.” Miller v. Miller, 375 S.C. 443, 457, 652 S.E. 2d 754, 761 (Ct. App. 2007) (internal citations omitted).

As applied in this matter, the Order to Compel clearly states Defendant was required to make the Property and all areas of its interior and exterior of the single family residence and all of its improvements available to a South Carolina licensed real estate appraiser and/or home inspector at a date and time convenient to the designated real estate appraiser/home inspector, and that said appraisal should take place within forty five (45) days of the entry of the Order. See Order to Compel. The Order also provides that the time period may be extended upon good cause and the Parties could ask the Court to appoint a real estate appraiser and/or home inspector if one cannot be agreed upon. Id.

It appears that the Parties agreed and/or consented through their conduct to have Mr. Lowry appraise the Property and that a time and date was agreed upon for him to appraise the Property within the forty-five (45) days required by the Order. See Vergeldt Aff. and Lowry Aff. It also appears that, for whatever reason, Mr. Lowry was delayed in arriving on the agreed date and that Defendant refused to allow him access to the interior single-family residence only after being told Mr. Lowry had been delayed. Id.

Under a favorable interpretation of the facts submitted through the Vergeldt Affidavit and the Lowry Affidavit, Defendant released his real estate professional knowing he could not stay due to a doctor's appointment, failed to communicate same to his counsel and/or Plaintiff's counsel and has not cooperated with Plaintiff on providing new dates and times for Mr. Lowry to appraise the Property or provide the name of a new appraiser thereby willfully violating the Order to Compel without justification.

Under the worst interpretation of facts submitted through the Vergeldt Affidavit and the Lowry Affidavit, Ms. Shaw was not actually present during the events described, Defendant did not have a medical/doctor's appointment as stated, refused to let Mr. Lowry enter the Property to perform his work, and has failed and refused to cooperate with Plaintiff on providing new dates and times for Mr. Lowry to appraise the Property, provide the name of a new appraiser thereby violating the Order to Compel, or seek the Court's intervention to select an appraiser.

Under either interpretation of the facts, the Court finds Defendant willfully and intentionally violated the Order to Compel and the same has been shown by clear and convincing evidence considering the Order requires Defendant to make the Property available at a time and date convenient to the appraiser, Mr. Lowry, and Defendant has taken no other steps to comply with the other provisions of the Order that would have provided him relief or mitigated his violation.

Accordingly, a finding of contempt is appropriate, and the Court concludes that a fine of Five Hundred and 00/100 (\$500.00) Dollars payable to the Charleston County Master of Equity in thirty (30) days is appropriate. The Court also concludes an assessment against Defendant of Plaintiff's attorneys fees in the amount of Three Thousand and 00/00 (\$3,000.00) Dollars and costs in the amount of Two Hundred Eleven and 74/100 (\$211.74) Dollars associated with bringing the Motion for Contempt to be an appropriate sanction Ex parte Cannon, 385 S.C. 643, 685 S.E. 2d

814 (Ct. App. 2009), and the Court concludes that said attorney's fees and costs are reasonable considering: (1) extent and difficulty of the legal services rendered, (2) the time and labor necessarily devoted to the case, (3) the professional standing of counsel, (4) the contingency of compensation, the customary fee charged in the locality for similar services, and (5) the beneficial result obtained. See Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 337 S.E. 2d 296 (1989).

Further the Court concludes it is a reasonable and proper sanction that Mr. Lowry's fees for his services in the amount of Four Hundred Seventy-Five and 00/100 (\$475.00) Dollars be charged to Defendant, and the same shall be paid upon receipt by Defendant or his counsel from Mr. Lowry.

Finally, the Court concludes it proper and appropriate for Mr. Lowry to be charged to go back to the Property on a set date and time to complete his work and that he should be accompanied by Plaintiff's counsel and Defendant's counsel or a deputy with the Charleston County Sheriff's Department. Plaintiff and Defendant shall do their best to coordinate with Mr. Lowry; however, the Property is to be made available at Mr. Lowry's convenience.

ORDER

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED
as follows:

1. Defendant's Motion to Dismiss is **DENIED**.
2. Defendant's Motion to Stay Proceedings is **DENIED**.
3. Plaintiff's Motion for Contempt and/or for Sanctions is **GRANTED**, and, as a result:
 - a. Defendant is hereby fined Five Hundred and 00/100 (\$500.00) Dollars and, within thirty (30) days of the entry of this Order, Defendant shall pay the same to the Charleston County Master-In-Equity Court;

- b. Within thirty (30) days of the entry of this Order, Defendant shall pay to Plaintiff's counsel his reasonable attorneys' fees and costs associated with bringing the Motion for Contempt in the amount of Three Thousand Two Hundred Eleven and 74/100 (\$3,211.74) Dollars;
 - c. Defendant shall make the Property available to Mr. Lowry at a time and date convenient to Mr. Lowry, which shall be communicated to Defendant through counsel. At the appointed time and on the appointed date, Defendant shall not harass or abuse Mr. Lowry. To insure compliance with the provision of this Order, Plaintiff's counsel and Defendant's counsel or a Charleston County Sheriff's deputy shall be present at the Property for the appraisal.
 - d. Upon receipt of an invoice or bill from services in the amount of Four Hundred Seventy-Five and 00/100 (\$475.00) Dollars from Mr. Lowry, Defendant shall immediately pay same within 15 days.
4. Defendant's failure to comply with any provisions of the terms of this Order will result in the Court issuing its Rule to Show Cause requiring Defendant to appear and show cause why he cannot comply with the terms hereof and/or a grant of further relief, which may include arrest and detainment.

IT IS SO ORDERED!

Mikell R. Scarborough

Charleston County Master in Equity



Charleston Common Pleas

Case Caption: Vicki Lynn Vergeldt , plaintiff, et al VS John Edward Vergeldt ,
defendant, et al

Case Number: 2021CP1004257

Type: Master/Order/Other

So Ordered

s/Mikell R. Scarborough 3062

Electronically signed on 2024-02-01 17:16:33 page 13 of 13

ROA 00682

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP1004257

Vicki Lynn Vergeldt et al
PLAINTIFF(S)

John Edward Vergeldt
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

This matter came before the Court on Defendant's Motion for Re-hearing of Court's February 2, 2024 Order. The Defendant's Motion to Reconsider is hereby DENIED and the Court affirms the rulings in its February 2, 2024 Order, except for Paragraph 3(c) as Plaintiff's counsel informed the Court that there was no further need for the appraiser to return to the property. Accordingly, the Plaintiff's Motion for Contempt is GRANTED. The Defendant's Motion to Stay Pending Appeal and the Defendant's Motion to Dismiss are respectfully DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 03/28/2024 .

Vicki Lynn Vergeldt Trustee
John Vergeldt Jr Living Trust

RECEIVED
Jun 04 2024
SC Court of Appeals

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Charleston Common Pleas

Case Caption: Vicki Lynn Vergeldt , plaintiff, et al VS John Edward Vergeldt ,
defendant, et al

Case Number: 2021CP1004257

Type: Order/Electronic Form 4

So Ordered

s/Mikell R. Scarborough 3062

Electronically signed on 2024-03-28 16:30:11 page 3 of 3

ROA 00685

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2021CP1004257

Vicki Lynn Vergeldt et al
PLAINTIFF(S)

John Edward Vergeldt
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Upon consideration, this Court DENIES Defendant's Motion to Reconsider filed April 8, 2024, and the Court adopts the Plaintiff's Reply to the Motion filed April 18, 2024, as the basis for its denial of the Motion to Reconsider.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 05/06/2024 .

Vicki Lynn Vergeldt Trustee
John Vergeldt Jr Living Trust

RECEIVED
Jun 04 2024
SC Court of Appeals

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Charleston Common Pleas

Case Caption: Vicki Lynn Vergeldt , plaintiff, et al VS John Edward Vergeldt ,
defendant, et al
Case Number: 2021CP1004257
Type: Order/Electronic Form 4

So Ordered

s/Mikell R. Scarborough 3062

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ROA 00688

IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Jun 11 2024

S.C. SUPREME COURT

APPEAL FROM YORK COUNTY
TEASA KAY WEAVER, MASTER IN EQUITY

Appellate Case No.: 2024-000775
Unpublished Opinion No. 2024-UP-052 (S.C. Ct. App. Filed February 14, 2024)
Trial Court Case No.: 2016-CP-46-00820

Vicki Lynn Vergeldt, individually, and as
Successor Trustee of the John Vergeldt, Jr.
Revocable Living Trust dated
September 27, 1978..... Respondent

v.

John Edward Vergeldt.....Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS

Pursuant to Rule 242(f) SCACR, Respondent Vicki Lynn Vergeldt, Individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 (“Vicki”) herein files this Return to Petition for a Writ of Certiorari to the Court of Appeals in response to the Petition for a Writ of Certiorari to the Court of Appeals (“Petition”) filed by Petitioner John Edward Vergeldt (“John”) on May 13, 2024.

QUESTIONS PRESENTED

Vicki does not take issue with John’s Question No. 1 subject to the below arguments and the conclusions made.

COUNTER-STATEMENT OF THE CASE

John Vergeldt, Jr. (“Settlor”), deceased, is John and Vicki’s father who created the John Vergeldt, Jr. Revocable Living Trust dated September 27, 1978 (“Trust”). The Trust was last amended in its entirety in 2009 by the Eight Amendment and Restatement of the John Vergeldt, Jr., Revocable Living Trust dated September 27, 1978. (R. pp. 3-11). At the time, John, Vicki, and their sister, Patti, were the beneficiaries. Id. The Trust was amended a ninth time in 2010 and a tenth time in 2010. Id. The Tenth Amendment to Trust Agreement contains a “No Contest” Clause that contains the language referenced by John and goes on to state “Therefore, the precondition of subparagraph (A) above shall not apply to a challenge or contest if there is probable cause for asserting the challenge or contest. As used in this subparagraph, probable cause shall exist if at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful.” (R. pp. 1267-1272).

Settlor died on July 9, 2013, and, at the time of his death, John was serving as Co-Trustee of the Trust and thereafter as Successor Trustee until his resignation effective April 30, 2019. (R. pp. 517-520). Prior to Settlor’s passing, John filed a petition with the York County Probate Court seeking appointment as Settlor’s guardian which Vicki opposed and was not completed prior to Settlor’s passing. (R. pp. 3-11).

Soon thereafter, Vicki demanded various financial records from John related to the Trust which was denied and which resulted in Vicki filing an action in the York County Probate Court seeking declaratory relief related to John’s duties as Co-Trustee and Successor Trustee to provide financial records and accountings her. (R. pp. 66-167). The action was removed to the York

County Court of Common Pleas, given Case No.: 2014-CP-46-1956 (“2014 Case”), and subsequently referred to the Honorable S. Jackson Kimball, as Master in Equity for York County. (R. 3-11) The 2014 Case resulted in Judge Kimball issuing an Order filed August 31, 2015 (“2014 Order”) that found Vicki and John have a poor and strained relationship, that their communications foster suspicion and acrimony, and that John was required to provide Vicki with financial records and accountings for the time period in which he served as Successor Trustee. Id. The 2014 Order, based on the relief Vicki sought, was limited to the determination of her rights to receive financial records and accountings and determined, “No declaration concerning probable cause to challenge the Successor Trustee’s performance of his duty is made, as such the issue is not presented in this action. Such determination is preserved for such time as Plaintiff challenges the actions of John while acting as Successor Trustee.” (emphasis added) (R. p. 11). Judge Kimball also found, “No finding or conclusion in this order shall be deemed to be a determination of compliance, or non-compliance, with applicable law, or the terms of the Trust agreement. Further, no finding or conclusion in this order shall be deemed to establish the amount of any entitlement of any beneficiary under the terms of the Trust agreement.” Id. In other words, the 2014 Case, as pled by Vicki and litigated between the parties, was narrowly tailored and limited to the question of John’s duties to provide financial records and accountings. Id. The 2014 Order could not be clearer that Judge Kimball intended to and did leave the door open for Vicki to seek additional relief once (and if) John provided the accountings and financial information Judge Kimball determined he was required to provide. While Vicki filed a Motion to Reconsider, John appears to have taken no action and accepted findings, conclusions, and determinations in the 2014 Order “as is”¹. (R. 392-395)

¹ In the Petition, John makes some statement concerning the 2014 Order being the law of the case as it relates to John duties to Vicki. While this may be true in the sense that Judge Kimball’s Order may be the law of the case, which is

After John failed and refused to provide Vicki with financial accountings and records, she filed the underlying action in the York County Probate Court in 2015 which followed a similar track as the 2014 case. (R. pp. 31-42). It was removed to the York County Court of Common Pleas, given C/A No.: 2016-CP-46-00820, and referred to Judge Kimball. Id. In her Petition for Removal of Trustee and Related Relief filed March 16, 2016, Vicki sought the release of accounting and financial records that Judge Kimball already ordered that John was required to provide and sought his removal as Successor Trustee. (R. pp. 405-495). John answered and asserted various counterclaims (R. pp. 396-404). Important to this appeal is John did not raise the defense of *res judicata*. Id.

During discovery in the underlying case and due to John's continued failure and refusal to provide financial records and accountings during discovery, John and Vicki agreed to appoint Kathleen Palinski as the Limited Special Trustee for purposes of obtaining financial records and to perform an accounting, which took approximately a year and a half to complete. (R. pp. 13-19). Ms. Palinski, with John's consent, was authorized to obtain financial records back to 2008 if she believed same to be necessary. Id.

Vicki sought and was granted leave to amend her pleadings by Form 4 Order filed June 13, 2019 to assert causes of action for damages arising from causes of action related to breaches of fiduciary duty, unjust enrichment, and others against John based upon Ms. Palinski's work. (R. p. 23-26). Not long before Vicki was granted leave to amend her pleadings to assert damages, John resigned his position as Successor Trustee as noted above leaving Vicki to take his place. (R. -pp.

not necessarily on appeal, John is similarly bound by findings, conclusions, and directives set forth in the 2014 Order, including those in which Judge Kimball recognized Vicki was not challenging John's actions based on lack of information. The fact John did not seek to take further action as Vicki did is telling as to his acceptance of the 2014 Order.

517-520). John filed an answer to Vicki's amended pleadings that failed to raise many of the defenses identified in his initial answer. (R. pp. 619-630).

At the trial of the case, John argued on several occasions that the 2014 Order determined that Judge Kimball ruled that Settlor became incapacitated on or around May 6, 2013 and that he owed Vicki no duties prior that date. (R. pp. 719, lines 14-20). As referenced above, this was and continues to be a misunderstanding and/or misrepresentation of the 2014 Order. The trial court subsequently found John, while Co-Trustee and Successor Trustee of the Trust breached his fiduciary duties by making unequal distributions of trust assets to himself, Vicki, and Patti and enriching himself while serving as Co-Trustee and Successor Trustee, and, as a result, Vicki, individually, and as Successor Trustee of the Trust, was entitled to damages in the amount of the Judgment that is the subject of the appeal. Id.

John filed a Motion to Reconsider and Amended Motion to Reconsider in which he, for the first time, raised the issues of *re judicata* and issue preclusion based on the 2014 Order. (R. pp. 631-639). Neither of these affirmative defenses were raised in his responsive pleadings or to the trial court. (R. pp. 396-404, pp. 619-630). To the extent John raised issues surrounding the 2014 Order to the trial court at the final hearing, they were based on his misunderstanding of Judge Kimball's rulings and/or ignored the change in circumstance resulting from his resignation. They similarly were related to his ultimate liability and not raising the affirmative defense of *res judicata*.

After a hearing, the trial court denied John's Motion to Reconsider and Amended Motion to Reconsider on the grounds that he failed to raise the defenses he was then seeking to assert, and, to the extent he did, the 2014 Order did not bar Vicki's claim for damages based on the 2014 Order and the findings contained therein. (R. 46-65). The trial court specifically grounded its decision on the principle that a party may bring a claim for damages after seeking declaratory relief. Id.

COURT OF APPEALS

John presented two issues to the Court of Appeals. The first issue related to the application of *res judicata* and the second issue related to the standard of proof applied by the trial court. However, a review of the Record on Appeal and the briefs submitted reveals the issues John believes were preserved (ie: the defenses of *res judicata* and issue preclusion (which wasn't raised to the Court of Appeals) were not raised prior to the Motion to Reconsider and/or Amended Motion to Reconsider and were therefore waived. The Court of Appeals determined the issue of *res judicata* was not preserved for review and the trial court applied correct standard of proof in an unpublished opinion filed February 14, 2024. Vergeldt v. Vergeldt, Op. No. 2024-UP-052 (S.C. Court App. filed February 14, 2024).

After a Petition for Rehearing was filed on February 29, 2024, a Return to the Petition for Rehearing was filed March 15, 2024, and a reply was filed March 20, 2024, the Petition for Rehearing was denied on April 11, 2024.

ARGUMENT

I. John has not addressed the reasons or character of reasons why a Writ of Certiorari should be granted.

Under Rule 242 (b), SCRCP,

A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of the reasons will be considered:

- (1) Where there are novel questions of law.
- (2) Where there is dissent in the decision of the Court of Appeals.

- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of appeals conflicts with a decision of the United States Supreme Court.

In his Petition, John claims that the Court of Appeal's ruling contravenes prior Supreme Court precedent regarding issue preservation; however, Question Presented No. 1 does not state under how or under what theory Judge Kimball's 2014 Order has preclusive effect and/or it attempts to expand the express rulings in the 2014 Order as noted above. Instead, John cites allegations in his Answer and Counterclaim filed March 7, 2016 related to his counterclaim of malicious prosecution; however, these allegations were not preserved or restated in his Response to Amended Petition for Removal as Trustee and Other Related Relief filed August 17, 2019 and are therefore waived. Similarly, none of the affirmative defenses raised by John in his initial responsive pleading or thereafter indicate he was raising the defense of *res judicata* or issue preclusion as argued below. Further, the Petition contains no analysis or other explanation of how the other reasons or character of reasons why the Petition should be granted.

As a result, the Petition should be dismissed.

II. The Petition fails to demonstrate why the ruling by the Court of Appeals was improper.

A. John fails to show how the Court of Appeals erred affirming the Final Order in this matter.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised and ruled upon by the trial judge to be preserved for appellate review....Moreover, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector." Similarly, "[i]t is settled that '[a]n issue may not be raised for the first time in a motion to reconsider.'" Repko v. County of Georgetown, 424 S.C. 494, 502, 818 S.E. 2d 743, 747 (2018)

(citing Johnson v. Sonoco Prods. Co., 381 S.C. 172, 177, 672 S.E. 2d 567, 570 (2009)). Relatedly, “In replying to a preceding pleading, a party shall set forth affirmatively the defenses...*res judicata*...and any other matter constituting an avoidance or affirmative defense.” Rule 8(c), SCRPC. “Generally, a failure to plead an affirmative defense is deemed a waiver of the right to assert it.” Plyler v. Burns, 373 S.C. 637, 647 S.E. 2d 188 (2007). *Res Judicata* is an affirmative defense that must be pled at trial in order to be pursued on appeal. RIM Associates v. Blackwell, 539 S.C. 170, 597 S.E. 2d 152 (Ct. App. 2004).

In this matter, a review of John’s pleadings reveal that he did not raise the issue of *res judicata* or issue preclusion prior to or at the trial of this matter, and, as a result, the Court of Appeals was correct in its decision same were not preserved for appeal. There is simply no defense or allegation raised in his Answer and Counterclaim filed March 7, 2016 or his Response to Amended Petition for Removal of Trustee and Related Relief and Request for Damages and Disinheritance of Plaintiff filed August 21, 2019 that could be construed to raise it. (R. pp. 396-404, pp. 619-630). Any reference made by John in his responsive pleadings and at the trial of this matter to the 2014 Order are, again, a misrepresentation and conflation of the duty to provide accountings and financial records with the overall duties John owed Vicki,, the Settlor, and the Trust during the time for which he served as Co-Trustee and/or Successor Trustee. John, at the trial and thereafter, also ignored the change in circumstances and position between himself and Vicki brought about by his resignation as Successor Trustee. As a result, it was proper for the Court of Appeals to determine the defenses of *res judicata* and/or issue preclusion were not preserved for appeal.

Even if they had been raised, *res judicata* or issue preclusion would have provided no defense considering the 2014 Order determined when and to what extent John owed Vicki a duty

to provide accountings and financial records while Vicki was only a beneficiary. The relief Vicki sought and received in the 2014 Order did not relate to John's other fiduciary duties and breaches thereof. This is the reason for Judge Kimball ordering,

No declaration concerning probable cause to challenge the Successor Trustees' performance of his duties is made, as such issue is not presented in this action. Such determination is preserved for such time as Plaintiff challenges the actions of John while acting as Successor Trustee...No finding or conclusion in this order shall be deemed to be a determination of compliance or non-compliance with applicable law or the terms of the Trust agreement. Further, no finding or conclusion in this order shall be deemed to establish the amount of any entitlement of any beneficiary under the terms of the Trust agreement. (R. p. 11).

In other words, Judge Kimball recognized the scope of the relief sought and the effect a declaratory judgment has on the ability of a party to bring a subsequent claim for damages. See Robison v. Asbill, 328 S.C. 450, 453, 429 S.E. 2d 400, 401 (1997) ("But '[a] declaratory judgment is not res judicata as to matters not at issue and not passed upon.'....The doctrine 'is only a bar to matters which were actually litigated, not those that might have been litigated....Nor is it an absolute bar to subsequent proceedings where the parties are seeking other remedies, even though based on claims that could have been asserted in the original action. When plaintiff in the earlier declaratory judgment action sought only declaratory relief, the plaintiff may later be permitted to seek additional, coercive relief based on the same claim.'") (internal citations omitted).

As a result, the Court of Appeals did not err in affirming the Final Order in this matter.

B. John's's argument related to the Court of Appeals violation of S.C. Code Ann. § 14-3-330 is without merit and not grounds for a Writ of Certiorari

John also argues the Court of Appeals erred by violating S.C. Code Ann. §14-3-30(1) in failing to consider the order that allowed the amendment of the 2016 action to include a prayer for damages. However, the Opinion of the Court of Appeals specifically addressed same. In particular, it determined, "On appeal, John argues the circuit court erred by (1) allowing Vicki

Vergeldt to amend her petition to seek damages because damages were barred by res judicata...” Vergeldt v. Vergeldt, Op. No. 2024-UP-052 (S.C. Court App. filed February 14, 2024). In its Opinion, the Court of Appeals correctly held “John’s argument that the doctrine of res judicata barred Vicki from amending her petition for his removal as successor trustee and other related relief was not preserved for appellate review because John first raised the argument in his motion for reconsideration.” Id.

As a result, the Petition should be dismissed.

C. The Petition’s argument that the 2014 Order pointed out deficiencies in Respondent’s pleading and that Judge Kimball was without authority to reserve a claim to Respondent is without merit.

As discussed above, the 2014 Case was solely related to Vicki’s request for declaratory judgment and a determination of John’s duties to provide financial records and accountings to Vicki in light of his failure and refusal to recognize he owed any duties to Vicki. It was only after John and Vicki’s rights were determined that Vicki could proceed with the underlying action and could only seek damages after Ms. Palinski performed her work. Judge Kimball’s recognition of this fact in the 2014 Order is not pointing out deficiencies in Vicki’s pleadings, and his rulings do not have preclusive effect on Vicki’s claim for damages. It is directly in line with South Carolina law. See Robison v. Asbill, 328 S.C. 450, 453, 429 S.E. 2d 400, 401 (1997); Plum Creek Development Co., Inc. v. City of Conway, 334 S.C. 30, 512 S.E. 2d 106 (1999); Catawba Indian Nation v. State, 407 S.C. 526, 756 S.E. 2d 900 (2014). Similarly, by stating what he was not ruling on, Judge Kimball did not create a different standard of appeal limited to John, or, at a minimum, John does not state or explain what the purported standard of review on appeal to be and how it applies.

In a similar vein, John argues Vicki could have asserted a claim for damages in the 2014 Case as well as earlier in the underlying case. This argument is without merit, or, at a minimum, ignores Judge Kimball's Order in the 2014 Case, specifically those findings stating,

During the time John handled Mr. Vergeldt's affairs, and after Mr. Vergeldt's death, he provided a modicum of information concerning the status of the Trust to Vicki and Patti. It is apparent that the parties have a poor and strained relationship. Their communications foster acrimony and suspicion. In the course of dealing with Mr. Vergeldt's affairs, Vicki has questioned John's handling of Mr. Vergeldt's affairs and demanded accountings. John has responded by minimal communications and unnecessary assertions of authority that have contributed to Vicki's questioning of John's handling of Mr. Vergeldt's affairs and Successor Trustee. (R. p. 005)

As applied to this matter, the fact that John's continued failure to provide records and accountings in this matter (in apparent violation of the 2014 Order) caused Ms. Palinski to become involved makes it clear Vicki did not and could not have sought a claim for damages sooner as she did not have the information needed to know if a claim for damages existed. Also, any argument that Vicki was required to bring a claim for damages in the 2014 Case under Rule 18, SCRC, was not raised to and ruled upon by the trial court or the Court of Appeals and was therefore waived. See Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E. 2d 731 (1998); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526, S.E. 2d 716, 724 (2000).

D. The Court of Appeals decision is not the result of a phantom claim of failure to preserve

The Petition also argues that the Court of Appeals decision is based on a phantom claim of failure to preserve and its decision is inconsistent with multiple prior decisions of the Supreme Court; however, the Petition does not provide analysis or state why its decision is inconsistent with multiple prior decisions of this Court other than to make conclusory statements that the issues raised were preserved; however, as discussed above, they are not.

As this Court is aware, “[i]ssue preservation rules are designed to give the trial court a fair opportunity to rule on these issues, and thus provide the Supreme Court with a platform for meaningful appellate review.” Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E. 2d 640, 465 (2011) At a minimum, issue preservation requires that an issue be raised and ruled upon by the trial judge. Wilde Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E. 2d 731, 733 (1988). “Of course, a party is not required to use the exact name of a legal doctrine in order to preserve the issue...Nonetheless, the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge.” Herron, 395 S.C. at 465 (2011). Every ground for appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to ‘grope in the dark’ to ascertain the precise point at issue.” Id. “Issue preservation rules ‘prevent[] a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card, and, via a reversal, give him another opportunity to prove his case.” Id.

In this matter, and as discussed in depth in the Respondent’s Final Brief, John did not raise *res judicata*, issue preclusion or other similar defense in his responsive pleadings, and they were waived as a result. See Rule 8, SCRCP; RIM Associates v. Blackwell, 539 S.C. 170, 597 S.E. 2d 152 (Ct. App. 2004). To the extent John raised any issues at the trial court level, they were not clear as John did not articulate same with reasonable clarity and appeared to argue that Judge Kimball found him to be without fault or liability in matters concerning the Trust prior to May 6, 2013 (which is inaccurate). John’s apparent denial of liability cannot be argued to have been distinctly stated such that it could have been understood by the trial judge as raising *res judicata* or other preclusive defense. The first time these theories were raised with any specificity was in the Motion for Reconsideration and/or the Amended Motion for Reconsideration.

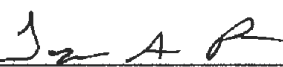
As a result, the Court of Appeals did not rely on a phantom claim of failure to preserve. John simply did not preserve the issues of which he now claims. Accordingly, the Petition should be denied.

CONCLUSION

Based on the above as well as the Record on Appeal, the Petition should be denied and/or the decision of the Court of Appeals affirmed.

Respectfully Submitted,

HARRELL, MARTIN & PEACE, P.A.

By: 

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Attorneys for Respondent Vicki Lynn Vergeldt,
Individually, and as Successor Trustee of the
John Vergeldt, Jr. Revocable Living Trust dated
September 27, 1978

June 11, 2024
Chapin, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

Jun 26 2024

S.C. SUPREME COURT

APPEAL FROM YORK COUNTY
Teasa Kay Weaver, Master-In-Equity

Unpublished Opinion No. 2024-UP-052 (S.C. Ct. App. filed February 14, 2024)
Appellate Case No.: 2024-000775

Vicki Lynn Vergeldt, Individually and as Successor
Trustee of the John Vergeldt Jr. Revocable Living Trust
Dated September 27, 1978,.....Respondent,
v.
John Edward Vergeldt Petitioner.

REPLY TO RETURN
TO PETITION FOR
WRIT OF CERTIORARI

Petitioner John Edward Vergeldt (hereafter “John”) hereby files this Reply to the Respondent’s Return to John’s Petition for a Writ of Certiorari filed and served on June 11, 2024. John’s Petition for Certiorari seeks review and reconsideration of the Court of Appeals’ decision in this matter, issued on February 14, 2024, which affirmed the master-in-equity’s order granting Vicki Vergeldt, individually and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust a money judgment (hereafter “Vicki”) against John.

ARGUMENT

I. John’s Petition specifically addressed the reasons why a Writ of Certiorari should be granted.

Vicki incorrectly asserts that John has not set for the reasons or character of the reasons for this Court to grant a Writ of Certiorari as required by Rule 242(b), SCRPC. Rule 242(b), SCRPC

lists five circumstances or character of reasons that “neither control nor fully measure the Supreme Court’s discretion or power to grant review in general,” including “[w]here the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court. In his Petition, John specifically asserted that the ruling for the Court of Appeals is inconsistent with multiple prior decisions of this Court and cited those decisions to support the assertion. *See Eades v. Palmetto Cardiovascular and Thoracic PA*, 422 S.C. 196, 810 S.E.2d 848 (2018) (finding that an issue is preserved for appellate review and addressing the merits of the issue on appeal); *see also Historic Charleston Holdings LLC v. Mallon*, 381 S.C. 417, 673 S.E.2d 448 (2009) (deciding an issue that is preserved for appellate review is in the interest of judicial economy), citing *I’On LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d. 716, 724 (2000). Accordingly, John’s Petition sets forth a sufficient character of reason for which this Court can grant a Writ of Certiorari.

II. The Petition clearly demonstrates why the Court of Appeals erred in its ruling.

As set forth in detail in the Petition, the Court of Appeals found that the issues regarding issue preclusion and res judicata were not properly preserved for appellate review, specifically finding that John raised the issue of res judicata for the first time in his Motion to Reconsider. The ruling from the Court of Appeals is improper because the Record on Appeal clearly demonstrates multiple instances in which John raised the issues of res judicata issue and the preclusive effect of Judge Kimball’s order in trial court pleadings and during trial.

This Court has spoken repeatedly and explicitly on the requirements for preserving issues on appeal. *Blanding v. Long Beach Mortgage Co.*, 379 S.C. 206, 665 S.E.2d 608 (2008). “It is well settled that an issue cannot be raised for the first time on appeal but must have been raised and ruled on by the trial judge” *Id.* It is understood that issue preservation rules will be applied

consistently by appellate courts, however this Court has also made clear that “issue preservation rules should not be applied in a rigid, hyper-technical manner...elevating form over substance to trap trial lawyers so as to prevent the appeal of a legitimate issue.” See *State v. Morales*, 439 S.C. 600, 889 S.E.2d 551 (2023) (quoting *Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011)). Accordingly, this Court has specifically held that “a party is not required to use the exact name of a legal doctrine in order to preserve the issue. *Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011) (citing *State v. Russell*, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001)).

This is the exact scenario presented by this case. While John did not use the term “res judicata,” as he was a pro se litigant, he did expressly assert to the trial court that the issues raised in Vicki’s Amended Petition had already been addressed and ruled on in the prior litigation from 2014. (R. pp. 619-622, ¶¶ 13-24). In his Answer and Counterclaim filed March 7, 2016, John pleaded that the previous case:

[T]erminated in [John’s] favor, as it resulted in an Order declaring that [John] owned no duties as Successor Trustee of the trust until May 6, 2013, the date the Court concluded the Settlor became mentally incapacitated...The Court’s order in the [2014 case] determined that [John] owed no such duties...[Vicki] did not appeal the Order.

(R. 401, ¶¶ 52-53).

Even though John did not raise *res judicata* in his Response to Amended Petition for Removal of Trustee filed August 21, 2019, he previously and sufficiently raised the issue in the original Answer, therefore it was not necessary to raise the issue again. Furthermore, John preserved the issue by raising it during the trial of this matter. As demonstrated by the Record, John repeatedly raised the issue of the effect of Judge Kimball’s order in the 2014 case as barring Vicki’s claim for damages. Specifically, John argued:

Judge Kimball ruled that my father became incapacitated and that he was, in fact, in charge of all of his finances until May 6th...2013. So anything prior to that, it's already been ruled, my father was in charge of. So a lot of things that [Vicki's] lawyer brought up are things from 2008 or 2009.

(R. p. 719, lines 14-20) (Emphasis added).

Issue preservation rules require that “the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge.” *Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011). John did not use the term “res judicata” explicitly, however it is apparent from the Record that he articulated the nature of the error so that it was reasonably understood by the trial court. The Court of Appeals’ refusal to recognize that John preserved the issue regarding the preclusive effect of Judge Kimball’s ruling in the 2014 case is clear error in light of this Court’s previous decisions on issue preservation. Accordingly, granting a Writ of Certiorari is appropriate.

CONCLUSION

John respectfully requests that this Honorable Court grant the Writ of Certiorari, dispense with further briefing, and reverse the decision of the Court of Appeals, with direction to address the issue it found unpreserved.

Respectfully submitted,

s/ Desa Ballard

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ATTORNEYS FOR PETITIONER

June 26, 2024

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON FOR THE NINTH JUDICIAL CIRCUIT

Case No. 2021-CP-10-04257

Vicki Lynn Vergeldt, Individually and as)
Successor Trustee of the John Vergeldt,)
Jr. Revocable Living Trust dated)
September 27, 1978,)
Plaintiff,)

vs.)

John Edward Vergeldt and Teresa A. Shaw-)
Vergeldt,)
Defendants.)

Hearing before the Honorable Mikell R.
Scarborough, reported by Josie Allen Boehm, Registered
Professional Reporter and Notary Public, at 100 Broad
Street, Courtroom 2A, Charleston, South Carolina,
January 8th, 2024 commencing at 2:11 p.m.

APPEARANCES

For the Plaintiff:

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1 THE COURT: Okay. This is Vicki Lynn
2 Vergeldt individually and as Successor Trustee of the
3 John Vergeldt, Jr. Revocable Living Trust versus John
4 Edward Vergeldt and Teresa Shaw-Vergeldt. Case number
5 is 2021-CP-10-4257.

6 Present today in the courtroom is Mr. Taylor
7 Peace representing the plaintiffs in this matter, and
8 I have a number of motions I believe.

9 If my record is correct, Mr. Peace has filed
10 a motion for contempt and sanctions against the
11 defendant, John Vergeldt. The defendant is not
12 present, nor is his counsel, Ms. Desa Ballard, or
13 Harvey Watson or Haley Hubbard.

14 I saw there was a notice of appearance by
15 Ms. Hubbard, wasn't it?

16 MR. PEACE: Yes, Your Honor. Ms. Hubbard
17 made an appearance already in the 2021-CP-10-3664, or
18 the collection -- kind of what I started calling the
19 supplemental proceedings case, but she had not made an
20 appearance here.

21 THE COURT: Okay. And from the defense, I
22 have received a motion to dismiss under Rule 12(b)(6)
23 along with their answer to the amended complaint which
24 this Court had previously granted. I believe it was
25 in September and the amended complaint was filed in

1 October.

2 This motion was filed October 30 of 2023 and
3 then a motion to stay was filed on October 25 of 2023
4 seeking to stay the collection proceedings in this
5 matter, and I want to make sure that that would be
6 properly in this case.

7 There's a separate action with the
8 supplemental proceedings going on or is that in this
9 action?

10 MR. PEACE: No, sir. It was in a separate
11 action. When he transcribed the judgement here in
12 Charleston County from York County. We just continued
13 on with that one. If Your Honor will remember --

14 THE COURT: The supplemental proceedings are
15 going on where?

16 MR. PEACE: Here in Charleston.

17 THE COURT: And the argument as I see it from
18 the defense side is two-fold. One, the underlying
19 judgement is on appeal. And according to the record,
20 y'all argued that appeal in November, like the 8th of
21 November?

22 MR. PEACE: Yes, sir. And we have -- I have
23 been watching these like a hawk, even looking to see
24 where they were argued. It looks like the Court of
25 Appeals, at least on the reported cases dealing with

1 opinions for case, argued September, October. So we
2 are looking at a month or so.

3 THE COURT: And then the other one has to do
4 with posting of a bond. And I believe the defendants
5 claims that the plaintiff has to post a bond, but we
6 can talk about that.

7 Because my understanding is that the
8 underlying judgement that is on appeal is a money
9 judgement, is it not?

10 MR. PEACE: That is correct.

11 THE COURT: And filing of a notice of appeal
12 does not stay a money judgement, and that is cited
13 directly to the code section that's cited in
14 defendant's motion, which is 18-9-130-A1.

15 First sentence reads: A notice of appeal
16 from a judgement directing the payment of money does
17 not stay the execution of the judgement unless the
18 presiding judge before whom the judgement was obtained
19 grants a stay of execution.

20 Mr. Peace, I'm assuming that's not been done?

21 MR. PEACE: It has not.

22 THE COURT: That would have been Judge
23 Kimball like years ago?

24 MR. PEACE: Judge Weaver. Judge Kimball
25 originally had the case, but due to my client's

1 previous counsel's illness and what we would argue is
2 Mr. Vergeldt's failure to provide documentation and
3 move the matter along, participate in discovery, Judge
4 Kimball retired and Judge Weaver went on the bench.

5 THE COURT: Okay. Now, subsection two of
6 that same statute, I have been reviewing this before I
7 came out, says a plaintiff may not enforce a sale of
8 property after notice of appeal is filed undertaking a
9 bond, but also says the plaintiff in such case would
10 not proceed with a sale if the defendant enters an
11 undertaking in double the amount of the judgement for
12 the value of the property.

13 And I think that gets us to where we are with
14 your motion, which is for sanctions. Because this
15 Court previously, I believe it was in September,
16 granted a motion to compel which was to require the
17 property to which y'all seek to collect your judgement
18 at Star Flower Aly in James Island be appraised; is
19 that correct?

20 MR. PEACE: That is correct, Your Honor.

21 THE COURT: And that's what got us to today?
22 All right. Well, set it up the best I can. Tell me
23 where you want to go.

24 MR. PEACE: All right, thank you, Your Honor.
25 May it please the Court. Taylor Peace for the

1 plaintiff.

2 As you can see from both the affidavits --
3 well, we filed this motion for sanctions and for
4 contempt.

5 As Your Honor is aware, we filed a motion
6 back on September 28th, 2023. That order required
7 Mr. Vergeldt to make the property at 1523 Star Flower
8 Aly available for appraisal or inspection by a
9 residential home inspector and appraiser, the interior
10 and the exterior, at the appraiser's convenience.

11 I have various communications between
12 Ms. Ballard and myself. I can hand those up. I would
13 prefer not to make them a matter of public record for
14 various reasons.

15 But everybody agreed that a Kevin Lowry with
16 Lowcountry Real Estate Appraisal would be suitable for
17 everybody to have the property appraised.

18 We coordinated a time for Mr. Lowry to go out
19 there to the property, that being October 24th, 2023.
20 On the date and time on the date agreed upon, I got a
21 phone call from or an e-mail from Mr. Lowry about 9:33
22 that said, hey, I have been stuck in traffic.
23 Mr. Lowry, according to his affidavit, lives in Mount
24 Pleasant. We're talking about Johns Island. We have
25 to come down the crosstown, over the Ravenel. And

1 Mr. Lowry reported that he -- that there was a
2 disabled vehicle that stopped traffic.

3 I relayed that to Ms. Ballard at about 9:41.
4 Ms. Ballard responded a few minutes later saying that
5 her client had informed her that time was up, that he
6 would not be -- Mr. Lowry would not be available to
7 enter the property. There's no dispute that Mr. Lowry
8 was late getting there --

9 THE COURT: He was late getting there but
10 Mr. Vergeldt decided he was going to unilaterally
11 terminate his right to come to the property; is that
12 right?

13 MR. PEACE: Yes, sir. At that point, I asked
14 Ms. Ballard for -- she communicated to me that -- as I
15 mentioned, Judge, I have e-mails supporting all this.
16 Reporting to me that Mr. Vergeldt had preliminary
17 talks with a different appraiser and that my client
18 could pay for any she so chose.

19 I have not received any new names. I asked
20 for additional times for Mr. Lowry to go out to the
21 property. I have received no new times, and the
22 Court's order required it be done within 45 days, and
23 we're well outside that time.

24 So I believe Mr. -- and as you can see from
25 the various affidavits, Your Honor, there's very

1 different tellings of what happened. But I do think
2 that the fact of the matter is that Mr. Vergeldt
3 decided that he was done and Mr. Lowry was, as a
4 result, done.

5 I believe, Your Honor, that that constitutes
6 a violation of the Court's order. Mr. Vergeldt, to
7 the extent he violated it, has not attempted to
8 remediate any violation. I believe it was done
9 intentionally.

10 If you look at the timeline as I stated and
11 also put in the affidavit, it was communicated through
12 defense counsel that Mr. Lowry would be late and
13 Mr. Vergeldt said, okay, great, I'm going to take this
14 opportunity to weasel out of this.

15 So we believe that -- or would argue that
16 that constitutes a willing and knowing violation of a
17 court order. Certainly Mr. Lowry would have preferred
18 to be on time as does everybody, but unfortunately due
19 to circumstances beyond his control, it doesn't appear
20 that he could have been.

21 So what we would request, Your Honor, is that
22 to the extent -- I know Mr. Lowry said he was willing
23 to go back out there or at least the attorneys to go
24 out with him to supervise, but as of right here
25 today -- which I think is appropriate based on what's

1 happened.

2 But what we would also like is for
3 Mr. Vergeldt to be responsible for paying the fee for
4 the appraisal, which I understand is \$475, as well as
5 for my attorneys' fees and costs, Your Honor. Which I
6 can submit an affidavit --

7 THE COURT: Do you have a round-about figure
8 for that?

9 MR. PEACE: Yes, sir. I have calculated
10 those as being -- with everything that happened
11 related to the day of the appraisal is \$3,120.31.
12 Cost for final motion and appearance, everything from
13 October 24th through travel back today related to this
14 motion.

15 THE COURT: Okay.

16 MR. PEACE: As I said, we started working on
17 a affidavit, but because we didn't know what the Court
18 was going to do --

19 THE COURT: All right. If you'll submit an
20 affidavit to that effect, that would be good, of your
21 fees and costs. And Mr. Lowry's fee to do an
22 appraisal is 475?

23 MR. PEACE: I believe so, yes, sir.

24 THE COURT: And, Mr. Lowry, you were out
25 there, but you were not able to complete any or even

1 initiate an appraisal; is that what happened?

2 WITNESS: Yes, sir.

3 THE COURT: There seems to be a difference of
4 opinion based upon Mr. Vergeldt's affidavit and your
5 own, but there's no question that you did arrive later
6 than 9 a.m. for whatever reason. Well familiar with
7 the traffic problems in Charleston County. It might
8 explain why the defendants are not present today.
9 Then again, it might not.

10 You never got an response or inquiry of, hey,
11 things are busy in Charleston, today?

12 MR. PEACE: I did not, Judge. When I spoke
13 with Ms. Hubbard on Friday, I did not receive any
14 indication that nobody would be here.

15 THE COURT: And what was the original
16 arrangement? Were you going to pay for the appraisal
17 by -- Mr. Lowry's appraisal up there?

18 MR. PEACE: Well, I don't know that it was
19 included in the order, but that would have been my
20 assumption. Quite frankly having to -- yeah. That
21 would have been --

22 THE COURT: Clearly, Mr. Lowry went out
23 there, and Mr. Lowry was not able to do his thing.
24 And from what I gather, Mr. Vergeldt decided to take
25 the dogs for a walk and turned Ms. Shaw loose, who is

1 a real estate professional. Can I assume that to be
2 the co-defendant, Ms. Shaw, or do we know? I'm not
3 sure if she's still the co-defendant.

4 MR. PEACE: Right. We voluntarily dismissed
5 her.

6 THE COURT: His ex-wife?

7 MR. PEACE: Without getting too far into the
8 weeds on the family court matter, I'm not sure they
9 are divorced. However, I know their property has been
10 equitably distributed and I reviewed -- the family
11 court docket shows there is a motion in order that --
12 it would not surprise me if it's an order for a name
13 change.

14 THE COURT: Okay.

15 MR. PEACE: That may be why she's not Mrs.
16 Shaw-Vergeldt.

17 THE COURT: All right. I'm going to grant
18 your motion for contempt. I find that Mr. Vergeldt's
19 behavior shows a willful and intentional disregard for
20 this Court's order of September 28th, 2023. I'm going
21 to find him in contempt of court.

22 I will issue the Court's fine of \$500 against
23 Mr. Vergeldt. He owes that to this Court. In
24 addition to that, I'm going to award you attorneys'
25 fees and costs of I'm just going to say \$3,000 because

1 it sounds like you're going to have some figure around
2 that number, and I will order that they pay for the
3 appraisal. It sounds like the appraisal fee is 475.

4 MR. PEACE: Yes, sir.

5 THE COURT: Mr. Lowry is going to charge for
6 his appraisal. I need to get the appraisal in hand.
7 And I don't really care -- I don't want to -- to the
8 extent that I need to get the police out there, I
9 don't want to do that.

10 If what we need -- and you're in Columbia.
11 There's no local lawyer in this case or you have
12 somebody you could use? Might be easier to get the
13 sheriff out there.

14 MR. PEACE: I can make some phone calls and
15 see if somebody can appear, or I can appear.

16 THE COURT: Here's where I'm going with this.
17 If for some reason they want to challenge Mr. Lowry's
18 appraisal, which is what they're indicating they're
19 going to do, they're claiming biased and prejudiced,
20 then my typical solution is go get your own appraisal.

21 They don't seem to be in any hurry to move
22 this ball along that I can see. And that's going to
23 get into what I'm going to talk about in a second,
24 which is their motion to stay the proceedings.
25 Because they're not here to argue that motion.

1 But anyway, I'm going to allow Mr. Lowry to
2 go out there and get a new appraisal. And what y'all
3 can do is just set a date and time, and I'm going to
4 order that either he can take the sheriff's office
5 with him -- I will award him that -- or counsel can be
6 there. I don't care.

7 Okay. But I'm not asking his permission; I'm
8 ordering him to allow Mr. Lowry into the house at
9 whatever date and time Mr. Lowry decides is convenient
10 for him. Okay?

11 Need you to be there. But, anyway, let's get
12 that done. Give that to him, because this is a clear
13 case of foot dragging that I'm seeing going on here.

14 Y'all's judgement was \$361,000 and some
15 change. I don't know what it's -- it's three years --
16 judgement is three years old now.

17 MR. PEACE: Yes, sir.

18 THE COURT: So I calculated with just five
19 percent interest, and I don't remember what the
20 judgement interest has been for the last three years.

21 MR. PEACE: It's generous.

22 THE COURT: Yeah. It's at least another
23 \$40,000.

24 MR. PEACE: Yes, sir.

25 THE COURT: So the judgement has got to be

1 over \$400,000 today.

2 As to their motion to stay, well, let me deal
3 with the first. The motion to dismiss filed with --
4 their 12(b)(6) motion to dismiss really piggy-backs on
5 what their appeal is. They have not waived that
6 argument.

7 MR. PEACE: Generally, yes. I mean, the idea
8 is it's void on its face.

9 THE COURT: They're claiming race judicata.
10 Race judicata to me means the thing was decided. And
11 if no thing was decided then I don't see how it could
12 be race judicata, and I'm assuming that's what you're
13 arguing in appellate court.

14 MR. PEACE: Yes, sir.

15 THE COURT: I'm going to deny their motion to
16 dismiss on 12(b)(6) grounds, and the next would be the
17 motion to stay the proceedings.

18 The general rule of thumb -- number one,
19 they're getting denied because they're not here to
20 argue the motion. Number two, I think they got the
21 cart before the horse.

22 A monetary judgement is not stayed unless the
23 underlying court decides to stay the monetary
24 judgement. There is no stay of the proceeding.

25 At this point in time, y'all have not

1 actually sold or sought to sell the property? That's
2 what we're setting up for?

3 MR. PEACE: Yes, Your Honor.

4 THE COURT: And that's the language as I saw
5 it in 18-9-130.

6 MR. PEACE: Yes, sir.

7 THE COURT: There's a difference to this
8 Court between a plaintiff may not enforce the sale of
9 the property versus a plaintiff may not proceed with
10 the sale of the property.

11 So what you're trying to do is set this thing
12 up for potential sale, right?

13 MR. PEACE: Yes, Your Honor.

14 THE COURT: All right. So in order to get
15 that, it's either the amount of the judgement doubled
16 or the amount of the value doubled or two undertakings
17 basically what it is, the way the statute reads. And
18 frankly, those sureties are difficult to obtain but
19 they can be obtained.

20 But in one instance, the defendant has to get
21 the underwriting, which is what I always understood it
22 to be. You have the judgement, and you're not holding
23 any of their funds, they would like to stop the sale
24 of the property, they would need to post the
25 judgement, post a bond saying, okay, the bond will

1 stand in lieu of the property, right?

2 If they do that then I think you need to come
3 forward and guarantee that it's going to be valid. In
4 the meanwhile, you may get an answer from the Court of
5 Appeals and you may not. There's no sense in waiting
6 on that, I don't think.

7 So the motion to stay the proceeding is also
8 denied. Okay?

9 MR. PEACE: I get kind of worried especially
10 with the language in *Gordon vs. Lancaster*.

11 THE COURT: Yeah, I see that a lot. I had to
12 put some guy in jail last fall and he languished
13 through the holidays but his judgement expired on
14 December 22.

15 It was just a payment of the sanctions that I
16 awarded that case that kept him in jail, which he got
17 out after the new year. He was happy to get out. He
18 missed New Years with his family. I didn't give an
19 answer until last week.

20 All right. So can I look to you for a
21 proposed order? I'm sure there will be moaning and
22 groaning from the other side.

23 I'm not going to do a Form 4. What I have
24 found in these kinds of situations, Form 4 causes
25 problems when a real order gets done.

1 MR. PEACE: Yes, sir.

2 THE COURT: So just submit your affidavit of
3 attorneys' fees and costs. I will award the sanctions
4 that I have indicated, \$3,000 of fees, \$500 to the
5 Court, and he's going to pay the appraisal when
6 Mr. Lowry gets the appraisal.

7 Mr. Lowry decides which day it's going to be
8 and then y'all set it up. I don't care, either
9 counsel be there or -- either counsel or deputy
10 sheriff.

11 MR. PEACE: Yes, sir.

12 THE COURT: Just needs to be contacted.
13 Okay? Very good. All right. Good to see you.

14 Mr. Lowry, thank you.

15 (Off the record at 2:33 p.m. on January 8th,
16 2024.)

1 COURT REPORTER'S CERTIFICATE

2
3 I DO HEREBY CERTIFY THAT THE TESTIMONY
4 CONTAINED IN SAID HEARING WAS, BY ME, REDUCED TO
5 WRITING IN THE PRESENCE OF SAID WITNESS BY MEANS OF A
6 COMPUTERIZED TRANSCRIPTION. THE SAID HEARING IS A
7 TRUE AND ACCURATE TRANSCRIPT OF THE WHOLE OF THE
8 TESTIMONY GIVEN BY SAID WITNESS, AS AFORESAID.

9 I DO FURTHER CERTIFY THAT I AM NOT CONNECTED
10 BY BLOOD OR MARRIAGE WITH ANY OF THE PARTIES OR THEIR
11 ATTORNEYS OR AGENTS, AND THAT I AM NOT AN EMPLOYEE OF
12 EITHER OF THEM, NOR INTERESTED DIRECTLY OR INDIRECTLY
13 IN THE MATTER OF CONTROVERSY EITHER AS COUNSEL,
14 ATTORNEY, AGENT, OR OTHERWISE.

15 SIGNED THIS THE 26th DAY OF JUNE 2024.

16 

17 JOSIE ALLEN BOEHM

18 My Commission Expires 10/18/32
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HEARING PROCEEDINGS

March 28, 2024

Vicki Lynn Vergeldt, etc.

VS

John Edward Vergeldt

2021-CP-10-03640

REPORTER: Kathryn Bostrom

ROA 00725

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
2 COUNTY OF CHARLESTON) CASE NO.: 2021-CP-10-03640
3
4 Vicki Lynn Vergeldt,)
5 Individually, and as Successor)
6 Trustee of the John Vergeldt,) HEARING
7 Jr. Revocable Living Trust) MARCH 28, 2024
8 Plaintiff,)
9 vs.)
10 John Edward Vergeldt,)
11 Defendant,)
12 _____)

13
14 The following hearing, reported by Kathryn B Bostrom,
15 Court Reporter and Notary Public in and for the State of
16 South Carolina; pursuant to Rule 30 of the South Carolina
17 Rules of Civil Procedure; said hearing was held before the
18 Honorable Judge Mikell R. Scarborough, taken at the
19 Charleston County Judicial Center, 100 Broad Street,
20 Charleston, South Carolina, on Thursday, the 28th day of
21 March, 2024, commencing at the hour of 11:12 a.m.

22
23
24
25

APPEARANCES:

Representing the Plaintiff:

Taylor A. Peace, Esquire
Harrell Martin and Peace
135 Columbia Avenue
Chapin, South Carolina 29036

Representing the Defendant:

Desa Ballard, Esquire
Ballard and Watson
226 State Street
West Columbia, South Carolina 29169

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EXHIBITS

There were no exhibits marked during this hearing.

- Court Reporter's Legend:
- dashes [--] Intentional or purposeful]
 - interruption
 - [ph] Denotes phonetically written
 - [sic] Written as said

1 P-R-O-C-E-E-D-I-N-G-S

2 THE COURT: So it's Vickie Lynn Vergeldt,
3 Individually, Successor Trustee of the John
4 Vergeldt, Jr. Trust. I'm just going to say
5 versus John Edward Vergeldt. Mr. Vergeldt, the
6 Defendant, is present today with his counsel, Ms.
7 Desa Ballard and present for the Plaintiff is Mr.
8 Taylor Peace. Mr. Peace, are you Richland County
9 Bar?

10 MR. PEACE: Yes, sir.

11 THE COURT: And Ms. Ballard, you're Lexington County
12 Bar?

13 MS. BALLARD: My office is in Lexington County, yes.

14 THE COURT: Statewide practice I'm well aware.

15 MS. BALLARD: Yeah, I'm statewide.

16 MR. PEACE: I think I'm both, too.

17 THE COURT: I'm sorry.

18 MR. PEACE: I said I think I'm both Richland and
19 Lexington, too.

20 THE COURT: Yeah, okay. All right, very good. All
21 right. So the matter was previously before the
22 Court on January 8th. Neither the Defendant nor
23 counsel appeared. The Court found Mr. Vergeldt
24 in contempt of court based upon the matter that
25 was then pending before the Court. A Motion to

1 Reconsider that finding was timely filed by Ms.
2 Ballard's office. What was the young lady's
3 name, Haley?

4 MS. BALLARD: Haley Hubbard.

5 THE COURT: Haley Hubbard.

6 MS. BALLARD: She's the young associate. She joined
7 us about two years ago --

8 THE COURT: Okay.

9 MS. BALLARD: -- after three years as a public
10 defender.

11 THE COURT: Okay.

12 MS. BALLARD: She used to be a superstar.

13 THE COURT: Okay. All right. And then, and part and
14 parcel to that, the Court was apprised Ms.
15 Ballard had had some health issues and apparently
16 had occurred that day on the way to the
17 courthouse. And it sounded horrendous, Ms.
18 Ballard. So I'm sorry for that --

19 MS. BALLARD: Thank you, Your Honor.

20 THE COURT: -- and have happily reset this matter on
21 the Motion to Reconsider. Also pending -- and I
22 can't recall whether -- no, the Court did rule.
23 The Court ruled on the Motion to Stay and the
24 appealed the Motion for Contempt and Sanctions
25 and I believe the Motion to Dismiss. I think

1 those were all ruled upon in that Order --

2 MR. PEACE: They were, Your Honor.

3 THE COURT: -- from -- let me get that. The Order was
4 entered February 2 from the January 8th hearing.
5 The Motion to Reconsider came within ten days,
6 and that's what's got us here today, March 28th,
7 2024. Okay. So let's take those up then, and
8 Ms. Ballard, I'm happy to have you here.

9 MS. BALLARD: Thank you, Your Honor. This is our
10 Motion to Stay, and I emailed you last night with
11 a copy to Mr. Peace, a copy of the original Order
12 --

13 THE COURT: That was Judge Kimball's Order.

14 MS. BALLARD: Judge Kimball's Order.

15 THE COURT: From like 2015, maybe?

16 MS. BALLARD: Yes.

17 THE COURT: All right.

18 MS. BALLARD: And that's -- I wanted to give you more
19 background than we'd given you before.

20 THE COURT: Okay.

21 MS. BALLARD: Because it's -- I think it's fair for
22 you to know what Mr. Vergeldt has been defending
23 against for ten years. Vickie Vergeldt, his
24 sister, filed this lawsuit against him and his
25 late sister, other Vergeldt sister --

1 THE COURT: Okay.

2 MS. BALLARD: -- originally in 2014 --

3 THE COURT: Okay.

4 MS. BALLARD: -- and as you'll find from Judge
5 Kimball's Order, she only requested equitable
6 relief. She asked for a construction of the
7 trust agreement. Judge Kimball walked around in
8 circles as hard as he could.

9 THE COURT: He did -- I thought he did a pretty good
10 job --

11 MS. BALLARD: He did a great job.

12 THE COURT: -- of saying what he was asked to do.

13 MS. BALLARD: He was not ruling on this --

14 THE COURT: Right.

15 MS. BALLARD: -- he was not ruling on that, and then
16 Vickie Vergeldt filed a second lawsuit in 2016.
17 And in that lawsuit she was seeking to remove
18 John Vergeldt as the Trustee, Successor Trustee.
19 Two years into that 2016 action -- she had a
20 prior counsel. She had several prior counsel.
21 It wasn't Mr. Peace at that time -- filed a
22 Motion to Amend to add a claim for damages. Mr.
23 Vergeldt was pro se at that time, and when the
24 case was tried he objected and said we've already
25 litigated all this. She's had the opportunity to

1 seek damages from me in the 2014 case. He didn't
2 use the words res judicata, but he -- he
3 described in detail what had occurred. And this
4 case was tried before Tessa Weaver, Master of
5 Equity in York County, and she overruled his
6 objections. When we --

7 THE COURT: Mr. Vergeldt was pro se at the time?

8 MS. BALLARD: Yes, he was.

9 THE COURT: Okay.

10 MS. BALLARD: But I have to say I went through the
11 record thoroughly, and it was thoroughly
12 preserved. You know, I've done hundreds of
13 appeals, and you don't take an appeal if you
14 don't have a preserved issue.

15 THE COURT: Right.

16 MS. BALLARD: So --

17 THE COURT: The Court of Appeals didn't agree with you
18 on that, though, did they?

19 MS. BALLARD: Exactly, exactly, but what's fascinating
20 about it is -- as I say, I've done lots of
21 appeals. This time when we filed our Petition
22 for a Rehearing, the Court of Appeals asked Mr.
23 Peace for a response. That's probably happened
24 half a dozen times in my entire career. They
25 almost never ask for a response. I was actually

1 on the phone with somebody and uttered a word I
2 shouldn't have uttered when I saw it pop in. I
3 was so surprised to see it.

4 THE COURT: Okay.

5 MS. BALLARD: And of course, let Mr. Vergeldt know.

6 And so the Court of Appeals, I believe, is paying
7 attention to what we have raised in terms of the
8 failure to preserve and one of the other issues
9 that we raised in our Motion to Reconsider.

10 THE COURT: The other motion had to do with the
11 standard of -- basically the standard, right?

12 MS. BALLARD: Yes, the 10th amendment to the Trust
13 Agreement -- thank you for reminding me -- the
14 10th amendment to the Trust Agreement required
15 that the burden of proof for somebody challenging
16 the actions of the successor trustee was like the
17 highest possible burden of proof. I don't recall
18 the exact language. And Judge Weaver said it was
19 preponderance, and we take the position that
20 there is a world of difference between
21 preponderance. And clearly the late Mr. Vergeldt
22 knew his siblings or his children had a strange
23 relationship, and I've seen no contest clauses in
24 a trust and wills and things like that before.
25 That's what he was shooting for, but he didn't

1 get it.

2 THE COURT: Yeah.

3 MS. BALLARD: So we are seeking relief from the Court
4 of Appeals. We hope the Court of Appeals will
5 give us relief, but the most interesting thing on
6 Judge Kimball's Order is that Judge Kimball
7 specifically found that my client, Mr. Vergeldt,
8 duties as Successor Trustee didn't begin until
9 2013, which is when his father became disabled to
10 handle his own affairs. So when we did the 2016
11 action, which was amended in 2018, the damages
12 that were awarded went back way before 2013.
13 Again, Mr. Vergeldt, pro se, said wait a minute.
14 Judge Kimball said I wasn't responsible for
15 anything prior to 2013, and Judge Weaver allowed
16 all that evidence in, and those are the issues
17 that we're struggling with on appeal.

18 THE COURT: Okay.

19 MS. BALLARD: And --

20 THE COURT: The first one being the argument of res
21 judicata.

22 MS. BALLARD: Correct.

23 THE COURT: The second one would be as to the
24 allegation of damages ultimately, would it not?

25 MS. BALLARD: Damages and the burden of proof --

1 THE COURT: Okay, yeah.

2 MS. BALLARD: -- because I think the late Mr. Vergeldt
3 made it clear that he didn't want this to happen.
4 He didn't want this ten years worth of litigation
5 to happen.

6 THE COURT: Right.

7 MS. BALLARD: And he did the best he could, but here
8 we go. The first time we appeared before Your
9 Honor, I told you that Mr. Vergeldt, my client,
10 was not in a position to post an appeal bond and
11 has not posted an appeal bond, but in other
12 circumstances that I've had like this we have
13 always relied on 18-9-130(a)(2), which says that
14 a plaintiff may not enforce the sale of property
15 after a notice of appeal is filed without giving
16 an undertaking in twice the amount of the value
17 of the asset that she's trying to sell or twice
18 the value of the judgment, whichever's higher.
19 And at this point, and this circles around to our
20 Motion to Dismiss as well, Vickie Vergeldt has
21 not done that. She has not done anything to
22 suggest to this court that she's in a position to
23 execute on this judgment as to the house. Now,
24 the judgment has been executed as to an LLC and
25 two bank accounts, which you've held in abeyance,

1 but the -- I'm sorry, the motorcycle, an LLC and
2 two bank accounts. But our Motion to Dismiss
3 says wait a minute. We don't even know if this
4 house is going to be an asset that is capable of
5 execution. And we take the position that 18-9-
6 130(a)(2) prevents the Court from considering
7 anything about the house until Vickie Vergeldt,
8 the Plaintiff, has demonstrated that she has
9 posted a bond in the amount required by 18-9-
10 130(a)(2). And I've brought this up several
11 times in my pleadings, and it's been met with a
12 resounding silence from the other side. So I
13 don't think they're even trying to do that. Now,
14 the September Order granting the motion to be
15 held requiring Mr. Vergeldt to make the house
16 available for an appraisal on the motion of
17 Vickie Vergeldt was issued on September 28th,
18 2023 by Your Honor. And Mr. Peace reached out to
19 me on October 10th, 2023, and that's almost a
20 month later, I think, and said I'm suggesting
21 this particular appraiser. And Haley, in my
22 absence, said that's fine. We've got two times,
23 two dates and times that are available, and he
24 picked one, and it happened to be October 24th at
25 9:00 a.m. So it was set up by agreement. It was

1 set up not by court order. It was set up by
2 agreement. The only thing the Order to Compel
3 said is the parties shall agree. If they can't
4 agree, they'll have to come back to the Court.
5 We didn't have to come back to the Court. We
6 agreed on it. Attached to -- I'm not sure which
7 of my pleadings it's attached to -- on emails
8 that Mr. Peace and I exchanged the morning of
9 October 24th -- he emailed me at 9:43 a.m., which
10 was 43 minutes after the appraiser was supposed
11 to be at Mr. Vergeldt's house and is quoting Mr.
12 Lowery -- his name is --

13 THE COURT: Kevin Lowery, right?

14 MS. BALLARD: I believe -- yes, Kevin Lowery.

15 THE COURT: Okay.

16 MS. BALLARD: I had been sitting in traffic for an
17 hour. It finally let up, and I should be there
18 in ten minutes. That was emailed to me at 9:43.
19 I had already spoken to Mr. Vergeldt, and I said
20 please wait a little bit longer. You know, I
21 know you've got things to do, but wait a little
22 bit longer. And then they moved for contempt.
23 The thing that struck me was in the Affidavit of
24 Mr. Lowery -- first of all, I objected to the
25 Affidavit of Mr. Lowery or I intended to on

1 January 8th when we were here because Rule 6(d)
2 requires that affidavits in support of a motion
3 be filed with the motion unless the court allows
4 it to be filed at a later time. This was filed
5 the Friday before our Monday hearing. So I
6 intended to object to it. Assuming you overrule
7 my objection, I'd like you to pay close attention
8 to paragraph 11 in Mr. Lowery's Affidavit which
9 says: My own experience in my morning and
10 evening commutes and other travels in that
11 vehicular traffic on Highway 17 is frequently
12 slow, delayed and/or halted due to traffic
13 accidents, disabled vehicles, et cetera, as it
14 sometimes narrows to a four lane road. He knew
15 that there may be a problem with the traffic.
16 Earlier in his Affidavit he says he left home --
17 which he doesn't identify the address of -- he
18 left home in plenty of time to make it to Mr.
19 Vergeldt's house for the 9:00 appointment. He
20 doesn't explain how that contradicts his own
21 experience that the traffic in that area
22 frequently is delayed. And he didn't notify Mr.
23 Peace until 43 minutes after he was late for the
24 appointment. I don't know how long the hearing
25 took on January 8th, Your Honor, but I'll bet you

1 it didn't take 43 minutes. That was the first
2 time he reached out. It was forwarded to me -- I
3 contacted Mr. Vergeldt, and you'll see the chain
4 of emails that I exchanged with Mr. Peace -- and
5 I said he's leaving, I think at 10:00 or words to
6 that effect. Here it is. It's: Mr. Vergeldt
7 told me at 9:45 he was done waiting. He will get
8 his own appraiser, and Vickie can pay for it.
9 And at that time I was still trying to maintain a
10 friendly relationship with Mr. Peace, and I said
11 don't shoot the messenger. That was, of course,
12 prior to January 8th. And he responded at 10:28
13 a.m. and said: Please have Mr. Vergeldt provide
14 the name and contact for the appraiser. So the
15 next day I filed a Motion to Stay these
16 proceedings, pointing out what had pointed out
17 repeatedly, which is that Vickie Vergeldt has not
18 done the conditions precedent that are required
19 to execute on this house. So while an appraisal
20 was fine, she can't do anything with it unless or
21 until --

22 THE COURT: Well, isn't that kind of the rub on the
23 whole matter right now. They're just trying to
24 get an appraisal.

25 MS. BALLARD: And we gave them one.

1 THE COURT: That came after the fact --

2 MS. BALLARD: Well, it did --

3 THE COURT: -- so we're going back in time to what
4 happened on the day of the -- what got us here
5 today on the issue of contempt --

6 MS. BALLARD: Correct.

7 THE COURT: -- is what happened on that particular day
8 --

9 MS. BALLARD: Correct.

10 THE COURT: -- in October, last fall.

11 MS. BALLARD: Yes.

12 THE COURT: The issue of the posting of the bond
13 wouldn't come unless and until such time as they
14 seek to enforce the sale of the property,
15 correct?

16 MS. BALLARD: And I -- yes, and I understand them
17 wanting to know that the property has enough
18 value to satisfy the judgment.

19 THE COURT: Right.

20 MS. BALLARD: I understand them wanting to do that.

21 THE COURT: Right.

22 MS. BALLARD: But the day after this little dustup
23 between Mr. Lowery and Mr. Vergeldt, I filed a
24 Motion to Stay. I think that alerted everybody
25 that the 45 days wasn't really an issue, so I

1 told Mr. Vergeldt get your own appraisal. The
2 house is unencumbered. There's no mortgage.
3 Let's sent it to them so they know what they need
4 to know.

5 THE COURT: Right.

6 MS. BALLARD: And so we did that, and we filed, I
7 think a couple of weeks after he had it done. He
8 had it done like in December. We filed it the
9 first week in January, I think, coming up to the
10 January 8th hearing.

11 THE COURT: Just prior to the hearing about?

12 MS. BALLARD: I believe it was, yes.

13 THE COURT: I don't recall being aware of that at the
14 time of the hearing. I may have been, but I
15 don't recall that.

16 MS. BALLARD: It's in your file, Your Honor.

17 THE COURT: Okay.

18 MS. BALLARD: The house appraised for 650, I believe -
19 -

20 THE COURT: Okay.

21 MS. BALLARD: 630 -- which is more than twice the
22 amount of the judgment.

23 THE COURT: That was Mr. Aaron's?

24 MS. BALLARD: Yes.

25 THE COURT: Right, Burke Aaron.

1 MS. BALLARD: Yes. And so the need, if any, that
2 existed for an appraisal of this house has been
3 satisfied. I felt comfortable having filed a
4 Motion to Stay when I heard about the dustup.
5 You know, her giving to me two different versions
6 of what happened, I thought filing a Motion to
7 Stay was sufficient to protect Mr. Vergeldt and
8 me. And of course, we didn't have the hearing
9 until it got scheduled in January, and we all
10 know what happened after that.

11 THE COURT: Right.

12 MS. BALLARD: So my Motion to Stay is to do exactly
13 what 18-9-130(a)(2) says. I'm sorry (b)(2). The
14 stay described in this subsection is effective
15 upon the filing of the notice of appeal. And
16 during the entire course of appellate review of
17 the judgment we are still there. We're in a
18 petition for rehearing at the Court of Appeals
19 after which time if denied, we will petition for
20 cert to the South Carolina Supreme Court.

21 THE COURT: Okay.

22 MS. BALLARD: We have preserved issues. I didn't
23 assist Mr. Vergeldt at the trial court level. He
24 hired me solely for the appeal, and, you know,
25 the first thing I looked for is do we have

1 preserved issues. I wasn't about to let him
2 spend money taking an appeal that was on issues
3 that were not preserved. He could seek other
4 remedies, but he had several good preserved
5 issues, and why the Court of Appeals didn't pick
6 up on that despite our oral argument, I don't
7 know, but they did pick up on it when we filed
8 the Petition for Rehearing, because within days
9 we got the letter from the Court of Appeals
10 saying oh, we'd like to hear from the other side
11 on this. And so I checked yesterday, and the
12 docket still shows it for consideration. So it
13 is still pending at the Court of Appeals, and I
14 reiterate the motion that I filed on October 25th
15 of last year, and I supplemented it yesterday
16 with the developments at the Court of Appeals, so
17 this court is aware that the opinions issued --
18 rehearing was filed for, and it looks like it
19 might be granted, but we don't know, but what we
20 do know is we're during the appellate review of
21 the judgment. And --

22 THE COURT: Let me ask you this, because I've looked
23 at Section (a)(2) that you reference. What about
24 (a)(1), because (a)(1) says you go to the
25 presiding judge before whom the judgment was

1 attained to seek the stay, not this court. This
2 court -- its only setting is a court -- this is a
3 supplemental proceeding. I don't have -- as I
4 say in almost every supplemental proceeding, I
5 don't vest myself in the underlying judgment,
6 because I have to take that as a given, okay? So
7 (a)(1) says you've got to go back basically to
8 Judge --

9 MS. BALLARD: Weaver.

10 THE COURT: -- Weaver and say hey, will you stay your
11 judgment while we're on appeal. Has that been
12 done?

13 MS. BALLARD: We did that.

14 THE COURT: You did do that?

15 MS. BALLARD: We did do that.

16 THE COURT: And that was denied?

17 MS. BALLARD: Yes.

18 THE COURT: Okay. All right.

19 MS. BALLARD: My first appearance in the case was the
20 Motion to Reconsider --

21 THE COURT: Okay.

22 MS. BALLARD: -- the Final Order that was issued by
23 Judge Weaver, and I also asked her to consider a
24 stay --

25 THE COURT: Okay.

1 MS. BALLARD: -- and she -- I guess it was during
2 Covid, because we had a Zoom hearing --

3 THE COURT: Okay, okay.

4 MS. BALLARD: -- on the Petition for Rehearing, but --

5 THE COURT: I'm with you.

6 MS. BALLARD: -- the original judgment was entered in
7 York County.

8 THE COURT: Yeah.

9 MS. BALLARD: Mr. Vergeldt lives in Charleston County,
10 so Mr. Peace in recording the judgment from York
11 to Charleston County started us on this road.
12 Section (a), we've done that.

13 THE COURT: Okay. All right. I wasn't aware,
14 because, again, I don't --

15 MS. BALLARD: You don't have the file.

16 THE COURT: -- I don't look into that. Again, I just
17 -- if there's a problem with the underlying
18 judgment, my position has been you need to take
19 that to the court that issued the judgment --

20 MS. BALLARD: Right.

21 THE COURT: -- and/or, you know, you've got it on
22 appeal.

23 MS. BALLARD: Right.

24 THE COURT: And some cases, as you well know -- some
25 cases are stayed by virtue of the notice of

1 appeal.

2 MS. BALLARD: Correct.

3 THE COURT: Money judgments are not.

4 MS. BALLARD: That's correct.

5 THE COURT: And that's what this is, so --

6 MS. BALLARD: That's right.

7 THE COURT: -- so it's not stayed automatically.

8 There's other steps, but in the event that the
9 Plaintiff seeks to sell the property, then I
10 think you would then trigger what you're
11 requested. That's not yet been done. I think
12 what they've tried to do is decide whether or not
13 they can wait it out and see. I forget. The
14 judgment's 350 or something?

15 MS. BALLARD: Something like that.

16 THE COURT: Okay.

17 MS. BALLARD: Your Honor, what I want to point out is
18 not only has Mr. Vergeldt not attempted to
19 interfere with their judgment, he has
20 unencumbered that property when these proceedings
21 began. The property was owned by Mr. Vergeldt
22 and his wife.

23 THE COURT: Yeah.

24 MS. BALLARD: And his wife conveyed her interest to
25 Mr. Vergeldt so it is a wholly free and clear

1 asset. He's not attempted to borrow money
2 against the house. He's not attempted to take
3 out a mortgage against the house. He has done
4 nothing to interfere with their ability to
5 collect their judgment once it's a final
6 judgment.

7 THE COURT: Well, then based upon that appraisal --
8 and I could not find it in the record. If it's
9 in there, I couldn't find it.

10 MS. BALLARD: I'll --

11 THE COURT: But in any event, they should feel fairly
12 secure --

13 MS. BALLARD: They should.

14 THE COURT: -- in their judgment.

15 MS. BALLARD: They should.

16 THE COURT: I understand that point. I'm with you on
17 that one.

18 MS. BALLARD: And I think it's important --

19 THE COURT: And it's in Charleston County, unless the
20 old county real estate matter has been closed.

21 MS. BALLARD: Well, I stopped by Mr. Vergeldt's house
22 this morning --

23 THE COURT: It's done that before.

24 MS. BALLARD: It's still standing. It still looks
25 great.

1 THE COURT: All right.

2 MS. BALLARD: So --

3 THE COURT: I'm with you. I understand the Motion to
4 Stay. I don't think we're quite there yet, but
5 I'll let Mr. Peace address that. Let's talk
6 about -- if you want, I'm happy to talk about the
7 contempt, but I've got to go back in time on
8 that.

9 MS. BALLARD: Yes.

10 THE COURT: And apparently the appraisal that came in
11 from Mr. Herring was after the fact.

12 MS. BALLARD: It was.

13 THE COURT: And again, I can't find it of record, so
14 if it's filed I'm not seeing it. Do you have a
15 copy?

16 MR. PEACE: I don't have a copy printed out, Judge.
17 It was filed as part of the Motion to Reconsider
18 back on February 12th.

19 THE COURT: February, okay.

20 MS. BALLARD: I know it's attached to one of my
21 pleadings.

22 THE COURT: Okay.

23 MS. BALLARD: But that one was already ruled on, so I
24 didn't print it out.

25 THE COURT: It was an exhibit to the Motion to

1 Reconsider?

2 MS. BALLARD: Yes.

3 THE COURT: Okay. All right. Well, I would not have
4 had it prior to the hearing.

5 MS. BALLARD: Right.

6 THE COURT: Okay. All right.

7 MS. BALLARD: You didn't have it prior to the hearing
8 --

9 THE COURT: Got it, okay. All right.

10 MS. BALLARD: -- and it was when I -- as I said, I
11 learned about the dustup on October 24th.

12 THE COURT: Okay.

13 MS. BALLARD: I thought, you know, this is not going
14 to be pleasant. Let's file a Motion to Stay.

15 THE COURT: Sure.

16 MS. BALLARD: And I've told Mr. Peace repeatedly that
17 the house was unencumbered. Of course, he can
18 search the records himself and see that. It
19 doesn't take much to figure out, you know -- if
20 you do a realtor.com search, you can figure out
21 an approximate value of the house. I would also
22 point out that when Judge Weaver's Order was
23 issued, Vickie Vergeldt took ownership of the
24 cottage in Michigan that had belonged to the late
25 Mr. Vergeldt and has fixed it up and moved right

1 into it. So she's gotten, you know, a piece of
2 flesh, whatever you want to call it.

3 THE COURT: A pound of flesh.

4 MS. BALLARD: Pound of flesh. She's gotten a pound of
5 flesh out of --

6 THE COURT: You get a piece of flesh by biting an arm.

7 MS. BALLARD: My words are still not 100 percent.

8 THE COURT: You're doing great, okay. I want to know
9 that. You look well.

10 MS. BALLARD: Thank you. I'm doing my best.

11 THE COURT: Working to get some color in your face. I
12 can see that.

13 MS. BALLARD: Yes, I am. Thank you.

14 THE COURT: And I just can't -- when I read what you
15 sent me, I was just like yikes.

16 MS. BALLARD: It was --

17 THE COURT: It was a rough day.

18 MS. BALLARD: It was a rough day. My husband found me
19 at 7:30 in Charleston on East Bay Street, with
20 the assistance of the Charleston Police
21 Department.

22 THE COURT: Okay. All right.

23 MS. BALLARD: And I don't remember that. And he won't
24 tell me the details, and that's probably good.

25 THE COURT: Yeah, yeah, you don't want to know.

1 MS. BALLARD: I don't want to know.

2 THE COURT: You don't want to know. Okay.

3 MS. BALLARD: But I'm seeing a neurologist to try to
4 figure out what wires got disconnected to try to
5 make sure they don't get disconnected again.

6 THE COURT: I'm with you on that one.

7 MS. BALLARD: And it's the first time I ever felt
8 helpless.

9 THE COURT: Pretty rough feeling, yeah.

10 MS. BALLARD: It's a very rough feeling. And of
11 course, Mr. Vergeldt had called me as I was
12 driving to Charleston. I said fine, I'll be at
13 the courthouse. I remember that.

14 THE COURT: Uh-huh, uh-huh.

15 MS. BALLARD: So I don't know what happened. I don't
16 think -- of unknown origin is not a very
17 comforting term. But on the Motion to Stay there
18 is nothing to be gained by the Plaintiff, Vickie
19 Vergeldt, in having had that appraisal done in 45
20 days or 95 days or even now, because we're still
21 pending on appeal. And she has not shown any
22 effort to comply with the statute which requires
23 her to post a bond pending appeal in double the
24 amount of the judgment and/or value of the asset.
25 The other thing that she has not done is not

1 determine or not even attempted to show this
2 court that there are not other assets that could
3 be executed on that would be sufficient to
4 satisfy this judgment. She also has not -- she's
5 not demonstrated -- I forget what the third thing
6 was I was going to tell you. I can't remember,
7 but she is fully protected. She is fully
8 protected by a house that's been appraised. The
9 appraisal is on record. It is an unencumbered
10 piece of property. I hope I don't have another
11 day like January 8th, but I went back to work
12 February 1st, and I've been getting stronger
13 every day. So I think I'm going to be able to
14 help Mr. Vergeldt get through this.

15 THE COURT: She's back to her fighting weight. That's
16 good, that's good.

17 MS. BALLARD: Exactly, exactly. Thank you, Your
18 Honor.

19 THE COURT: Thank you.

20 MS. BALLARD: Of course, we want to respond to the
21 Motion of Contempt and argue the Motion to
22 Dismiss as well.

23 THE COURT: Let me hear from you, Mr. Peace, on the
24 Motion to Stay, and we'll bleed into the
25 contempt, because that's really what's gotten us

1 here.

2 MR. PEACE: Thank you, Your Honor. May it please the
3 Court, Taylor Peace for the Plaintiff. I want to
4 clarify or at least clear up a couple of things,
5 especially with regard to Judge Kimball's Order.
6 There seems to be some confusion on what exactly
7 he ordered, and I've pulled it up on the public
8 index, and I understand that Ms. Ballard has sent
9 you a copy. So I want to direct the Court's
10 attention -- I want to direct the court's
11 attention --

12 THE COURT: Is that the exhibit? I've got three of
13 those. Do you want me to keep all of them?

14 MS. BALLARD: Well, I just wanted you to have one --

15 THE COURT: You want a hard copy?

16 MR. PEACE: No, Judge, I'm fine. Thank you. I want
17 to direct the Court's attention to the very
18 bottom of page 6 and then more specifically the
19 last paragraph of Section B. I've lived with
20 this case now since 2019, and Ms. Ballard is
21 right and the defense is right that in the
22 underlying case, in the 2014 case, Ms. Vergeldt
23 did simply seek equitable relief.

24 THE COURT: Right.

25 MR. PEACE: Only sought really the release of trust

1 records, because at the time Mr. Vergeldt had --
2 my understanding is that had basically said that
3 he owed no duties to provide those to her, which
4 precipitated that case. And there seems to be
5 some confusion about what Judge Kimball ordered.
6 If you'll look about halfway down the paragraph,
7 we're talking about current trust beneficiaries
8 as it relates only to the release of trust
9 records, in particular those provisions of the
10 trust that talks about the duties, and Judge
11 Kimball found only as to this. About halfway
12 down, Judge Kimball ruled thus: John's duties as
13 Successor Trustee provide statements of account
14 to Vickie and Patty did not arise until Mr.
15 Vergeldt's death in 2013. That statement only
16 finds as to his duties to provide statements.
17 And that's important, Judge, because if we go all
18 the way down to the order of the Court, in
19 particular number 5 and number 6 is what we're
20 really dealing with in the second provisioned
21 case. Judge Kimball found that no declaration
22 concerning probable cause to challenge the
23 Successor Trustee's performance of his duties is
24 made as notice has been presented in this court.
25 Such determination is explicitly preserved until

1 such time as Plaintiff, meaning Vickie as
2 beneficiary at the time, challenged the action of
3 John. The finding or conclusion of this Order
4 shall be deemed to be a determination of
5 compliance or noncompliance for applicable law or
6 the terms of the Trust Agreement. Further, no
7 finding or conclusion in this Order that shall be
8 deemed to establish the amount of any entitlement
9 of any beneficiary under the terms of the Trust
10 Agreement -- paragraph 5 and 6, Judge, and Mr.
11 Vergeldt's subsequent failure to comply with this
12 Order, Judge Kimball's Order, is exactly why Ms.
13 Vergeldt's previous counsel brought the case.
14 And we actually did not -- were not able to
15 determine what in the world was going on with the
16 trust despite Mr. Vergeldt's objection, because -
17 - in 2016 because he continued to refuse to
18 provide records. If you go through the case
19 which -- or the underlying case --

20 THE COURT: Even after the Order, is that what you're
21 saying?

22 MR. PEACE: Even after the Order. That's right,
23 Judge. And as Your Honor mentioned, you don't
24 have that file, but the court and Judge Kimball
25 before he retired ended up by consent order of

1 the parties appointing Kathleen Palenski as a
2 limited successor trustee for the purpose of
3 going in and finding the records.

4 THE COURT: Okay.

5 MS. BALLARD: So I wanted to clear that up, because
6 there seems to be some confusion on Mr. Belgeldt
7 -- or by Mr. Vergeldt of what exactly what Judge
8 Kimball ordered. He specifically did not find
9 damages and specifically did not say that Mr.
10 Vergeldt was absolved of any wrongdoing he could
11 have done prior to the date of his death, which
12 has been further complicated by the fact that
13 during the course of the 2016 action, which is
14 the one that's on appeal, Mr. Vergeldt resigned
15 as Successor Trustee only after my client was --
16 or the Plaintiff was allowed to amend her
17 petition to assert damages. And while we are
18 also talking about it, we would dispute that Mr.
19 Vergeldt has done absolutely nothing to stop us
20 from trying to enforce the judgment, because if
21 you go downstairs to the family court -- Family
22 Clerk of Court, Your Honor will find a family
23 court file that was an action for equitable
24 division and separate support and maintenance
25 filed by Mr. Vergeldt's wife six days after the

1 Motion to Reconsider was denied, asking that she
2 continue to hold sole title to the property which
3 Mr. Vergeldt deeded his interest to her after we
4 were -- nine days after -- and I may be wrong
5 there, but approximately nine days after we were
6 allowed to assert damages, seeking to have her
7 have legal title, but for him to have equitable
8 interest. In other words, as Your Honor is
9 aware, batches of fraud include who gets
10 beneficial title and who gets legal title. They
11 were asking the family court to approve that, and
12 it was only after we intervened, after we stopped
13 that from going forward, did Mr. Vergeldt finally
14 say -- and Mr. Vergeldt finally say okay, we'll
15 deed the property to Ms. Vergeldt.

16 THE COURT: I recall something about that. Your
17 argument basically is that the matter was not
18 previously addressed, right? It's not res
19 judicata?

20 MR. PEACE: Correct.

21 THE COURT: The court -- Judge Kimball never discussed
22 any type of damages claim and expressly excluded
23 that on his consideration? That's y'all's
24 argument on the res judicata issue?

25 MR. PEACE: Correct.

1 THE COURT: Okay. All right.

2 MR. PEACE: And even if there have been some -- and
3 further it's argued there was no -- the initial
4 action only sets so much declaratory relief, and
5 under applicable law we can then assert damages
6 once our rights are adjudicated as to the
7 documents.

8 THE COURT: Okay. All right.

9 MR. PEACE: As to the Motion to Stay proceedings, I
10 do think that S.C. Code 18-9-130 is appropriate.
11 I think it applies in this matter. However, as
12 the Court noted, Your Honor wouldn't have
13 authority to stay execution of the judgment
14 unless -- well, wouldn't have authority to stay
15 execution of the judgment. And Your Honor is
16 right. We are not -- the provision regarding
17 appeal for the plaintiff's side only comes into
18 play if we seek to enforce the sale of real
19 property. Right now we are just seeking an order
20 of foreclosure. As Your Honor is well aware,
21 judgment holders, lenders, other creditors may
22 seek a judgment of foreclosure, but not
23 necessarily sell the property or sell it
24 immediately. What we are seeking in our
25 Complaint is for a judgment of foreclosure and

1 order of sale. That does not mean that we are
2 seeking to enforce the judgment. The only thing
3 that we are trying to do is have the Court issue
4 foreclosure, which we may -- which I think is
5 going to end up being required in this case,
6 because as the court knows, under now applicable
7 case law -- I think it's Thorne v. Lancaster --
8 we don't have a lot of time to sit around and
9 wait for the Court of Appeals to make -- or the
10 Supreme Court if we get that far to make its
11 decision. Judge Weave initially entered her
12 Order in 2021, and we're now in 2024. That ten
13 year clock may be running, and quite frankly I
14 don't -- Plaintiff doesn't want to wait around to
15 find out what that means. So without -- if --
16 without the Plaintiff seeking, actively seeking,
17 an order to enforce the judgment by virtue of
18 sale of the property, I don't think that -- I
19 don't think we're required to put the bond. And
20 this court knows, seeking a -- or execution on a
21 money judgment seeking to collect -- as Your
22 Honor mentioned before at one of the hearing's
23 before, we're doing so at our own risk. We could
24 seek to -- we could seek to sell the property,
25 but then we've got to put up a bond. We could

1 seek to sell Goldman. We'd have to put up a
2 bond. We could seek to move money out of the
3 bank accounts. We'd have to put a bond. That's
4 the only time that this provision comes in.
5 Seeking an order -- seeking a judgment of
6 foreclosure on this house really doesn't --
7 doesn't apply necessarily in this situation or
8 doesn't -- doesn't trigger the provisions of this
9 particular.

10 THE COURT: I'm assuming y'all filed a Lis pendens
11 when you brought this action?

12 MR. PEACE: We did.

13 MS. BALLARD: Your Honor, I'm aware that you don't
14 have the record on appeal, but there's
15 significant testimony in the record about what
16 Mr. Vergeldt did and did not provide. And the
17 important thing about Judge Kimball's Order is
18 that Judge Kimball's Order found that my client,
19 Mr. Vergeldt, did not have any obligation until
20 the late Mr. Vergeldt became incapacitated in
21 2013.

22 THE COURT: Right.

23 MS. BALLARD: The significance of that is that the
24 damages that were awarded in the second lawsuit
25 after they amended in 2019 -- is that they

1 include damages for periods of time way prior to
2 that. So in terms of the res judicata issue, I
3 have searched through the cases that construe
4 Rule 18, Joyner, and I can find no authority
5 whatsoever for Judge Kimball to have reserved to
6 Vickie Vergeldt the right to bring a second
7 lawsuit for things she chose not to bring in the
8 first lawsuit. You've got mandatory joinder of
9 claims.

10 THE COURT: Well, apparently three judges on the Court
11 of Appeals didn't agree with that.

12 MS. BALLARD: Well, I didn't make that argument,
13 because we didn't get there.

14 THE COURT: All right.

15 MS. BALLARD: We didn't get there, but there's no --

16 THE COURT: Y'all did have argument, though.

17 MS. BALLARD: We did.

18 THE COURT: I've been hearing about the appellate case
19 for a while.

20 MS. BALLARD: Yes, we did have oral argument. I don't
21 remember the details of it, but we had oral
22 argument and --

23 THE COURT: Okay. Back in November, I think it was.

24 MS. BALLARD: Right. And --

25 THE COURT: Got the Order in February, filed the

1 Motion to Re --

2 MS. BALLARD: This is in our brief, but --

3 THE COURT: Right.

4 MS. BALLARD: -- but one of the things that I was
5 unable to find was any authority to allow a
6 circuit judge to say oh, you don't have to comply
7 with rule. Forever after you go right to bring
8 this lawsuit. He can't -- he can't enlarge the
9 statute of limitations. He can't deviate from
10 what the requirements of the rules are. I don't
11 think you can preserve a claim for damages, which
12 he didn't do, but he walked that circle and said
13 I'm not deciding this, I'm not deciding that, I'm
14 not deciding now. So this thing has been -- this
15 thing, this litigation has been odd, needless to
16 say, from the beginning. And that's all I wanted
17 to say. The record says that -- which you don't
18 have -- but the record says that the late Mr.
19 Vergeldt was in fact providing transfer -- bank
20 statements to all the beneficiaries. He had four
21 children at that time. And of course, Mr.
22 Vergeldt likewise didn't have any obligation to
23 do anything until 2013. And the transcript below
24 when this case was tried contains Mr. Vergeldt's
25 testimony that he continued to provide bank

1 statements. So, you know, those are issues of
2 fact that Your Honor need not decide.

3 THE COURT: Yeah.

4 MS. BALLARD: Could I address -- I know we've bled
5 over into it. Could I address the issue of
6 contempt --

7 THE COURT: Sure.

8 MS. BALLARD: -- briefly?

9 THE COURT: Yeah.

10 MS. BALLARD: Your Honor, the Master's authority for
11 contempt is set forth in 15-39-490, and it
12 doesn't state in the statute like it does in the
13 case law that the finding of contempt has to be
14 beyond a reasonable doubt. And I would suggest
15 to you that for many reasons there is
16 insufficient evidence to find beyond a reasonable
17 doubt that Mr. Vergeldt knowingly and
18 intentionally violated the court order. As I
19 pointed out earlier, we don't have a court order
20 that says this appraisal will take place on
21 October 24th at 9:00 a.m. We don't have a court
22 order that says that. We have a court order that
23 says the parties shall bring, and we did. And we
24 have evidence that Mr. Lowery didn't even notify
25 Mr. Peace for 43 minutes after he had already

1 missed the appointment. And Mr. Vergeldt had
2 given that specific time and another specific
3 date and time. So respectfully, I don't think
4 there is evidence beyond a reasonable doubt of
5 Mr. Vergeldt's knowing and intentional violation
6 of a court order. He did everything he was
7 required to do by that court order by consenting
8 to have Mr. Lowery attend the appraisal on
9 October 24th at 9:00 a.m. Mr. Lowery didn't get
10 there. That's not Mr. Vergeldt's fault. And the
11 other interesting thing in Mr. Lowery's Affidavit
12 is paragraph ten. Mr. Lowery says he was delayed
13 on Highway 17. Well, that's a long way from
14 where Mr. Vergeldt's house is -- due to a
15 disabled vehicle that blocked one or more lanes
16 of traffic. Where's the proof? If there was a
17 disabled vehicle, there would be an incident
18 report. There would be some police records.
19 There would be something. There's nothing.
20 There's only Mr. Lowery's word that there was a
21 disabled vehicle on 17 somewhere. Your Honor, I
22 drove from Savannah this morning on 17. You
23 know, if there were disabled vehicles, I would
24 have had to prove where it was, you know, what
25 time the call came in, how long the lane was

1 blocked. Mr. Lowery has done none of that. So
2 in terms of establishing contempt beyond
3 reasonable doubt, we think they've not come
4 close. And the statute in 15-39-490 doesn't say
5 beyond a reasonable doubt, but the way it's
6 written anticipates either civil or criminal
7 contempt. If it's criminal contempt, which is
8 clearly what is being sought by way of sanctions
9 and attorneys fees and those things -- I mean,
10 we're not asking to put Mr. Vergeldt in jail
11 until he allows the appraisal. The appraisal's
12 already been done. They're seeking criminal
13 contempt, which requires a finding of clear and -
14 - excuse me -- beyond a reasonable doubt --

15 THE COURT: What makes that a criminal violation as
16 opposed to a civil?

17 MS. BALLARD: There's two types of contempt.

18 THE COURT: Right.

19 MS. BALLARD: There's civil and there's criminal.

20 THE COURT: Right.

21 MS. BALLARD: Civil contempt, which has to be proven
22 by clear and convincing evidence is to force
23 someone to reveal information. Where is the
24 child being held or something like that. Civil
25 contempt is to start action taking place.

1 Criminal contempt is to punish for something
2 that's already occurred. I don't have those
3 cases here, but I cited in our Memorandum the
4 differences between civil and criminal contempt.
5 I don't do family law, Your Honor, but you see it
6 often in family court opinions when one parent
7 won't produce the child. The parent gets put in
8 jail until they produce the child.

9 THE COURT: Right.

10 MS. BALLARD: That's civil contempt. If you're
11 seeking damages for attorneys fees or
12 imprisonment, that's punitive, and there's no way
13 to purge yourself of that. That's the difference
14 between civil contempt and criminal contempt.
15 And the way this motion -- although it's not
16 specific -- the way the motion is written they're
17 clearly seeking criminal contempt. The way the
18 statute is written -- that's 15-39-490 -- this
19 court has authority to do civil or criminal
20 contempt, which requires a finding beyond
21 reasonable doubt. Neither one of us spend much
22 time in general sessions court, Your Honor, but I
23 think we both know what that mean, and a standard
24 hasn't even been met. Mr. Lowery's Affidavit
25 says oh, I left in plenty of time, but then he

1 was delayed for more than an hour in traffic by a
2 disabled vehicle, but he hasn't provided any
3 evidence to show why he waited 43 minutes after
4 he was supposed to be at Mr. Vergeldt's house
5 before he contacted Mr. Peace. And I encouraged
6 Mr. Vergeldt to stay there, and he did stay there
7 until 9:45 or a little after, but he had a
8 doctor's appointment. I don't know the specifics
9 of the doctor's appointments, but he certainly --
10 you know, most appraisers -- they don't even to
11 cover the property any more. They just look at
12 the square footage in the neighborhood, and they
13 appraise that way. So it shouldn't have taken
14 more than that. Your Honor, I think the Motion
15 for Sanctions is brought in bad faith. I was
16 shocked -- never mind, I'm not going to go there.
17 Mr. Lowery's Affidavit is patently insufficient
18 to support a finding of contempt. If they wanted
19 to find in contempt, they needed to give evidence
20 to this court. The only evidence they brought
21 was that Mr. Lowery didn't show up when he was
22 supposed to show up pursuant to our agreement.
23 There is no order that was violated, because the
24 order required us to agree, and we did. So there
25 is nothing that Mr. Vergeldt can be held in

1 contempt of. Thank you very much, Your Honor.

2 THE COURT: Okay. You want to hear that, Mr. Peace?

3 MR. PEACE: Yes, Your Honor. And I'll start by

4 citing or referring directly to the Order to

5 Compel. The Order to Compel specifically states

6 -- it was what was entered September 28th, 2023 -

7 - that the Defendant, Mr. Vergeldt, is required

8 to make the property and all areas of the

9 interior and exterior of the single family

10 residence located thereon and other attendant and

11 appurtenant improvements available to an agreed

12 upon South Carolina licensed real estate

13 appraiser and/or home inspector at a date and

14 time convenient to the -- importantly at a date

15 and time convenient to the designated real estate

16 appraiser and home inspector. The appraisal --

17 going on to (b) -- the appraisal or inspection

18 shall take place within 45 days of the date of

19 this Order, which time may be extended by

20 subsequent order upon good cause shown. In the

21 event that Plaintiff and Defendant cannot agree

22 upon a South Carolina real estate -- South

23 Carolina licensed real estate appraiser or home

24 inspector, the Court may appoint one by

25 subsequent order. We do not dispute, Judge, the

1 clarification -- the characterization that we had
2 an agreement on number one, who the appraiser
3 would be, even though Mr. Vergeldt's Affidavit
4 says that we picked them out, he consented to it
5 by silence or otherwise. We do not dispute that
6 we scheduled a specific time and a place -- time,
7 excuse me, time and a place -- date and time. We
8 do not dispute that Mr. Lowery was late, although
9 we have some disputes or some concerns about what
10 Mr. Vergeldt placed in his Affidavit about the
11 events leading up to it. We do not dispute that
12 Mr. Lowery did not contact me until 9:40 as the
13 email states and/or around that time to say that
14 he was going to be late. We do not -- I do not
15 dispute that I sent the email, and Ms. Ballard
16 responded by saying -- I think it's important --
17 I just spoke to John. He's tired of waiting. He
18 will get his own appraiser -- meaning there is no
19 -- there either is no agreement or there is no
20 longer an agreement, and that Vickie can pay for
21 it, neither of which was contained in this Order.
22 Your Honor, we also, as set forth in the
23 correspondence that Ms. Ballard filed with the
24 motion or with the Memorandum -- I specifically
25 asked okay, can you provide me, number one, who

1 the appraiser is in an attempt to comply with
2 this Order. I said two, if we can't decide on
3 that, please provide me some additional dates and
4 times that the property can be made available.
5 What you don't see, Judge, and what was not filed
6 with the Memorandum is nothing else, no response
7 either telling me who Mr. Vergeldt chose or the
8 additional dates and times. All we get and all
9 that's filed of record is that Mr. Vergeldt
10 decided unilaterally without consultation with us
11 that he was done, and he had appointments more --
12 he had appointments to go to. This was --

13 THE COURT: Well, he said he had appointments, but
14 then he went to take the dog for a walk, right?

15 MR. PEACE: Correct.

16 THE COURT: All right.

17 MR. PEACE: And that -- in about the ten minute time
18 period is when Mr. Lowery showed up, and then
19 whatever happened, happened. Ms. Ballard is
20 right. This was a dustup. It depends on who you
21 believe as to who caused the dustup, but --

22 THE COURT: I have no doubt about that.

23 MR. PEACE: -- but I think that's irrelevant to --
24 irrelevant to the Motion for Contempt. So we do
25 not dispute the fact that the parties, up until

1 October 24th, 2023, effectively complied with the
2 Order. Our issue, and the subject of the Motion
3 for Contempt is what happened after. We tried in
4 good faith to reach out to Mr. Vergeldt through
5 counsel to say hey, sorry this occurred. Let's
6 figure out where we go from here, and we get no
7 response. Then we get the Motion to Stay
8 proceedings. There's no order saying -- there's
9 no motion filed that says we can't agree to Mr.
10 Lowery anymore. We cannot -- we need to -- we
11 need to take extended time. There's nothing
12 about that. The first time we hear about we can
13 agree to this is the day of, and it is almost a -
14 - Mr. Vergeldt's actions are almost reactionary
15 to an agreement that violates the Order. And the
16 fact that he made the decision to get his own
17 appraiser shows in light of this -- in light of
18 the actions taken by him and counsel to comply
19 with the Order to begin with indicates that they
20 knew exactly what it said. And Mr. Vergeldt,
21 because he was frustrated, because he was mad
22 that Mr. Lowery was late, or viewed in it's worst
23 light, that he took an opportunity to violate the
24 court's Order by saying ah, sorry, I can't be --
25 I can't be here anymore. I've got to go. Mr.

1 Lowery's late. I now know it. I know the
2 reason. This doesn't suit me anymore. I'm
3 leaving. The fact that he took that opportunity,
4 Judge, shows a willing and voluntary violation of
5 the Court's Order. And the fact that the first
6 time we hear about doctor's appointments is the
7 Friday before -- before the hearing on January
8 8th is a problem, and shows maybe that these
9 doctor's appointments did not happen, did not
10 exist. It's just I messed up, let me see if I
11 can cover my tracks. And then also the fact that
12 this appraisal -- he hires Burke Herron, gets an
13 appraisal of this property, and we don't hear
14 about it until February 12th. We could have
15 resolved at least two of these motions prior to
16 January 8th. It's a problem. It shows that Mr.
17 Vergeldt decided on October 24th willingly and
18 voluntarily in knowledge of what this court said
19 that I'm going to do it my way. Judge Scarborough,
20 I don't really care about what you're telling me
21 to do. I'm going to do it my way. That, Your
22 Honor, is why we filed the motion, and that is
23 why I believe that -- we believe that the finding
24 of contempt and sanctions is appropriate. We
25 would have had to address defense's Motion to

1 Dismiss on January 8th or today anyway, but that
2 would have been a lot less attorneys fees spent
3 by both sides if that app -- if there had been
4 cooperation from the defense, from Mr. Vergeldt
5 in complying with the Order, or if information
6 had been timely submitted to the Plaintiff by Mr.
7 Vergeldt prior to January 8th. I think that at
8 the end of the day based on, as I put in the
9 Order that the court -- in the draft Order that
10 the court entered on February 2nd -- at the worst
11 he took it as an opportunity to flaunt the
12 Order's terms. And at a minimum it's -- all end
13 up just being a misunderstanding, but based on
14 the facts that have developed in his refusal to
15 cooperate with us and only to try and stop the
16 court from moving on this matter, it has to be
17 determined that he violated the Order knowingly
18 and willingly, resulting in actions constituting
19 contempt.

20 THE COURT: All right. Anything further, Ms. Ballard?

21 MS. BALLARD: Your Honor, I would simply reiterate the
22 fact that the Order did not state a date and
23 time. Mr. Peace emailed us on October 10th and
24 said he was following up. And this is the person
25 that he's got, and his resume is attached. And

1 we responded and said that Mr. Vergeldt can make
2 the house available for appraisal on either
3 October 24th at 9:00 a.m. or October 26 after
4 1:30 p.m. And Mr. Peace responds and says:
5 October 24th at 9:00 a.m. works for the
6 appraiser. We agreed to that. The appraiser
7 screwed this up. Now, I will also say that Mr.
8 Vergeldt didn't leave the house until he spoke to
9 me. So if anybody's at fault, it's me, because I
10 just got an email from Taylor Peace saying: oh,
11 he's been stuck in traffic for an hour. He
12 should be there in ten minutes. And, you know, I
13 can't disclose my communications with him, but he
14 did in fact communicate with me before he left
15 the house. We complied with the Order by
16 agreeing to the date and time. And if we didn't
17 respond to him to reschedule it, that's our fault
18 too.

19 THE COURT: Okay. All right, that's fine. All right.
20 I'm ready to rule.

21 MS. BALLARD: Thank you, Your Honor.

22 THE COURT: So what I have to do is go back in time
23 somewhat, and let me do that, because first and
24 foremost in this particular matter, one is the
25 supplemental proceeding. So again, the Court

1 takes the judgment as given. That judgment is on
2 appeal by virtue of filing of the Notice of
3 Appeal. It does not stay the judgment. We have
4 gotten into some other issues in the case. The
5 Order that the Court issued on September 28th of
6 '23 followed the Plaintiff's Motion to Compel.
7 Apparently there had been attempts to have the
8 property appraised and they were not successful.
9 So y'all just need to know no judge likes to hear
10 motions to compel. It's fairly much my practice
11 that failure to comply with motions to compel
12 lead to sanctions. It's just what I've had to
13 do. Any of y'all that practice in the non jury
14 court will know that that's about the only remedy
15 that the court has to enforce their judgments.
16 We don't particularly put people in jail, but we
17 do punish for contempt. So after the September
18 28 Order apparently there was an agreement. That
19 was the gist of the emails back and forth. The
20 event which brings us to really before the court
21 today happened on October 24th of 2023 when the
22 appraiser -- when the agreement was the
23 appraiser's going to come to Mr. Vergeldt's home
24 do an appraisal, both interior and exterior. I
25 seem to recall there was some issue about whether

1 or not he could get in previously. And the
2 appraisal was to take place within 45 days of the
3 date of the Order, so September 28th, 45 days
4 gets you to somewhere around mid November, maybe
5 the 13th or so of November. That clearly was not
6 done. There was no appraisal done after Mr.
7 Lowery got to the property. Anybody that
8 presides on John's Island knows traffic is a
9 nightmare, and it can take forever to get on and
10 off of that island. I live on James Island. It
11 ain't quite as bad as John's Island, but anybody
12 that lives on John's Island -- there are two ways
13 on and two ways off, and it can be a nightmare.
14 While living on James Island I once left James
15 Island to go to John's Island to get downtown.
16 That's how bad it was, but I don't normally do
17 that, okay. James Island's got three ways on and
18 off and four if you want to go to the edge of
19 America at Folly Beach, but I don't typically go
20 out there. So what happened? All right. So the
21 event was the 24th of October. I'll get into the
22 facts of that in a minute. Following that, the
23 day after, I got a Motion to Stay pending appeal
24 then a Motion to Dismiss on October the 30th
25 under 12(b)(6) and then finally a Motion for

1 Contempt and Sanctions. So apparently y'all
2 spoke for a week or so and weren't able to
3 resolve the issue at that time. So back to the
4 events of the day. Mr. Lowery leaves for -- I
5 believe he testified he lives in Mt. Pleasant
6 when he was in here previously. And I can't
7 recall, but that's my recollection. Seventeen
8 runs from -- you know, up and down the entire
9 east coast, so it can be -- I don't know where
10 the problem was, and I'm aware -- I'm not exactly
11 sure where this property is, but I don't know
12 whether he went down to the main road to hang a
13 left or whether he was coming across to James
14 Island onto -- I just don't know. I don't know
15 the answer to that question, but I do know that
16 once he got there that there was -- as y'all have
17 described it a dustup between the two. Mr.
18 Vergeldt apparently was tired of waiting. He
19 gave the story that he had a doctor's
20 appointment, but then took the dog for a walk,
21 and that's just not the way it's going to be
22 done, okay. The Court did order that an
23 appraisal be done, that he be allowed in there.
24 The fact that he's 45, 50, even an hour late does
25 not justify Mr. Vergeldt's decision, whether with

1 or without counsel, to unilaterally terminate
2 that decision. I find that his failure to allow
3 the appraiser into the property was a willful
4 violation of this court Order, both the terms of
5 the Order on the Plaintiff's Motion to Compel
6 from September 28th and the terms of the parties'
7 agreement that they had -- that the violation was
8 willful, that Mr. Vergeldt unilaterally canceled
9 the appraisal, gave Mr. Lowery a piece of his
10 mind as to what he thought was done. Don't know
11 what Mr. Lowery had to say. Don't think he went
12 into any details about that except that he was --
13 I'm not sure he wanted to go back there after
14 that. I don't even know if y'all seeked to have
15 him go back there after this other appraisal's
16 been done.

17 MR. PEACE: I think we are fine not having an
18 additional one.

19 THE COURT: Okay.

20 MR. PEACE: I've spoken with my client, and we should
21 be fine with the actual appraisal that was done.

22 THE COURT: All right, all right. So anyway -- but
23 I've got to go back to -- as I say, got to go
24 back to the date and time. So I did find Mr.
25 Vergeldt in contempt. I did sanction him \$500.00

1 to the Court and some attorneys fees to counsel
2 for the Plaintiff, some \$3,000.00 or something as
3 I recall --

4 MR. PEACE: Yes, sir.

5 THE COURT: -- on my Order. \$3,211.74 attorneys fees.
6 Fourth was to make the property available for a
7 future date and time. You're telling me you
8 don't seek that now.

9 MR. PEACE: No, sir.

10 THE COURT: And then Mr. Lowery's bill was, I think,
11 \$475.00; is that right?

12 MR. PEACE: Yes, sir.

13 THE COURT: All right. Okay. So I'm going to stand
14 by my Order as to the findings of contempt. As
15 it stands today, I'm also going to deny the
16 Motion to Dismiss. I think that was part and
17 parcel. Motion to Stay at this time is denied.
18 And as I said the Motion for Contempt and
19 Sanctions is granted, but I'm not going to
20 require there be another appraisal be done, okay.
21 I am inquisitive as to the status of the Motion
22 for the Rehearing, and we just ask that y'all
23 give me some information on that. Upon that time
24 period, I will set you up for another hearing.
25 I'm not going to do that today.

1 MS. BALLARD: Usually we hear from -- they don't
2 usually have oral argument on those.

3 THE COURT: They just grant?

4 MS. BALLARD: They just either grant or deny.

5 THE COURT: Right.

6 MS. BALLARD: And then I have 30 days to petition for
7 cert.

8 THE COURT: Right.

9 MS. BALLARD: I'll keep you informed.

10 THE COURT: Yeah, just let me know.

11 MS. BALLARD: I checked yesterday, but not this
12 morning.

13 THE COURT: I would think --

14 MR. PEACE: We're still --

15 THE COURT: I would think they would do that within 30
16 days, would they not? I mean, the time just ran,
17 so --

18 MS. BALLARD: Usually it's a pretty quick turnaround.

19 THE COURT: Yeah.

20 MS. BALLARD: What was fast was their request for a
21 response, which was really fast.

22 THE COURT: Yeah, yeah.

23 MS. BALLARD: That surprised me.

24 THE COURT: Okay. Well, I think you made some pretty
25 good arguments.

1 MS. BALLARD: I'd like to think so.

2 THE COURT: All right. So I think that concludes our
3 matter for today. I'm just going to do a Form 4
4 unless y'all want something more. You let me
5 know. And if so, Mr. Peace, I'd ask that you
6 prepare me another order, okay? Run it by Ms.
7 Ballard, okay? I'm basically just denying the
8 Motion to Reconsider, okay. All right. I'm
9 going to do a Form 4 unless y'all want something
10 more.

11 MS. BALLARD: Well, I thought you had already granted
12 the Motion to Reconsider.

13 THE COURT: I'm sorry. I have granted the Motion to
14 Reconsider, and I'm affirming my prior Order is
15 what I'm doing. I'm not making any changes to
16 that Order.

17 MS. BALLARD: Okay.

18 THE COURT: That's what I'm doing.

19 MR. PEACE: Except for the -- Mr. Lowery doesn't have
20 to go out there, right?

21 THE COURT: Right. I think that was paragraph (c) of
22 my Order or something.

23 MR. PEACE: Okay.

24 THE COURT: So I'll put a Form 4 in there just saying
25 what we did and go from there, okay?

1 MR. PEACE: Thank you.

2 MS. BALLARD: And I would ask Your Honor to stay the
3 imposition of a contempt citation pending appeal
4 that will be filed.

5 THE COURT: I will respectfully deny that request, and
6 you can go on from there, okay?

7 MS. BALLARD: Thank you very much.

8 MR. PEACE: Thank you, Your Honor.

9 THE COURT: All right, very good.

10 Further deponent sayeth not.

11 (There being no further questions, the deposition
12 concluded at 12:18 p.m.)

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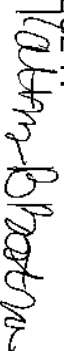
CERTIFICATE OF REPORTER

I, KATHRYN BOSTROM, COURT REPORTER AND NOTARY PUBLIC
IN AND FOR THE STATE OF SOUTH CAROLINA AT LARGE, HEREBY
CERTIFY THAT I REPORTED THE HEARING ON THURSDAY, THE 28TH
DAY OF MARCH, 2024, THAT THE WITNESS WAS FIRST DULY SWORN
BY ME AND THAT THE FOREGOING 58 PAGES CONSTITUTE A TRUE AND
CORRECT TRANSCRIPTION OF MY STENOMASK REPORT OF SAID
DEPOSITION.

I FURTHER CERTIFY THAT I AM NEITHER ATTORNEY NOR
COUNSEL FOR, NOR RELATED TO OR EMPLOYED BY ANY OF THE
PARTIES CONNECTED WITH THIS ACTION, NOR AM I FINANCIALLY
INTERESTED IN SAID CAUSE.

I FURTHER CERTIFY THAT THE ORIGINAL OF SAID TRANSCRIPT
WAS THEREAFTER SEALED BY ME AND DELIVERED TO DESA BALLARD,
225 STATE STREET, WEST COLUMBIA, SOUTH CAROLINA, WHO WILL
RETAIN THIS SEALED ORIGINAL TRANSCRIPT AND SHALL BE
RESPONSIBLE FOR FILING SAME WITH THE COURT PRIOR TO TRIAL
OR ANY HEARING WHICH MIGHT RESULT IN A FINAL ORDER ON ANY
ISSUE.

IN WITNESS WHEREOF, I HAVE SET MY HAND AND SEAL THIS
17th DAY OF MAY 2024.



KATHRYN B. BOSTROM, COURT REPORTER
MY COMMISSION EXPIRES AUGUST 23, 2032

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HEARING PROCEEDINGS

March 17, 2021

Vicky Lynn Vergeldt. etc.

VS

John Edward Vergeldt

2016-CP-46-00820

REPORTER: Laura DeCillis

ROA 00800

APPEARANCES:

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Also present:

Vicky L. Vergeldt
(Attending via Zoom Video Conference)

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EXHIBITS

(None were proffered)

1 PROCEEDINGS

2 THE COURT: Okay. This is case number
3 2016-CP-46-0820, Vicky Vergeldt versus John Vergeldt.
4 Present on behalf of petitioner is Mr. Taylor Peace.
5 Present on behalf of respondent is Ms. Desa Ballard?

6 MS. BALLARD: That's correct, your Honor.

7 THE COURT: This is respondent's motion to
8 reconsider a judgment order that I filed on February 2nd
9 of 2021. And, Ms. Ballard, whenever you're ready.

10 MS. BALLARD: Thank you very much. Your Honor,
11 I can tell that this has been a long and arduous case and
12 I think Mr. Peace and I are the recent additions to it,
13 relatively recent, me more so than him. So, please, as I
14 said in my Motion for Reconsideration, my hands are a bit
15 tied by not having been counsel of record all the way
16 through the proceedings, but Mr. Peace gave me the
17 transcript which helped tremendously so I was able to
18 amend my Motion for Reconsideration.

19 In the memo I kind of grouped my issues into
20 topics as opposed to the specific numbers in the Amended
21 Motion for Reconsideration. Is it all right with you if
22 I just address them in the order that I did in the memo?

23 THE COURT: That's fine.

24 MS. BALLARD: Okay. The first issue that we
25 briefed is the error that we believe occurred when the

1 Court allowed Mr. Peace's client to amend to add a legal
2 cause of action. If you will recall, there was a consent
3 order sending the case to the Master in Equity a year or
4 so before this amendment was sought. So when this
5 amendment occurred and a legal claim for damages was
6 sought for the first time, my client was in a difficult
7 position in that he couldn't demand a jury trial in the
8 equity court because he'd already consented to being in
9 the equity court and the counsel that was representing
10 him at the time either didn't raise it or didn't discuss
11 it with Mr. Peace. I'm not sure and it's not clear from
12 the record, I don't have the whole file. But our
13 position is, once the amendment was made, the doctrine of
14 res judicata kicked in and it would have been error at
15 that point to allow a claim that could have been
16 litigated in the first case, the 2014 case, to be added
17 to this case.

18 Judge Kimball was very clear in his order that
19 nobody was asking him to award damages and he was not
20 awarding damages and he wasn't making any rulings about
21 liability. Our position is that the doctrine of res
22 judicata required any claim for damages to be brought
23 during that action and not in this action. And when the
24 second action was brought, when this action was brought,
25 it initially sought only equitable relief, so there

1 wasn't a res judicata issue to it because it focused on
2 acts that occurred after the first action.

3 Mr. Vergeldt was still the trustee so the Court
4 still had the ability to monitor the trust and issue such
5 orders as might be appropriate for the internal
6 operations of the trust. But when the amendment was
7 allowed to assert a damages cause of action, I think
8 that's when the res judicata doctrine kicked in and
9 should have prevented the Order to Amend from being
10 granted.

11 So our first issue on reconsideration is that
12 the Order Amending should have been denied, because any
13 claim for damages should have been brought during the
14 original 2014 action and not in this action. And I
15 included in my memorandum a number of citations.

16 I hope you can't hear that phone. I'm so
17 sorry. There's a phone ringing in my office.

18 I've cited a bunch of cases. I'm not going to
19 read them to you. Everybody knows what res judicata is.
20 I would, with reference to Mr. Peace's response, he cited
21 some case law, which I totally agree with, that when
22 there is an equitable counterclaim and a legal primary
23 claim or an equitable claim and a legal counterclaim, and
24 I agree that that is the law, but this wasn't a
25 counterclaim so that law doesn't apply here.

1 We had ourselves in equity court and in order
2 to request a jury trial we would have had to either
3 somehow go back to Circuit Court and request a jury
4 trial, and then I'm not sure what would have happened at
5 that point. But by amending and allowing the character
6 and nature of the case to change from strictly equitable
7 to a legal claim, adding a claim for damages, we think
8 that was error and our motion for reconsideration asks
9 the Court to vacate the order allowing the amendment of
10 the complaint under the doctrine of res judicata.
11 Because I think the claim for damages relates primarily
12 to issues that occurred prior to the bringing of this
13 claim. They relate primarily to issues that talk about
14 Mr. Vergeldt's service as trustee and by the time, of
15 course, the case was tried in January of last year, he
16 was no longer the trustee because he had resigned by that
17 time. But what got Ms. Vergeldt in court the second time
18 was the continued equitable jurisdiction of the Court
19 pursuant to statute.

20 The first action was the only action in our
21 mind that should have allowed a claim for damages.
22 Mr. Peace says in his memorandum in response to my
23 memorandum that he didn't know the extent, or his client
24 didn't know the extent of the damages during the first
25 case. But that's not the test. The test is, you knew

1 you had a claim, not the extent of the claim but you knew
2 you had a claim. It's the same type of analysis that's
3 supplied on a discovery rule for a statute of limitations
4 issue. You don't have to know the extent of your
5 damages, you just have to know that you've been damaged.
6 And you can tell from the pleadings in the original 2014
7 action that she believed she had been damaged. And she
8 says in her complaint in this action she didn't
9 understand the extent of her damages until the first
10 action was finished.

11 But my point is, she had one shot to seek
12 damages and her shot to seek damages was in the 2014
13 lawsuit. So it was error for the Court to allow an
14 amendment to add a whole new cause of action that should
15 have been brought during the original 2014 action. Did
16 you want to have Mr. Peace respond issue by issue?

17 THE COURT: Well, that might be easier, in my
18 opinion. But, Mr. Peace, if you'd rather wait to respond
19 until the very end, it's up to you.

20 MR. PEACE: No, Judge, that's fine. I can
21 respond to that, the res judicata argument.

22 Your Honor, I think Ms. Ballard is 100 percent
23 correct. This is a long -- with one respect, this is a
24 long tortuous journey between two siblings who either at
25 one point did like each other and now clearly don't or

1 never did. I think it's based on who you ask.

2 But on this 2014 action, Judge, and I think
3 that this directly relates to the res judicata issue, I
4 think Judge Kimball's order is telling. But Judge
5 Kimball did say that he wasn't being asked for damages
6 and nothing had been planned at that point. But I also
7 think that if you'll look at the order carefully, what he
8 ends up saying is that that first action only answers the
9 narrow question of what Mr. Vergeldt's obligations were
10 as trustee to the beneficiaries to provide records.
11 Because as your Honor heard at the trial and as Judge
12 Kimball's order indicates, Mr. Vergeldt had basically
13 told his sister that she wasn't entitled to anything, she
14 was entitled to the trust, she was entitled to the
15 records that he produced in the manner that he produced
16 them and nothing else.

17 Judge Kimball's order seeks that issue and
18 says, no, no, no, you're entitled to records of the trust
19 regardless as to time and scope. And, most importantly,
20 Judge -- and if you've got it in front of you it can
21 actually be found on -- one second. It can be found in
22 the Order of the Court section in findings 5 -- or orders
23 5 and 6.

24 It says specifically that no declaration
25 concerning probable cause to challenge the successor

1 trustee's performance of his duties as made as such is
2 not presented in this case. Thus, determination is
3 preserved for such time as plaintiff challenges the
4 actions of John while acting as successor trustee. Order
5 bullet point number 6 says: No finding or conclusion in
6 this order shall be deemed to be a determination to
7 compliance or non-compliance with applicable law or the
8 terms of the trust agreement. Further, no finding or
9 conclusion of this order shall be deemed to establish the
10 amount of any entitlement of any beneficiary in terms of
11 the trust agreement.

12 By carving this, by answering that narrow
13 question of record and what had to be produced -- and by
14 those two parts of the order, your Honor, which was on
15 appeal by Mr. Vergeldt's previous counsel, it's our
16 position that regardless of the elements of res judicata,
17 Judge Kimball specifically carved out a case such as the
18 one that your Honor heard in January of 2020 for this
19 very reason.

20 The respondent says that, well, she knew that
21 she had a claim or knew that she had, or believed she had
22 a claim back when this was filed. Well, actually, Judge,
23 that case was merely related to the production of
24 documents, and this 2016 case only got brought because
25 Mr. Vergeldt, in contradiction and in defiance of what

1 the 2014 order said, refused to provide the document that
2 Judge Kimball said that my client was entitled to, which
3 then led to, as your Honor knows, the hiring of Kathleen
4 Polenski to be the limited special trustee to put
5 together an accounting, because Mr. Vergeldt's
6 record-keeping was so poor, and it took her two years to
7 put that together because he was so obstinate in getting
8 the records together, despite what he will swear up and
9 down until the cows come home on. It was only once
10 Ms. Polenski finished the report was my client able to --
11 able to understand and know that she had a claim beyond
12 the reactions of her brother of refusing to give
13 documents.

14 So on that res judicata issue, and specifically
15 as to Judge Kimball's order, that claim was not ripe.
16 Or, at least, my client would not qualify under the
17 discovery rules for having knowledge or knowing that she
18 had a claim or even really believing that she had a
19 claim, other than she knew that her brother had denied
20 her records and so she needed to file this action to
21 demand them. And unless the and in light of this Court's
22 position or the law of this state that the discovery rule
23 allows for an unsubstantiated inkling of a claim, I don't
24 think res judicata on the 2014 case applies. But even if
25 it does, Judge Kimball's order explicitly carved out this

1 sort of action and claim for that very purpose. Because,
2 at least, as far as he was concerned I think the
3 assumption could be made based on the language that he
4 didn't think that my client had enough information to
5 bring it back. And, again, that order was unappealed for
6 whatever reason.

7 On the jury trial issue, I noticed that, or I
8 had a couple of thoughts about that -- well, let me
9 finish kind of the res judicata part.

10 Ms. Ballard, in her -- let me see if I can find
11 it. Yeah. In the brief cites, or cites to the three
12 elements for res judicata, identity of the parties. In
13 the 2014 case you had my client as petitioner, as the
14 beneficiary, suing both her brother and her deceased
15 sister, but with her brother being the first successor
16 trustee for the demand of record and her other sister as
17 a beneficiary. So on the face of it we have identities
18 of party.

19 The second case initially had the same
20 alignment, but when Mr. Vergeldt resigned as the first
21 successor trustee, I'm not sure that we have identify of
22 party. Because while they maybe have the same names and
23 may involve the same people, they switched positions once
24 Ms. Vergeldt -- or Mr. Vergeldt resigned and Mr. Vergeldt
25 became the -- or Ms. Vergeldt became the successor

1 trustee.

2 She basically took over that fiduciary position
3 and her status changed, so to speak. So not only was she
4 suing Mr. Vergeldt as a former trustee to collect damages
5 or to seek liability based on the actions she'd taken as
6 first successor trustee, but also as beneficiary in
7 seeking the Court's declaration that either he had gotten
8 everything he was entitled to or he had acted in
9 contradiction of the trust which would have triggered the
10 forfeiture provision or the no contest provision that
11 seems to be at issue.

12 We also don't have identity of the subject
13 matter. Even though we have the identity of the parties,
14 we still have the identify of, or we still have people's
15 rights under the trust at issue. The initial bringing of
16 this petition, Ms. Ballard, I think would agree that we
17 don't have identity of the subject matter or, at least,
18 it is still subject to the Court's jurisdiction, not
19 barred by res judicata. But it seems to be the issues
20 is, is the amendment to allow the damages.

21 Well, in the 2014 case, as previously argued,
22 nobody was seeking damages at that time because my client
23 couldn't bring the claim for damages because she had
24 nothing to tell her that she had damages. The only thing
25 she had at the time was the fact that her brother was

1 refusing to provide records and saying, here, here's
2 your life-long bit of inheritance, please sign this
3 release, thank you very much.

4 It was only after the 2016 case and the work of
5 the Court and Kathleen Polenski were we able to know that
6 we had, or discover that we had a claim for damages.
7 And, also, your Honor, we don't have it here, the third
8 element, the adjudication of the issue in the former
9 suit. The only thing that was adjudicated in the 2014
10 claim was that very narrow question of what records
11 Mr. Vergeldt was, or my client was required to be given
12 by Mr. Vergeldt, which again he refused to give which
13 brought about this action.

14 So we don't have res judicata, I don't think,
15 under the current law, even if -- even if it may have
16 been a claim that's floating out there. My client at the
17 end of the day didn't have enough or was not given enough
18 by her brother to actually qualify under the discovery
19 rule to bring that action.

20 On the jury trial issue, as the Court knows,
21 under Rule 38 you're allowed to demand a jury trial on
22 actions that you're entitled to, a legal claim. If it's
23 an action in equity, you don't have a claim for a jury
24 trial but you may have a claim for a jury trial if it's a
25 compulsory counterclaim.

1 Now, in the initial reply that was filed by
2 Mr. Ballou before this case was actually referred to
3 Judge Kimball, Mr. Ballou filed counterclaims for abuse
4 of process, malicious prosecution and frivolous civil
5 proceedings. I don't know whether those are -- I have to
6 be honest. I couldn't find any research showing that
7 those are legal counterclaims for which, and compulsory
8 for which Mr. Vergeldt would be entitled to a jury trial.
9 But I think at the end of the day, those claims were
10 waived when he didn't reassert them after we filed ours
11 are insufficient. But what is noticeable, or what is
12 important to note, your Honor, is he would have a jury
13 trial -- a claim for a jury trial, excuse me, on our
14 claims in the amended petition and he didn't assert it.

15 Now, understand that there was a consent order
16 that vested the equity court with jurisdiction. But
17 that's vesting and that consent order was entered at the
18 time, I'm assuming, when everybody thought this case was
19 just equitable in nature.

20 I don't believe that there's any prohibition,
21 or I'm not aware of one that would have prohibited
22 Mr. Vergeldt from filing for a jury trial or demanding a
23 jury trial when we introduced legal counterclaim. So we
24 believe that he could have demanded it under Rule 38(b)
25 at that time, he just didn't do so. And he also had ten

1 days after the last pleading pointed to that issue, which
2 I believe would have been our reply to actually his
3 counterclaim back in August, I would say August of 2019.
4 He just didn't do it.

5 Now, I don't know. Rule 38 doesn't say, if you
6 consented to the jurisdiction of the equity court based
7 on equitable counterclaims if something is reasserted to
8 bring a legal counterclaim they're barred from doing it.
9 So we believe that at that time he could have made a
10 demand for a jury trial and simply didn't do so. So I'm
11 not sure. Again, we would say that it's not a grounds
12 for reconsideration or a striking of the amendment.

13 Also, your Honor, based on the failure of the
14 discovery rule and even kind of aside that, under Rule 15
15 a party can amend their pleading once as a matter of
16 course before or within 30 days after a responsive
17 pleading is heard. Then after that, a pleading can be
18 amended only by the consent of the other party or with
19 leave granted by the Court which shall be freely given as
20 long as there's no prejudice to the opposing party.

21 As your Honor knows, when this case was
22 originally filed, Mr. Silvernail, my client's first
23 attorney in this matter in the 2016 case, basically
24 alleged that Ms. Vergeldt, upon information and belief,
25 had -- or that Mr. Vergeldt had threatened her with

1 disinheritance and unequal distributions in direct
2 contravention of the trust. And at the hearing we had
3 before your Honor in, say, May or June of 2019,
4 Mr. Ballou, Mr. Vergeldt's previous counsel, argued that
5 they would have handled the case differently and we knew
6 about this all along and it's a year-and-a-half into
7 litigation. And I at least argued to the Court then and
8 will argue to the Court now that based on Mr. Vergeldt's
9 refusal and threats, quite frankly, that he had made
10 against his sister, that once the work of the special
11 trustee or limited special trustee was completed, then
12 the allegations were made except for other than damages.
13 So it should have come as no surprise at least in the
14 2016 case that this was coming. And so the only
15 prejudice there, if any -- or it wouldn't be prejudice to
16 Mr. Vergeldt merely because he would have to defend a
17 claim in a litigation that had been going on for three
18 years.

19 So we don't believe that it was error for the
20 Court to allow the amendment based on res judicata. We
21 don't believe that Mr. Vergeldt has been prejudiced by
22 the failure to demand a jury trial, which he could have
23 done when we introduced legal counterclaims, and we don't
24 believe it was error or that there was prejudice there to
25 Mr. Vergeldt when we amended to assert this legal

1 counterclaim. And, as the Court knows, parties can even
2 be allowed to amend their pleadings up until the day of
3 trial as long as there's, you know -- as long as there's
4 consent. And even then, as the Court knows, the
5 amendment was made and then we had about another half a
6 year before we actually had a final hearing.

7 So Mr. Vergeldt had plenty of time to -- so
8 there's no surprise. Mr. Vergeldt had plenty of time to
9 prepare himself to where there would be no prejudice, if
10 any.

11 MS. BALLARD: May I reply briefly?

12 THE COURT: You may.

13 MR. PEACE: That's all I've got on those
14 issues, Judge.

15 MS. BALLARD: Very briefly, your Honor. First
16 of all, I don't think Judge Kimball could carve out an
17 exception to allow the petitioner to bring an action for
18 damages in a separate case. I think that's part of the
19 reason he went out of the way to say nobody's asked this
20 question.

21 Particularly, I think it was beyond the scope
22 of his authority to reserve some right to the petitioner
23 when no request to do so had been made. So, of course,
24 the issue was not appealed at that point because, as is
25 clear, a second action could have been and was brought

1 seeking additional equitable relief. And I think it's
2 inescapable if you'll look at the original action, the
3 2014 action, these parties, as Mr. Peace said, didn't
4 like each other and I think there was a significant
5 amount of distrust between the parties as to whether my
6 client was doing an adequate job and whether Ms. Vergeldt
7 had been damaged at all by inequitable distributions from
8 the trust.

9 So while the issue for damages was not
10 litigated in the first action, it could have been. And
11 the doctrine of res judicata specifically says, any issue
12 that could have been litigated in the first action is
13 barred by subsequent litigation. And those are the cases
14 that talk about nobody gets a second bite of the apple.
15 And res judicata was not raised when the second action
16 was brought because it was continuing issues internal to
17 the trust which the Court does have continuing
18 jurisdiction over.

19 The Court's order granting the amendment finds
20 that there would be no prejudice to Mr. Vergeldt and we
21 strenuously disagree with that. There was huge prejudice
22 to Mr. Vergeldt because all that had been before the
23 Court prior to that time was equitable release about who
24 does what in the trust. The amendment specifically
25 included an action for damages against him which hadn't

1 been raised before, so clearly that was prejudicial to
2 him. It was prejudicial to him because he was already in
3 a court where he couldn't request a jury trial. And I
4 will agree with Mr. Peace. I've researched the issue of
5 whether you can request a jury trial after a case has
6 been referred to the Master in Equity and I can't find
7 that, either. So I think that this is a novel issue.

8 But in terms of, I don't think we have to get
9 to that novel issue because damages could have been
10 brought in the first action. And if you look very
11 carefully at the complaint in the second action, it says,
12 Ms. Vergeldt's petitions says she didn't know the extent
13 of her damages which is an admission that she knew she
14 had damages before she brought the second action.

15 So three years in, allowing an amendment three
16 years in to this litigation to seek damages seriously
17 prejudiced Mr. Vergeldt and deprived him of an
18 opportunity to request his jury trial. I hope that was
19 sufficiently brief in reply.

20 THE COURT: Yes. And, Ms. Ballard, I do have a
21 question for you.

22 MS. BALLARD: Yes.

23 THE COURT: Judge Kimball in his previous order
24 made clear that this was a declaratory action in which he
25 was only reviewing the terms of the trust to determine

1 what the duties were as to Mr. Vergeldt as successor
2 trustee, and being a declaratory action with your
3 argument about res judicata does not apply in declaratory
4 actions where they're just determining what right an
5 individual or other has and that they're still able to
6 proceed. I may need to do a little bit of research.
7 Even if you're aware of actions or potential actions or
8 claims or damages that you may have, is it still res
9 judicata just to have your rights declared prior to
10 bringing the action when there's no, I guess, judgment on
11 those issues in that declaratory action.

12 MS. BALLARD: I think the answer to that is,
13 under our liberal joinder rules, Joinder of Claims
14 rules -- and, again, with reference to Rule 15 -- had a
15 motion been made during the pendency of the first action
16 to add a claim for damages, I don't think my client could
17 have said a word about it. I think it would have clearly
18 been permitted. And the case law says, any issue that
19 was litigated or could have been litigated -- and we know
20 it could have been litigated because Rule 15, as
21 Mr. Peace says, favors an amendment even up to and
22 including trial.

23 So even though the first action, the 2014
24 action, was brought as just a declaratory judgment
25 action, the claim for damages could have been brought in

1 that action by an amendment, but they could have been
2 brought by that action. And if, in fact, Mr. Vergeldt
3 was not providing the documents, even in that first
4 action there are motions to compel discovery. There are
5 all sorts of relief that was available in the first
6 action that nobody ever asked for. It was just, let's
7 see what this trust says and we'll worry about the rest
8 of it later.

9 Well, my point is, res judicata says we can't
10 worry about it later. Under the joinder rules of the
11 parties and of the causes of action, it could have been
12 and should have been. It was in existence at the time of
13 the first time. The late Mr. Vergeldt died in 2013, so
14 activities by my client post-death of the settlor was
15 squarely before the Court. The first action was brought
16 a year after the decedent died so the Court could have
17 adjudicated at that time, not only how do we interpret
18 the trust, but as actions of one person or another caused
19 damages to one or more of the other beneficiaries. I
20 realize there were additional beneficiaries during the
21 2014 case.

22 But my point is, the case law says any issue
23 which was litigated or which could have been litigated,
24 and under Rule 15 a claim for damages certainly could
25 have been litigated. It was ripe, the decedent had been

1 passed for a year. While Ms. Vergeldt didn't know the
2 extent of her damages, she certainly knew that she had
3 some damages that she had sustained because the proposed
4 distributions to her appeared to be unequal or
5 inequitable. So she didn't know whether they had been
6 made but her discovery could have proved whether they had
7 been made, whether inequitable distributions had been
8 made. All of that should have been done in the first
9 action. And so my point is that the amendment should not
10 have been granted. The amendment should have been
11 denied. The Court should have continued to adjudicate
12 the equitable issues that were before the Court, which
13 continued once my client resigned and Ms. Vergeldt took
14 over as the trustee, there still had to be some
15 supervision by the Court of equitable issues.

16 But the second action was not the place to
17 adjudicate the damages. That should have been brought in
18 the first case. I hope that answers your question.

19 THE COURT: It did, yes.

20 MS. BALLARD: Okay.

21 THE COURT: Again, Mr. Peace, anything you
22 would like to respond? You don't have to, I'm just
23 making sure. Everybody gets a chance.

24 MR. PEACE: In short, Judge. I understand
25 Ms. Ballard's point about discovery and post-trial

1 motions and motions to compel. The problem is that at
2 the time that the first action was brought, I think one
3 of the ways to consider the first action is a motion to
4 compel. But prior to, Judge, prior to the agreement of
5 the first action, Mr. Vergeldt had insinuated or
6 represented to his sister that she wasn't entitled to
7 anything.

8 So I think that the Court can view that
9 particular case as a motion to compel, or at least an
10 action to compel to tell Mr. Vergeldt, these are the
11 things that you have to do, these are the documents your
12 sister is entitled to and these are the documents you
13 have to produce if requested, you know.

14 The extent -- and I want to make sure we're
15 clear here -- my client could not have known that she had
16 damages when the first action was brought, at least my
17 understanding of the facts of that case, because her
18 brother refused to provide her information and she
19 suspected or based on his actions didn't know but had a
20 small inkling that she may have had a claim. But
21 suspicion, I don't believe, is a grounds to bring a case
22 in good faith.

23 I think what our amended pleading said was,
24 once he brought -- once he's continued to refuse to bring
25 her documents, refuse to produce the documents or produce

1 them in a false and misleading manner, then and through
2 the actions of Kathleen Polenski, then was my client able
3 to know into what extent she had damages. I don't think
4 that this first action, and I think Judge Kimball, I
5 mean, I think his order is pretty clear that the action
6 for probable cause to challenge a successor trustee's
7 performance of his duties is made was preserved until the
8 plaintiff, being my client, challenges the actions of her
9 brother.

10 In dealing with the entitlement or compliance
11 or non-compliance with the trust explicitly states, or
12 expressly states that such action for damages is still
13 preserved. I don't think res judicata bars an action
14 based on somebody's suspicion, especially when they have
15 no evidence of it because a person holding the evidence,
16 it's the fox watching the henhouse, won't let anybody
17 look at what is being done and then continues to fail to
18 do so, continues to stonewall and be obstinate.

19 I think that if the Court were to look at this
20 in kind of the discovery terms, yeah, this is an
21 action -- or the first action was a Motion to Compel.
22 It's only after the second action was brought and after
23 Mr. Vergeldt refused to comply with an order to compel or
24 an order declaring, that we began, or that my client
25 began to know or have more than a whiff of a claim for

1 damages. We just don't think that applies here based on
2 the facts of the case.

3 THE COURT: Thank you. Ms. Ballard --

4 MS. BALLARD: Thank you.

5 THE COURT: -- do you want to continue with
6 your next point?

7 MS. BALLARD: The next point, your Honor, has
8 to do with the sua sponte relief, and I'll just mention
9 this briefly. There were two orders that we think were
10 issued by the Court without a request for that relief
11 having been granted.

12 One was an order restraining the operation of
13 the trust while my client was still the trustee. It
14 required him to get permission of the other beneficiaries
15 before expenditures were made and there was no relief
16 before the Court at the time, or there was no motion
17 before the Court for that relief to be granted at the
18 time that order was granted. The motion that was before
19 the Court at that time was, I believe, to remove
20 Mr. Vergeltdt, in a temporary capacity to remove him from
21 acting as trustee. And the Court's order says, well, I'm
22 not going to remove him, but this is what I'm going to
23 do. So it kind of said, no, you haven't asked me for
24 this but I'll do this instead.

25 Our position is, that relief wasn't requested

1 and that relief, which became a serious point of
2 contention as the litigation went on, it prevented
3 Mr. Vergeldt from making any expenditures on the trust to
4 repair the cabin or the cottage or whatever it is they
5 called it because Ms. Vergeldt would not consent to it.
6 And from the docket, there's at least one filing by
7 Mr. Vergeldt -- and it may have been pro se, I don't
8 recall -- where he asked the Court to allow him to make
9 expenditures because the petitioner would not consent to
10 expenditures that had to be made.

11 So when you ended up trying the case in
12 January, the extent of the damages that may have been
13 presented at that time were exacerbated by Mr. Vergeldt's
14 inability to make trust expenditures to maintain the
15 trust assets, and we take the position that that was
16 relief that was not requested and should have been
17 vacated.

18 The other relief that we think was not
19 requested that was granted was in the Court's final order
20 barring Mr. Vergeldt's interest in the trust going
21 forward. That issue was not litigated before the Court.
22 It was certainly tempting, but I don't think it was
23 properly requested in the pleadings. And so I think
24 those two issues should be addressed on reconsideration.
25 And I'm the last person who wants to suggest we want to

1 jump back into the litigation of this, but I think if we
2 reconsider where we are and we vacate the order amending,
3 then you put us in a position where, now that we have
4 good counsel on both sides we may be able to resolve this
5 matter without having to burden the Court much further.

6 I just wanted to mention that. I realize the
7 case law is varying on whether relief requested in the
8 pleadings can or cannot be granted. There are cases
9 that say it both ways. I'm arguing that it can't be
10 granted because it's not requested in the pleading, but I
11 understand if the Court disagrees with me.

12 Can I move on to the burden of proof issue?
13 Mr. Peace, you're welcome to respond, but I realize
14 that's my weakest issue.

15 THE COURT: She just wants to proceed with, I
16 guess, another point on --

17 MS. BALLARD: Yes.

18 THE COURT: -- what she's already talked about,
19 or would you like to go ahead and respond, Mr. Peace?

20 MR. PEACE: If the Court is fine, I'll just
21 respond very, very briefly.

22 The issue of the cottage, I realize that -- I
23 don't believe there is anything of record on this. My
24 understanding, and I will go back and double check. I
25 wasn't the attorney of record at the time. I'll go back

1 and check with Mr. Silvernail to see if he has any
2 recollection of this.

3 My understanding is that after this hearing
4 where Judge -- that resulted in this order by Judge
5 Kimball, Judge Kimball eventually actually called the
6 parties into chambers and had a discussion about what was
7 left in the trust, whether it was liquid, you know, kind
8 taking stock of the assets. And, apparently, he had a
9 concern that nothing would be left and so issued --
10 instead of removing the trustee on summary judgment,
11 issued as part of the order on the expenditures. Right
12 about this time, Mr. Silvernail, as I think I told the
13 Court and I think as Ms. Ballard knows, was suffering
14 some pretty severe health issues that ended up having him
15 being relieved as counsel, and the application for
16 payment that was filed of record, I've not seen any kind
17 of resolution on that.

18 MS. BALLARD: I haven't either.

19 MR. PEACE: That's on the docket. It's just
20 sitting out there. And from what I understand from my
21 client -- and I'll go back through the correspondence
22 I've got to see if I can find it. She at least tells me
23 that her second lawyer, Tommy Lydon, had communications
24 with Mr. Ballou to approve those expenditures prior to
25 there needing to be any action by the Court.

1 I'm just representing that to the Court based
2 on what I know. But I've got really no evidence to
3 support that other to say there's an application on the
4 docket and nothing came after it.

5 MS. BALLARD: That's true. I checked that.
6 There's no order following that motion.

7 MR. PEACE: Yeah. And I will say, you know,
8 Ms. Ballard did raise, at least in her memo, the issue of
9 the indemnification or the one time that my client really
10 wouldn't provide any kind of consent, and that was after
11 Mr. Vergeldt went ahead and paid or tried to pay
12 Mr. Ballou out of the trust fund without seeking Court
13 approval first. Or I think it may have been all kind of
14 contemporaneous.

15 We filed an objection saying that Mr. Ballou
16 argued that the trust allowed Mr. Vergeldt to be
17 reimbursed and indemnified by the trust, and we took the
18 position at the time in the court order that that issue
19 had not been -- because his actions as trustee were a
20 part of the litigation, that it was not proper for him to
21 pay his attorney's fees out of the trust, especially when
22 the Court may have ultimately found, and I guess did,
23 that his actions were being taken in bad faith which
24 would have triggered a whole host of other issues.

25 But on the sua sponte, on the remainder of the

1 relief, I think a Court sitting in equity has the option
2 to fashion a remedy that it sees fitting. In our
3 complaint, we did allege and made a petition that we did
4 allege that we're entitled to such other and further
5 relief as the Court deems just and proper. I think in
6 this case that's not necessarily just stock language in a
7 petition.

8 We also requested that the Court order that
9 Mr. Vergeldt has received all things that he is entitled
10 to under the trust, which I think it's pleading in the
11 alternative but it may end up being the same thing, just
12 meaning that there's -- other than kind of having --
13 other than the portions of the trust saying that
14 Mr. Vergeldt pre-deceased his father due to the no
15 contest provision, I think effectively that just means
16 for going forward, for trust assets that Mr. Vergeldt
17 does not already have advantage of to which he's not
18 entitled to, that any more distributions don't go to him.

19 So that's maybe longer than I wanted it to be,
20 but I think that the Court does have the opportunity to
21 fashion some remedies such as these, even though it may
22 not be as express -- even if it may not be the flashing
23 yellow light in the pleading.

24 MS. BALLARD: I don't have any reply on that
25 now. Thank you.

1 THE COURT: Ms. Ballard, I do have two
2 questions for you.

3 MS. BALLARD: Yes?

4 THE COURT: The significance of -- there was no
5 objection, the order is filed, there was no objection by
6 respondent or anything by his counsel regarding the sua
7 sponte provision that Judge Kimball added. And number
8 two -- let me see. I had a number two. What was it?
9 See? This is why I need to write things down.

10 Well, we'll just start with the first and I'll
11 see if I can remember my second point.

12 MS. BALLARD: Thank you, your Honor. I
13 recognize that issue and with reference to that issue, I
14 would only ask that in the Court's Order on
15 Reconsideration that mention of that be made, that prior
16 counsel did not raise an objection to that. Because I
17 don't want Mr. Vergeldt in a position where -- I want him
18 to be able to seek relief if he needs to.

19 I think there were several things that should
20 have been raised during the litigation that may not have
21 been raised and I would ask that whatever order your
22 Honor issues on reconsideration, point out that whichever
23 issues you find were not preserved, the reason you were
24 not addressing them is because they were not preserved.

25 THE COURT: And now I remember point two.

1 Point two is that, although it may have been additional
2 hoops to jump through, it wasn't -- the way Judge Kimball
3 structured how payments would be made from the trust
4 there didn't impede the process, it just may have made it
5 just more hoops to jump through. And just your response
6 to that. I know you're saying that it impeded the
7 respondent's ability to be able to make payments on the
8 cottage, but it didn't necessary impede, it just might
9 have made it a little bit --

10 MS. BALLARD: It made it in terms of getting
11 relief from the Court or seeking relief from the Court
12 when they couldn't do it by agreement. And maybe Judge
13 Kimball should have foreseen the inability of these
14 people to agree on anything, I don't know. But I think
15 it certainly made it more difficult and made the final
16 analysis of what damages were due at the end of the day
17 much more difficult because my client -- there's letters,
18 some of them are filed of record. And that's what I'm
19 limited to, is what I found of record, where he's asking
20 for permission either from the opposing side, I don't
21 remember if it was Mr. Peace at the time, where he's
22 asking for permission to make these expenditures and he's
23 not getting consent, so he filed for relief with the
24 Court.

25 I don't know how I can quantify that other than

1 to say, he wasn't able to make expenditures after that
2 order was issued. Maybe we'd be speculating to say that
3 his damages were greater as a result of his ability to
4 do -- or his inability to do that. But my point was, it
5 was relief that was not requested and whether it
6 proximately resulted in dollars that were not spent from
7 the trust that could have been perhaps spent to maintain
8 the cottage or prevent the cottage from falling into
9 further disrepair, we don't know on this record. We just
10 don't know. The case has been tried on both sides and
11 that's not an issue that was gone into so we don't know.

12 THE COURT: You may proceed to your next point.

13 MS. BALLARD: Thank you, your Honor. This one
14 I call the standard of proof or the burden of proof and I
15 reference the tenth amendment to the trust agreement
16 which was introduced into the record at trial. And it
17 looks like it may have introduced earlier because I found
18 a copy of it stamped on an earlier filing.

19 The tenth amendment to the trust -- I've never
20 seen a trust with ten amendments -- but the tenth
21 amendment may have been a result of the settlor realizing
22 that his children did not get along very well together,
23 and so he specifically established a very, very high
24 burden of proof for liability by a successor trustee.
25 And the tenth amendment says an individual successor's

1 liability is limited to an act or omission committed in
2 bad faith or with reckless indifference to the purpose of
3 the trust or the interest of the beneficiaries.

4 This Court's order did not find that, did not
5 mention the burden of proof that was set forth in the
6 tenth amendment to the trust. I think it necessarily
7 follows that the Court apply a common law standard of
8 proof, which was preponderance of the evidence which is a
9 much lower burden of proof. And I think Mr. Vergeldt,
10 the deceased Mr. Vergeldt intended to set a very high bar
11 before either of his children sue the other for damages
12 and that may be the purpose for the tenth trust.

13 But my point is that the proper burden of
14 proof, the proper element of degree of proof that
15 Mr. Vergeldt required before damages were sought between
16 these parties was not met. If it was a preponderance of
17 the evidence, that's a preponderance of the evidence, but
18 the order doesn't say so I can only assume that it was
19 preponderance of the evidence, and that's a lower burden
20 of proof than the one he set forth in the tenth
21 amendment.

22 So our position is, the burden of proof was not
23 sustained by the burden of proof set forth in the tenth
24 amendment which required bad faith or reckless
25 indifference to the purpose of the trust or the interest

1 of the beneficiaries, plural. And that may be something
2 that can be fixed on reconsideration, I don't know. But
3 it was not addressed in the final order so I felt
4 obligated to raise that issue.

5 THE COURT: Mr. Peace?

6 MR. PEACE: Judge, on this, I'm not sure I have
7 a whole lot of disagreement here with Ms. Ballard. I
8 think that the tenth amendment to the trust says what it
9 says in terms of the bad faith and reckless indifference.
10 I think probably our agreement though ends when it comes
11 down to the actions of Mr. Vergeldt whether they were
12 made in bad faith and reckless indifference. And, you
13 know, I'm not even sure that -- I'm not even entirely
14 sure that the burden of finding something in bad faith
15 or reckless indifference constitutes a higher burden of
16 proof, or at least raises to the clear and convincing
17 evidence standard. I've just not seen anything to say
18 that and maybe it's just something I missed in
19 Ms. Ballard's brief that, you know, it seems to talk
20 about a lot of the two different standards, but whether
21 an action taken in bad faith or whether the action taken
22 with reckless indifference for the purposes of the trust
23 rises to a clear and convincing evidence standard.

24 But those issues notwithstanding, we would at
25 last argue that as a result of seven years of litigation

1 that the Court can only come to the conclusion that
2 Mr. Vergeldt acted in bad faith and reckless indifference
3 to the purposes of the trust through spending assets that
4 he was not entitled to, by refusing to provide documents
5 to the Court or to his sister in violation of the trust
6 and a Court order and then threatening to disinherit his
7 sister for, or terminating her interest in the trust if
8 you questioned what she did.

9 So we would actually have no -- I don't think
10 we would have any issue with the Court finding that
11 Mr. Vergeldt acted in bad faith with reckless
12 indifference. But I will amend my previous statement and
13 say, I'm not sure that the finding of bad faith or
14 reckless indifference necessarily leads -- there's a
15 direct line between a higher standard of proof in bad
16 faith or reckless indifference. And, like I said, I may
17 have just missed it if Ms. Ballard cited to a case that
18 says it. I'm just not -- I'm not convinced that that's
19 where, if you've got bad faith that immediately means
20 clear and convincing evidence.

21 I think you probably have bad faith be proved
22 by the preponderance of evidence. And even if she can in
23 this case, I think we've got enough evidence even on
24 reconsideration on the Court's order, or on the Court's
25 findings of fact and conclusions at this point that if

1 the Court wants to insert language in there that says
2 that Mr. Vergeldt acted in bad faith we'd be find with
3 it. But I'm sure Ms. Ballard would not be fine with
4 that.

5 MS. BALLARD: A brief reply?

6 THE COURT: A brief reply.

7 MS. BALLARD: Thank you, your Honor. As with
8 any contract, a trust is a contract and the settlor of
9 the trust can establish whatever terms he wants to. And
10 our courts have said -- the Supreme Court, I know, has
11 said that parties are free to contract intelligently or
12 unintelligently. And if he decided to establish a burden
13 of proof that was higher than the common law burden of
14 proof, he had a right to do that. And Mr. Peace is
15 right. I could not find any cases that equated the bad
16 faith finding to the common law burdens of proof. The
17 common law burdens of proof are preponderance of the
18 evidence and clear and convincing. I think this is a
19 higher burden but we don't know. But it was spelled out
20 in the trust.

21 Our position is, it wasn't argued, it wasn't
22 raised, Ms. Vergeldt didn't argue that she was proving
23 anything was a violation of bad faith or with reckless
24 indifference, and the Court didn't find that anything was
25 in bad faith or with reckless indifference; and,

1 therefore, the burden of proof was not satisfied, the
2 burden of proof set forth in the trust was not satisfied,
3 and we think the findings of fact as a result should be
4 vacated.

5 THE COURT: Okay. The next point?

6 MS. BALLARD: Thank you, your Honor. The last
7 issue that I briefed -- and I reserve all of the other
8 issues as well -- but the last issue that I briefed was
9 the absence of expert testimony. And my point here is,
10 Ms. Polenski obviously is uber qualified as a trustee,
11 but she testified as to the standard of trust as to what
12 an expert trustee would do. The only thing she actually
13 said that she would have recommended that Mr. Vergeldt do
14 was to hire a bookkeeper. That's the only thing she said
15 that she thought he should have done differently.

16 She didn't address proximate cause, she didn't
17 address whether his failure to get a bookkeeper caused
18 any damages to anybody. There was no testimony as to a
19 deviation of a standard of care of a lay trustee. There
20 was clearly testimony as to a deviation of a standard of
21 care if Mr. Vergeldt had been a professional trustee, but
22 he's not. So the standard of proof that was established
23 by Ms. Polenski's testimony clearly is not the right
24 standard of proof for determining whether Mr. Vergeldt
25 violated his duties as a lay fiduciary.

1 And with reference to the testimony of Mr. --
2 is it Bosler, I believe? Mr. Bosler is very
3 knowledgeable, I make no issue with that. But he was
4 helpful in that he told us what the law was in several
5 different states as to what a trustee's obligations were,
6 but at the end of the day all he really did was go
7 through the documents and piece together what he said is
8 what a prudent man should have done. And he even
9 testified that a prudent man shouldn't have even tried to
10 maintain that cottage. A prudent man should have gotten
11 the agreement of the other side to sell the cottage.
12 Well, we all know how that would have gone.

13 My position here is that Mr. Bosler's numbers
14 are based on a whole lot of assumptions. And he admits
15 he didn't have all the documents that he needed, he only
16 had the only ones that were provided to him by
17 Ms. Polenski and that he made a lot of assumptions. His
18 numbers were not to a reasonable degree of certainty, his
19 numbers were really based on guesses.

20 So the numbers that amounted to the damages
21 that were awarded were not established, I believe by the
22 record, were not established by the required expert
23 testimony. We had no expert testimony as to what is
24 expected of a lay trustee. We had an expert trustee and
25 I'll disagree with her testimony as to an expert trustee.

1 Mr. Bosler, while he was an expert, the only
2 thing he testified is about, I assumed these certain
3 numbers because this is what Vicky told me. There were a
4 couple of times where he said, this is what Vicky told
5 me, and I noticed in the transcript where Mr. Vergeldt
6 said, well, you never talked to me. So he did have a
7 one-sided view of things and it's clear from his
8 testimony that he had to assume a lot. So our position
9 is that the numbers that are represented by Mr. Bosler's
10 report are not established to a sufficient degree of
11 certainty to support an award of damages.

12 He also did not testify to proximate cause.
13 Neither Ms. Polenski nor Mr. Bosler testified to
14 proximate cause. They both said Mr. Vergeldt did things
15 he shouldn't have done, but neither one of them said that
16 the trust or Ms. Vergeldt were proximately harmed by that
17 in any way. So I think that obviates in favor of a
18 finding that the plaintiff, or the petitioner did not
19 sustain her burden of proof and, therefore, the order
20 should be vacated.

21 THE COURT: Mr. Peace?

22 MR. PEACE: Thank you, Judge. Well, on the
23 proximate cause issue, I think that Mr. Bosler and
24 Ms. Polenski's testimony somewhat speaks to themselves.
25 And as the Doreety case from a couple of years ago points

1 out, that a breach of trust is a breach of trust is a
2 breach of trust, or failures as the duties of a trustee
3 be, if you breach them, that they're harmful and damages
4 are the result. And I'm not sure that Ms. Polenski or
5 Mr. Bosler were there to testify necessarily as to
6 proximate cause. I think that's something that the Court
7 actually -- that the Court may have to find, especially
8 sitting without a jury.

9 So I think both of the people that testified,
10 all testified that Mr. Vergeldt did not act properly, did
11 not act appropriately. And as to the proximate cause, I
12 think that Mr. Bosler's report, as well as Ms. Polenski's
13 report, all point to a breach of trust which show unequal
14 distributions and damages to my client such that they may
15 not have testified to it, but the documentary evidence
16 that they produced certainly did. And with Mr. Bosler,
17 it gets a little funny because, like I said or like we've
18 noted before, Mr. Vergeldt, when he resigned as trustee,
19 relinquished the, or basally relinquished that authority
20 over to Ms. Vergeldt. And so some of those damages, I
21 think, your Honor, are the result of Ms. Vergeldt seeking
22 damages on behalf of the trust. I think there is a --
23 there is proximate cause and I think the evidence shows
24 proximate cause between the unequal distributions which
25 would have been damning with Ms. Polenski and Mr. Bosler

1 both testifying that Mr. Vergeldt acted in a manner that
2 was inappropriate for his position as the fiduciary.

3 On the licensed fiduciary versus a lay
4 fiduciary, I'm not aware of any difference between -- at
5 least in our trust code and I know this is governed by
6 Michigan law and Ms. Ballard kind of does this a little
7 bit more than I do -- I'm not aware of any difference in
8 our trust code between a licensed fiduciary having a
9 higher degree of, or super fiduciary duties whereas a lay
10 fiduciary may just have fiduciary duties. And so I think
11 if -- and Ms. Polenski, I think, testified to this, if
12 you're a fiduciary, you're a fiduciary, you're a
13 fiduciary. And so as she kept saying in her testimony,
14 it's not your money, it's not your money. That extra
15 training may give her a leg up, but I don't think that
16 imposes any higher standard on her that she can testify
17 as any different to the standard that would be on
18 Mr. Vergeldt as a lay fiduciary.

19 On Mr. Bosler, part of the reason -- and I
20 think Ms. Polenski testified to this, too -- part of the
21 reason that there were so many assumptions comes back to
22 why these two cases were brought to begin with. Because
23 Mr. Vergeldt didn't keep good records, didn't keep
24 complete records and refused to give them, Ms. Polenski
25 had to issue numerous subpoenas over two years to be able

1 to provide the documents or to be able to put together
2 her report, which I think even she testified was still
3 not complete at the time.

4 So part of those assumptions were based on
5 incomplete records. And as effectively our expert, as
6 the petitioner's expert, I'm not so sure that he would
7 have spoken to Mr. Vergeldt or that he would have
8 gotten, you know -- with all due respect to Mr. Vergeldt,
9 I'm not sure he would have gotten a straight answer. So
10 I think that those assumptions are not necessarily
11 harmless error, but within the scope of what he would be
12 able to do as a CPA.

13 Now, this reasonable man, prudent man standard,
14 I'm not an expert in accounting by any means, but I do
15 think that he can testify and do a hypothetical on what
16 would happen based on what accountancy standards would
17 tell him. I don't necessary disagree that on some level
18 that he probably did step into our world, but I think
19 that was part of what he is -- part of maybe some leeway
20 he could have been given on what he could testify to and
21 what he couldn't. And even then, those weren't -- and I
22 know Ms. Ballard is preserving these for the record, but
23 at the same time, there was no objection as to what
24 his -- as to what he was qualified to do or qualified to
25 say.

1 The only thing that, the only objection that
2 was made was Mr. Vergeldt had never seen this, seen the
3 report before, and I'm sure we'll get into that a little
4 bit with Ms. Ballard's evidentiary objections. So that's
5 all I have on those right now.

6 MS. BALLARD: And just briefly in reply, your
7 Honor. I think the Court has to determine whether this
8 was a cause of action that required the assistance of
9 expert testimony in order for the Court to make an
10 adjudication of the issues. If it is something that
11 falls within the common knowledge exception, and I don't
12 think it is, but if it is something that falls within the
13 common knowledge exception, then we didn't need any
14 expert testimony and the omissions and the failure of the
15 experts to speak to proximate cause or to speak to the
16 actual losses didn't hurt anything because the Court
17 didn't need expert testimony to start with.

18 But I think the law is pretty clear that a
19 breach of fiduciary duty is something that requires
20 expert testimony. And my point is, if you look at
21 Ms. Polenski's testimony very carefully, her only
22 criticism was that Mr. Vergeldt should have hired a
23 bookkeeper. He kept terrible records. I think those
24 were her words, he kept terrible records.

25 That, of course, was reinforced by Mr. Bosler

1 who, in calculating the numbers, had to guess at a lot of
2 his numbers. And Mr. Vergeldt, while he was pro se at
3 that last hearing, he did object to Mr. Bosler's report
4 on the grounds that it was based primarily on guesses and
5 speculation so that issue is preserved. Mr. Vergeldt
6 raised that himself. And that's why I set forth in my
7 memorandum all of the different qualifications that I
8 found Mr. Bosler making during his testimony, you know,
9 well, I didn't know this and I didn't know that so I
10 speculated this.

11 The last point I would make, your Honor, on
12 this is with reference to the Doreety case, it
13 unfortunately doesn't give us a lot of comfort because
14 the trustee in that case was a licensed lawyer and so,
15 therefore, fell into the scope of an expert. And the
16 testimony, the expert testimony that was provided in that
17 case came from Allen Midland and Cathy Kennedy. So we
18 had experts all across the board.

19 This is very, very different. This is a
20 layperson who is a pilot, probably doesn't balance his
21 own checkbook. So I think there would have had to have
22 been some testimony as to what was expected of a lay
23 guardian and the only testimony you had was from
24 Ms. Polenski who said that he should have hired a
25 bookkeeper. And I don't think any of us disagree with

1 that, he should have hired a bookkeeper. But she did not
2 say that his failure to hire a bookkeeper proximately
3 resulted in any damages to the trust or to the
4 petitioner. And that's an issue I didn't raise because I
5 don't think these pleadings embrace the issue of whether
6 the damages were due to the trust or the damages were due
7 to the petitioner. It doesn't look to me like that issue
8 was ever spelled out or explored in the litigation so I'm
9 not raising that issue. And I think since Ms. Vergeldt
10 and Mr. Vergeldt are the only surviving beneficiaries,
11 it's probably a moot point.

12 But my point is, if it doesn't fall within the
13 common knowledge exception, and I don't think it does,
14 then the expert testimony that you had wasn't sufficient
15 to adjudicate a lay guardian's obligations and certainly
16 neither of them testified as to proximate cause.

17 THE COURT: Any additional, or anything to add,
18 Mr. Peace, before we proceed?

19 MR. PEACE: Well, I was a little bit concerned
20 when I mentioned Doreety, because I knew Ms. Ballard was
21 on that and I was a little bit concerned she was going to
22 tell me something I didn't know or that I had completely
23 wrong.

24 The only thing, Judge, again, I'm not aware of
25 any different standard between a lay fiduciary and a

1 licensed fiduciary insofar as this trust is concerned. I
2 certainly agree that there is different -- that different
3 experiences lend themselves to different -- I don't want
4 to say qualifications, but maybe that's the best way to
5 say it, you know. Somebody that's been a fiduciary and
6 has been a lawyer and licensed as a CPA like Ms. Polenski
7 is going to have a higher degree or a higher knowledge of
8 what her standards are, her duty of loyalty and duties of
9 care are.

10 With that being said, I would liken it to a
11 pro se defendant or a pro se party versus as dealing with
12 a lawyer. The rules, you know, we as lawyers and as the
13 Court know the Rules of Civil Procedure and we're
14 presumed to know what the law is and to be competent in
15 it. The same can be said for a pro se defendant or a pro
16 se party. A pro se party can't get out of -- under the
17 rules still has to answer the complaint just like a
18 lawyer does, has to follow the same rules. And I think
19 the law is pretty clear that there's nothing that
20 differentiates the two on the standards of care.

21 So we think that the distinction between a
22 licensed fiduciary and a lay fiduciary is one that may
23 not make a difference here regardless of who testified,
24 because I think even if he had somebody that was, I
25 guess, qualified as an expert as a "lay fiduciary" would

1 still say, you still have the same duties of care, you
2 still have the same duties of loyalty. And in this case,
3 I think the evidence bore out that Mr. Vergeldt violated
4 both of those duties as it relates to my client. And
5 just, again, the documentary evidence shows that he
6 breached those duties that proximately caused it, that he
7 treated both himself and his sister, Patty -- and their
8 sister, Patty -- in a differing manner and tried to hold
9 the disinheritance of my client over her head to get what
10 he wanted. So that would be my response or my reply on
11 that.

12 THE COURT: Okay. Ms. Ballard, now you can
13 proceed to the next point.

14 MS. BALLARD: Your Honor, I wasn't planning on
15 offering any oral argument on the evidentiary issues,
16 knowing that the standard for that is the discretion of
17 the Court. I just wanted to preserve those issues in the
18 event this matter goes up on appeal. And it is my
19 sincere hope that some of these issues that I have raised
20 will result in an order that doesn't require us to get to
21 those evidentiary issues so they will become moot.

22 And, Mr. Peace, please don't hold the Doreety
23 case against me. I fought that one pretty hard and I
24 didn't like the way it turned out, but it was a
25 fascinating case, I will give you that.

1 MR. PEACE: Okay. Now, let me be clear. It's
2 just, I knew that case had kind of come down and you were
3 involved and I always get worried telling somebody else
4 about their case because, you know, I would be anxious to
5 jump out of my seat and say, well, that's not how it went
6 at all.

7 MS. BALLARD: We don't have to be on the record
8 for this, Madam Court Reporter.

9 (Discussion off the record)

10 MS. BALLARD: Your Honor, thank you so much for
11 allowing me to be heard on all of these issues. Do you
12 have any guidance as to whether you want proposed orders
13 from us, or how do you want to address this?

14 THE COURT: I was just about to say, because of
15 the number of issues and I'm sure that getting a proposed
16 order from both of you would help at least me
17 tremendously, I would appreciate it. So I don't know how
18 much time that you would need to do that but that would
19 be appreciated --

20 MS. BALLARD: Could I --

21 THE COURT: -- by me.

22 MS. BALLARD: Could I have 30 days?

23 THE COURT: Yes.

24 MS. BALLARD: Thank you. That will be very
25 helpful.

1 THE COURT: If you need an extension just let
2 me know. That's not a set deadline where I'm going to
3 deny receiving your proposed order at that point.

4 MS. BALLARD: Thank you, your Honor. And this
5 is my first time appearing in front of you and I want to
6 tell you that it's nice to meet you and I appreciate
7 having you on the bench.

8 THE COURT: Well, thank you. Thank you. It
9 was very nice to meet you, too.

10 MR. PEACE: Judge, I know your office knows
11 this and Ms. Ballard knows this. My wife is expecting
12 our second daughter on April 4th so I may be out for a
13 couple of weeks. Would it be okay if we go ahead and
14 vault that 30-day deadline out to 60 days?

15 THE COURT: Any objection, Ms. Ballard?

16 MS. BALLARD: Not at all.

17 THE COURT: Okay. 60 days is fine. And,
18 congratulations. Well, thank you all. This concludes
19 the hearing.

20 (The taking of the hearing adjourned at
21 3:55 p.m.)
22
23
24
25

CERTIFICATE OF REPORTER

I, Laura S. DeCillis, Certified Court Reporter and Notary Public in and for the State of South Carolina at large, do hereby certify:

That the foregoing Videotaped Zoom Video Hearing was taken before me on the date and time stated on page 1 of this transcript; that said proceedings was recorded stenographically by me and was thereafter transcribed; that the foregoing hearing as typed is a true, accurate and complete record to the best of my ability.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

I further certify that the original of said transcript shall be hereafter sealed and delivered to DESA BALLARD, ESQUIRE, Ballard & Watson, 226 State Street, West Columbia, South Carolina, 29169.

Witness my hand, I hereunto affixed my official seal this 27th day of April 2021, Richland County, South Carolina.

Laura S. DeCillis

Laura S. DeCillis, CCR, CVR, CCRI
State of South Carolina at Large
My Commission expires
August 4, 2026

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		words	

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
	)	Case No. 2021-CP-10-04257
Vicky Lynn Vergeldt, Individually,	)	
and as Successor Trustee of the John	)	AFFIDAVIT OF JOHN E. VERGELDT
Vergeldt, Jr. Revocable Living Trust	)	
Dated September 27, 1978,	)	
	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
John Edward Vergeldt and Teresa A.	)	
Shaw-Vergeldt,	)	
Defendants.	)	
	)	

PERSONALLY APPEARED BEFORE ME, **John E. Vergeldt**, who first being duly cautioned and sworn, deposes and states as follows:

1. I am over the age of 21 and am presently of sound mind; I have read the information in this affidavit and I understand such information to be true and correct to the best of my ability, except for those matters which are stated as an opinion herein, or stated as based upon information and belief, and as to those matters, I believe them to be true and correct in all respects, to the best of my knowledge.
2. The Plaintiff requested that I make my home located at 1523 Star Flower Alley, Johns Island, SC 29455 available for appraisal, which request was granted by the Court pursuant to Order dated September 28, 2023.
3. I agreed to make my home available for appraisal on October 24, 2023. The appraiser, Kevin Lowry, was selected by counsel for the Plaintiff. I retained a real estate professional, Ms. Shaw, to attend and monitor the appraisal.
4. The agreed-upon time for the appraisal was at 9:00 am as both me and Ms. Shaw had

appointments starting at 10:30 am.

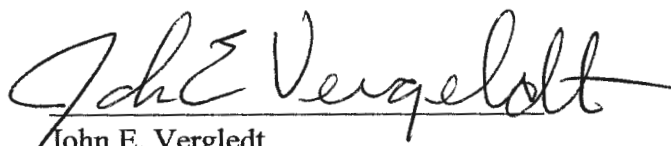
5. Ms. Shaw and I were at the house at 1523 Star Flower Alley, Johns Island, SC 29455 at 8:45 am on October 24, 2023. Ms. Shaw had with her a comprehensive list of upgrades and local comps to discuss with Mr. Lowry during the appraisal.
6. I contacted my attorney, Desa Ballard, by telephone at 9:15 am and informed her that Mr. Lowry had neither shown up for the appraisal nor attempted to contact us. We were advised to be patient and that she would attempt to find out what was going on.
7. I contacted Ms. Ballard again by phone at 9:45 am and advised her that Mr. Lowry had still not shown up for the appraisal. On the advice of Ms. Ballard, me and Ms. Shaw were released to go about our day at 9:47 am.
8. I had a scheduled doctor's appointment at 10:30 am which was 20-25 minutes away.
9. Ms. Shaw left my house at around 9:50 am, and I leashed my dogs for a short walk at around 9:55 am.
10. Plaintiff's counsel has stated, for the record, that he was contacted by Mr. Lowery via email and advised that Mr. Lowery was stuck in traffic on I-17 on the Crosstown Parkway and that he would arrive shortly. On information and belief, this email was sent to Mr. Peace at least 40 minutes after the scheduled appointment time. Mr. Peace asserts that he promptly emailed Ms. Ballard to notify her of the delay.
11. A subsequent check with traffic division of the Charleston police department, as well as a Google Maps search, showed no abnormal traffic delays on I-17 between Mt. Pleasant and Johns Island, Whitney Lakes, on the morning of October 24, 2023.
12. Mr. Lowry arrived at my house at approximately 10:00 am. He met me at the front porch

and informed me that he was here for the appraisal. I informed him that he was too late and that we would have to reschedule.

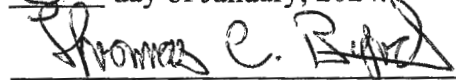
13. I informed Mr. Lowry that Ms. Shaw, on the advice of my attorney, had left and that I had an appointment at 10:30 am which I would need to leave for shortly. I asked Mr. Lowry to leave, however he ignored the request. At no time did Mr. Lowry tell me that he would only need 10 minutes to complete his work.
14. As I was leaving the house to walk the dogs, I noticed that Mr. Lowry had entered the house without permission. I returned to the house and again asked him to leave. He again ignored my request. At that point, I did raise my voice and demanded that Mr. Lowry get out of my house.
15. Mr. Lowry stepped back onto the front porch but did not leave. He told me that I could leave the dogs with him to allow him to finish the appraisal without me being present. At that time, I took the dogs out front to pee and returned. I never left sight of the house. I again demanded that he leave, and he finally did.
16. Mr. Lowry was extremely belligerent and abrasive through the encounter on October 24, 2023. Because of his demeanor, as well as his tardiness, it was agreed amongst myself, Ms. Shaw, and Ms. Ballard that we would not agree to reschedule an appraisal using Mr. Lowry's services.
17. I agreed to a subsequent appraisal of the property as long as I would be included in selecting the appraiser and that Plaintiff would agree to pay for the appraisal. To my knowledge, Plaintiff's counsel would not agree to this proposal.

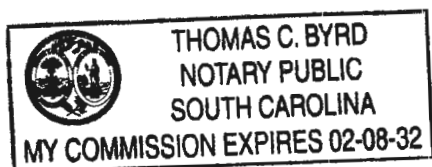
18. I am informed and believe that the only way this even could have transpired as it did was that Mr. Lowry simply did not leave his place of work in Mt. Pleasant early enough to arrive on Johns Island by 9:00 am at our scheduled time for the appraisal.
19. It is my belief that this entire event was orchestrated by the Plaintiff and her attorney to make me appear noncompliant with the Judge's orders.

Further Affiant sayeth naught.


John E. Vergeldt
Affiant

SWORN to before me this
5th day of January, 2024.


Notary Public for South Carolina
My Commission Expires: 02-08-32



STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) CIVIL ACTION NO.: 2021-CP-10-04257

Vicki Lynn Vergeldt, Individually, and as
Successor Trustee of the John Vergeldt, Jr.
Revocable Living Trust dated September
27, 1978,

Plaintiff,

vs.

John Edward Vergeldt and Teresa A. Shaw
Vergeldt,

Defendants.

**AFFIDAVIT OF
KEVIN C. LOWRY**

PERSONALLY APPEARED before me, Kevin C. Lowry with Lowcountry Real Estate Appraisals, LLC, who, after being duly sworn, deposes and says as follows:

1. I am over the age of eighteen (18) and have personal knowledge of the facts set forth herein except those matters stated upon information and belief.

2. I have a license issued by the South Carolina Department of Labor, Licensing, and Regulation as a certified real estate appraiser, said license having number 4811. I have maintained said license continuously for the past twenty (20) years, and I am the sole shareholder of Lowcountry Real Estate Appraisals, Inc. which has been in business since at least 2005 under one name or another.

3. My involvement in this matter began on or around October 6, 2023 when I was contacted by Taylor A. Peace, Esq, with Harrell, Martin & Peace, P.A., who I understand to be the attorney for Plaintiff Vicki Lynn Vergeldt, Individually, and as Successor Trustee of the John Vergeldt, Jr. Revocable Living Trust ("Plaintiff").

4. I was informed by Mr. Peace that an order had been entered in this case requiring the real property at 1523 Star Flower Alley, John's Island, South Carolina 29455 ("Property") to be appraised within forty-five (45) days of September 28, 2023; however, Mr. Peace did not discuss the underlying facts with me. I understood the Property to be owned by Defendant John Edward Vergeldt ("Defendant") based on my initial investigation into the Property.

5. Mr. Peace requested a copy of my resume and/or qualifications which I provided on October 10, 2023. I understood these documents would be provided to Defendant's counsel for their review and to determine whether an agreement could be reached between the parties on whether my services would be utilized for the required appraisal. To my knowledge, no objection was received regarding my qualification and/or services.

6. I also informed Mr. Peace I would be able to perform the requested appraisal during the week of October 23, 2023 if the Property could be made available.

7. Mr. Peace informed me the Property could be made available on either October 24, 2023 at 9:00 A.M. or October 26, 2023 after 1:30 P.M., and I chose the October 24, 2023 date due to other scheduling conflicts and to allow more time to write-up the appraisal.

8. I asked Mr. Peace to confirm the date and time of the appraisal in the event anything changed with the other side, and I understand he did that based on an email I received on October 23, 2023 in which I was informed everything was good to go.

9. On the morning of October 24, 2023, I left my home in Mount Pleasant, South Carolina in plenty of time to arrive at the Property no later than the agreed upon time of 9:00 A.M.

10. However, I was delayed while traveling on U.S. Highway 17 ("Hwy 17") due to a disabled vehicle that blocked one or more lanes of traffic. Hwy 17 is a main and heavily trafficked thoroughfare to and from Charleston, South Carolina and the surrounding areas, which I

understand to be often utilized to travel from Mount Pleasant to Johns Island. I personally use it for my own needs.

11. My own experience in my morning and evening commutes and other travels is that vehicular traffic on Hwy 17 is frequently slowed, delayed and/or halted due to traffic accidents, disabled vehicles, etc., as it sometimes narrows to a four-lane road.

12. When it became clear I was going to be more than thirty (30) minutes late arriving at the Property, I contacted Mr. Peace by email at 9:39 A.M. to let him know of my situation in the hopes he would communicate same to whoever needed it in the event someone was waiting for me at the Property and/or it was unlocked. I also let him know the traffic was clearing and I would arrive at the Property in about ten (10) minutes.

13. I arrived at the Property around 9:50 A.M. or shortly thereafter and walked to the front of the house where I was met by the Defendant and his dog as they stepped out of the front door.

14. I attempted to enter the house to perform the appraisal after Defendant and his dog stepped to the side which indicated to me an invitation to enter. However, at that time, Defendant began to yell and swear at me, inform me I was an hour late, and that I was to get off the Property, which he said in more colorful language.

15. While I was able to view the exterior of the Property, I was not able to nor have I viewed its interior nor did I attempt to enter same again based on my interaction with Defendant, and, as a result, I am not able to complete an appraisal of the Property.

16. I understand Mr. Peace has requested additional dates and times that Defendant is willing to make the Property available so that I can view its interior and complete my work, but no such dates and times have been forthcoming. Based on my experience and in viewing the size of the Property based on County and other public records, the inspection and viewing of the

Property's interior should take approximately ten (10) to fifteen (15) minutes.

17. I also understand Plaintiff has filed a Motion to Stay Proceedings ("Motion") that I have reviewed in which allegations are made that I am biased and incapable of providing an accurate appraisal. I am confused by these allegations as I have no interest in this matter and the processes I would follow to conduct the appraisal I was engaged to perform are prescribed by standards imposed on me by my license, the governing body that issued same, and other professional organizations and associations of which I am a member.

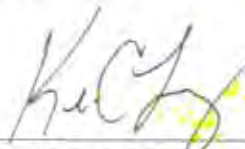
18. I was and still am surprised and shocked at Defendant's behavior during our interaction as I have never encountered that sort of reaction from a property owner in the past twenty (20) years of my career as a real estate appraiser. This is especially true since it did not appear Defendant had any pressing professional or personal matters to attend since he appeared to have left the Property to walk his dog after our interaction.

19. I further understand Defendant has alleged he hired a professional to supervise the appraisal, which also confuses me as he was at the Property when I arrived, and I assume he was there before. His Motion is the first time I have heard of him hiring a professional to supervise the appraisal which I think he would have mentioned at the time of our interaction based on the anger and rage he expressed to me.

20. Defendant's reaction to my presence was, quite frankly, disturbing, and I'm not certain or sure what his reaction will be if I go back out to the Property.

21. If I am requested to go back to the Property (which I am willing to do), I would ask that the lawyers involved or a deputy with a local law enforcement agency be present to insure my personal safety while I finish the work required to perform the appraisal.

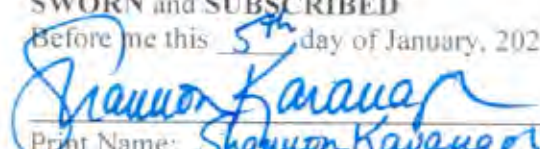
DEPONENT FURTHER SAYETH NOT!



KEVIN C. LOWRY

SWORN and SUBSCRIBED

Before me this 5th day of January, 2024


Print Name: Shannon Kavanagh
Notary Public for South Carolina
My Commission Expires: 10/24/2033

SHANNON KAVANAGH
Notary Public, State of South Carolina
My Commission Expires 10/24/2033

RECEIVED

Dec 09 2024

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
MIKELL R. SCARBOROUGH, CIRCUIT COURT JUDGE

Appellate Case No.: 2024-000947

Vicki Lynn Vergeldt, individually and as
Successor Trustee of the John Vergeldt, Jr.
Revocable living Trust dated September 27, 1978, ...Respondent,

v.

John Edward Vergeldt and
Teresa Shaw-Vergeldt, Defendants,

Of whom John Edward Vergeldt is the, ...Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed
to be included by any of the parties and not any other material.

Respectfully submitted,

s/ Haley Hubbard

Desa Ballard (S.C. Bar No.498)

Harvey M. Watson III (S.C. Bar No. 74053)

Haley Hubbard (S.C. Bar No. 103195)

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November 22, 2024