IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

---

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr, Circuit Court Judge

---

Case No.: 10-CP-26-9113
Appellate Case No.: 2014-001135

---



Scott Lemons and Gold Coast Resorts, LLC — Petitioners,

vs.

The McNair Law Firm, P.A. — Respondent.

---

# RESPONDENT'S RETURN TO PETITION FOR A WRIT OF CERTIORARI

---

Robert E. Stepp
S.C. Bar No.: 5335
Roland M. Franklin, Jr.
S.C. Bar No.: 14247
SOWELL GRAY STEPP & LAFFITTE, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

**Attorneys for Respondent**

## INDEX

## OVERVIEW OF ISSUES

Pursuant to Rule 242(f), SCACR, Respondent McNair Law Firm, P.A. ("McNair") submits the following Return to the Petition for Writ of Certiorari ("Petition"). The Petition should be summarily rejected for the following reasons.

First, the Petition does not present any circumstances that justify the exercise of this Court's discretion to review the decision of the Court of Appeals. Not even one of the factors identified in Rule 242(b), SCACR, is present. The issues are not novel, the decision of the Court of Appeals was announced in a *per curiam* unpublished opinion after argument, there is no conflict with any decision of this Court, there are no constitutional issues presented, and there is no conflict with federal law.

Second, the arguments made by Petitioners are the very same ones that have been made unsuccessfully to the trial court, both in opposing the motion for summary judgment and in seeking reconsideration of that order. Likewise, Petitioners made almost identical arguments to the Court of Appeals and again in support of the Petition for Rehearing.

Third, the Petition ignores other dispositive issues. Petitioners' only cause of action is that Respondent settled the underlying case without authority to do so for less than its value. Assuming that allegation to be true, as required by Rule 56, SCRCP, the principal issue below was whether the underlying case (the "Hyatt Case") had any merit as a matter of law. The contract ("Hyatt Contract") at issue in the Hyatt Case provided for the sale of land by one of the Petitioners to Hyatt. Under established South Carolina contract principles, because Petitioners did not have title to the property on the closing date, the Hyatt Contract was discharged and Petitioners could make no valid claim

against Hyatt. For this reason, even an unauthorized settlement of the Hyatt Case could not have proximately caused any damages recoverable in the current action. Therefore, even if this Court were to address the grounds raised in the Petition, the result should still be affirmed on other grounds that the Petition ignores.

Fourth, the legal arguments made in the Petition are erroneous. The Court of Appeals did not "misapprehend" the holdings of *Crowley v. Harvey & Battey, P.A.* or *Lincoln v. Aetna Capacity and Surety Co.* Nor did the Court of Appeals err in supporting its decision to affirm by relying on well established principles of ratification.

## Questions Presented

I. Did the Court of Appeals correctly rely on principles of ratification when Petitioners' only claim in this case was that the underlying case was settled without authorization and for less than its value?

II. Did the Court of Appeals correctly rely on principles of ratification when all elements of ratification were established in the record?

III. Did the Court of Appeals correctly affirm the grant of summary judgment when the underlying case had no merit and therefore any wrongful conduct did not proximately cause any damages?

IV. Did the Court of Appeals correctly affirm the grant of summary judgment because Petitioners were bound as a matter of law by the prior judicial ruling that the contract at issue was null and void?

## Counter Statement of the Case

On September 28, 2010, Scott Lemons and Gold Coast Resorts, LLC (collectively "Petitioners") commenced this action with the filing of the Summons and Complaint (R. pp. 63-68.) against McNair and Mark McAdams ("McAdams"), an attorney formerly with McNair. The Complaint alleged a single cause of action for legal malpractice, stating simply that McAdams represented Petitioners in the Hyatt Case seeking damages

for a breach of the Hyatt Contract and settled the Hyatt Case without Petitioners' consent and for less than the claim was worth, Petitioners never served McAdams and McAdams was therefore never a party to this action.

On June 11, 2012, McNair filed its Motion for Summary Judgment. (R. pp. 21-24.) The trial court heard the motion on July 30, 2012. Following the hearing, Judge Hyman gave the parties time to submit additional materials and authorities. By order entered on September 11, 2012, the trial court granted summary judgment in favor of McNair. (R. pp. 1-20.)

The trial court granted summary judgment in McNair's favor on four separate and independent grounds. First, the trial court held that Petitioners' claim in the Hyatt Case had no merit or value and, therefore, Petitioners were not damaged by the settlement of that claim. Second, the trial court concluded that because the court in the Hyatt Case had ruled that the Hyatt Contract was null and void and Petitioners took no action to challenge or appeal that beneficial ruling, Petitioners were collaterally estopped from asserting otherwise in this case. Third, the trial court concluded that Petitioners had ratified the settlement agreement executed in the underlying case. Finally, the trial court concluded that Petitioners were bound by the mutual release they executed in the Hyatt Case.

On October 12, 2012, Petitioners filed their Notice of Appeal from the trial court's September 11, 2012 Order. The Court of Appeals heard argument on the merits of the appeal on March 3, 2013. The Court of Appeals filed its unpublished opinion affirming the grant of summary judgment on March 19, 2014. Petitioners sought rehearing by petition filed on April 7, 2014, which was denied by order of the Court of

Appeals entered on April 25, 2014. The Petition for Writ of Certiorari was filed on May 22, 2014.

## Counter Statement of Facts

The "Facts" section of the Petition is incorrect and incomplete. The principal errors and omissions are as follows:

(a) Petitioners were never "ready willing and able to close" on the Hyatt Contract. (Pet. at 6.) It is undisputed that neither of the Petitioners ever had title to the property.

(b) Global Holdings was not a "deal put together by the McNair Law Firm." (Pet. at 8.) Petitioners do not cite any part of the record for this assertion and it is not supported in or outside of the record. It is undisputed that McNair had no knowledge of anything related to Global Holdings until McAdams had left the employment of McNair. Lemons, one of the Petitioners, separately sued McNair in a case based on Global Holdings. Summary judgment was granted to McNair in that case, from which Lemons took no appeal. *See* Order in civil action no. 2011-CP-26-6677.

(c) Petitioners never made a claim against McNair for negligent advice. (Pet. at 6.)

(d) The summary judgment order does not "misrepresent the facts." (Pet. at 9.) First, the reference in the order to Petitioners' agreement to settle the Hyatt Case was based upon the document executed at the mediation by McAdams, which in fact is an agreement to settle the case. The trial court did not rely on that document in granting summary judgment to McNair. Second, the trial court assumed that McAdams lied to Petitioners at the time the release was executed, but found that Petitioners ratified the

settlement by their subsequent conduct. Third, the letter addressed to Lemons is in the record (R. at pp. 394-396), and fully supports the recitation by the trial court that it was mailed to Lemons. The order granting summary judgment acknowledges, however, that Lemons testified that he did not receive it or read it and does not assume or find to the contrary. Finally, the footnote in the order noting that Lemons did not complain about any other aspect of the representation by McNair is correct. The only claim made in this case was for the unauthorized settlement of the Hyatt Case for less than it was worth.

(e) The Petition also omits material uncontested facts that are relevant to the issues raised in the Petition. The most important of these are as follows:

i. Neither Petitioner had title to the property on the date specified for closing in the Hyatt Contract. (R. p. 188, lines 15-16.)

ii.. Petitioners each signed the Mutual Release. (R. pp. 197, line 20 – p. 198, line 4; R. pp. 397-399.)

iii. Petitioners cashed the settlement check, kept the proceeds, and never offered to return the money. (R. 230, line 18 – p. 231, line 17.)

iv. In their motion for reconsideration in the underlying case, Petitioners represented to Judge Stroman that "Kenney Hyatt agreed to pay . . . [Petitioners] $5,000 in exchange for a Release from the parties and a Dismissal from the case." (R. p. 409.)

v. Judge Stroman ruled that the Hyatt Contract was "null and void." (R. p. 417.)

vi. Judge Stroman further found that Petitioners "were aware of the fraud [by Hyatt] and recovered money from and released Mr. Hyatt." (R. p. 417.)

vii. Petitioners thereafter accepted the benefits of the order relieving them of the judgment and finding that the Hyatt Contract was null and void, and did not appeal or otherwise challenge that finding in any way. (R. pp. 415-418; R. pp. 419-422.)

viii. Petitioners repeatedly represented to the lower court and to the Court of Appeals that the Hyatt Case was settled, and never reserved any rights with respect thereto. (R. p. 409.)

## Argument

Petitioners seek review of the unpublished *per curiam* decision of the Court of Appeals affirming the grant of summary judgment in favor of McNair. The Court of Appeals was asked whether clients may recover against their attorney for allegedly settling a case without their authorization when (a) the case had no value and should have been dismissed as a matter of law; (b) the contract on which the case was based was declared null and void in a final order entered pursuant to a motion filed on behalf of the Petitioners by independent counsel; and (c) Petitioners either agreed to or ratified the settlement by signing a release that they never sought to set aside and by retaining the settlement proceeds and otherwise taking advantage of the settlement after learning about it. The Court of Appeals recognized that these questions are controlled by clear principles of law that were correctly applied by the trial court to uncontested facts. The Court of Appeals therefore affirmed the decision below in an unpublished opinion that cited pertinent authorities regarding ratification. The decision to affirm was correct in all respects, was based on established legal principles, and does not raise any issue warranting review by this Court.

### I. Principles of Ratification Govern Because Petitioners' Only Claim In This Case Was That the Underlying Case Was Settled Without Authorization And For Less Than Its Value.

Petitioners' effort to bring this case within the perimeter of *Crowley v. Harvey & Battey, P.A.*, 327 S.C. 68, 488 S.E.2d 334 (1997), fails. Petitioners' sole cause of action

in this case is for legal malpractice resulting from McNair's alleged performance of an unauthorized act, which they described as follows:

> McNair Law Firm, while representing the Plaintiff, breached the standard of care, and was negligent by settling a valuable claim for less than it was worth without the knowledge or permission of their client.

(R. pp. 63 – 68; *see also* Appellants' Br. 6-7.) Petitioners never sought to amend the Complaint to add another cause of action or to modify this specification of legal malpractice and Petitioners never made any claim that they received legal advice about the settlement that was below the standard of care. Petitioners' attempt at this stage of the case retroactively to convert their clearly pleaded claim to one for negligent advice or fraud, *see, e.g.* Pet. at 11, 12, 14, should not be permitted.

The dispositive authority for this issue in the case is therefore *L.F.S. Corp. v. Kennedy*, 287 S.C. 162, 337 S.E.2d 209 (1985), which is discussed in *Crowley*. In *Kennedy*, a client sued its lawyer alleging that the lawyer failed to follow the client's instructions concerning settlement negotiations and permitted summary judgment to be entered based on an unauthorized agreement. 287 S.C. at 163, 337 S.E.2d at 210. The court found that, despite the lawyer's alleged failure to follow his client's instructions, the client was barred from suing the lawyer because the client ratified its lawyer's actions by accepting funds pursuant to the settlement agreement and taking action to enforce the agreement. *Id.* These facts are very similar to the present case, in which Petitioners allege that McAdams acted without authority, yet Petitioners accepted the funds and repeatedly cited the settlement to Judge Stroman and to the Court of Appeals in aid of an argument to reverse a judgment against Petitioners. *Kennedy* therefore controls on the

facts of this case and the Court of Appeals was correct in affirming the dismissal of Petitioners' cause of action.

The facts in *Crowley* are quite different. In *Crowley*, a client sued her law firm alleging that it was negligent in advising her in settling the property division issues in her divorce action. 327 S.C. at 70, 488 S.E.2d at 334. The law firm argued that, by accepting the settlement funds and suing to enforce the agreement, the client had ratified the agreement. *Id.* at 70, 488 S.E.2d at 335. The court distinguished *Kennedy*, noting that in Kennedy "the malpractice claim was premised on allegations that the attorney had exceeded his authority in settling the client's case [and] *despite knowledge of this problem*, the client ratified its attorney-agent's acts by accepting the benefits of the settlement." *Id.* (Emphasis in original). The court found that the claim in *Crowley* was "entirely different" from the claim in *Kennedy* in that the claim in *Crowley* concerned "the adequacy of the attorneys' advice to their client." *Id.* at 71, 488 S.E.2d at 335. The court thus held that "where . . . the settlement itself cannot be attacked and the issue is not one of agency but of negligence, the fact the client has accepted the benefits of the settlement and judicially sought to enforce its terms are not bars to maintenance of a malpractice claim." *Id.*

Thus, two distinct legal principles emerge from *Kennedy* and *Crowley*. If, on the one hand, the basis for the client's legal malpractice claim is that the lawyer was negligent in advising the client concerning settlement, then the client's signing the settlement agreement and accepting settlement funds do not constitute ratification that bars suit against the lawyer. *Crowley*, 327 S.C. at 71, 488 S.E.2d at 335. If, on the other hand, the basis of the client's legal malpractice claim is that the lawyer exceeded his

authority in settling the client's case, then the client's retaining the settlement funds and affirming the settlement agreement constitute ratification that does bar suit against the lawyer. *Kennedy*, 287 S.C. at 163-64, 337 S.E.2d at 210.

This distinction is very logical. Ratification relates to the principal-agent relationship and not to negligence. When, as in *Kennedy*, the lawyer-agent purports to contract with a third person on behalf of the client-principal, the client-principal can confirm the lawyer-agent's authority to do so by acts of ratification or can disclaim the lawyer-agent's authority by not performing acts of ratification. In contrast, the lawyer's authority to commit the client is never questioned when the client commits itself directly, even when that action is in reliance on negligent advice from the lawyer. *Crowley* confirms that, when the client signs the settlement agreement itself in reliance on advice from the lawyer, a ratification theory would not preclude a suit against the lawyer for negligent advice.

In the *per curiam* affirmance of the judgment in favor of McNair, the Court of Appeals cites *Crowley* for the proposition that "an attorney may settle a case on behalf of his client and *absent fraud or mistake,* such a settlement is binding on the client." (Emphasis in original). That proposition is relevant because Petitioners alleged that McAdams misrepresented the contents of the release and that Petitioners would not have signed it had they known what it was. (R. p. 220, line 14 – p. 221, line 1.) Notwithstanding an alleged factual basis to have asserted that the release was procured either by fraud or mistake and therefore was not binding upon them, Petitioners instead concluded that they were bound by the settlement, could not challenge it, and did not challenge it. Petitioners therefore argued that their conduct did not constitute ratification

as a matter of law. (Pet. 11-12.) The Court of Appeals was simply pointing out that if the settlement agreement was executed as result of fraud by the attorney, the agreement could have been set aside. The failure of Petitioner to take any such action is therefore evidence of ratification of the agreement.

The fact that Petitioners did not "allege that the advice given to him by the Respondent to sign the settlement agreement was fraudulent," (Pet. at 10), misses the point for two reasons. First, as previously noted, Petitioners did not allege a cause of action for negligent advice but, instead pleaded a lack of authority. Second, although Petitioners did not plead a claim for fraud, they nonetheless alleged (and continue to assert) that Respondent misrepresented the contents of the release to Petitioners. (*See, e.g.* Pet. at 14 ("In this case Mr. Lemons claims that the McNair Law Firm lied to him by advising him that the Mutual Release was only releasing the earnest money . . . .")). Such a misrepresentation, if proven, would have provided a basis to avoid the release had Petitioners elected to do so.

Petitioners argue that they would not have prevailed in a claim to set aside the release, citing *Lord Jeff Knitting v. Mills*, 281 S.C. 374, 377, 315 S.E. 2d 377 (Ct. App. 1984). That case, however, only stands for the proposition that a confession of judgment made with apparent authority is binding notwithstanding a lack of actual authority. That case does not address fraud. By contrast, the subsequent decision of this Court in *Crowley* is directly on point when it states the rule that a settlement is binding absent fraud or mistake. 488 S.E. 2d at 334-35. In any event, the fact that Petitioners never made any effort to disclaim or to avoid the settlement, whether nor not such an effort might have been successful, is pertinent evidence of "conduct that justifies a reasonable

assumption" of consent consistent with the Restatement (Third) of Agency § 4.01(2), which was also cited by the Court of Appeals.

The Court of Appeals therefore did not "misapprehend" *Crowley.* Because the present case only raised an issue about the authority of the attorney to act, and did not state a claim for negligent advice regarding the settlement or for fraud, and because Petitioners had a basis to have avoided the release but elected not to do so, Petitioners' claim was barred by the principles of ratification cited by the Court of Appeals.

## II. All Elements of Ratification Were Established in the Record Before the Court of Appeals.

The Court of Appeals opinion in part relies on *Lincoln v. Aetna Cas. & Sur. Co.*, 300 S.C. 188, 386 S.E. 2d 801 (1989), which confirms that "[r]atification...means the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent." 386 S.E.2d at 803. Petitioners argue that they did not have full knowledge about the facts of the release and therefore could not have ratified it. (Pet. at 13.)

This argument overlooks undisputed facts to the contrary. First, Petitioners admitted that at some time before the trial of the Hyatt Case they knew the claim against Hyatt had been settled. (R. 222, line 11 – p. 223, line 1.) That trial was less than three weeks after the execution of the release. (R. pp; 100; 243.) Most, if not all, of the conduct that constitutes ratification occurred after Petitioners knew that their claims against Hyatt had been settled:

(a) Petitioners kept the $5,000 paid by Hyatt; (R. 230, line 18 – p. 231, line 17.);

(b) following the trial, Petitioners made no effort to avoid the settlement or to rescind the release and continued to keep the settlement proceeds; (R. p. 234, lines 5-10.);

(c) Judge Cross's order plainly recites that Petitioners had settled their claims against Hyatt for $5,000 (R. p. 401), and Petitioners never objected to or sought to alter that portion of the order;

(d) Petitioners represented to Judge Stroman—in support of their motion to alter or amend the judgment entered against them—that their claims against Hyatt had been settled for $5,000; (R. p. 409.);

(e) Petitioners thereafter accepted the benefit of Judge Stroman's order relieving them of that judgment, which again recites that their claims against Hyatt were settled for $5,000; (R. p. 416);

(f) when Judge Stroman's order was appealed, Petitioners represented to the Court of Appeals that their claims against Hyatt had been settled for $5,000; (R. pp. 428, 431); and

(g) thereafter, Petitioners accepted the benefits of the order of the Court of Appeals which affirmed Judge Stroman's order vacating the judgment against them. (R. p. 420.)

These actions comprise much more than the "silent acquiescence" that is sufficient to establish ratification. *See Foxworth,* 136 S.C. at ___, 134 S.E. at 431. The Court of Appeals was therefore fully justified in finding Petitioners ratified the settlement based on *Lincoln v. Aetna Cas. & Sur. Co.*, 300 S.C. 188, 386 S.E.2d 801 (Ct. App. 1989), and therefore affirming the award of summary judgment.

## III. The Underlying Case Had No Merit or Value and Therefore the Order Granting Summary Judgment was Properly Affirmed.

If Petitioners were not entitled to recover, as a matter of law, against Hyatt in the Hyatt Case, they have no valid claim against McNair based on an unauthorized settlement

of the Hyatt Case. Notwithstanding any issue raised by Petitioners, the order granting summary judgment was properly affirmed by the Court of Appeals because the Hyatt Case had no merit under established principles of contract law.

A seller who on the closing date does not have title to the property that is the subject of the contract may not enforce the contract against a purchaser who does not perform. At the time a seller enters into a contract to convey real estate, the seller is not required to have title to the property he intends to sell. *Searles v. Auld*, 118 S.C. 430, ___, 111 S.E. 785, 785 (1922) ("The fact . . . that defendant at the time of making the contract did not have title, is not sufficient to indicate an impossibility of compliance on his part at the date set for same."). Under the prevailing "American Rule," "a purchaser cannot, prior to the time fixed by the contract for conveyance, complain that a seller's title is deficient or encumbered." *Wolken v. Wade*, 406 N.W.2d 720, 723-24 (S.D. 1987). Thus, Gold Coast was legally entitled to enter into a contract to sell property that it did not own at the time the contract to sell was executed.

However, at the time for performance, the seller must have title to the property as a condition of enforcing the contract to sell it. *See, e.g.*, *Leitner v. Eltinge*, 54 Cal. Rptr. 703, 710 (Cal. App. 4th 1966) ("Ordinarily a vendor need not have any title at the time he contracts to sell real property, if, at the time set for performance, he is able to furnish the title he agreed to convey."). "[T]he [purchaser] may rightfully insist . . . that the title be perfect at the time fixed by the contract for final performance." *Wolken*, 406 N.W.2d at 723-24. A real estate contract, like the Hyatt Contract, that provides that a deed shall be delivered to the buyer at the closing in exchange for the specified purchase price, creates dependent concurrent conditions. A concurrent condition is "a condition precedent where

performances are due at the same time." Restatement (First) of Contracts § 251 (2012). "Since concurrent conditions protect both parties, courts endeavor, so far as possible in light of the expressed intention of the parties, to construe performances of mutual promises as concurrent conditions." 15 *Williston on Contracts* § 44:20 (4th ed. 2011); *Am. Nat'l Bank of Winter Haven, Fla. v. Caldwell*, 166 S.C. 194, ___164 S.E. 613, 615 (1932) ("It is the tendency of the courts to construe the undertakings of the parties to such contracts as being dependent, unless a contrary intention appears."); 35 A.L.R. 108 ("It is a fundamental rule that in contracts for the sale and purchase of real property the undertakings of the respective parties are considered to be dependent unless a contrary intention appears [and where] the acts to be done are concurrent the covenants are dependent.").

When a contract contains dependent concurrent conditions, as the Hyatt Contract did, the law is clear that neither party may sue for breach when neither party was prepared to perform. As this Court explained:

> Where the covenants are dependent and concurrent neither party can recover against the other without a performance or offer to perform on his part, unless performance shall be excused or rendered impossible by the other party. Hence, if a [purchaser] wishes to compel the vendor to fulfill his contract, he must make his part of the agreement precedent, and cannot proceed against the other without an actual performance of the agreement on his part, or a tender and refusal.

*Bishop v. Tolbert*, 249 S.C. 289, 300, 153 S.E.2d 912, 918 (1967). This reflects the well established "American Rule," and applies to both parties to the transaction. Under this rule, at the time set for performance a seller must tender, or be able to tender, the title to the property as a condition precedent to enforcement of the agreement against the

purchaser. "[W]here all or part of the performances to be exchanged under an exchange of promises are due simultaneously, it is a condition of each party's duty to perform that the other party either tender *or with manifested present ability to do so*, offer performance of his or her part of the simultaneous exchange." 15 *Williston on Contracts* 43:31 (4th ed. 2011) (emphasis added). The rule also provides that when neither party is able to perform at the specified closing date, and the contract provides, as the Hyatt Contract did, that time is of the essence, the contract becomes void and both parties' duty to perform is discharged. *See Nadeau v. Beers*, 440 P.2d 164, 166 (Wash. 1968) (holding that when an agreement makes time of the essence and fixes a termination date, and there is no conduct giving rise to waiver or estoppel, the agreement becomes "legally defunct" on the termination date if performance is not tendered); *Pittman v. Canham*, 2 Cal. App. 4th 556, 559-60 (Cal. App. 1992) ("The failure of both parties to perform concurrent conditions during the time for performance results in a discharge of both parties' duty to perform."); 15 *Williston on Contracts* 43:31 (4th ed. 2011) ("After the time fixed by the contract . . . the conditions become impossible of performance, so the contract must be considered discharged."); Restatement (Second) of Contracts § 238 (1981) (until a party has made an offer of performance "the other party is under no duty to perform, and if both parties fail to make such an offer, neither party's failure is a breach").

In the present case, neither Petitioner had the ability to perform on the closing date, because neither had title to the property and therefore could not have performed or tendered performance on that date. Lemons never acquired title to the Property and never entered into any kind of agreement with Gold Coast to transfer title to Gold Coast. (R. p. 188, lines 15 – 16.) Gold Coast therefore did not have the ability to tender title to Hyatt

on November 23, 2006 as required by the express terms of the Hyatt Contract. Because time was made of the essence in the closing of the Hyatt Contract, the failure of both parties to tender performance by the closing date specified in the Hyatt Contract resulted in the discharge of that contract. Therefore, neither party could hold the other in default and no cause of action to enforce the Hyatt Contract ever arose. Because Gold Coast's failure to perform discharged Hyatt of his duty to purchase the property, there was no breach of the Hyatt Contract. Because there was no breach, Petitioners' claims against Hyatt were worthless, Petitioners had no recoverable damages, and summary judgment was properly awarded to McNair.

## IV. Petitioners Were Bound as a Matter of Law by the Prior Judicial Ruling that the Contract at Issue in the Underlying Case Was Null and Void.

Judge Stroman found that the Hyatt Contract was "null and void." (R. p. 417.) In so finding, Judge Stroman vacated the $270,000 judgment previously entered against Petitioners. (*Id.*) Petitioners never challenged or appealed Judge Stroman's finding that the Hyatt Contract was null and void and, in fact, argued that the Court of Appeals should affirm Judge Stroman's order voiding the $270,000 judgment. The Court of Appeals did so without modifying the finding that the Hyatt Contract was null and void. (R. pp. 419-422.) As a result, Petitioners are bound by the finding that the Hyatt Contract was null and void and are collaterally estopped from arguing otherwise. Simply put, Petitioners cannot have it both ways—asking one court to find that the Hyatt Contract was null and void and another court to find that the Hyatt Contract was enforceable. The Hyatt Contract was either an enforceable contract or it was not. That issue was litigated and determined in the Hyatt Case, and collateral estoppel bars Petitioners from re-litigating it in this case.

The law of collateral estoppel is well-established in South Carolina. Collateral estoppel "'prevents a party from re-litigating an issue in a subsequent suit which was actually and necessarily litigated and determined in a prior action.'" *Crosby v. Prysmian Commc'ns Cables & Sys., USA, LLC*, 397 S.C. 101, 723 S.E.2d 813 (Ct. App. 2012) (quoting *Aaron v. Mahl*, 381 S.C. 585, 592, 674 S.E.2d 482, 486 (2009)). Collateral estoppel prevents the re-litigation of issues "regardless of whether the claims in the first and subsequent lawsuits are the same." *Carolina Renewal, Inc. v. South Carolina Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). *E.g., Aaron v. Mahl*, 381 S.C. 585, 593, 674 S.E.2d 482, 486 (2009) (holding that because respondent raised the issue of the validity of an assignment to the Indiana circuit court and respondent's position was rejected by that court and not appealed by respondent, the respondent "[c]learly . . . should have been collaterally estopped from making the same argument about the assignment to the South Carolina courts").

"A party claiming preclusive effect under collateral estoppel must demonstrate that the particular issue was '(1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.'" *Crosby*, 397 S.C. at 109, 723 S.E.2d at 817 (quoting *Carolina Renewal*, 385 S.C. at 554, 684 S.E.2d at 782). "'While the traditional use of collateral estoppel required mutuality of parties to bar relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issues." *Carolina Renewal*, 385 S.C. at 554, 684 S.E.2d at 782; *Zurcher v. Bilton*, 379 S.C. 132, 135, 666 S.E.2d 224, 226 (2008) ("The doctrine may not be invoked unless the precluded party has

had a full and fair opportunity to litigate the issue in the first action."). "[T]he identity of the parties, and their relationships to one another, is simply not a concern when deciding whether to apply the doctrine of collateral estoppel." *Carolina Renewal*, 385 S.C. at 555, 684 S.E.2d at 782.

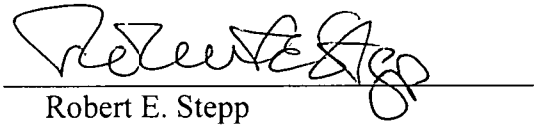
The issue of the validity of the Hyatt Contract was actually litigated and was directly determined in the Hyatt Case, and was necessary to support the judgment in favor of Petitioners. As a result, Petitioners are collaterally estopped from asserting that the Hyatt Contract was valid and enforceable. Because the Hyatt Contract was null and void, Petitioners could not have recovered against Hyatt. Appellants therefore cannot now recover against McNair for settling a claim based on that void contract. The trial court correctly granted summary judgment in McNair's favor on this ground, and the Court of Appeals properly affirmed.

## Conclusion

Each of these bases for the affirmance by the Court of Appeals is independent of the others. Consequently, if this Court were to address the issues raised in the Petition, the decision of the Court of Appeals should be affirmed if even one of these bases is correct as a matter of law. Because all four bases are correct under established law, the Petition for Writ of Certiorari is manifestly without merit and should be denied.

[signature block on following page]

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: 

Robert E. Stepp
S.C. Bar No.: 5335
Roland M. Franklin, Jr.
S.C. Bar No.: 14247
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

***Attorneys for Respondent McNair Law Firm, P.A.***

Columbia, South Carolina

June 20, 2014

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge



Case No. 10-CP-26-9113
Appellate Case No.: 2014 - 001135

Scott Lemons and Gold Coast Resorts, LLC.....Appellant,

v.

The McNair Law Firm, P.A.....Respondents.

PROOF OF SERVICE

I certify that I have served the Respondent's Return to Petition for Writ of Certiorari by hand delivery on June 20, 2014 on the Appellant, addressed to its attorney of record, Mark W. Hardee, The Hardee Law Firm, 2301 Devine Street, Columbia, South Carolina 29205.

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: _____

Robert E. Stepp
S.C. Bar No.: 5335
Roland M. Franklin, Jr.
S.C. Bar No.: 14247
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

***Attorneys for Respondent McNair Law Firm, P.A.***

June 20, 2014