DAVID RAMSAY HOUSE
c. 1740

LEATH, BOUCH & SEEKINGS, LLP
COMMERCIAL LITIGATION • CONSTRUCTION • ENVIRONMENTAL

August 25, 2014

VIA U.S. REGULAR MAIL AND FAX (803)734.1839
The Honorable Jenny Abbott Kitchings
Clerk
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211-1629

RE: Fairway Townes v NVR
Appellate Case No. 2014-001439

Dear Ms. Kitchings:

This will confirm Cheryl Steadman's telephone conversation today with Elizabeth regarding an extension to file an initial brief in the above Appeal. Elizabeth stated we were unable to file an extension request as there is a pending Motion to Dismiss filed by the Counsel for MI Windows. I have enclosed Appellant's response to the Motion to Dismiss which the Appellant filed July 14, 2014 containing the Order of February 18, 2014 cited as being omitted from our pleadings.

Thank you for your courtesies. If you have any questions, please contact me.

Sincerely,

LEATH BOUCH & SEEKINGS, LLP

Jefferson Leath

W. Jefferson Leath, Jr.

WJLjr:cas
Enclosures as stated
c: All counsel of record (w/enclosures)

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FACSIMILE TRANSMITTAL SHEET

TO: The Honorable Jenny Abbott Kitchings

FAX No.: 803 - 734-1839

FROM: Cheryl Steadman
843-513-1076

TOTAL NUMBER OF PAGES (INCLUDING THIS SHEET): 23

NOTES/COMMENTS:

Please contact me with any questions.
Thank you.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) SIXTENTH JUDICIAL CIRCUIT
) Civil Action No.: 2011-CP-46-04552
FAIRWAY TOWNES OWNERS' ASSOCIATION, INC.,)
)
Plaintiff,)
)
v.)
)
NVR, INC., et al.,)
)
Defendants.)

FILED-RECEIVED
2014 FEB 20 AM 11:39
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

ORDER
RE: MI WINDOWS & DOORS, INC.'S
MOTION FOR SUMMARY JUDGMENT

MI Windows and Doors, Inc. (MIWD), has moved the Court, pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure, for summary judgment on all claims asserted against it by Plaintiff. Arguments on the motions were heard by the undersigned on January 14, 2014. MIWD was represented by Hugh M. Claytor, Esq. Plaintiff was represented by W. Jefferson Leath, Jr., and Michael S. Seekings, Esq.

MIWD argues it is entitled to summary judgment because Plaintiff has set forth no evidence or competent testimony to support its claims that the MIWD windows installed at Fairway Townes are defective. The Consent Scheduling Order which is in effect in this case required Plaintiff to disclose its testifying expert witnesses, and to have those experts complete their investigations and present all opinions they may offer at trial by October 1, 2013. Plaintiff failed to present any opinions to a reasonable degree of expert certainty by that date regarding MIWD's windows. As set forth below, an affidavit of an expert is now of record. The expert, Richard Moore, worked on the Fairway Townes project for more than two and a half years. Richard Moore, Plaintiff's liability/causation expert, testified at his deposition on October 17-18, 2013, that he had no opinions to a reasonable degree of certainty about the design of MIWD's

windows, the manufacture of MIWD's windows, the MIWD window installation instructions, or the MIWD window warranty. This testimony was given seventeen days after the deadline for Moore to finalize his opinions.

As noted above, Plaintiff has submitted an affidavit of Mr. Moore subsequent to the filing of MIWD's filing of its motion for summary judgment.

Plaintiff is the homeowners' association for a townhouse complex located in York County known, as Fairway Townes. MIWD manufactures windows and manufactured the windows installed in approximately half of the townhomes located in Fairway Townes.[1] Plaintiff originally filed this action on December 5, 2011. On July 5, 2012, by way of a Second Amended Complaint, Plaintiff added MIWD as an additional Defendant. On March 21, 2013, Plaintiff filed a Third Amended Complaint to add even more Defendants.

In its Third Amended Complaint, Plaintiff alleges the following causes of action against MIWD: negligence, breach of the implied warranties of merchantability and fitness for a particular purpose, and unfair trade practices. *See* 3rd Am. Compl. ¶¶ 45-77. Plaintiff's claims against MIWD are essentially product defect claims.

On August 29, 2013, the Court entered a Consent Scheduling Order, which required Plaintiff to:

> "issue any expert reports, if any, it may issue on the existence of design, construction and/or manufacturer defects and the causation of alleged damage resulting therefrom no later than **October 1, 2013**. Plaintiff's causation/ liability experts are required to ***finalize investigation and causation/liability opinion by this date*** (emphasis added) and be subject to deposition on all opinion that may be advanced at trial on or after this date except for any rebuttal opinions."

On October 17 and 18, 2013, the deposition of Richard Moore was taken. At his deposition, Moore was asked if he had done any testing on the windows at Fairway Townes. His

[1] The other window manufacturer has not been sued in this case.

answer was no. Moore Depo. Tran. 180:14-18. Moore also testified that because he had done no testing on the MIWD windows at Fairway Townes, he had formed no opinions to a reasonable degree of certainty regarding the design or manufacture of those windows. *Id.* At 181:11-16. Moore failed to "issue any report[2] on the existence of design, construction and/or manufacturer defects and the causation of alleged damage resulting therefrom" with respect to the MIWD windows by the October 1, 2013 scheduling order deadline. He also failed to finalize any opinions relating to any alleged product defect in MIWD windows located at Fairway Townes by either the October 1, 2013 deadline, or his subsequent deposition dates. In fact, as of the date of his affidavit, December 6, 2013, Mr. Moore averred that his investigation was ongoing even though he had been involved with Plaintiff regarding construction issues since March of 2011. Moore Depo. Tran , 72, LL.16-20.

On November 19, 2013, MIWD filed its Motion for Summary Judgment based on Plaintiff's discovery response and the sworn deposition testimony of Richard Moore regarding the MIWD windows. On December 10, 2013, more than two months after Plaintiff's expert opinion deadline had passed, Plaintiff filed a Memorandum Opposing MIWD's Summary Judgment Motion ("Memo in Opposition:"). Attached to that Memo in Opposition was the Affidavit of Richard H. Moore, dated December 6, 2013, which Plaintiff claims "is more than sufficient to... defeat MI's motion."[3] *See* Pl.'s Memo in Opp. The Court here does not reach the sufficiency of the evidence for the reasons set forth below. However, the Court feels compelled to make relevant observations related to the affidavit.

In Moore's December affidavit, which Plaintiff filed without moving to amend the Consent Scheduling Order or otherwise seeking leave of this Court to produce such opinions out

[2] The record contains no report issued by Mr. Moore regarding the windows.
[3] Plaintiff relies on the "Scintilla" rule. (Hancock v. Mid-South Management Co., Inc., 381 SC 326, 613 S.E.2d 801 (Ct. App. 2009).

of time, Moore asserts for the first time that "he has the ***opinion most probably to a reasonable degree of engineering certainty***,[4] that the MI windows installed at the Fairway Townes project are ***inadequate***." *See* Aff. Of Richard Moore, attached to Pl.'s Memo in Opp., ¶ 8 (emphasis added). Moore's stated basis for this opinion is his first hand visual observations of the performance of different models of MIWD windows at other developments that are located in Mount Pleasant, South Carolina. Id. At ¶¶ 3-5. He also notes that his opinions are based on "visual-only surveys of some windows at the Fairway Townes" and that "his investigation is ongoing" to ***include future testing of the windows.*** Id. At ¶¶ 6, 8 (emphasis added).

In evaluating a motion for summary judgment, a court must view "the evidence and all reasonable inferences . . . in the light most favorable to the non-moving party." Hansson v. Scalise Builders of S.C., 374 S.C. 352, 355, 650 S.E.2d 68, 70 (2007). However, if, after granting such deference to the non-moving party, it is apparent to the court that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact," and the moving party is entitled to judgment "as a matter of law," the court should grant summary judgment. *Id.* (quoting S.C. R. Civ. P. 56(c)).

As to this evaluation there must be a point in time at which (absent timely filed affidavits in the absence of a scheduling order), the Court can focus and apply this standard. Where there is a scheduling order and a deadline for production of material evidence a party seeks to utilize at trial or an extension of such deadline, the scheduling order sets this point in time. Of course, post deadline discovery is in order, but such post deadline discovery is keyed off of the deadline. Post deadline discovery is bottomed on information provided before the deadline.

[4] MIWD argues this is an incorrect standard for expert testimony. However, our Supreme Court has, most probably, sanctioned the hybred mixing of causation language (most probably) and the expert opinion threshold (with a reasonable degree of certainty) (*See* Gunnoni v. SCDOT, 378 S.C. 573, 664 S.C.2d 450 (at headnote 3 and 4).

Furthermore, Rule 56(e), SCRCP, requires a party opposing summary judgment to come forward with affidavits or other supporting documents demonstrating the existence of a genuine issue for trial." Montgomery v. CSX Transp., Inc., 362 S.C. 529, 542, 608 S.E.2d 440, 447 (Ct. App. 2004). A plaintiff's "conclusory statement on the issue in dispute does not create a question of fact precluding summary judgment," Trotter v. First Federal Sav. & Loan Ass'n, 298 S.C. 85, 90, 378 S.E.2d 267, 270, n. 3 (Ct. App. 1989).

Expert evidence is required in cases, such as this one, where a factual issue must be resolved with scientific, technical, or any other specialized knowledge. Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). A plaintiff must establish three elements in a products liability action: (1) he was injured by the product; (2) the injury occurred because the product was in a defective condition; and (3) the product was in essentially the same condition as when it left the hands of the defendant when the injury occurred. Jackson v. Bermuda Sands, Inc., 383 S.C. 11, 15, 677 S.E.2d 612, 614 (Ct. App. 2009). "In addition, liability for negligence also requires proof that the manufacturer breached its duty to exercise reasonable care to adopt a safe design." *Id.* At 15, 677 S.E.2d at 514-15. Plaintiff failed to timely present any competent expert testimony in this case which supports a finding of product liability as to MIWD's windows both prior to the scheduling order deadline and at the later time of Mr. Moore's deposition. While the December 6, 2013 affidavit may arguably present a scintilla of evidence supportive of Plaintiff's claim against MIWD, the Court finds consideration of the December 6, 2013 affidavit inappropriate as further discussed herein below.

MIWD notes that a court may disregard a subsequent affidavit as a "sham" if it is submitted to contradict that witness' own prior sworn statement. Cothran v. Brown, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (2004). The Court does not address the validity of the affidavit as

it is not necessary for the Court's disposition of MIWD's Motion for Summary Judgment. Additionally, the Court does not consider the affidavit a "sham."

Richard Moore's deposition took place on October 17 and 18, 2013, at which time he testified that he did not have any opinions to a reasonable degree of certainty related to the MIWD windows, and that he had performed no testing of the windows and at that time was not even engaged by Plaintiff to perform any testing. Moore Depo Tran., p. 180, L 14 to p. 181, L 16. Less than six weeks later, on December 6, 2013, without indicating having done any additional window work at Fairway Townes, Moore signed an affidavit which in pertinent matters does not differ from his deposition testimony. In October and in December, Mr. Moore acknowledged that he had done no testing. Because the affidavit was executed and filed more than two months after the deadline for Plaintiff's experts to complete their investigations, submit expert reports, and finalize their opinions, it is disregarded by the Court.

"A scheduling order 'is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.'" Bryant v. Food Lion, Inc., 100 F.Supp. 2d 346, 373 (D.S.C. 2000) (quoting Forstmann v. Culp, 114 F.R.D. 83, 85 (M.D.N.C. 1987)), *aff'd* 8 F. App'x 194 (4th Cir. 2001).

Judges in South Carolina state courts have the right to uphold the terms of their scheduling orders, despite a party's request to extend a deadline. *See* Arthur v. Sexton Dental Clinic, 368 S.C. 326, 335, 628 S.E.2d 894, 899 (Ct. App. 2006). In Arthur, the Court of Appeals upheld Judge Baxley's decision declining to extend the time for discovery beyond that which was set in the scheduling order in that case. *Id.* Specifically, the court found that "[i]n view of this extensive time frame for discovery, we cannot discern nor can Appellants explain how they were prejudiced or that a 'manifest injustice' was created by the judge's decision to limit the

time for discovery given the case had been pending for nearly *three years.*" *Id.* (emphasis added).

The present case has been pending for more than two (2) years. Richard Moore has been involved in the case as Plaintiff's liability/causation expert for almost three (3) years. Plaintiff has not attempted to obtain an extension of the Consent Scheduling Order deadline by filing a Motion to Amend the Consent Scheduling Order, or attempted to gain an extension by consent, or otherwise sought leave of Court to file late opinions. Even after MIWD took his deposition and filed their motion for summary judgment, Mr. Moore still did no testing of the windows prior to December 6, 2013.

"It is within the trial court's discretion to allow an appropriate sanction[5] when a party fails to strictly comply with a scheduling order." Bryson v. Bryson, 378 S.C. 502, 507, 662 S.E.2d 611, 613 (Ct. App. 2008). Because Plaintiff's expert affidavit was filed out of time with no explanation or attempt to change the deadline, the Court may, and I find should, disregard the affidavit in its consideration of MIWD's summary judgment motion.

Our Court of Appeals as recently as January 2, 2014, noted some of the criteria a court may consider when using a violation of a scheduling order as having a prejudicial effect on litigation. Holland v. Morbark, Inc., 2014 WL 23647 (Ct. App. 2014). While the issue here is not directly one of prejudice, it is an issue which begs of similar considerations. In Holland, the Court of Appeals set forth, with approval, the trial judge's assessment of an out of time (per a scheduling order) motion. The Holland trial judge observed:

> [Holland' has long known about the possible relevance of the OSHA Standard and the defect theory based on the absence of brakes because his own experts ... extensively discussed these two topics during their respective depositions.

[5] The Court does not intend the holding in this Order to be any type of sanction. The holding is based on the substantive posture of the parties not by way of a sanction.

Earlier our Supreme Court addressed a trial court's denial of a motion to enlarge time for discovery[6] in Savannah Bank, N.A. v. Stalljard, 400 S.C. 246 2012, 734 S.E.2d 161, (S. Ct. 2012). There, the Court noted:

> In this case, the deadline for discovery was February 15, 2011. On March 15, 2011, Bank filed and served its Motion for Summary Judgment. On May 2, 2011, more than two months after the discovery had passed, Appellant moved to extend the time for discovery and to continue Bank's summary judgment motion.
> The Record indicates that Appellant had ample time during discovery to uncover evidence and speak with any potential witnesses from Bank. If Appellant believed he did not have sufficient time, Appellant should have promptly filed a motion seeking additional discovery time. Instead, Appellant waited until after Bank filed a summary judgment motion and two months after the deadline for discovery expired to request an extension. In addition, Appellant did not provide affidavits to support allegations he made in requesting a discovery extension or submit an affidavit stating why he was unable to obtain such affidavits. 400 S.C. at 253.

Here, allegations of defective windows manufactured at MIWD were raised in Plaintiff's Second Amended Complaint on July 5, 2012, just short of fifteen months before the scheduling order's deadline for expert opinions, October 1, 2013. Keeping in mind that counsels' arguments are not evidence, Plaintiff's counsel related to the Court and Mr. Moore so stated in his affidavit, that Mr. Moore was familiar with the windows in question based on his "experience with MI windows which includes firsthand observation of MI single-hung vinyl windows" at Tennyson Row in Park West, and Marias Townhomes at Seaside Farms, both in Mount Pleasant, South Carolina. Here, the Court must note that "firsthand observation" is a far cry from any technical analysis that is usually and necessarily performed by an expert in construction defect cases. Additionally, Mr. Moore presents no time frame in which he conducted the referenced

[6] As earlier observed, no such motion was made here either before the expiration date of October 1, 2013, or to date.

"observation," nor does he set forth at what time he made a "visual-only" survey of the Plaintiff's MIWD windows.

Obviously, regardless of the time at which Mr. Moore made his visual-only survey, the results of that survey were insufficient for his forming any opinion regarding the windows, and nothing in the record reflects that these surveys were conducted after his deposition. The gist of this, from the record, is that as of October 17 and 18, 2013, Mr. Moore had no opinion as to the design, manufacture, installation, warranty, or need to replace any MIWD window.

In its brief, Plaintiff references a multi-state multi-district lawsuit involving MIWD Windows. Hildebrand v. MI Windows and Doors, Inc., MDL No. 2333./ Nos. 2:12-mn-00001, 2:12-cv-01261-DCN. The undersigned reviewed a November 7, 2012 Order of the Honorable David C. Norton which dismissed the litigation without prejudice and invited a refiling of the Complaint within 20 days.[7] The operative information gleaned from a review of Judge Norton's Order is that as early as December 2011, claims were being asserted that MIWD Windows were problematic. This would be of no import here, but for Plaintiff's reference to and familiarity with the Hildebrand case, and its misplaced reliance on the perhaps related, but unresolved litigation, as support for its claim of defective MIWD Windows.[8]

In sum, Plaintiff has taken the position that MIWD Windows were defective since at least July 5, 2012, and is aware that claims regarding defective MIWD windows were raised by litigation taking place as early as December of 2011. As did Holland in Holland, supra, Plaintiff knew of its claim when it made it (excuse the twist of logic). Plaintiff consented to a deadline for expert opinions and reports, did not meet the deadline, did not and, as yet, has not made a

[7] Per Judge Norton's law clerk, this litigation is currently pending

[8] A lawsuit is just a lawsuit. It is not dispositive of any material facts within itself until conclusion and as to other lawsuits, it is never dispositive of any material facts save through collateral estoppel (not here at issue) or res judicata (not here at issue).

request for additional discovery time, and filed no expert affidavit until after MIWD made its Motion for Summary Judgment.

I find that MIWD is entitled to summary judgment as Plaintiff failed to comply with the Consent Scheduling Order issued by the Court on August 29, 2013. As to MIWD Windows, Plaintiff issued no expert reports on the design, manufacture, liability, or construction related to MIWD Windows by the Consent Scheduling Order deadline, and the only expert tendered as to the windows, Mr. Moore, under oath, testified that as of October 17 and 18, 2013, he had no opinion as to any of these issues.

Wherefore, there being no genuine issue of material fact timely produced by Plaintiff, Defendant MI Windows and Doors, Inc.'s Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

John C. Hayes, III
Presiding Judge

February 14, 2014
York, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPPEAL FROM YORK COUNTY
In the Court of Common Pleas
J. Michael Baxley, Circuit Court Judge

Case No. 2011-CP-46-04552

Fairway Townes Owners' Association, Inc. . ..... Appellants,

v.

MI Windows and Doors, Inc.,. ..... Respondents.

PROOF OF SERVICE

I, Cheryl Steadman, paralegal at the firm of Leath Bouch & Seekings, LLP, certify that I have served the letter to the clerk dated August 25, 2014 by depositing a copy in the United States Mail, postage prepaid, on August 25, 2014, addressed to his attorney of record and to all attorneys of record as follows:

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The Honorable David Hamilton
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DAVID RAMSAY HOUSE
c 1740

LEATH, BOUCH & SEEKINGS, LLP
COMMERCIAL LITIGATION • CONSTRUCTION • ENVIRONMENTAL

July 14, 2014

The Honorable Jenny Abbott Kitchings
Clerk
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211-1629

RE: Fairway Townes Owners Association vs. NVR, Inc., McGee Brothers, Inc.
Lake Brothers, Inc., MI Windows & Doors, Inc., et al.
COA No. 2014-001439

Dear Ms. Kitchings:

Please find enclosed a copy of the Order by Judge Hayes dated February 18, 2014 and filed February 20, 2014 referenced in the Notice of Appeal. The Order was inadvertently not enclosed with the Notice of Appeal dated June 30, 2014. I am also enclosing a Proof of Service to all counsel in the above matter.

Thank you for your courtesies. If you have any questions, please contact me.

Sincerely,

LEATH BOUCH & SEEKINGS, LLP

Cheryl Steadman

Cheryl Steadman
Paralegal to W. Jefferson Leath, Jr.

/cas
Enclosures as stated
c: All counsel of record (w/enclosures)

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP4604552

PLAINTIFF(S)	DEFENDANT(S)
Fairway Townes Owners Association Inc	NVR Inc Stonecutt LLC Lake Builders Inc Hans Construction Company Inc McGee Brothers Company Inc Howe & Simpson Contracting LLC Alpha Omega Construction Group Inc MI Windows And Doors Inc James Thompson

Submitted by: The Court

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

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. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

s/John C. Hayes, III
Circuit Court Judge

2049
Judge Code

2/18/2014
Date

RECEIVED
JUL 18 2014
SC Court of Appeals

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

For Clerk of Court Office Use Only

This judgment was entered on **February 20, 2014**, and a copy mailed first class or placed in the appropriate attorney's box on **February 20, 2014**, to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

David Hamilton

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)