

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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S.C. SUPREME COURT

Doyet A Early, III, Circuit Court Judge

Case No 2005-CP-07-1990

Carolina Management Corporation of Beaufort, James B Jackson, Whaley R Hinnant, Jr , Mary Gasser Rawl and Rhoda G Rentz, individually and in their capacities as the Limited Partners of Pinewood Park Apartments, a South Carolina Limited Partnership

Appellants,

vs

Pinewood Park Apartments, a South Carolina Limited Partnership, Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group, Inc , AmReal Corporation a/ka and f/k/a USS Corporation a/k/a and f/k/a U S Shelter Corporation, ISTC Corporation, N Barton Tuck, Jr , and John Doe, a generic designation for a party or parties whose true identity is unknown

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STATEMENT OF ISSUES ON APPEAL

- 1 Did Judge Early err in dismissing Appellants' claims and requiring them to pay costs and attorneys fees to Respondents because Appellants did not disclose privileged communications with their attorneys, thereby requiring reversal and vacation of his order of April 6, 2010, as well as prior orders upon which it is based? In this regard, (a) did Judge Early err in holding that Appellants, merely by filing their complaints, put at issue the statute of limitations and waived their attorney-client privilege concerning that issue? and (b) did Judge Early err in holding that language in other complaints filed by other litigants in other counties put at issue the statute of limitations in this case and waived their attorney-client privilege concerning that issue?
- 2 Did Judge Early err in imposing the sanctions of dismissal of Appellants' claims and requiring them to pay costs and attorneys fees to Respondents for alleged deficiencies in their discovery responses, thereby requiring reversal and vacation of his order of April 6, 2010, as well as prior orders upon which it is based?
- 3 Was Judge Early legally qualified to accept and/or retain the assignment to preside over this case? Specifically, (a) Did Judge Early violate the duty to fully disclose to Chief Justice Total and to Appellants and their counsel the full and complete nature of the long-term relationship between him and members of his family with Respondents' counsel, Ellis Johnston, and members of his family? (b) Did Judge Early violate the continuing duty to fully disclose to Chief Justice Total and to Appellants and their counsel the additional relationships between him and members of his family with Ellis Johnston and members of his family which developed following his acceptance of the assignment of this case, as well as the full and complete nature of any such relationships involving attorneys Anne Ross Rosen and Marvin Infringe after they became counsel of record?
- 4 Did Judge Early err in failing to recuse himself and vacate his prior orders?
- 5 Did Judge Early fail to insure that the Appellants' claims were being litigated in a fair and impartial forum, thereby depriving them of their rights to due process of law under the Constitutions of the State of South Carolina and the United States of America?

STATEMENT OF THE CASE

The complaint in this case was filed in the Beaufort County Court of Common Pleas on October 13, 2005, alleging seven causes of action at law for damages, including, *inter alia*, a claim for breach of fiduciary duty, and three (3) causes of action for equitable relief (Complaint, p 44-65) Respondents answered on January 17, 2006, setting forth a general denial and twenty-two affirmative defenses including, *inter alia*, the statute of limitations, this defense specifically did not include any of Appellants' claims subsequent to 1999 (Answer, p 2-35) Prior to the filing of this case, a similar lawsuit had been filed against the Respondents in the Beaufort County

Court of Common Pleas in 2003 by the limited partners in Parkview Apartments Limited Partnership (“Parkview”) One of the Appellants in this case, Rhoda G Rentz, is also an Appellant in the Parkview case, Appellants’ counsel in this case is also counsel for the Appellants in Parkview Following the filing of the Parkview case, counsel for the parties agreed to postpone any discovery in that case, as well as the filing of this and other related cases, in order to pursue a universal resolution for all cases involved Counsel agreed to jointly employ an independent appraiser to establish fair market values for each of the properties involved, and then to mediate any disputed values The appraiser did not complete the appraisals within the time frame required, and the mediation was canceled Thereafter, in 2005, suits were filed in Beaufort, Charleston and Orangeburg counties against Respondents on behalf of the limited partners in this and two other affordable housing projects/partnerships, *i e* , Palmetto Apartments, Orleans Gardens Apartments, and Roosevelt Gardens Apartments ¹ On March 7, 2006, South Carolina Supreme Court Chief Justice Toal assigned all five cases to Circuit Judge Doyet A Early, III (“the judge”) “to hear and decide all pre-trial motions and other matters pertaining to these cases, including the trial and post-trial motions ” (Order, 3-7-06, p 1-2)

Between the time of his appointment and the present appeal, the judge held hearings on various motions filed by the parties, including hearings on October 4, 2006, November 19, 2007, July 1, 2008, December 9, 2008, July 6, 2009, August 24, 2009, January 14, 2010 and March 29, 2010 As a result of these hearings, as well as pertinent motions under Rule 59, SCRCPP, the judge issued orders dated August 18, 2008, December 17, 2008, March 3, 2009, June 2, 2009, June 16, 2009, July 28, 2009, April 6, 2010, September 16, 2010, October 7, 2010, October 22, 2010, and December 11, 2010, from which this appeal is being taken The hearings and orders initially involved Respondents’ motions for dismissal and change of venue, but then included

¹ See Appellants’ briefs in the related pending appeals

discovery issues, and eventually evolved into rulings by the judge requiring disclosure of privileged communications between Appellants and their counsel in this case, as well as the four related cases on appeals. Appellants retained other counsel and sought interim relief in this Court and also in the Court of Appeals, which was denied²

Following this action by the Appellate Courts, the judge issued his order of April 6, 2010, dismissing Appellants' claims in all cases, as part of the sanctions which he imposed. Appellants' Amended Notice of Appeal was served on January 28, 2011. By Order dated March 9, 2011, these appeals were certified for review by the Supreme Court and transferred from the Court of Appeals.

STATEMENT OF THE FACTS

The facts and circumstances involving Pinewood Park Apartments Limited Partnership ("Pinewood") have several critical differences from those in the four related appeals. One primary difference is that Respondents' counsel in this case was also representing the limited partnership in connection with the very matters that are at issue in this case, this dual representation occurred both prior and subsequent to the filing of this case. During the course of their dual representation, neither Respondents nor their counsel made full disclosure to Appellants concerning their respective roles, as required of fiduciaries under the law of this State.

Appellants are limited partners in Pinewood. This limited partnership originally consisted of Carolina Realty Company, which was both a general partner and a limited partner, and Carson R. Rentz, the sole individual limited partner. The original partnership was formed in 1971 in order to construct and operate Pinewood Park Apartments, an affordable housing project for low-income citizens in Allendale, South Carolina. (Complaint, p. 8-9.) Through amendments,

²

On November 19, 2009, this Court denied Appellants' Petition for writs of prohibition and certiorari, on December 1, 2009, the Court of Appeals dismissed Appellants' appeal.

Carolina Realty remained the sole general partner, and Alfred E. Rawl, Jr., James B. Jackson and Whaley R. Hinnant joined Rentz as limited partners. In 1975, it was amended to include the Respondents and/or their predecessors as general partners, Carolina Realty Company, together with Messrs. Rawl, Rentz, Jackson and Hinnant became limited partners (Complaint, p. 3-5). A detailed history of this partnership is set forth in the affidavit of Davis dated April 7, 2010, (p. 5-6). Appellants incorporate by reference herein the statements contained in such affidavit.

Original partners Rawl and Rentz are deceased. Their widows, Appellants Mary Gasser Rawl and Rhoda G. Rentz, acquired their interests in Pinewood from the estates of their late husbands, Mrs. Rawl has a twenty-five (25%) percent interest and Mrs. Rentz has a ten (10%) percent interest (Complaint, p. 3). Appellants Jackson and Hinnant each own a twenty-five (25%) percent interest (*Ibid*, p. 4). Appellant Carolina Management Corporation of Beaufort ("Carolina Mgmt.") owns a ten (10%) percent interest, having acquired it from Carolina Realty Company (*Ibid*, p. 1-2). The remaining five (5%) percent ownership interest is held by the Respondents Tuck ("Tuck") and AIMCO, either directly or through its subsidiary, AmReal (Complaint, p. 5-6). The president of Carolina Mgmt. is Laurance H. Davis, Jr., who is also an appellant in the Parkview, Palmetto and Roosevelt cases. The Appellants are elderly, in their late 70's and 80's, many have significant health issues (*Cf*, Rentz Aff. p. 2, Davis Aff. p. 2, Hinnant Aff. p. 2).

Following the inclusion of Respondents Tuck and US Shelter as general partners in 1975, the Appellants had little involvement in partnership affairs, as these were handled by the general partners. While Mr. Tuck remained as individual general partner, the corporate general partner changed through a series of mergers and acquisitions which are described more fully in the complaint, ultimately, Respondent AIMCO, through one or more of its subsidiaries, *i.e.*, Respondents AmReal and/or ISTC Corporation, acceded to the role of corporate general partner.

(Complaint, p 5-8) In 1984, Respondents notified Appellants that they had contracted to sell the apartment complex to Management Assistance Group, Inc (“MAGI”) for the sum of \$1,320,000 00, plus interest (*Ibid* p 11-12) The terms of the sale called for a small amount to be paid up front but the majority of the sales price was to be in a balloon payment, with accruing interest, in 1999, in the amount of \$1,730,000 00 (*Ibid*, p 12-13) Although told by the general partners that they had vetted the purchaser’s ability to pay, the limited partners later discovered that the sale was actually made to a newly formed limited partnership with no assets other than the property being acquired (*Ibid*, p 14, Davis Aff , p 8-9, Hinnant Aff p 3)

Prior to 1999, Respondents advised Appellants of the potential for a problem with the final balloon payment, but made repeated assurances that they would make every effort to protect the partnership and to recover any assets due to it (Complaint, p 13-17, Davis Aff , p 8-9, Hinnant Aff p 3-4) Appellants repeatedly informed Respondents of the increasing value of the apartment complex in light of the then-existing real estate market and requested that Respondents pursue retrieval of the property in the event the note was not paid (Complaint, p 17, Davis Aff , p 8-9) In 1999, the purchaser defaulted, and Appellants began to make inquiries of Respondents, as their general partners, concerning the status of any efforts being made to recover the assets of the partnership Respondents provided no substantive information to Appellants (Complaint, p 27, Davis Aff , p 8-9) As a result, Appellants consulted legal counsel to investigate the status of the monies due to the partnership (Davis Aff p 9-10, Hinnant Aff p 3) When their counsel was unable to obtain information from the general partners, Appellants called for a special meeting of the limited partnership to discuss available options, including replacement of any general partners who were unwilling to pursue recovery of the partnership assets The special meeting took place in Beaufort at the office of attorney Joel D Bailey on September 14, 2000 The general partners sent AIMCO employee George Buchanan to the

meeting to provide information to the limited partners Mr Buchanan was not familiar with all of the details of the transactions, and it was agreed that a subsequent meeting of the partnership would take place which would be attended by other agents of the general partners possessing more knowledge (Davis Aff , p 16, Complaint, p 28-31, Tr 9-14-00, p 1-65)

The subsequent meeting occurred at AIMCO's office in Greenville, South Carolina on October 24, 2000 This meeting was attended by general partners N Barton Tuck, Jr and AIMCO vice president Patrick J Foye Appellants discussed with Mr Tuck and Mr Foye numerous options available to the partnership, including pursuing potential sale of the past-due note to third parties, as well as legal efforts to recover monies due under the past-due note or, alternatively, recovery of the apartment complex (Davis Aff p 11-12, Complaint, p 33-36, Buchanan ltr 11-10-00, p 1) It was agreed that counsel would be hired for the partnership for this purpose Appellants expressed a willingness to receive the apartment complex in lieu of payment of the note, and Respondents assured Appellants that they would again explore this possibility Both Mr Tuck and Mr Foye indicated, however, that they would not wish to remain as general partners in the event the apartment complex was retrieved by the partnership Years later, as part of the discovery undertaken in this case, Appellants would learn the real reason why the general partners were unwilling to remain in that position if the apartment complex was retrieved (Davis Aff p 11-12, Tr 10-24-00, p 1-172)

By letter of November 10, 2000, Respondents informed Appellants that attorney Arthur L Howson, Jr had been retained on behalf of the partnership (Appellants' Memorandum in Support of Motion to Compel, 11-19-07, Ex 11, 1 page) On December 8, 2000, Mr Howson wrote to Mr Max Perry of Los Angeles, California, the general partner of the purchasing limited partner created by MAGI to hold title to the property Mr Howson's letter, written on behalf of Respondent AmReal, stated, "We hereby withdraw any authority to take any action disposing

of any partnership property or assets ” This indicates that Respondents had previously given the defaulting purchaser authority to dispose of the partnership property¹ This fact had not been disclosed to Appellants Furthermore, Mr Howson’s letter asked for “recommendations” from the defaulting purchaser “with regard to the disposition of the assets ” Respondents provided Appellants’ counsel with a copy of this letter, and it was referenced in the letter from Appellants’ counsel to Mr Howson on December 15, 2000 (*Ibid*) At this point in time, Appellants were operating under the assumption, based on Respondents’ representations at the October, 2000 meeting, that the Respondents were taking appropriate action to protect the partnership assets

In 2002, Respondents informed Appellants that the HUD reserve account for Pinewood exceeded the mortgage balance, and that the defaulting purchaser was willing to return the apartments, Appellants then informed Respondents that they wanted to explore this offer, and requested information concerning the amount of money in the HUD reserve account (Complaint, p 38) Respondents then informed Appellants that they did not want to accept the return of the property, and would resign as general partners, provided Appellants paid compensation and released them from all liability (*Ibid*, p 38-39) Appellants requested financial information as to the property, including, *inter alia*, verification of the amount of the HUD reserve account, the existence and amount of any liens on the property, and HUD’s position as to any reconveyance to the partnership Respondents never provided this information or documentation (*Ibid*, p 39) Through the investigation of our counsel and, years later, through discovery in this and the related cases under appeal, Appellants would learn that MAGI and its principal, Dean Earl Ross, had been the subjects of federal criminal proceedings in California concerning management fee kickback schemes on affordable housing projects, and that Respondents had also been the subject of a criminal investigation involving a kick-back scheme for management fees associated with many of their properties Appellants also discovered that Pinewood was one of the properties

involved in the kickback schemes Respondents had negotiated with HUD and the United States Department to pay a \$5,000,000 00 fine to end the criminal inquiry (Davis Aff p 19-20, Hinnant Aff p 10-11)

Following the filing of the complaint in Parkview in April 2003, Respondents' counsel, Ellis M Johnston, II, ("Johnston") wrote to Appellants' counsel, advising that he represented the general partners of Pinewood, indicating Respondents' opposition to having the property returned and seeking Appellants' consent to the resignation of the general partners if that occurred (Johnston Aff Ex A, all pages) Between June 2003 and September 8, 2003, counsel for the parties exchanged various communications primarily relating to information sought by Appellants in order to evaluate Respondents' proposals concerning return of the properties, Johnston indicated in his correspondence that there was a "tolling agreement" in place concerning these matters (Johnston Aff Exs A-G, all pages) Johnston did not, however, indicate that Respondents would pursue litigation against the defaulting purchaser, his correspondence related only to negotiations with the defaulting purchaser On September 8, 2003, Johnston filed a lawsuit against the defaulting purchaser in the Greenville County Court of Common Pleas on behalf of the Pinewood partnership in order to collect "the sum of \$1,045,520 00, together with interest at the rate of 10 25%, compounded annually, and for attorney's fees and costs " (Pendarvis Aff p 26-27, Ex 93, 54 pages) Johnston wrote Appellants' counsel that same day, indicating his intent "to obtain an additional extension of the Tolling Agreement," but never mentioned the filing of the suit (Johnston Aff Ex G, all pages) This lawsuit did not become known to Appellants until 2007

Between September and December 2003, Johnston informed Appellants' counsel that the defaulting purchaser wished to "purchase" the apartment complex for \$300,000 00 Notwithstanding the obvious inconsistency of purchasing property which they already owned,

Appellants' counsel expressed concerns that the "purchase price" being offered was approximately 1/3 of the *appraisal of the property which had been conducted by Respondents* (Johnston Aff Exs H-J (all pages), Complaint, p 40-42) On April 19, 2004, unbeknownst to Appellants, the Greenville County Clerk of Court informed Johnston that the lawsuit which he had filed for Pinewood was about to be dismissed because Johnston had never provided proof of service The lawsuit was dismissed for lack of proof of service by order dated July 26, 2004, which was sent to Johnston Appellants were not informed of this action Johnston, however, re-filed the lawsuit under a new civil action number by complaint dated May 11, 2004 Johnston was notified by the Greenville County Clerk of Court on October 24, 2005 that the second Pinewood lawsuit was up for trial during the week of November 7, 2005 On October 27, 2005, the Greenville County Clerk of Court again informed Johnston that the case would be dismissed for lack of service On November 7, 2005, Johnston filed a "Stipulation of Dismissal", certifying that the case had not been served and that dismissal was appropriate (Pendarvis Aff , p 26-27, Ex 93, 54 pages) Johnston did not inform Appellants or their counsel of any of the facts relating to the second lawsuit (Complaint, p 43, Pendarvis Aff p 26-27) Notwithstanding that the stipulation dismissing the lawsuit was "without prejudice," the effect of the dismissal under South Carolina law was exactly the opposite in light of the dismissal of the first suit, dismissal of the second suit operated "as an adjudication upon the merits " Rule 41(a)(1), SCRPC Accordingly, Johnston's failure to prosecute the suit effectively eliminated the opportunity for subsequent suits to recover the property or the sums due under the note

Less than a month prior to the second dismissal of the Greenville County suit against the defaulting purchaser, Appellants had filed their suit against the Respondents, as noted above From the time this case was filed, the primary agenda of the Respondents and their counsel was to prevent Appellants' claims from ever being heard on the merits Respondents were

unsuccessful on two (2) prior attempts before two (2) separate judges in the Parkview case to have the claims dismissed, and thus avoid a determination on the merits. Once the remaining cases were filed and assigned to Judge Early, similar motions to dismiss were made by Respondents. These motions were based on the defense of the statute of limitations and were limited to Palmetto, Roosevelt and Orleans. As shown above the statute of limitations defense in Pinewood is limited to Respondents' conduct prior to November, 1999. The defense, as asserted, was never applicable to events occurring after that time. Therefore, no legitimate argument could be presented for the proposition that the Pinewood case was barred by the statute of limitations as to any acts or omissions by Respondents subsequent to November, 1999. Accordingly, when Respondents subsequently moved for summary judgment, based upon the statute of limitations defense, their motion did not include Pinewood.

The summary judgment motion of Respondents, made with respect to Palmetto, Orleans and Roosevelt, was denied. (Order of 6-5-08, p. 1-2.) This was the last time that the judge declined any request for substantive relief by counsel for Respondents in any of these cases. Instead, he began to impose a double standard on the parties, holding Appellants to a significantly higher standard than Respondents. He ordered Appellants to produce privileged communications with their counsel in this case and the related cases, and threatened to dismiss their claims if they failed to do so. Appellants were thereby put in the untenable position of having to give up their right to privileged communications with their attorney in order to comply with the judge's order and preserve their claims. Notwithstanding the detailed nature of Appellants' discovery responses and numerous supplements thereto, the judge adopted the argument of Respondents' counsel that the responses were deficient. This is particularly important in this case, as discovery in Pinewood, by agreement of counsel, was held to a minimum because of the numerous differences between it and the other cases. (Hinnant Aff. p. 6, Appellants' Memorandum in Opposition to

Defendants' Motion to Compel, p 8, Fn 1) The differences were so significant that Pinewood was not even included in the mediation which occurred in March 2008, in fact, no mediation has ever been held in Pinewood (Hinnant Aff p 6-7) Appellants sought interim appellate relief, which was denied Appellants declined to produce the privileged documents and were unable to satisfy the judge as to their discovery responses This led to his dismissal of their claims in each of these cases This course of events, and Appellants' efforts to avoid the dismissal of their claims, are hereinafter discussed in greater detail

ARGUMENTS

Given the time and space constraints applicable to these appeals, it is impossible to identify and discuss each abuse of discretion by the judge over the past five (5) years he has presided over these cases, as he repeatedly made rulings which were not supported by the evidence or were controlled by errors of law The arguments in this appeal, therefore, seek to address the more obvious and egregious rulings and conduct on his part

1 Judge Early erred in imposing the sanctions of dismissal of Appellants' claims and requiring them to pay costs and attorneys fees to Respondents for Appellants failure to disclose privileged communications with their attorneys, therefore, his order of April 6, 2010, as well as prior orders upon which it is based, should be reversed and vacated **(Issue 1, Orders dated 12-17-08, 3-3-09, 6-2-09, 6-16-09, 7-28-09, 4-6-10, 9-16-10, 10-22-10, 12-11-10)** Dismissal of Appellants' claims, which had been sought from the outset by Respondents' counsel, was the first and only sanction imposed or even seriously considered by the judge for what he perceived to be misconduct on the part of the Appellants Dismissal of Appellants' claims, coupled with an award of attorneys fees and costs, was the harshest sanction short of incarceration that the court could impose, Appellants contend that it should not have been utilized given the facts of this case, and that the judge abused his discretion in doing so This is particularly true in light of the facts that (1) less draconian alternatives were available, (2) Appellants offered to submit to lesser

sanctions and took extraordinary steps to avoid the dismissal, (3) the judge repeatedly adopted arguments of Respondents' counsel as evidence for the factual basis to support his decision, and (4) the judge repeatedly deviated from the law of this State in order to effect the dismissal

“When the court orders dismissal, or the sanction itself results in dismissal, the end result is harsh medicine that should not be administered lightly. The moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction.” *Griffin Grading and Clearing Inc. vs Tire Service Equipment Mfg Co Inc* 334 SC 193, 511 SE2d 716 (Ct App 1999) (striking of pleading as discovery sanction reversed) “The sanction imposed should be reasonable, and not go beyond the necessities of the situation to foreclose a decision on the merits of a case. The sanction should be aimed at the specific misconduct of the party sanctioned. The sanction should be a rifle shot, not a shotgun blast.” *The Balloon Plantation Inc vs Head Balloons Inc et al* 303 SC 152, 399 SE2d 439 (Ct App 1990) (trial court's dismissal for failure to comply with discovery order reversed, calling the sanction “a hydrogen bomb”) Dismissal has been held an inappropriate sanction where “any number of lesser, more narrowly tailored sanctions would have sufficed.” *Karppi v Greenville Terrazzo Co Inc* 327 SC 528, 489 SE2d 679 (Ct App 1997) The record in this case is clear that the judge did not comply with the law of this State, as cited above, in imposing sanctions in this case

The judge dismissed Appellants' claims on April 6, 2010, (“Dismissal Order”) finding that Appellants' were in contempt for failing to abide by his orders of March 3, 2009, (“Discovery Order”) requiring them to provide “adequate responses to discovery requests” and July 28, 2009 (“Privilege Order”) requiring them to produce privileged communications with their counsel. On April 22, 2010, Appellants moved to alter or amend the Dismissal Order (Motion 4-22-10, p 1-52) The judge denied this motion on September 16, 2010 (Order 9-16-10, p 1-2) A review of the Dismissal Order necessitates a review of the two underlying orders. The present discussion

concerns the Privilege Order, the Discovery Order is discussed in detail under Issue 2

Rule 26(b)(1), SCRCP, excludes privileged materials from documents and information normally subject to discovery “Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter ” (Id , Emphasis added) The exemption of privileged materials from discovery, particularly those protected under the attorney-client privilege, rests upon the historical and societal value attributed to that privilege As this Court has stated

The attorney-client privilege is based upon a public policy that the best interest of society is served by promoting a relationship between the attorney and the client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client within the relationship is maintained The attorney-client privilege belongs to the client and not the attorney, and may be waived only by the client *Wilson v Preston*, 378 SC 348, 662 SE2d 580 (2008), citing *State v Doster*, 276 SC 647, 284 SE2d 218 (1981)

“The attorney-client privilege also applies to communications originating from the lawyer rather than from the client ” *Marshall v Marshall*, 282 SC 534, 320 SE2d 44 (Ct App 1984) “The trial court must determine the question of privilege without first requiring disclosure of the substance of the communication ” *Wilson supra* In this regard, the “trial court should not require disclosure of attorney-client communications to other parties without first determining whether the communications are privileged by inquiring into all the facts and circumstances of the communication ” *Ibid* As shown in the following discussion, the judge did not do this

Both sides sought discovery from attorneys, however, there was a substantial and critical difference in their positions Appellants sought information relating to attorneys hired by Respondents *to represent the limited partnership in separate proceedings*, ostensibly to recover partnership assets Two attorneys, Mr Howson and Mr Brown, were listed as witnesses by Respondents in their initial discovery responses The role of these attorneys was a critical component of Appellants’ action, particularly with respect to their claim for breach of fiduciary duty (Bailey Aff 3-30-10, p 7-8)

Mr Howson was hired to represent the partnership following the October 2000 meeting. Appellants were unaware at that time of the tremendous conflict of interest on the part of Respondents, whereby their role as general partner directly conflicted with their own self interest in avoiding criminal prosecution. The instructions given to the attorneys by Respondents concerning the nature and scope of their retention were clearly relevant, Respondents, however, asserted a claim of attorney-client privilege to keep this information from Appellants.

Appellants served discovery requests and deposition notices relating to the involvement of these attorneys *with respect to their representation of the limited partnership*. *they did not seek information concerning any communications between Respondents and their counsel in this case*. When Respondents asserted the attorney-client privilege, Appellants filed a motion to compel. Appellants' positions were in keeping with the existing law of this State, and included, *inter alia*, (1) Appellants were members of the partnership "client", and therefore within the persons entitled to share privileged communications, (2) Respondents had waived the privilege by providing Appellants with communications generated by these attorneys and inviting Appellants to communicate directly with the attorneys, (3) Respondents were required as fiduciaries to make full disclosure to Appellants, including communications with counsel for the partnership, and (4) the evidence of fraud resulting from the Respondents' conflict of interest was sufficient to place Appellants within the "crime-fraud" exception to the attorney-client privilege³. The judge rejected these arguments at the urging of Respondents, and ruled that, not only were Appellants not entitled to this information, but that every document listed on the 71-page Privilege Log of Respondents was privileged and not discoverable (Order 12-17-08, p. 1-2), he made this ruling without ever seeing a single document, notwithstanding that Appellants had specifically asked

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For a detailed discussion of these arguments which were presented to the lower court, see Appellants' Memoranda dated 11-19-07, p. 1-30 and 1-16-09, p. 1-4.

him to conduct an in-camera review of those documents. Furthermore, he received no information concerning the privileged nature of these documents other than from Respondents' counsel, by way of argument or statements in their memoranda. Therefore, there was no proper evidence to support his findings in this regard. *Higgins v MUSC*, 326 SC 592, 486 SE2d 269 (Ct App 1997) ("factual statements of the attorneys, whether made during argument or in written briefs or memoranda may not be considered by the court.") Likewise, he clearly did not inquire "into all the facts and circumstances of the communications," as required by *Wilson, supra*, and *Tucker v Honda of SC Mfg Inc* 354 SC 574, 582 SE2d 405 (2003). Accordingly, there was a clear abuse of discretion, as the order was not supported by the evidence and was controlled by an error of law, the order of December 17, 2008 should be vacated.

Conversely, Respondents sought documents relating to Appellants' privileged communications with their attorneys *in this case*. This did not occur until August, 2008, even though many of these documents had been listed by Appellants on their Privilege Log since 2005. Respondents claimed that the documents were discoverable because they were relevant to the statute of limitations issue. It is important to note that the communications which Respondents sought were communications between Appellants and their counsel *in this litigation*. The privileged nature of the communications between Appellants and their counsel, and the duty of counsel to protect such communications from disclosure, was acknowledged by counsel for Respondents as early as 2007⁴ (Tr 11-19-07, p 40, ll 22-24.)

In an attempt to get around this obstacle and the prohibition of Rule 26(b), Respondents claimed that Appellants had waived their attorney-client privilege and work product protection.

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In arguing against Appellants' request for information and documents concerning attorneys hired for the partnerships, Mr. Johnston stated to the judge, "Clearly Mr. Bailey is not going to turn over what he sent to his limited partners and what they sent to him."

“The definition of waiver, approved by this court in many cases, is ‘the intentional relinquishment of a known right ’ It may be either express or implied If claimed to have been express, *it must appear to have been a clear unequivocal and decisive act showing such a purpose* If claimed to have been implied, *it must appear that the opposite party has been misled to his prejudice* into the honest belief that such *waiver was intended or consented to* (Emphasis added) *W S Gray Cotton Mills v Spartanburg County Mills* 139 SC 223, 137 SE 684 (1927) As herein discussed, Respondents failed to prove that Appellants waived their attorney-client privilege

There was no express waiver by Appellants, as they had asserted from the outset that their communications with their counsel were privileged Therefore, Respondents advanced the theory that Appellants had *impliedly* waived their privilege and protection through what they called an “at issue” waiver Under Respondents’ theory, Appellants, *merely by filing their complaint*, had put the statute of limitations “at issue” and thereby impliedly waived any claim of privilege or protection as to any documents or information which might be relevant to that issue Appellants repeatedly pointed out to the judge that there was absolutely no support for such a position under the law of this State and that, in fact, South Carolina law was exactly the opposite - the statute of limitations is an affirmative defense under Rule 8(c), SCRCP, and must be affirmatively pled or it is waived This requirement was clearly recognized by Respondents, and is confirmed by their own Answer, which asserts the statute of limitations *as an affirmative defense* Furthermore, Respondents never made any showing that they had been misled to their prejudice into believing Appellants had intended or consented to any implied waiver *Cf W S Gray supra*

Nevertheless, the judge again adopted the argument of Respondents’ counsel and held that, *merely by filing their complaint*, Appellants had put the statute of limitations at issue and impliedly waived any privilege or protection concerning any documents which might be relevant to that issue (Order, 7-28-09, p 6, Order, 4-6-10, p 20) The Discovery Order states that the

finding of implied waiver was derived exclusively from Respondents' memorandum and their argument concerning the statute of limitations. This reliance upon arguments of counsel is contrary to the laws of this State. *Cf. Higgins, supra*. The Dismissal Order states, "The factual bases for the Court's rulings on the privilege issues have not changed" (Order, 4-6-10, p 20). This order states that the judge "considered at length" the arguments and memoranda of Respondents' counsel, that he "disagrees" with Appellants' arguments showing the factual and legal errors in the Privilege Order, and concludes, "*Once privilege was waived as to the documents (by mere filing of the suits and/or by reasons of the allegations in the Orleans and Roosevelt complaints) they were subject to discovery in all five cases*" (*Ibid*, emphasis added). There is no law in this State to support such a finding, the judge abused his discretion and the order should be vacated.

The Dismissal Order does not quote language from the Orleans and Roosevelt complaints which it references, the reference apparently relates to Respondents' assertion, *in their memoranda*, that certain language in the complaints in the two cases impliedly put at issue the statute of limitations. These two complaints refer to the parties' agreement to forgo discovery and the filing of additional lawsuits in order to appraise the properties and mediate all claims, and allege that Respondents misled Appellants, thereby resulting in a delay of their ability to recover their damages. A fair reading of these two complaints reveals that the statute of limitations is not mentioned at all, and that the allegations only serve to provide the basis for Appellants' claims for damages resulting from the delay occasioned by the Respondents' misuse of the appraisal and mediation process. It does not meet the test for implied waiver under South Carolina law. The implied waiver must be "reasonably inferable" from the conduct of the party. *Canal Insurance Company v Caldwell*, 338 SC 1, 524 SE2d 416 (Ct App 1999), it must involve "circumstances *indicating an intent to waive*" (Emphasis added). *Bonnette v State*, 277 SC 17,

282 SE2d 597 (1981) “Waiver will not be implied from doubtful acts” *Zeller v Cumberland Truck Sales*, 272 SC 558, 253 SE2d 111 (1979) The language in the two complaints does not meet this criteria for waiver, to interpret the allegation concerning delay and resulting claim for damages as injecting the issue of the statute of limitations so as to impliedly waive any attorney-client privilege with respect to such issue is a gross distortion of the language of the pleadings, represents a deviation from the law of this State and constitutes an abuse of discretion by the judge. Incredibly, the judge adopted Respondents’ arguments and held that such language justified his finding that Appellants had waived their right to claim privilege or protection, *even though the complaint in this case does not contain the language referenced and relied upon*

The dismissal of Appellants’ claims and imposition of monetary sanctions based on the implied waiver arguments demonstrates a clear abuse of discretion. “An abuse of discretion occurs when the decision of the trial judge is unsupported by the evidence or controlled by an error of law.” *Austin v Stokes-Craven Holding Corp*, 387 SC 22, 691 SE2d 135 (2010). The judge’s reliance upon arguments of counsel, as set forth in their oral arguments, memoranda and proposed orders, in order to establish a factual basis for his decision, shows that his orders of July 28, 2009 and April 6, 2010 conflict with *Higgins supra* they were not supported by proper evidence, and were clearly controlled by errors of law. Accordingly, they should be vacated.

Respondents’ argument that Appellants had waived their attorney-client privilege, so readily adopted by the judge, had previously been rejected by the Honorable Gary E. Clary, who was appointed as Special Master for the specific purpose of examining this issue. The judge, confronted with Appellants’ request for an in-camera review of all documents claimed to be privileged by either party, acknowledged that he did not “have the time and the resources to go through all of the attorney-client documents,” and referred the privilege issue to Judge Clary, including documents concerning the lawyers hired to represent the partnerships. (Tr 12-9-08,

pp 49-61, quote at p 59, ll 17-19, Orders, 12-30-08 (p 1-3), 1-31-09 (p 1-2), 4-9-09 (p 1-2))

The parties were required to share equally the fees charged by Judge Clary for his services as Special Master

Judge Clary spent several days reviewing the documents Respondents reasserted their arguments concerning implied waiver, Judge Clary rejected these arguments (Amended Report p 4) Judge Clary also ruled that certain documents which Respondents claimed to be privileged were not privileged and were discoverable by Appellants (*Ibid* p 14) During Judge Clary's review, Appellants' counsel discovered that counsel for Respondents had, for several months, been in possession of documents from the Bryan Cave law firm, which Appellants had sought in their prior discovery requests Respondents had not disclosed that they were in possession of this evidence Once these documents became known to Appellants, Respondents immediately sought to include them on their growing Privilege Log The issue of their "privileged" status was added to the task of Judge Clary He determined that many of these documents were not privileged, and ruled that they were subject to discovery by Appellants

When the judge adopted Judge Clary's rulings *per se* (Order 6-2-09 p 1-2), Respondents moved that Judge Clary's rulings be altered in order to reinstate the protections earlier given by the judge They also asked that the judge reject Judge Clary's findings concerning the privileged nature of Appellants' communications with their counsel (Rule 59 Motion of Respondents 6-15-09 p 1-9) Appellants also noted significant errors in Judge Clary's findings, including, *inter alia*

- (1) his adoption of Respondents' "divergence" theory which is not recognized in South Carolina and which materially alters South Carolina law as to fiduciary duties, *Cf*, *Anthony v Padmar Inc* 320 SC 436, 465 SE2d 745 (Ct App 1995) (general partners owe fiduciary duties to limited partners, and violate such duties when they fail to disclose all known information that is significant and material, especially in transactions in which they have a pecuniary interest), *Beck v Clarkson*, 300 SC 293, 387 SE2d 681 (Ct App 1989) (partners' fiduciary duty is continuous, and extends even past dissolution of the partnership) (Bailey Aff 3-30-10, p 8),

- (2) his rejection of the “common interest doctrine” concerning privileged communications, finding Appellants’ waiver of the attorney-client privilege concerning communications made to persons possessing a common interest with Appellants. The judge’s adoption of Judge Clary’s rulings conflict with the law of this State. *Cf. Tobaccoville USA, Inc. vs McMaster*, 387 SC 287, 692 SE2d 526 (2010) (common interest doctrine adopted by Supreme Court under facts presented “The common interest doctrine protects the transmission of data to which the attorney-client privilege or work product protection has attached when it is shared between parties with a common interest in a legal matter. The inquiry is whether or not the matters discussed in the allegedly privileged documents are matters of common interest. So long as the documents at issue were covered by an applicable privilege, when created, that privilege continues until waived. When the common interest doctrine applies, it creates an exception to any potential waiver of privilege.”)

Again, based on nothing but the arguments of Respondents’ counsel, the judge modified his Order of June 2, 2009 to accommodate the requests of Respondents’ counsel and deny the relief sought by Appellants. By Order of July 28, 2009, he altered Judge Clary’s rulings, providing Respondents with the protections they sought while requiring Appellants to produce communications with their counsel which Judge Clary had protected as privileged.⁵ The Privilege Order did not provide for any redaction of counsel’s impressions or any other protections, if obeyed, it would render meaningless their attorney-client privilege, and place Appellants in the position of providing Respondents with their “game plan” for this litigation. (Bailey Aff. 3-30-10, p. 8-9.) Furthermore, the order applied to all limited partners in all five cases, even though the Parkview Appellants were clearly in a different position than those in the other cases, having filed their case as early as 2003.

Appellants made several attempts and efforts to find some alternative to the dilemma occasioned by the Privilege Order. These included, *inter alia*

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Prior to the entry of the 7-28-09 order, Appellants’ counsel objected to it on the basis that Rule 53, SCRPC, prohibited the judge from altering the rulings of the Special Master. This issue was addressed in Appellants’ prior Petition for Writ of Prohibition and the arguments stated therein are adopted and incorporated into this brief. See also Bailey Affidavit 3-30-10, p. 11-13.

- (1) First, they sought to have the order amended under Rule 60, SCRPC, in order to correct mistakes of fact and law. At the urging of Respondents' counsel, this motion was denied by the judge (Order 4-6-10, p. 28).
- (2) Appellants were concerned that a partial production of their communications with their counsel could constitute a total waiver of their attorney-client privilege, in light of the decision in *Marshall supra* (disclosure to a third party "waives the attorney-client privilege not only to the specific communication disclosed but also to all communications between the same attorney and the same client on the same subject") (Tr. 12-9-08, p. 55, l. 17- p. 56, l. 7). The judge's ruling also began to cause Appellants to avoid communicating with their counsel, adversely affecting their representation in this case (Davis Aff. P. 23-24, Bailey Aff. 3-30-10, p. 18, Pike Aff., p. 3, Hinnant Aff., p. 15, Rentz Aff., p. 3, Reynolds Aff., p. 3, Hodge Aff., p. 5, Ivey Aff., p. 3-4).
- (3) At the urging of Respondents' counsel, the judge threatened to dismiss their claims if Appellants withheld their privileged communications. Appellants urged the judge to consider lesser sanctions, including a contempt citation which would entitle them to an immediate appeal (Bailey Aff. 3-30-10, p. 14). This request was opposed by Respondents' counsel and, again, the judge acceded to their wishes, and prepared to dismiss their claims. This placed Appellants in the untenable position of either (1) complying with the order, which would destroy their attorney-client privilege and give Respondents unrestricted access to their confidential communications with their counsel, or (2) declining to comply with the order, which would put them at risk of having their claims dismissed and deprive them of a trial on the merits.
- (4) Through independent counsel, Appellants then sought relief in the appellate courts, as documented above. Simultaneously, Appellants asked Chief Justice Toal to transfer their cases to the Business Court, but their request was denied.
- (5) Appellants filed a motion for protection on February 22, 2010, requesting that the judge consider other options, including permitting them to submit their attorney-client documents under seal for an in-camera review. The judge denied this request (Motion for Protective Order, p. 1-4, Order 10-22-10, p. 1-4)⁶

On April 6, 2010, the judge executed the order prepared by Respondents' counsel, finding Appellants in contempt of court and imposing the harshest sanction possible: dismissal of their claims and requiring them to pay attorneys' fees and costs to Respondents. As shown above, this

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Although the judge denied Appellants' request to submit documents under seal for in-camera review, he earlier granted Respondents' request to submit documents to him under seal for in-camera review as part of their efforts to avoid the rulings of Judge Clary (Order 8-31-09, p. 1-2).

amounted to an abuse of discretion, it is not supported by the evidence in the case, and is controlled by numerous errors of law *Cf. Grosshuesch v Cramer*, 377 SC 12, 659 SE2d 112 (2008) (trial court erred in holding party in contempt for failing to respond to discovery requests which would have required party to waive privilege against self incrimination) If it is allowed to stand, this decision will affect not only the litigants in this case, but litigants in all future cases Specifically, future litigants, *merely by filing complaints*, will be deemed to have put at issue the statute of limitations and impliedly waived their attorney-client privilege as to that issue, they may be deemed to have waived their attorney-client privilege because of language in other complaints filed by other parties in other cases Future defendants will no longer have to raise the statute of limitations as an affirmative defense and Rule 8(c), SCRCP will become a nullity Future litigants standing in a fiduciary relationship will be confronted with a significant change in existing law, as fiduciary duties will no longer include full and complete disclosure of significant and material information, including disclosure of conflicts of interest Fiduciary duties will no longer be continuing in nature, throughout the fiduciary relationship, but will end when there is a “divergence of interest” between members within the relationship Appellants contend that these deviations from existing law should not be adopted by this Court, as they were by the judge, accordingly, the orders discussed above should be reversed and vacated

2 Judge Early erred in imposing the sanctions of dismissal of Appellants’ claims and requiring them to pay costs and attorneys fees to Respondents for alleged deficiencies in their discovery responses, thereby requiring vacation of his order of April 6, 2010, as well as prior orders upon which it is based **(Issue 2) (Orders dated 12-17-08, 3-3-09, 3-3-09 (Granting in Part and Denying in Part) 4-6-10)** Apparently recognizing the deficiencies and reversible error of the rulings in the Privilege Order, Respondents sought to find a back-up excuse to justify the dismissals They did this by accusing Appellants of failing to comply with discovery rules

Again, the judge readily adopted Respondents' position, notwithstanding that it was not supported by proper evidence or existing law

In the Dismissal Order, and at the request of Respondents' counsel, the judge found Appellants in contempt of court for failure to comply with his prior order of March 3, 2009 (Discovery Order), and dismissed Appellants' claims in all five (5) cases as the sanction for the contempt. He further ordered that Respondents were entitled to "receive a monetary award to compensate them for the reasonable costs and attorneys fees incurred in connection with their Motion to Compel Discovery and their two Motions for Sanctions." Appellants contend that the rulings of the judge in this regard result from and are tainted by the bias and prejudice hereinafter discussed, and evidence the judge's imposition of a double standard concerning discovery.

The finding of contempt and the imposition of sanctions also result from an abuse of discretion on the part of the judge and should accordingly be vacated, as these are unsupported by the evidence and controlled by errors of law. *Austin supra*. The factual findings in the Dismissal Order and the Discovery Order were taken from the memoranda supplied to the judge by counsel for Respondents. As previously noted, it is improper for a judge to use the unsworn statements of counsel, whether in argument or in a memorandum, to establish factual findings. Cf., *Higgins supra*. The factual findings of both orders simply parrot the arguments of Respondents' counsel and the language of their memoranda.

In order to understand the deficiencies in the Dismissal Order, it is necessary to examine the underlying Discovery Order upon which it is based. The Discovery Order followed a motion to compel filed by Respondents, which was heard on December 9, 2008. The motion was accompanied by a memorandum containing Respondents' arguments, which was filed the day before the hearing. The Discovery Order mirrors the memorandum and references seventeen (17) answers to interrogatories and forty three (43) responses to production requests which the judge

found to be “incomplete and inadequate ” This finding is not supported by the evidence An examination of Appellants’ discovery responses clearly shows that they met or exceeded the requirements of the South Carolina Rules of Civil Procedure, and certainly exceeded the discovery responses provided by counsel for Respondents This Court is respectfully requested to examine these responses in determining whether the judge abused his discretion concerning their adequacy Appellants’ discovery responses are addressed in the affidavit of Thomas A Pendarvis, 4-22-10, p 2-24) Due to the voluminous nature of the responses, it is impossible to discuss each of them, however, the Court is directed to the following examples

- 1 On July 14, 2005, Appellants responded to Respondents’ initial discovery requests in this case The responses were based upon the information and documents in the possession of Appellants or their counsel at that time, and included, *inter alia* (a) valuation for the Parkview apartments, (b) eleven pages listing persons having knowledge or information concerning the facts of the case and a summary of their testimony, (c) seven pages listing generic categories of witnesses, as the specific individuals were then unknown, (d) twenty four pages specifically identifying documents in Appellants’ possession, and enclosing copies of any documents not in possession of Respondents, and (e) information relating to the expert witness who had been retained *The information produced was in addition to more than 35,000 pages of documents already produced in the case*⁷ (Appellants’ answers to interrogatories, p 4-53) Appellants also provided Respondents with a privilege log for documents being withheld under a claim of privilege between 2000 and 2003 Counsel for Respondents made no complaint regarding these responses
- 2 Appellants supplemented their discovery responses on November 6, 2007 by adding witnesses and documents relating to insurance valuations for the subject properties (Pendarvis Aff , p 4, Ex 10, 11, (all pages)) Supplemental responses were provided on numerous occasions prior to the issuance of the Dismissal Order as information became known to Appellants These included, *inter alia*, supplements identifying witnesses and documents relating to (a) assessed values of the subject properties (Pendarvis Aff , p 5-6, Ex 13, 14, 22, 23, (all pages)), (b) a title history for each of the subject properties (*Ibid* , p 6, Ex 21 (all pages)), and (c) appraised values, HUD rental comparability studies and

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Nearly 34,000 pages of these documents came from one source, *i e*, Gary Hediger d/b/a Hediger Enterprises, Inc Although less than 5,000 pages of these actually related to the five (5) properties involved in the cases on appeal, Appellants’ counsel was required to review each page in order to determine any relevancy to the issues involved in this litigation (Tr 7-1-08 p 34, ll 10-24)

subsequent sales information for the subject property (*Ibid*, p 8, Ex 29 and 30 (all pages)) These supplements do not include the discovery responses by Appellants to Respondents' second set of discovery requests dated August 28, 2008

- 3 In August, 2008, more than three years after the filing of this case, less than one year before the trial date in May, 2009, and without having taken a single deposition, counsel for Respondents served a second set of discovery requests (*Ibid*, p 11, Ex 45 (all pages)) These requests were incredibly vague, burdensome, and overly broad, and far exceeded the abuses described in *Oncology and Hematology Associates of SC vs SC DHEC*, 387 SC 380, 692 SE2d 920 (2010) For example, interrogatory #13 sought voluminous information regarding accountants, financial planners and advisers, tax advisers or preparers, et al with regard to each of the partnerships, properties, notes, sales transactions, purchasers, subsequent sales, Mr Hediger, subsequent purchasers and/or the Respondents (*Ibid*, p 11, Ex 45, p 17) Interrogatory #17 required Appellants to "describe in detail all actions taken to study, assess, analyze, estimate or project the impact of the changes in the tax laws during the 1980s on the value of, or market for, the Properties or any other low-income housing or HUD-regulated properties" (*Ibid*, p 11, Ex 45, p 19-20) The interrogatories had no time frames, so that they covered the entire life span of each of the Appellants (*Ibid*, p 11) The Discovery Order sanctioned these and other interrogatories, finding Appellants' answers to be "incomplete and inadequate"
- 4 Respondents' requests for production were no better, requesting, for example, "all documents concerning any of the properties, the limited partnerships, the notes, the sales transactions, the purchasers, Hediger, subsequent sales transactions, and subsequent purchasers" (*Ibid*, p 11, Ex 45, p 8-9) They also requested documents regarding tax information, including estate and gift taxes and investments (*Ibid*, p 11, Ex 45, p 9) Incredibly, although the Respondents had managed the respective properties, and the Appellants, as limited partners, had nothing to do with them since 1975, Respondents sought documents concerning the "operating statements, financial statements, balance sheets, rent rolls" and other financial information for these properties, as well as documents concerning the "physical condition" of the properties (*Ibid*, p 11, Ex 45, p 9-10), as former managers, Respondents already had access to these documents *Respondents even sought all documents reflecting criminal activity or suspected criminal activity at the Properties or in the immediate vicinity of the Properties* (*Ibid* p 11, Ex 45, p 10) The Discovery Order nevertheless sanctioned these requests, finding Appellants' responses to be "incomplete and inadequate"
- 5 Based on the ages and health of Appellants, some of whom are widows or heirs of original partners, Appellants responded to the best of their ability Many Appellants did not possess any responsive documents, and Appellants' counsel specifically pointed these facts out to the judge at the hearings on the Respondents' motions For example, on December 9, 2008, counsel stated

- a “I can show you 15 supplemental discovery responses or better that we have done Every time we get something, we pass it along to them We send it in If I’ve got it, they’ve got it ” (Tr 12-9-08, p 37, l 18-21)
- b “There were 4 primary partners originally in Parkview Mr Davis is now almost 80 years old One was Rentz He is dead One was Pike He is dead The fourth was Hodge He is dead The only living creature out of that original group is Mr Davis We didn’t get a lot of materials from the Orleans partnership and different ones The reason is we have asked for these documents but people are either dead or they’re too old ” (*Ibid* , p 40, l 24 - p 41, l 9)
- c “In the case of Parkview widows have succeeded to their partnership interests and in the case of Mr Hodge, his daughter has as part of the estate So, we have asked them – each of them – to go back and look and see what you can find Get it to us whatever it is Go through old trunks Go through safe deposit boxes Go to anything you can find that relates to this They have presented it to us We have turned it over We have turned over every document that we have been presented with with the exception of documents that are listed on our privilege log It’s just that simple ” (*Ibid* , p 41, ll 11-22)

Furthermore, at a later hearing on August 24, 2009, Appellants’ counsel reiterated these ongoing concerns to the judge

- a “We are having difficulty getting a lot of the documents from people who can’t communicate because of their health issues ” (Tr 8-24-09, p 6, ll 5-7)
- b “We’ve had to send these people out searching for materials not in their immediate control We had our clients looking for these documents ” (Tr 8-24-09, p 6, ll 17-19, 23-24)
- c “This production is all we could do It’s absolutely the best we can do Every time we’ve gotten new documents, we have delivered them Some of the things are things that are just not within the control of these people Life insurance applications they made back in the 60s they’re having to go back We’ve gotten as many of these documents as we can And we’re going to continue to comply as we’re able ” ” (Tr 8-24-09, p 7, ll 10-11, l 21- p 8, l 4)

- 6 The judge also found that Appellants’ responses concerning their damages were deficient, the Discovery Order and subsequent Dismissal Order rely upon Respondents’ Supplemental Memorandum to support this finding (Dismissal Order, p 10) Notwithstanding that the reliance on the memorandum violates *Higgins supra*, the finding is simply not supported by the evidence Appellants’ initial discovery responses in 2005 set forth the manner in which their damages were calculated, and included the fair market value for the Parkview complex as

a component of this calculation Appellants had nothing to do with the apartments subsequent to Respondents' entry into the partnership in 1975, and were not privy to many documents which would establish the fair market value As part of their discovery efforts, however, they were able to obtain a number of values for each of the apartments from which the jury could ascertain the fair market value needed to calculate damages, and provided these to Respondents as noted above With the exception of Pinewood, Appellants provided an itemization of the values for each apartment complex to Respondents on multiple occasions, including following the mediation in March, 2008 and again as to Parkview in their Third Supplemental Response to the August 28, 2008 discovery (Appellants' Third Supplemental Response and Bailey letter of 1-25-10, (all pages)) The itemizations showed ranges of values for each complex The Appellants are not required to itemize the amount of their damages to a mathematical certainty *Holly Woods Ass vs Hiller*, 392 SC 172, 708 SE2d 787 (Ct App 2011), *Whisenant v James Island Corp*, 277 SC 10, 281 SE2d 794 (1981) ("proof with mathematical certainty of the amount of loss or damage is not required") These responses clearly comply with the rules of procedure and the laws of this State

- 7 The judge also found that Appellants' responses relating to their expert witnesses were deficient The Dismissal Order states, "the Parkview Plaintiffs' Third Supplemental Responses fall well short of what is required by the General Discovery Order, *as shown in Defendants' Second Supplemental Memorandum at pp 9-14*, Plaintiffs in the other cases have provided even less " (Dismissal Order, p 9) (Emphasis added) Again, reliance on the memorandum violates *Higgins, supra*, furthermore, the finding is simply not supported by the evidence Following the hearing in January, 2010, Appellants' counsel provided the judge and Respondents with the Third Supplemental Response referenced above Though unmentioned in the Order, Appellants' counsel also provided a letter which stated that the supplemental responses were limited to Parkview in light of the judge's comments that it was the first case scheduled for trial The letter also expressed the belief that the supplemental responses were "in compliance with both your prior order and the South Carolina Rules of Civil Procedure," and added this sentence "*If you agree we will provide similar updated responses in the other cases*" The judge did not respond, other than to issue the Dismissal Order once he received Respondents' memorandum The supplemental responses addressed both the damages and expert witness "deficiencies" about which Respondents and the judge had complained Also, the valuations by the assessors, appraisers, insurance brokers, et al referenced above were included for Parkview, as well as a precise dollar valuation by two (2) experts (Ltr 1-25-10, Third Supplemental Response, (all pages)) In any event, Respondents knew the identities of all Appellants' experts since March 2008, and declined to depose them Therefore, they were not prejudiced by any alleged deficiencies in Appellants' responses Cf, *Holly Woods supra*, (" even if there was a discovery violation, we find no prejudice because Appellants failed to depose [the expert]")

The judge's interpretation of Respondents' discovery requests exceed discovery

envisioned or permitted under the South Carolina Rules of Civil Procedure. They validate the concern of this Court, as expressed in *Oncology supra*, that “discovery practice has become a cottage industry and the merits of a claim are being relegated to a secondary status.” Appellants’ counsel informed the judge that the third supplemental responses were “as detailed and complete as I know how to make it in a written discovery response” (Ltr, 1-25-10, (all pages)). Appellants believe that their responses were adequate and that their cases should not have been dismissed based on the discovery responses. Respondents’ discovery requests, as was the case in *Oncology supra*, are “abusive and beyond the pale.” As the Court there noted, “the trial court must make an effort to impose reasonable discovery limits. The trial court abuses its discretion by ordering discovery that exceeds that permitted by the rules of procedure.” The judge made no such effort and abused his discretion.

It is also apparent that the judge, in order to exercise his discretion as to the discovery issues, failed to weigh the factors required in such undertakings. *Cf., Samples v. Mitchell*, 329 SC 105, 495 SE2d 213 (Ct. App. 1997), and cases cited therein. The order does not address any weight given to the nature of the discovery requests, the discovery posture of the case, the existence of any wilfulness by Appellants, or the degree of prejudice to Respondents. This omission, in and of itself, is fatal to the judge’s findings. As stated in *Samples supra*:

A failure to exercise discretion amounts to an abuse of that discretion. When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred. The mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised. It should be stated on what basis that discretion was exercised.

Accordingly, there was a clear abuse of discretion on the part of the judge, as both the Discovery Order and the Dismissal Order were not supported by the evidence and were controlled by errors of law, the orders of March 3, 2009 and April 6, 2010 should be reversed and vacated.

3 Judge Early was not legally qualified to accept and/or retain the assignment to

preside over this case (Issues 3, Order 3-7-06) The general rule with respect to a judge's qualification to preside over matters before him or her is set forth as follows

It is the judge's responsibility to disclose sua sponte all information of any potential conflict between himself and the parties or their attorneys when his impartiality might reasonably be questioned neither the client nor his attorney have any obligation to investigate the judge's impartiality Litigants have a right to have their causes tried fairly in court by an impartial tribunal, and are entitled to the due process requirement of a hearing before an impartial and disinterested tribunal *Where the circumstances are such as to create in the mind of a reasonable man a suspicion of bias, there may well be a basis for disqualification though in fact no bias exists* For this reason, a judge should disqualify himself where grounds for disqualification exist as well as in situations where his impartiality might reasonably be questioned A judge should disqualify himself when circumstances and conditions surrounding the litigation are of such nature that they might cast doubt and question as to the impartiality of any judgment 75 Am Jur , 2d, Trial, §86 (Emphasis added)

The qualification of a judge in this State to preside over matters brought before them is ostensibly controlled by the Code of Judicial Conduct, which is entirely consistent with the foregoing general proposition of law The Code, adopted by this Court under Section V of the South Carolina Appellate Court Rules, together with the pertinent canons and sections, is "intended to govern conduct of judges and to be binding upon them " Rule 501, SCACR, Preamble "An independent and honorable judiciary is indispensable to justice in our society " Rule 501, SCACR, Canon 1A "Although judges should be independent, they must comply with the law, including the provisions of this Code *Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility Conversely violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law ' Ibid , Commentary (Emphasis added)*

Whenever the term "shall" is used in the Code, it imposes mandatory, non-discretionary conduct on judges, "it is intended to impose binding obligations " Rule 501, SCACR, Preamble Accordingly, "A judge *shall* respect and comply with the law and *shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary* " Ibid , Canon 2 A (Emphasis added) The Commentary to Canon 2 A explains

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. *A judge must avoid all impropriety and appearance of impropriety.* The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. *Actual improprieties* under this standard include violations of law, court rules or other specific provisions of this Code. The test for *appearance of impropriety* is whether the conduct would create in reasonable minds a *perception* that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired. (Emphasis added)

Furthermore, "A judge *shall be faithful to the law* and maintain professional competence in it," " *shall perform judicial duties without bias or prejudice,*" and " *shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice.* " *Ibid* , Canon 3B(2) & (5) (Emphasis added) As noted in the Commentary to this Canon, "A judge who manifests bias *on any basis* in a proceeding *impairs the fairness of the proceeding and brings the judiciary into disrepute* " (Emphasis added) Additionally, as a general proposition, "A judge *shall not initiate, permit, or consider ex parte communications* " unless such communications are " expressly authorized by law " *Ibid* , Subsection (7) and (7)(e) (Emphasis added) As stated in the Commentary to this section, "*To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge*

As to the issue of qualification *per se*, the Code provides, "A judge *shall* disqualify himself or herself in a proceeding in which the judge's impartiality *might reasonably be questioned*, including *but not limited to* instances where (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer " *Ibid* , Canon 3E(1) (Emphasis added) Under this Canon, which imposes an *objective standard* of reasonableness as opposed to a subjective standard of impartiality in fact, a judge is *automatically disqualified* if his impartiality might reasonably be questioned. *Nothing else need be shown.* The specifics mentioned in Canon 3E(1) are simply *examples* of instances when a judge's impartiality is reasonably at issue. This position is supported by the Commentary to the Canon. "Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, *regardless whether any of the specific*

rules in Section 3E(1) apply ” (Emphasis added)

At the time the judge was assigned by Chief Justice Toal to preside over this case, as well as the aforesaid four (4) related cases, the judge was disqualified to accept the assignment under Canon 3E. At that time, he had a *personal* relationship with Ellis Johnston, lead counsel for the Respondents, which was substantially different from the *professional* relationship which he had with counsel for Appellants, and which went beyond the normally expected casual relationships existing between members of the bench and bar. His relationship involving Mr. Johnston inevitably leads to the conclusion that the judge's impartiality might reasonably be questioned. This relationship between the judge and Mr. Johnston involved members of their families and included, *inter alia*, the following information which was *not* disclosed by the judge until years after these cases were assigned to him: (a) the judge had known Mr. Johnston's wife for approximately 40 years, and she had been married to the judge's college fraternity brother (T 3-29-10, p. 10, l. 21-22, Order of 10-7-10, p. 3), (b) the judge's son (Ross) and Mr. Johnston's son (Caldwell) were close friends, had known each other for at least ten (10) years, were fraternity brothers in college, and had traveled together in Europe (T 3-29-10, p. 10, l. 13-16, Order of 10-7-10, p. 3), and (c) the judge had a picture of his son and Mr. Johnston's son together, which he keeps in his office (T 3-29-10, p. 10, l. 17-20).

Appellants and their counsel were totally unaware of *any* personal relationship between the judge and Mr. Johnston when this case was assigned to the judge. Their close inter-familial relationship was clearly one whereby the judge's impartiality might reasonably be questioned, accordingly, the judge was automatically disqualified from accepting this assignment and should have made that fact known to Chief Justice Toal and to Appellants and their counsel. At the very least, this was certainly information which was clearly *relevant to the issue* of the judge's qualification to fairly and impartially preside in these cases, and therefore *should have been fully and completely disclosed on the record at the outset*.

Prior to accepting the assignment of these cases, the judge had an initial duty at least to fully disclose to Chief Justice Toal and Appellants the full and complete nature of this relationship with Mr. Johnston. This is true even if the judge did not believe that the relationship with Mr. Johnston would require his disqualification. As stated in the Commentary to Canon 3E, “A judge should *disclose on the record* information that the judge believes the parties or their lawyers *might consider relevant* to the question of disqualification, *even if the judge believes there is no real basis for disqualification*” (Emphasis added). Canon 3E recognizes that the integrity of the judiciary depends upon the candor of judges not only to disqualify themselves *sua sponte* as stated above, but at the very least to disclose on the record all information potentially relevant to the judge’s qualification to preside. There is nothing in the record to indicate that the judge made any such disclosure prior to or contemporaneously with the assignment Order of Chief Justice Toal. In fact, the only time the judge made any disclosures on the record concerning his relationship with counsel for Respondents was not until March 2010, and then only after Appellants filed a motion requesting that he do so (Motion for Disclosure, p. 1-3, Tr. 3-29-10, (all pages)).

A judge’s duty to disqualify himself, or to at least disclose on the record all information which the parties or attorneys might consider relevant to the issue of disqualification, is not temporally limited by Canon 3. Therefore, the judge had a *continuing duty* to fully disclose to Chief Justice Toal and Appellants not only the relevant information concerning the relationship with Mr. Johnston existing at the time of his assignment to these cases, but also any additional information concerning this relationship which developed subsequent to his assignment. Furthermore, this continuing duty required the judge to fully disclose *on the record* all relevant information concerning the full and complete nature of his relationships with attorneys Anne Ross Rosen and Marvin Infinger once they became counsel of record for Respondents in these cases.

The record in this case clearly reveals that the judge violated this duty by making only cursory and partial disclosures, *off the record*, concerning relationships with Respondents' counsel prior to his formal disclosure in March of 2010 (Bailey Aff 3-30-10, p 2-5) The record also shows that even the one belated disclosure which the judge finally made on the record was not complete, nor was it entirely accurate (Bailey Aff 3-30-10, p 15-17, Bailey Aff 4-7-10, p 1-4) This will be discussed in greater detail in the following section

Based on the relationships described above and the judge's failure and refusal to make a full and complete disclosure concerning those relationships, the judge was not qualified to accept the assignment of the five cases under the Order of March 7, 2006 Appellants believe that such order would not have been issued had Chief Justice Toal been made aware of the full extent of these relationships Accordingly, the order assigning these cases to the judge should be vacated, and the cases should be reassigned to a fair and impartial judge

4 Judge Early erred in failing to recuse himself and to vacate his prior orders (Issue 4, Orders 8-18-08, 12-17-08, 3-3-09, 3-3-09 (granting in part, denying in part), 6-2--09, 6-16-09, 7-28-09, 4-6-10, 9-16-10, 10-7-10, 10-22-10, 12-11-10) By order of October 7, 2010, the judge denied Appellants' motion for recusal (p 1-4) On October 28, 2010 Appellants filed a motion to alter or amend the recusal denial order, the motion was denied by the judge on December 11, 2010 (Motion to alter or amend, p 1-4, Order, 12-11-10, p 1-2) As noted above under the Canons, the onus for any inquiry or disclosure concerning a judge's qualification is placed upon the judge, not the litigants or their lawyers Theoretically, judges who act in accordance with Canon 3 will *sua sponte* disqualify themselves if there is any potential whereby a reasonable person could question their impartiality, if the theory held true, there would never be a need for a litigant or their attorney to request recusal of a judge In practice, however, it is extremely rare that judges *sua sponte* disqualify themselves Therefore, it becomes even more

important that judges at least honor their obligation to make a full and complete disclosure on the record of any information which might lead a reasonable person to question their impartiality. This will at least permit the litigants and their attorneys to make an informed decision as to whether or not to pursue a motion for recusal.

In the experience of the undersigned, motions to recuse judges are infrequently made. It is axiomatic that such motions run the risk of alienating the presiding judge, not only in the case *sub judice* but in other proceedings as well, and most lawyers refrain from requesting recusal for that reason alone. Furthermore, motions to recuse in this state are decided by the judge whose recusal is sought, so there is little chance that such a motion will be granted. It is human nature for judges to resist any idea that they may not be fair or impartial, so they are not likely to make a ruling which, by its nature, must acknowledge that the possibility of unfairness or partiality exists. Finally, our appellate court decisions regarding motions to recuse reveal that judges' refusals to recuse themselves are not likely to be overturned on appeal, so the potential benefit of making a recusal motion is far outweighed by the unlikelihood of success. All of these act as deterrents to recusal motions. As a general proposition, this is not necessarily bad. We do not want our judges unnecessarily burdened with recusal requests from disgruntled litigants. Unfortunately, it also creates an atmosphere whereby, as in the present appeal, judges recognize the probable outcome of a recusal request and take advantage of that reality, to the undeserving prejudice of litigants with legitimate grounds for recusal.

An examination of the case law in South Carolina reveals that it is extremely rare for an appellate court to overturn a judge's denial of a motion to recuse, as our courts have imposed the additional burden of showing evidence of bias or prejudice in the record. *Cf., Lyvers v Lyvers*, 280 SC 361, 312 SE2d 590 (Ct App 1984), *Burgess v Stern*, 311 SC 326, 428 SE2d 880 (1993) (Even though the trial judge admitted to *ex parte* contacts with counsel for one of the parties, and

even though Supreme Court acknowledged the specific prohibitions against *ex parte* communications, no error found in trial court's order emanating from the *ex parte* contact because court concluded "that no prejudice resulted "), *Simpson v Simpson*, 377 SC 519, 660 SE2d 274 (Ct App 2008) (court upheld trial judge's subsequent refusal to recuse herself, reversing her prior decision to *sua sponte* recuse herself, again finding no evidence of bias or prejudice), *Eadie v Krause*, 381 SC 55, 671 SE2d 389 (Ct App 2008) (court relegated discussion of recusal to a footnote, affirming trial judge's refusal to recuse himself notwithstanding that he was a former law partner of the named defendant, stating "we do not find evidence of bias or prejudice sufficient to warrant reversal ")

Given the legal talent in the South Carolina Bar, it is rather astonishing to find that virtually no appellant's counsel has been able to point to any evidence in the record sufficient to convince an appellate court in this State to reverse the decision of trial judges not to recuse themselves. Unfortunately, the use of the "no evidence of bias or prejudice" standard by our appellate courts on a near universal basis for affirmation of trial judges' refusals to disqualify or recuse themselves has resulted in the fact that there are virtually no guidelines or criteria which have been established in order to determine precisely *what* evidence of bias or prejudice, or what degree of proof of such evidence, *would* warrant disqualification or recusal. An exception to this, however, was presented in *Ellis v Proctor & Gamble*, 315 SC 283, 433 SE2d 856 (1993). There are three (3) points to be made in light of the *Ellis* decision:

- (1) Justice Moore, author of the opinion, utilized language entirely consistent with the Judicial Canons of Ethics, finding disqualification should occur if a judge's impartiality "might reasonably be questioned." Furthermore, Justice Moore set the appellate standard for reviewing disqualification or recusal issues as one which *limits the court's ability to affirm a trial judge's failure to disqualify himself*, stating "Under Canon 3C, a judge *should* disqualify himself if his impartiality might reasonably be questioned. In cases involving a violation of Canon 3, *this Court will affirm a trial judge's failure to disqualify himself only if there is no evidence of judicial prejudice*." *Ellis supra* (Emphasis added.)

- (2) *Ellis* addressed the language of Canon 3C, which was the predecessor to our present Canon 3E, previously quoted herein. An important distinction exists, however, between Canon 3C, under review in *Ellis*, and present Canon 3E. The present language of Canon 3E uses the mandatory term “*shall*” as opposed to the discretionary term “*should*” cited in *Ellis*. Accordingly, under the present language of Canon 3, disqualification by the judge is *mandatory* as previously stated herein if his impartiality might reasonably be questioned.
- (3) Justice Moore’s opinion in *Ellis* is unique in that it actually provides a small window for determining the *type of evidence* our appellate courts will deem sufficient to demonstrate a judge’s bias or partiality requiring his recusal. Even though the trial judge in *Ellis*, much like the judge in the present case, gave assurances of his impartiality, Justice Moore found the following: “While we accord great weight to the trial judge’s assurance of his own impartiality, we find *a judge’s impartiality might reasonably be questioned when his factual findings are not supported by the record*. Accordingly, we find evidence of judicial prejudice in this case.” The evidence of prejudice referenced in *Ellis* consisted of an *ex parte* memorandum provided to the trial judge by counsel for one of the parties. Justice Moore found this single *ex parte* communication sufficient to require recusal, even though the trial judge stated that it “had no bearing on the trial court’s decision,” specifically noting “the prohibition against *ex parte* communications under Canon 3A(4) of the Code of Judicial Conduct.”

In the present case, the record is replete with evidence that the judge’s findings are not supported by the record, so that his impartiality “might reasonably be questioned,” thereby rendering his disqualification mandatory. This evidence includes not only evidence of bias or prejudice against Appellants, but also evidence of partiality and bias in favor of counsel for the Respondents. This is particularly true beginning in the Spring of 2008, when the judge and his son were treated to an all-expense paid fishing trip in Florida by Mr. Johnston’s brother, and when Mr. Johnston, whose position as counsel for Respondents was in jeopardy, brought in Mr. Infinger and Ms. Rosen as additional counsel. This evidence includes, *inter alia*

- 1 In Spring, 2008, the judge remarked that his son, Ross, and Mr. Johnston’s son, Caldwell, “have become friends.” This gave the impression that the relationship between their sons was recent in origin, and was the first time that the judge had made any disclosure concerning any relationship between any member of his family and Mr. Johnston’s family since his acceptance of the assignment of these cases approximately two (2) years earlier. (Bailey Aff 3-30-10, p. 2-3.) It was not until 2010, in response to a motion by Appellants for a full and complete disclosure of the relationships between the judge and Respondents’ counsel, that the judge made any disclosure on the record, and Appellants then became aware

of the following additional facts which the judge had not previously disclosed

- a The judge's son and Mr Johnston's son had not just become friends, but had been friends for years, and were actually college fraternity brothers, (Tr 3-29-10, p 10, ll 14-15)
- b The judge's son and Mr Johnston's son traveled together in Europe, (Tr 3-29-10, p 10, ll 15-16)
- c The judge's son had attended and possibly participated in the wedding of Mr Johnston's son, (Tr 3-29-10, p 11, ll 2-3)
- d Mr Johnston's son and his wife had stayed at the judge's beach house as guests of the judge and his son, (Tr 3-29-10, p 11, ll 7-10)
- e The judge kept a picture of Mr Johnston's son in his office (Tr 3-29-10, p 10, ll 17-20)

Other evidence in the record demonstrates that the judge's disclosures on March 29, 2010, concerning the relationship between the judge and Mr Johnston and members of their respective families were incomplete and/or inaccurate, while he made some disclosures concerning the relationships with Mr Johnston's son, he omitted any information relating to Mr Johnston's daughter. In support of their motion for recusal, Appellants produced evidence that (a) the judge's son, Ross, was also friends with Mr Johnston's daughter, Annie, (b) both Annie Johnston and Respondents' counsel Anne Ross Rosen are listed as friends of Ross Early on his Facebook page, and (c) the judge's picture appeared on the Facebook page of Mr Johnston's daughter, Annie (Bailey Aff 4-7-10, p 2-4) The judge failed to make any disclosure as to these additional relationships

- 2 In 2008 the judge also casually mentioned that his son had been invited by Mr Johnston's son to go on a fishing trip on a boat belonging to Mr Johnston's brother, that the judge had also been invited on the trip and that the judge had accepted the invitation (Bailey Aff 3-30-10, p 2-3) It was not until 2010, in response to Appellants motion for disclosure, that Appellants became aware that the fishing trip took place in Islamorada, Florida, at no cost to the judge, that Mr Johnston's brother was present, and that the judge took Mr Johnston's brother and his wife to dinner on two (2) separate occasions during the trip at the judge's expense (Tr 3-29-10, p 11, l 10-13)
- 3 On a subsequent occasion, the judge stated to Mr Johnston that he had gone to see Mr Johnston's brother when he was in Georgetown and that his brother had invited him to go fishing again (Bailey Aff 3-30-10, p 2-3) The judge did not mention this visit with Mr Johnston's brother in his "disclosure" on the record, nor did he ever indicate whether he accepted the invitation
- 4 On another occasion, Mr Johnston stated to the judge that he was aware that the judge's son, Ross, was going fishing in Islamorada (Florida) and that Mr

Johnston thought he would “go with him ” (Bailey Aff 3-30-10, p 2-3) The judge denied Appellants’ motion to require Respondents’ counsel to disclose under oath the full nature and extent of their association with the judge, which prohibited Appellants from determining if, in fact, Mr Johnston ever accompanied the judge’s son to Islamorada or to any other destination

- 5 Mr Johnston also casually mentioned on one occasion that he and the judge attend a “white tie and tails” affair each year, and also that there was an “incident in Europe” involving their sons (Bailey Aff 3-30-10, p 2-3) Although the judge, as part of his “disclosure” on the record in 2010, made some comments concerning the common memberships of himself and Mr Johnston in the Caroliniana social organization, he made no reference to the “incident in Europe ” Since the judge denied Appellants’ motion to require Respondents’ counsel to disclose under oath the full nature and extent of their association with the judge, Appellants were prohibited from access to any information concerning the “incident in Europe” involving their sons
- 6 At an April 23, 2008 status conference, Mr Infinger appeared with Mr Johnston for the first time At the status conference, Mr Johnston stated to the judge and the others present that Mr Hilty, who was in-house counsel for Respondents, felt Mr Johnston had done “a shitty job” at the mediation the prior month, and that Mr Infinger was being named as additional counsel for Respondents The judge welcomed Mr Infinger to the case, and casually remarked that he had known Mr Infinger for several years, and that Mr Infinger had spent the night on one occasion at the judge’s home several years earlier following a wedding All of the above occurred off the record (Bailey Aff 3-30-10, p 4)
- 7 Additionally, Mr Johnston stated at the status conference that an associate of Mr Infinger’s, Ms Anne Ross Rosen, was also being assigned as counsel of record for the Respondents in these cases At that point, the judge commented that he knew Ms Rosen and had, in fact, “married her ” He made no other disclosure concerning Ms Rosen This also occurred off the record (Bailey Aff 3-30-10 p 5) It was not until 2010, in response to Appellants’ motion for disclosure, that the judge finally disclosed that
 - a Ms Rosen was a native of the judge’s hometown of Bamberg, South Carolina and that the judge had known her for her entire life
 - b Ms Rosen’s parents and the judge moved to Bamberg around the same time and their careers grew side by side over the years
 - c Ms Rosen’s father was a surgeon and the judge had been his patient, specifically, Dr Ross had performed one or two surgical procedures on the judge and had referred him to at least one other physician for another procedure
 - d Ms Rosen was the same age as the judge’s son, Ross and they went through school together

e Ms. Rosen and her fiancé, John Rosen, asked the judge to perform their wedding ceremony and the judge and his wife and son Ross were provided with a room for one (1) night at a condominium at Fripp Island by Dr. Ross (Tr. 3-29-10 p. 6, l. 25 - p. 8 l. 3.)

The record demonstrates that the judge's disclosures on March 29, 2010, concerning Ms. Rosen were also incomplete and/or inaccurate. For example, in response to a subpoena issued by Appellants, the Fripp Island Resort provided documentation which contradicts the "disclosure" made by the judge and reveals that (1) the condominium referenced by the judge was provided to him and a guest at no charge by the Ross family for two (2) nights, not one (1) night as stated by the judge in his "disclosure," and (2) the judge's other son, Will, and another guest were also provided accommodations on Fripp Island as part of the Ross-Rosen wedding, at no charge (Bailey Aff. 3-30-10, p. 15.)

All of the foregoing clearly documents extrajudicial relationships and conduct on the part of the judge requiring his disqualification from accepting and from retaining the assignment of these five (5) cases. Had he remained true to the language and intent of Canon 3, he would have recognized that these extrajudicial relationships create a situation whereby his impartiality might reasonably be questioned, and that the circumstances are certainly such as to create in the mind of a reasonable man at least a suspicion of bias. Under Canon 3, this is as far as the situation should have gotten. Since the judge did not *sua sponte* disqualify himself, however, he should have at least timely and fully disclosed the relationships and circumstances on the record, as provided in the Canons.

Having failed to disqualify himself or to reveal any information concerning his qualifications on the record, the judge should have granted Appellants' motion to recuse. There should be no doubt that these relationships and circumstances create an appearance of impropriety; they create in reasonable minds a perception that the judge's ability to carry out his responsibilities with integrity, impartiality and competence is impaired. Cf., Commentary to

Canon 2A, *supra* Under these facts, whether pursuant to a *sua sponte* disqualification or an order of recusal, the judge should have removed himself from this litigation *A judge should disqualify himself where grounds for disqualification exist as well as in situations where his impartiality might reasonably be questioned A judge should disqualify himself when circumstances and conditions surrounding the litigation are of such nature that they might cast doubt and question as to the impartiality of any judgment* 75 Am Jur , 2d, Trial, §86 (Emphasis added)

The record in these cases, apparently unlike virtually any other case besides *Ellis supra*, also demonstrates that the factual findings in the orders issued by the judge, as previously shown herein, are not supported by the record Accordingly, there is evidence of judicial prejudice, requiring the disqualification or recusal of the judge under the decision in *Ellis* Subsequent to the said fishing trip, and following Mr Johnston's revelation that Mr Hilty was dissatisfied with his performance and the addition of Mr Infinger and Ms Rosen as counsel of record, the judge's attitude and conduct toward the parties and their counsel changed significantly This change in attitude and conduct is reflected in both his comments and the orders which he issued from that point Although promising to "feed everyone from the same spoon," (Tr , 7-1-08, p 12, ll 1-2) he, in fact, established a double standard for discovery between the two parties, with the Respondents enjoying a lesser and more favorable standard than that imposed upon Appellants, this will be discussed in greater detail below Almost without exception, the orders which he issued were prepared for his signature by counsel for the Respondents As demonstrated herein, these orders reflect the double standard which he imposed, were often not based upon proper and credible evidence, misstated or disregarded existing applicable law and/or contained factual findings which were not supported by the record For example

- 1 Order of August 18, 2008, denying Appellants' motion to compel #6 Appellants sought certain financial information which had been requested by Dr Oliver G Wood, Jr , an economist and expert witness retained on behalf of Appellants The information was needed to formulate and support his opinions concerning the issue of punitive damages (Motion to Compel 6-12-08, p 1-12)

- a Appellants' counsel presented the request to the judge at the hearing on this motion to compel, which took place July 1, 2008 (Tr 7-1-08, p 40, ll 6-8) The judge then alluded to personal knowledge which he had concerning Dr Wood and "his questionnaire," and indicated that Dr Wood's prior questionnaires had not included information being sought in these cases (*Ibid* , ll 9-10, l 22 - p 41, l 6) The judge referenced a prior case in which Dr Wood testified, outlining his recollection of Dr Wood's testimony (*Ibid* , p 46, ll 9-16) These are references to matters clearly outside and not supported by the record in this case
- b At the hearing, Respondents' counsel handed to the judge a document identified as "a sampling of one 10K report" of Respondent AIMCO, stating that the document was "available on the SEC website," and expressing the opinion that the information contained was more "than I think an expert could ever use " This document was not marked or introduced into evidence to be considered by the judge The judge then stated, "I think that the information that Oliver can get out of the SEC ought to be enough " (Tr 7-1-08 p 42, ll 13-20, p 45, ll 4-6) Accordingly, the record reflects that the judge based his ruling upon a document and information which was not admitted into evidence or properly part of the record
- c The judge stated that, notwithstanding his oral ruling, he would reconsider that ruling or hold it in abeyance, and require production of the information sought under a protective order if he received an affidavit from Dr Wood stating that he needed more information than was available through the SEC (Tr 7-1-08, p 45, ll 7-13, p 46, ll 3-9) By letter of July 30, 2008, Appellants' counsel provided the judge with a copy of a filed affidavit from Dr Wood dated July 28, 2008, which specifically stated that the items contained in Appellants' discovery requests were needed "to formulate my opinions," and that "*a substantial portion of the information I requested is not publically available* " The affidavit further states that the information sought in Appellants' discovery requests "is what I will need to prepare my opinion " (Affidavit of Oliver G Wood, Jr , p 1-2) (Emphasis added)
- d No counter affidavit to Dr Wood's affidavit was ever submitted to the judge by Respondents Instead, they provided the judge with a letter from Mr Johnston to Appellants' counsel dated July 30, 2008, together with a "Definitive Proxy Statement" which AIMCO had purportedly prepared for submission to the SEC This information was sent to the judge by Mr Johnston via an email dated August 12, 2008 Neither the letter nor the "Definitive Proxy Statement" were ever verified through affidavit or filed with the Clerk of Court as part of the record in this case The statements and information in the proxy statement, which was evidently intended for dissemination to shareholders, were not made under oath Even if these matters had been properly entered into the record, examination of the

proxy statement reveals that it does not provide the information required by Dr Wood, as it states nothing concerning Appellants' requests for information relating to (1) financial information for the years 2004-2007, (2) profit sharing allocations, (3) specific conditions required in order for executive bonuses to be paid, (4) life or health insurance, (5) professional or social membership dues, (6) reimbursement of entertainment expenses, or (7) allowances for automobile travel, etc. Notwithstanding these facts, the judge issued his order on August 18, 2008, finding "that there is sufficient information publically available through filings with the Securities and Exchange Commission to satisfy this request " (Order 8-18-08, p 1-2) The order does *not* state that the judge ever looked at any SEC filings, other than the 10k report *which was never in evidence or made part of the record* Since this finding is clearly at odds with the express statements in Dr Wood's affidavit, and references information which is not part of the record, the judge's factual finding is not supported by the record This is not cured by the fact that counsel for the Respondents attempted to get the information before the judge in the form of memoranda, letters or oral arguments These do not constitute evidence Factual statements of an attorney, whether made during argument or in written briefs or memoranda, may not be considered or accepted by the court as proof *Higgins supra, Gilmore v Ivey*, 290 SC 53, 348 SE2d 180 (Ct App 1986)

- 2 Order of March 9, 2009, continuing the Parkview trial (Order 3-9-09, p 1-2) The subject of this order was the Respondents' request for a continuance of the Parkview case past the scheduled trial date of May 18, 2009 Appellants' counsel was not included in the communication process whereby the signed order was transmitted from the judge to counsel for the Respondents, and did not become aware of the executed order until receiving a copy of it from Respondents' counsel It is clear that the findings of the judge in the order are not only erroneous, but are not supported by the record
 - a The order states that the matter was before the judge "on Defendants' motion to continue the trial " In fact, there was no motion by Respondents, and the matter was never properly before the Judge (*Cf*, Rule 7(b)(1), SCRCF)
 - b The order also states that the Respondents' request for a continuance was granted "for good cause having been shown " In fact, *no* cause was shown for the continuance, certainly, no cause was shown which complied with the rules, since no motion was ever made
 - c The order further states that, "by prior order of the court," the Parkview case was to be the first of the assigned cases to be tried In fact, no such order was ever issued

All of these deficiencies were among those brought to the judge's attention in Appellants' motion to alter or amend dated March 23, 2009. The judge denied this motion, allowing the defective order to stand.

3 Order dated October 7, 2010, denying Appellants' motion for recusal and vacation of orders. The findings of the judge in this order are likewise erroneous and unsupported by the record. These include, *inter alia*,

- a The order states that the judge "complied" with Appellants' request that he "make a full disclosure of any type of relationship he had with the defense lawyers." This finding erroneously narrows the parameters of the disclosure request, which included "a full and complete disclosure on the record of any and all affiliations or relationships which (the judge), or any member of his family, presently has or has previously had with any of the Defendants or counsel of record for any named Defendants in these cases, as well as with family members of such counsel of record." The requested disclosure specifically included "recreational and/or social activities, and personal visits and/or contacts," whether "in person, via telephone, mail, electronic means or internet sites." The judge clearly failed to make a full and complete disclosure on the record relating to his involvement of the marriage of Respondents' counsel Anne Ross Rosen, as well as the relationships involving Mr. Johnston's daughter. The finding that the judge "complied" with Appellants' request for "full disclosure of any type of relationship" is both erroneous and unsupported by the record.
- b The order states that the judge "considered the heartache and loss of position suffered by a family court judge who recently refused to recuse herself in a case." At no time was the judge presented with any evidence relating to a family court judge who refused to recuse herself, much less any "heartache" or "loss of position suffered" by the unnamed family court judge. Consideration of this extraneous matter is clearly erroneous and patently unsupported by the record in this case. As such, it represents clear evidence of bias and prejudice under *Ellis supra*.
- c The order finds that Appellants' recusal effort did not commence until "immediately prior to the entry of a April 6, 2010 sanctions order, *after almost a year of sanctions and contempt orders entered against them*." While counsel for Respondents vigorously requested that the judge sign orders holding Appellants in contempt and imposing dismissal of their claims as an appropriate sanction, and the judge verbally threatened to sign such an order, he did not do so until he signed the order of April 6, 2010, the judge himself acknowledged as of March 29, 2010 that no such order had been filed, *i.e.* "entered" (Tr. 3-29-10, p. 26, ll. 16-17). The finding that there have been "sanctions and contempt orders entered" against Appellants for "almost a year" is totally erroneous and is unsupported by the record. This is another example of clear evidence of bias and prejudice under *Ellis supra*.

- d The order finds that the judge “held a hearing on March 29, 2010 and put on the record all of my relationships with counsel for both parties, *most of which had previously been disclosed in the course of litigation*” As shown in the prior discussion, this finding is patently false, any “disclosures” made by the judge during the course of the litigation prior to the hearing were minimal and cursory at best Accordingly, this finding is not supported by the record and is clear evidence of bias and prejudice
- e The order also states, “at the hearing Plaintiffs made an oral motion to recuse me I respectfully denied it, having thoroughly addressed their concerns” The record clearly shows, in addition to the fact that the judge did not “thoroughly address” the concerns of Appellants, there was no oral motion for recusal made at the March 29, 2010 hearing (Tr 3-29-10, p 24, l 6 - l 20, p 26, ll 9-14, ll 19-25) The transcript of the hearing clearly shows that counsel for Appellants proposed, as a possible solution to the judge’s reluctance to give Appellants time to review his disclosures before deciding whether or not to make a motion for recusal, that a verbal motion *could* be made and marked heard The judge denied that proposed option (Tr 3-29-10, p 27, ll 2-6)
- f The order lists eight “disclosures” which the judge states were revealed not only at the March 29, 2010 hearing, but “openly throughout the litigation” The only *evidence* in the record on this issue contradicts this finding (Bailey Aff , 3-30-10, p 1-19) The only *reference* in the record to support this statement is found in the Respondents’ Memorandum dated April 20, 2010 (Respondents’ Memorandum, 4-20-10, p 4) In fact, the language used in the judge’s order, in many instances, is taken verbatim from this memorandum Statements of counsel in a written memoranda cannot be considered by the court in determining factual findings Cf , *Higgins supra*, *Gilmore supra* Inasmuch as the trial judge clearly based his findings in this regard solely on unsworn statements of Respondents’ counsel set forth in a memorandum, and such reliance is prohibited by the law of this State, these findings are not properly supported by the record
- g In an attempt to refute Appellants’ allegations in their motion and affidavit, the order states that Appellants’ motion for recusal is “made *without basis or justification*, with the *sole purpose of polluting the record and intimidating me* into recusal” (Emphasis added) The record shows that separate motions for recusal were made in this case and the four related cases All of the motions were supported by affidavits from numerous Appellants in each case, as well as their counsel (Motion to Recuse, p 1-4, Davis Aff , p 1-24, Reynolds Aff , p 1-7, Pike Aff , p 1-6, Rentz Aff , p 1-5, Ivey Aff , p 1-5, Hinnant Aff , p 1-16, Hodge Aff , p 1-7, Bailey Aff 3-30-10, p 1-19, Bailey Aff 4-7-10, p 1-4 with exhibits, Pendarvis Aff , p 29) These affidavits set forth specific facts and circumstances justifying the motion for recusal and vacation of the judge’s orders, and amply demonstrate circumstances which would create in the mind of a reasonable man at least a suspicion of bias, as well as

demonstrating that his impartiality might reasonably be questioned. While a judge may consider the legal sufficiency of facts alleged in a motion for recusal, he must nonetheless accept as true the factual allegations in the motion. *Shaw v. State*, 276 SC 190, 277 SE2d 140 (1981). Where affidavits are submitted in support of a motion for recusal, the judge “is required to accept as true the facts stated in the motion and accompanying affidavits.” 46 Am. Jur. 2d, *Judges*, §214, *Mallett v. Mallett*, 323 SC 141, 473 SE2d 804 (Ct. App. 1996). The judge, by attacking the facts stated by Appellants rather than accepting them, did not follow the law. Since it is obviously controlled by an error of law, there is an abuse of discretion and the order should be vacated.

- h The finding of the judge that he had addressed the issue of recusal “repeatedly” is not supported by the record. Appellants’ motion was made following the “disclosures” made by the judge and he only addressed the issue briefly at the hearing on March 29, 2010 and in the written order of October 7, 2010. This is evidence of bias and prejudice under *Ellis supra*, as the finding is not supported by the record.
- i Incredibly, the judge’s order makes a factual finding that Appellants ***“continue to harass and prod me to recuse myself”***. This is simply untrue and totally unsupported by the record. The judge’s finding of harassment on the part of Appellants, most of whom are elderly and in ill health, is ludicrous. This statement is not only unsupported by the record, but is in itself a clear indicator of the bias and prejudice exhibited by the judge against Appellants. *“A judge who is presented with a motion for disqualification and who looks beyond the mere legal sufficiency of a suggestion of prejudice and attempts to refute the charges of partiality exceeds the proper scope of his inquiry and on that basis alone establishes grounds for his disqualification.”* 46 Am. Jur. 2d, *Judges*, §§95 and 214.

Time and space constraints imposed in this appeal do not permit Appellants to address each and every instance whereby the judge made factual findings which were totally unsupported by the record. The above instances are included as examples only. In addition to these unsupported factual findings, Appellants direct this Court to the following examples in the record of other evidence indicating bias or prejudice on the part of the judge:

- a The evidence shows that the judge had completely abandoned any pretense of acting as a fair and impartial arbiter and had totally aligned himself with counsel for the Respondents. As shown above, the orders simply parroted the arguments and representations of Respondents’ counsel, and incorporated them as factual findings. The orders were either prepared by Respondents’ counsel or the language in his orders was taken straight from memoranda or other documents which they submitted to him. He also verbally aligned himself with Respondents’

counsel at hearings in this litigation. For example, on January 14, 2010 he stated “ when *they* didn't do that, you moved for compelling, and *we* signed the order of March 3, '09. And *we get in here today* and *they* still admit *they* haven't given it *to us* ” (Tr 1-14-10, p 50, ll 6-9) (Emphasis added) The judge clearly included himself in the same “we” camp as Respondents’ counsel, with Appellants and their counsel clearly being assigned to the opposing “they” camp. Such comments and conduct create in the mind of a reasonable man at least a suspicion of bias, and demonstrate that the judge’s impartiality might reasonably be questioned, accordingly, they provide evidence of bias requiring his recusal.

- b. Additional evidence of the judge’s bias and prejudice may be found in his comments at the “disclosure” hearing on March 29, 2010. The judge, referencing his reaction when he first read Mr. Johnston’s email enclosing the subpoena issued to Fripp Island by Appellants, stated “I got the thing. I looked at it. Of course, you know, when you first read something like that *your blood boils* a little bit ” (Tr 3-29-10, p 25 ll 18-20) This statement clearly evidences his bias and prejudice. It also evidences anger and a “combative and defensive attitude” which caused “some concern” to the court in *Mallett supra*, as to whether the trial judge could impartially decide the recusal issue.
- c. There is also evidence in the record of prohibited *ex parte* communications between the judge and counsel for Respondents which Appellants contend would at least add to the appearance of impropriety which is attendant to the judge’s conduct in this matter. Such evidence includes, *inter alia*,
 - (1) The order of March 9, 2009, previously discussed above. Appellants’ counsel was not included in the communication process whereby the signed order was transmitted from the judge to counsel for the Respondents, and did not become aware of the executed order until receiving a copy of it from Respondents’ counsel (Order, 3-9-09, p 1-2),
 - (2) The email from Respondents’ counsel, Calvin T. Vick, dated February 17, 2010, which precipitated Appellants’ motion for a protective order in an effort to avoid the dismissal sanction ultimately imposed by the judge (Motion for Protective Order, p 1-3). The email is an attempt by Mr. Vick to explain the *ex parte* communication initiated by the judge that same day, wherein the judge ostensibly instructed Mr. Vick to prepare an order holding Appellants in contempt and dismissing their cases. Although the judge had previously indicated an inclination concerning this ruling, he had subsequently been provided with briefs and materials by counsel for both sides and had not announced his final decision before the *ex parte* communication with Mr. Vick. The practice of directing counsel for one party *ex parte* to draft an order prior to the judge announcing his final decision to both sides is prohibited under Opinion 2-1988, Committee on Standards of Judicial Conduct. A judge is prohibited from discussing a proposed order with counsel for one party without giving notice to counsel for the other side, because failure to provide such notice gives rise to an appearance of impropriety (Ibid). This opinion has been cited with approval by our courts for many years. *Cf Higgins supra*.

d Evidence of bias and prejudice is also found in the judge's imposition of a double standard, as previously noted. Examples of this double standard are *inter alia*

- (1) Respondents' initial discovery responses of August 26, 2004, contained 15 general objections, followed by specific objections and minimal responses to each discovery request. When Appellants moved to compel proper responses, the judge ruled Appellants "have an obligation to take the deposition" of witnesses to get more specific information and, as to documents, would "have to make your own determination as to what's there," ordering Appellants to "go take the depositions and ask them what it meant" (Tr 7-1-08, p 17, ll 22-25, p 18, ll 12-15, p 35, ll 1-14, p 36, ll 9-16, l 24- p 37, l 2, p 47, ll 20-23). Based upon the judge's promise to "feed both sides from the same spoon" (Tr, 7-1-08 p 12, ll 1-2), Appellants aggressively undertook to depose witnesses who had been listed by Respondents.

In responding to the Respondents' discovery requests, Appellants utilized their discovery technique of asserting general objections, actually using *verbatim* the language employed by Respondents which had been sanctioned by the judge. When Respondents complained about these objections, the judge responded by dismissing Appellants' claims.

- (2) When Respondents sought a protective order prohibiting Appellants from deposing Respondents' officers, the judge granted their request, even though one of the officers was present at the meeting where the "*status quo*" agreement was reached and was a material witness on the issue of the statute of limitations. Conversely, when Appellants sought a protective order as a means of complying with the judge's Privilege Order, their request was denied (Tr 7-1-08, ll 21-25, Order Denying Appellants' Motion for Protective Order, p 1-4).
- (3) When Appellants sought information from the corporate Respondents relating to lawsuits and other claims against them, the judge permitted Respondents to re-write Appellants' discovery requests. In doing so, Respondents eliminated a responding party, as well as the time frame encompassed by the request. The effect was to protect disclosures concerning the conflicts of interest which formed the basis of the Appellants' claims. Conversely, the judge approved Respondents' document request #48, ordering Appellants to produce "all documents concerning any litigation in which any of the Plaintiffs were a party (plaintiff, defendant or third-party plaintiff or defendant), or any person in which any of the Plaintiffs had an ownership or management interest was a party." Despite the lack of any time limitation or showing of relevancy, this request was included in those found to be deficient by the judge and used by him as a reason for dismissing Appellants' claims.

- (4) The judge required Appellants to produce their confidential communications with their counsel in this case, while protecting Respondents from producing communications with attorneys in other proceedings which were relevant to this case
- (5) The judge granted Respondents' motion to seal certain documents for his in-camera review, while denying relief to Appellants (Order, 8-31-09, p 1-2, Order 10-22-10, p 1-4)

Due to time and space constraints, Appellants direct this Court to the affidavit of Joel D Bailey dated March 30, 2010, paragraph 13 (p 5-10) for a more detailed listing of instances wherein the judge imposed a double standard, and incorporate said affidavit herein by reference. Given the abundance of evidence demonstrating bias and partiality on the part of the judge, he erred in failing to disqualify and/or recuse himself and to vacate his orders. The rulings of the judge result from and are tainted by the bias and prejudice herein discussed, they contain factual findings not properly supported by the evidence and are evidence *per se* of the judge's bias and prejudice. Furthermore, they are controlled by errors of law and result from abuses of discretion, and should be vacated on that basis, as well.

5 Judge Early failed to insure that Appellants' claims were being litigated in a fair and impartial forum, thereby depriving them of their rights to due process of law under the Constitutions of the State of South Carolina and the United States of America (Issue 5) The right to due process of law is guaranteed to citizens of this State by the Constitutions of South Carolina (Article I, §3) and the United States (5th and 14th Amendments). It is axiomatic that a fair and impartial forum must include, at a minimum, a presiding judge whose impartiality and lack of bias is beyond question. "Every litigant has the lawful right to expect utter impartiality and neutrality in a judge who tries his case." 46 Am Jur 2d, *Judges*, §146. "The right to disqualify a judge for bias and prejudice is substantive and it is included within the right to a fair trial guaranteed by the due process clause of the United States Constitution." *Ibid*. The constitutional guarantee of a fair and impartial judge and forum is recognized in this State.

Mallett supra (“ the expectation of a fair and impartial tribunal is a basic tenet of all cherished notions of due process ”) In determining the fairness or impartiality of a judge or tribunal under a due process inquiry, the United States Supreme Court has determined that the objective test of a reasonable perception of bias, referenced above in the Code of Judicial Conduct, as opposed to the subjective “bias in fact test” is the proper procedure to be followed *Cf Caperton v A T Massey Coal Co Inc* , 129 S Ct 2252 (2009) The decision in *Caperton* has particular application to this case For example

- 1 Part of the alleged bias claimed in *Caperton* involved the judge’s personal relationship with a litigant, and his receipt of personal benefits derived from that relationship, *i e* , donations to his campaign for election In this case, the judge’s personal relationship with counsel for a litigant is at issue, together with his receipt of personal benefits derived from that relationship, *i e* , all expense paid fishing trips and accommodations at an ocean-front resort Canon 3E(1) does not distinguish between “a party or a party’s lawyer” where bias is alleged
- 2 Justice Kennedy’s majority opinion, finding a judge’s refusal to disqualify or recuse himself was a denial of constitutional due process, specifically relies upon the language of the Code of Judicial Conduct, including Canon 3E(1) The Court discarded the judge’s assertions of lack of personal interest on his part, as well as his assertion that there was no objective evidence of bias Instead, the Court adopted the “appearance of impropriety” and reasonableness language of the Code consistent with Appellants’ position in this case
- 3 The present case amply demonstrates the concern expressed by Justice Kennedy if the focus is on proof of evidence to show bias in fact, rather than a reasonable perception of bias “This is particularly true where, as here, there is no procedure for judicial fact-finding and the sole trier of fact is the one accused of bias Objective standards may also require recusal whether or not actual bias exists or can be proved Due process may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties *The failure to consider objective standards requiring recusal is not consistent with the imperatives of due process* ”

The personal relationships involving the judge and counsel for the Respondents create an appearance of impropriety, as well as a reasonable suspicion of bias, requiring the disqualification and recusal of the judge under the Code of Judicial Conduct and applicable laws These relationships, coupled with the overwhelming evidence that the judge abused his discretion time

after time in favor of Respondents, denied Appellants a fair and impartial forum and violated their rights to due process under the Constitutions of the State of South Carolina and the United States

CONCLUSION

For the reasons stated herein, Appellants request that this Court (a) reverse and vacate the order of March 7, 2006 assigning these cases to Judge Early and the orders issued by Judge Early which are the subject of this appeal and (b) remand this case for a trial on the merits before a fair, unbiased, disinterested and impartial judge

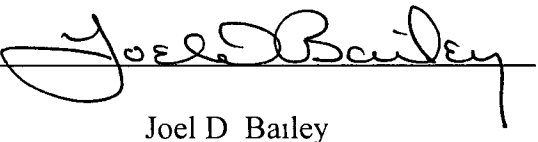
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October 11, 2011

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Doyet A Early, III, Circuit Court Judge

Case No 2005-CP-07-1990

RECEIVED

JUN 27 2011

S.C Supreme Court

Carolina Management Corporation of Beaufort, James B Jackson, Whaley R Hinnant, Jr , Mary Gasser Rawl and Rhoda G Rentz, individually and in their capacities as the Limited Partners of Pinewood Park Apartments, a South Carolina Limited Partnership

Appellants,

vs

Pinewood Park Apartments, a South Carolina Limited Partnership, Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group, Inc , AmReal Corporation a/ka and f/k/a USS Corporation a/k/a and f/k/a U S Shelter Corporation, ISTC Corporation, N Barton Tuck, Jr , and John Doe, a generic designation for a party or parties whose true identity is unknown

Respondents

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STATEMENT OF ISSUES ON APPEAL

- 1 Did Judge Early err in dismissing Appellants' claims and requiring them to pay costs and attorneys fees to Respondents because Appellants did not disclose privileged communications with their attorneys, thereby requiring reversal and vacation of his order of April 6, 2010, as well as prior orders upon which it is based? In this regard, (a) did Judge Early err in holding that Appellants, merely by filing their complaints, put at issue the statute of limitations and waived their attorney-client privilege concerning that issue? and (b) did Judge Early err in holding that language in other complaints filed by other litigants in other counties put at issue the statute of limitations in this case and waived their attorney-client privilege concerning that issue?
- 2 Did Judge Early err in imposing the sanctions of dismissal of Appellants' claims and requiring them to pay costs and attorneys fees to Respondents for alleged deficiencies in their discovery responses, thereby requiring reversal and vacation of his order of April 6, 2010, as well as prior orders upon which it is based?
- 3 Was Judge Early legally qualified to accept and/or retain the assignment to preside over this case? Specifically, (a) Did Judge Early violate the duty to fully disclose to Chief Justice Total and to Appellants and their counsel the full and complete nature of the long-term relationship between him and members of his family with Respondents' counsel, Ellis Johnston, and members of his family? (b) Did Judge Early violate the continuing duty to fully disclose to Chief Justice Total and to Appellants and their counsel the additional relationships between him and members of his family with Ellis Johnston and members of his family which developed following his acceptance of the assignment of this case, as well as the full and complete nature of any such relationships involving attorneys Anne Ross Rosen and Marvin Infringe after they became counsel of record?
- 4 Did Judge Early err in failing to recuse himself and vacate his prior orders?
- 5 Did Judge Early fail to insure that the Appellants' claims were being litigated in a fair and impartial forum, thereby depriving them of their rights to due process of law under the Constitutions of the State of South Carolina and the United States of America?

STATEMENT OF THE CASE

The complaint in this case was filed in the Beaufort County Court of Common Pleas on October 13, 2005, alleging seven causes of action at law for damages, including, *inter alia*, a claim for breach of fiduciary duty, and three (3) causes of action for equitable relief (Complaint, ¶¶ 100-142, R) Respondents answered on January 17, 2006, setting forth a general denial and twenty-two affirmative defenses including, *inter alia*, the statute of limitations, this defense specifically did not include any of Appellants' claims subsequent to 1999 (Answer, R) Prior to the filing of this case, a similar lawsuit had been filed against the Respondents in the Beaufort

County Court of Common Pleas in 2003 by the limited partners in Preview Apartments Limited Partnership ("Preview") One of the Appellants in this case, Rhoda G Rentz, is also an Appellant in the Preview case, Appellants' counsel in this case is also counsel for the Appellants in Parkview Following the filing of the Parkview case, counsel for the parties agreed to postpone any discovery in that case, as well as the filing of this and other related cases, in order to pursue a universal resolution for all cases involved Counsel agreed to jointly employ an independent appraiser to establish fair market values for each of the properties involved, and then to mediate any disputed values The appraiser did not complete the appraisals within the time frame required, and the mediation was canceled Thereafter, in 2005, suits were filed in Beaufort, Charleston and Orangeburg counties against Respondents on behalf of the limited partners in this and two other affordable housing projects/partnerships, *i.e.*, Palmetto Apartments, Orleans Gardens Apartments, and Roosevelt Gardens Apartments¹ On March 7, 2006, South Carolina Supreme Court Chief Justice Toal assigned all five cases to Circuit Judge Doyet A Early, III ("the judge") "to hear and decide all pre-trial motions and other matters pertaining to these cases, including the trial and post-trial motions" (Order, 3-7-06, R)

Between the time of his appointment and the present appeal, the judge held hearings on various motions filed by the parties, including hearings on October 4, 2006, November 19, 2007, July 1, 2008, December 9, 2008, July 6, 2009, August 24, 2009, January 14, 2010 and March 29, 2010 As a result of these hearings, as well as pertinent motions under Rule 59, SCRCPP, the judge issued orders dated August 18, 2008, December 17, 2008, March 3, 2009, June 2, 2009, June 16, 2009, July 28, 2009, April 6, 2010, September 16, 2010, October 7, 2010, October 22, 2010, and December 11, 2010, from which this appeal is being taken The hearings and orders initially involved Respondents' motions for dismissal and change of venue, but then included

¹ See Appellants' briefs in the related pending appeals

discovery issues, and eventually evolved into rulings by the judge requiring disclosure of privileged communications between Appellants and their counsel in this case, as well as the four related cases on appeals. Appellants retained other counsel and sought interim relief in this Court and also in the Court of Appeals, which was denied.²

Following this action by the Appellate Courts, the judge issued his order of April 6, 2010, dismissing Appellants' claims in all cases, as part of the sanctions which he imposed. (Order, 4-6-10, R.) Appellants' Amended Notice of Appeal was served on January 28, 2011. By Order dated March 9, 2011, these appeals were certified for review by the Supreme Court and transferred from the Court of Appeals.

STATEMENT OF THE FACTS

The facts and circumstances involving Pinewood Park Apartments Limited Partnership ("Pinewood") have several critical differences from those in the four related appeals. One primary difference is that Respondents' counsel in this case was also representing the limited partnership in connection with the very matters that are at issue in this case, this dual representation occurred both prior and subsequent to the filing of this case. During the course of their dual representation, neither Respondents nor their counsel made full disclosure to Appellants concerning their respective roles, as required of fiduciaries under the law of this State.

Appellants are limited partners in Pinewood. This limited partnership originally consisted of Carolina Realty Company, which was both a general partner and a limited partner, and Carson R. Rentz, the sole individual limited partner. The original partnership was formed in 1971 in order to construct and operate Pinewood Park Apartments, an affordable housing project for low-income citizens in Allendale, South Carolina. (Complaint, ¶ 21, R.) Through amendments,

²

On November 19, 2009, this Court denied Appellants' Petition for writs of prohibition and certiorari, on December 1, 2009, the Court of Appeals dismissed Appellants' appeal.

Carolina Realty remained the sole general partner, and Alfred E Rawl, Jr , James B Jackson and Whaley R Hinnant joined Rentz as limited partners In 1975, it was amended to include the Respondents and/or their predecessors as general partners, Carolina Realty Company, together with Messrs Rawl, Rentz, Jackson and Hinnant became limited partners (Complaint, ¶¶ 6-9, R) A detailed history of this partnership is set forth in the affidavit of Davis dated April 7, 2010, (¶ 8(c), R) Appellants incorporate by reference herein the statements contained in such affidavit

Original partners Rawl and Rentz are deceased Their widows, Appellants Mary Gasser Rawl and Rhoda G Rentz, acquired their interests in Pinewood from the estates of their late husbands, Mrs Rawl has a twenty five (25%) percent interest and Mrs Rentz has a ten (10%) percent interest (Complaint, ¶¶ 4,5, R) Appellants Jackson and Hinnant each own a twenty-five (25%) percent interest (Ibid , ¶ 8, R) Appellant Carolina Management Corporation of Beaufort (“Carolina Mgmt ”) owns a ten (10%) percent interest, having acquired it from Carolina Realty Company (Ibid, ¶1, R) The remaining five (5%) percent ownership interest is held by the Respondents Tuck (“Tuck”) and AIMCO, either directly or through its subsidiary, AmReal (Complaint, ¶¶ 9, 11, 12, R) The president of Carolina Mgmt is Laurance H Davis, Jr , who is also an appellant in the Parkview, Palmetto and Roosevelt cases The Appellants are elderly, in their late 70's and 80's, many have significant health issues (Cf , Rentz Aff ¶¶ 3, 4, R , Davis Aff ¶ 3, R , Hinnant Aff ¶ 1,2, R)

Following the inclusion of Respondents Tuck and US Shelter as general partners in 1975, the Appellants had little involvement in partnership affairs, as these were handled by the general partners While Mr Tuck remained as individual general partner, the corporate general partner changed through a series of mergers and acquisitions which are described more fully in the complaint, ultimately, Respondent AIMCO, through one or more of its subsidiaries, i e , Respondents AmReal and/or ISTC Corporation, acceded to the role of corporate general partner (Complaint ¶¶ 11-17, R) In 1984, Respondents notified Appellants that they had contracted to

sell the apartment complex to Management Assistance Group, Inc (“MAGI”) for the sum of \$1,320,000 00, plus interest (*Ibid* ¶ 31, R) The terms of the sale called for a small amount to be paid up front but the majority of the sales price was to be in a balloon payment, with accruing interest, in 1999, in the amount of \$1,730,000 00 (*Ibid*, ¶ 32, R) Although told by the general partners that they had vetted the purchaser’s ability to pay, the limited partners later discovered that the sale was actually made to a newly formed limited partnership with no assets other than the property being acquired (*Ibid*, ¶ 35, R , Davis Aff , ¶12, R , Hinnant Aff ¶5, R)

Prior to 1999, Respondents advised Appellants of the potential for a problem with the final balloon payment, but made repeated assurances that they would make every effort to protect the partnership and to recover any assets due to it (*Ibid*, ¶¶ 33, 39, R , Davis Aff , ¶12, R , Hinnant Aff ¶7, R) Appellants repeatedly informed Respondents of the increasing value of the apartment complex in light of the then-existing real estate market and requested that Respondents pursue retrieval of the property in the event the note was not paid (*Ibid*, ¶ 40, R , Davis Aff , ¶12, R) In 1999, the purchaser defaulted, and Appellants began to make inquiries of Respondents, as their general partners, concerning the status of any efforts being made to recover the assets of the partnership Respondents provided no substantive information to Appellants (*Ibid*, ¶¶ 64, 65, R , Davis Aff , ¶12, R) As a result, Appellants consulted legal counsel to investigate the status of the monies due to the partnership (Davis Aff ¶14, R , Hinnant Aff ¶ 6, R) When their counsel was unable to obtain information from the general partners, Appellants called for a special meeting of the limited partnership to discuss available options, including replacement of any general partners who were unwilling to pursue recovery of the partnership assets The special meeting took place in Beaufort at the office of attorney Joel D Bailey on September 14, 2000 The general partners sent AIMCO employee George Buchanan to the meeting to provide information to the limited partners Mr Buchanan was not familiar with all of the details of the transactions, and it was agreed that a subsequent meeting of the partnership

would take place which would be attended by other agents of the general partners possessing more knowledge (Davis Aff , ¶16, R , Complaint, ¶¶70-72, R , Tr 9-14-00, R)

The subsequent meeting occurred at AIMCO's office in Greenville, South Carolina on October 24, 2000 This meeting was attended by general partners N Barton Tuck, Jr and AIMCO vice president Patrick J Foye Appellants discussed with Mr Tuck and Mr Foye numerous options available to the partnership, including pursuing potential sale of the past-due note to third parties, as well as legal efforts to recover monies due under the past-due note or, alternatively, recovery of the apartment complex (Davis Aff ¶¶ 16-18, R , Complaint, ¶¶77-78, R , Pendarvis Aff, Ex 11, R) It was agreed that counsel would be hired for the partnership for this purpose Appellants expressed a willingness to receive the apartment complex in lieu of payment of the note, and Respondents assured Appellants that they would again explore this possibility Both Mr Tuck and Mr Foye indicated, however, that they would not wish to remain as general partners in the event the apartment complex was retrieved by the partnership Years later, as part of the discovery undertaken in this case, Appellants would learn the real reason why the general partners were unwilling to remain in that position if the apartment complex was retrieved (Davis Aff ¶¶17-18, R , Tr 10-24-00, R)

By letter of November 10, 2000, Respondents informed Appellants that attorney Arthur L Howson, Jr had been retained on behalf of the partnership (Appellants' Memorandum in Support of Motion to Compel, 11-19-07, Ex 11, R) On December 8, 2000, Mr Howson wrote to Mr Max Perry of Los Angeles, California, the general partner of the purchasing limited partner created by MAGI to hold title to the property Mr Howson's letter, written on behalf of Respondent AmReal, stated, "We hereby withdraw any authority to take any action disposing of any partnership property or assets " This indicates that Respondents had previously given the defaulting purchaser authority to dispose of the partnership property¹ This fact had not been disclosed to Appellants Furthermore, Mr Howson's letter asked for "recommendations" from

the defaulting purchaser “with regard to the disposition of the assets ” Respondents provided Appellants’ counsel with a copy of this letter, and it was referenced in the letter from Appellants’ counsel to Mr Howson on December 15, 2000 (*Ibid* , R) At this point in time, Appellants were operating under the assumption, based on Respondents’ representations at the October, 2000 meeting, that the Respondents were taking appropriate action to protect the partnership assets

In 2002, Respondents informed Appellants that the HUD reserve account for Pinewood exceeded the mortgage balance, and that the defaulting purchaser was willing to return the apartments, Appellants then informed Respondents that they wanted to explore this offer, and requested information concerning the amount of money in the HUD reserve account (Complaint, ¶¶ 82, 83, R) Respondents then informed Appellants that they did not want to accept the return of the property, and would resign as general partners, provided Appellants paid compensation and released them from all liability (*Ibid*, ¶¶ 84, 86, R) Appellants requested financial information as to the property, including, *inter alia*, verification of the amount of the HUD reserve account, the existence and amount of any liens on the property, and HUD’s position as to any reconveyance to the partnership Respondents never provided this information or documentation (*Ibid*, ¶85, R) Through the investigation of our counsel and, years later, through discovery in this and the related cases under appeal, Appellants would learn that MAGI and its principal, Dean Earl Ross, had been the subjects of federal criminal proceedings in California concerning management fee kickback schemes on affordable housing projects, and that Respondents had also been the subject of a criminal investigation involving a kick-back scheme for management fees associated with many of their properties Appellants also discovered that Pinewood was one of the properties involved in the kickback schemes Respondents had negotiated with HUD and the United States Department to pay a \$5,000,000 00 fine to end the criminal inquiry (Davis Aff ¶36, R , Hinnant Aff ¶20, R)

Following the filing of the complaint in Parkview in April 2003, Respondents’ counsel,

Ellis M Johnston, II, (“Johnston”) wrote to Appellants’ counsel, advising that he represented the general partners of Pinewood, indicating Respondents’ opposition to having the property returned and seeking Appellants’ consent to the resignation of the general partners if that occurred (Johnston Aff Ex A, R) Between June 2003 and September 8, 2003, counsel for the parties exchanged various communications primarily relating to information sought by Appellants in order to evaluate Respondents’ proposals concerning return of the properties, Johnston indicated in his correspondence that there was a “tolling agreement” in place concerning these matters (Johnston Aff Exs A-G, R) Johnston did not, however, indicate that Respondents would pursue litigation against the defaulting purchaser, his correspondence related only to negotiations with the defaulting purchaser On September 8, 2003, Johnston filed a lawsuit against the defaulting purchaser in the Greenville County Court of Common Pleas on behalf of the Pinewood partnership in order to collect “the sum of \$1,045,520 00, together with interest at the rate of 10 25%, compounded annually, and for attorney’s fees and costs ” (Pendarvis Aff ¶102, Ex 93, R) Johnston wrote Appellants’ counsel that same day, indicating his intent “to obtain an additional extension of the Tolling Agreement,” but never mentioned the filing of the suit (Johnston Aff Ex G, R) This lawsuit did not become known to Appellants until 2007

Between September and December 2003, Johnston informed Appellants’ counsel that the defaulting purchaser wished to “purchase” the apartment complex for \$300,000 00 Notwithstanding the obvious inconsistency of purchasing property which they already owned, Appellants’ counsel expressed concerns that the “purchase price” being offered was approximately 1/3 of the *appraisal of the property which had been conducted by Respondents* (Johnston Aff Exs H-J, R , Complaint, ¶¶ 88-95, R) On April 19, 2004, unbeknownst to Appellants, the Greenville County Clerk of Court informed Johnston that the lawsuit which he had filed for Pinewood was about to be dismissed because Johnston had never provided proof of service The lawsuit was dismissed for lack of proof of service by order dated July 26, 2004,

which was sent to Johnston Appellants were not informed of this action Johnston, however, re-filed the lawsuit under a new civil action number by complaint dated May 11, 2004 Johnston was notified by the Greenville County Clerk of Court on October 24, 2005 that the second Pinewood lawsuit was up for trial during the week of November 7, 2005 On October 27, 2005, the Greenville County Clerk of Court again informed Johnston that the case would be dismissed for lack of service On November 7, 2005, Johnston filed a "Stipulation of Dismissal", certifying that the case had not been served and that dismissal was appropriate (Pendarvis Aff Ex 93, R) Johnston did not inform Appellants or their counsel of any of the facts relating to the second lawsuit (Complaint, ¶98, R , Pendarvis Aff ¶102, R) Notwithstanding that the stipulation dismissing the lawsuit was "without prejudice," the effect of the dismissal under South Carolina law was exactly the opposite in light of the dismissal of the first suit, dismissal of the second suit operated "as an adjudication upon the merits " Rule 41(a)(1), SCRCP Accordingly, Johnston's failure to prosecute the suit effectively eliminated the opportunity for subsequent suits to recover the property or the sums due under the note

Less than a month prior to the second dismissal of the Greenville County suit against the defaulting purchaser, Appellants had filed their suit against the Respondents, as noted above From the time this case was filed, the primary agenda of the Respondents and their counsel was to prevent Appellants' claims from ever being heard on the merits Respondents were unsuccessful on two (2) prior attempts before two (2) separate judges in the Parkview case to have the claims dismissed, and thus avoid a determination on the merits Once the remaining cases were filed and assigned to Judge Early, similar motions to dismiss were made by Respondents These motions were based on the defense of the statute of limitations and were limited to Palmetto, Roosevelt and Orleans As shown above the statute of limitations defense in Pinewood is limited to Respondents' conduct prior to November, 1999 The defense, as asserted, was never applicable to events occurring after that time Therefore, no legitimate

argument could be presented for the proposition that the Pinewood case was barred by the statute of limitations as to any acts or omissions by Respondents subsequent to November, 1999. Accordingly, when Respondents subsequently moved for summary judgment, based upon the statute of limitations defense, their motion did not include Pinewood.

The summary judgment motion of Respondents, made with respect to Palmetto, Orleans and Roosevelt, was denied (Order of 6-5-08, R). This was the last time that the judge declined any request for substantive relief by counsel for Respondents in any of these cases. Instead, he began to impose a double standard on the parties, holding Appellants to a significantly higher standard than Respondents. He ordered Appellants to produce privileged communications with their counsel in this case and the related cases, and threatened to dismiss their claims if they failed to do so. Appellants were thereby put in the untenable position of having to give up their right to privileged communications with their attorney in order to comply with the judge's order and preserve their claims. Notwithstanding the detailed nature of Appellants' discovery responses and numerous supplements thereto, the judge adopted the argument of Respondents' counsel that the responses were deficient. This is particularly important in this case, as discovery in Pinewood, by agreement of counsel, was held to a minimum because of the numerous differences between it and the other cases (Hinnant Aff ¶13, R , Appellants' Memorandum in Opposition to Defendants' Motion to Compel, p. 8, Fn. 1, R). The differences were so significant that Pinewood was not even included in the mediation which occurred in March 2008, in fact, no mediation has ever been held in Pinewood (Hinnant Aff ¶14, R). Appellants sought interim appellate relief, which was denied. Appellants declined to produce the privileged documents and were unable to satisfy the judge as to their discovery responses. This led to his dismissal of their claims in each of these cases. This course of events, and Appellants' efforts to avoid the dismissal of their claims, are hereinafter discussed in greater detail.

ARGUMENTS

Given the time and space constraints applicable to these appeals, it is impossible to identify and discuss each abuse of discretion by the judge over the past five (5) years he has presided over these cases, as he repeatedly made rulings which were not supported by the evidence or were controlled by errors of law. The arguments in this appeal, therefore, seek to address the more obvious and egregious rulings and conduct on his part.

1 Judge Early erred in imposing the sanctions of dismissal of Appellants' claims and requiring them to pay costs and attorneys fees to Respondents for Appellants failure to disclose privileged communications with their attorneys, therefore, his order of April 6, 2010, as well as prior orders upon which it is based, should be reversed and vacated. (Issue 1, Orders dated 12-17-08, 3-3-09, 6-2-09, 6-16-09, 7-28-09, 4-6-10, 9-16-10, 10-22-10, 12-11-10) Dismissal of Appellants' claims, which had been sought from the outset by Respondents' counsel, was the first and only sanction imposed or even seriously considered by the judge for what he perceived to be misconduct on the part of the Appellants. Dismissal of Appellants' claims, coupled with an award of attorneys fees and costs, was the harshest sanction short of incarceration that the court could impose, Appellants contend that it should not have been utilized given the facts of this case, and that the judge abused his discretion in doing so. This is particularly true in light of the facts that (1) less draconian alternatives were available, (2) Appellants offered to submit to lesser sanctions and took extraordinary steps to avoid the dismissal, (3) the judge repeatedly adopted arguments of Respondents' counsel as evidence for the factual basis to support his decision, and (4) the judge repeatedly deviated from the law of this State in order to effect the dismissal.

“When the court orders dismissal, or the sanction itself results in dismissal, the end result is harsh medicine that should not be administered lightly. The moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction.” *Griffin Grading and Clearing, Inc. vs Tire Service Equipment Mfg Co Inc* 334 SC 193, 511 SE2d 716

(Ct App 1999) (striking of pleading as discovery sanction reversed) “The sanction imposed should be reasonable, and not go beyond the necessities of the situation to foreclose a decision on the merits of a case. The sanction should be aimed at the specific misconduct of the party sanctioned. The sanction should be a rifle shot, not a shotgun blast.” *The Balloon Plantation Inc vs Head Balloons, Inc et al* 303 SC 152, 399 SE2d 439 (Ct App 1990) (trial court’s dismissal for failure to comply with discovery order reversed, calling the sanction “a hydrogen bomb”) Dismissal has been held an inappropriate sanction where “any number of lesser, more narrowly tailored sanctions would have sufficed.” *Karppi v Greenville Terrazzo Co Inc* 327 SC 528, 489 SE2d 679 (Ct App 1997) The record in this case is clear that the judge did not comply with the law of this State, as cited above, in imposing sanctions in this case.

The judge dismissed Appellants’ claims on April 6, 2010, (“Dismissal Order”) finding that Appellants’ were in contempt for failing to abide by his orders of March 3, 2009, (“Discovery Order”) requiring them to provide “adequate responses to discovery requests” and July 28, 2009 (“Privilege Order”) requiring them to produce privileged communications with their counsel. On April 22, 2010, Appellants moved to alter or amend the Dismissal Order. (Motion 4-22-10, R.) The judge denied this motion on September 16, 2010. (Order 9-16-10, R.) A review of the Dismissal Order necessitates a review of the two underlying orders. The present discussion concerns the Privilege Order, the Discovery Order is discussed in detail under Issue 2.

Rule 26(b)(1), SCRCP, excludes privileged materials from documents and information normally subject to discovery. “Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter.” (Id., Emphasis added) The exemption of privileged materials from discovery, particularly those protected under the attorney-client privilege, rests upon the historical and societal value attributed to that privilege. As this Court has stated

The attorney-client privilege is based upon a public policy that the best interest of society is served by promoting a relationship between the attorney and the client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client

within the relationship is maintained. The attorney-client privilege belongs to the client and not the attorney, and may be waived only by the client. *Wilson v Preston*, 378 SC 348, 662 SE2d 580 (2008), citing *State v Doster*, 276 SC 647, 284 SE2d 218 (1981).

“The attorney-client privilege also applies to communications originating from the lawyer rather than from the client.” *Marshall v Marshall*, 282 SC 534, 320 SE2d 44 (Ct App 1984). “The trial court must determine the question of privilege without first requiring disclosure of the substance of the communication.” *Wilson supra*. In this regard, the “trial court should not require disclosure of attorney-client communications to other parties without first determining whether the communications are privileged by inquiring into all the facts and circumstances of the communication.” *Ibid*. As shown in the following discussion, the judge did not do this.

Both sides sought discovery from attorneys, however, there was a substantial and critical difference in their positions. Appellants sought information relating to attorneys hired by Respondents *to represent the limited partnership in separate proceedings*, ostensibly to recover partnership assets. Two attorneys, Mr. Howson and Mr. Brown, were listed as witnesses by Respondents in their initial discovery responses. The role of these attorneys was a critical component of Appellants’ action, particularly with respect to their claim for breach of fiduciary duty. (Bailey Aff 3-30-10, ¶13r, R)

Mr. Howson was hired to represent the partnership following the October 2000 meeting. Appellants were unaware at that time of the tremendous conflict of interest on the part of Respondents, whereby their role as general partner directly conflicted with their own self interest in avoiding criminal prosecution. The instructions given to the attorneys by Respondents concerning the nature and scope of their retention were clearly relevant, Respondents, however, asserted a claim of attorney-client privilege to keep this information from Appellants.

Appellants served discovery requests and deposition notices relating to the involvement of these attorneys *with respect to their representation of the limited partnership, they did not seek information concerning any communications between Respondents and their counsel in this case*

When Respondents asserted the attorney-client privilege, Appellants filed a motion to compel (R) Appellants' positions were in keeping with the existing law of this State, and included, *inter alia*, (1) Appellants were members of the partnership "client", and therefore within the persons entitled to share privileged communications, (2) Respondents had waived the privilege by providing Appellants with communications generated by these attorneys and inviting Appellants to communicate directly with the attorneys, (3) Respondents were required as fiduciaries to make full disclosure to Appellants, including communications with counsel for the partnership, and (4) the evidence of fraud resulting from the Respondents' conflict of interest was sufficient to place Appellants within the "crime-fraud" exception to the attorney-client privilege³ The judge rejected these arguments at the urging of Respondents, and ruled that, not only were Appellants not entitled to this information, but that every document listed on the 71-page Privilege Log of Respondents was privileged and not discoverable (Order 12-17-08, R), he made this ruling without ever seeing a single document, notwithstanding that Appellants had specifically asked him to conduct an in-camera review of those documents Furthermore, he received no information concerning the privileged nature of these documents other than from Respondents' counsel, by way of argument or statements in their memoranda Therefore, there was no proper evidence to support his findings in this regard *Higgins v MUSC*, 326 SC 592, 486 SE2d 269 (Ct App 1997) ("factual statements of the attorneys, whether made during argument or in written briefs or memoranda may not be considered by the court ") Likewise, he clearly did not inquire "into all the facts and circumstances of the communications," as required by *Wilson supra*, and *Tucker v Honda of SC Mfg, Inc* , 354 SC 574, 582 SE2d 405 (2003) Accordingly, there was a clear abuse of discretion, as the order was not supported by the evidence and was

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For a detailed discussion of these arguments which were presented to the lower court, see Appellants' Memoranda dated 11-19-07, R and 1-16-09, R

controlled by an error of law, the order of December 17, 2008 should be vacated

Conversely, Respondents sought documents relating to Appellants' privileged communications with their attorneys *in this case*. This did not occur until August, 2008, even though many of these documents had been listed by Appellants on their Privilege Log since 2005. Respondents claimed that the documents were discoverable because they were relevant to the statute of limitations issue. It is important to note that the communications which Respondents sought were communications between Appellants and their counsel *in this litigation*. The privileged nature of the communications between Appellants and their counsel, and the duty of counsel to protect such communications from disclosure, was acknowledged by counsel for Respondents as early as 2007⁴ (Tr 11-19-07, p 40, ll 22-24, R)

In an attempt to get around this obstacle and the prohibition of Rule 26(b), Respondents claimed that Appellants had waived their attorney-client privilege and work product protection. "The definition of waiver, approved by this court in many cases, is 'the intentional relinquishment of a known right.' It may be either express or implied. If claimed to have been express, *it must appear to have been a clear, unequivocal, and decisive act showing such a purpose*. If claimed to have been implied, *it must appear that the opposite party has been misled to his prejudice* into the honest belief that such waiver was intended or consented to." (Emphasis added) *W S Gray Cotton Mills v Spartanburg County Mills* 139 SC 223, 137 SE 684 (1927). As herein discussed, Respondents failed to prove that Appellants waived their attorney-client privilege.

There was no express waiver by Appellants, as they had asserted from the outset that their communications with their counsel were privileged. Therefore, Respondents advanced the theory that Appellants had *impliedly* waived their privilege and protection through what they called an

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In arguing against Appellants' request for information and documents concerning attorneys hired for the partnerships, Mr. Johnston stated to the judge, "Clearly Mr. Bailey is not going to turn over what he sent to his limited partners and what they sent to him."

“at issue” waiver Under Respondents’ theory, Appellants, *merely by filing their complaint*, had put the statute of limitations “at issue” and thereby impliedly waived any claim of privilege or protection as to any documents or information which might be relevant to that issue Appellants repeatedly pointed out to the judge that there was absolutely no support for such a position under the law of this State and that, in fact, South Carolina law was exactly the opposite - the statute of limitations is an affirmative defense under Rule 8(c), SCRPC, and must be affirmatively pled or it is waived This requirement was clearly recognized by Respondents, and is confirmed by their own Answer, which asserts the statute of limitations *as an affirmative defense* Furthermore, Respondents never made any showing that they had been misled to their prejudice into believing Appellants had intended or consented to any implied waiver Cf *W S Gray, supra*

Nevertheless, the judge again adopted the argument of Respondents’ counsel and held that, *merely by filing their complaint*, Appellants had put the statute of limitations at issue and impliedly waived any privilege or protection concerning any documents which might be relevant to that issue (Order, 7-28-09, p 6, R , Order, 4-6-10, p 20, R) The Discovery Order states that the finding of implied waiver was derived exclusively from Respondents’ memorandum and their argument concerning the statute of limitations This reliance upon arguments of counsel is contrary to the laws of this State Cf *Higgins, supra* The Dismissal Order states, “The factual bases for the Court’s rulings on the privilege issues have not changed ” (Order, p 20, R) This order states that the judge “considered at length” the arguments and memoranda of Respondents’ counsel, that he “disagrees” with Appellants’ arguments showing the factual and legal errors in the Privilege Order, and concludes, “*Once privilege was waived as to the documents (by mere filing of the suits and/or by reasons of the allegations in the Orleans and Roosevelt complaints) they were subject to discovery in all five cases*” (*Ibid* , emphasis added) There is no law in this State to support such a finding, the judge abused his discretion and the order should be vacated

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The Dismissal Order does not quote language from the Orleans and Roosevelt complaints which it references, the reference apparently relates to Respondents' assertion, *in their memoranda*, that certain language in the complaints in the two cases impliedly put at issue the statute of limitations. These two complaints refer to the parties' agreement to forgo discovery and the filing of additional lawsuits in order to appraise the properties and mediate all claims, and allege that Respondents misled Appellants, thereby resulting in a delay of their ability to recover their damages. A fair reading of these two complaints reveals that the statute of limitations is not mentioned at all, and that the allegations only serve to provide the basis for Appellants' claims for damages resulting from the delay occasioned by the Respondents' misuse of the appraisal and mediation process. It does not meet the test for implied waiver under South Carolina law. The implied waiver must be "reasonably inferable" from the conduct of the party. *Canal Insurance Company v Caldwell*, 338 SC 1, 524 SE2d 416 (Ct App 1999), it must involve "circumstances *indicating an intent to waive*" (Emphasis added). *Bonnette v State*, 277 SC 17, 282 SE2d 597 (1981). "Waiver will not be implied from doubtful acts." *Zeller v Cumberland Truck Sales*, 272 SC 558, 253 SE2d 111 (1979). The language in the two complaints does not meet this criteria for waiver, to interpret the allegation concerning delay and resulting claim for damages as injecting the issue of the statute of limitations so as to impliedly waive any attorney-client privilege with respect to such issue is a gross distortion of the language of the pleadings, represents a deviation from the law of this State and constitutes an abuse of discretion by the judge. Incredibly, the judge adopted Respondents' arguments and held that such language justified his finding that Appellants had waived their right to claim privilege or protection, *even though the complaint in this case does not contain the language referenced and relied upon*.

The dismissal of Appellants' claims and imposition of monetary sanctions based on the implied waiver arguments demonstrates a clear abuse of discretion. "An abuse of discretion occurs when the decision of the trial judge is unsupported by the evidence or controlled by an

error of law ” *Austin v Stokes-Craven Holding Corp* , 387 SC 22, 691 SE2d 135 (2010) The judge’s reliance upon arguments of counsel, as set forth in their oral arguments, memoranda and proposed orders, in order to establish a factual basis for his decision, shows that his orders of July 28, 2009 and April 6, 2010 conflict with *Higgins supra* they were not supported by proper evidence, and were clearly controlled by errors of law Accordingly, they should be vacated

Respondents’ argument that Appellants had waived their attorney-client privilege, so readily adopted by the judge, had previously been rejected by the Honorable Gary E Clary, who was appointed as Special Master for the specific purpose of examining this issue The judge, confronted with Appellants’ request for an in-camera review of all documents claimed to be privileged by either party, acknowledged that he did not “have the time and the resources to go through all of the attorney-client documents,” and referred the privilege issue to Judge Clary, including documents concerning the lawyers hired to represent the partnerships (Tr 12-9-08, pp 49-61, R , quote at p 59, ll 17-19, R , Orders, 12-30-08, 1-31-09, 4-9-09, R) The parties were required to share equally the fees charged by Judge Clary for his services as Special Master

Judge Clary spent several days reviewing the documents Respondents reasserted their arguments concerning implied waiver, Judge Clary rejected these arguments (Amended Report p 4, R) Judge Clary also ruled that certain documents which Respondents claimed to be privileged were not privileged and were discoverable by Appellants (Ibid, p 14, R) During Judge Clary’s review, Appellants’ counsel discovered that counsel for Respondents had, for several months, been in possession of documents from the Bryan Cave law firm, which Appellants had sought in their prior discovery requests Respondents had not disclosed that they were in possession of this evidence Once these documents became known to Appellants, Respondents immediately sought to include them on their growing Privilege Log The issue of their “privileged” status was added to the task of Judge Clary He determined that many of these documents were not privileged, and ruled that they were subject to discovery by Appellants

When the judge adopted Judge Clary's rulings *per se* (Order 6-2-09, R), Respondents moved that Judge Clary's rulings be altered in order to reinstate the protections earlier given by the judge. They also asked that the judge reject Judge Clary's findings concerning the privileged nature of Appellants' communications with their counsel (Rule 59 Motion of Respondents 6-15-09, R). Appellants also noted significant errors in Judge Clary's findings, including, *inter alia*

- (1) his adoption of Respondents' "divergence" theory which is not recognized in South Carolina and which materially alters South Carolina law as to fiduciary duties, *Cf, Anthony v Padmar Inc* 320 SC 436, 465 SE2d 745 (Ct App 1995) (general partners owe fiduciary duties to limited partners, and violate such duties when they fail to disclose all known information that is significant and material, especially in transactions in which they have a pecuniary interest), *Beck v Clarkson*, 300 SC 293, 387 SE2d 681 (Ct App 1989) (partners' fiduciary duty is continuous, and extends even past dissolution of the partnership) (Bailey Aff 3-30-10, ¶13f, R),
- (2) his rejection of the "common interest doctrine" concerning privileged communications, finding Appellants' waiver of the attorney-client privilege concerning communications made to persons possessing a common interest with Appellants. The judge's adoption of Judge Clary's rulings conflict with the law of this State. *Cf Tobaccoville USA, Inc vs McMaster*, 387 SC 287, 692 SE2d 526 (2010) (common interest doctrine adopted by Supreme Court under facts presented "The common interest doctrine protects the transmission of data to which the attorney-client privilege or work product protection has attached when it is shared between parties with a common interest in a legal matter. The inquiry is whether or not the matters discussed in the allegedly privileged documents are matters of common interest. So long as the documents at issue were covered by an applicable privilege, when created, that privilege continues until waived. When the common interest doctrine applies, it creates an exception to any potential waiver of privilege.")

Again, based on nothing but the arguments of Respondents' counsel, the judge modified his Order of June 2, 2009 to accommodate the requests of Respondents' counsel and deny the relief sought by Appellants. By Order of July 28, 2009, he altered Judge Clary's rulings, providing Respondents with the protections they sought while requiring Appellants to produce communications with their counsel which Judge Clary had protected as privileged.⁵ The Privilege

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Prior to the entry of the 7-28-09 order, Appellants' counsel objected to it on the basis that Rule 53, SCRCF, prohibited the judge from altering the rulings of the Special Master. This issue was

Order did not provide for any redaction of counsel's impressions or any other protections, if obeyed, it would render meaningless their attorney-client privilege, and place Appellants in the position of providing Respondents with their "game plan" for this litigation (Bailey Aff 3-30-10, ¶13g, 16, R) Furthermore, the order applied to all limited partners in all five cases, even though the Parkview Appellants were clearly in a different position than those in the other cases, having filed their case as early as 2003

Appellants made several attempts and efforts to find some alternative to the dilemma occasioned by the Privilege Order These included, *inter alia*

- (1) First, they sought to have the order amended under Rule 60, SCRCP, in order to correct mistakes of fact and law At the urging of Respondents' counsel, this motion was denied by the judge (Order 4-6-10, p 28, R)
- (2) Appellants were concerned that a partial production of their communications with their counsel could constitute a total waiver of their attorney-client privilege, in light of the decision in *Marshall supra* (disclosure to a third party "waives the attorney client privilege not only to the specific communication disclosed but also to all communications between the same attorney and the same client on the same subject ") (Tr 12-9-08, p 55, l 17- p 56, l 7, R) The judge's ruling also began to cause Appellants to avoid communicating with their counsel, adversely affecting their representation in this case (Davis Aff ¶42, R , Bailey Aff 3-29-10, ¶25, R , Pike Affidavit, ¶8, R , Hinnant Aff , ¶27, R , Rentz Aff ¶8, R , Reynolds Aff , ¶6, R , Hodge Aff ¶ R , Ivey Aff , ¶9, R)
- (3) At the urging of Respondents' counsel, the judge threatened to dismiss their claims if Appellants withheld their privileged communications Appellants urged the judge to consider lesser sanctions, including a contempt citation which would entitle them to an immediate appeal (Bailey Aff 3-30-10, ¶21, R) This request was opposed by Respondents' counsel and, again, the judge acceded to their wishes, and prepared to dismiss their claims This placed Appellants in the untenable position of either (1) complying with the order, which would destroy their attorney-client privilege and give Respondents unrestricted access to their confidential communications with their counsel, or (2) declining to comply with the order, which would put them at risk of having their claims dismissed and deprive them of a trial on the merits

addressed in Appellants' prior Petition for Writ of Prohibition and the arguments stated therein are adopted and incorporated into this brief (R) See also Bailey Affidavit 3-29-10, ¶ 17, R

- (4) Through independent counsel, Appellants then sought relief in the appellate courts, as documented above. Simultaneously, Appellants asked Chief Justice Toal to transfer their cases to the Business Court, but their request was denied.
- (5) Appellants filed a motion for protection on February 22, 2010, requesting that the judge consider other options, including permitting them to submit their attorney-client documents under seal for an in-camera review. The judge denied this request. (Motion for Protective Order, R. , Order 10-22-10, R.)⁶

On April 6, 2010, the judge executed the order prepared by Respondents' counsel, finding Appellants in contempt of court and imposing the harshest sanction possible: dismissal of their claims and requiring them to pay attorneys fees and costs to Respondents. As shown above, this amounted to an abuse of discretion, it is not supported by the evidence in the case, and is controlled by numerous errors of law. *Cf., Grosshuesch v. Cramer*, 377 SC 12, 659 SE2d 112 (2008) (trial court erred in holding party in contempt for failing to respond to discovery requests which would have required party to waive privilege against self incrimination). If it is allowed to stand, this decision will affect not only the litigants in this case, but litigants in all future cases. Specifically, future litigants, *merely by filing complaints*, will be deemed to have put at issue the statute of limitations and impliedly waived their attorney-client privilege as to that issue, they may be deemed to have waived their attorney-client privilege because of language in other complaints filed by other parties in other cases. Future defendants will no longer have to raise the statute of limitations as an affirmative defense and Rule 8(c), SCRCP will become a nullity. Future litigants standing in a fiduciary relationship will be confronted with a significant change in existing law, as fiduciary duties will no longer include full and complete disclosure of significant and material information, including disclosure of conflicts of interest. Fiduciary duties will no longer be continuing in nature, throughout the fiduciary relationship, but will end when

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Although the judge denied Appellants' request to submit documents under seal for in-camera review, he earlier granted Respondents' request to submit documents to him under seal for in-camera review as part of their efforts to avoid the rulings of Judge Clary. (Order, 8-31-09, R.)

there is a “divergence of interest” between members within the relationship Appellants contend that these deviations from existing law should not be adopted by this Court, as they were by the judge, accordingly, the orders discussed above should be reversed and vacated

2 Judge Early erred in imposing the sanctions of dismissal of Appellants’ claims and requiring them to pay costs and attorneys fees to Respondents for alleged deficiencies in their discovery responses, thereby requiring vacation of his order of April 6, 2010, as well as prior orders upon which it is based **(Issue 2) (Orders dated 12-17-08, 3-3-09, 3-3-09 (Granting in Part and Denying in Part) 4-6-10)** Apparently recognizing the deficiencies and reversible error of the rulings in the Privilege Order, Respondents sought to find a back-up excuse to justify the dismissals They did this by accusing Appellants of failing to comply with discovery rules Again, the judge readily adopted Respondents’ position, notwithstanding that it was not supported by proper evidence or existing law

In the Dismissal Order, and at the request of Respondents’ counsel, the judge found Appellants in contempt of court for failure to comply with his prior order of March 3, 2009 (Discovery Order), and dismissed Appellants’ claims in all five (5) cases as the sanction for the contempt He further ordered that Respondents were entitled to “receive a monetary award to compensate them for the reasonable costs and attorneys fees incurred in connection with their Motion to Compel Discovery and their two Motions for Sanctions ” Appellants contend that the rulings of the judge in this regard result from and are tainted by the bias and prejudice hereinafter discussed, and evidence the judge’s imposition of a double standard concerning discovery

The finding of contempt and the imposition of sanctions also result from an abuse of discretion on the part of the judge and should accordingly be vacated, as these are unsupported by the evidence and controlled by errors of law *Austin, supra* The factual findings in the Dismissal Order and the Discovery Order were taken from the memoranda supplied to the judge

by counsel for Respondents. As previously noted, it is improper for a judge to use the unsworn statements of counsel, whether in argument or in a memorandum, to establish factual findings. Cf., *Higgins, supra*. The factual findings of both orders simply parrot the arguments of Respondents' counsel and the language of their memoranda.

In order to understand the deficiencies in the Dismissal Order, it is necessary to examine the underlying Discovery Order upon which it is based. The Discovery Order followed a motion to compel filed by Respondents, which was heard on December 9, 2008. The motion was accompanied by a memorandum containing Respondents' arguments, which was filed the day before the hearing. The Discovery Order mirrors the memorandum and references seventeen (17) answers to interrogatories and forty three (43) responses to production requests which the judge found to be "incomplete and inadequate." This finding is not supported by the evidence. An examination of Appellants' discovery responses clearly shows that they met or exceeded the requirements of the South Carolina Rules of Civil Procedure, and certainly exceeded the discovery responses provided by counsel for Respondents. This Court is respectfully requested to examine these responses in determining whether the judge abused his discretion concerning their adequacy. Appellants' discovery responses are addressed in the affidavit of Thomas A. Pendarvis, (R.) Due to the voluminous nature of the responses, it is impossible to discuss each of them, however, the Court is directed to the following examples:

1. On July 14, 2005, Appellants responded to Respondents' initial discovery requests in this case. The responses were based upon the information and documents in the possession of Appellants or their counsel at that time, and included, *inter alia* (a) valuation for the Parkview apartments, (b) eleven pages listing persons having knowledge or information concerning the facts of the case and a summary of their testimony, (c) seven pages listing generic categories of witnesses, as the specific individuals were then unknown, (d) twenty four pages specifically identifying documents in Appellants' possession, and enclosing copies of any documents not in possession of Respondents, and (e) information relating to the expert witness who had been retained. *The information produced was in addition to more than*

35,000 pages of documents already produced in the case⁷ (Appellants' answers to interrogatories, R) Appellants also provided Respondents with a privilege log for documents being withheld under a claim of privilege between 2000 and 2003 Counsel for Respondents made no complaint regarding these responses

- 2 Appellants supplemented their discovery responses on November 6, 2007 by adding witnesses and documents relating to insurance valuations for the subject properties (Pendarvis Aff, Ex 10, 11, R) Supplemental responses were provided on numerous occasions prior to the issuance of the Dismissal Order as information became known to Appellants These included, *inter alia*, supplements identifying witnesses and documents relating to (a) assessed values of the subject properties (Pendarvis Aff, Ex 13, 14, 22, 23, R), (b) a title history for each of the subject properties (Ibid, Ex 21, R), and (c) appraised values, HUD rental comparability studies and subsequent sales information for the subject property (Ibid, Ex 29 and 30, R) These supplements do not include the discovery responses by Appellants to Respondents' second set of discovery requests dated August 28, 2008
- 3 In August, 2008, more than three years after the filing of this case, less than one year before the trial date in May, 2009, and without having taken a single deposition, counsel for Respondents served a second set of discovery requests (Ibid, Ex 45, R) These requests were incredibly vague, burdensome, and overly broad, and far exceeded the abuses described in *Oncology and Hematology Associates of SC vs SC DHEC*, 387 SC 380, 692 SE2d 920 (2010) For example, interrogatory #13 sought voluminous information regarding accountants, financial planners and advisers, tax advisers or preparers, et al with regard to each of the partnerships, properties, notes, sales transactions, purchasers, subsequent sales, Mr Hediger, subsequent purchasers and/or the Respondents Interrogatory #17 required Appellants to "describe in detail all actions taken to study, assess, analyze, estimate or project the impact of the changes in the tax laws during the 1980s on the value of, or market for, the Properties or any other low-income housing or HUD-regulated properties " The interrogatories had no time frames, so that they covered the entire life span of each of the Appellants (Ibid, R) The Discovery Order sanctioned these and other interrogatories, finding Appellants' answers to be "incomplete and inadequate "
- 4 Respondents' requests for production were no better, requesting, for example, "all documents concerning any of the properties, the limited partnerships, the notes, the sales transactions, the purchasers, Hediger, subsequent sales transactions, and subsequent purchasers " (Ibid, Requests 1-10, R) They also requested documents regarding tax information, including estate and gift taxes and

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Nearly 34,000 pages of these documents came from one source, *i e*, Gary Hediger d/b/a Hediger Enterprises, Inc Although less than 5,000 pages of these actually related to the five (5) properties involved in the cases on appeal, Appellants' counsel was required to review each page in order to determine any relevancy to the issues involved in this litigation (Tr 7-1-08 p 34, ll 10-24, R)

investments (Ibid, requests #11 and 12) Incredibly, although the Respondents had managed the respective properties, and the Appellants, as limited partners, had nothing to do with them since 1975, Respondents sought documents concerning the “operating statements, financial statements, balance sheets, rent rolls” and other financial information for these properties, as well as documents concerning the “physical condition” of the properties (Ibid, requests #13 and 16), as former managers, Respondents already had access to these documents *Respondents even sought ‘all documents reflecting criminal activity or suspected criminal activity at the Properties or in the immediate vicinity of the Properties (request #17)* The Discovery Order nevertheless sanctioned these requests, finding Appellants’ responses to be “incomplete and inadequate ”

5 Based on the ages and health of Appellants, some of whom are widows or heirs of original partners, Appellants responded to the best of their ability Many Appellants did not possess any responsive documents, and Appellants’ counsel specifically pointed these facts out to the judge at the hearings on the Respondents’ motions For example, on December 9, 2008, counsel stated

a “I can show you 15 supplemental discovery responses or better that we have done Every time we get something, we pass it along to them We send it in If I’ve got it, they’ve got it ” (Tr 12-9-08, p 37, l 18-21, R)

b “There were 4 primary partners originally in Parkview Mr Davis is now almost 80 years old One was Rentz He is dead One was Pike He is dead The fourth was Hodge He is dead The only living creature out of that original group is Mr Davis We didn’t get a lot of materials from the Orleans partnership and different ones The reason is we have asked for these documents but people are either dead or they’re too old ” (Ibid , p 40, l 24 - p 41, l 9, R)

c “In the case of Parkview widows have succeeded to their partnership interests and in the case of Mr Hodge, his daughter has as part of the estate So, we have asked them – each of them – to go back and look and see what you can find Get it to us whatever it is Go through old trunks Go through safe deposit boxes Go to anything you can find that relates to this They have presented it to us We have turned it over We have turned over every document that we have been presented with with the exception of documents that are listed on our privilege log It’s just that simple ” (Ibid , p 41, ll 11-22, R)

Furthermore, at a later hearing on August 24, 2009, Appellants’ counsel reiterated these ongoing concerns to the judge

a “We are having difficulty getting a lot of the documents from people who can’t communicate because of their health issues ” (Tr 8-24-09, p 6, ll 5-7, R)

- b “We’ve had to send these people out searching for materials not in their immediate control We had our clients looking for these documents ” (Tr 8-24-09, p 6, ll 17-19, 23-24, R)
- c “This production is all we could do It’s absolutely the best we can do Every time we’ve gotten new documents, we have delivered them Some of the things are things that are just not within the control of these people Life insurance applications they made back in the 60s they’re having to go back We’ve gotten as many of these documents as we can And we’re going to continue to comply as we’re able ” ” (Tr 8-24-09, p 7, ll 10-11, l 21- p 8, l 4, R)

- 6 The judge also found that Appellants’ responses concerning their damages were deficient, the Discovery Order and subsequent Dismissal Order rely upon Respondents’ Supplemental Memorandum to support this finding (Dismissal Order, p 10, R) Notwithstanding that the reliance on the memorandum violates *Higgins, supra*, the finding is simply not supported by the evidence Appellants’ initial discovery responses in 2005 set forth the manner in which their damages were calculated, and included the fair market value for the Parkview complex as a component of this calculation Appellants had nothing to do with the apartments subsequent to Respondents’ entry into the partnership in 1975, and were not privy to many documents which would establish the fair market value As part of their discovery efforts, however, they were able to obtain a number of values for each of the apartments from which the jury could ascertain the fair market value needed to calculate damages, and provided these to Respondents as noted above With the exception of Pinewood, Appellants provided an itemization of the values for each apartment complex to Respondents on multiple occasions, including following the mediation in March, 2008 and again as to Parkview in their Third Supplemental Response to the August 28, 2008 discovery (Appellants’ Third Supplemental Response and Bailey letter of 1-25-10, R) The itemizations showed ranges of values for each complex The Appellants are not required to itemize the amount of their damages to a mathematical certainty *Holly Woods Ass vs Hiller*, 392 SC 172, 708 SE2d 787 (Ct App 2011), *Whisenant v James Island Corp*, 277 SC 10, 281 SE2d 794 (1981) (“proof with mathematical certainty of the amount of loss or damage is not required”) These responses clearly comply with the rules of procedure and the laws of this State
- 7 The judge also found that Appellants’ responses relating to their expert witnesses were deficient The Dismissal Order states, “the Parkview Plaintiffs’ Third Supplemental Responses fall well short of what is required by the General Discovery Order, *as shown in Defendants Second Supplemental Memorandum at pp 9-14*, Plaintiffs in the other cases have provided even less ” (Dismissal Order, p 9, R) (Emphasis added) Again, reliance on the memorandum violates *Higgins, supra*, furthermore, the finding is simply not supported by the evidence Following the hearing in January, 2010, Appellants’ counsel provided the judge and Respondents with the Third Supplemental Response referenced above Though unmentioned in the Order, Appellants’ counsel also provided a letter

which stated that the supplemental responses were limited to Parkview in light of the judge's comments that it was the first case scheduled for trial. The letter also expressed the belief that the supplemental responses were "in compliance with both your prior order and the South Carolina Rules of Civil Procedure," and added this sentence "*If you agree we will provide similar updated responses in the other cases*." The judge did not respond, other than to issue the Dismissal Order once he received Respondents' memorandum. The supplemental responses addressed both the damages and expert witness "deficiencies" about which Respondents and the judge had complained. Also, the valuations by the assessors, appraisers, insurance brokers, et al referenced above were included for Parkview, as well as a precise dollar valuation by two (2) experts (Ltr 1-25-10, R , Third Supplemental Response, R). In any event, Respondents knew the identities of all Appellants' experts since March 2008, and declined to depose them. Therefore, they were not prejudiced by any alleged deficiencies in Appellants' responses. Cf , *Holly Woods, supra*, (" even if there was a discovery violation, we find no prejudice because Appellants failed to depose [the expert]")

The judge's interpretation of Respondents' discovery requests exceed discovery envisioned or permitted under the South Carolina Rules of Civil Procedure. They validate the concern of this Court, as expressed in *Oncology supra*, that "discovery practice has become a cottage industry and the merits of a claim are being relegated to a secondary status." Appellants' counsel informed the judge that the third supplemental responses were "as detailed and complete as I know how to make it in a written discovery response." (Ltr, 1-25-10, R). Appellants believe that their responses were adequate and that their cases should not have been dismissed based on the discovery responses. Respondents discovery requests, as was the case in *Oncology supra*, are "abusive and beyond the pale." As the Court there noted, " the trial court must make an effort to impose reasonable discovery limits. The trial court abuses its discretion by ordering discovery that exceeds that permitted by the rules of procedure." The judge made no such effort and abused his discretion.

It is also apparent that the judge, in order to exercise his discretion as to the discovery issues, failed to weigh the factors required in such undertakings. Cf , *Samples v Mitchell*, 329 SC 105, 495 SE2d 213 (Ct App 1997), and cases cited therein. The order does not address any

weight given to the nature of the discovery requests, the discovery posture of the case, the existence of any wilfulness by Appellants, or the degree of prejudice to Respondents. This omission, in and of itself, is fatal to the judge's findings. As stated in *Samples supra*

A failure to exercise discretion amounts to an abuse of that discretion. When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred. The mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised. It should be stated on what basis that discretion was exercised.

Accordingly, there was a clear abuse of discretion on the part of the judge, as both the Discovery Order and the Dismissal Order were not supported by the evidence and were controlled by errors of law, the orders of March 3, 2009 and April 6, 2010 should be reversed and vacated.

3 Judge Early was not legally qualified to accept and/or retain the assignment to preside over this case (Issues 3, Order 3-7-06). The general rule with respect to a judge's qualification to preside over matters before him or her is set forth as follows:

It is the judge's responsibility to disclose, sua sponte, all information of any potential conflict between himself and the parties or their attorneys when his impartiality might reasonably be questioned; neither the client nor his attorney have any obligation to investigate the judge's impartiality. Litigants have a right to have their causes tried fairly in court by an impartial tribunal, and are entitled to the due process requirement of a hearing before an impartial and disinterested tribunal. Where the circumstances are such as to create in the mind of a reasonable man a suspicion of bias, there may well be a basis for disqualification though in fact no bias exists. For this reason, a judge should disqualify himself where grounds for disqualification exist as well as in situations where his impartiality might reasonably be questioned. A judge should disqualify himself when circumstances and conditions surrounding the litigation are of such nature that they might cast doubt and question as to the impartiality of any judgment. 75 Am. Jur. 2d, Trial, §86 (Emphasis added).

The qualification of a judge in this State to preside over matters brought before them is ostensibly controlled by the Code of Judicial Conduct, which is entirely consistent with the foregoing general proposition of law. The Code, adopted by this Court under Section V of the South Carolina Appellate Court Rules, together with the pertinent canons and sections, is "intended to govern conduct of judges and to be binding upon them." Rule 501, SCACR,

Preamble “An independent and honorable judiciary is indispensable to justice in our society ”
Rule 501, SCACR, Canon 1A “Although judges should be independent, they must comply with the law, including the provisions of this Code *Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility Conversely violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law Ibid , Commentary (Emphasis added)*

Whenever the term “shall” is used in the Code, it imposes mandatory, non-discretionary conduct on judges, “it is intended to impose binding obligations ” Rule 501, SCACR, Preamble Accordingly, “A judge *shall* respect and comply with the law and *shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary*” *Ibid , Canon 2 A (Emphasis added) The Commentary to Canon 2 A explains*

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges *A judge must avoid all impropriety and appearance of impropriety* The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge *Actual improprieties* under this standard include violations of law, court rules or other specific provisions of this Code The test for *appearance of impropriety* is whether the conduct would create in reasonable minds a *perception* that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired (Emphasis added)

Furthermore, “A judge *shall be faithful to the law* and maintain professional competence in it,” “ *shall perform judicial duties without bias or prejudice,*” and “ *shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice* ” *Ibid , Canon 3B(2) & (5) (Emphasis added) As noted in the Commentary to this Canon, “A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute ” (Emphasis added) Additionally, as a general proposition, “A judge shall not initiate, permit or consider ex parte communications ” unless such communications are “ expressly authorized by law ” Ibid , Subsection (7) and (7)(e) (Emphasis added) As stated in*

the Commentary to this section, *'To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge*

As to the issue of qualification *per se*, the Code provides, "A judge *shall* disqualify himself or herself in a proceeding in which the judge's impartiality *might reasonably be questioned*, including *but not limited to* instances where (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer " *Ibid* , Canon 3E(1) (Emphasis added) Under this Canon, which imposes an *objective standard* of reasonableness as opposed to a subjective standard of impartiality in fact, a judge is *automatically disqualified* if his impartiality might reasonably be questioned *Nothing else need be shown* The specifics mentioned in Canon 3E(1) are simply *examples* of instances when a judge's impartiality is reasonably at issue This position is supported by the Commentary to the Canon "Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, *regardless whether any of the specific rules in Section 3E(1) apply* " (Emphasis added)

At the time the judge was assigned by Chief Justice Toal to preside over this case, as well as the aforesaid four (4) related cases, the judge was disqualified to accept the assignment under Canon 3E At that time, he had a *personal* relationship with Ellis Johnston, lead counsel for the Respondents, which was substantially different from the *professional* relationship which he had with counsel for Appellants, and which went beyond the normally expected casual relationships existing between members of the bench and bar His relationship involving Mr Johnston inevitably leads to the conclusion that the judge's impartiality might reasonably be questioned This relationship between the judge and Mr Johnston involved members of their families and included, *inter alia*, the following information which was *not* disclosed by the judge until years after these cases were assigned to him (a) the judge had known Mr Johnston's wife for approximately 40 years, and she had been married to the judge's college fraternity brother, (T

3-29-10, p 10, l 21-22, Order of 10-7-10, p 3) (b) the judge's son (Ross) and Mr Johnston's son (Caldwell) were close friends, had known each other for at least ten (10) years, were fraternity brothers in college, and had traveled together in Europe, (T 3-29-10, p 10, l 13-16, Order of 10-7-10, p 3) and (c) the judge had a picture of his son and Mr Johnston's son together, which he keeps in his office (T 3-29-10, p 10, l 17-20)

Appellants and their counsel were totally unaware of *any* personal relationship between the judge and Mr Johnston when this case was assigned to the judge Their close inter-familial relationship was clearly one whereby the judge's impartiality might reasonably be questioned, accordingly, the judge was automatically disqualified from accepting this assignment and should have made that fact known to Chief Justice Toal and to Appellants and their counsel At the very least, this was certainly information which was clearly *relevant to the issue* of the judge's qualification to fairly and impartially preside in these cases, and therefore *should have been fully and completely disclosed on the record at the outset*

Prior to accepting the assignment of these cases, the judge had an initial duty at least to fully disclose to Chief Justice Toal and Appellants the full and complete nature of this relationship with Mr Johnston This is true even if the judge did not believe that the relationship with Mr Johnston would require his disqualification As stated in the Commentary to Canon 3E, "A judge should *disclose on the record* information that the judge believes the parties or their lawyers *might consider relevant* to the question of disqualification, *even if the judge believes there is no real basis for disqualification*" (Emphasis added) Canon 3E recognizes that the integrity of the judiciary depends upon the candor of judges not only to disqualify themselves *sua sponte* as stated above, but at the very least to disclose on the record all information potentially relevant to the judge's qualification to preside There is nothing in the record to indicate that the judge made any such disclosure prior to or contemporaneously with the assignment Order of Chief Justice Toal In fact, the only time the judge made any disclosures on the record concerning

his relationship with counsel for Respondents was not until March 2010, and then only after Appellants filed a motion requesting that he do so (Motion for Disclosure, R , Tr 3-29-10, R)

A judge's duty to disqualify himself, or to at least disclose on the record all information which the parties or attorneys might consider relevant to the issue of disqualification, is not temporally limited by Canon 3 Therefore, the judge had a *continuing duty* to fully disclose to Chief Justice Toal and Appellants not only the relevant information concerning the relationship with Mr Johnston existing at the time of his assignment to these cases, but also any additional information concerning this relationship which developed subsequent to his assignment Furthermore, this continuing duty required the judge to fully disclose *on the record* all relevant information concerning the full and complete nature of his relationships with attorneys Anne Ross Rosen and Marvin Infinger once they became counsel of record for Respondents in these cases The record in this case clearly reveals that the judge violated this duty by making only cursory and partial disclosures, *off the record*, concerning relationships with Respondents' counsel prior to his formal disclosure in March of 2010 (Bailey Aff 3-30-10 ¶¶ 6, 7, 10, 12, R) The record also shows that even the one belated disclosure which the judge finally made on the record was not complete, nor was it entirely accurate (Bailey Aff 3-30-10 ¶¶ 23, 24, R , Bailey Aff 4-7-10, R) This will be discussed in greater detail in the following section

Based on the relationships described above and the judge's failure and refusal to make a full and complete disclosure concerning those relationships, the judge was not qualified to accept the assignment of the five cases under the Order of March 7, 2006 Appellants believe that such order would not have been issued had Chief Justice Toal been made aware of the full extent of these relationships Accordingly, the order assigning these cases to the judge should be vacated, and the cases should be reassigned to a fair and impartial judge

4 Judge Early erred in failing to recuse himself and to vacate his prior orders (Issue 4, Orders 8-18-08, 12-17-08, 3-3-09, 3-3-09 (granting in part, denying in part), 6-2--09, 6-16-09, 7-28-09, 4-6-10, 9-16-10, 10-7-10, 10-22-10, 12-11-10) By order of October 7, 2010, the judge denied Appellants' motion for recusal (R) On October 28, 2010 Appellants filed a motion to alter or amend the recusal denial order, the motion was denied by the judge on December 11, 2010 (Motion to alter or amend, R , 12-11-10 Order, R) As noted above under the Canons, the onus for any inquiry or disclosure concerning a judge's qualification is placed upon the judge, not the litigants or their lawyers Theoretically, judges who act in accordance with Canon 3 will *sua sponte* disqualify themselves if there is any potential whereby a reasonable person could question their impartiality, if the theory held true, there would never be a need for a litigant or their attorney to request recusal of a judge In practice, however, it is extremely rare that judges *sua sponte* disqualify themselves Therefore, it becomes even more important that judges at least honor their obligation to make a full and complete disclosure on the record of any information which might lead a reasonable person to question their impartiality This will at least permit the litigants and their attorneys to make an informed decision as to whether or not to pursue a motion for recusal

In the experience of the undersigned, motions to recuse judges are infrequently made It is axiomatic that such motions run the risk of alienating the presiding judge, not only in the case *sub judice* but in other proceedings as well, and most lawyers refrain from requesting recusal for that reason alone Furthermore, motions to recuse in this state are decided by the judge whose recusal is sought, so there is little chance that such a motion will be granted It is human nature for judges to resist any idea that they may not be fair or impartial, so they are not likely to make a ruling which, by its nature, must acknowledge that the possibility of unfairness or partiality exists Finally, our appellate court decisions regarding motions to recuse reveal that judges'

refusals to recuse themselves are not likely to be overturned on appeal, so the potential benefit of making a recusal motion is far outweighed by the unlikelihood of success. All of these act as deterrents to recusal motions. As a general proposition, this is not necessarily bad. We do not want our judges unnecessarily burdened with recusal requests from disgruntled litigants. Unfortunately, it also creates an atmosphere whereby, as in the present appeal, judges recognize the probable outcome of a recusal request and take advantage of that reality, to the undeserving prejudice of litigants with legitimate grounds for recusal.

An examination of the case law in South Carolina reveals that it is extremely rare for an appellate court to overturn a judge's denial of a motion to recuse, as our courts have imposed the additional burden of showing evidence of bias or prejudice in the record. *Cf., Lyvers v Lyvers*, 280 SC 361, 312 SE2d 590 (Ct App 1984), *Burgess v Stern*, 311 SC 326, 428 SE2d 880 (1993) (Even though the trial judge admitted to *ex parte* contacts with counsel for one of the parties, and even though Supreme Court acknowledged the specific prohibitions against *ex parte* communications, no error found in trial court's order emanating from the *ex parte* contact because court concluded "that no prejudice resulted"), *Simpson v Simpson*, 377 SC 519, 660 SE2d 274 (Ct App 2008) (court upheld trial judge's subsequent refusal to recuse herself, reversing her prior decision to *sua sponte* recuse herself, again finding no evidence of bias or prejudice), *Eadie v Krause*, 381 SC 55, 671 SE2d 389 (Ct App 2008) (court relegated discussion of recusal to a footnote, affirming trial judge's refusal to recuse himself notwithstanding that he was a former law partner of the named defendant, stating "we do not find evidence of bias or prejudice sufficient to warrant reversal").

Given the legal talent in the South Carolina Bar, it is rather astonishing to find that virtually no appellant's counsel has been able to point to any evidence in the record sufficient to convince an appellate court in this State to reverse the decision of trial judges not to recuse

themselves Unfortunately, the use of the “no evidence of bias or prejudice” standard by our appellate courts on a near universal basis for affirmation of trial judges’ refusals to disqualify or recuse themselves has resulted in the fact that there are virtually no guidelines or criteria which have been established in order to determine precisely *what* evidence of bias or prejudice, or what degree of proof of such evidence, *would* warrant disqualification or recusal An exception to this, however, was presented in *Ellis v Proctor & Gamble*, 315 SC 283, 433 SE2d 856 (1993) There are three (3) points to be made in light of the *Ellis* decision

- (1) Justice Moore, author of the opinion, utilized language entirely consistent with the Judicial Canons of Ethics, finding disqualification should occur if a judge’s impartiality “might reasonably be questioned ” Furthermore, Justice Moore set the appellate standard for reviewing disqualification or recusal issues as one which *limits the court s ability to affirm a trial judge s failure to disqualify himself*, stating “Under Canon 3C, a judge *should* disqualify himself if his impartiality might reasonably be questioned In cases involving a violation of Canon 3, *this Court will affirm a trial judge s failure to disqualify himself only if there is no evidence of judicial prejudice* ” *Ellis supra* (Emphasis added)
- (2) *Ellis* addressed the language of Canon 3C, which was the predecessor to our present Canon 3E, previously quoted herein An important distinction exists, however, between Canon 3C, under review in *Ellis*, and present Canon 3E the present language of Canon 3E uses the mandatory term “*shall*” as opposed to the discretionary term “*should*” cited in *Ellis* Accordingly, under the present language of Canon 3, disqualification by the judge is *mandatory* as previously stated herein if his impartiality might reasonably be questioned
- (3) Justice Moore’s opinion in *Ellis* is unique in that it actually provides a small window for determining the *type of evidence* our appellate courts will deem sufficient to demonstrate a judge’s bias or partiality requiring his recusal Even though the trial judge in *Ellis*, much like the judge in the present case, gave assurances of his impartiality, Justice Moore found the following “While we accord great weight to the trial judge’s assurance of his own impartiality, we find *a judge s impartiality might reasonably be questioned when his factual findings are not supported by the record* ” Accordingly, we find evidence of judicial prejudice in this case ” The evidence of prejudice referenced in *Ellis* consisted of an *ex parte* memorandum provided to the trial judge by counsel for one of the parties Justice Moore found this single *ex parte* communication sufficient to require recusal, even though the trial judge stated that it “had no bearing on the trial court’s decision,” specifically noting “the prohibition against *ex parte* communications under Canon 3A(4) of the Code of Judicial Conduct ”

In the present case, the record is replete with evidence that the judge's findings are not supported by the record, so that his impartiality "might reasonably be questioned," thereby rendering his disqualification mandatory. This evidence includes not only evidence of bias or prejudice against Appellants, but also evidence of partiality and bias in favor of counsel for the Respondents. This is particularly true beginning in the Spring of 2008, when the judge and his son were treated to an all-expense paid fishing trip in Florida by Mr. Johnston's brother, and when Mr. Johnston, whose position as counsel for Respondents was in jeopardy, brought in Mr. Infinger and Ms. Rosen as additional counsel. This evidence includes, *inter alia*

- 1 In Spring, 2008, the judge remarked that his son, Ross, and Mr. Johnston's son, Caldwell, "have become friends." This gave the impression that the relationship between their sons was recent in origin, and was the first time that the judge had made any disclosure concerning any relationship between any member of his family and Mr. Johnston's family since his acceptance of the assignment of these cases approximately two (2) years earlier. (Bailey Aff. 3-29-10, ¶ 7, R.) It was not until 2010, in response to a motion by Appellants for a full and complete disclosure of the relationships between the judge and Respondents' counsel, that the judge made any disclosure on the record, and Appellants then became aware of the following additional facts which the judge had not previously disclosed:
 - a The judge's son and Mr. Johnston's son had not just become friends, but had been friends for years, and were actually college fraternity brothers, (Tr. 3-29-10, p. 10, ll. 14-15, R.)
 - b The judge's son and Mr. Johnston's son traveled together in Europe, (Tr. 3-29-10, p. 10, ll. 15-16, R.)
 - c The judge's son had attended and possibly participated in the wedding of Mr. Johnston's son, (Tr. 3-29-10, p. 11, ll. 2-3, R.)
 - d Mr. Johnston's son and his wife had stayed at the judge's beach house as guests of the judge and his son, (Tr. 3-29-10, p. 11, ll. 7-10, R.)
 - e The judge kept a picture of Mr. Johnston's son in his office. (Tr. 3-29-10, p. 10, ll. 17-20, R.)

Other evidence in the record demonstrates that the judge's disclosures on March 29, 2010, concerning the relationship between the judge and Mr. Johnston and members of their respective families were incomplete and/or inaccurate, while he made some disclosures concerning the relationships with Mr. Johnston's son, he

omitted any information relating to Mr Johnston's daughter. In support of their motion for recusal, Appellants produced evidence that (a) the judge's son, Ross, was also friends with Mr Johnston's daughter, Annie, (b) both Annie Johnston and Respondents' counsel Anne Ross Rosen are listed as friends of Ross Early on his Facebook page, and (c) the judge's picture appeared on the Facebook page of Mr Johnston's daughter, Annie. (Bailey Aff 4-7-10, R) The judge failed to make any disclosure as to these additional relationships.

- 2 In 2008 the judge also casually mentioned that his son had been invited by Mr Johnston's son to go on a fishing trip on a boat belonging to Mr Johnston's brother, that the judge had also been invited on the trip and that the judge had accepted the invitation. (Bailey Aff 3-29-10, ¶ 7, R) It was not until 2010, in response to Appellants' motion for disclosure, that Appellants became aware that the fishing trip took place in Islamorada, Florida, at no cost to the judge, that Mr Johnston's brother was present, and that the judge took Mr Johnston's brother and his wife to dinner on two (2) separate occasions during the trip at the judge's expense. (Tr 3-29-10, p 11, l 10-13, R)
- 3 On a subsequent occasion, the judge stated to Mr Johnston that he had gone to see Mr Johnston's brother when he was in Georgetown and that his brother had invited him to go fishing again. (Bailey Aff 3-29-10, ¶7, R) The judge did not mention this visit with Mr Johnston's brother in his "disclosure" on the record, nor did he ever indicate whether he accepted the invitation.
- 4 On another occasion, Mr Johnston stated to the judge that he was aware that the judge's son, Ross, was going fishing in Islamorada (Florida) and that Mr Johnston thought he would "go with him." (Bailey Aff 3-29-10, ¶7, R) The judge denied Appellants' motion to require Respondents' counsel to disclose under oath the full nature and extent of their association with the judge, which prohibited Appellants from determining if, in fact, Mr Johnston ever accompanied the judge's son to Islamorada or to any other destination.
- 5 Mr Johnston also casually mentioned on one occasion that he and the judge attend a "white tie and tails" affair each year, and also that there was an "incident in Europe" involving their sons. (Bailey Aff 3-29-10 ¶ 7, R) Although the judge, as part of his "disclosure" on the record in 2010, made some comments concerning the common memberships of himself and Mr Johnston in the Caroliniana social organization, he made no reference to the "incident in Europe." Since the judge denied Appellants' motion to require Respondents' counsel to disclose under oath the full nature and extent of their association with the judge, Appellants were prohibited from access to any information concerning the "incident in Europe" involving their sons.
- 6 At an April 23, 2008 status conference, Mr Infinger appeared with Mr Johnston for the first time. At the status conference, Mr Johnston stated to the judge and the others present that Mr Hilty, who was in-house counsel for Respondents, felt Mr Johnston had done "a shitty job" at the mediation the prior month, and that

Mr Infinger was being named as additional counsel for Respondents. The judge welcomed Mr Infinger to the case, and casually remarked that he had known Mr Infinger for several years, and that Mr Infinger had spent the night on one occasion at the judge's home several years earlier following a wedding. All of the above occurred off the record. (Bailey Aff 3-29-10 ¶¶ 9-10, R)

7 Additionally, Mr Johnston stated at the status conference that an associate of Mr Infinger's, Ms Anne Ross Rosen, was also being assigned as counsel of record for the Respondents in these cases. At that point, the judge commented that he knew Ms Rosen and had, in fact, "married her." He made no other disclosure concerning Ms Rosen. This also occurred off the record. (Bailey Aff 3-29-10 ¶12, R) It was not until 2010, in response to Appellants' motion for disclosure, that the judge finally disclosed that

- a Ms Rosen was a native of the judge's hometown of Bamberg, South Carolina and that the judge had known her for her entire life
- b Ms Rosen's parents and the judge moved to Bamberg around the same time and their careers grew side by side over the years
- c Ms Rosen's father was a surgeon and the judge had been his patient, specifically, Dr Ross had performed one or two surgical procedures on the judge and had referred him to at least one other physician for another procedure
- d Ms Rosen was the same age as the judge's son, Ross and they went through school together
- e Ms Rosen and her fiancé, John Rosen, asked the judge to perform their wedding ceremony and the judge and his wife and son Ross were provided with a room for one (1) night at a condominium at Fripp Island by Dr Ross. (Tr 3-29-10 p 6, l 25 - p 8, l 3, R)

The record demonstrates that the judge's disclosures on March 29, 2010, concerning Ms Rosen were also incomplete and/or inaccurate. For example, in response to a subpoena issued by Appellants, the Fripp Island Resort provided documentation which contradicts the "disclosure" made by the judge and reveals that (1) the condominium referenced by the judge was provided to him and a guest at no charge by the Ross family for two (2) nights, not one (1) night as stated by the judge in his "disclosure," and (2) the judge's other son, Will and another guest were also provided accommodations on Fripp Island as part of the Ross-Rosen wedding, at no charge.

All of the foregoing clearly document extrajudicial relationships and conduct on the part of the judge requiring his disqualification from accepting and from retaining the assignment of these five (5) cases. Had he remained true to the language and intent of Canon 3, he would have recognized that these extrajudicial relationships create a situation whereby his impartiality might reasonably be questioned, and that the circumstances are certainly such as to create in the mind of a reasonable man at least a suspicion of bias. Under Canon 3, this is as far as the situation should have gotten. Since the judge did not *sua sponte* disqualify himself, however, he should have at least timely and fully disclosed the relationships and circumstances on the record, as provided in the Canons.

Having failed to disqualify himself or to reveal any information concerning his qualifications on the record, the judge should have granted Appellants' motion to recuse. There should be no doubt that these relationships and circumstances create an appearance of impropriety, they create in reasonable minds a perception that the judge's ability to carry out his responsibilities with integrity, impartiality and competence is impaired. *Cf.* Commentary to Canon 2A, *supra*. Under these facts, whether pursuant to a *sua sponte* disqualification or an order of recusal, the judge should have removed himself from this litigation. *A judge should disqualify himself where grounds for disqualification exist, as well as in situations where his impartiality might reasonably be questioned. A judge should disqualify himself when circumstances and conditions surrounding the litigation are of such nature that they might cast doubt and question as to the impartiality of any judgment.* 75 Am Jur , 2d, Trial, §86 (Emphasis added)

The record in these cases, apparently unlike virtually any other case besides *Ellis, supra*, also demonstrates that the factual findings in the orders issued by the judge, as previously shown herein, are not supported by the record. Accordingly, there is evidence of judicial prejudice,

requiring the disqualification or recusal of the judge under the decision in *Ellis*. Subsequent to the said fishing trip, and following Mr. Johnston's revelation that Mr. Hilty was dissatisfied with his performance and the addition of Mr. Infinger and Ms. Rosen as counsel of record, the judge's attitude and conduct toward the parties and their counsel changed significantly. This change in attitude and conduct is reflected in both his comments and the orders which he issued from that point. Although promising to "feed everyone from the same spoon," (Tr., 7-1-08, p. 12, ll. 1-2, R.) he, in fact, established a double standard for discovery between the two parties, with the Respondents enjoying a lesser and more favorable standard than that imposed upon Appellants, this will be discussed in greater detail below. Almost without exception, the orders which he issued were prepared for his signature by counsel for the Respondents. As demonstrated herein, these orders reflect the double standard which he imposed, were often not based upon proper and credible evidence, misstated or disregarded existing applicable law and/or contained factual findings which were not supported by the record. For example

1. Order of August 18, 2008, denying Appellants' motion to compel #6. Appellants sought certain financial information which had been requested by Dr. Oliver G. Wood, Jr., an economist and expert witness retained on behalf of Appellants. The information was needed to formulate and support his opinions concerning the issue of punitive damages. (Motion to Compel 6-12-08, R.)
 - a. Appellants' counsel presented the request to the judge at the hearing on this motion to compel, which took place July 1, 2008. (Tr. 7-1-08, p. 40, ll. 6-8, R.) The judge then alluded to personal knowledge which he had concerning Dr. Wood and "his questionnaire," and indicated that Dr. Wood's prior questionnaires had not included information being sought in these cases. (Ibid., ll. 9-10, l. 22 - p. 41, l. 6 R.) The judge referenced a prior case in which Dr. Wood testified, outlining his recollection of Dr. Wood's testimony. (Ibid., p. 46, ll. 9-16, R.) These are references to matters clearly outside and not supported by the record in this case.
 - b. At the hearing, Respondents' counsel handed to the judge a document identified as "a sampling of one 10K report" of Respondent AIMCO, stating that the document was "available on the SEC website," and expressing the opinion that the information contained was more "than I think an expert could ever use." This document was not marked or introduced into evidence to be considered by the judge. The judge then stated, "I think that the information that Oliver can get out of the SEC

ought to be enough” (Tr 7-1-08 p 42, ll 13-20, p 45, ll 4-6) Accordingly, the record reflects that the judge based his ruling upon a document and information which was not admitted into evidence or properly part of the record

- c The judge stated that, notwithstanding his oral ruling, he would reconsider that ruling or hold it in abeyance, and require production of the information sought under a protective order if he received an affidavit from Dr Wood stating that he needed more information than was available through the SEC (Tr 7-1-08, p 45, ll 7-13, p 46, ll 3-9, R) By letter of July 30, 2008, Appellants’ counsel provided the judge with a copy of a filed affidavit from Dr Wood dated July 28, 2008, which specifically stated that the items contained in Appellants’ discovery requests were needed “to formulate my opinions,” and that “*a substantial portion of the information I requested is not publically available*” The affidavit further states that the information sought in Appellants’ discovery requests “is what I will need to prepare my opinion” (Affidavit of Oliver G Wood, Jr , R) (Emphasis added)
- d No counter affidavit to Dr Wood’s affidavit was ever submitted to the judge by Respondents Instead, they provided the judge with a letter from Mr Johnston to Appellants’ counsel dated July 30, 2008, together with a “Definitive Proxy Statement” which AIMCO had purportedly prepared for submission to the SEC This information was sent to the judge by Mr Johnston via an email dated August 12, 2008 Neither the letter nor the “Definitive Proxy Statement” were ever verified through affidavit or filed with the Clerk of Court as part of the record in this case The statements and information in the proxy statement, which was evidently intended for dissemination to shareholders, were not made under oath Even if these matters had been properly entered into the record, examination of the proxy statement reveals that it does not provide the information required by Dr Wood, as it states nothing concerning Appellants’ requests for information relating to (1) financial information for the years 2004-2007, (2) profit sharing allocations, (3) specific conditions required in order for executive bonuses to be paid, (4) life or health insurance, (5) professional or social membership dues, (6) reimbursement of entertainment expenses, or (7) allowances for automobile travel, etc Notwithstanding these facts, the judge issued his order on August 18, 2008, finding “that there is sufficient information publically available through filings with the Securities and Exchange Commission to satisfy this request” (Order 8-18-08, R) The order does *not* state that the judge ever looked at any SEC filings, other than the 10k report *which was never in evidence or made part of the record* Since this finding is clearly at odds with the express statements in Dr Wood’s affidavit, and references information which is not part of the record, the judge’s factual finding is not supported by the record This is not cured by the fact that counsel for the Respondents attempted to get the information before the judge in the form of

memoranda, letters or oral arguments. These do not constitute evidence. Factual statements of an attorney, whether made during argument or in written briefs or memoranda, may not be considered or accepted by the court as proof. *Higgins supra, Gilmore v Ivey*, 290 SC 53, 348 SE2d 180 (Ct App 1986)

- 2 Order of March 9, 2009, continuing the Parkview trial (Order 3-9-09, R) The subject of this order was the Respondents' request for a continuance of the Parkview case past the scheduled trial date of May 18, 2009. Appellants' counsel was not included in the communication process whereby the signed order was transmitted from the judge to counsel for the Respondents, and did not become aware of the executed order until receiving a copy of it from Respondents' counsel. It is clear that the findings of the judge in the order are not only erroneous, but are not supported by the record.
 - a The order states that the matter was before the judge "on Defendants' motion to continue the trial." In fact, there was no motion by Respondents, and the matter was never properly before the Judge. (*Cf.*, Rule 7(b)(1), SCRCP)
 - b The order also states that the Respondents' request for a continuance was granted "for good cause having been shown." In fact, *no* cause was shown for the continuance, certainly, no cause was shown which complied with the rules, since no motion was ever made.
 - c The order further states that, "by prior order of the court," the Parkview case was to be the first of the assigned cases to be tried. In fact, no such order was ever issued.

All of these deficiencies were among those brought to the judge's attention in Appellants' motion to alter or amend dated March 23, 2009 (Motion 3-23-09, R). The judge denied this motion, allowing the defective order to stand.

- 3 Order dated October 7, 2010, denying Appellants' motion for recusal and vacation of orders The findings of the judge in this order are likewise erroneous and unsupported by the record. These include, *inter alia*,
 - a The order states that the judge "complied" with Appellants' request that he "make a full disclosure of any type of relationship he had with the defense lawyers." This finding erroneously narrows the parameters of the disclosure request, which included "a full and complete disclosure on the record of any and all affiliations or relationships which (the judge), or any member of his family, presently has or has previously had with any of the Defendants or counsel of record for any named Defendants in these cases, as well as with family members of such counsel of record." The requested disclosure specifically included "recreational and/or social activities, and personal visits and/or contacts," whether "in person, via telephone, mail, electronic means or internet sites." The judge clearly failed to make a full

and complete disclosure on the record relating to his involvement of the marriage of Respondents' counsel Anne Ross Rosen, as well as the relationships involving Mr Johnston's daughter. The finding that the judge "complied" with Appellants' request for "full disclosure of any type of relationship" is both erroneous and unsupported by the record.

- b The order states that the judge "considered the heartache and loss of position suffered by a family court judge who recently refused to recuse herself in a case." At no time was the judge presented with any evidence relating to a family court judge who refused to recuse herself, much less any "heartache" or "loss of position suffered" by the unnamed family court judge. Consideration of this extraneous matter is clearly erroneous and patently unsupported by the record in this case. As such, it represents clear evidence of bias and prejudice under *Ellis supra*.
- c The order finds that Appellants' recusal effort did not commence until "immediately prior to the entry of a April 6, 2010 sanctions order, *after almost a year of sanctions and contempt orders entered against them*." While counsel for Respondents vigorously requested that the judge sign orders holding Appellants in contempt and imposing dismissal of their claims as an appropriate sanction, and the judge verbally threatened to sign such an order, he did not do so until he signed the order of April 6, 2010, the judge himself acknowledged as of March 29, 2010 that no such order had been filed, i.e. "entered" (Tr 3-29-10, p 26, ll 16-17, R). The finding that there have been "sanctions and contempt orders entered" against Appellants for "almost a year" is totally erroneous and is unsupported by the record. This is another example of clear evidence of bias and prejudice under *Ellis supra*.
- d The order finds that the judge "held a hearing on March 29, 2010 and put on the record all of my relationships with counsel for both parties, *most of which had previously been disclosed in the course of litigation*." As shown in the prior discussion, this finding is patently false, any "disclosures" made by the judge during the course of the litigation prior to the hearing were minimal and cursory at best. Accordingly, this finding is not supported by the record and is clear evidence of bias and prejudice.
- e The order also states, "at the hearing Plaintiffs made an oral motion to recuse me. I respectfully denied it, having thoroughly addressed their concerns." The record clearly shows, in addition to the fact that the judge did not "thoroughly address" the concerns of Appellants, there was no oral motion for recusal made at the March 29, 2010 hearing (Tr 3-29-10, p 24, l 6 - l 20, p 26, ll 9-14, ll 19-25, R). The transcript of the hearing clearly shows that counsel for Appellants proposed, as a possible solution to the judge's reluctance to give Appellants time to review his disclosures before deciding whether or not to make a motion for recusal, that a verbal motion *could* be made and marked heard. The judge denied

that proposed option (Tr 3-29-10, p 27, ll 2-6)

- f The order lists eight “disclosures” which the judge states were revealed not only at the March 29, 2010 hearing, but “openly throughout the litigation ” The only *evidence* in the record on this issue contradicts this finding (Bailey Aff , 3-30-10, R) The only *reference* in the record to support this statement is found in the Respondents’ Memorandum dated April 20, 2010 (Respondents’ Memorandum, 4-20-10, R) In fact, the language used in the judge’s order, in many instances, is taken verbatim from this memorandum Statements of counsel in a written memoranda cannot be considered by the court in determining factual findings Cf , *Higgins supra*, *Gilmore, supra* Inasmuch as the trial judge clearly based his findings in this regard solely on unsworn statements of Respondents’ counsel set forth in a memorandum, and such reliance is prohibited by the law of this State, these findings are not properly supported by the record
- g In an attempt to refute Appellants’ allegations in their motion and affidavit, the order states that Appellants’ motion for recusal is “made *without basis or justification*, with the *sole purpose of polluting the record and intimidating me* into recusal ” (Emphasis added) The record shows that separate motions for recusal were made in this case and the four related cases All of the motions were supported by affidavits from numerous Appellants in each case, as well as their counsel (Motion to Recuse, R , Davis Aff , R , Reynolds Aff , R , Pike Aff , R , Rentz Aff R , Ivey Aff , R , Hinnant Aff , R , Hodge Aff R , Bailey Aff 3-29-10, R , Bailey Aff 4-7-10, R , , Pendarvis Aff ¶104, R) These affidavits set forth specific facts and circumstances justifying the motion for recusal and vacation of the judge’s orders, and amply demonstrate circumstances which would create in the mind of a reasonable man at least a suspicion of bias, as well as demonstrating that his impartiality might reasonably be questioned While a judge may consider the legal sufficiency of facts alleged in a motion for recusal, he must nonetheless accept as true the factual allegations in the motion *Shaw v State*, 276 SC 190, 277 SE2d 140 (1981) Where affidavits are submitted in support of a motion for recusal, the judge “is required to accept as true the facts stated in the motion and accompanying affidavits ” 46 Am Jur 2d, *Judges*, §214, *Mallett v Mallett*, 323 SC 141, 473 SE2d 804 (Ct App 1996) The judge, by attacking the facts stated by Appellants rather than accepting them, did not follow the law Since it is obviously controlled by an error of law, there is an abuse of discretion and the order should be vacated
- h The finding of the judge that he had addressed the issue of recusal “repeatedly” is not supported by the record Appellants’ motion was made following the “disclosures” made by the judge and he only addressed the issue briefly at the hearing on March 29, 2010 and in the written order of October 7, 2010 This is evidence of bias and prejudice under *Ellis supra*, as the finding is not supported by the record

- 1 Incredibly, the judge's order makes a factual finding that Appellants ***"continue to harass and prod me to recuse myself"*** This is simply untrue and totally unsupported by the record The judge's finding of harassment on the part of Appellants, most of whom are elderly and in ill health, is ludicrous This statement is not only unsupported by the record, but is in itself a clear indicator of the bias and prejudice exhibited by the judge against Appellants *"A judge who is presented with a motion for disqualification and who looks beyond the mere legal sufficiency of a suggestion of prejudice and attempts to refute the charges of partiality exceeds the proper scope of his inquiry and on that basis alone establishes grounds for his disqualification"* 46 Am Jur 2d, Judges, §§95 and 214

Time and space constraints imposed in this appeal do not permit Appellants to address each and every instance whereby the judge made factual findings which were totally unsupported by the record The above instances are included as examples only In addition to these unsupported factual findings, Appellants direct this Court to the following examples in the record of other evidence indicating bias or prejudice on the part of the judge

- a The evidence shows that the judge had completely abandoned any pretense of acting as a fair and impartial arbiter and had totally aligned himself with counsel for the Respondents As shown above, the orders simply parroted the arguments and representations of Respondents' counsel, and incorporated them as factual findings The orders were either prepared by Respondents' counsel or the language in his orders was taken straight from memoranda or other documents which they submitted to him, He also verbally aligned himself with Respondents' counsel at hearings in this litigation For example, on January 14, 2010 he stated " when *they* didn't do that, you moved for compelling, and *we* signed the order of March 3, '09 And *we* get in here today and *they* still admit *they* haven't given it to us (Tr 1-14-10, p 50, ll 6-9, R) (Emphasis added) The judge clearly included himself in the same "we" camp as Respondents' counsel, with Appellants and their counsel clearly being assigned to the opposing "they" camp Such comments and conduct create in the mind of a reasonable man at least a suspicion of bias, and demonstrate that the judge's impartiality might reasonably be questioned, accordingly, they provide evidence of bias requiring his recusal
- b Additional evidence of the judge's bias and prejudice may be found in his comments at the "disclosure" hearing on March 29, 2010 The judge, referencing his reaction when he first read Mr Johnston's email enclosing the subpoena issued to Fripp Island by Appellants, stated "I got the thing I looked at it Of course, you know, when you first read something like that *your blood boils* a little bit " (Tr 3-29-10, p 25 ll 18-20, R) This statement clearly evidences his bias and prejudice It also evidences anger and a "combative and defensive attitude" which caused "some concern" to the court in *Mallett supra*, as to whether the trial judge could impartially decide the recusal issue

- c There is also evidence in the record of prohibited *ex parte* communications between the judge and counsel for Respondents which Appellants contend would at least add to the appearance of impropriety which is attendant to the judge's conduct in this matter. Such evidence includes, *inter alia*,
- (1) The order of March 9, 2009, previously discussed above. Appellants' counsel was not included in the communication process whereby the signed order was transmitted from the judge to counsel for the Respondents, and did not become aware of the executed order until receiving a copy of it from Respondents' counsel (Order, 3-9-09, R), and
 - (2) The email from Respondents' counsel, Calvin T. Vick, dated February 17, 2010, which precipitated Appellants' motion for a protective order in an effort to avoid the dismissal sanction ultimately imposed by the judge (Motion for Protective Order, R). The email is an attempt by Mr. Vick to explain the *ex parte* communication initiated by the judge that same day, wherein the judge ostensibly instructed Mr. Vick to prepare an order holding Appellants in contempt and dismissing their cases. Although the judge had previously indicated an inclination concerning this ruling, he had subsequently been provided with briefs and materials by counsel for both sides and had not announced his final decision before the *ex parte* communication with Mr. Vick. The practice of directing counsel for one party *ex parte* to draft an order prior to the judge announcing his final decision to both sides is prohibited under Opinion 2-1988, Committee on Standards of Judicial Conduct. A judge is prohibited from discussing a proposed order with counsel for one party without giving notice to counsel for the other side, because failure to provide such notice gives rise to an appearance of impropriety (Ibid). This opinion has been cited with approval by our courts for many years. Cf. *Higgins, supra*.
- d Evidence of bias and prejudice is also found in the judge's imposition of a double standard, as previously noted. Examples of this double standard are *inter alia*
- (1) Respondents' initial discovery responses of August 26, 2004, contained 15 general objections, followed by specific objections and minimal responses to each discovery request. When Appellants moved to compel proper responses, the judge ruled Appellants "have an obligation to take the deposition" of witnesses to get more specific information and, as to documents, would "have to make your own determination as to what's there ," ordering Appellants to "go take the depositions and ask them what it meant " (Tr. 7-1-08, p. 17, ll. 22-25, R , p. 18, ll. 12-15, R , p. 35, ll. 1-14, R , p. 36, ll. 9-16, l. 24- p. 37, l. 2 R , p. 47, ll. 20-23, R). Based upon the judge's promise to "feed both sides from the same spoon" (Tr. , 7-1-08 p. 12, ll. 1-2), Appellants aggressively undertook to depose witnesses who had been listed by Respondents.

In responding to the Respondents' discovery requests, Appellants utilized their discovery technique of asserting general objections, actually using *verbatim* the language employed by Respondents which had been sanctioned by the judge. When Respondents complained about these objections, the judge responded by dismissing Appellants' claims.

- (2) When Respondents sought a protective order prohibiting Appellants from deposing Respondents' officers, the judge granted their request, even though one of the officers was present at the meeting where the "*status quo*" agreement was reached and was a material witness on the issue of the statute of limitations. Conversely, when Appellants sought a protective order as a means of complying with the judge's Privilege Order, their request was denied. (Tr 7-1-08, ll 21-25, R , Order Denying Appellants' Motion for Protective Order, R)
- (3) When Appellants sought information from the corporate Respondents relating to lawsuits and other claims against them, the judge permitted Respondents to re-write Appellants' discovery requests. In doing so, Respondents eliminated a responding party, as well as the time frame encompassed by the request. The effect was to protect disclosures concerning the conflicts of interest which formed the basis of the Appellants' claims. Conversely, the judge approved Respondents' document request #48, ordering Appellants to produce "all documents concerning any litigation in which any of the Plaintiffs were a party (plaintiff, defendant or third-party plaintiff or defendant), or any person in which any of the Plaintiffs had an ownership or management interest was a party." Despite the lack of any time limitation or showing of relevancy, this request was included in those found to be deficient by the judge and used by him as a reason for dismissing Appellants' claims.
- (4) The judge required Appellants to produce their confidential communications with their counsel in this case, while protecting Respondents from producing communications with attorneys in other proceedings which were relevant to this case.
- (5) The judge granted Respondents' motion to seal certain documents for his in-camera review, while denying relief to Appellants. (Order, 8-31-09, R , Order 10-22-10, R)

Due to time and space constraints, Appellants direct this Court to the affidavit of Joel D Bailey dated March 30, 2010, paragraph 13 (R) for a more detailed listing of instances wherein the judge imposed a double standard, and incorporate said affidavit herein by reference. Given the abundance of evidence demonstrating bias and partiality on the part of the judge, he erred in

failing to disqualify and/or recuse himself and to vacate his orders. The rulings of the judge result from and are tainted by the bias and prejudice herein discussed, they contain factual findings not properly supported by the evidence and are evidence *per se* of the judge's bias and prejudice. Furthermore, they are controlled by errors of law and result from abuses of discretion, and should be vacated on that basis, as well.

5 Judge Early failed to insure that Appellants' claims were being litigated in a fair and impartial forum, thereby depriving them of their rights to due process of law under the Constitutions of the State of South Carolina and the United States of America (Issue 5) The right to due process of law is guaranteed to citizens of this State by the Constitutions of South Carolina (Article I, §3) and the United States (5th and 14th Amendments). It is axiomatic that a fair and impartial forum must include, at a minimum, a presiding judge whose impartiality and lack of bias is beyond question. "Every litigant has the lawful right to expect utter impartiality and neutrality in a judge who tries his case." 46 Am. Jur. 2d, *Judges*, §146. "The right to disqualify a judge for bias and prejudice is substantive and it is included within the right to a fair trial guaranteed by the due process clause of the United States Constitution." *Ibid*. The constitutional guarantee of a fair and impartial judge and forum is recognized in this State. *Mallett, supra* ("the expectation of a fair and impartial tribunal is a basic tenet of all cherished notions of due process.") In determining the fairness or impartiality of a judge or tribunal under a due process inquiry, the United States Supreme Court has determined that the objective test of a reasonable perception of bias, referenced above in the Code of Judicial Conduct, as opposed to the subjective "bias in fact test" is the proper procedure to be followed. *Cf. Caperton v. A T Massey Coal Co. Inc.*, 129 S.Ct. 2252 (2009). The decision in *Caperton* has particular application to this case. For example

- 1 Part of the alleged bias claimed in *Caperton* involved the judge's personal relationship with a litigant, and his receipt of personal benefits derived from that relationship, *i e* , donations to his campaign for election. In this case, the judge's personal relationship with counsel for a litigant is at issue, together with his receipt of personal benefits derived from that relationship, *i e* , all expense paid fishing trips and accommodations at an ocean-front resort. Canon 3E(1) does not distinguish between "a party or a party's lawyer" where bias is alleged.
- 2 Justice Kennedy's majority opinion, finding a judge's refusal to disqualify or recuse himself was a denial of constitutional due process, specifically relies upon the language of the Code of Judicial Conduct, including Canon 3E(1). The Court discarded the judge's assertions of lack of personal interest on his part, as well as his assertion that there was no objective evidence of bias. Instead, the Court adopted the "appearance of impropriety" and reasonableness language of the Code consistent with Appellants' position in this case.
- 3 The present case amply demonstrates the concern expressed by Justice Kennedy if the focus is on proof of evidence to show bias in fact, rather than a reasonable perception of bias. "This is particularly true where, as here, there is no procedure for judicial fact-finding and the sole trier of fact is the one accused of bias. Objective standards may also require recusal whether or not actual bias exists or can be proved. Due process may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. *The failure to consider objective standards requiring recusal is not consistent with the imperatives of due process*."

The personal relationships involving the judge and counsel for the Respondents create an appearance of impropriety, as well as a reasonable suspicion of bias, requiring the disqualification and recusal of the judge under the Code of Judicial Conduct and applicable laws. These relationships, coupled with the overwhelming evidence that the judge abused his discretion time after time in favor of Respondents, denied Appellants a fair and impartial forum and violated their rights to due process under the Constitutions of the State of South Carolina and the United States.

CONCLUSION

For the reasons stated herein, Appellants request that this Court (a) reverse and vacate the order of March 7, 2006 assigning these cases to Judge Early and the orders issued by Judge Early which are the subject of this appeal and (b) remand this case for a trial on the merits before a fair, unbiased, disinterested and impartial judge.

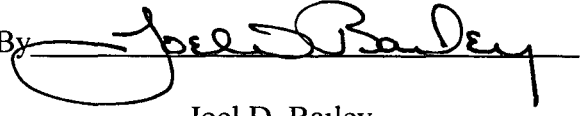
Respectfully submitted,

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baileylawfirm@charter.net

Attorneys for Appellants

By 
Joel D Bailey

June 22, 2011

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Doyet A Early, III, Circuit Court Judge

Case No 2005-CP-07-1990

RECEIVED

JUN 28 2011

S C Supreme Court

Carolina Management Corporation of Beaufort, James B
Jackson, Whaley R Hinnant, Jr , Mary Gasser Rawl and
Rhoda G Rentz, individually and in their capacities as the
Limited Partners of Pinewood Park Apartments, a South
Carolina Limited Partnership

Appellants,

vs

Pinewood Park Apartments, a South Carolina Limited Partnership,
Apartment Investment and Management Company a/k/a
AIMCO, Insignia Financial Group, Inc , AmReal Corporation
a/ka and f/k/a USS Corporation a/k/a and f/k/a U S Shelter
Corporation, ISTC Corporation, N Barton Tuck, Jr , and John
Doe, a generic designation for a party or parties whose true
identity is unknown

Respondents

**APPELLANTS' CORRECTED DESIGNATION OF
MATTER TO BE INCLUDED IN THE RECORD ON APPEAL**

Appellants designate the following documents for inclusion in the Record on Appeal

Order of Judge Perry Buckner dated 12-15-03

Order of Judge Curtis L Coltrane dated 2-11-05

Order of Chief Justice Toal dated 3-7-06

Order of Doyet A Early, III dated 3-13-07

Order of Doyet A Early, III dated 6-5-08

Order of Doyet A Early, III dated 8-18-08

Order of Doyet A Early, III dated 12-17-08

Order of Doyet A Early, III dated 12-30-08

Order of Doyet A Early, III dated 1-31-09

Order of Doyet A Early, III dated 3-3-09, Granting in Part and Denying Part Plaintiffs' Motion to Compel

Order of Doyet A Early, III dated 3-3-09, Granting Defendants' Motion to Compel

Order of Doyet A Early, III dated 4-9-09

Amended Report of Special Master dated 4-15-09

Order of Doyet A Early, III dated 6-2-09

Order of Doyet A Early, III dated 6-16-09

Order of Doyet A Early, III dated 7-28-09

Order of Doyet A Early, III dated 8-31-09

Order of Doyet A Early, III dated 4-6-10

Order of Doyet A Early dated 9-16-10

Order of Doyet A Early, III dated 10-7-10

Order of Doyet A Early, III dated 10-22-10

Order of Doyet A Early, III dated 12-11-10

Parkview Amended Complaint dated 3-23-04 (C/A # 03-CP-07-00726)

Parkview Answer dated 4-9-04 (C/A # 03-CP-07-00726)

Palmetto Complaint dated 10-6-05 (C/A # 05-CP-07-1989)

Palmetto Answer dated 1-17-06 (C/A # 05-CP-07-1989)

Orleans Complaint dated 10-6-05 (C/A # 05-CP-10-4229)

Orleans Answer dated 1-17-06 (C/A # 05-CP-10-4229)

Roosevelt Complaint dated 10-6-05 (C/A # 05-CP-38-1131)

Roosevelt Answer dated 1-17-06 (C/A # 05-CP-38-1131)

Pinewood Complaint dated 10-6-05 (C/A # 05-CP-07-1990)

Pinewood Answer dated 1-17-06 (C/A # 05-CP-07-1990)

Transcript of hearing held on 10-4-06

Transcript of hearing held on 11-19-07

Transcript of hearing held on 7-1-08

Transcript of hearing held on 12-9-08

Transcript of hearing held on 7-6-09

Transcript of hearing held on 8-24-09

Transcript of hearing held on 1-14-10

Transcript of hearing held on 3-29-10

Transcript of Special Meeting of Limited Partnership held on 9-14-00

Transcript of Special Meeting of Limited Partnership held on 10-24-00

Appellants' Petition for Writ of Prohibition filed in the Supreme Court

Appellants' Motion to Compel dated 7-29-05

Appellants' Motion to Compel dated 10-5-07

Appellants' Motion to Compel dated 11-7-07

Appellants' Memorandum in Support of Motion to Compel dated 11-19-07

Appellants' Motion to Compel dated 6-12-08

Appellants' Memorandum to Special Master in Opposition to Respondents' Motion to Compel dated 1-16-09

Appellants' Motion to Alter or Amend dated 3-23-09

Respondents' Motion to Alter or Amend dated 6-15-09

Appellants' Motion for Protective Order dated 2-22-10

Appellants' Motion for Disclosure dated 2-22-10

Appellants' Motion for Recusal and Vacation of Orders dated 3-30-10

Respondents' Motion to Strike and Memorandum in Opposition to Appellants' Motion for Recusal and Vacation of Orders dated 4-20-10

Appellants' Motion to Alter or Amend dated 4-22-10

Appellants' Motion to Alter or Amend dated 10-28-10

Appellants' Answers to Interrogatories and Responses to Request for Production dated 7-14-05, with privilege log

Appellants' Third Supplemental Response to discovery with letter of Joel D Bailey dated 1-25-10

Affidavit of Joel D Bailey dated 3-30-10

Affidavit of Joel D Bailey dated 4-7-10

Affidavit of Laurance H Davis, Jr , dated 4-7-10

Affidavit of Whaley R Hinnant dated 4-13-10

Affidavit of Miles Hodge dated 4-8-10

Affidavit of James and Erin Ivey dated 4-15-10

Affidavit of Ellis M Johnston, II dated 6-7-10

Affidavit of Mary Jane Pike dated 4-9-10

Affidavit of Rhoda G Rentz dated 4-9-10

Affidavit of Thomas A Pendarvis dated 4-22-10

Affidavit of Eva Maria Reynolds dated 4-15-10

Affidavit of Oliver G Wood dated 7-28-08

Memorandum of Ford Von Weise dated 8-31-99

Letter of George Buchanan dated 11-10-00

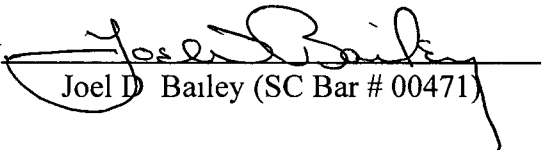
I certify that this designation contains no matter which is irrelevant to this appeal

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and

Joel D Bailey
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baileylawfirm@charter.net

Attorneys for Appellants

By 
Joel D Bailey (SC Bar # 00471)

June 23, 2011



THE
BAILEY LAW FIRM

A PROFESSIONAL ASSOCIATION

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EMAIL ADDRESS

BAILEYLAWFIRM@CHARTLR.NET

PHONE 843-525-6090

FAX 843 525-6070

January 20, 2012

R

D

Honorable Daniel E. Shearouse
South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

SC Supreme Court

RE	Davis, et al vs Parkview Apartments, et al	Case No 2010180666
	Davis, et al vs Roosevelt Gardens, et al	Case No 2010180086
	Davis et al vs Palmetto Apartments, et al	Case No 2010180087
	Rentz, et al vs Orleans Gardens, et al	Case No 2010176826
	Carolina Mgmt, et al vs Pinewood Park, et al	Case No 2010180088

Dear Mr. Shearouse

Pursuant to this Court's order of January 18, 2012, enclosed please find seven (7) copies of the Appendix to the Record on Appeal, as well as six (6) compact discs. Each disc contains one copy of the Appendix to the Record on Appeal. By copy of this letter, I am serving counsel for the Respondents with a compact disc which contains a copy of the Appendix.

I am enclosing herewith a proof of service as well as the Certificate of Counsel that the record complies with Rule 210 (g).

I would appreciate you filing these documents in the above-referenced appeals at your earliest convenience. Thank you for your assistance with this matter.

With kindest regards, I am

Very truly yours,

THE BAILEY LAW FIRM, P A

Joel D. Bailey

JDB/shb
enclosures

cc Ellis M. Johnston, II, Esquire (w/enclosures)
Calvin T. Vick, Jr., Esquire (w/enclosures)
Thomas A. Pendarvis, Esquire (w/enclosures)

The Supreme Court of South Carolina

Laurance H Davis, Jr , Mary Jane R Pike, Eva Marie Reynolds and Rhoda G Rentz, individually and in their capacities as the Limited Partners of Parkview Apartments, a South Carolina Limited Partnership

Appellants,

vs

Parkview Apartments, a South Carolina Limited Partnership, Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group, Inc , AmReal Corporation a/ka and f/k/a USS Corporation a/k/a and f/k/a U S Shelter Corporation, ISTC Corporation, N Barton Tuck, Jr , and John Doe, a generic designation for a party or parties whose true identity is unknown

Respondents

Laurance H Davis, Jr , Marvin D McCarthy, James W Ivey and Erin E Ivey, individually and in their capacities as the Limited Partners of Palmetto Apartments, a South Carolina Limited Partnership

Appellants,

vs

Palmetto Apartments, a South Carolina Limited Partnership, Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group, Inc , AmReal Corporation a/ka and f/k/a USS Corporation a/k/a and f/k/a U S Shelter Corporation, ISTC Corporation, N Barton Tuck, Jr , and John Doe, a generic designation for a party or parties whose true identity is unknown

Respondents

Carolina Management Corporation of Beaufort, James B Jackson, Whaley R Hinnant, Jr , Mary Gasser Rawl and Rhoda G Rentz, individually and in their capacities as the Limited Partners of Pinewood Park Apartments, a South Carolina Limited Partnership

Appellants,

vs

Pinewood Park Apartments, a South Carolina Limited Partnership, Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group, Inc , AmReal Corporation a/ka and f/k/a USS Corporation a/k/a and f/k/a U S Shelter Corporation, ISTC Corporation, N Barton Tuck, Jr , and John Doe, a generic designation for a party or parties whose true identity is unknown

Respondents

RECEIVED
JAN 27 2010
SOUTH CAROLINA COURT

Rhoda G Rentz, Mary Jane Pike, Eva Marie Reynolds, and
Joanne O Mercy, individually and in their capacities as the
Limited Partners of Orleans Gardens, a South Carolina
Limited Partnership

Appellants,

vs

Orleans Gardens, a South Carolina Limited Partnership,
Apartment Investment and Management Company a/k/a
AIMCO, Insignia Financial Group, Inc., AmReal Corporation
a/ka and f/k/a USS Corporation a/k/a and f/k/a U S Shelter
Corporation, ISTC Corporation, N Barton Tuck, Jr, and John
Doe, a generic designation for a party or parties whose true
identity is unknown

RECEIVED

JAN 25 '12

SC Supreme Court

Respondents

Laurance H Davis, Jr, Rhoda G Rentz, Mortimer M
Weinberg, Jr, Hodge Land Co, Inc, and Anna Trotter,
individually and in their capacities as the Limited Partners
of Roosevelt Gardens, a South Carolina Limited Partnership

Appellants,

vs

Roosevelt Gardens, a South Carolina Limited Partnership,
Apartment Investment and Management Company a/k/a
AIMCO, Insignia Financial Group, Inc, AmReal Corporation
a/k/a and f/k/a USS Corporation a/k/a and f/k/a U S Shelter
Corporation, ISTC Corporation, N Barton Tuck, Jr, and
John Doe, a generic designation for a party or parties whose
true identity is unknown

Respondents

PROOF OF SERVICE

I, Joel D Bailey, of The Bailey Law Firm, P A, certify that I have served a compact disc containing one (1) copy of the Appendix to the Record on Appeal on counsel for Respondents, by depositing the same in the United States Mail, postage prepaid, on the 20th day of January, 2012, the same being addressed to

Ellis M Johnston, II, J D
Calvin T Vick, Jr, J D
HAYNSWORTH SINKLER BOYD, PA
PO Box 2048
Greenville SC 29602


Joel D Bailey (SC Bar # 471)

The Bailey Law Firm, P A
PO Box 1437, 510 Ribaut Road
Beaufort, South Carolina 29901-1437
Attorney for Appellants

January 20, 2012

The Supreme Court of South Carolina

Laurance H Davis, Jr , Mary Jane R Pike, Eva Marie Reynolds and Rhoda G Rentz, individually and in their capacities as the Limited Partners of Parkview Apartments, a South Carolina Limited Partnership

Appellants,

vs

Parkview Apartments, a South Carolina Limited Partnership, Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group, Inc , AmReal Corporation a/ka and f/k/a USS Corporation a/k/a and f/k/a U S Shelter Corporation, ISTC Corporation, N Barton Tuck, Jr , and John Doe, a generic designation for a party or parties whose true identity is unknown

RECEIVED

JAN 23 2012

S C Supreme Court

Respondents

Laurance H Davis, Jr , Marvin D McCarthy, James W Ivey and Erin E Ivey, individually and in their capacities as the Limited Partners of Palmetto Apartments, a South Carolina Limited Partnership

Appellants,

vs

Palmetto Apartments, a South Carolina Limited Partnership, Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group, Inc , AmReal Corporation a/ka and f/k/a USS Corporation a/k/a and f/k/a U S Shelter Corporation, ISTC Corporation, N Barton Tuck, Jr , and John Doe, a generic designation for a party or parties whose true identity is unknown

Respondents

Carolina Management Corporation of Beaufort, James B Jackson, Whaley R Hinnant, Jr , Mary Gasser Rawl and Rhoda G Rentz, individually and in their capacities as the Limited Partners of Pinewood Park Apartments, a South Carolina Limited Partnership

Appellants,

vs

Pinewood Park Apartments, a South Carolina Limited Partnership, Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group, Inc , AmReal Corporation a/ka and f/k/a USS Corporation a/k/a and f/k/a U S Shelter Corporation, ISTC Corporation, N Barton Tuck, Jr , and John Doe, a generic designation for a party or parties whose true identity is unknown

Respondents

Rhoda G Rentz, Mary Jane Pike, Eva Marie Reynolds, and
Joanne O Mercy, individually and in their capacities as the
Limited Partners of Orleans Gardens, a South Carolina
Limited Partnership

Appellants,

vs

Orleans Gardens, a South Carolina Limited Partnership,
Apartment Investment and Management Company a/k/a
AIMCO, Insignia Financial Group, Inc., AmReal Corporation
a/k/a and f/k/a USS Corporation a/k/a and f/k/a U S Shelter
Corporation, ISTC Corporation, N Barton Tuck, Jr, and John
Doe, a generic designation for a party or parties whose true
identity is unknown

RECEIVED

JUN 23 07

SC Supreme Court

Respondents

Laurance H Davis, Jr, Rhoda G Rentz, Mortimer M
Weinberg, Jr, Hodge Land Co, Inc, and Anna Trotter,
individually and in their capacities as the Limited Partners
of Roosevelt Gardens, a South Carolina Limited Partnership

Appellants,

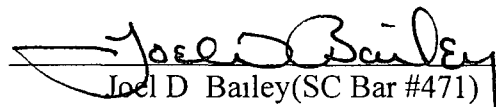
vs

Roosevelt Gardens, a South Carolina Limited Partnership,
Apartment Investment and Management Company a/k/a
AIMCO, Insignia Financial Group, Inc, AmReal Corporation
a/k/a and f/k/a USS Corporation a/k/a and f/k/a U S Shelter
Corporation, ISTC Corporation, N Barton Tuck, Jr, and
John Doe, a generic designation for a party or parties whose
true identity is unknown

Respondents

CERTIFICATE OF COUNSEL

Pursuant to Rule 210 (g) of the South Carolina Appellate Court Rules, the undersigned, as counsel for Appellants, hereby certifies that, to the best of my knowledge and belief, the Appendix to the Record on Appeal contains all remaining material proposed to be included by any of the parties and not any other material


Joel D Bailey (SC Bar #471)

PO Box 1437
Beaufort, SC 29901-1437
843-525-6090

Beaufort, South Carolina
January 20, 2012

The Supreme Court of South Carolina

Laurance H Davis, Jr , Rhoda
G Rentz, Mortimer W
Weinberg, Jr , Hodge Land Co ,
Inc , and Anna Trotter,
Individually and in their
capacities as the Limited
Partners of Roosevelt Gardens,
a South Carolina Limited
Partnership,

Appellants,

v

Roosevelt Gardens, a South
Carolina Limited Partnership,
Apartment Investment and
Management Company a/k/a
AIMCO, Insignia Financial
Group, Inc , Amreal
Corporation and a/k/a and f/k/a
USS Corporation a/k/a and
f/k/a U S Shelter Corporation,
ISTC Corporation, N Barton
Tuck, Jr , and John Doe, a
generic designation for a party
or parties whose true identity is
unknown,

Respondents

Carolina Management
Corporation of Beaufort, James
B Jackson, Whaley R Hinnant,
Jr , Mary Gasser Rawl and
Rhoda Rentz, Individually and

in their capacities as the
Limited Partners of Pinewood
Park Apartments, a South
Carolina Limited Partnership, Appellants,

v

Pinewood Park Apartments, a
South Carolina Limited
Partnership, Apartment
Investment and Management
Company a/k/a AIMCO,
Insignia Financial Group, Inc ,
AmReal Corporation a/k/a and
f/k/a USS Corporation a/k/a
and f/k/a U S Shelter
Corporation, ISTC
Corporation, N Barton Tuck,
Jr , and John Doe, a generic
designation for a party or
parties whose true identity is
unknown, Respondents

Laurance H Davis, Jr , Mary
Jane R Pike, Eva Marie
Reynolds and Rhoda G Rentz,
Individually and in their
capacities as the Limited
Partners of Parkview
Apartments, a South Carolina
Limited Partnership, Appellants,

v

Parkview Apartments, a South
Carolina Limited Partnership,

Apartment Investment and
Management Company a/k/a
AIMCO, Insignia Financial
Group, Inc , AmReal
Corporation a/k/a and f/k/a
USS Corporation a/k/a and
f/k/a U S Shelter Corporation,
ISTC Corporation, N Barton
Tuck, Jr , and John Doe, a
generic designation for a party
or parties whose true identity is
unknown,

Respondents

Laurance H Davis, Jr , Marvin
D McCarthy, James W Ivey,
and Erin E Ivey, Individually
and in their capacities as the
Limited Partners of Palmetto
Apartments, a South Carolina
Limited Partnership,

Appellants,

v

Palmetto Apartments, a South
Carolina Limited Partnership,
Apartment Investment and
Management Company a/k/a
AIMCO, Insignia Financial
Group, Inc , Amreal
Corporation and a/k/a and f/k/a
USS Corporation a/k/a and
f/k/a U S Shelter Corporation,
ISTC Corporation, N Barton
Tuck, Jr , and John Doe, a
generic designation for a party

or parties whose true identity is
unknown,

Respondents

4 Rhoda G Rentz, Mary Jane
Pike, Eva Marie Reynolds, and
Joanne O Mercy, Individually
and in their capacities as the
Limited Partners of Orleans
Gardens, a South Carolina
Limited Partnership,

Appellants,

v

Orleans Gardens, a South
Carolina Limited Partnership,
Apartment Investment and
Management Company a/k/a
AIMCO, Insignia Financial
Group, Inc , Amreal
Corporation and a/k/a and f/k/a
USS Corporation a/k/a and
f/k/a U S Shelter Corporation,
ISTC Corporation, N Barton
Tuck, Jr , and John Doe, a
generic designation for a party
or parties whose true identity is
unknown,

Respondents

ORDER

The parties to this action have filed a joint motion seeking
permission for appellants to supplement the record on appeal by way of an

appendix and a stay or extension of the time limits for the service and filing of respondents' final brief as well as the sealed appendix to the record on appeal that respondents are to file pursuant to this Court's October 5, 2011, order. Appellants ask that they be given until January 20, 2012, to serve and file the appendix.

The motion is granted. No later than January 20, 2012, appellants shall serve and file an appendix to the record on appeal containing the materials included in respondents' designation of matter to be included in the record on appeal, but inadvertently omitted from the record on appeal. The time for respondents to serve and file their final brief and the sealed appendix to the record on appeal referenced in this Court's October 5, 2011, order shall be stayed pending service and filing by appellants of the appendix permitted by this order.

IT IS SO ORDERED



FOR THE COURT

Columbia, South Carolina

January 18, 2012

cc Joel D Bailey, Esquire
Thomas A Pendarvis, Esquire
Ellis M Johnston, Jr , Esquire
Calvin T Vick, Esquire

Haynsworth
Sinkler Boyd, P.A.

GREENVILLE

CHARLESTON

COLUMBIA

FLORENCE

ATTORNEYS AND COUNSELORS AT LAW

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CALVIN T VICK JR
DIRECT DIAL NUMBER (864) 240 3324
EMAIL tvick@hsblawfirm.com

January 3, 2012

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

RE *Carolina Management Corporation of Beaufort et al v Pinewood Park
Apartments Aimco et al*
Case No 2010180088

Dear Mr Shearouse

Enclosed for filing in connection with the above matter, please find the original and seven (7) copies of the *Joint Motion of Appellants and Respondents to Supplement Record on Appeal via Appendix to Record on Appeal and for Stay of Time Limits for Filing and Service of Respondents Final Brief and Proof of Service* of same Also enclosed is our firm's check in the amount of \$25 00 to cover the filing fee After the documents have been filed, I would appreciate your returning filed-stamped copies to me in the enclosed self-addressed stamped envelope

As Ted Vick discussed with Linda Wednesday, the enclosed Joint Motion has Ted Vick's (attorney for Respondents) original signature only Joel Bailey, attorney for Appellants, will be forwarding a Joint Motion with his original signature Please do not hesitate to contact me if you have any questions

With kind regards, I remain,

Very truly yours,

RECEIVED

JAN 05 2012

S.C. SUPREME COURT

HAYNSWORTH SINKLER BOYD, P A

Calvin T Vick, Jr

CTVjr/amp

Enclosures

cc Ellis M Johnston, II, Esquire (via e-mail)
Thomas A Pendarvis, Esquire (w/enclosures)
Joel D Bailey, Esquire (w/enclosures)

THE SUPREME COURT OF SOUTH CAROLINA

Laurance H Davis, Jr , Rhoda G Rentz,) Transfer from Court of Appeals
Mortimer M Weinberg, Jr , Hodge Land) Case No 2010180086
Co , Inc , and Anna Trotter, Individually)
and in their capacities as the Limited)
Partners of Roosevelt Gardens, a South)
Carolina Limited Partnership,) Appellants,

vs

Roosevelt Gardens, a South Carolina)
Limited Partnership, Apartment)
Investment and Management Company)
a/k/a AIMCO, Insignia Financial Group,)
Inc , AmReal Corporation a/k/a and f/k/a)
USS Corporation a/k/a and f/k/a U S)
Shelter Corporation, ISTC Corporation,)
N Barton Tuck, Jr , and John Doe a)
generic designation for a party or parties)
whose true identity is unknown,) Respondents

Carolina Management Corporation of) Transfer from Court of Appeals
Beaufort, James B Jackson, Whaley R) Case No 2010180088
Hinnant, Jr , Mary Gasser Rawl, and)
Rhoda Rentz, Individually and in their)
capacities as the Limited Partners of)
Pinewood Park Apartments, a South)
Carolina Limited Partnership,) Appellants,

vs

Pinewood Park Apartments, a South)
Carolina Limited Partnership, Apartment)
Investment and Management Company)
a/k/a AIMCO, Insignia Financial Group,)
Inc , AmReal Corporation a/k/a and f/k/a)
USS Corporation a/k/a and f/k/a U S)
Shelter Corporation, ISTC Corporation,)
N Barton Tuck, Jr , and John Doe, a)
generic designation for a party or parties)
whose true identity is unknown,) Respondents

RECEIVED

JAN 05 2012

S.C. SUPREME COURT

Laurance H Davis, Jr , Mary Jane R	)	Transfer from Court of Appeals
Pike, Eva Marie Reynolds, and Rhoda G	)	Case No 2010180666
Rent/, individually and in their capacities	)	
as the Limited Partners of Parkview	)	
Apartments, a South Carolina Limited	)	Appellants,
Partnership,	)	
	)	
vs	)	
	)	
Parkview Apartments, a South Carolina	)	
Limited Partnership, Apartment	)	
Investment and Management Company	)	
a/k/a AIMCO, Insignia Financial Group,	)	
Inc , AmReal Corporation a/k/a and f/k/a	)	
USS Corporation a/k/a and f/k/a U S	)	
Shelter Corporation, ISTC Corporation,	)	
N Barton Tuck, Jr , and John Doe, a	)	
generic designation for a party or parties	)	
whose true identity is unknown,	)	Respondents

Laurance H Davis, Jr , Marvin D	)	Transfer from Court of Appeals
McCarthy, James W Ivey, and Erin E	)	Case No 2010180087
Ivey, Individually and in their capacities	)	
as the Limited Partners of Palmetto	)	
Apartments, a South Carolina Limited	)	
Partnership,	)	Appellants,
	)	
vs	)	
	)	
Palmetto Apartments, a South Carolina	)	
Limited Partnership, Apartment	)	
Investment and Management Company	)	
a/k/a AIMCO, Insignia Financial Group,	)	
Inc , AmReal Corporation a/k/a and f/k/a	)	
USS Corporation a/k/a and f/k/a U S	)	
Shelter Corporation, ISTC Corporation,	)	
N Barton Tuck, Jr , and John Doe, a	)	
generic designation for a party or parties	)	
whose true identity is unknown,	)	Respondents

Rhoda G Rentz, Mary Jane Pike, Eva	)	Transfer from Court of Appeals
Marie Reynolds, and Joanne O Mercy,	)	Case No 2010176826
Individually and in their capacities as the	)	
Limited Partners of Orleans Gardens, a	)	
South Carolina Limited Partnership,	)	
	)	Appellants,
vs	)	
	)	
Orleans Gardens, a South Carolina	)	
Limited Partnership, Apartment	)	
Investment and Management Company	)	
a/k/a AIMCO, Insignia Financial Group,	)	
Inc , AmReal Corporation a/k/a and f/k/a	)	
USS Corporation a/k/a and f/k/a U S	)	
Shelter Corporation, ISTC Corporation,	)	
N Barton Tuck, Jr , and John Doe, a	)	
generic designation for a party or parties	)	
whose true identity is unknown,	)	Respondents

**JOINT MOTION OF APPELLANTS AND RESPONDENTS
TO SUPPLEMENT RECORD ON APPEAL VIA APPENDIX TO
RECORD ON APPEAL AND FOR STAY OF TIME LIMITS FOR FILING
AND SERVICE OF RESPONDENTS' FINAL BRIEF**

Appellants and Respondents, through their respective undersigned counsel hereby move the Court for an Order granting Appellants permission to supplement the Record on Appeal filed in this case via a separate Appendix to the Record, pursuant to Rule 212(b), SCACR, and granting Respondents a stay of the time limits (or in the alternative, an extension of the time limits) for the filing and service of Respondents' Final Brief. Due to prior commitments of Appellants' counsel, the parties request that Appellants be given until January 20, 2012, to serve the Appendix to the Record. The parties further request that the stay of the time limits for Respondents' Final Brief apply also to the Sealed Appendix to the Record, which Respondents are to file under seal.

pursuant to the Court's Order dated October 5, 2011. In support of this Joint Motion, the parties show the Court as follows:

Appellants served the Record on Appeal upon Respondents via U.S. Mail on December 16, 2011. Respondents' counsel received the Record on Appeal on December 20, 2011. In preparing their Final Brief, Respondents' counsel discovered that some of the materials included in their Designation of Matter to be Included in the Record on Appeal had been inadvertently omitted (in whole or in part) from the Record on Appeal. Respondents' counsel informed Appellants' counsel that they would be unable to complete Respondents' Final Brief until the inadvertently omitted materials were included in the Record on Appeal and assigned Record page numbers. In the meantime, Appellants had filed the Record on Appeal with the Clerk of the South Carolina Supreme Court on December 22, 2011. On December 27 and 28, 2011, counsel for the parties consulted with one another concerning the inadvertently omitted materials and agreed that, with the Court's permission, they would supplement the Record on Appeal to include the inadvertently omitted materials via an Appendix to the Record, and seek a stay of the time limits for the filing and service of Respondents' Final Brief.

Wherefore, Appellants and Respondents jointly request that the Court permit Appellants to supplement the Record on Appeal by filing and serving an Appendix to the Record on Appeal on or before January 20, 2012, stay the time limits for the filing and service of Respondents' Final Brief until the Appendix to the Record is served by Appellants, and stay the time limits for the filing of the Sealed Appendix to the Record on Appeal by Respondents such that the Sealed Appendix to the Record will be filed at the same time as Respondents' Final Brief.

Respectfully submitted,



Ellis M Johnston, II, SC Bar # 3065
Calvin T Vick, Jr , SC Bar #68187
HAYNSWORTH SINKLER BOYD, PA
Post Office Box 2048
Greenville, South Carolina 29602
(864) 240-3200

ATTORNEYS FOR RESPONDENTS

Date 1/2/12
Greenville, South Carolina

Joel D Bailey, SC Bar #00471
The Bailey Law Firm
510 Ribaut Road
P O Box 1437
Beaufort, SC 29901-1437
(843) 525-6090

Thomas A Pendarvis, SC Bar #064918
Pendarvis Law Offices, P C
500 Carteret Street, Suite A
Beaufort, SC 29902
(843) 524-9500

ATTORNEYS FOR APPELLANTS

Date _____
Beaufort, South Carolina

THE SUPREME COURT OF SOUTH CAROLINA

Laurance H Davis, Jr , Rhoda G Rentz,)
Mortimer M Weinberg, Jr , Hodge Land)
Co , Inc , and Anna Trotter, Individually)
and in their capacities as the Limited)
Partners of Roosevelt Gardens, a South)
Carolina Limited Partnership,)

VS

Roosevelt Gardens, a South Carolina)
Limited Partnership, Apartment)
Investment and Management Company)
a/k/a AIMCO, Insignia Financial Group,)
Inc , AmReal Corporation a/k/a and f/k/a)
USS Corporation a/k/a and f/k/a U S)
Shelter Corporation, ISTC Corporation,)
N Barton Tuck, Jr , and John Doc, a)
generic designation for a party or parties)
whose true identity is unknown,)

Transfer from Court of Appeals
Case No 2010180086

Appellants,

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JAN - 5 2012

S C Supreme Court

Respondents

Carolina Management Corporation of)
Beaufort, James B Jackson, Whalcy R)
Hinnant, Jr , Mary Gasser Rawl, and)
Rhoda Rentz, Individually and in their)
capacities as the Limited Partners of)
Pinewood Park Apartments, a South)
Carolina Limited Partnership,)

VS

Pinewood Park Apartments, a South)
Carolina Limited Partnership, Apartment)
Investment and Management Company)
a/k/a AIMCO, Insignia Financial Group,)
Inc , AmReal Corporation a/k/a and f/k/a)
USS Corporation a/k/a and f/k/a U S)
Shelter Corporation, IS FC Corporation,)
N Barton Tuck, Jr , and John Doe, a)
generic designation for a party or parties)
whose true identity is unknown,)

Transfer from Court of Appeals
Case No 2010180088

Appellants,

Respondents

Laurance H Davis, Jr , Mary Jane R	)	Transfer from Court of Appeals
Pike, Eva Marie Reynolds, and Rhoda G	)	Case No 2010180666
Rentz, individually and in their capacities	)	
as the Limited Partners of Parkview	)	
Apartments, a South Carolina Limited	)	Appellants,
Partnership,	)	
	)	
vs	)	
	)	
Parkview Apartments, a South Carolina	)	
Limited Partnership, Apartment	)	
Investment and Management Company	)	
a/k/a AIMCO, Insignia Financial Group,	)	
Inc , AmReal Corporation a/k/a and f/k/a	)	
USS Corporation a/k/a and f/k/a U S	)	
Shelter Corporation, ISTC Corporation,	)	
N Barton Tuck, Jr , and John Doe, a	)	
generic designation for a party or parties	)	
whose true identity is unknown,	)	Respondents

Laurance H Davis, Jr , Marvin D	)	Transfer from Court of Appeals
McCarthy, James W Ivey, and Erin E	)	Case No 2010180087
Ivey, Individually and in their capacities	)	
as the Limited Partners of Palmetto	)	
Apartments, a South Carolina Limited	)	
Partnership,	)	Appellants,
	)	
vs	)	
	)	
Palmetto Apartments, a South Carolina	)	
Limited Partnership, Apartment	)	
Investment and Management Company	)	
a/k/a AIMCO, Insignia Financial Group,	)	
Inc , AmReal Corporation a/k/a and f/k/a	)	
USS Corporation a/k/a and f/k/a U S	)	
Shelter Corporation, ISTC Corporation,	)	
N Barton Tuck, Jr , and John Doe, a	)	
generic designation for a party or parties	)	
whose true identity is unknown,	)	Respondents

Rhoda G Rentz, Mary Jane Pike, Eva	)	Transfer from Court of Appeals
Marie Reynolds, and Joanne O Mercy,	)	Case No 2010176826
Individually and in their capacities as the	)	
Limited Partners of Orleans Gardens, a	)	
South Carolina Limited Partnership,	)	
	)	Appellants,
vs	)	
	)	
Orleans Gardens, a South Carolina	)	
Limited Partnership, Apartment	)	
Investment and Management Company	)	
a/k/a AIMCO, Insignia Financial Group,	)	
Inc , AmReal Corporation a/k/a and f/k/a	)	
USS Corporation a/k/a and f/k/a U S	)	
Shelter Corporation, ISTC Corporation,	)	
N Barton Tuck, Jr , and John Doe, a	)	
generic designation for a party or parties	)	
whose true identity is unknown,	)	Respondents

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below, he served counsel for the Appellants with a copy of *Joint Motion of Appellants and Respondents to Supplement Record on Appeal via Appendix to Record on Appeal and for Stay of Time Limits for Filing and Service of Respondents Final Brief* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses

Thomas A Pendarvis
Pendarvis Law Offices, P C
500 Carteret Street, Suite A
Beaufort, South Carolina 29902-5066

Joel D Bailey
The Bailey Law Firm, P A
P O Box 1437
Beaufort, South Carolina 29901-1437



Ellis M Johnston, II, SC Bar # 3065
Calvin F Vick, Jr, SC Bar #68187
HAYNSWORTH SINKLER BOYD, P A
Post Office Box 2048
Greenville, South Carolina 29602
(864) 240-3200

ATTORNEYS FOR RESPONDENTS

This 3rd day of January, 2012
Greenville, South Carolina



THE
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A PROFESSIONAL ASSOCIATION

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EMAIL ADDRESS
BAILEYLAWFIRM@CHARTER.NET

PHONE 843-525-6090
FAX 843-525-6070

December 22, 2011
VIA HAND DELIVERY

Honorable Daniel E. Shearouse
South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RECEIVED

DEC 22 2011

S.C. SUPREME COURT

RE Laurance H. Davis, Jr., et al vs Pinewood Park Apartments, et al
Case No. 2005-CP-07-1990

Dear Mr. Shearouse:

With regard to the above-referenced matter, please find fifteen (15) copies of Appellants' Brief, together with a certification pursuant to SCACR 211 and proof of service.

I would appreciate you filing these documents in the above-referenced appeal at your earliest convenience. Thank you for your assistance with this matter.

With kindest regards, I am

Very truly yours,

THE BAILEY LAW FIRM, P A

Joel D. Bailey

JDB/shb
enclosures

cc Ellis M. Johnston, II, Esquire (w/enclosures)
Calvin T. Vick, Jr., Esquire (w/enclosures)
Thomas A. Pendarvis, Esquire (w/enclosures)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Doyet A Early, III, Circuit Court Judge

Case No 2005-CP-07-1990

RECEIVED

DEC 22 2011

S.C. SUPREME COURT

Carolina Management Corporation of Beaufort, James B
Jackson, Whaley R Hinnant, Jr , Mary Gasser Rawl and
Rhoda G Rentz, individually and in their capacities as the
Limited Partners of Pinewood Park Apartments, a South
Carolina Limited Partnership

Appellants,

vs

Pinewood Park Apartments, a South Carolina Limited Partnership,
Apartment Investment and Management Company a/k/a
AIMCO, Insignia Financial Group, Inc , AmReal Corporation
a/ka and f/k/a USS Corporation a/k/a and f/k/a U S Shelter

Respondents

CERTIFICATE OF COUNSEL

The undersigned, as counsel for Appellants, hereby certifies that, to the best of my knowledge
and belief, the Appellants' Brief complies with Rule 211 of the South Carolina Appellate Court
Rules


Joel D. Bailey (SC Bar #471)
PO Box 1437
Beaufort, SC 29901-1437
843-525-6090

Beaufort, South Carolina
December 22, 2011

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Doyet A Early, III, Circuit Court Judge

Case No 2005-CP-07-1990

RECEIVED

DEC 22 2011

S.C. SUPREME COURT

Carolina Management Corporation of Beaufort, James B Jackson, Whaley R Hinnant, Jr , Mary Gasser Rawl and Rhoda G Rentz, individually and in their capacities as the Limited Partners of Pinewood Park Apartments, a South Carolina Limited Partnership

Appellants,

vs

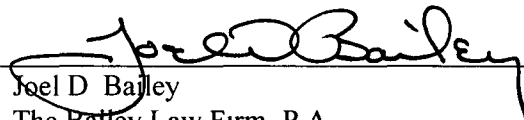
Pinewood Park Apartments, a South Carolina Limited Partnership, Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group, Inc , AmReal Corporation a/ka and f/k/a USS Corporation a/k/a and f/k/a U S Shelter Corporation, ISTC Corporation, N Barton Tuck, Jr , and John Doe, a generic designation for a party or parties whose true identity is unknown

Respondents

PROOF OF SERVICE

I, Joel D Bailey, of The Bailey Law Firm, P A , certify that I have served one (1) copy of Appellants' Brief on counsel for Respondents, by depositing a copy of the same in the United States Mail, postage prepaid, on the 22nd day of December, 2011, the same being addressed to

Ellis M Johnston, II, J D
Calvin T Vick, Jr , J D
HAYNSWORTH SINKLER BOYD, PA
PO Box 2048
Greenville, SC 29602


Joel D Bailey
The Bailey Law Firm, P A
PO Box 1437, 510 Ribaut Road
Beaufort, South Carolina 29901-1437
Attorney for Appellants

December 22, 2011



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PHONE 843-525-6090

FAX 843-525-6070

October 11, 2011

Honorable Daniel E. Shearouse
South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RE Carolina Management Corp. of Beaufort et al vs Pinewood Park Apartments et al
Case No. 2005-CP-07-1990

Dear Mr. Shearouse:

Pursuant to the Court's order of October 5, 2011, enclosed for filing please find the Appellants' Amended Initial Brief. I am also enclosing the original proof of service.

I would appreciate your filing these documents in the above-referenced appeal at your earliest convenience. Thank you for your assistance with this matter.

With kindest regards, I am

Very truly yours,

THE BAILEY LAW FIRM, P.A.

Joel D. Bailey

JDB/shb
enclosures

cc Ellis M. Johnston, II, Esquire (w/enclosures)
Calvin T. Vick, Jr., Esquire (w/enclosures)
Thomas A. Pendarvis, Esquire (w/enclosures)

RECEIVED

OCT 17 2011

SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Doyet A Early, III, Circuit Court Judge

Case No 2005-CP-07-1990

RECEIVED

OCT 17 2011

S C Supreme Court

Carolina Management Corporation of Beaufort, James B
Jackson, Whaley R Hinnant, Jr , Mary Gasser Rawl and
Rhoda G Rentz, individually and in their capacities as the
Limited Partners of Pinewood Park Apartments, a South
Carolina Limited Partnership

vs

Appellants,

Pinewood Park Apartments, a South Carolina Limited Partnership,
Apartment Investment and Management Company a/k/a
AIMCO, Insignia Financial Group, Inc , AmReal Corporation
a/ka and f/k/a USS Corporation a/k/a and f/k/a U S Shelter
Corporation, ISTC Corporation, N Barton Tuck, Jr , and John
Doe, a generic designation for a party or parties whose true
identity is unknown

Respondents

PROOF OF SERVICE

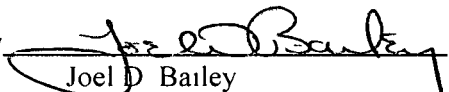
I, Joel D Bailey, of The Bailey Law Firm, P A , certify that I have served one (1) copy of Appellants'
Amended Initial Brief on counsel for Respondents, by depositing a copy of the same in the United States
Mail, postage prepaid, on the 11th day of October, 2011, the same being addressed to

Ellis M Johnston, II, J D
Calvin T Vick, Jr , J D
HAYNSWORTH SINKLER BOYD, PA
PO Box 2048
Greenville, SC 29602

THOMAS A PENDARVIS (SC Bar # 064918)
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843-524-9501 fax
Thomas@PendarvisLaw.com

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843- 525-6070 fax
baileylawfirm@charter.net

Attorneys for Appellants

By 
Joel D Bailey

October 11, 2011

The Supreme Court of South Carolina

Laurance H Davis, Jr , Rhoda
G Rentz, Mortimer W
Weinberg, Jr , Hodge Land Co ,
Inc , and Anna Trotter,
Individually and in their
capacities as the Limited
Partners of Roosevelt Gardens,
a South Carolina Limited
Partnership, Appellants,

v

Roosevelt Gardens, a South
Carolina Limited Partnership,
Apartment Investment and
Management Company a/k/a
AIMCO, Insignia Financial
Group, Inc , Amreal
Corporation and a/k/a and f/k/a
USS Corporation a/k/a and
f/k/a U S Shelter Corporation,
ISTC Corporation, N Barton
Tuck, Jr , and John Doe, a
generic designation for a party
or parties whose true identity is
unknown, Respondents

Carolina Management
Corporation of Beaufort, James
B Jackson, Whaley R Hinnant,
Jr , Mary Gasser Rawl and
Rhoda Rentz, Individually and

in their capacities as the
Limited Partners of Pinewood
Park Apartments, a South
Carolina Limited Partnership, Appellants,

v

Pinewood Park Apartments, a
South Carolina Limited
Partnership, Apartment
Investment and Management
Company a/k/a AIMCO,
Insignia Financial Group, Inc ,
AmReal Corporation a/k/a and
f/k/a USS Corporation a/k/a
and f/k/a U S Shelter
Corporation, ISTC
Corporation, N Barton Tuck,
Jr , and John Doe, a generic
designation for a party or
parties whose true identity is
unknown, Respondents

Laurance H Davis, Jr , Mary
Jane R Pike, Eva Marie
Reynolds and Rhoda G Rentz,
Individually and in their
capacities as the Limited
Partners of Parkview
Apartments, a South Carolina
Limited Partnership, Appellants,

v

Parkview Apartments, a South
Carolina Limited Partnership,

Apartment Investment and
Management Company a/k/a
AIMCO, Insignia Financial
Group, Inc , AmReal
Corporation a/k/a and f/k/a
USS Corporation a/k/a and
f/k/a U S Shelter Corporation,
ISTC Corporation, N Barton
Tuck, Jr , and John Doe, a
generic designation for a party
or parties whose true identity is
unknown,

Respondents

Laurance H Davis, Jr , Marvin
D McCarthy, James W Ivey,
and Erin E Ivey, Individually
and in their capacities as the
Limited Partners of Palmetto
Apartments, a South Carolina
Limited Partnership,

Appellants,

v

Palmetto Apartments, a South
Carolina Limited Partnership,
Apartment Investment and
Management Company a/k/a
AIMCO, Insignia Financial
Group, Inc , Amreal
Corporation and a/k/a and f/k/a
USS Corporation a/k/a and
f/k/a U S Shelter Corporation,
ISTC Corporation, N Barton
Tuck, Jr , and John Doe, a
generic designation for a party

or parties whose true identity is
unknown,

Respondents

Rhoda G Rentz, Mary Jane
Pike, Eva Marie Reynolds, and
Joanne O Mercy, Individually
and in their capacities as the
Limited Partners of Orleans
Gardens, a South Carolina
Limited Partnership,

Appellants,

v

Orleans Gardens, a South
Carolina Limited Partnership,
Apartment Investment and
Management Company a/k/a
AIMCO, Insignia Financial
Group, Inc , Amreal
Corporation and a/k/a and f/k/a
USS Corporation a/k/a and
f/k/a U S Shelter Corporation,
ISTC Corporation, N Barton
Tuck, Jr , and John Doe, a
generic designation for a party
or parties whose true identity is
unknown,

Respondents

ORDER

} Respondents in the above-captioned appeals move to dismiss the
appeals based on appellants' failure to comply with the requirements of Rules

208(b)(4), 208(b)(8), 209(b), 210(c), and 267(c), SCACR. In the alternative, respondents move to strike appellants' initial briefs and designations of matter to be included in the record on appeal based on appellants' failure to comply with the rules, strike the citations and designated materials within appellants' initial briefs and designations that are in violation of Rules 208(b)(4), 209(b), and 210(c), and require appellants to serve and file amended initial briefs and designations. Appellants have filed returns in opposition to the motions. The motions to dismiss and to strike are denied, however, appellants shall, within ten days of the date of this order, serve and file amended briefs that identify the page numbers of the documents they cite therein.

Respondents also seek permission to file a consolidated initial brief and designation of matter to be included in the record on appeal, to exceed the page limit set forth in Rule 208(b)(5), SCACR, by thirty pages, and to provide a document entitled "In Camera Supplement to Memorandum in Support of Defendants' Motion to Alter or Amend Order," along with eight attached exhibits, in a separate, sealed appendix to the record on appeal.

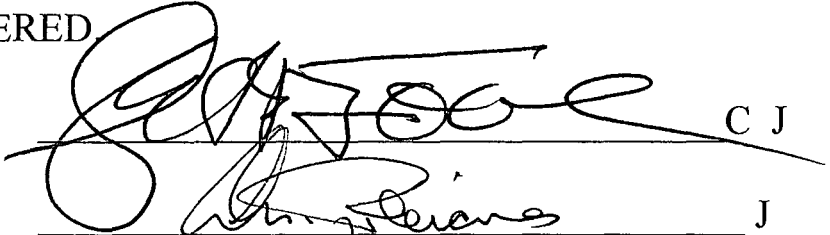
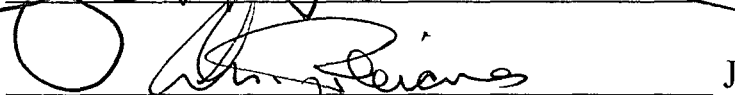
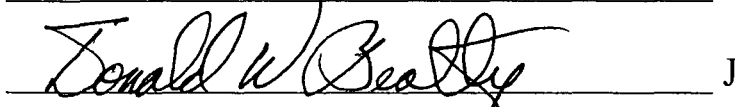
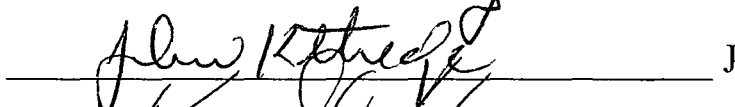
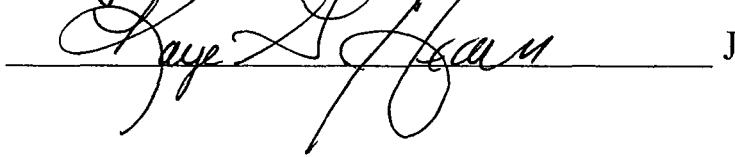
Appellants oppose the requests. The requests are granted.¹

Finally, as to respondents' motion to stay the time limits and for a

¹ Appellants may file a consolidated initial reply brief if they so choose.

thirty day extension of time, which appellants also oppose, respondents are hereby directed to serve and file their initial brief and designation of matter to be included in the record on appeal within thirty days of service of appellants' amended briefs

IT IS SO ORDERED

 C J
 J
 J
 J
 J

Columbia, South Carolina

October 5, 2011

cc Joel D Bailey, Esquire
Thomas A Pendarvis, Esquire
Ellis M Johnston, Jr , Esquire
Calvin T Vick, Esquire



THE
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A PROFESSIONAL ASSOCIATION

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PHONE 843-525-6090

FAX 843-525-6070

June 23 2011

Honorable Daniel E. Shearouse
South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RE Carolina Management Corporation, et al vs Pine & Oak Park Apartments, et al
Case No. 2005-CP-07-1990

Dear Mr. Shearouse

Yesterday I mailed the Appellants' initial brief, proof of service and Designation of Matter to be Included in the Record on Appeal in the above-referenced matter. I later realized that the Designation did not contain the Pinewood caption, but erroneously included the caption from the Palmetto case. Accordingly, I am enclosing a Corrected Designation of Matter to be Included in the Record on Appeal. The only change made to this document is the caption. I am also enclosing a proof of service.

I would appreciate you filing this corrected Designation in the above-referenced appeal at your earliest convenience. Thank you for your assistance with this matter.

With kindest regards, I am

Very truly yours,

THE BAILEY LAW FIRM P A

Joel D. Bailey

JDB/shb
enclosures

cc Ellis M. Johnston, II, Esquire (w/enclosures)
Calvin T. Vick, Jr., Esquire (w/enclosures)
Thomas A. Pendarvis, Esquire (w/enclosures)

RECEIVED

JUN 28 2011

SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Doyet A Early, III, Circuit Court Judge

Case No 2005-CP-07-1990

Carolina Management Corporation of Beaufort, James B Jackson, Whaley R Hinnant, Jr , Mary Gasser Rawl and Rhoda G Rentz, individually and in their capacities as the Limited Partners of Pinewood Park Apartments, a South Carolina Limited Partnership

Appellants,

VS

Pinewood Park Apartments, a South Carolina Limited Partnership, Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group, Inc , AmReal Corporation a/ka and f/k/a USS Corporation a/k/a and f/k/a U S Shelter Corporation, ISTC Corporation, N Barton Tuck, Jr , and John Doe, a generic designation for a party or parties whose true identity is unknown

Respondents

PROOF OF SERVICE

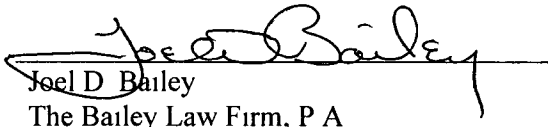
I, Joel D Bailey, of The Bailey Law Firm, P A , certify that I have served one (1) copy of Appellants' Corrected Designation of Matter to be Included in the Record on Appeal on counsel for Respondents, by depositing a copy of the same in the United States Mail, postage prepaid, on the 23rd day of June, 2011, the same being addressed to

Ellis M Johnston, II, J D
Calvin T Vick, Jr , J D
HAYNSWORTH SINKLER BOYD, PA
PO Box 2048
Greenville, SC 29602

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JUN 28 2011

SC SUPREME COURT


Joel D Bailey
The Bailey Law Firm, P A
PO Box 1437, 510 Ribaut Road
Beaufort, South Carolina 29901-1437
Attorney for Appellants

June 23, 2011



THE
BAILEY LAW FIRM

A PROFESSIONAL ASSOCIATION

510 RIBAUT ROAD

POST OFFICE BOX 1437 BEAUTORT SOUTH CAROLINA 29901-1437

EMAIL ADDRESS

BAILEYLAWFIRM@CHARTER.NET

PHONE 843-525-6090

FAX 843-525-6070

June 22, 2011

Honorable Daniel E. Shearouse
South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RECEIVED

JUN 27 2011

SC SUPREME COURT

RE Laurance H. Davis, Jr., et al. vs Pinewood Park Apartments, et al.
Case No. 2005-CP-07-1990

Dear Mr. Shearouse:

With regard to the above-referenced matter, enclosed for filing please find Appellants' Initial Brief, Designation of Matter to be Included in the Record on Appeal and proof of service.

I would appreciate you filing these documents in the above-referenced appeal at your earliest convenience. Thank you for your assistance with this matter.

With kindest regards, I am

Very truly yours,

THE BAILEY LAW FIRM, P A

Joel D. Bailey

JDB/shb
enclosures

cc Ellis M. Johnston, II, Esquire (w/enclosures)
Calvin T. Vick, Jr., Esquire (w/enclosures)
Thomas A. Pendarvis, Esquire (w/enclosures)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Doyet A Early, III, Circuit Court Judge

Case No 2005-CP-07-1990

Carolina Management Corporation of Beaufort, James B
Jackson, Whaley R Hinnant, Jr , Mary Gasser Rawl and
Rhoda G Rentz, individually and in their capacities as the
Limited Partners of Pinewood Park Apartments, a South
Carolina Limited Partnership

Appellants,

VS

Pinewood Park Apartments, a South Carolina Limited Partnership,
Apartment Investment and Management Company a/k/a
AIMCO, Insignia Financial Group, Inc , AmReal Corporation
a/ka and f/k/a USS Corporation a/k/a and f/k/a U S Shelter
Corporation, ISTC Corporation, N Barton Tuck, Jr , and John
Doe, a generic designation for a party or parties whose true
identity is unknown

Respondents

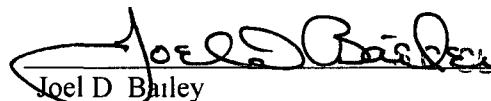
PROOF OF SERVICE

I, Joel D Bailey, of The Bailey Law Firm, P A , certify that I have served one (1) copy of Appellants' Initial Brief and Designation of Matter to be Included in the Record on Appeal on counsel for Respondents, by depositing a copy of the same in the United States Mail, postage prepaid, on the 22nd day of June, 2011, the same being addressed to

Ellis M Johnston, II, J D
Calvin T Vick, Jr , J D
HAYNSWORTH SINKLER BOYD, PA
PO Box 2048
Greenville, SC 29602

RECEIVED

JUN 27 2011


Joel D Bailey
The Bailey Law Firm, P A
PO Box 1437, 510 Ribaut Road
Beaufort, South Carolina 29901-1437
Attorney for Appellants

June 22, 2011

Hopkins, Debbie

From baileylawfirm@charter net
Sent Monday May 23 2011 1 06 PM
To Hopkins Debbie
Cc Ted Vick Ellis Johnston Thomas Pendarvis
Subject RE Missing Transcript

Debbie

The transcript from the retired court reporter, Ms Bennett, arrived in today's mail As I understand the Court's last order, the time for filing Appellants' initial briefs begins to run today, making the briefs due on June 22nd Please advise if this is incorrect

Thank you for your assistance

Joel D Bailey

The Bailey Law Firm, P A
PO Box 1437
Beaufort, SC 29901-1437
843-525-6090
843-525-6070 (fax)
baileylawfirm@charter.net

RECEIVED

MAY 23 2011

SC Supreme Court

On Mon, May 23, 2011 at 9 26 AM, Hopkins, Debbie wrote

Thank you, Mr Bailey

From baileylawfirm@charter net [mailto:baileylawfirm@charter.net]
Sent Friday, May 20, 2011 6 11 PM
To Hopkins, Debbie
Subject Missing Transcript

Debbie

FYI, I did not receive the transcript from Ms Bennett in today's mail I checked after both morning and afternoon postings Will update you on Monday

Joel D Bailey
The Bailey Law Firm, P A
PO Box 1437
Beaufort, SC 29901-1437
843-525-6090
843-525-6070 (fax)
baileylawfirm@charter.net

Hopkins, Debbie

From baileylawfirm@charter.net
Sent Thursday, May 19, 2011 11:02 AM
To Hopkins, Debbie
Subject Transcripts Update

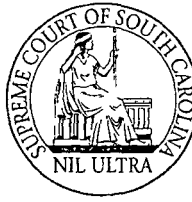
Debbie

I am now in receipt of one of the transcripts from court reporter Elizabeth Harris. I spoke with the other court reporter, Harriett Bennett, this morning and she informed me that she has now located the other transcript, and is sending it to me today. I hope to have it by tomorrow, and will advise you when I am in actual possession of it.

Thanks for your assistance.

Joel D. Bailey
The Bailey Law Firm, P.A.
PO Box 1437
Beaufort, SC 29901-1437
843-525-6090
843-525-6070 (fax)
baileylawfirm@charter.net

843-694-3480



The Supreme Court of South Carolina

DANIEL E SHEAROUSE
CLERK OF COURT

BRENDA F SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA SOUTH CAROLINA 29211

(803) 734 1080

FAX (803) 734 1499

May 19, 2011

Joel D Bailey, Esquire
The Bailey Law Firm, PA
P O Box 1437
Beaufort, SC 29901

Thomas A Pendarvis, Esquire
Pendarvis Law Offices, PC
500 Carteret St Ste A
Beaufort, SC 29902

Ellis M Johnston, Jr , Esquire
Calvin T Vick, Esquire
Haynsworth Sinkler Boyd, P A
P O Box 2048
Greenville, SC 29602

Re Laurance Davis v Roosevelt Gardens
Carolina Management v Pinewood Park
Laurance Davis v Parkview Apartments
Laurance Davis v Palmetto Apartments
Rhoda Rentz v Orleans Gardens

Dear Counsel

Enclosed is the order issued in the above entitled matters

Laurance Davis v Roosevelt Gardens
Carolina Management v Pinewood Park
Laurance Davis v Parkview Apartments
Laurance Davis v Palmetto Apartments
Rhoda Rentz v Orleans Gardens

Page Two

May 19, 2011

Very truly yours,

A handwritten signature in black ink, appearing to be 'DES', with a long horizontal line extending to the right.

CLERK

DES/dmh

Enclosure

The Supreme Court of South Carolina

Laurance H Davis, Jr , Rhoda
G Rentz, Mortimer W
Weinberg, Jr , Hodge Land Co ,
Inc , and Anna Trotter,
Individually and in their
capacities as the Limited
Partners of Roosevelt Gardens,
a South Carolina Limited
Partnership,

Appellants,

v

Roosevelt Gardens, a South
Carolina Limited Partnership,
Apartment Investment and
Management Company a/k/a
AIMCO, Insignia Financial
Group, Inc , Amreal
Corporation and a/k/a and f/k/a
USS Corporation a/k/a and
f/k/a U S Shelter Corporation,
ISTC Corporation, N Barton
Tuck, Jr , and John Doe, a
generic designation for a party
or parties whose true identity is
unknown,

Respondents

Carolina Management
Corporation of Beaufort, James
B Jackson, Whaley R Hinnant,
Jr , Mary Gasser Rawl and
Rhoda Rentz, Individually and
in their capacities as the

Limited Partners of Pinewood
Park Apartments, a South
Carolina Limited Partnership,

Appellants,

v

Pinewood Park Apartments, a
South Carolina Limited
Partnership, Apartment
Investment and Management
Company a/k/a AIMCO,
Insignia Financial Group, Inc ,
AmReal Corporation a/k/a and
f/k/a USS Corporation a/k/a
and f/k/a U S Shelter
Corporation, ISTC
Corporation, N Barton Tuck,
Jr , and John Doe, a generic
designation for a party or
parties whose true identity is
unknown,

Respondents

Laurance H Davis, Jr , Mary
Jane R Pike, Eva Marie
Reynolds and Rhoda G Rentz,
Individually and in their
capacities as the Limited
Partners of Parkview
Apartments, a South Carolina
Limited Partnership,

Appellants,

v

Parkview Apartments, a South
Carolina Limited Partnership,
Apartment Investment and
Management Company a/k/a

AIMCO, Insignia Financial
Group, Inc , AmReal
Corporation a/k/a and f/k/a
USS Corporation a/k/a and
f/k/a U S Shelter Corporation,
ISTC Corporation, N Barton
Tuck, Jr , and John Doe, a
generic Designation for a party
or parties whose true identity is
unknown,

Respondents

Laurance H Davis, Jr , Marvin
D McCarthy James W Ivey,
and Erin E Ivey, Individually
and in their capacities as the
Limited Partners of Palmetto
Apartments, a South Carolina
Limited Partnership,

Appellants,

v

Palmetto Apartments, a South
Carolina Limited Partnership,
Apartment Investment and
Management Company a/k/a
AIMCO, Insignia Financial
Group, Inc , Amreal
Corporation and a/k/a and f/k/a
USS Corporation a/k/a and
f/k/a U S Shelter Corporation,
ISTC Corporation, N Barton
Tuck, Jr , and John Doe, a
generic designation for a party
or parties whose true identity is
unknown,

Respondents

Rhoda G Rentz, Mary Jane
Pike, Eva Marie Reynolds, and
Joanne O Mercy, Individually
and in their capacities as the
Limited Partners of Orleans
Gardens, a South Carolina
Limited Partnership,

Appellants,

v

Orleans Gardens, a South
Carolina Limited Partnership,
Apartment Investment and
Management Company a/k/a
AIMCO, Insignia Financial
Group, Inc , Amreal
Corporation and a/k/a and f/k/a
USS Corporation a/k/a and
f/k/a U S Shelter Corporation,
ISTC Corporation, N Barton
Tuck, Jr , and John Doe, a
generic designation for a party
or parties whose true identity is
unknown,

Respondents

ORDER

The joint motion seeking extensions is denied. Since appellants
are still awaiting the delivery of a transcript from a court reporter, the time to

serve and file the appellant's brief has not begun to run Rule 208(a)(1),
SCACR (time to serve and file appellant's initial brief begins on receipt of
transcript) Counsel for appellant shall advise this Court when this transcript
is received

IT IS SO ORDERED



FOR THE COURT C J

Columbia, South Carolina

May 19, 2011

PENDARVIS LAW OFFICES, P.C.

THOMAS A. PENDARVIS, J.D.
ADMITTED IN SC AND GA
Thomas@PendarvisLaw.com
Board Certified by the American Board
of Professional Liability Attorneys in
Legal Malpractice



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BEAUFORT, SC 29902 5066
www.PendarvisLaw.com
TEL 843 524 9500
FAX 843 524 9501

May 16, 2011

Daniel E. Shearouse, Clerk of Court
Supreme Court of South Carolina
PO Box 11330
Columbia SC 29211

RECEIVED

MAY 19 2011

SC Supreme Court

Re Rentz, et al v Orleans Gardens, et al
Davis, et al v Roosevelt Gardens et al
Carolina Management, et al v Pinewood Park Apartments, et al
Davis, et al v Palmetto Apartments, et al
Davis, et al v Parkview Apartments, et al

Dear Mr. Shearouse

As stated in correspondence from Atty. Ellis Johnston of this date, enclosed please find a copy of the JOINT MOTION OF APPELLANTS AND RESPONDENTS which includes my original signature page.

Should you need anything further, please do not hesitate to call or contact my office.

With kind regards, I remain

Sincerely,

PENDARVIS LAW OFFICES P.C.

Thomas A. Pendarvis

TAP/jac
Enclosure

cc Joel D. Bailey, J.D. (w/enclosure)
Ellis M. Johnston II, J.D. (w/enclosure)
Calvin T. Vick, J.D. (via e-mail w/enclosure)

THE SUPREME COURT OF SOUTH CAROLINA

Laurance H. Davis, Jr., Rhoda G. Rentz,
Mortimer M. Weinberg, Jr., Hodge Land
Co., Inc. and Anna Trotter Individually
and in their capacities as the Limited
Partners of Roosevelt Gardens, a South
Carolina Limited Partnership)
Transfer from Court of Appeals
Case No. 2010180086
Appellants,

vs.

Roosevelt Gardens, a South Carolina
Limited Partnership, Apartment
Investment and Management Company
a/k/a AIMCO Insignia Financial Group
Inc., AmReal Corporation a/k/a and f/k/a
USS Corporation a/k/a and f/k/a U.S.
Shelter Corporation, ISTC Corporation,
N. Barton Tuck, Jr. and John Doe, a
generic designation for a party or parties
whose true identity is unknown)
Respondents

RECEIVED

MAY 19, 2011

SC Supreme Court

Carolina Management Corporation of
Beaufort, James B. Jackson, Whaley R.
Hinnant, Jr., Mary Gasser Rawl, and
Rhoda Rentz Individually and in their
capacities as the Limited Partners of
Pinewood Park Apartments, a South
Carolina Limited Partnership)
Transfer from Court of Appeals
Case No. 2010180088
Appellants

vs.

Pinewood Park Apartments, a South
Carolina Limited Partnership, Apartment
Investment and Management Company
a/k/a AIMCO Insignia Financial Group
Inc., AmReal Corporation a/k/a and f/k/a
USS Corporation a/k/a and f/k/a U.S.
Shelter Corporation, ISTC Corporation,
N. Barton Tuck, Jr. and John Doe, a
generic designation for a party or parties
whose true identity is unknown)
Respondents

Laurance H Davis Jr, Mary Jane R	)	Transfer from Court of Appeals
Pike, Eva Marie Reynolds and Rhoda G	)	Case No 2010180666
Rentz individually and in their capacities	)	
as the Limited Partners of Parkview	)	
Apartments a South Carolina Limited	)	Appellants
Partnership	)	
	)	
vs	)	
	)	
Parkview Apartments a South Carolina	)	
Limited Partnership, Apartment	)	
Investment and Management Company	)	
a/k/a AIMCO Insignia Financial Group	)	
Inc AmReal Corporation a/k/a and f/k/a	)	
USS Corporation a/k/a and f/k/a U S	)	
Shelter Corporation, ISTC Corporation	)	
N Barton Tuck Jr, and John Doe a	)	
generic designation for a party or parties	)	
whose true identity is unknown	)	Respondents

Laurance H Davis, Jr Marvin D	)	Transfer from Court of Appeals
McCarthy James W Ivey and Erin E	)	Case No 2010180087
Ivey, Individually and in their capacities	)	
as the Limited Partners of Palmetto	)	
Apartments, a South Carolina Limited	)	
Partnership	)	Appellants,
	)	
vs	)	
	)	
Palmetto Apartments a South Carolina	)	
Limited Partnership Apartment	)	
Investment and Management Company	)	
a/k/a AIMCO Insignia Financial Group	)	
Inc, AmReal Corporation a/k/a and f/k/a	)	
USS Corporation a/k/a and f/k/a U S	)	
Shelter Corporation ISTC Corporation,	)	
N Barton Tuck Jr and John Doe a	)	
generic designation for a party or parties	)	
whose true identity is unknown	)	Respondents

Rhoda G. Rentz, Mary Jane Pike, Eva	)	Transfer from Court of Appeals
Marie Reynolds and Joanne O. Mercy	)	Case No. 2010176826
Individually and in their capacities as the	)	
Limited Partners of Orleans Gardens, a	)	
South Carolina Limited Partnership,	)	
	)	Appellants,
vs	)	
	)	
Orleans Gardens, a South Carolina	)	
Limited Partnership, Apartment	)	
Investment and Management Company	)	
a/k/a AIMCO Insignia Financial Group,	)	
Inc., AmReal Corporation a/k/a and f/k/a	)	
USS Corporation a/k/a and f/k/a U.S.	)	
Shelter Corporation, ISTC Corporation	)	
N. Barton Tuck, Jr., and John Doe, a	)	
generic designation for a party or parties	)	
whose true identity is unknown	)	Respondents

JOINT MOTION OF APPELLANTS AND RESPONDENTS

Pursuant to Rule 240, South Carolina Appellate Court Rules (SCACR), Appellants and Respondents in the five (5) above-captioned appeals respectfully move the Court for an additional 30 days time for each to file their initial briefs and designation of matter to be included in the record on appeal and an additional ten (10) days for Appellants to file reply briefs, as well as an additional 30 days to file the record on appeal. The basis for this motion is set forth below.

By Order dated May 5, 2011 (Exhibit 1), this Court denied certain motions then pending which had stayed the filing of initial briefs and designation of matter to be included in the record on appeal. Thus, Appellants' initial briefs and designation of matter to be included in the record on appeal would be due on June 6, 2011. Respondents' initial briefs and designation of matter to be included in the record on appeal would then be due on July 6, 2011 (or 30 days after filing of Appellants' briefs).

The record in this case will be unusually voluminous and out of necessity, this Court has ordered that it be filed electronically (Exhibit 1). The Notices of Appeal take exception to thirteen (13) separate Orders each of which must be addressed in Appellants' and Respondents' papers.

Mr. Thomas Pendarvis, one of two attorneys for Appellants, presently has trials scheduled for the week of May 23, 2011, the first two weeks in June of 2011, and the week of July 11, 2011. Thus, compliance with the current schedule requiring Appellants to file their papers on June 6, 2011, would impose an exceptional hardship on Appellants.

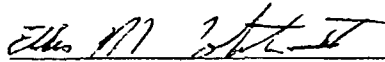
Mr. Calvin T. Vick, Jr., one of two attorneys for Respondents, is expecting the birth of his third child on May 28, 2011, and has a week-long U.S. District Court jury trial beginning July 5, 2011. He anticipates that preparation for this trial and completing the discovery necessary for it would severely limit his ability to assist in the preparation of Respondents' papers and would impose an exceptional hardship on them.

Counsel for the Appellants and Respondents have conferred and agree that, under the circumstances discussed above, it will not be practically possible for either of them to adequately brief the issues presented in these appeals and properly designate the documents to be included in the record in the standard 30-day period allowed to each of them under the Rules. Due to these exceptional circumstances, both Appellants and Respondents jointly request that each be granted an additional thirty (30) days to prepare their respective papers (i.e., 30-day extension for Appellants' initial briefs and 30-day extension for Respondents' initial briefs) and that Appellants be granted an additional ten (10) days to file reply briefs and an additional thirty (30) days to file the record on appeal.

(Signature Pages Follow)

Respectfully Submitted

HAYNSWORTH SINKLER BOYD PA



Ellis M Johnston II SC Bar # 3065

Calvin T Vick, II SC Bar #68187

Post Office Box 2048

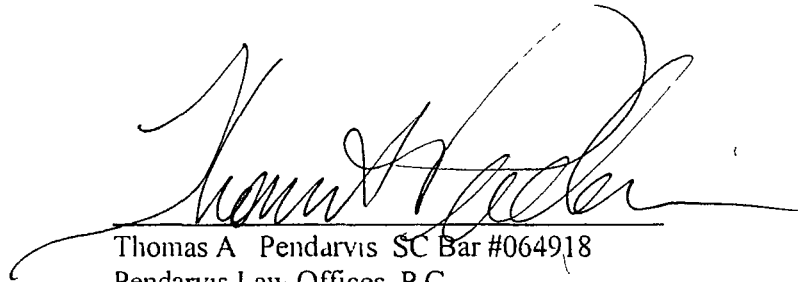
Greenville South Carolina 29602

(864) 240 3200

ATTORNEYS FOR RESPONDENTS

This ⁴⁶~~16~~ day of May 2011
Greenville South Carolina

This 16 day of May 2011
Beaufort South Carolina

A handwritten signature in black ink, appearing to read 'Thomas A. Pendarvis', is written over a horizontal line.

Thomas A Pendarvis SC Bar #064918
Pendarvis Law Offices P C
500 Carteret Street, Suite A
Beaufort, SC 29902
(843) 524 9500

Joel D Bailey SC Bar #00471
The Bailey Law Firm
510 Ribaut Road
P O Box 1437
Beaufort SC 29901-1437
(843) 525-6090

ATTORNEYS FOR APPELLANTS

The Supreme Court of South Carolina

Laurance H Davis, Jr , Rhoda
G Rentz, Mortimer W
Weinberg, Jr , Hodge Land Co ,
Inc , and Anna Trotter,
Individually and in their
capacities as the Limited
Partners of Roosevelt Gardens,
a South Carolina Limited
Partnership,

Appellants,

v

Roosevelt Gardens, a South
Carolina Limited Partnership,
Apartment Investment and
Management Company a/k/a
AIMCO, Insignia Financial
Group, Inc , Amreal
Corporation and a/k/a and f/k/a
USS Corporation a/k/a and
f/k/a U S Shelter Corporation,
ISTC Corporation, N Barton
Tuck, Jr , and John Doe, a
generic designation for a party
or parties whose true identity is
unknown,

Respondents

Carolina Management
Corporation of Beaufort, James
B Jackson, Whaley R Hinnant,
Jr , Mary Gasser Rawl and
Rhoda Rentz, Individually and
in their capacities as the

Appellants,

EXHIBIT 1

Limited Partners of Pinewood
Park Apartments, a South
Carolina Limited Partnership,

v

Pinewood Park Apartments, a
South Carolina Limited
Partnership, Apartment
Investment and Management
Company a/k/a AIMCO,
Insignia Financial Group, Inc ,
AmReal Corporation a/k/a and
f/k/a USS Corporation a/k/a
and f/k/a U S Shelter
Corporation, ISTC
Corporation, N Barton Tuck,
Jr , and John Doe, a generic
designation for a party or
parties whose true identity is
unknown,

Respondents

Laurance H Davis, Jr , Mary
Jane R Pike, Eva Marie
Reynolds and Rhoda G Rentz,
Individually and in their
capacities/as the Limited
Partners of Parkview
Apartments, a South Carolina
Limited Partnership,

Appellants,

v

Parkview Apartments, a South
Carolina Limited Partnership,
Apartment Investment and
Management Company a/k/a

AIMCO, Insignia Financial
Group, Inc , AmReal
Corporation a/k/a and f/k/a
USS Corporation a/k/a and
f/k/a U S Shelter Corporation,
ISTC Corporation, N Barton
Tuck, Jr , and John Doe, a
generic Designation for a party
or parties whose true identity is
unknown,

Respondents

Laurance H Davis, Jr , Marvin
D McCarthy James W Ivey,
and Erin E Ivey, Individually
and in their capacities as the
Limited Partners of Palmetto
Apartments, a South Carolina
Limited Partnership,

Appellants,

v

Palmetto Apartments, a South
Carolina Limited Partnership,
Apartment Investment and
Management Company a/k/a
AIMCO, Insignia Financial
Group, Inc , Amreal
Corporation and a/k/a and f/k/a
USS Corporation a/k/a and
f/k/a U S Shelter Corporation,
ISTC Corporation, N Barton
Tuck, Jr , and John Doe, a
generic designation for a party
or parties whose true identity is
unknown,

Respondents

Rhoda G Rentz, Mary Jane
Pike, Eva Marie Reynolds, and
Joanne O Mercy, Individually
and in their capacities as the
Limited Partners of Orleans
Gardens, a South Carolina
Limited Partnership, Appellants,

v

Orleans Gardens, a South
Carolina Limited Partnership,
Apartment Investment and
Management Company a/k/a
AIMCO, Insignia Financial
Group, Inc , Amreal
Corporation and a/k/a and f/k/a
USS Corporation a/k/a and
f/k/a U S Shelter Corporation,
ISTC Corporation, N Barton
Tuck, Jr , and John Doe,, a
generic designation for a party
or parties whose true identity is
unknown, Respondents

ORDER

Respondents move to dismiss all of the above-captioned appeals
with the exception of the Rentz appeal The motion is denied

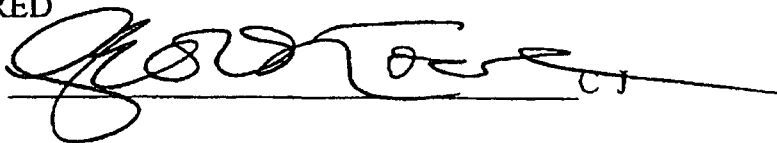
Marvin Infinger, Anne Rosen, and Jesse Belcher move to be
relieved as counsel for respondents to the extent they may be perceived as

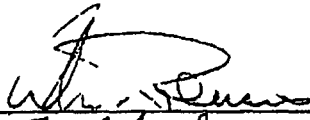
continuing to be counsel of record in the appeals That motion is granted

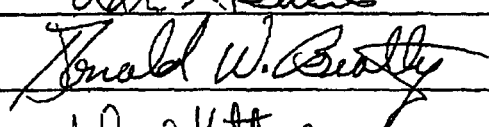
Prior to these appeals being transferred to this Court, appellants filed a Motion for Status Conference, for Consolidated Record, and to Stay Appeal Pending Hearing That motion is still pending The request for a status conference is denied, however, we grant the request to file a consolidated record Moreover, since respondents have indicated the record will be "extraordinarily voluminous," the consolidated record shall be submitted in electronic format, as will be discussed further below

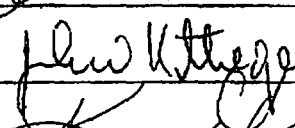
One of the issues appellants sought to address in a status conference is the feasibility of expediting these appeals We decline to expedite the appeals, however, no extensions of the time limits set forth in Rules 208 through 211, SCACR, will be granted absent extraordinary circumstances The record on appeal shall be in electronic format on CDs or DVDs Appellants shall serve one copy of the consolidated record on appeal in electronic format on respondents and file six electronic copies and seven hard copies with this Court The appeals shall be consolidated for purposes of oral argument

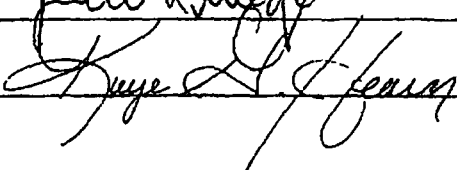
IT IS SO ORDERED











Columbia, South Carolina

May 5, 2011

cc Joel D Bailey, Esquire
Thomas A Pendarvis, Esquire
Ellis M Johnston, Jr , Esquire
Calvin T Vick, Esquire
Marvin D Infinger, Esquire
Anne Ross Rosen, Esquire

Haynsworth
Sinkler Boyd, PA

ATTORNEYS AND COUNSELORS AT LAW

75 BEATTIE PLACE 11TH FLOOR (29601 2119)
POST OFFICE BOX 2048 (29602 2048)
GREENVILLE SOUTH CAROLINA
TELEPHONE 864 240 3200
FACSIMILE 864 240 3300
WEBSITE www.hsblawfirm.com

ELLIS M JOHNSTON II
DIRECT DIAL NUMBER (864) 240 3217
EMAIL ejohnston@hsblawfirm.com

May 16, 2011

VIA FEDERAL EXPRESS

The Honorable Daniel E Shearouse
Clerk of Court, Supreme Court of South Carolina
Supreme Court Building
1231 Gervais Street
Columbia, South Carolina 29201

RECEIVED

MAY 17 2011

SC SUPREME COURT

Re Davis, et al v Roosevelt Gardens, Aimco, et al ,
Carolina Management Corporation of Beaufort, et al v Pinewood Park Apartments, Aimco, et al ,
Davis v Parkview Apartments, Aimco, et al ,
Davis v Palmetto Apartments, Aimco, et al ,
Rentz v Orleans Gardens, Aimco, et al

Dear Mr Shearouse

Enclosed for filing please find the *Joint Motion of Appellants and Respondents* pursuant to Rule 240 of the South Carolina Appellant Court Rules and *Proof of Service* by mail of same Also enclosed is our firm's check in the amount of \$25 00 to cover the filing fee I also enclose seven (7) copies of the Motion and Proof of Service After the documents have been filed, I would appreciate your returning filed-stamped copies to me in the enclosed self-addressed stamped envelope

Mr Thomas Pendarvis attorney for Appellants, will be forwarding his original signature page along with a copy of the Motion for your files

We would jointly ask that consideration of the Motion be done on an expedited basis as the time limitations lie upon us

With kind regards, I remain

Very truly yours,

HAYNSWORTH SINKLER BOYD, P A


Ellis M Johnston, II

FMJ II jmb
Enclosures

cc Calvin T Vick, Esquire (via e-mail)
Thomas A Pendarvis, Esquire (via U S Mail)
Joel D Bailey Esquire (via U S Mail)

THE SUPREME COURT OF SOUTH CAROLINA

Laurance H Davis, Jr , Rhoda G Rentz,
Mortimer M Weinberg, Jr , Hodge Land
Co Inc , and Anna Trotter, Individually
and in their capacities as the Limited
Partners of Roosevelt Gardens, a South
Carolina Limited Partnership,

vs

Roosevelt Gardens, a South Carolina
Limited Partnership, Apartment
Investment and Management Company
a/k/a AIMCO, Insignia Financial Group,
Inc , AmReal Corporation a/k/a and t/k/a
USS Corporation a/k/a and f/k/a U S
Shelter Corporation, ISTC Corporation,
N Barton Tuck, Jr , and John Doe a
generic designation for a party or parties
whose true identity is unknown,

Transfer from Court of Appeals
Case No 2010180086

Appellants,

RECEIVED

MAY 17 2011

S C. SUPREME COURT

Respondents

Carolina Management Corporation of
Beaufort, James B Jackson, Whaley R
Hinnant Jr , Mary Gasser Rawl, and
Rhoda Rentz, Individually and in their
capacities as the Limited Partners of
Pinewood Park Apartments a South
Carolina Limited Partnership,

vs

Pinewood Park Apartments, a South
Carolina Limited Partnership, Apartment
Investment and Management Company
a/k/a AIMCO, Insignia Financial Group,
Inc , AmReal Corporation a/k/a and t/k/a
USS Corporation a/k/a and f/k/a U S
Shelter Corporation, ISTC Corporation,
N Barton Tuck, Jr , and John Doe, a
generic designation for a party or parties
whose true identity is unknown,

Transfer from Court of Appeals
Case No 2010180088

Appellants,

Respondents

Laurance H Davis, Jr , Mary Jane R	)	Transfer from Court of Appeals
Pike, Eva Marie Reynolds, and Rhoda G	)	Case No 2010180666
Rentz, individually and in their capacities	)	
as the Limited Partners of Parkview	)	
Apartments, a South Carolina Limited	)	Appellants,
Partnership,	)	
	)	
vs	)	
	)	
Parkview Apartments, a South Carolina	)	
Limited Partnership, Apartment	)	
Investment and Management Company	)	
a/k/a AIMCO Insignia Financial Group,	)	
Inc AmReal Corporation a/k/a and f/k/a	)	
USS Corporation a/k/a and f/k/a U S	)	
Shelter Corporation, ISTC Corporation,	)	
N Barton Tuck, Jr , and John Doe, a	)	
generic designation for a party or parties	)	
whose true identity is unknown,	)	Respondents

Laurance H Davis, Jr , Marvin D	)	Transfer from Court of Appeals
McCarthy, James W Ivey, and Erin E	)	Case No 2010180087
Ivey, Individually and in then capacities	)	
as the Limited Partners of Palmetto	)	
Apartments a South Carolina Limited	)	
Partnership,	)	Appellants,
	)	
vs	)	
	)	
Palmetto Apartments, a South Carolina	)	
Limited Partnership Apartment	)	
Investment and Management Company	)	
a/k/a AIMCO Insignia Financial Group,	)	
Inc , AmReal Corporation a/k/a and f/k/a	)	
USS Corporation a/k/a and f/k/a U S	)	
Shelter Corporation, ISTC Corporation,	)	
N Barton Tuck, Jr , and John Doe, a	)	
generic designation for a party or parties	)	
whose true identity is unknown,	)	Respondents

Rhoda G Rentz, Mary Jane Pike, Eva	)	Transfer from Court of Appeals
Marie Reynolds, and Joanne O Mercy,	)	Case No 2010176826
Individually and in their capacities as the	)	
Limited Partners of Orleans Gardens, a	)	
South Carolina Limited Partnership,	)	
	)	Appellants,
vs	)	
	)	
Orleans Gardens, a South Carolina	)	
Limited Partnership, Apartment	)	
Investment and Management Company	)	
a/k/a AIMCO, Insignia Financial Group,	)	
Inc , AmReal Corporation a/k/a and f/k/a	)	
USS Corporation a/k/a and f/k/a U S	)	
Shelter Corporation, ISTC Corporation,	)	
N Barton Tuck, Jr , and John Doe, a	)	
generic designation for a party or parties	)	
whose true identity is unknown,	)	Respondents

JOINT MOTION OF APPELLANTS AND RESPONDENTS

Pursuant to Rule 240, South Carolina Appellant Court Rules (SCACR), Appellants and Respondents in the five (5) above-captioned appeals respectfully move the Court for an additional 30 days time for each to file their initial briefs and designation of matter to be included in the record on appeal and an additional ten (10) days for Appellants to file reply briefs, as well as an additional 30 days to file the record on appeal. The basis for this motion is set forth below.

By Order dated May 5, 2011 (Exhibit 1), this Court denied certain motions then pending which had stayed the filing of initial briefs and designation of matter to be included in the record on appeal. Thus Appellants' initial briefs and designation of matter to be included in the record on appeal would be due on June 6, 2011. Respondents' initial briefs and designation of matter to be included in the record on appeal would then be due on July 6, 2011 (or 30 days after filing of Appellants' briefs).

The record in this case will be unusually voluminous and, out of necessity, this Court has ordered that it be filed electronically (Exhibit 1). The Notices of Appeal take exception to thirteen (13) separate Orders, each of which must be addressed in Appellants' and Respondents' papers.

Mr. Thomas Pendarvis, one of two attorneys for Appellants, presently has trials scheduled for the week of May 23, 2011, the first two weeks in June of 2011, and the week of July 11, 2011. Thus, compliance with the current schedule requiring Appellants to file their papers on June 6, 2011, would impose an exceptional hardship on Appellants.

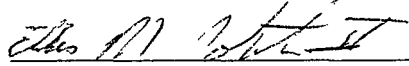
Mr. Calvin T. Vick, Jr., one of two attorneys for Respondents, is expecting the birth of his third child on May 28, 2011, and has a week-long U.S. District Court jury trial beginning July 5, 2011. He anticipates that preparation for this trial and completing the discovery necessary for it would severely limit his ability to assist in the preparation of Respondents' papers and would impose an exceptional hardship on them.

Counsel for the Appellants and Respondents have conferred and agree that, under the circumstances discussed above, it will not be practically possible for either of them to adequately brief the issues presented in these appeals, and properly designate the documents to be included in the record, in the standard 30-day period allowed to each of them under the Rules. Due to these exceptional circumstances, both Appellants and Respondents jointly request that each be granted an additional thirty (30) days to prepare their respective papers (*i.e.*, 30-day extension for Appellants' initial briefs and 30-day extension for Respondents' initial briefs) and that Appellants be granted an additional ten (10) days to file reply briefs and an additional thirty (30) days to file the record on appeal.

(Signature Pages Follow)

Respectfully Submitted,

HAYNSWORTH SINKLER BOYD, PA



Ellis M Johnston, II, SC Bar # 3065

Calvin T Vick, Jr, SC Bar #68187

Post Office Box 2048

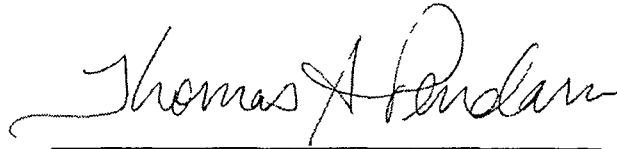
Greenville, South Carolina 29602

(864) 240-3200

ATTORNEYS FOR RESPONDENTS

This ⁴⁶~~16~~ day of May, 2011
Greenville, South Carolina

This ____ day of May 2011
Beaufort South Carolina



Thomas A Pendarvis SC Bar #064918
Pendarvis Law Offices P C
500 Carteret Street, Suite A
Beaufort, SC 29902
(843) 524-9500

Joel D Bailey SC Bar #00471
The Bailey Law Firm
510 Ribaut Road
P O Box 1437
Beaufort SC 29901 1437
(843) 525 6090

ATTORNEYS FOR APPELLANTS

The Supreme Court of South Carolina

Laurance H Davis, Jr , Rhoda
G Rentz, Mortimer W
Weinberg, Jr , Hodge Land Co ,
Inc , and Anna Trotter,
Individually and in their
capacities as the Limited
Partners of Roosevelt Gardens,
a South Carolina Limited
Partnership,

Appellants,

v

Roosevelt Gardens, a South
Carolina Limited Partnership,
Apartment Investment and
Management Company a/k/a
AIMCO, Insignia Financial
Group, Inc , Amreal
Corporation and a/k/a and f/k/a
USS Corporation a/k/a and
f/k/a U S Shelter Corporation,
ISTC Corporation, N Barton
Tuck, Jr , and John Doe, a
generic designation for a party
or parties whose true identity is
unknown,

Respondents

Carolina Management
Corporation of Beaufort, James
B Jackson, Whaley R Hinnant,
Jr , Mary Gasser Rawl and
Rhoda Rentz, Individually and
in their capacities as the

Appellants,

EXHIBIT 1

Limited Partners of Pinewood
Park Apartments, a South
Carolina Limited Partnership,

v

Pinewood Park Apartments, a
South Carolina Limited
Partnership, Apartment
Investment and Management
Company a/k/a AIMCO,
Insignia Financial Group, Inc ,
AmReal Corporation a/k/a and
f/k/a USS Corporation a/k/a
and f/k/a U S Shelter
Corporation, ISTC
Corporation, N Barton Tuck,
Jr , and John Doe, a generic
designation for a party or
parties whose true identity is
unknown,

Respondents

Laurance H Davis, Jr , Mary
Jane R Pike, Eva Marie
Reynolds and Rhoda G Rentz,
Individually and in their
capacities as the Limited
Partners of Parkview
Apartments, a South Carolina
Limited Partnership,

Appellants,

v

Parkview Apartments, a South
Carolina Limited Partnership,
Apartment Investment and
Management Company a/k/a

3

AIMCO, Insignia Financial
Group, Inc , AmReal
Corporation a/k/a and f/k/a
USS Corporation a/k/a and
f/k/a U S Shelter Corporation,
ISTC Corporation, N Barton
Tuck, Jr , and John Doe, a
generic Designation for a party
or parties whose true identity is
unknown,

Respondents

Laurance H Davis, Jr , Marvin
D McCarthy James W Ivey,
and Erin E Ivey, Individually
and in their capacities as the
Limited Partners of Palmetto
Apartments, a South Carolina
Limited Partnership,

Appellants,

v

Palmetto Apartments, a South
Carolina Limited Partnership,
Apartment Investment and
Management Company a/k/a
AIMCO, Insignia Financial
Group, Inc , Amreal
Corporation and a/k/a and f/k/a
USS Corporation a/k/a and
f/k/a U S Shelter Corporation,
ISTC Corporation, N Barton
Tuck, Jr , and John Doe, a
generic designation for a party
or parties whose true identity is
unknown,

Respondents

Rhoda G Rentz, Mary Jane
Pike, Eva Marie Reynolds, and
Joanne O Mercy, Individually
and in their capacities as the
Limited Partners of Orleans
Gardens, a South Carolina
Limited Partnership, Appellants,

v

Orleans Gardens, a South
Carolina Limited Partnership,
Apartment Investment and
Management Company a/k/a
AIMCO, Insignia Financial
Group, Inc , Amreal
Corporation and a/k/a and f/k/a
USS Corporation a/k/a and
f/k/a U S Shelter Corporation,
ISTC Corporation, N Barton
Tuck, Jr , and John Doe, a
generic designation for a party
or parties whose true identity is
unknown, Respondents

ORDER

Respondents move to dismiss all of the above-captioned appeals
with the exception of the Rentz appeal The motion is denied

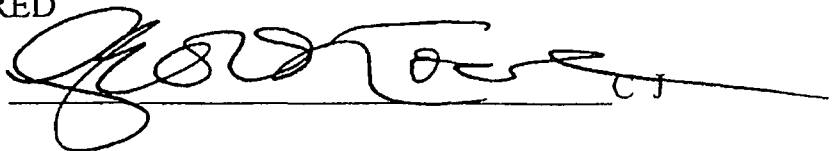
Marvin Infinger, Anne Rosen, and Jesse Belcher move to be
relieved as counsel for respondents to the extent they may be perceived as

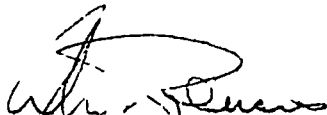
continuing to be counsel of record in the appeals That motion is granted

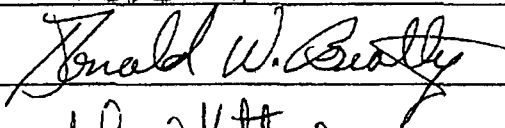
Prior to these appeals being transferred to this Court, appellants filed a Motion for Status Conference, for Consolidated Record, and to Stay Appeal Pending Hearing That motion is still pending The request for a status conference is denied, however, we grant the request to file a consolidated record Moreover, since respondents have indicated the record will be "extraordinarily voluminous," the consolidated record shall be submitted in electronic format, as will be discussed further below

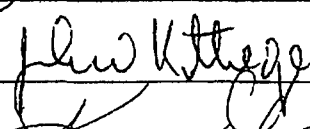
One of the issues appellants sought to address in a status conference is the feasibility of expediting these appeals We decline to expedite the appeals, however, no extensions of the time limits set forth in Rules 208 through 211, SCACR, will be granted absent extraordinary circumstances The record on appeal shall be in electronic format on CDs or DVDs Appellants shall serve one copy of the consolidated record on appeal in electronic format on respondents and file six electronic copies and seven hard copies with this Court The appeals shall be consolidated for purposes of oral argument

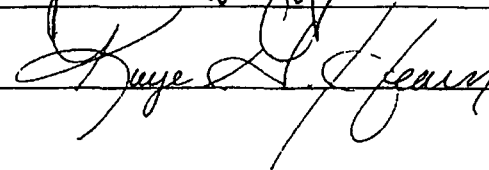
IT IS SO ORDERED











Columbia, South Carolina

May 5, 2011

cc Joel D Bailey, Esquire
Thomas A Pendarvis, Esquire
Ellis M Johnston, Jr , Esquire
Calvin T Vick, Esquire
Marvin D Infinger, Esquire
Anne Ross Rosen, Esquire

THE SUPREME COURT OF SOUTH CAROLINA

Laurance H Davis, Jr Rhoda G Rentz,	)	Transfer from Court of Appeals
Mortimer M Weinberg, Jr , Hodge Land	)	Case No 2010180086
Co , Inc , and Anna Trotter, Individually	)	
and in their capacities as the Limited	)	
Partners of Roosevelt Gardens, a South	)	
Carolina Limited Partnership,	)	Appellants,
	)	
vs	)	
	)	
Roosevelt Gardens, a South Carolina	)	
Limited Partnership, Apartment	)	
Investment and Management Company	)	
a/k/a AIMCO, Insignia Financial Group,	)	
Inc AmReal Corporation a/k/a and f/k/a	)	
USS Corporation a/k/a and f/k/a U S	)	
Shelter Corporation, ISTC Corporation,	)	
N Barton Tuck Jr , and John Doe, a	)	
generic designation for a party or parties	)	
whose true identity is unknown,	)	Respondents

Carolina Management Corporation of	)	Transfer from Court of Appeals
Beaufort, James B Jackson, Whaley R	)	Case No 2010180088
Hinnant, Ji , Mary Gasser Rawl, and	)	
Rhoda Rentz, Individually and in their	)	
capacities as the Limited Partners of	)	
Pinewood Park Apartments, a South	)	
Carolina Limited Partnership,	)	Appellants,
	)	
vs	)	
	)	
Pinewood Park Apartments, a South	)	
Carolina Limited Partnership, Apartment	)	
Investment and Management Company	)	
a/k/a AIMCO, Insignia Financial Group,	)	
Inc AmReal Corporation a/k/a and f/k/a	)	
USS Corporation a/k/a and f/k/a U S	)	
Shelter Corporation, ISTC Corporation,	)	
N Barton Tuck, Jr , and John Doe, a	)	
generic designation for a party or parties	)	
whose true identity is unknown,	)	Respondents

Laurance H Davis, Jr , Mary Jane R	)	Transfer from Court of Appeals
Pike, Eva Marie Reynolds, and Rhoda G	)	Case No 2010180666
Rentz, individually and in their capacities	)	
as the Limited Partners of Parkview	)	
Apartments, a South Carolina Limited	)	Appellants,
Partnership,	)	
	)	
vs	)	
	)	
Parkview Apartments, a South Carolina	)	
Limited Partnership Apartment	)	
Investment and Management Company	)	
a/k/a AIMCO Insignia Financial Group,	)	
Inc , AmReal Corporation a/k/a and f/k/a	)	
USS Corporation a/k/a and f/k/a U S	)	
Shelter Corporation, ISTC Corporation,	)	
N Barton Tuck, Jr , and John Doe, a	)	
generic designation for a party or parties	)	
whose true identity is unknown,	)	Respondents

Laurance H Davis, Jr , Marvin D	)	Transfer from Court of Appeals
McCarthy, James W Ivey, and Erin E	)	Case No 2010180087
Ivey Individually and in their capacities	)	
as the Limited Partners of Palmetto	)	
Apartments, a South Carolina Limited	)	
Partnership,	)	Appellants,
	)	
vs	)	
	)	
Palmetto Apartments, a South Carolina	)	
Limited Partnership Apartment	)	
Investment and Management Company	)	
a/k/a AIMCO, Insignia Financial Group,	)	
Inc AmReal Corporation a/k/a and f/k/a	)	
USS Corporation a/k/a and f/k/a U S	)	
Shelter Corporation, ISTC Corporation,	)	
N Barton Tuck, Jr , and John Doe, a	)	
generic designation for a party or parties	)	
whose true identity is unknown,	)	Respondents

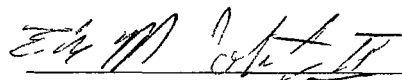
Rhoda G Rentz, Mary Jane Pike, Eva	)	Transfer from Court of Appeals
Marie Reynolds, and Joanne O Mercy,	)	Case No 2010176826
Individually and in their capacities as the	)	
Limited Partners of Orleans Gardens, a	)	
South Carolina Limited Partnership,	)	
	)	Appellants,
vs	)	
	)	
Orleans Gardens, a South Carolina	)	
Limited Partnership, Apartment	)	
Investment and Management Company	)	
a/k/a AIMCO, Insignia Financial Group,	)	
Inc AmReal Corporation a/k/a and f/k/a	)	
USS Corporation a/k/a and f/k/a U S	)	
Shelter Corporation, ISTC Corporation,	)	
N Barton Tuck Jr and John Doe, a	)	
generic designation for a party or parties	)	
whose true identity is unknown,	)	Respondents

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below, he served counsel for the Appellants with a copy of *JOINT MOTION OF APPELLANTS AND RESPONDENTS* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses

Thomas A Pendarvis
Pendarvis Law Offices, P C
500 Carteret Street, Suite A
Beaufort, South Carolina 29902-5066

Joel D Bailey
The Bailey Law Firm, P A
PO Box 1437
Beaufort, South Carolina 29901-1437



Ellis M Johnston, II

May 16, 2011
Greenville, South Carolina



THE
BAILEY LAW FIRM

A PROFESSIONAL ASSOCIATION

510 RIBAUT ROAD

POST OFFICE BOX 1437 BEAUTORT SOUTH CAROLINA 29901-1437

EMAIL ADDRESS
BAILEYLAWFIRM@CHARTER.NET

PHONE 843-525-6090
FAX 843-525-6070

May 17, 2011

VIA EMAIL and US MAIL OVERNIGHT DELIVERY

RECEIVED

MAY 18 2011

SC SUPREME COURT

Honorable Daniel E. Shearouse
South Carolina Supreme Court
PO Box 11330
Columbia, South Carolina 29211

RE	Davis, et al vs Parkview, et al	C/A # 03-CP-07-726
	Davis, et al vs Roosevelt, et al	C/A # 05-38-1131
	Davis, et al vs Palmetto, et al	C/A # 05-CP-07-1989
	Rentz, et al vs Orleans, et al	C/A # 05-CP-10-4229
	Carolina Management, et al vs Pinewood Park, et al	C/A # 05-CP-07-1990

Dear Mr. Shearouse

I am currently involved in five (5) related appeals in the SC Supreme Court wherein I am co-counsel for the Appellants. I was previously asked by Deputy Clerk Debbie Hopkins whether I had received copies of all transcripts, and I informed her that I had. In preparing the initial briefs, however, and after communications today between my paralegal and the paralegal for Respondents' counsel, I just learned that I now need two (2) additional transcripts. Counsel for the Respondents have already ordered these additional transcripts, and I am informed that they have received them from the respective court reporters.

I called Ms. Hopkins today to inform her of this development, and of the fact that I will need the additional transcripts in order to properly prepare this appeal. At her suggestion, I contacted Court Administration and received e-mail addresses for the respective court reporters. I am sending a letter today for overnight delivery to the court reporters, as well as an e-mail to them, requesting expedited copies of these transcripts. Copies of these letters are attached hereto.

I apologize for any misunderstanding or inconvenience which this oversight has caused. With kindest regards, I am

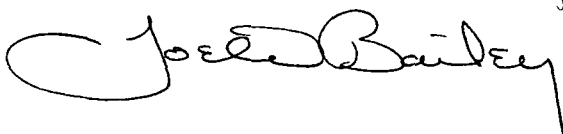
Mr Daniel E Shearouse

May 17, 2011

Page Two

Very truly yours,

THE BAILEY LAW FIRM, P A

A handwritten signature in black ink, appearing to read "Joel D Bailey". The signature is fluid and cursive, with a large initial "J" and "B".

Joel D Bailey

JDB/shb

cc Ellis M Johnston, II, Esquire
Calvin T Vick, Jr, Esquire
Thomas A Pendarvis, Esquire



THE
BAILEY LAW FIRM

A PROFESSIONAL ASSOCIATION

510 RIBAUT ROAD

POST OFFICE BOX 1437 BEAUFORT SOUTH CAROLINA 29901-1437

EMAIL ADDRESS

BAILEYLAWFIRM@CHARTER.NET

PHONE 843-525-6090

FAX 843-525-6070

May 17, 2011

VIA EMAIL and U S MAIL OVERNIGHT DELIVERY

Ms Elizabeth B Harris, Reporter
3008 Barnes Springs Road
Columbia, SC 29204

RE	Davis, et al vs Parkview, et al	C/A # 03-CP-07-726
	Davis, et al vs Roosevelt, et al	C/A # 05-38-1131
	Davis, et al vs Palmetto, et al	C/A # 05-CP-07-1989
	Rentz, et al vs Orleans, et al	C/A # 05-CP-10-4229
	Carolina Management, et al vs Pinewood Park, et al	C/A # 05-CP-07-1990

Dear Ms Harris

The above-referenced matters are currently on appeal in the South Carolina Supreme Court. It has come to my attention that you were the court reporter for a hearing held before Circuit Court Judge Doyet A. Early on January 14, 2010 in these cases. I understand that you previously provided Defendants' counsel, Ellis Johnston and Calvin T. Vick, with this transcript. Accordingly, I will need a copy of the transcript as soon as possible.

The Appellants' briefs are due on June 6th, and I would appreciate you contacting me upon receipt of this letter/email, in order that we can discuss the most efficient way for you to get the transcript to me. The best number to reach me is 843-694-3480.

I agree to pay the per page charge for this transcript as provided by Rule 607, SCACR. Thank you for your prompt attention to this matter. With kindest regards, I am

Very truly yours,

THE BAILEY LAW FIRM, P A

Joel D. Bailey
JDB/shb

RECEIVED

MAY 18 2011

S.C. SUPREME COURT

cc Ellis M Johnston, II, Esquire
Calvin T Vick, Jr , Esquire
Thomas A Pendarvis, Esquire
SC Court Administration
Honorable Daniel E Shearouse



THE
BAILEY LAW FIRM

A PROFESSIONAL ASSOCIATION

510 RIBAUT ROAD

POST OFFICE BOX 1437 BEAUTORT SOUTH CAROLINA 29901-1437

EMAIL ADDRESS
BAILEYLAWFIRM@CHARTER.NET

PHONE 843-525-6090
FAX 843-525-6070

May 17, 2011

VIA EMAIL and U S MAIL OVERNIGHT DELIVERY

Ms Harriet P Bennett, Reporter
SC Court Administration
PO Box 86
Ladson, SC 29456

RE	Davis, et al vs Parkview, et al	C/A # 03-CP-07-726
	Davis, et al vs Roosevelt, et al	C/A # 05-38-1131
	Davis, et al vs Palmetto, et al	C/A # 05-CP-07-1989
	Rentz, et al vs Orleans, et al	C/A # 05-CP-10-4229
	Carolina Management, et al vs Pinewood Park, et al	C/A # 05-CP-07-1990

Dear Ms Bennett

The above-referenced matters are currently on appeal in the South Carolina Supreme Court. You previously provided me with a copy of a transcript of a hearing held on November 19, 2007, before Circuit Court Judge Doyet A. Early. It has come to my attention that you were also the court reporter for a earlier hearing in these cases which was held by Judge Early on October 4, 2006. I understand that you previously provided Defendants' counsel, Ellis Johnston and Calvin T. Vick, with this transcript. Accordingly, I will need a copy of the October, 2006 transcript as soon as possible.

The Appellants' briefs are due on June 6th, and I would appreciate you contacting me upon receipt of this letter/email, in order that we can discuss the most efficient way for you to get the transcript to me. The best number to reach me is 843-694-3480.

I agree to pay the per page charge for this transcript as provided by Rule 607, SCACR. Thank you for your prompt attention to this matter. With kindest regards, I am

Very truly yours,

THE BAILEY LAW FIRM, P A

Joel D. Bailey
JDB/shb

cc Ellis M Johnston, II, Esquire
Calvin T Vick, Jr , Esquire
Thomas A Pendarvis, Esquire
SC Court Administration
Honorable Daniel E Shearouse

The Supreme Court of South Carolina

Laurance H Davis, Jr , Rhoda
G Rentz, Mortimer W
Weinberg, Jr , Hodge Land Co ,
Inc , and Anna Trotter,
Individually and in their
capacities as the Limited
Partners of Roosevelt Gardens,
a South Carolina Limited
Partnership,

Appellants,

v

Roosevelt Gardens, a South
Carolina Limited Partnership,
Apartment Investment and
Management Company a/k/a
AIMCO, Insignia Financial
Group, Inc , Amreal
Corporation and a/k/a and f/k/a
USS Corporation a/k/a and
f/k/a U S Shelter Corporation,
ISTC Corporation, N Barton
Tuck, Jr , and John Doe, a
generic designation for a party
or parties whose true identity is
unknown,

Respondents

Carolina Management
Corporation of Beaufort, James
B Jackson, Whaley R Hinnant,
Jr , Mary Gasser Rawl and
Rhoda Rentz, Individually and
in their capacities as the

Appellants,

Limited Partners of Pinewood
Park Apartments, a South
Carolina Limited Partnership,

v

Pinewood Park Apartments, a
South Carolina Limited
Partnership, Apartment
Investment and Management
Company a/k/a AIMCO,
Insignia Financial Group, Inc ,
AmReal Corporation a/k/a and
f/k/a USS Corporation a/k/a
and f/k/a U S Shelter
Corporation, ISTC
Corporation, N Barton Tuck,
Jr , and John Doe, a generic
designation for a party or
parties whose true identity is
unknown,

Respondents

Laurance H Davis, Jr , Mary
Jane R Pike, Eva Marie
Reynolds and Rhoda G Rentz,
Individually and in their
capacities as the Limited
Partners of Parkview
Apartments, a South Carolina
Limited Partnership,

Appellants,

v

Parkview Apartments, a South
Carolina Limited Partnership,
Apartment Investment and
Management Company a/k/a

AIMCO, Insignia Financial
Group, Inc , AmReal
Corporation a/k/a and f/k/a
USS Corporation a/k/a and
f/k/a U S Shelter Corporation,
ISTC Corporation, N Barton
Tuck, Jr , and John Doe, a
generic Designation for a party
or parties whose true identity is
unknown,

Respondents

Laurance H Davis, Jr , Marvin
D McCarthy James W Ivey,
and Erin E Ivey, Individually
and in their capacities as the
Limited Partners of Palmetto
Apartments, a South Carolina
Limited Partnership,

Appellants,

v

Palmetto Apartments, a South
Carolina Limited Partnership,
Apartment Investment and
Management Company a/k/a
AIMCO, Insignia Financial
Group, Inc , Amreal
Corporation and a/k/a and f/k/a
USS Corporation a/k/a and
f/k/a U S Shelter Corporation,
ISTC Corporation, N Barton
Tuck, Jr , and John Doe, a
generic designation for a party
or parties whose true identity is
unknown,

Respondents

Rhoda G Rentz, Mary Jane
Pike, Eva Marie Reynolds, and
Joanne O Mercy, Individually
and in their capacities as the
Limited Partners of Orleans
Gardens, a South Carolina
Limited Partnership, Appellants,

v

Orleans Gardens, a South
Carolina Limited Partnership,
Apartment Investment and
Management Company a/k/a
AIMCO, Insignia Financial
Group, Inc , Amreal
Corporation and a/k/a and f/k/a
USS Corporation a/k/a and
f/k/a U S Shelter Corporation,
ISTC Corporation, N Barton
Tuck, Jr , and John Doe, a
generic designation for a party
or parties whose true identity is
unknown, Respondents

ORDER

Respondents move to dismiss all of the above-captioned appeals
with the exception of the Rentz appeal The motion is denied

Marvin Infinger, Anne Rosen, and Jesse Belcher move to be
relieved as counsel for respondents to the extent they may be perceived as

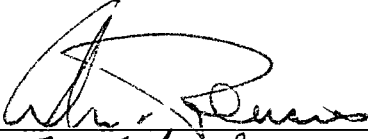
continuing to be counsel of record in the appeals That motion is granted

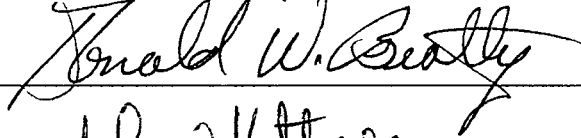
Prior to these appeals being transferred to this Court, appellants filed a Motion for Status Conference, for Consolidated Record, and to Stay Appeal Pending Hearing That motion is still pending The request for a status conference is denied, however, we grant the request to file a consolidated record Moreover, since respondents have indicated the record will be "extraordinarily voluminous," the consolidated record shall be submitted in electronic format, as will be discussed further below

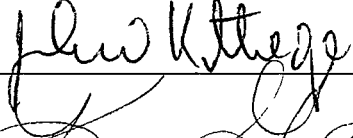
One of the issues appellants sought to address in a status conference is the feasibility of expediting these appeals We decline to expedite the appeals, however, no extensions of the time limits set forth in Rules 208 through 211, SCACR, will be granted absent extraordinary circumstances The record on appeal shall be in electronic format on CDs or DVDs Appellants shall serve one copy of the consolidated record on appeal in electronic format on respondents and file six electronic copies and seven hard copies with this Court The appeals shall be consolidated for purposes of oral argument

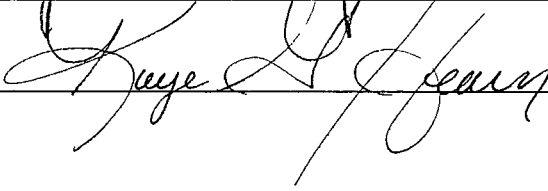
IT IS SO ORDERED










_____ J

Columbia, South Carolina

May 5, 2011

cc Joel D Bailey, Esquire
Thomas A Pendarvis, Esquire
Ellis M Johnston, Jr , Esquire
Calvin T Vick, Esquire
Marvin D Infinger, Esquire
Anne Ross Rosen, Esquire

The Supreme Court of South Carolina

Carolina Management
Corporation of Beaufort, James
B Jackson, Whaley R Hinnant,
Jr , Mary Gasser Rawl and
Rhoda Rentz, Individually and
in their capacities as the
Limited Partners of Pinewood
Park Apartments, a South
Carolina Limited Partnership, Appellants,

v

Pinewood Park Apartments, a
South Carolina Limited
Partnership, Apartment
Investment and Management
Company a/k/a AIMCO,
Insignia Financial Group, Inc,
AmReal Corporation a/k/a and
f/k/a USS Corporation a/k/a
and f/k/a U S Shelter
Corporation, ISTC
Corporation, N Barton Tuck,
Jr , and John Doe, a generic
designation for a party or
parties whose true identity is
unknown, Respondents

The Honorable Doyet A Early, III
Beaufort County
Trial Court Case No 2005-CP-07-01990

ORDER

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

IT IS SO ORDERED



FOR THE COURT CJ

Columbia, South Carolina

March 9, 2011

cc Joel D. Bailey, Esquire
Thomas A. Pendarvis, Esquire
Ellis M. Johnston, Esquire
Calvin T. Vick, Esquire
The Honorable Tanya Gee



THE
BAILEY LAW FIRM

A PROFESSIONAL ASSOCIATION

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PHONE 843 525 6090
FAX 843-525-6070

February 15, 2011

Honorable Tanya Gee, Clerk
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

RE Carolina Management Corp of Beaufort, et al vs Pinewood Park Apartments, et al
Case No 2005-CP-07-1990
Case Tracking # 2010180088

Dear Ms Gee

I am in receipt of Calvin T. Vick's letter to you dated February 10, 2011, wherein Mr. Vick advises this Court that Marvin Infinger, Anne Ross Rosen and Jesse Belcher are not counsel of record for Respondents in the above-referenced appeal. Mr. Infinger, Ms. Rosen and Mr. Belcher were previously identified as counsel for the Defendants in the lower court. None of these attorneys have filed a motion to be relieved as counsel, nor has any order been issued relieving them.

Rule 11(b), SCRCP, provides that attorneys may be relieved in the lower court "by order of the Court, and not otherwise." Rule 235(a), SCACR, provides that "the attorneys of the respective parties of the court below shall be deemed the attorneys in the appellate court until withdrawal is approved and notice is given as provided in this Rule." Rule 235(b), SCACR, prohibits an attorney of record from withdrawing from representation of a client in an appeal "without justifiable cause, or the consent of his client, and then only after proper written notice to his client, on petition to and by written order of the appellate court, and with notice to the adverse party."

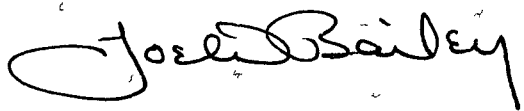
Rule 5, SCRCP, requires service of documents on all counsel of record. Accordingly, Mr. Pendarvis and I have provided these attorneys with copies of all communications in the lower court and concerning this appeal, as we have never received a written order relieving them as counsel in this Court or in the lower court. In light of the existing law, we must continue to treat these attorneys as counsel of record unless notified to do otherwise by this Court.

Honorable Tanya Gee, Clerk
February 15, 2011
Page Two

With kindest regards, I am

Very truly yours,

THE BAILEY LAW FIRM, P A

A handwritten signature in black ink, reading "Joel D Bailey". The signature is fluid and cursive, with a large loop at the beginning and a long, sweeping tail.

Joel D Bailey

JDB/shb

cc Ellis M Johnston, II, Esquire
Calvin T Vick, Jr , Esquire
Jesse C Belcher, Jr , Esquire
Anne Ross Rosen, Esquire
Marvin D Infinger, Esquire
Thomas A Pendarvis, Esquire

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

1990
C/A # 05-CP-07-2007-10

Carolina Management Corporation of
Beaufort, James B Jackson, Whaley R.
Hinnant, Jr , Mary Gasser Rawl, and
Rhoda G Rentz, individually and in their
capacities as the Limited Partners of
Pinewood Park Apartments, a South
Carolina Limited Partnership,

Plaintiffs,

vs

Pinewood Park Apartments, a South
Carolina Limited Partnership,
Apartment Investment and Management
Company a/k/a AIMCO, Insignia
Financial Group, Inc , Amreal
Corporation a/k/a and f/k/a USS
Corporation a/k/a and f/k/a U S Shelter
Corporation, ISTC Corporation,
N Barton Tuck, Jr , and John Doe, a
generic designation for a party or
parties whose true identity is unknown,

Defendants

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SC Court of Appeals

**COMPLAINT
(JURY TRIAL DEMANDED)**

The Plaintiffs above-named, complaining of the Defendants herein, respectfully allege

1 The Plaintiff Carolina Management Corporation of Beaufort (hereinafter referred to as Carolina Management) is a corporation organized and existing pursuant to the laws of the State of South Carolina, having its principal place of business in the County of Beaufort, State of

The South Carolina Court of Appeals

Carolina Management Corporation of
Beaufort, James B Jackson, Whaley R
Hinnant, Jr, Mary Gasser Rawl and
Rhoda Rentz, Individually and in their
capacities as the Limited Partners of
Pinewood Park Apartments, a South
Carolina Limited Partnership,

Appellants,

v

Pinewood Park Apartments, a South
Carolina Limited Partnership,
Apartment Investment and
Management Company a/k/a AIMCO,
Insignia Financial Group, Inc, AmReal
Corporation a/k/a and f/k/a USS
Corporation a/k/a and f/k/a U S Shelter
Corporation, ISTC Corporation, N
Barton Tuck, Jr, and John Doe, a
generic designation for a party or
parties whose true identity is unknown,

Respondents

The Honorable Doyet A Early, III
Beaufort County
Trial Court Case No 2005-CP-07-01990

ORDER

For good cause having been shown, the time for serving a Reply to the Return to the Motion to
Dismiss in the above entitled matter is hereby extended until February 8, 2011

IT IS SO ORDERED

JOHN CANNON FEW, CHIEF JUDGE
For the Court

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina
cc Joel D Bailey, Esquire
Thomas A Pendarvis, Esquire
Ellis M Johnson, Esquire
Calvin T Vick, Esquire
Jesse C Belcher, Esquire
Marvin D Infinger, Esquire
Anne Ross Rosen, Esquire

FILED

2/4/11



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

February 4, 2011

Joel D Bailey, Esquire
The Bailey Law Firm, PA
P O Box 1437
Beaufort, SC 29901

Thomas A Pendarvis, Esquire
Pendarvis Law Offices, PC
500 Carteret St Ste A
Beaufort, SC 29902

Re Carolina Management v Pinewood
Case Tracking # 2010180088

Dear Counsel

We have received your Amended Notice of Appeal in the above matter in which you are appealing the additional orders of Judge Early dated October 7, 2010, October 22, 2010, and December 11, 2010

Within ten days of the date of this letter, you must provide the \$100 Notice of Appeal filing fee in order to appeal these additional orders

Very truly yours,

V. Claire Allen, Deputy

CLERK

TAG/ec

cc Ellis M Johnson, Esquire
Calvin T Vick, Esquire
Jesse C Belcher, Esquire
Marvin D Infinger, Esquire
Anne Ross Rosen, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Doyet A Early, III, Circuit Court Judge

Case No 2005-CP-07-1990

Carolina Management Corporation of Beaufort, James B Jackson, Whaley R Hinnant, Jr , Mary Gasser Rawl and Rhoda G Rentz, individually and in their capacities as the Limited Partners of Pinewood Park Apartments, a South Carolina Limited Partnership

Appellants,

vs

Pinewood Park Apartments, a South Carolina Limited Partnership, Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group, Inc , AmReal Corporation a/ka and f/k/a USS Corporation a/k/a and f/k/a U S Shelter Corporation, ISTC Corporation, N Barton Tuck, Jr , and John Doe, a generic designation for a party or parties whose true identity is unknown

Respondents

AMENDED NOTICE OF APPEAL

Appellants Carolina Management Corporation of Beaufort, James B Jackson, Whaley R Hinnant, Jr , Mary Gasser Rawl and Rhoda G Rentz appeal the following orders

- 1 ORDER denying Plaintiffs' motion to compel #6, dated August 18, 2008, a copy of which is attached as Exhibit 1
- 2 ORDER DENYING PLAINTIFFS' MOTION TO COMPEL #2, dated December 17, 2008, a copy of which is attached as Exhibit 2

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SC Court of Appeals

- 3 ORDER GRANTING DEFENDANTS' MOTION TO COMPEL, DATED NOVEMBER 6, 2008,
dated March 3, 2009, a copy of which is attached as Exhibit 3
- 4 ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO
COMPEL, DATED JULY 29, 2005, dated March 3, 2009, a copy of which is
attached as Exhibit 4
- 5 ORDER ADOPTING FINDINGS AND CONCLUSIONS OF SPECIAL MASTER CLARY,
dated June 2, 2009, a copy of which is attached as Exhibit 5
- 6 ORDER DENYING PLAINTIFFS' MOTION TO ALTER OR AMEND ORDER GRANTING
DEFENDANTS' MOTION TO COMPEL DATED NOVEMBER 6, 2008, dated June 16,
2009, a copy of which is attached as Exhibit 6
- 7 ORDER AMENDING COURT'S ORDER DATED JUNE 2, 2009, dated July 28, 2009,
a copy of which is attached as Exhibit 7
- 8 ORDER GRANTING DEFENDANTS' TWO MOTIONS FOR SANCTIONS, FINDING
PLAINTIFFS IN CONTEMPT OF COURT, AND DISMISSING THE ABOVE-CAPTIONED
ACTIONS AS SANCTIONS FOR PLAINTIFFS' CONTEMPT, dated April 6 2010, a
copy of which is attached as Exhibit 8
- 9 ORDER denying Plaintiffs' motion for reconsideration, dated September 16,
2010, filed on September 20, 2010, and receipt of written notice of entry of
which was received by Counsel for Appellants on November 29, 2010, a
copy of which is attached as Exhibit 9
- 10 ORDER appointing the Honorable Doyet A Early, III to hear and decide all
matters pertaining to these cases, dated March 7, 2006, issued by Chief
Justice Jean Hoefer Toal, a copy of which is attached as Exhibit 10

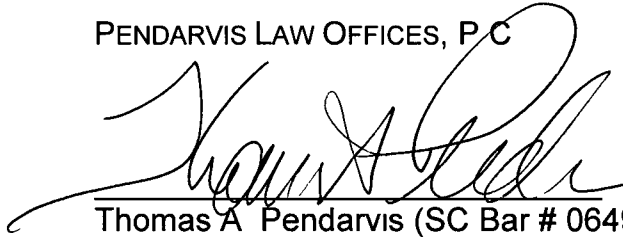
- 11 ORDER denying Plaintiffs' motion for recusal (issued by the Honorable Doyet A Early, III), dated October 7, 2010, filed on October 11, 2010, and receipt of written notice of entry of which was received by Counsel for Appellants on October 18, 2010, a copy of which is attached as Exhibit 11
- 12 ORDER denying Plaintiffs' motion for protective order (issued by the Honorable Doyet A Early, III), dated October 22, 2010, filed on October 25, 2010, and receipt of written notice of entry of which was received by Counsel for Appellants on October 29, 2010, a copy of which is attached as Exhibit 12
- 13 ORDER denying Plaintiffs' motion to alter or amend order denying Plaintiffs' motion for protective order and the Order denying Plaintiffs' motion for recusal (issued by the Honorable Doyet A Early, III), dated December 11, 2010, filed on December 16, 2010, and receipt of written notice of entry of which was received by Counsel for Appellants on December 30, 2010, a copy of which is attached as Exhibit 13

The above Orders, except for Exhibit 10, were issued by the Honorable Doyet A Early, III

Respectfully submitted,

Joel D Bailey
THE BAILEY LAW FIRM, P A
PO Box 1437
Beaufort, SC 29901-1437
(843) 525-6090 tele
(843) 525-6070 fax
baileylawfirm@charter.net

PENDARVIS LAW OFFICES, P C



Thomas A Pendarvis (SC Bar # 064918)

500 Carteret St , Suite A
Beaufort, SC 29902-5066

843 524 9500 tel

843 524 9501 fax

Thomas@PendarvisLaw.com

Counsel for Appellants

January 28, 2011

Beaufort, South Carolina

OTHER COUNSEL OF RECORD

Ellis M Johnston, Jr , J D

Calvin T Vick, J D

Jesse C Belcher, J D

HAYNSWORTH SINKLER BOYD, P A

P O Box 2048

Greenville SC 29602

Marvin D Infinger, J D

Anne Ross Rosen, J D

HAYNSWORTH SINKLER BOYD, P A

134 Meeting Street, 3rd Floor

Charleston SC 29401

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Parkview Apartments, a South Carolina Limited
Partnership, *et al* , Defendants

Beaufort County
C A No 2003-CP-07-726

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Roosevelt Gardens, a South Carolina Limited
Partnership, *et al* , Defendants

Orangeburg County
C A No 2005-CP-38-1131

Rhonda G Rentz, *et al* , Plaintiffs,
v
Orleans Gardens, a South Carolina Limited
Partnership, *et al* , Defendants

Charleston County
C A No 2005-CP-10-4229

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Palmetto Apartments, a South Carolina Limited
Partnership, *et al* , Defendants

Beaufort County
C A No 2005-CP-07-1989

Carolina Management Corporation of Beaufort,
et al , Plaintiffs,
v
Pinewood Park Apartments, a South Carolina
Limited Partnership, *et al* , Defendants

Beaufort County
C A No 2005-CP-07-1990

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JAN 31 2011
SC Court of Appeals

ORDER

This matter is before the court upon Plaintiffs' Motion to Compel #6 dated June 12, 2008 seeking discovery of certain financial information from Defendants which Plaintiffs deem necessary for their expert to give opinions on the appropriate level of punitive damages that might be awarded. The court finds that there is sufficient information publicly available through filings with the Securities and Exchange Commission to satisfy this request, and therefore denies Plaintiffs' Motion to Compel #6 dated June 12, 2008.

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IT IS SO ORDERED



The Honorable Doyet A. Early, III,
Judge, 2nd Judicial Circuit

Dated this 18 day of August, 2008

Greenville South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

Laurance H Davis Jr <i>et al</i> Plaintiffs	)	
v	)	Beaufort County
Parkview Apartments a South Carolina Limited Partnership <i>et al</i> Defendants	)	C A No 2003-CP-07-726
	)	
Laurance H Davis, Jr <i>et al</i> Plaintiffs	)	
v	)	Orangeburg County
Roosevelt Gardens a South Carolina Limited Partnership <i>et al</i> Defendants	)	C A No 2005-CP-38-1131
	)	
Rhonda G Rentz <i>et al</i> Plaintiffs	)	
v	)	Charleston County
Orleans Gardens a South Carolina Limited Partnership, <i>et al</i> Defendants	)	C.A No 2005 CP-10-4229
	)	
Laurance H Davis, Jr, <i>et al</i> Plaintiffs	)	
v	)	Beaufort County
Palmetto Apartments, a South Carolina Limited Partnership <i>et al</i> Defendants	)	C.A No 2005 CP 07 1989
	)	
Carolina Management Corporation of Beaufort, <i>et al</i> Plaintiffs	)	
v	)	Beaufort County
Pinewood Park Apartments a South Carolina Limited Partnership <i>et al</i> Defendants	)	C A No 2005 CP-07-1990
	)	

ORDER DENYING
PLAINTIFFS' MOTION TO COMPEL # 2

THESE MATTERS COME BEFORE THE COURT on Plaintiffs Motion to Compel Production, dated November 7 2007 (hereinafter 'Motion') in each of the above-captioned actions The Court has considered the parties memoranda and other submissions, including the Defendants Privilege Log a copy of which was provided to the Court and to Plaintiffs counsel in connection with the Motion (hereinafter Defendants' Privilege Log) as well as the oral argument of the parties' counsel at the hearing held on November 19 2007 The Court finds that

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the documents identified in the Defendants Privilege Log are privileged and that the Defendants shall not be compelled to produce such documents to Plaintiffs

Further, the Court finds that Plaintiffs Motion is not ripe with respect to questions that may be asked at the depositions of certain attorneys that previously represented the Defendants, such depositions having not yet taken place

WHEREFORE Plaintiffs Motion is hereby DENIED Further, Plaintiffs' request for an award of reasonable expenses of the Motion including their attorneys fees pursuant to Rule 37 SCRPC is DENIED

IT IS SO ORDERED

This 17 day of Dec 2008

Banks South Carolina

Doyet A. Early, III
Doyet A. Early, III Circuit Court Judge

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Parkview Apartments, a South Carolina Limited
Partnership, *et al* , Defendants

)
)
) Beaufort County
) C A No 2003-CP-07-726
)

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Roosevelt Gardens, a South Carolina Limited
Partnership, *et al* , Defendants

)
)
) Orangeburg County
) C A No 2005-CP-38-1131
)

Rhonda G Rentz, *et al* , Plaintiffs,
v
Orleans Gardens, a South Carolina Limited
Partnership, *et al* , Defendants

)
)
) Charleston County
) C A No 2005-CP-10-4229
)

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Palmetto Apartments, a South Carolina Limited
Partnership, *et al* , Defendants

)
)
) Beaufort County
) C A No 2005-CP-07-1989
)

Carolina Management Corporation of Beaufort,
et al , Plaintiffs,
v
Pinewood Park Apartments, a South Carolina
Limited Partnership, *et al* , Defendants

)
)
) Beaufort County
) C A No 2005-CP-07-1990
)

ORDER GRANTING DEFENDANTS'
MOTION TO COMPEL, DATED NOVEMBER 6, 2008

THESE MATTERS COME BEFORE THE COURT on Defendants' Motion to Compel, dated November 6, 2008 (the "Motion"), which concerns Defendants' Interrogatories and Requests for Production, dated August 28, 2008 (the "Discovery Requests"), and Plaintiffs' responses to such Discovery Requests. The Court has considered the Defendants' memorandum in support of the Motion, which was filed on December 8, 2008 ("Defendants' Memorandum"), and the oral argument of the parties' counsel at the hearing held on December 9, 2008, as well as

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the additional written materials submitted by the parties since the hearing on December 9, 2008, including Plaintiffs' Supplemental Response to Defendants' Discovery to All Plaintiffs Dated August 28, 2008 ("Supplemental Response") The Plaintiffs did not submit a memorandum in opposition to the Motion

The Court finds that the Defendants served the Discovery Requests upon Plaintiffs on August 28, 2008, and the Defendants subsequently granted Plaintiffs a 30-day extension to serve their responses, such that Plaintiffs' responses were due to be served by October 27, 2008 Plaintiffs failed to timely serve their responses to the Discovery Requests, and Defendants filed the Motion on November 6, 2008 Plaintiffs then served their initial responses to the Discovery Requests on November 14, 2008, but Defendants elected to proceed with the Motion, claiming that the Plaintiffs' responses to the Discovery Requests were incomplete and inadequate

The subject matter of the Motion can be broken into two distinctive sets of issues The first set of issues concerns whether Plaintiffs should be compelled to produce documents identified on their Privilege Log, and these issues were referred by the Court to Gary E Clary, as Special Master, for *in camera* inspection of the subject documents Special Master Clary's report to the Court concerning his findings is pending at this time, and those issues shall be addressed in a separate Order of this Court The second set of issues concerns whether Plaintiffs should be compelled to provide full and complete responses to certain Interrogatories, which were identified in the Defendants' Memorandum, and whether Plaintiffs should be compelled to produce documents (separate and apart from the documents listed on Plaintiffs' Privilege Log) in response to certain Requests for Production, which were also identified in Defendants' Memorandum At the hearing of the Motion, the Court directed the parties to make further attempts to resolve the discovery disputes presented by this second set of issues, but the parties'

attempts have not resulted in a resolution of their disputes

On January 29, 2009, Plaintiffs served their Supplemental Response to the Discovery Requests, as well as documents Bates stamped Davis 007134-007192. Though the Defendants' Discovery Requests were directed to each of the Plaintiffs in the five (5) above-captioned actions, the Plaintiffs' Supplemental Response expressly provides that it is made only by the Plaintiffs in the Parkview action, and that the Plaintiffs in the other actions will supplement their responses to the Discovery Requests "at a later date." Further, the documents produced along with the Supplemental Response were the financial statements of only one of the Plaintiffs, Laurance Davis. As for the content of the Supplemental Response, very little additional information is provided, and Plaintiffs reaffirm their objections contained in their previous responses to the Discovery Requests.

The Defendants seek to compel the Plaintiffs to provide full and complete answers to the following Interrogatories Nos. 3, 6-18, 20, and 22-23. The Court finds that the Plaintiffs' responses to these Interrogatories are incomplete and inadequate, and the Plaintiffs are hereby compelled to provide full and complete responses to these Interrogatories, subject only to the limitations stated herein.

The Defendants also seek to compel the Plaintiffs to produce all documents in their possession, custody or control, which are responsive to the following Requests for Production Nos. 1-8, 10-16, 19-34, 36-43, and 45-48. The Court finds that the Plaintiffs' responses to these Requests for Production are incomplete and inadequate, and the Plaintiffs are hereby compelled to produce all documents in their possession, custody or control, which are responsive to these Requests, subject only to the limitations stated herein.

Where Plaintiffs can fully and completely respond to such Interrogatories or Requests for

Production by reference to documents that have been produced by Plaintiffs in these lawsuits, and all such documents have been Bates stamped for tracking and identification purposes,¹ Plaintiffs may so state. Any information or documents withheld on the grounds of attorney-client privilege or work product must be specifically identified, as discussed further below. With respect to Interrogatory No. 6, if the experts identified by Plaintiffs have produced written reports setting forth the opinions held by the experts and the bases for such opinions, Plaintiffs may produce such reports in response to this Interrogatory to the extent the reports contain all of the information requested. If the reports do not contain all of the requested information, Plaintiffs must supplement the information contained in the reports so as to fully and completely answer Interrogatory No. 6. If the Plaintiffs' experts have not produced such written reports, Plaintiffs must provide a summary of the important opinions held by each expert (i.e. the opinion testimony the expert is expected to give in these cases), as well as the factual bases for such opinions. A description of the expert's general experience is not sufficient.

In response to each and every Interrogatory and Request for Production, the Plaintiffs incorporate numerous general objections, which are set out in their initial discovery response and Supplemental Response prior to the Plaintiffs' specific responses to the Discovery Requests ("General Objections"). This blanket method of objecting to all of the Discovery Requests, coupled with Plaintiffs' subsequent failure to respond in any meaningful way to the particular complaints raised in Defendants' Memorandum, make it impossible for Defendants to know if

¹ Though the parties are not required to Bates stamp all documents produced, as a matter of law the parties have agreed to Bates stamp the documents produced in these cases for purposes of tracking and identification. Due to the volume of documents produced by the parties in these cases, as a practical matter, it is unfair and ambiguous for the Plaintiffs to respond to discovery requests by merely stating that responsive documents have already been produced or are already in the possession of Defendants or their counsel, leaving open the question as to whether the referenced documents are among the Bates stamped documents produced by Plaintiffs. While the Court has not required the parties to identify the specific documents or pages by reference to specific Bates numbers when responding in this fashion, the responding party must at least identify the group of documents in a readily discernable fashion, such as "Bates stamped documents produced in these cases by Plaintiffs."

responsive information and/or documents are being withheld, and, if so, based on which specific grounds To the extent that Plaintiffs have withheld any information or documents that would otherwise be responsive to the Discovery Requests on the grounds of attorney-client privilege or work product, such information and documents shall be sufficiently identified in Plaintiffs' Privilege Log or by other written means, so as to afford Defendants a reasonable opportunity to assess the applicability of the privilege or protection, as required by Rule 26(b)(5), SCRCP To the extent that Plaintiffs have withheld any information or documents that would otherwise be responsive to the Discovery Requests on the grounds of any of the other General Objections contained in Plaintiffs' discovery responses, Plaintiffs are hereby compelled to provide full and complete responses to all such Interrogatories and to produce the documents responsive to all such Requests for Production The Court notes that Defendants have withdrawn Request for Production No 44, so no further response to that Request is required

Plaintiffs' response to Interrogatory No 24 indicates that each of the Plaintiffs in the above-captioned actions may not have participated in answering the Interrogatories Each and every Plaintiff is required to provide all information reasonably available to him or her, which would be responsive to any of the Interrogatories Further, each and every Plaintiff is required to produce all documents in his or her possession, custody or control, which would be responsive to any of the Requests for Production

Plaintiffs shall fully comply with the terms of this Order within thirty (30) days of the date of this Order

WHEREFORE, Defendants' Motion is GRANTED, as stated above Further, Defendants' request for an award of reasonable expenses of the Motion, including their attorneys' fees, pursuant to Rule 37, SCRCP, is GRANTED ~~Defendants shall submit evidence~~

*held in abeyance pending
resolution of all discovery disputes -
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DNE*

~~of the amount of their reasonable expenses of the Motion, including their attorneys' fees, within~~
~~twenty (20) days of the date of this Order~~ DAF

IT IS SO ORDERED

This 3rd day of March, 2009
Bamberg, South Carolina

DAF
Doyet A. Early, III, Circuit Court Judge

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Parkview Apartments, a South Carolina Limited
Partnership, *et al* , Defendants

)
) Beaufort County
) C A No 2003-CP-07-726
)

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Roosevelt Gardens, a South Carolina Limited
Partnership, *et al* , Defendants.

)
) Orangeburg County
) C A No 2005-CP-38-1131
)

Rhonda G Rentz, *et al* , Plaintiffs,
v
Orleans Gardens, a South Carolina Limited
Partnership, *et al* , Defendants

)
) Charleston County
) C A No 2005-CP-10-4229
)

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Palmetto Apartments, a South Carolina Limited
Partnership, *et al* , Defendants

)
) Beaufort County
) C A No 2005-CP-07-1989
)

Carolina Management Corporation of Beaufort,
et al , Plaintiffs,
v
Pinewood Park Apartments, a South Carolina
Limited Partnership, *et al* , Defendants

)
) Beaufort County
) C A No 2005-CP-07-1990
)

**ORDER GRANTING IN PART AND DENYING IN PART
PLAINTIFFS' MOTION TO COMPEL, DATED JULY 29, 2005**

THESE MATTERS COME BEFORE THE COURT on Plaintiffs' Motion to Compel, dated July 29, 2005 ("Motion"), which concerns Defendants' responses to Plaintiffs' Interrogatories and Request for Production, dated April 22, 2003, in the Parkview action. The Court has considered the parties' memoranda, and the oral argument of the parties' counsel at the hearing held on July 1, 2008, as well as the additional written materials submitted by the parties since the hearing on July 1, 2008.

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It appears to the Court that the only remaining issue arising out of the Plaintiffs' Motion is the reasonable and appropriate scope of Plaintiffs' Interrogatory No 12, Interrogatory No 24 and Request for Production No 6. In accordance with the Court's previous instructions to the parties, counsel for the Plaintiffs and Defendants have attempted to reach an agreement as to the reasonable and appropriate scope of such discovery requests, but have been unable to do so. The subject discovery requests, and Defendants' responses to such requests, are set forth below.

Interrogatory No 12

For each complaint, claim or lawsuit initiated against the responding Defendant, state

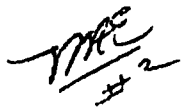
- (a) The title and date of each such complaint, claim or lawsuit,*
- (b) Outline the contents of the complaint, claim or lawsuit filed in each such action,*
- (c) The name and address of the court involved, if any, including the case number or civil action number assigned to the action, and*
- (d) The name and address of the complaining party, if applicable, and the name and address of the attorney for such party in each such complaint, claim or lawsuit*

ANSWER Defendants object to this interrogatory on the grounds that it is vague and ambiguous, overly broad, unduly burdensome, and seeks information that is not reasonably calculated to lead to the discovery of admissible evidence. Defendants further object to Interrogatory No 12 to the extent it seeks historical information as to entities which no longer exist. Defendants further object on the basis that, to the extent such is public information, such is as easily available to Plaintiffs as Defendants. AIMCO is producing a list of lawsuits from its database.

Interrogatory No 24

Has the responding Defendant been investigated, reprimanded, criticized, cited or sanctioned by any governmental entity or organization with respect to the ownership, management and/or operation of any apartment complex? If so, set forth the names, addresses and telephone numbers of each such entity or organization, together with the precise nature of the investigation, reprimand, criticism, citation or sanction, and the form in which such activity occurred.

ANSWER Defendants object to this interrogatory on the grounds that it is vague and ambiguous, overly broad, unduly burdensome, and to the extent it seeks discovery of information that is not reasonably calculated to lead to the discovery of admissible evidence. For instance, the responding Defendants are subject to a vast array of rules and regulations of federal, state, and local agencies.

Handwritten signature and initials, possibly "JMC" with a checkmark and the number "2" below it.

Request for Production No. 6

Originals or complete copies of any and all documentation relating to any lawsuits or other legal claims made against the responding Defendant by any limited partner of any other limited partnership in which the Defendant is or has been involved while also acting as a general partner in the Defendant Parkview Apartments Limited Partnership

RESPONSE *Defendants object to this Request on the grounds that it is improper, overly broad, unduly burdensome and seeks discovery of information that is not reasonably calculated to lead to the discovery of admissible evidence. Defendants further object to this request to the extent that it seeks documents readily available in the public domain and already in the possession of Plaintiffs or their attorneys*

The Court finds that each of the above discovery requests is overly broad and unduly burdensome, and seeks information that will be inadmissible at the trial of this action and is not reasonably calculated to lead to the discovery of admissible evidence. As such, the above discovery requests are beyond the scope of permissible discovery, pursuant to Rule 26(b), SCRCP. However, rather than flatly denying Plaintiffs' Motion with respect to these discovery requests, the Court orders the Defendants AIMCO, AmReal and Barton Tuck ("Tuck") to produce the following information and documents that are reasonably available to them, within thirty (30) days of the date of this Order:

- (1) Identify each lawsuit known to the Defendants AIMCO, AmReal or Tuck, which was initiated against AmReal or Tuck between 1984 and 2004, or initiated against AIMCO between 1994 and 2004, and which involved each of the following:
 - (a) claims by limited partners of a limited partnership, as plaintiffs, against the Defendants AIMCO, Tuck or AmReal, as general partners of the same limited partnership,
 - (b) allegations that the Defendants AIMCO, Tuck or AmReal breached fiduciary duties owed to the plaintiff limited partners, and
 - (c) allegations that the plaintiff limited partners' claims arise out of or are related to the said Defendants' ownership, management and/or operation of low-income apartment housing

The scope of this discovery does not include lawsuits based on tenant or prospective tenant complaints of any kind, employment disputes, construction disputes, vendor disputes, violation of any applicable environmental laws or regulations, claims of personal injury or property

damage, claims of simple breach of contract unrelated to the general partner-limited partner fiduciary relationship, or similar claims that are wholly unrelated to the subject matter of these cases. Defendants may comply with this discovery by providing a listing of the litigation with sufficient descriptors such that Plaintiffs can locate the court filings. The Court notes that Defendants have informed it and the Plaintiffs that, with respect to information that is reasonably available to Defendants AIMCO, AmReal and Tuck, the lawsuits responsive to this discovery have been previously identified to the Plaintiffs.

(2) Identify all formal administrative proceedings initiated by the United States Department of Housing and Urban Development ("HUD") against Defendants AmReal or Tuck between 1984 and 2001, or against Defendant AIMCO between 1994 and 2001, which involved or resulted in each of the following:

- (a) fines, financial penalties or financial settlements paid to HUD by Defendants AIMCO, AmReal or Tuck, and
- (b) alleged violation of HUD regulations by Defendants AIMCO, AmReal or Tuck in the course of their ownership, management and/or operation of any low-income apartment housing.

For the purposes of this discovery, "administrative proceedings" shall be limited to those matters in which HUD sought administrative relief for the violation of a federal regulation or other law. The scope of this discovery does not include proceedings based on tenant or prospective tenant complaints of any kind, employment disputes, construction disputes, vendor disputes, violation of any applicable environmental laws or regulations, claims of personal injury or property damage, or similar claims that are wholly unrelated to the subject matter of these cases. In lieu of identifying the administrative proceedings responsive to this discovery by written response, Defendants may produce documents that would be responsive to this discovery.

WHEREFORE, Plaintiffs' Motion is GRANTED in part, with respect to the information or documents that Defendants are required to produce to Plaintiffs, as stated above. Except as expressly provided above, the Motion is DENIED. Further, Plaintiffs' request for an award of reasonable expenses of the Motion, including their attorneys' fees, pursuant to Rule 37, SCRCP, is DENIED.

IT IS SO ORDERED.

This 3rd day of March, 2009
Burke, South Carolina

Doyet A. Early, III
Doyet A. Early, III, Circuit Court Judge

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Parkview Apartments, a South Carolina Limited
Partnership, *et al* , Defendants

)
)
) Beaufort County
) C A No 2003-CP-07-726
)

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Roosevelt Gardens, a South Carolina Limited
Partnership, *et al* , Defendants.

)
)
) Orangeburg County
) C A No 2005-CP-38
)

Rhonda G Rentz, *et al* , Plaintiffs,
v
Orleans Gardens, a South Carolina Limited
Partnership, *et al* , Defendants

)
)
) Charleston County
) C A No 2005-CP-10-4229
)

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Palmetto Apartments, a South Carolina Limited
Partnership, *et al* , Defendants

)
)
) Beaufort County
) C A No 2005-CP-07-1989
)

Carolina Management Corporation of Beaufort,
et al , Plaintiffs,
v
Pinewood Park Apartments, a South Carolina
Limited Partnership, *et al* , Defendants

)
)
) Beaufort County
) C A. No 2005-CP-07-1990
)

2009 JUN -4 PM 12:45
CLERK OF COURT
ELIZABETH M SMITH
BEAUFORT COUNTY SC

ORDER ADOPTING FINDINGS AND CONCLUSIONS OF SPECIAL MASTER CLARY

By Orders of this Court dated December 30, 2008, January 31, 2009, and April 9, 2009 (collectively, "Prior Orders"), the Court appointed the Honorable Gary E Clary as Special Master in these actions for the purposes set forth in such Prior Orders Pursuant to the Prior Orders, which are incorporated herein by reference, Special Master Clary issued his Reports to the Court, dated April 14, 2009 and April 22, 2009 (collectively, "Reports") The Reports contain Special Master Clary's findings and conclusions with respect to the matters referred to

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him Counsel for the parties have advised the Court that they wish to be heard concerning their respective arguments and objections to the findings and conclusions contained in the Reports

The Reports are hereby adopted verbatim as an Order of the Court The Reports, which are attached hereto, are incorporated herein by reference This action is taken without prejudice to the parties' rights to make any arguments or objections concerning the findings and conclusions contained in the Reports, or the subject matter thereof, via Motion(s) to Alter or Amend this Order, pursuant to Rule 59(e), SCRCP As requested by the parties' counsel, the Court will grant a hearing on any Rule 59(e) Motion filed by the parties with respect to this Order and will afford the parties full consideration of any arguments or objections stated in such Motion(s), if any

IT IS SO ORDERED

This 3 day of June, 2009
Bowling, South Carolina

Doyet A. Early, III
Doyet A. Early, III, Circuit Court Judge

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

Case No 2003-CP-07-726

Davis, et al

V. ~~2009~~ JUN 19 AM 11:54 Parkview Apartments LP, et al

Plaintiff(s)

BEAUFORT COUNTY
CLERK OF COURT
BEAUFORT, S C

Defendant(s)

CHECK ONE

☐ JURY VERDICT This action came before the court for a trial by jury The issues have been tried and the verdict has been rendered

☒ DECISION BY 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 _____

IT IS ORDERED AND ADJUDGED

☐ See attached order, ☒ Statement of Judgment by Court

After carefully reviewing all evidence before me and my prior order in the above-referenced matter, the Applicant's Motion to Alter or Amend Order Granting Defendant's Motion to Compel, dated November 6, 2008, Pursuant to Rule 59(e), SCRPC, is hereby DENIED.

Dated at Aiken, South Carolina, Date June 16, 2009 Judge W B Early Jr

This judgment was entered on the 16th Day of June, 20 09, and a copy mailed this 22 Day of June, 20 09, to attorneys of record or to parties as follows

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Bailey Law Firm
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Greenville, SC 29602-2048

Calvin T Vick, Jr
Haynsworth Sinkler Boyd, P A
Post Office Box 2048
Greenville, SC 29602-2048



Paul H. Smith

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

Laurance H Davis Jr *et al* Plaintiffs
v
Parkview Apartments, a South Carolina Limited
Partnership *et al* Defendants

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)

Beaufort County
C A No 2003-CP-07-726

Laurance H Davis Jr *et al* Plaintiffs
v
Roosevelt Gardens, a South Carolina Limited
Partnership, *et al* Defendants

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)

Orangeburg County
C A No 2005-CP-38-1131

Rhonda G Rentz *et al* Plaintiffs,
v
Orleans Gardens a South Carolina Limited
Partnership *et al* Defendants

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Charleston County
C A No 2005-CP-10 4229

Laurance H Davis Jr *et al* Plaintiffs
v
Palmetto Apartments, a South Carolina Limited
Partnership *et al* Defendants

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Beaufort County
C A No 2005-CP 07-1989

Carolina Management Corporation of Beaufort
et al Plaintiffs,
v
Pinewood Park Apartments a South Carolina
Limited Partnership *et al* , Defendants

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Beaufort County
C A No 2005-CP 07-1990

ORDER AMENDING COURT'S ORDER DATED JUNE 2, 2009

These matters are before the Court on the Plaintiffs Motion to Alter or Amend dated June 11 2009 and the Defendants Motion to Alter or Amend, dated June 15, 2009 In their respective motions the Plaintiffs and the Defendants request that the Court amend its Order dated June 2 2009 which adopted Special Master Clary's reports verbatim The parties motions were timely filed pursuant to Rule 59(e) SCRCP, and the Court has carefully considered the parties' memoranda exhibits oral arguments of all counsel at the July 6, 2009

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hearing and Special Master Clary's reports which were incorporated into the Court's June 2, 2009 Order by reference. The motions of the Plaintiffs and the Defendants are granted, in part, and denied, in part as set forth herein.

The Court's June 2, 2009 Order and the Special Master's reports incorporated therein are sustained in all aspects, except for the following amendments thereto:

(1) With regard to the Plaintiffs' argument that the fiduciary duty exception applies to Defendants' privileged documents, the Court finds that the requisite mutuality of interest between the parties ceased to exist as of December 9, 1999, which is the date of Mr. Weinberg's first letter to a general partner threatening litigation (AMREAL 014864 attached to Defendants' Memorandum as Exhibit 1). Accordingly, the fiduciary duty exception is not available to the Plaintiffs with regard to any privileged document dated (i.e. created) after December 9, 1999, and the following privileged documents which were previously designated for production shall not be produced:

Defendants' Documents (listed on pp. 12-14 of the Special Master's April 14, 2009 report)

1	AMREAL 00573-00576
20	AMREAL 004865-004867
23	GWB 000011
60	GWB 000271
76	GWB 000458-000459
78	GWB 000484

'Bryan Cave' Documents (listed on pp. 14-17 of the Special Master's April 14, 2009 report)

2	AMREAL 014670-014671
3	AMREAL 014672-014681
16	AMREAL 014875

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17	AMREAL 014876
18	AMREAL 014877-014879
19	AMREAL 014880-014886
20	AMREAL 014887-014890
21	AMREAL 014891-014892
22	AMREAL 014893-014894
24	AMREAL 014896-014897
26	AMREAL 014899
27	AMREAL 014900-014902
28	AMREAL 014903-014904
30	AMREAL 014906
31	AMREAL 014907
32	AMREAL 014908
33	AMREAL 014909
34	AMREAL 014910-014912
36	AMREAL 014914
37	AMREAL 014915
59	AMREAL 015060-015061
60	AMREAL 015062-015066
62	AMREAL 015068-015071
63	AMREAL 015072-015074
64	AMREAL 015075-015077
66	AMREAL 015079-015081
67	AMREAL 015087
68	AMREAL 015091-015092
69	AMREAL 015093-015095
70	AMREAL 015100-015103
71	AMREAL 015104-015107
72	AMREAL 015118-015119
73	AMREAL 015120-015122
74	AMREAL 015123-015126
75	AMREAL 015136-015138
76	AMREAL 015139-015140
77	AMREAL 015141-015144
78	AMREAL 015145-015151
79	AMREAL 015152-015153
81	AMREAL 015157-015167
87	AMREAL 015209-015213
89	AMREAL 015256
90	AMREAL 015257
91	AMREAL 015258
92	AMREAL 015259-015261
93	AMREAL 015262-015263
94	AMREAL 015268-015269
95	AMREAL 015272-015273

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96	AMREAL 015276-015277
97	AMREAL 015278-015279
98	AMREAL 015282-015283
99	AMREAL 015284
100	AMREAL 015285-015286
101	AMREAL 015287-015297
102	AMREAL 015298-015306
103	AMREAL 015307-015316
104	AMREAL 015317-015332
108	AMREAL 015341-015342
109	AMREAL 015343-015344
110	AMREAL 015345-015346
112	AMREAL 015350-015352
113	AMREAL 015353-015357
114	AMREAL 015358-015362
115	AMREAL 015363-015366
116	AMREAL 015367-015369
129	AMREAL 015423-015426
130	AMREAL 015427-015430
131	AMREAL 015431-015436
132	AMREAL 015437-015442
133	AMREAL 015443-015445

(2) The Court finds that the limited power of attorney from Mary Jane Pike to Jim Pike and/or Jane Miller was valid and there was no waiver of privilege as a result of documents being provided to Jim Pike and/or Jane Miller. The subject documents are identified in Special Master Clary's reports as Plaintiffs' documents 8, 9, 46, 54, 59, 100 and 103. However, two of these documents (46 – Bailey 3735, dated 2/14/01, 54 – Bailey 4019-4020 dated 9/19/02) are subject to production under paragraph 4 below, so they shall be produced as previously ordered. The net result of the Court's findings is that the following documents, which were previously designated for production shall not be produced:

8	Parkview 2114-2115
9	Parkview 2143
59	Bailey 4055
100	Bailey 4874-4875

*NOTE
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(3) The Special Master concluded that documents involving communications with prospective clients of Mr Bailey were not privileged and should be produced, because Mr Bailey lacked the necessary attorney-client relationship with such prospective clients. Plaintiffs argue that the attorney-client privilege extends to communications between Mr Bailey and prospective clients such as Warren Griffin, a limited partner in Lincoln Limited Partnership who did not retain Mr Bailey and is not a party to these lawsuits. The Court agrees with the Plaintiffs. Communications that are solely between Mr Bailey and prospective clients, who are not parties (or their predecessors or successors) to these lawsuits, are privileged and should not be produced. However, after reviewing the Special Master's reports and the Plaintiffs' Privilege Log, it appears that there are no such documents. There are, however, communications between Mr Bailey and his current clients (Plaintiffs) concerning, in whole or in part, Lincoln Limited Partnership. Mr Griffin is a party to some of these communications, but his participation does not, itself, destroy the privilege. Such documents are privileged unless the privilege has been impliedly waived by the Plaintiffs as described in paragraph 4 below (i.e., Plaintiffs have impliedly waived privilege as to documents dated more than three years prior to the filing of these lawsuits). The Court finds that two of the documents concerning the Lincoln Limited Partnership, which were designated for production by the Special Master, are privileged and are not subject to the implied waiver described in paragraph 4. These documents are communications occurring in 2004 between Mr Bailey and Plaintiffs, Rentz and Hodge. Accordingly, the following documents, which were previously designated for production, shall not be produced.



83	Bailey 4593

(4) The Court finds that the statute of limitations is a major issue in these cases, and as shown in the Defendants' Memorandum and exhibits thereto, that the Plaintiffs impliedly waived their claims of privilege with respect to documents dated (i.e., created) more than three years prior to the filing of these lawsuits. As a result the following documents, which were previously designated for protection, shall be produced

12	Bailey 3059
13	Bailey 3060
14	Bailey 3067 3069
15	Bailey 3070-3072
17	Bailey 3077-3078
18	Bailey 3082
19	Bailey 3105
20	Bailey 3148
21	Bailey 3151
22	Bailey 3152
23	Bailey 3153
24	Bailey 3154
25	Bailey 3155 3156
26	Bailey 3180
27	Bailey 3209 3212
28	Bailey 3215
29	Bailey 3216
30	Bailey 3217
31	Bailey 3316
34	Bailey 3321
38	Bailey 3333
39	Bailey 3334-3335
40	Bailey 3512
41	Bailey 3526-3528
42	Bailey 3695
43	Bailey 3715-3719
44	Bailey 3721-3726
45	Bailey 3731-3732
47	Bailey 3737
48	Bailey 3738

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49	Bailey 3754-3755
51	Bailey 3758-3759
52	Bailey 3768
53	Bailey 3799
66	Bailey 4218-4219
77	Bailey 4560
85	Bailey 4783
86	Bailey 4785-4787
87	Bailey 4804
88	Bailey 4808-4809
89	Bailey 4810
91	Bailey 4827
93	Bailey 4837
94	Bailey 4842
95	Bailey 4843
97	Bailey 4847-4851
98	Bailey 4854
99	Bailey 4859-4868
110	Bailey 4999
111	Bailey 5002 5004
112	Bailey 5008-5012
113	Bailey 5016
114	Bailey 5024
116	Bailey 5028
117	Bailey 5056
118	Bailey 5062
119	Bailey 5064
120	Bailey 5065-5069
121	Bailey 5071
122	Bailey 5073
123	Bailey 5074
124	Bailey 5080-5081
125	Bailey 5088 5089
126	Bailey 5092

(5) The Court finds that the Defendants' privileged documents identified as Bryan Cave documents Nos. 2 and 3 (listed on p. 15 of the Special Master's April 14, 2009 report) are not subject to the fiduciary duty exception, because these documents are not communications between a general partner acting in that capacity and the Limited Partnerships' attorneys.

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Rather these documents concern communications between AIMCO, acting in its individual capacity and AIMCO's separate counsel Art Hessel who did not represent the Limited Partnerships As a result the following documents, which were previously designated for production shall not be produced

2	AMREAL 014670-014671
3	AMREAL 014672-014681

The Court's June 2, 2009 Order, and the Special Master's reports incorporated therein, are hereby amended as set forth above. In sum, pursuant to the Court's June 2, 2009 Order, as amended herein, the Plaintiffs and Defendants are ordered to produce the following documents within seven (7) days of the date of this Order.

Plaintiffs Shall Produce

1	Parkview 1951-1952
5	Parkview 2083
12	Bailey 3059
13	Bailey 3060
14	Bailey 3067-3069
15	Bailey 3070-3072
16	Bailey 3073
17	Bailey 3077-3078
18	Bailey 3082
19	Bailey 3105
20	Bailey 3148
21	Bailey 3151
22	Bailey 3152
23	Bailey 3153
24	Bailey 3154
25	Bailey 3155-3156
26	Bailey 3180
27	Bailey 3209-3212
28	Bailey 3215
29	Bailey 3216
30	Bailey 3217

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31	Bailey 3316
32	Bailey 3317
33	Bailey 3320
34	Bailey 3321
35	Bailey 3325
36	Bailey 3326-3327
37	Bailey 3328
38	Bailey 3333
39	Bailey 3334-3335
40	Bailey 3512
41	Bailey 3526-3528
42	Bailey 3695
43	Bailey 3715-3719
44	Bailey 3721-3726
45	Bailey 3731-3732
46	Bailey 3735
47	Bailey 3737
48	Bailey 3738
49	Bailey 3754-3755
50	Bailey 3756-3757
51	Bailey 3758 3759
52	Bailey 3768
53	Bailey 3799
54	Bailey 4019-4020
66	Bailey 4218-4219
71	Bailey 4467-4468
72	Bailey 4471
73	Bailey 4473
74	Bailey 4540-4543
75	Bailey 4547
76	Bailey 4548
77	Bailey 4560
78	Bailey 4565
79	Bailey 4572-4575
80	Bailey 4576-4577
81	Bailey 4580 4582
84	Bailey 4763
85	Bailey 4783
86	Bailey 4785-4787
87	Bailey 4804
88	Bailey 4808-4809
89	Bailey 4810
90	Bailey 4811
91	Bailey 4827
92	Bailey 4831

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93	Bailey 4837
94	Bailey 4842
95	Bailey 4843
96	Bailey 4846
97	Bailey 4847-4851
98	Bailey 4854
99	Bailey 4859 4868
104	Bailey 4885-4886
105	Bailey 4968
106	Bailey 4980
107	Bailey 4993
108	Bailey 4995 (identified as 4996 on Plaintiffs Privilege Log)
109	Bailey 4998
110	Bailey 4999
111	Bailey 5002 5004
112	Bailey 5008 5012
113	Bailey 5016
114	Bailey 5024
115	Bailey 5025
116	Bailey 5028
117	Bailey 5056
118	Bailey 5062
119	Bailey 5064
120	Bailey 5065-5069
121	Bailey 5071
122	Bailey 5073
123	Bailey 5074
124	Bailey 5080-5081
125	Bailey 5088-5089
126	Bailey 5092

Defendants Shall Produce

70	GWB 000380
71	GWB 000381-000421
'Bryan Cave	
6	AMREAL 014865
7	AMREAL 014866
8	AMREAL 014867
9	AMREAL 014868
10	AMREAL 014869
11	AMREAL 014870

MAE
2/10

12	AMREAL 014871
13	AMREAL 014872
14	AMREAL 014873
39	AMREAL 014917-014922
41	AMREAL 014924-014928
42	AMREAL 014939-014944
43	AMREAL 014945-014949
44	AMREAL 014950-014953
45	AMREAL 014954-014959
46	AMREAL 014960-014964
47	AMREAL 014965-014968
48	AMREAL 014984-014989
49	AMREAL 014990-014994
50	AMREAL 014995-014998
51	AMREAL 014999-015004
52	AMREAL 015005-015009
53	AMREAL 015010-015013
54	AMREAL 015020-015024
55	AMREAL 015044-015049
56	AMREAL 015050-015054
57	AMREAL 015055-015058

IT IS SO ORDERED

This 28th day of July 2009

Banker, South Carolina

Doyet A. Early III

Doyet A. Early III Circuit Court Judge

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

2010 APR -9 PM 3:32
Laurance H Davis, Jr , *et al* , Plaintiffs,)

v)
Parkview Apartments, a South Carolina Limited)
Partnership, *et al* , Defendants)

Beaufort County

C A No 2003-CP-07-726

Laurance H Davis, Jr , *et al* , Plaintiffs,)

v)
Roosevelt Gardens, a South Carolina Limited)
Partnership, *et al* , Defendants)

Orangeburg County

C A. No 2005-CP-38-1131

Rhonda G Rentz, *et al* , Plaintiffs,)

v)
Orleans Gardens, a South Carolina Limited)
Partnership, *et al* , Defendants)

Charleston County

C A No 2005-CP-10-4229

Laurance H Davis, Jr , *et al* , Plaintiffs,)

v)
Palmetto Apartments, a South Carolina Limited)
Partnership, *et al* , Defendants)

Beaufort County

C A No 2005-CP-07-1989

Carolina Management Corporation of Beaufort,)
et al , Plaintiffs,)

v)
Pinewood Park Apartments, a South Carolina)
Limited Partnership, *et al* , Defendants)

Beaufort County

C A No 2005-CP-07-1990

**ORDER GRANTING DEFENDANTS' TWO MOTIONS FOR SANCTIONS, FINDING
PLAINTIFFS IN CONTEMPT OF COURT, AND DISMISSING THE ABOVE-
CAPTIONED ACTIONS AS SANCTIONS FOR PLAINTIFFS' CONTEMPT**

This matter comes before the Court on Defendants' two Motions for Sanctions, dated July 24, 2009 and August 10, 2009 For the reasons set forth below, the Court grants Defendants' Motions The Court finds and hereby declares that Plaintiffs in each of the above-captioned actions are in contempt of court as a result of their willful failure to comply with the Court's Order dated July 28, 2009 (which amended the Court's Order dated June 2, 2009), and

DAE #1

EXHIBIT

8

dismisses each of the above-captioned actions with prejudice as sanctions for such contempt, pursuant to Rule 37(b), SCRPC. The Court further finds and declares that Plaintiffs in each of the above-captioned actions are in contempt of court for the separate and additional reason that they have willfully disobeyed the Court's Order dated March 3, 2009. The Court dismisses each of the above-captioned actions with prejudice as sanctions for Plaintiffs' contempt with regard to the March 3, 2009 Order, as well. The Court also finds that Defendants should receive a monetary award to compensate them for the reasonable costs and attorneys' fees incurred in connection with their Motion to Compel Discovery and their two Motions for Sanctions, and the Court will enter a subsequent order declaring the amount of the award, as provided in this Order. Plaintiffs may purge the sanctions of dismissal of these actions by fully complying with both of the Court's discovery Orders, dated March 3, 2009 and July 28, 2009, within twenty-five (25) calendar days of the date of this Order.

FINDINGS OF FACT

1 General Background

By Order of the Supreme Court of South Carolina, dated March 7, 2006, these five (5) cases were assigned to the Undersigned to hear and decide all pre-trial motions and other matters pertaining to these cases, including the trial and post-trial motions. The matters before the Court concern two separate discovery disputes that date back to the summer of 2008. The first discovery dispute concerned Plaintiffs' failure to provide adequate responses to discovery requests served on August 28, 2008, and the dispute resulted in the Court's March 3, 2009 Order ("General Discovery Order"). The second discovery dispute concerned Defendants' challenges to Plaintiffs' claims of privilege for documents identified in Plaintiffs' July 28, 2008 Privilege Log, which resulted in the Court's July 28, 2009 Order ("Privilege Discovery Order"). Plaintiffs

DAE #2

have failed to comply with either of the Court's discovery orders, resulting in Defendants' two Motions for Sanctions, dated July 24, 2009 (relating to General Discovery Order) and August 10, 2009 (relating to Privilege Discovery Order). The trial in the Parkview action was scheduled to commence on May 18, 2009, and again on January 19, 2010, but the trial had to be continued both times on account of Plaintiffs' failure to comply with the South Carolina Rules of Civil Procedure, the General Discovery Order and/or the Privilege Discovery Order.

Before taking the actions set forth in this Order, the Court has considered at length all of the motions, memoranda, arguments, reports, letters from counsel, proposed orders, and orders relating to the underlying discovery disputes and the current Motions for Sanctions, including without limitation the following: Defendants' Motion to Compel Discovery, dated November 6, 2008, all memoranda filed by the parties concerning Defendants' Motion to Compel, Plaintiffs' Responses to Defendants' Discovery Requests to All Plaintiffs, dated November 14, 2008, the oral argument of counsel at the December 9, 2008 hearing on Defendants' Motion to Compel, this Court's Orders dated December 30, 2008, January 31, 2009 and April 14, 2009, concerning the appointment of Special Master Clary, as well as the scope of the *in camera* review of documents by him, Plaintiffs' Supplemental Responses to Defendants' Discovery Requests to All Plaintiffs, dated January 26, 2009, this Court's Order dated March 3, 2009, Plaintiffs' Motion to Alter or Amend Order Granting Defendants' Motion to Compel, dated March 13, 2009, and all memoranda filed by the parties concerning Plaintiffs' Motion to Alter or Amend, Special Master Clary's reports to this Court, dated April 14, 2009 and April 22, 2009, this Court's Order dated June 2, 2009, the Plaintiffs' Motion to Alter or Amend the Court's Order, dated June 11, 2009, the Defendants' Motion to Alter or Amend the Court's Order, dated June 15, 2009, all memoranda filed by the parties concerning their respective motions to alter or

DAE #3

amend the June 2, 2009 Order; the oral argument of counsel at the July 6, 2009 hearing on the parties' respective motions to alter or amend the June 2, 2009 Order; this Court's Order dated July 28, 2009 (amending the June 2, 2009 Order), Defendants' Motion for Sanctions, dated July 24, 2009, Defendants' Second Motion for Sanctions, dated August 10, 2009, all memoranda (including supplemental memoranda) filed by the parties concerning either or both of Defendants' Motions for Sanctions, the oral argument of counsel at the August 24, 2009 hearing on Defendants' two Motions for Sanctions, including Plaintiffs' oral motion for reconsideration of the July 28, 2009 Order (denied), Plaintiffs' Second Supplemental Response to Defendants' Discovery Requests to All Plaintiffs, dated August 24, 2009, the oral argument of counsel at the January 14, 2010 hearing on Defendants' two Motions for Sanctions, Plaintiffs' Third Supplemental Responses to Defendants' Discovery Requests to All Plaintiffs, dated January 25, 2010, and Plaintiffs' Motions for Relief from July 28, 2009 Order, dated January 28, 2010, and all memoranda filed by the parties concerning Plaintiffs' Motions for Relief from July 28, 2009 Order

2. Background and Findings of Fact Defendants' First Motion for Sanctions (General Discovery Order)

Defendants' first Motion for Sanctions concerns Plaintiffs' failure to comply with the Court's General Discovery Order, which compelled Plaintiffs to fully and completely answer Defendants' August 28, 2008 discovery requests within thirty (30) days of the Order. The Court makes the following findings of fact relevant to the first Motion for Sanctions

Defendants served the subject discovery requests ("Discovery Requests") on Plaintiffs on August 28, 2008, and granted Plaintiffs a 30 day extension to respond, making the responses due October 27, 2008. After receiving no responses from Plaintiffs, Defendants filed their Motion to

DAE #9

Compel Discovery on November 6, 2008. Plaintiffs then served their responses and objections to the Discovery Requests on November 14, 2008. As the Court would later find in the General Discovery Order, Plaintiffs' responses to numerous document requests and interrogatories were "incomplete and inadequate." Defendants sent Plaintiffs' counsel a 12-page letter, dated December 4, 2008, discussing in detail the various deficiencies in Plaintiffs' discovery responses. Plaintiffs responded, by letter dated December 8, 2008, summarily dismissing the concerns and complaints raised in Defendants' counsel's letter. On that same date, Defendants filed and served their Memorandum in Support of Motion to Compel, which essentially addressed the same deficiencies noted in Defendants' counsel's December 4, 2008 letter.

On December 9, 2008, the Court heard oral argument from counsel on Defendants' Motion to Compel. The Court, with the agreement of the parties' counsel, essentially bifurcated the issues presented in the Motion to Compel. The Motion to Compel dealt primarily with two issues: (1) Plaintiffs' failure to provide full and complete responses to interrogatories and to produce non-privileged documents that were responsive to the Discovery Requests, and (2) Plaintiffs' failure to produce documents that they had withheld under claims of privilege, which had been challenged by Defendants. As to the first issue, the Court instructed the parties to attempt to resolve their dispute without Court intervention. Failing that, they were to return to the Court for its decision. As to the second issue (disputed claims of privilege), the Court and the parties agreed to enlist the assistance of a former Circuit Court Judge, Gary E. Clary, who would review the subject documents *in camera* and report his findings to the Court before the Court proceeded to rule on the privilege issues. The privilege issues pertain to Defendants' Second Motion for Sanctions, which is discussed separately in this Order.

In the weeks following the December 9, 2008 hearing, the parties' attorneys conferred

DAE #5 5

about the resolution of the discovery dispute, and Plaintiffs' counsel advised that Plaintiffs would serve supplemental responses to the Discovery Requests by Christmas, which would address the issues raised by Defendants. Christmas came and went with no supplemental responses from Plaintiffs. Defendants' counsel inquired as to when Plaintiffs would provide their supplemental responses, and Plaintiffs' counsel advised that they would provide the supplemental responses by January 19, 2009. Plaintiffs did not serve their Supplemental Responses until January 26, 2009, and when they did, Defendants found that they did not address the deficiencies previously raised by Defendants. The parties informed the Court of the impasse, and the Court instructed the parties to submit proposed orders on the Motion to Compel with regard to the adequacy of Plaintiffs' responses to the Discovery Requests. On March 3, 2009, pursuant to Defendants' motion, the Court issued the General Discovery Order, which required Plaintiffs to "fully comply with the terms of this Order within thirty (30) days of the date of this Order." Further, the Order stated that the "Defendants' request for an award of reasonable expenses of the Motion, including their attorneys' fees, pursuant to Rule 37, SCRCP, is held in abeyance pending resolution of all discovery disputes."

On March 13, 2009, Plaintiffs filed and served their Motion to Alter or Amend the Court's March 3, 2009 Order, thereby staying the 30-day period for compliance with the General Discovery Order. Due to Plaintiffs' continuing failure to respond to discovery (and the ongoing dispute over alleged privileged materials), the Court was forced to continue the trial of the Parkview action from the May 18, 2009 term. On or about June 3, 2009, the parties' counsel received written notice that the Court had denied Plaintiffs' Motion to Alter or Amend as of that

DAE #6

date¹ On July 21, 2009, having received no further responses from Plaintiffs, Defendants' counsel gave Plaintiffs written notice of their intent to file a motion for sanctions if Plaintiffs did not immediately comply with the General Discovery Order Plaintiffs' counsel replied, via letter, that they "hope" to provide complete discovery responses by the end of July Defendants filed their Motion for Sanctions on July 24, 2009, as a result of Plaintiffs' complete failure to comply with the General Discovery Order On July 28, 2009, during a conference call between and among the Court and the parties' counsel, the Court advised the parties that the new trial date for the Parkview action would be January 19, 2010 During that call, Plaintiffs' counsel again indicated that Plaintiffs would comply with the General Discovery Order, at least in piecemeal fashion, by the end of July

Despite Plaintiffs' assurances, they failed to provide any supplemental responses by the end of July Thus, the Court was required to hold a hearing on, *inter alia*, Defendants' Motion for Sanctions on August 24, 2009 At the hearing, Plaintiffs' counsel informed the Court that they were then serving Plaintiffs' Second Supplemental Response to the Discovery Requests (including two boxes of documents), and that such supplemental response constituted full compliance with the Court's General Discovery Order Based upon Plaintiffs' representation, the Court took the Motion for Sanctions under advisement Three days later, on August 27 2009, Defendants filed and served their Supplemental Memorandum in Support of Defendants' Motions for Sanctions, showing that Plaintiffs had not, in fact, complied with the General Discovery Order, and identifying the numerous deficiencies that remained in Plaintiffs' discovery responses As a result of Plaintiffs' continuing failure to comply with the Court's

¹ That June 3, 2009 Order was apparently lost during transmission from the Court to the Clerk of Court, so the Court issued a new order denying Plaintiffs' Motion to Alter or Amend on June 16, 2009, and the parties received written notice of the entry of that order soon thereafter Giving Plaintiffs the benefit of the doubt, the 30-day period for compliance with the General Discovery Order recommenced on or about June 16, 2009

DAE #7

discovery orders, the Court was compelled to continue the scheduled trial of these cases from the January 19, 2010 trial term, by Order dated January 4, 2010 ²

On January 14, 2010, the Court held a second hearing on the record concerning Defendants' Motions for Sanctions, which was the fourth hearing on the record concerning Plaintiffs' discovery deficiencies ³ At the hearing, Plaintiffs once again represented to the Court that their latest responses (i.e., Second Supplemental Responses to Discovery Requests) fully complied with the General Discovery Order. Contrary to such representation, the Court found that the Plaintiffs had not complied with the General Discovery Order, but granted Plaintiffs' request for an additional ten (10) days to fully comply. On January 25, 2010, Plaintiffs in the Parkview case served their Third Supplemental Responses to the Discovery Requests, supplementing their answers to Interrogatory Nos. 6, 18 and 19. None of the other Plaintiffs provided any supplemental response. Defendants responded by filing and serving their Second Supplemental Memorandum in Support of Motion for Sanctions Re General Discovery Order, identifying the continuing failure of all Plaintiffs, including the Parkview Plaintiffs, to comply with the General Discovery Order.

The Court finds that, despite the numerous opportunities afforded to Plaintiffs over the last year, the Plaintiffs have persistently failed to comply with the General Discovery Order and have failed to provide any legitimate excuse for their non-compliance. Plaintiffs' continuous non-compliance is well documented in the Memorandum in Support of Defendants' Two Motions for Sanctions, dated August 21, 2009 (pp. 2-6, 12-13), Supplemental Memorandum in

² The Court took no further action concerning the Motions for Sanctions between September and December, because the Plaintiffs filed a petition in the Supreme Court (denied), and a Notice of Appeal in the Court of Appeals (dismissed), seeking immediate review of the Privilege Discovery Order. The Court of Appeals issued remittitur on December 17, 2009.

³ In addition to the hearings on the record, the Court and the parties' counsel have discussed Plaintiffs' discovery deficiencies during several telephone conference calls and in-person meetings over the last 14 months.

DAE #8

Support of Defendants' Motions for Sanctions, dated August 27, 2009, and Defendants' Second Supplemental Memorandum in Support of Motion for Sanctions Re General Discovery Order, dated February 11, 2010 Plaintiffs' failure to comply with the General Discovery Order includes the following deficiencies

- Contrary to the explicit instructions contained in the General Discover Order, Plaintiffs have still not disclosed the relevant opinions held by their testifying expert witnesses or the bases for said opinions in response to Interrogatory No 6 (the Parkview Plaintiffs' Third Supplemental Responses fall well short of what is required by the General Discovery Order, as shown in Defendants' Second Supplemental Memorandum at pp 9-14, Plaintiffs in the other cases have provided even less),⁴
- Contrary to the express terms of the General Discovery Order, Plaintiffs have still not provided full and complete responses to Interrogatory Nos 9, 10 and 12, which seek information concerning the *first* communications between two or more Plaintiffs, and/or between a Plaintiff and an attorney, regarding the investigation or pursuit of legal claims against any of the Defendants, and the date(s) upon which each of the Plaintiffs agreed to retain Joel Bailey, their attorney in these actions, to represent such Plaintiff or to provide legal services concerning the investigation or pursuit of claims against the Defendants (Plaintiffs refuse to answer these interrogatories, relying on groundless objections or answering that they "do not recall", see Defendants' Second Supplemental Memorandum

⁴ Though the General Discovery Order addresses Plaintiffs' failure to provide adequate responses to the August 28, 2008 Discovery Requests, the answers compelled to Interrogatory No 6 (discovery of expert witnesses' opinions and basis for same) would be responsive to discovery served in the Parkview case on November 17, 2004, as well (see Interrogatory No 10 in November 17, 2004 discovery requests)

at pp 3-8 and Supplemental Memorandum at pp 11-12),⁵

- Contrary to the express terms of the General Discovery Order, Plaintiffs have still not provided a full and complete response to Interrogatory No 3, which requests, for each case, an itemized statement of all damages claimed to have been sustained by Plaintiffs (see Defendants' Supplemental Memorandum at pp 9-10),
- Contrary to the express terms of the General Discovery Order, Plaintiffs continue to refuse to identify which documents were actually in the possession of each of the Plaintiffs, which is clearly relevant to Defendants' statute of limitations defense (i.e. what did each Plaintiff know, and when) (see Supplemental Memorandum at pp 7-8), and
- Contrary to the express terms of the General Discovery Order, Plaintiffs only provide partial responses to Interrogatory Nos 8, 18 (except as to Plaintiffs Davis, Pike, Reynolds and Rentz, who supplemented their response to No 18 in the Parkview Plaintiffs' Third Supplemental Responses) and 20 (see Supplemental Memorandum at pp 10-13)

The above findings are based upon evidence appearing in the record of these cases, including the various motions, memoranda and transcripts of the hearings identified on pp 3-4 of this Order

3 Background and Findings of Fact Defendants' Second Motion for Sanctions (Privilege Discovery Order)

Defendants' Second Motion for Sanctions concerns Plaintiffs' failure to comply with the Court's Privilege Discovery Order, which compelled Plaintiffs to produce ninety-six (96)

⁵ Even if each of the Plaintiffs has no independent recollection of these matters, as Plaintiffs apparently contend, it is clear they could provide responses that are more complete by reviewing information readily available to them (e.g., the numerous documents from that time period that are identified on Plaintiffs' Privilege Log). The fact of consultation with an attorney, and the subject matter of the consultation, are not privileged.

DAE # 10
BT 10

documents identified in the Order within seven (7) days of the Order. The Court makes the following findings of fact relevant to the Second Motion for Sanctions.

The underlying discovery dispute began when Plaintiffs, pursuant to this Court's verbal order during a July 1, 2008 hearing, produced a complete privilege log to Defendants on July 30, 2008 ("Privilege Log").⁶ The Privilege Log identified ninety (90) documents, dated (i.e., created) between 1998 and 2004, which had not been previously identified in this litigation. On October 8, 2008, Defendants' counsel sent a letter to Plaintiffs' counsel, challenging Plaintiffs' claims of attorney-client privilege and/or work product protection for most of the documents listed on the Privilege Log. The parties were not able to resolve their differences as to whether various documents listed on the Privilege Log were privileged or subject to discovery. Defendants filed a Motion to Compel Discovery on November 6, 2008 (same as the Motion to Compel discussed above concerning the General Discovery Order), and argued, among other things, that various documents on Plaintiffs' Privilege Log were not protected by privilege and should be produced to Defendants.⁷

On December 9, 2008, this Court heard oral argument from counsel concerning Defendants' Motion to Compel Discovery. With respect to Defendants' claims that documents on Plaintiffs' Privilege Log should be produced in discovery, the Court, Plaintiffs' counsel and Defendants' counsel all agreed that an *in camera* review of the subject documents was in order.

⁶ Plaintiffs had provided a privilege log to Defendants on or about July 21, 2005 (identifying 44 documents), in response to discovery requests served by Defendants in the Parkview case on November 17, 2004, but Plaintiffs had since acknowledged that the privilege log needed to be supplemented to identify additional documents relevant to the subject matter of these actions. These additional documents were identified in Plaintiffs' July 30, 2008 Privilege Log.

⁷ After producing their July 28, 2008 Privilege Log, Plaintiffs subsequently produced revised privilege logs dated November 14, 2008 and December 31, 2008. All three are similar in content (same documents identified), but the December 31, 2008 version was the primary version considered in the parties' arguments and the Court's deliberations leading to the entry of the Privilege Discovery Order.

DAE #11

Further, the Court advised the parties that it would also order the *in camera* review of documents identified in Defendants' privilege log, which Plaintiffs had unsuccessfully sought to obtain in their own motion to compel. Specifically, the Court and the parties' counsel agreed that the Court would enlist the assistance of a retired Circuit Court Judge, Gary E. Clary, to review the subject documents (of both Plaintiffs and Defendants) *in camera* and to report his findings and conclusions to this Court, whereupon the Court would issue an order ruling on the privilege disputes. This Court then entered an Order, dated December 30, 2008, appointing Gary Clary as Special Master for the limited purpose of reviewing *in camera* the documents identified on the parties' respective privilege logs and to issue a report of his findings and conclusions to the Court.

To be clear, the Court did not refer the actions themselves, or any cause of action asserted in these actions, to Special Master Clary. The scope of documents and privilege issues to be reviewed *in camera* by Special Master Clary was later expanded by a Consent Order, dated January 31, 2009, and by this Court's Order dated April 9, 2009. Importantly, these orders amended the December 30, 2008 Order to expressly provide: "The subject Order is further amended to provide that Special Master Clary is to provide this Court with a Report setting forth his findings and conclusions." See Orders dated January 31, 2009 and April 9, 2009. These orders, the *in camera* review performed by Special Master Clary pursuant to these orders, and the issuance of the Special Master's reports to the Court were all the subject of agreement between and among the Court and the parties' counsel.

After meeting on several occasions with the parties' counsel and completing his *in camera* review of the various documents identified on the parties' respective privilege logs, Special Master Clary provided this Court with his Report, dated April 14, 2009, and a

Supplemental Report, dated April 22, 2009 After a discussion with the parties' counsel, this Court entered its Order, dated June 2, 2009, adopting the findings and conclusions contained in Special Master Clary's Reports, and incorporating the Reports therein As specifically requested by counsel for the Plaintiffs and the Defendants, the Court included the following language in its Order

"This action is taken without prejudice to the parties' rights to make any arguments or objections concerning the findings and conclusions contained in the Reports, or the subject matter thereof, via Motion(s) to Alter or Amend this Order, pursuant to Rule 59(e), SCRCP As requested by the parties' counsel, the Court will grant a hearing on any Rule 59(e) Motion filed by the parties with respect to this Order and will afford the parties full consideration of any arguments or objections stated in such Motion(s), if any "

See Order dated June 2, 2009 Plaintiffs then timely filed their Motion to Alter or Amend the June 2, 2009 Order, on June 11, 2009 Defendants also timely filed their Motion to Alter or Amend the June 2, 2009 Order, on June 15, 2009 On July 2, 2009, Plaintiffs and Defendants each served their memoranda in support of their respective motions to amend the June 2, 2009 Order, and the Court heard oral argument from the parties' counsel during a lengthy hearing on July 6, 2009

On July 28, 2009, this Court entered the Privilege Discovery Order, amending the June 2, 2009 Order, and granting in part and denying in part each of the parties' Rule 59(e) Motions In the Order, the Court specifically designated, by Bates number, the documents to be produced by Plaintiffs and the documents to be produced by Defendants Because the designated documents were readily available to the parties for production, having been previously Bates numbered and provided for *in camera* inspection, the Court ordered the parties to produce the documents within seven (7) days of the date of the Order See Order dated July 28, 2009 Defendants served a copy of the Privilege Discovery Order on Plaintiffs' counsel, via U S mail, on July 30, 2009

DAE #13

See Defendants' Certificate of Service, dated July 30, 2009 Defendants also provided an electronic copy of the Order to Plaintiffs' counsel via e-mail on July 30, 2009 See Memorandum in Support of Defendants' Two Motions for Sanctions, dated August 21, 2009, at Exhibit F

Pursuant to the terms of the Privilege Discovery Order, Defendants produced their designated documents to Plaintiffs on August 3, 2009 See Memorandum in Support of Defendants' Two Motions for Sanctions, dated August 21, 2009, at Exhibit G Plaintiffs, however, failed to produce their designated documents as required by the Court's Order On August 10, 2009, having received no documents from Plaintiffs, nor any indication as to when and if Plaintiffs intended to comply with the Court's Order, Defendants filed and served their Second Motion for Sanctions

Defendants served their Memorandum in Support of Defendants' Two Motions for Sanctions on August 21, 2009, and the Court heard oral argument from the parties' counsel on August 24, 2009 At the hearing, Plaintiffs' counsel confirmed that the Plaintiffs had not produced any of the ninety-six (96) documents they were compelled to produce in the Privilege Discovery Order In response to the Court's inquiries, Plaintiffs' counsel informed the Court that the individual Plaintiffs had still not determined whether they would produce the subject documents in compliance with the Order or refuse to produce the documents and seek to appeal the Order Plaintiffs' counsel informed the Court that they had consulted with the Plaintiffs on this matter, and that some or all of the Plaintiffs had also consulted with other attorneys as to whether they should comply with the Privilege Discovery Order or pursue an appeal of the Order It is well settled that the claim of privilege belongs to the client, of course, and not his attorney The Plaintiffs alone must decide whether they will comply with the Court's Order or

DAE #19 14

face sanctions for their failure to comply. At the August 24, 2009 hearing, the Court informed the parties' counsel that it was taking the matter under advisement, but warned that, if Plaintiffs' failure to comply with the Court's Order continued, the Court would likely dismiss the lawsuits pursuant to Rule 37(b), SCRPC. Plaintiffs made an oral motion for reconsideration of the Privilege Discovery Order at the conclusion of the hearing, which this Court denied.

On August 27, 2009, during a conference call among the parties' attorneys and the Court, the Court informed the parties' counsel that it intended to grant Defendants' Second Motion for Sanctions and dismiss the actions, but such sanctions would be vacated if Plaintiffs complied with the Privilege Discovery Order within twenty-five (25) days. The Court instructed Defendants' counsel to submit a proposed order and instructed Plaintiffs' counsel to immediately inform each of the Plaintiffs of the Court's intention to sign such an order in the next week. During a September 2, 2009 conference call with the parties' attorneys, the Court informed Plaintiffs' counsel that it would sign the aforementioned sanctions order that day. However, hours after the conference call concluded, and before the Court issued the written sanctions order, the Court was informed that Plaintiffs had filed that morning a Petition in the Supreme Court of South Carolina, seeking a Writ of Prohibition and/or a Writ of Certiorari concerning the Privilege Discovery Order and/or the sanctions order. The Court informed the parties that, in light of Plaintiffs' Petition to the Supreme Court, it would hold in abeyance the signing of the sanctions order. On September 10, 2009, Plaintiffs filed a Notice of Appeal to the Court of Appeals of South Carolina, seeking immediate review of the Privilege Discovery Order. On October 6, 2009, Plaintiffs sent a letter to Chief Justice Toal, requesting that these cases be transferred from the Undersigned to the Business Court. Chief Justice Toal denied Plaintiffs' request for a transfer on November 3, 2009. The Supreme Court denied Plaintiffs Petition on

DAE#15

November 19, 2009 The Court of Appeals dismissed Plaintiffs' appeal as premature on December 2, 2009, and issued remittitur on December 17, 2009

On January 14, 2010, the Court held a second hearing on Defendants' Motions for Sanctions, which was the fourth hearing concerning Plaintiffs' discovery deficiencies⁵ Plaintiffs' counsel acknowledged that Plaintiffs still had not complied with the Privilege Discovery Order, and the Court instructed Defendants' counsel to revise the proposed order granting Defendants' Second Motion for Sanctions to account for the passage of time since the Court first stated it would sign the sanctions order The Court also advised Plaintiffs' counsel that they would have ten (10) days from the date Defendants' counsel submitted the revised proposed order to respond to the proposed order Defendants' counsel submitted the revised proposed order, with a copy to Plaintiffs' counsel, and Plaintiffs' counsel responded within the ten (10) day period, sending a letter to the Court (copied to Defendants' counsel) with alternative proposed orders and filing and serving Motions for Relief from July 28, 2009 Order Amending Court's Order Dated June 2, 2009 in each of the above-captioned cases Plaintiffs' motions purported to be motions made under Rule 60(b), SCRCF

The above findings are based upon evidence appearing in the record of these cases, including the various motions, memoranda and transcripts of the hearings identified on pp 3-4 of this Order

DISCUSSION OF APPLICABLE LAW AND CONCLUSIONS

1. Civil Contempt

At this time, Plaintiffs have given the Court no reason to believe that they intend to

⁵ In addition to the hearings on the record on December 9, 2008, July 6, 2009, August 24, 2009 and January 14, 2010, the Court and the parties counsel have discussed Plaintiffs' discovery deficiencies on several other occasions, including conference calls and meetings off the record

DAE #16

comply with either the General Discovery Order or the Privilege Discovery Order. Indeed, their time for compliance under the terms of the two discovery orders passed many months ago. Plaintiffs have steadfastly refused to comply with the terms of the Privilege Discovery Order. The Court has afforded Plaintiffs many opportunities over the last year to comply with the terms of the General Discovery Order, but they have persistently failed to do so. They have been presented with a road map for compliance many times, through the plain terms of the General Discovery Order, the detailed memoranda served by Defendants, which specifically identify the manner in which Plaintiffs have failed to comply, and the Court's oral comments and rulings concerning the same. Further, the Plaintiffs, through their counsel, have been repeatedly warned that sanctions, including the sanctions of dismissing these actions, were not only a possible consequence, they were the likely consequence if the Plaintiffs persisted in their disobedience of the Court's orders. The Court even advised Plaintiffs that it was signing an order dismissing the actions as sanctions six (6) months ago. The Court can not escape the conclusion that Plaintiffs' failure to comply with the General Discovery Order and the Privilege Discovery Order is willful.

It is clear to the Court that Plaintiffs' failure to comply with either or both of the discovery orders has caused, and would continue to cause, extreme prejudice to Defendants. Plaintiffs' willful disobedience has deprived Defendants of critical discovery that is necessary to the presentment of their full defenses to Plaintiffs' claims. Plaintiffs' failure to produce the ninety-six (96) documents compelled in the Privilege Discovery Order, many of which appear relevant to Defendants' statute of limitations defense in these actions, continues to impede the Defendants' ability to complete discovery and prepare for trial. Defendants are similarly impacted by Plaintiffs' failure to provide complete responses to interrogatories concerning Plaintiffs' first communications with one another or with an attorney concerning the

DAE #17

investigation or pursuit of claims against any of the Defendants Defendants are also deprived of a fair opportunity to defend against Plaintiffs' claims as a result of Plaintiffs' failure to provide meaningful responses concerning the opinions held by their expert witnesses, the bases for such experts' opinions, or the damages claimed in these cases.

Further, it is inescapable that Plaintiffs' failure to obey the discovery orders has directly challenged and obstructed the Court's ability to control the administration of these cases The trial in the Parkview action had been scheduled to commence on January 19, 2010, but had to be continued due to Plaintiffs' failure to comply with the Court's discovery orders Plaintiffs' failure to comply with the General Discovery Order (in addition to the ongoing discovery dispute concerning the privilege issues) was a primary cause of the Court's earlier continuance of the Parkview trial from the May 18, 2009 term The Court's and the public's interests in the orderly, prompt and efficient administration of justice can little afford to have these cases, which were filed in 2003 and 2005, held hostage by Plaintiffs' continuing failure to comply with the Court's General Discovery Order and Privilege Discovery Order In addition to the obvious prejudice to Defendants, Plaintiffs' refusal to obey the Court's discovery orders impedes the Court's ability to control and efficiently manage its docket

After considering the record in these cases, the Court concludes that all Plaintiffs in these actions are in contempt of court "Contempt results from the willful disobedience of a court order, and before a court may find a person in contempt, the record must clearly and specifically reflect the contemptuous conduct A willful act is 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 " Ex Parte, David G Cannon, In Re, The Estate of James Brown, 685 S E 2d 814, 824 (Cl App 2009) (internal quotation marks and citations

DAE #18

omitted) The record clearly shows that all of the Plaintiffs in the above-captioned actions have willfully disobeyed both the General Discovery Order and the Privilege Discovery Order. Plaintiffs' persistent failure to comply with such orders has been both voluntary and intentional. Plaintiffs could produce the documents as required by the Privilege Discovery Order, but they choose not to do so. Plaintiffs could provide complete and intelligible responses to the interrogatories as required by the General Discovery Order, but they have chosen not to do so despite numerous opportunities. Instead, they have remained deliberately evasive and ambiguous in their responses.

While the Court is entering a finding of civil contempt, and imposing sanctions for the purpose of coercing compliance with the discovery orders and compensating and indemnifying Defendants (award of attorneys' fees), the record clearly reflects that Plaintiffs' persistent disobedience has, in fact, undermined the Court's administration of justice in these cases. "In addition, courts have the inherent power to punish for offenses that are calculated to obstruct, degrade, and undermine the administration of justice. Judges have the authority to *sua sponte* use contempt proceedings to preserve the authority and dignity of their courts." Id. (internal quotation marks and citations omitted)

"Once the moving party has made out a prima facie case for contempt, the burden then shifts to the respondent to establish his defense and inability to comply with the order." Id. (internal quotation marks and citations omitted). Civil contempt "must be proven by clear and convincing evidence." Id. The Court concludes that, as shown in its findings of fact, there is clear and convincing evidence of Plaintiffs' contempt (i.e., willful disobedience of both discovery orders), and Defendants have clearly made out a prima facie case for contempt.

DAE #19

Plaintiffs have provided no defense, nor have they shown an inability to comply with either of the discovery orders. Their repeated representations that they have complied with the General Discovery Order, without more, is no defense at all in light of the clear evidence to the contrary. They freely admit that they have not complied with the terms of the Privilege Discovery Order. Instead, Plaintiffs have persisted in arguing, by way of untimely motions for reconsideration and otherwise, that the Privilege Discovery Order was wrongly decided. Plaintiffs continue to ask the Court to vacate or amend the Privilege Discovery Order, arguing, *inter alia*, that there are questions as to the effect of the implied waiver in the Orleans and Roosevelt cases, that the Court's Privilege Discovery Order was the result of mistakes of fact and law, and that the Court must now undertake a review of the 96 documents themselves. First, the Court disagrees with Plaintiffs' arguments. Once privilege was waived as to the documents (by mere filing of the suits and/or by reason of the allegations in the Orleans and Roosevelt complaints), they were subject to discovery in all five cases. There is no question that the 96 documents are relevant to the subject matter of these actions.⁹ At the July 6, 2009 hearing, which preceded the entry of the Privilege Discovery Order, in view of Special Master Clary's reports and the information contained in the parties' privilege logs, the Court did not find it necessary to review the documents themselves, nor did the parties request, or even suggest, such a review. The factual bases for the Court's rulings on the privilege issues have not changed. Second, and most importantly, Plaintiffs' dissatisfaction with the Court's rulings in the discovery orders are not an excuse for their willful disobedience of those orders. If Plaintiffs' disobedience

⁹ Plaintiffs briefly raised the question of relevance with respect to a few documents concerning Lincoln Limited Partnership in their June 11, 2009 Rule 59(e) motion, but the Court determined that the documents concerning Lincoln are relevant (see July 28, 2009 Order at p. 5). Special Master Clary's report did not find, and Plaintiffs have not contended (except as noted regarding Lincoln), that any of the 96 documents lack relevance to the subject matter of these actions.

DAE #20 20

were excused by reason of their disagreement with the Court's rulings, a finding of contempt would never be appropriate in any case

"In determining whether the contempt is civil or criminal, the major factor to consider is the purpose for which the power is exercised, including the nature of the relief and the purpose for which the sentence is imposed. The purpose of civil contempt is to coerce the defendant to do the thing required by the order for the benefit of the complainant, while the primary purposes of criminal contempt are to preserve the court's authority and to punish for disobedience of its orders. If it is for civil contempt, the punishment is remedial and for the benefit of the complainant. If it is for criminal contempt, the sentence is punitive and meant to vindicate the authority of the court. When sanctions are conditioned on compliance with the court's order, the contempt is civil in nature." Id. (internal quotation marks and citations omitted). The Court finds and declares that Plaintiffs are in civil contempt, due to their willful disobedience of the General Discovery Order, and due to their willful disobedience of the Privilege Discovery Order. The sanctions of dismissal imposed in this Order are intended to coerce Plaintiffs' compliance with the discovery orders, allowing them to purge the dismissal sanctions if they comply with the discovery orders within twenty-five (25) calendar days of this Order. The sanction of awarding Defendants their expenses, including attorneys' fees, of the motions necessitated by Plaintiffs' misconduct in discovery is remedial, intended to compensate Defendants and indemnify them from the losses incurred due to Plaintiffs' misconduct.

2. Rule 37 Sanctions; Grounds for Dismissal

The General Discovery Order and the Privilege Discovery Order are orders compelling discovery, made under Rule 37(a), SCRCF, in response to the Defendants' Motion to Compel Discovery. It is clear that Plaintiffs have failed to comply with either of these orders and,

DAE #21

therefore, Rule 37(b)(2), SCRPC, applies. The Rule provides, in part

"If a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following

(C) An order striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust "

Rule 37(b)(2), SCRPC

In light of Plaintiffs' refusal to comply with the Court's discovery orders, and the extreme prejudice suffered by Defendants as a result of Plaintiffs' non-compliance, the only sanction that can achieve justice is the dismissal of the lawsuits. Plaintiffs' non-compliance simply deprives Defendants of their ability to defend against Plaintiffs' claims, based on the statute of limitations defense and otherwise. Most of the documents that Plaintiffs were compelled to produce in the Privilege Discovery Order are dated (i.e., were created) more than three (3) years prior to the filing of these lawsuits, and they are likely relevant to Defendants' statute of limitations defense in these actions. Plaintiffs have failed to provide the dates that they first consulted an attorney regarding (or first discussed among themselves) the investigation or pursuit of claims against any of the Defendants. The Court compelled Plaintiffs to answer interrogatories seeking this information in its General Discovery Order (Interrogatory Nos. 9, 10 and 12), but Plaintiffs have refused to provide adequate responses. The Court has already found that "the statute of limitations is a major issue in these cases." See Order dated July 28, 2009, at

DAE #22

The other sanctions available to the Court are either inadequate or would lead to the exact same result as the sanction of dismissal. Further, lesser sanctions are incapable of addressing the additional prejudice (i.e., prejudice to defenses unrelated to the statute of limitations), which Defendants have likely suffered but can not specifically identify due to Plaintiffs' refusal to provide the relevant documents and information. "Overly lenient sanctions are to be avoided where they result in inadequate protection of discovery." Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213, 217 (Ct. App. 1997). Refusing to disclose the substance of the Plaintiffs' expert witnesses' opinions, and the bases for such opinions, is clearly prejudicial to the Defendants. A lesser sanction aimed at this particular failure to comply with the Court's General Discovery Order, such as exclusion of expert witness testimony, would lead to the same result, because expert witness testimony as to the value of the subject properties is vital to the Plaintiffs' cases given the nature of this litigation. When a party is deprived of his rights to discovery, "prejudice must be presumed." See id. The party refusing to submit to discovery must bear the burden of proving lack of prejudice. See id. Plaintiffs have not proven a lack of prejudice on the Defendants' part.

In imposing the sanctions of dismissal, the Court has considered the various factors set forth in the applicable case law. For the reasons set forth above, the Court finds that, under these circumstances, the sanction of dismissal is reasonable, it does not go beyond the necessities of the situation to foreclose a decision on the merits of the cases, and it is aimed at the specific misconduct of the Plaintiffs. See Karppi v. Greenville Terrazzo Co., Inc., 327 S.C. 538, 489 S.E.2d 679, 682 (Ct. App. 1997). Further, the sanction imposed serves to protect the rights of discovery provided by the Rules of Civil Procedure. See id. If Plaintiffs are going to file

DAE #23

lawsuits, engage in discovery under the Rules of Civil Procedure and receive the benefits thereof, but repeatedly refuse to produce their documents or provide full and meaningful responses to reasonable discovery requests after being ordered to do so by the Court, then their lawsuits should be dismissed in order to, among other things, protect the rights of discovery under the Rules

The Court has also considered the following factors in imposing the sanctions of dismissal (1) the "precise nature of the discovery," (2) "the discovery posture of the case," (3) "willfulness," and (4) "degree of prejudice" See Griffin Grading and Clearing, Inc. v. Tire Service Equipment Mfg. Co., Inc., 334 S C 193, 551 S E 2d 716, 719 (Ct App 1999) (citing Laney v. Hefley, 262 S C 54, 202 S E 2d 12 (1974)) The discovery compelled by the Court is directed at, among other things the statute of limitations issue in these cases (the 96 documents to be produced may be responsive to a myriad of other discovery requests served in these actions by Defendants), the critical issue of the value of the properties (Plaintiffs claim the properties had substantial value and Defendants breached their fiduciary duties by not taking them back, whereas Defendants claim the properties lacked value net of indebtedness and accepting a return of the properties would not have been in the Limited Partnerships' best interests), and the basic issue of damages or the lack thereof The trial in the Parkview action was set to commence on January 19, 2010, but had to be continued due to Plaintiffs' failure to comply with the Court's discovery orders, and the Parkview action is almost seven (7) years old The other cases are more than four (4) years old Considering that Plaintiffs did not identify ninety (90) of the documents listed on their Privilege Log until July 30, 2008, Defendants could not have challenged Plaintiffs' claims of privilege earlier than they did Many of the documents first identified in July 2008 are among the documents Plaintiffs have been compelled to produce Nor

DAE #24

could Defendants have acted more expediently in addressing Plaintiffs' failure to provide adequate responses to the Discovery Requests

The willfulness of the Plaintiffs' failure to comply with the discovery orders is abundantly clear, as discussed above. Plaintiffs have made the conscious choice to disobey the Court's discovery orders. The prejudice to the Defendants is also clear, as discussed above. As for the relative prejudice to the Plaintiffs, clearly it is prejudicial to dismiss Plaintiffs' actions. However, the prejudice to Plaintiffs if the cases are dismissed is not out of balance with the prejudice to Defendants as a result of Plaintiffs' failure to comply with the Court's General Discovery Order and Privilege Discovery Order. The prejudice to Plaintiffs is reasonable and necessary in order to counter the specific prejudice to Defendants. Further, the Court has afforded Plaintiffs ample opportunity to avoid the imposition of these sanctions, and Plaintiffs can purge the dismissal of these actions by complying with the General Discovery Order and the Privilege Discovery Order within twenty-five (25) days of the date of this Order. Plaintiffs control whether these cases stand permanently dismissed.

"Where the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction." Griffin, 551 S.E.2d at 719. There is no question that Plaintiffs have willfully disobeyed the Court's discovery orders. By refusing to provide the Defendants with the documents and information as required by the Court's orders, Plaintiffs have also exhibited gross indifference to Defendants' rights in discovery. Defendants have carried their burden in showing that dismissal of the actions is the appropriate sanction under these circumstances. As to whether Plaintiffs have acted in bad faith, there is ample evidence that they have. Plaintiffs agreed to the entire process that ultimately resulted in the Court's Privilege Discovery Order, received benefits

DAE #25

from this process, and it now appears that they never intended to produce the documents they claimed to be privileged if the Court ordered them to do so. Further, Plaintiffs' initial responses to the Discovery Requests, as well as their First, Second and Third Supplemental Responses, are persistently evasive, ambiguous, incomplete and/or non-responsive. Plaintiffs have repeatedly been given a road map as to how to comply with the General Discovery Order, and the Court has afforded them many opportunities over the course of a full year to do so, but they have willfully and intentionally disobeyed the General Discovery Order at every turn.

3. Award of Expenses, Including Attorneys' Fees

In each of their Motions for Sanctions, Defendants request that they be awarded their reasonable expenses, including attorneys' fees, incurred as a result of Plaintiffs' failure to comply with the Court's General Discovery Order and Privilege Discovery Order. Further, in the General Discovery Order, the Court held in abeyance the Defendants' request for an award of reasonable expenses of their Motion to Compel Discovery, including attorneys' fees, pursuant to Rule 37(a)(4), SCRCP. The Court finds that Defendants should receive a monetary award to compensate them for the expenses, including attorneys' fees, that they have incurred in connection with their Motion to Compel (i.e., expenses incurred in order to obtain the General Discovery Order, pursuant to Rule 37(a)(4)) and each of their Motions for Sanctions. "Courts, by exercising their contempt power, can award attorneys' fees under a compensatory contempt theory. The award of attorneys' fees is not a punishment but an indemnification to the party bringing the action. However, any component of a sanction must be directly related to the contemptuous conduct and the loss incurred by the offended party." Ex Parte Cannon, 685 S.E.2d at 827 (internal quotation marks and citations omitted). The award of expenses is remedial and civil, even though the Plaintiffs will have no opportunity to purge themselves of the

DAE #26 26

award See id. ("A fine may also be 'remedial and civil if paid to the complainant even though the contemnor has no opportunity to purge himself of the fine'" (citations omitted))

In order that the Court may determine the proper amount of expenses, including attorneys' fees, required for indemnification of the Defendants, the Court will accept evidence of such expenses as follows. Within fifteen (15) calendar days of the date of this Order, Defendants shall submit to the Court an affidavit in support of their requests for expenses. Beginning on the date Defendants serve their affidavit, Plaintiffs shall have fifteen (15) calendar days to respond by affidavit or at a hearing, if a hearing is requested. The Court shall retain jurisdiction over Defendants' requests for an award of expenses, and will enter a separate order as to the amount of the award at the appropriate time. The time allotted to Defendants to file their supporting affidavit, and for Plaintiffs' response to the same, shall not affect the running of the twenty-five (25) day period in which Plaintiffs may fully comply with the Orders dated March 3, 2009 and July 28, 2009, in order to purge the sanctions of dismissal entered herein.

4 Plaintiffs' Pending Motions for Relief from July 28, 2009 Order Are Denied

On January 28, 2010, Plaintiffs filed Motions for Relief from July 28, 2009 Order Amending Court's Order Dated June 2, 2009 in each of the above-captioned actions. These motions, which purport to be motions under Rule 60(b), SCRCP, are actually untimely motions for reconsideration subject to Rule 59(e), SCRCP. The Court's July 28, 2009 Order is an interlocutory discovery order, not a final order. As such, the Privilege Discovery Order is not subject to review by the trial court under Rule 60(b), SCRCP. Instead, the trial court may consider Plaintiffs' mislabeled motions as being additional motions for reconsideration of the Privilege Discovery Order under Rule 59(e), SCRCP (Plaintiffs previously made an oral motion

DAE #27

for reconsideration on August 24, 2009, which the Court denied) Further, Plaintiffs' motions are clearly untimely under Rule 59(e), which requires that such a motion be served "not later than 10 days after receipt of written notice of the entry of the order " Rule 59(e), SCRPC Plaintiffs' motions are inappropriate and are, therefore, denied

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT both of the Defendants' Motions for Sanctions are hereby GRANTED, the Court finds and hereby declares that the Plaintiffs in the above-captioned actions are in CONTEMPT of court, each of the above-captioned actions is hereby DISMISSED WITH PREJUDICE as sanctions for Plaintiffs' contempt, and pursuant to Rule 37(b)(2), SCRPC, subject to the terms stated herein, and the Court finds and hereby declares that Defendants are entitled to an award of reasonable expenses, including attorneys' fees, incurred in connection with their Motion to Compel Discovery and each of their two Motions for Sanctions, and that a subsequent order shall be entered as to the amount of the award Plaintiffs may purge the sanctions of dismissal with prejudice by showing the Court that they have fully complied with the Court's Orders dated March 3, 2009 and July 28, 2009 within twenty-five (25) calendar days of the date of this Order (i.e., the date this Order is signed, set forth below) Further, Plaintiffs' Motions for Relief from July 28, 2009 Order, which purport to be motions under Rule 60(b), SCRPC, but are actually untimely motions for reconsideration, are DENIED

IT IS SO ORDERED

This 10th day of April, 2010
Chen, South Carolina

Doyet A. Early, III
Doyet A. Early, III, Circuit Court Judge

RECEIVED NOV 29 2010

STATE OF SOUTH CAROLINA ^{085P 20 Pii 3 52}

IN THE COURT OF COMMON PLEAS

Laurance H Davis, Jr, ¹⁻¹⁵⁻¹⁰ *et al*, Plaintiffs,
v
Parkview Apartments, a South Carolina
Limited Partnership, *et al*, Defendants

Beaufort County
C A No 2003-CP-07-726

Laurance H Davis, Jr, *et al*, Plaintiffs,
v
Roosevelt Gardens, a South Carolina
Limited Partnership, *et al*, Defendants

Orangeburg County
C A No 2005-CP-38-1131

Rhonda G Rentz, *et al*, Plaintiffs,
v
Orleans Gardens, a South Carolina
Limited Partnership, *et al*, Defendants

Charleston County
C A No 2005-CP-10-4229

Laurance H Davis, Jr, *et al*, Plaintiffs,
v
Palmetto Apartments, a South Carolina
Limited Partnership, *et al*, Defendants

Beaufort County
C A No 2005-CP 07-1989

Carolina Management Corporation of
Beaufort, *et al*, Plaintiffs,
v
Pinewood Park Apartments, a South Carolina
Limited Partnership, *et al*, Defendants

Beaufort County
C A No 2005-CP-07-1990

ORDER

Plaintiffs have filed a motion seeking reconsideration of this court's order dated April 6, 2010, pursuant to Rule 59, SCRCP. The order was signed after Plaintiffs repeatedly failed to comply with orders dealing with discovery dated March 3, 2009 and July 28, 2009. Each of those orders have resulted from numerous hearings, motions, memoranda, arguments and rulings, including rulings denying Plaintiff's Rule 59/60 motions seeking reconsideration of these orders.



The court has carefully reconsidered all of Plaintiff's arguments in support of their motion, revisited all prior orders and the cases, memoranda and exhibits presented at each hearing, the court is still of the opinion that the previous orders were a correct application of the law to this factual matter

Therefore Plaintiff's motion is DENIED

IT IS SO ORDERED



The Honorable Doyet A. Early, III

Sept 16, 2010
Barnes, South Carolina



State of South Carolina
The Circuit Court of the Second Judicial Circuit

Doyet A Early, III
Judge

Post Office Box 90
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Phone (803) 245 4004
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dearlyj@sccourts.org

September 16, 2010

The Honorable Jeri Ann Roseneau
Post Office Box 1128
Beaufort, South Carolina 29901-1128

Re Laurance H Davis Jr et al v Parkview Apartments 03 CP 07 726
Laurance H Davis Jr et al v Palmetto Apartments, 05 CP 07-1989
Carolina Management Corp of Beaufort et al v Pinewood Park Apartments 05 CP 07 1990

Dear Ms Roseneau

Please find enclosed for filing my orders in the above cases Please file and serve all interested parties

Sincerely,


D A Early, III

DAE khc
Enclosures

cc Joel Bailey, Esquire
Ellis Johnston, Esquire
Thomas Pendarvis, Esquire

The Supreme Court of South Carolina

Lawrence H Davis, Jr , et al ,		Plaintiffs,
	v	
Parkview Apartments, et al ,		Defendants
	Beaufort County	
	2003-CP-07-0723	

Lawrence H Davis, Jr , et al ,		Plaintiffs,
	v	
Palmetto Apartments, et al ,		Defendants
	Beaufort County	
	2005-CP-07-1989	

Carolina Management Corporation of Beaufort, et al,		Plaintiffs,
	v	
Pinewood Park Apartments,		Defendants
	Beaufort County	
	2005-CP-07-1990	

Rhoda G Rentz, et al ,		Plaintiffs,
	v	
Orleans Gardens, et al ,		Defendants
	Charleston County	
	2005-CP-10-4229	

Lawrence H Davis, Jr , et al ,		Plaintiffs,
	v	
Roosevelt Gardens,		Defendants
	Orangeburg County	
	2005-CP-38-1131	

ORDER

Pursuant to the provisions of S C CONST Art V, § 4, I find that assigning a single circuit judge to dispose of all matters arising out of the apartment management litigation currently pending and to be filed in the state court system will

promote the effective and expeditious disposition of this litigation by uniform rulings and will conserve the resources of the parties, their counsel, and the judiciary Therefore,

IT IS ORDERED that the Honorable Doyet A Early, III is assigned to hear and decide all pre-trial motions and other matters pertaining to these cases, including the trial and post-trial motions Judge Early may schedule necessary hearings at any time

S/Jean Hoefer Toal

Jean Hoefer Toal
Chief Justice

March 7, 2006
Columbia, South Carolina

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Parkview Apartments, a South Carolina
Limited Partnership, *et al* , Defendants

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Roosevelt Gardens, a South Carolina
Limited Partnership, *et al* , Defendants

Rhonda G Rentz, *et al* , Plaintiffs,
v
Orleans Gardens, a South Carolina
Limited Partnership, *et al* , Defendants

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Palmetto Apartments, a South Carolina
Limited Partnership, *et al* , Defendants

Carolina Management Corporation of
Beaufort, *et al* , Plaintiffs,
v
Pinewood Park Apartments, a South Carolina
Limited Partnership, *et al* , Defendants

Beaufort County
C A No 2003-CP-07-726

Orangeburg County
C A No 2005-CP-38-1131

Charleston County
C A No 2005-CP-10-4229

Beaufort County
C A No 2005-CP-07-1989

Beaufort County
C A No 2005-CP-07-1990

ORDER

This matter comes before the Court pursuant to Plaintiffs' Motion for Recusal

These cases were assigned to me by Chief Justice Toal in March 2006 with the consent of the parties and respective counsel. Since the assignment, the court has actively engaged in all pretrial matters. Most of the pretrial issues have dealt with discovery disputes. The Defendants have, from the beginning, raised the defense of the action being filed outside the statute of limitations. To prove their position, they have sought the production of a volume of documents in the Plaintiff's possession which date back many

DAE#1

years Plaintiffs have claimed many of the documents were protected either as work product or safeguarded under the attorney-client privilege. Because of the number of documents, the court, with consent of the parties, appointed Gary Clary, retired Circuit Court Judge, to serve as a "special master" to conduct hearings, have in camera reviews of the documents and issue a report on the production of these documents. He did so, and his report was adopted. Both sides asked for reconsideration. Ultimately, after careful review, this court ruled the plaintiffs had to produce a number of documents. They refused to produce them. The court orally, at first, told the Plaintiffs that if they continued to fail to comply with the order, their suits would be dismissed. Before the written order was issued, they appealed. The appeals were denied. Thereafter, a written order was issued requiring production of the documents or dismissal of the case. A motion to reconsider the order dismissing the actions was filed and denied.

The Plaintiffs filed a request of the court to make a full disclosure of any type of relationship he had with the defense lawyers. The court complied with this request. An oral motion to recuse was made and denied, followed by this written motion to recuse. When the motion to recuse was made, I stepped back and examined everything I had done in these cases, reviewed all of my orders, read all the canons and comments pertaining to recusal, researched the relevant cases decided by our appellate courts and considered the heartache and loss of position suffered by a family court judge who recently refused to recuse herself in a case, and I have concluded that none of my rulings, orders or the management of this litigation has been infected with any bias or prejudice against any party or their attorneys.



The Plaintiffs' concerns over recusal did not arise until the Court ruled adversely to them. The Plaintiffs made no objections when I was assigned these cases by Chief Justice Toal in March of 2006, despite my long term relationships with most of the lawyers. When the Court ruled in favor of the Plaintiffs on the Defendants' Summary Judgment Motion in 2007, based on the statute of limitations, Plaintiffs had no issues with recusal. However, immediately prior to the entry of a April 6, 2010 sanctions order, after almost a year of sanctions and contempt orders entered against them, Plaintiffs began their effort to have me recused. In response to their concerns, I held a hearing on March 29, 2010 and put on the record all of my relationships with counsel of both parties, most of which had previously been disclosed during the course of litigation. At the hearing, Plaintiffs made an oral motion to recuse me. I respectfully denied it, having thoroughly addressed their concerns. This second Motion for Recusal, signed by counsel the same day as the hearing, and the "supporting affidavits" appears to be nothing more than Plaintiffs' latest attempt to avoid producing the discovery critical to the determination of whether their claims survive a statute of limitations challenge.

At the March 29, 2010 hearing, I revealed the following (I admitted them openly throughout the litigation, again at the hearing, and again here, for despite Plaintiffs' "concerns," I have nothing to hide)

- (1) Ellis Johnston's wife's ex-husband was a fraternity brother of mine 40 years ago. I consider his wife a friend.
- (2) Thirty years ago, Marvin Infinger, a shareholder in Haynsworth Sinkler Boyd, spent the night at my lake house following the wedding of Steve Darling, also a shareholder in Haynsworth Sinkler Boyd, we both attended the wedding.
- (3) My son and Ellis Johnston's son were fraternity brothers in college 14 years ago and went to Europe together 13 years ago. They have stayed in touch over the years. This was disclosed to counsel on February 13, 2008 by the Court during a conference call.

- (4) During the same conference call, the Court informed counsel that my son, Ross, had been invited to go fishing with Ellis Johnston's son on Ellis Johnston's brother's boat I was asked to join them I specifically inquired if anyone had an objection, and there were none In his affidavit, Joel Bailey writes that he did not object because he was "somewhat uncomfortable with being put in the position of having to act as the potential spoiler of the judge's social agenda" (Joel Bailey's Affidavit submitted with his motion to recuse, p 3)
- (5) I officiated at the wedding of Anne Ross Rosen, an associate in Haynsworth Sinkler Boyd, in 2007 I made counsel aware of this in April 2008 when her involvement in the case was announced No objection was made
- (6) Mrs Rosen's father, a local surgeon, performed a colonoscopy on me
- (7) Though Mrs Rosen's parents once lived in Bamberg, S C, I did not see them socially then or now
- (8) I have been a member of the Caroliniana Ball, a social club, for approximately ten years I am not a member of the Board of Directors In 2009, Ellis Johnston was asked to become a member of the Caroliniana by its Board of Directors The Caroliniana is composed of 300 or 400 members and holds an annual white tie dance This was disclosed at the March 29, 2010, hearing

The law in South Carolina regarding recusal is clear

"Under South Carolina law, if there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal Roche v Young Bros., Inc., 332 S C 75, 504 S E 2d 311 (1998) In Roche, the Court applied Canon 3(E)(1)(a) of Rule 501, SCACR Under Canon 3(E)(1)(a), a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to, instances where he has some bias or prejudice against a party It is not sufficient for a party seeking disqualification to simply allege bias, the party must show some evidence of bias or prejudice Mallett v Mallett, 323 S C 141, 473 S E 2d 804 (Ct App 1996) If there is no evidence of judicial bias or prejudice, a judge's failure to disqualify himself will not be reversed on appeal Ellis v Proctor & Gamble Dist Co., 315 S C 283, 433 S E 2d 856 (1993) "

Patel v Patel, 359 S C 515, 599 S E 2d 114 (2004) See also Koon v Fares, 279 S C 150, 666 S E 2d 230 (2008)

Clearly, Plaintiffs are disappointed with some of the rulings of the Court However, such disappointment cannot form the basis for recusal "The fact that a trial judge ultimately rules against the litigant is not proof of prejudice by the judge, even if it is later

DAE#4

held the judge committed error in his rulings " Mortgage Elec Sys, Inc v White, 384 S C 606, 616, 682 S E 2d 498, 503 (Ct App 2009)(quoting Mallett v Mallett, 323 S C 141, 147, 473 S E 2d 804, 808 (Ct App 1996))

Plaintiffs have no evidence proving bias or prejudice against them or for the Defendants. Instead, they argue that the Court ruled against them on several motions without basis in law or fact, and reason that the Court's relationship with Defense counsel is the sole cause of these rulings. Their Motion for Recusal is made without basis or justification, with the sole purpose of polluting the record and intimidating me into recusal. I refuse to comply. I have addressed this issue repeatedly, openly, and unabashedly, and though Plaintiffs continue to harass and prod me to recuse myself, the law does not justify said action, and thus I refuse to do so.

This litigation is now over five years old. Many, many hours have been devoted by the judiciary and court personnel in getting this case ready to try and both sides, have incurred substantial attorney's fees. To start a new, absent any bias or prejudice, would be a colossal waste of time, effort and expense.

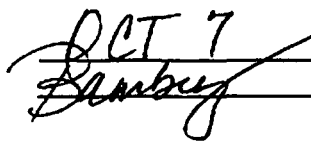
If I thought for one moment my prior involvement with any of the lawyers had an influence on any of my decisions, I would step aside. I practiced law for thirty years, attended school in South Carolina, have been active in social, civic, family and bar organizations, clubs and events all of my adult life and thankfully have formed many types of relationships with many people, a lot who are lawyers who practice in my court on an everyday basis. I am cognizant of these relationships, but if I recused myself when that happened, I could not hold court.

The Plaintiffs' second recusal motion is DENIED

IT IS SO ORDERED



The Honorable Doyet A. Early, III


_____, 2010
_____, South Carolina



State of South Carolina
The Circuit Court of the Second Judicial Circuit

Doyet A. Early, III
Judge

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Fax (803) 245 2983
dearlyj@sccourts.org

October 7, 2010

The Honorable Jerri Ann Roseneau
Post Office Box 1128
Beaufort, SC 29901

Re Laurance H. Davis, Jr. et al v. Parkview Apartments 03 CP-07 726
 Laurance H. Davis, Jr. et al v. Palmetto Apartments 05 CP-07 1989
 Carolina Management Corporation of Beaufort et al v. Pinewood Park Apartments, et al 05 CP 07 1990

Dear Ms. Roseneau:

Please find enclosed for filing my order in the above case. Please file and serve all interested parties.

Sincerely,



D. A. Early, III

DAE khc
Enclosure

cc Joel Bailey, Esquire
 Ellis Johnston, Esquire
 Thomas Pendarvis, Esquire



STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Parkview Apartments, a South Carolina Limited
Partnership, *et al* , Defendants

Beaufort County
C A No 2003-CP-07-726

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Roosevelt Gardens, a South Carolina Limited
Partnership, *et al* , Defendants

Orangeburg County
C A No 2005-CP-38-1

Rhonda G Rentz, *et al* , Plaintiffs,
v
Orleans Gardens, a South Carolina Limited
Partnership, *et al* , Defendants

Charleston County
C A No 2005-CP-10-4229

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Palmetto Apartments, a South Carolina Limited
Partnership, *et al* , Defendants

Beaufort County
C A No 2005-CP-07-1989

Carolina Management Corporation of Beaufort,
et al , Plaintiffs,
v
Pinewood Park Apartments, a South Carolina
Limited Partnership, *et al* , Defendants

Beaufort County
C A No 2005-CP-07-1990

ORDER DENYING PLAINTIFFS' MOTION FOR PROTECTIVE ORDER

This matter is before the Court on Plaintiffs' Motions for Protective Order (collectively, "Motion"), which were filed in each of the above-captioned actions on or about February 22, 2010. The Court has considered the written Motion itself, Defendants' Memorandum in Opposition to the Motion, other motions, memoranda and affidavits subsequently filed by the parties, which pertain to issues presented in the instant Motion, the oral argument of the parties'



counsel at the March 29, 2010 hearing in these cases, which concerned *inter alia*, Plaintiffs Motion, and other matters submitted to the Court for its consideration

Plaintiffs' Motion concerns their proposed production of the documents that the Court compelled Plaintiffs to produce in its July 28, 2009 Order ("Privilege Discovery Order"). Plaintiffs state that the Motion is made pursuant to Rule 26(c), SCRC, "in an attempt by Plaintiffs to comply with the Order of July 28, 2009." (Motion, p. 2). However, Plaintiffs do not propose to produce the subject documents as required by the Privilege Discovery Order. Instead, Plaintiffs propose that they provide the documents to the Court under seal, that the Court read, review and examine the documents *in camera* "before any dissemination to opposing counsel **and that the mental impressions, conclusions, opinions or legal theories of Plaintiffs' counsel concerning this litigation be redacted**" (Motion, p. 2, emphasis added). The Court finds that the Motion should be denied for the following reasons:

First, in light of Plaintiffs' proposed requirement that attorney mental impressions, conclusions, opinions or legal theories be redacted before any dissemination of the documents to Defendants' counsel, Plaintiffs are asking that the Court modify or amend the earlier Privilege Discovery Order, which required the Plaintiffs to produce the documents without exception.¹ A motion to alter or amend the Privilege Discovery Order in this manner must be filed in accordance with Rule 59(e), SCRC, not Rule 26(c). Plaintiffs' instant Motion was not filed within 10 days of their receipt of written notice of the entry of the Privilege Discovery Order, as required by Rule 59(e). Plaintiffs' Motion, which seeks the type of relief governed by Rule 59(e), is not timely.

¹ Considering Plaintiffs have not provided a single document to the Court under seal or otherwise, it appears that their willingness to do so is conditioned upon the Court first accepting their proposed redaction requirement. Thus, if the Court were to undertake the review proposed by Plaintiffs and determine that, consistent with its original order, the documents are to be produced without redaction, providing the documents to the Court under seal would in no way achieve the production required under the Privilege Discovery Order but would be fruitless.

mac
#2 2

Second, Plaintiffs' Motion, which clearly seeks to modify or amend the Privilege Discovery Order, raises arguments or issues that were not presented to the Court prior to entry of the Privilege Discovery Order, i.e., that the Court should inspect the subject documents *in camera* and the attorneys' mental impressions, conclusions, opinions or legal theories concerning this litigation should be redacted from the documents before being produced. Plaintiffs "cannot use a motion to alter or amend a judgment to present an issue that could have been raised prior to judgment but was not." Brailsford v. Brailsford, 380 S.C. 443, 669 S.E.2d 342, 345 (Ct. App. 2008). See also Pacific Insurance Co. v. American Nat'l Fire Insurance Co., 148 F.3d 396, 403 (4th Cir. 1998) (Rule 59 is not intended to allow a party to complete presenting his case after the court has ruled against him, or to re-litigate old matters, or to raise arguments or present evidence that could have been raised prior to entry of the judgment). Though styled as a motion for protective order under Rule 26(c), the Court cannot ignore the purpose and effect of the relief sought, which is to alter the terms of the Privilege Discovery Order.

Third, and perhaps most importantly, the Court has ruled that Plaintiffs waived all privileges that would otherwise attach to the subject documents, including claims of work product. The Court has considered Plaintiffs' various arguments that the Privilege Discovery Order should be amended to find that the Plaintiffs did not waive such protections, and it has reaffirmed its previous rulings based on its belief that those rulings are correct. If the Court were to redact attorney mental impressions, conclusions, opinions or legal theories concerning this litigation, as proposed by Plaintiffs, it would clearly undercut the Court's rulings in the Privilege Discovery Order and the grounds upon which such rulings were made. Each of Plaintiffs' documents compelled in the Privilege Discovery Order were created more than three years before filing of the Palmetto, Orleans, Roosevelt and Pinewood cases (many more than three

Handwritten signature and initials, possibly "MKE" and "X-3", in black ink.

years before the Parkview case was filed)² To the extent such documents contain Plaintiffs' attorneys' litigation and trial strategies in this litigation more than three years before the suits were filed, as Plaintiffs' Motion indicates, it is difficult to imagine a document that is more relevant to the statute of limitations issue and Plaintiffs' claims for damages due to Defendants' alleged interference with Plaintiffs' investigation and pursuit of these lawsuits (see Complaints in Roosevelt and Orleans cases) Such information within the documents certainly does not detract from the Court's finding that the Plaintiffs, through their actions (e g the allegations in the Roosevelt and Orleans Complaints), waived any otherwise applicable privilege Plaintiffs have not demonstrated that their proposed review process would be likely to accomplish anything other than reinforcement of the grounds for compelling production

In light of the above, Plaintiffs' Motion is DENIED

IT IS SO ORDERED


Doyet A. Early, III, Circuit Court Judge

Dated Oct 22, 2010

² The Court issued its rulings in the Privilege Discovery Order based on the information contained in the parties' respective Privilege Logs, which sufficiently identified and described the subject documents for the purposes of the Court's rulings Not incidentally, the information in the parties' respective privilege logs also provided the factual bases relied upon by the parties in their argument concerning the various privilege disputes presented in the parties' respective Rule 59 motions, each of which sought to alter or amend the Court's June 2, 2009 Order and resulted in the Court's July 28, 2009 Privilege Discovery Order

Laurance H Davis, Jr , *et al* , Plaintiffs,)
v)
Parkview Apartments, a South Carolina Limited Partnership, *et al* , Defendants)
JUL 7 ANN ROSENEAU
BEAUFORT COUNTY, S C
CLERK OF COURT

Beaufort County
C A No 2003-CP-07-726

Laurance H Davis, Jr , *et al* , Plaintiffs,)
v)
Roosevelt Gardens, a South Carolina Limited Partnership, *et al* , Defendants)

Orangeburg County
C A No 2005-CP-38-1131

Rhonda G Rentz, *et al* , Plaintiffs,)
v)
Orleans Gardens, a South Carolina Limited Partnership, *et al* , Defendants)

Charleston County
C A No 2005-CP-10-4229

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Laurance H Davis, Jr , *et al* , Plaintiffs,)
v)
Palmetto Apartments, a South Carolina Limited Partnership, *et al* , Defendants)

Beaufort County
C A No 2005-CP-07-1989

RECEIVED DEC 30 2010

Carolina Management Corporation of Beaufort, *et al* , Plaintiffs,)
v)
Pinewood Park Apartments, a South Carolina Limited Partnership, *et al* , Defendants)

Beaufort County
C A No 2005-CP-07-1990

CHECK ONE

- [] JURY VERDICT This action came before the court for a trial by jury The issues have been tried and the verdict has been rendered
- [X] DECISION BY 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 _____

T IS ORDERED AND ADJUDGED

[] See attached order, [X] Statement of Judgment by Court

Upon careful consideration and review of the facts, Plaintiff's Motion to Alter or Amend Order Denying Plaintiff's Motion for Protective Order and the Order Denying Plaintiff's Motion for Recusal have been DENIED.

Dated at Aiken, South Carolina, Date 12-16-10 Judge T. J. Early

This judgment was entered on the 16 Day of December, 2010, and a copy mailed his 28 Day of December, 2010, to attorneys of record or to parties as follows

Attorney(s) for Plaintiff
Thomas A Pendarvis
500 Carteret Street, Suite A
Beaufort, SC 29902-5066

Attorney(s) for Defendant
Ellis M Johnston, II
P O Box 2048
Greenville, SC 29602-2048

Joel D Bailey
PO Box 1437
Beaufort, SC 29901-1437

Anne Ross Rosen
134 Meeting St., 3rd floor
Charleston, SC 29401

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Doyet A Early, III, Circuit Court Judge

Case No 2005-CP-07-1990

Carolina Management Corporation of Beaufort, James B Jackson, Whaley R Hinnant, Jr , Mary Gasser Rawl and Rhoda G Rentz, individually and in their capacities as the Limited Partners of Pinewood Park Apartments, a South Carolina Limited Partnership

Appellants,

vs

Pinewood Park Apartments, a South Carolina Limited Partnership, Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group, Inc , AmReal Corporation a/ka and f/k/a USS Corporation a/k/a and f/k/a U S Shelter Corporation, ISTC Corporation, N Barton Tuck, Jr , and John Doe, a generic designation for a party or parties whose true identity is unknown

Respondents

PROOF OF SERVICE

I, Thomas A Pendarvis, an attorney with PENDARVIS LAW OFFICES, P C , certify that I have served one (1) copy of NOTICE OF APPEAL on counsel for Respondents, by depositing a copy of the same in the United States Mail, postage prepaid, on the 28th day of January, 2011 addressed to

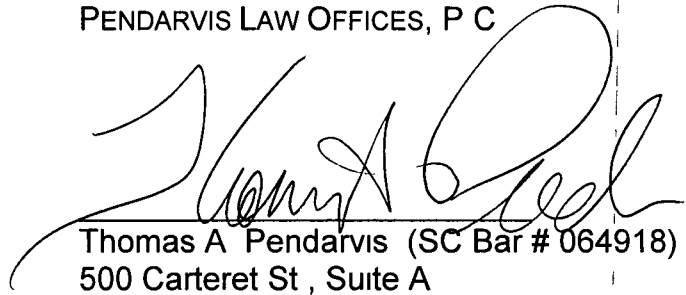
Ellis M Johnston, II, J D
Calvin T Vick, Jr , J D
Jesse C Belcher, Jr , J D
HAYNSWORTH SINKLER BOYD, PA
PO Box 2048
Greenville, SC 29602

Marvin D Infinger, J D
Ann Ross Rosen, J D
NEXSEN PRUET, PA
PO Box 486
Charleston, SC 29402

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JAN 31 2011

SC Court of Appeals

PENDARVIS LAW OFFICES, P C

A large, stylized handwritten signature in black ink, appearing to read 'Thomas A. Pendarvis', is written over the printed name and address.

Thomas A Pendarvis (SC Bar # 064918)

500 Carteret St , Suite A

Beaufort, SC 29902-5066

(843) 524 9500 tel

(843) 524 9501 fax

Thomas@PendarvisLaw.com

January 28, 2011

Beaufort, SC 29902

PENDARVIS LAW OFFICES, P.C.

THOMAS A. PENDARVIS, J.D.
ADMITTED IN SC AND GA
Thomas@PendarvisLaw.com
Board Certified by the American Board
of Professional Liability Attorneys in
Legal Malpractice



500 CARTERET STREET, SUITE A
BEAUFORT, SC 29902 5066
www.PendarvisLaw.com
TEL 843 524 9500
FAX 843 524 9501

January 28, 2011

Tanya Gee, Clerk
South Carolina Court of Appeals
PO Box 11629
Columbia SC 29211

Re Carolina Management, et al v Pinewood Park Apartments, et al
Civil Action No 2005-CP-07-1990

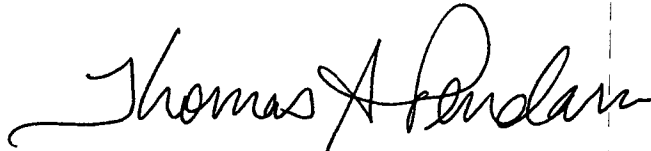
Dear Ms. Gee

Enclosed for filing please find the original and one copy of Plaintiffs-Appellants' AMENDED NOTICE OF APPEAL which includes copies of all of the subject Orders attached as exhibits, and a PROOF OF SERVICE in connection with the above referenced matter. Please return a date-stamped copy of the enclosed documents using the pre-paid return envelope also enclosed for your convenience.

Should you have any questions or concerns, please do not hesitate to contact my office. With kind regards, I remain

Sincerely,

PENDARVIS LAW OFFICES P.C.



Thomas A. Pendarvis, J.D.

TAP/jac
Enclosures

cc Beaufort County Clerk of Court (w/enclosures)
Joel D. Bailey, J.D. (w/enclosures)
Ellis M. Johnston, II, J.D. (w/enclosures)
Calvin T. Vick, Jr., J.D. (w/enclosures)
Jesse C. Belcher, Jr., J.D. (w/enclosures)
Marvin D. Infinger, J.D. (w/enclosures)
Ann Ross Rosen, J.D. (w/enclosures)

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JAN 31 2011

SC Court of Appeals



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Tanya Gee, Clerk
SC Court of Appeals
PO Box 11629
Columbia SC 29211-1629



THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Beaufort County
Court of Common Pleas

Doyet A Early, III, Circuit Court Judge

Case No 2010180088

Carolina Management Corporation of Beaufort, James B Jackson, Whaley R Hinnant, Jr , Mary Gasser Rawl and Rhoda G Rentz, individually and in their capacities as the Limited Partners of Pinewood Park Apartments, a South Carolina Limited Partnership,

v

Pinewood Park Apartments, a South Carolina Limited Partnership, Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group, Inc , AmReal Corporation a/k/a and f/k/a USS Corporation a/k/a and f/k/a U S Shelter Corporation, ISTC Corporation, N Barton Tuck, Jr , and John Doe a generic designation for a party or parties whose true identity is unknown,

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FEB 02 2011

SC Court of Appeals

Appellants,

Respondents

MOTION FOR EXTENSION OF TIME TO FILE RESPONDENTS' REPLY
MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS

Ellis M Johnston, II
Calvin T Vick, Jr
HAYNSWORTH SINKLER BOYD, PA
Post Office Box 2048
Greenville, SC 29602
Telephone (864) 240-3200
Facsimile (864) 240-3336

The undersigned, as attorney for Respondents in the above-captioned matter, respectfully move the Court for an extension of time until Tuesday, February 8, 2011, to file their reply memorandum in support of their motion to dismiss the above-captioned matter

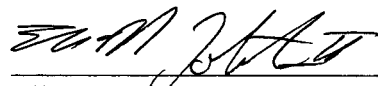
Respondents were served with Appellants' return to Respondents' Motion to Dismiss by letter dated January 28, 2011 and received in these offices on January 31, 2011 Pursuant to South Carolina Rule of Appellate Procedure 240, the time in which Respondents would be required to reply would be on Friday, February 4, 2011 Respondents respectfully request that that time period be extended until February 8, 2011

The basis for this motion is that one of Respondents' principal attorneys, Calvin T Vick, II, is on vacation with his wife and children at Disney World, and will not return until after the due date of Respondents Reply

The undersigned has consulted with Joel Bailey, attorney for Appellants, and he has no objection to the relief requested (Exhibit 1)

Respectfully Submitted,

HAYNSWORTH SINKLER BOYD, PA



Ellis M Johnston, II, SC Bar # 3065
Calvin T Vick, Jr, SC Bar #68187
Post Office Box 2048
Greenville, South Carolina 29602
(864) 240-3200 (phone)
(864) 240-3336 (fax)
tvick@hsblawfirm.com
ejohnston@hsblawfirm.com

Attorneys for Respondents

This 1st day of February, 2011
Greenville, South Carolina

Johnston, Ellis

From Joel Bailey [thebaileylawfirm@gmail.com]
Sent Tuesday February 01 2011 8:40 AM
To Johnston, Ellis
Cc thomas@pendarvislaw.com
Subject Re: parkview

Ellis

No changes to letter. Your request for 2 day extension is ok

Joel

On Mon, Jan 31, 2011 at 10:00 PM, Johnston, Ellis <cjohnston@hsblawfirm.com> wrote

any changes to the letter? How about the extension?

CONFIDENTIALITY NOTICE This e-mail and any files transmitted with it are confidential and may contain information which is legally privileged or otherwise exempt from disclosure. They are intended solely for the use of the individual or entity to whom this e-mail is addressed. If you are not one of the named recipients or otherwise have reason to believe that you have received this message in error, please immediately notify the sender and delete this message immediately from your computer. Any other use, retention, dissemination, forwarding, printing, or copying of this e-mail is strictly prohibited.

IRS CIRCULAR 230 NOTICE Internal Revenue Service regulations generally provide that for the purpose of avoiding federal tax penalties, a taxpayer may rely only on formal written advice meeting specific requirements. Any tax advice in this message or in any attachment to this message does not meet those requirements. Accordingly, any such tax advice was not intended or written to be used, and it cannot be used, for the purpose of avoiding federal tax penalties that may be imposed on you or for the purpose of promoting, marketing, or recommending to another party any tax-related matters. mm crp

Johnston, Ellis

From Johnston Ellis
Sent Monday January 31 2011 11 35 AM
To Joel Bailey Vick Ted Craddock Hugh
Cc Thomas A Pendarvis
Subject RE Parkview et al

The last thing I want is to have separate deadlines for each case so I guess we consent which I thought we had already done Anyway I will write the Court of Appeals today informing them that we have no objection to the relief you have requested Ted is at Disney World with his kids until Sunday Do you have any objection to agreeing to a 2 day extension (until Tuesday) to respond to your memo in opposition to our motion to dismiss?

Ellis M Johnston II
Haynsworth Sinkler Boyd PA
75 Beattie Place 11th Floor (29601)
PO Box 2048 (29602)
Greenville SC 29602
864 240 3217 (tel)
864 240 3300 (fax)
ejohnston@hsblawfirm.com

- -- Original Message - -

From Joel Bailey [mailto:baileylawfirm@charter.net]
Sent Monday, January 31, 2011 11 16 AM
To Johnston, Ellis, Vick, Ted, Craddock, Hugh
Cc 'Thomas A Pendarvis'
Subject RE Parkview, et al

Ellis

I understood your prior response to our motion for a status conference to state that you agreed that the initial briefing schedule for all 5 cases should be held in abeyance pending the hearing on your motion to dismiss but I did not understand it to consent to hold all briefing schedules in abeyance until the status conference was held We are concerned over the potential time gap between the decision on your motion to dismiss and any status conference which may be held Our thought is that, if your motion to dismiss is denied all 5 cases should be dealt with at the status conference and a briefing schedule imposed at that time for each of the cases If you are in agreement and are willing to amend your prior response to our motion for a scheduling order to reflect that it would certainly simplify matters to be dealt with by the Court of Appeals Of course our concern at this point is that we have heard nothing from the Court concerning any of the motions Since your motion to dismiss does not include Orleans the briefing schedule in that case is not automatically stayed by your motion notwithstanding your agreement that it should be stayed, at least until the motion to dismiss is decided If you agree that in the event your motion to dismiss is denied briefing schedules for all cases should be held in abeyance until the Court rules on the motion for a status conference it may be that such fact could simply be communicated to the court via a letter as opposed to amending any motions or responses Please let me know your position at your earliest convenience Thanks

Joel

From Johnston, Ellis [mailto:ejohnston@hsblawfirm.com]
Sent Monday, January 31, 2011 10 26 AM

To baileylawfirm@charter net, Thomas A Pendarvis, Vick, Ted, Craddock, Hugh
Subject Parkview, et al

Joel I thought we had consented to the extension to file initial briefs and designations in Orleans in our response to your motion for a status conference You are welcome to amend your motion to reflect such an agreement

Ellis M Johnston II
Haynsworth Sinkler Boyd PA
75 Beattie Place 11th Floor (29601)
PO Box 2048 (29602)
Greenville SC 29602
864 240 3217 (tel)
864 240 3300 (fax)
ejohnston@hsblawfirm.com

CONFIDENTIALITY NOTICE This e-mail and any files transmitted with it are confidential and may contain information which is legally privileged or otherwise exempt from disclosure They are intended solely for the use of the individual or entity to whom this e-mail is addressed If you are not one of the named recipients or otherwise have reason to believe that you have received this message in error please immediately notify the sender and delete this message immediately from your computer Any other use retention dissemination forwarding printing or copying of this e-mail is strictly prohibited

IRS CIRCULAR 230 NOTICE Internal Revenue Service regulations generally provide that for the purpose of avoiding federal tax penalties a taxpayer may rely only on formal written advice meeting specific requirements Any tax advice in this message or in any attachment to this message does not meet those requirements Accordingly any such tax advice was not intended or written to be used and it cannot be used for the purpose of avoiding federal tax penalties that may be imposed on you or for the purpose of promoting marketing or recommending to another party any tax-related matters mmcorp

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Beaufort County
Court of Common Pleas

Doyet A Early, III, Circuit Court Judge

Case No 2010180088

Carolina Management Corporation of Beaufort, James B Jackson, Whaley R Hinnant, Jr , Mary Gasser Rawl and Rhoda G Rentz, individually and in their capacities as the Limited Partners of Pinewood Park Apartments, a South Carolina Limited Partnership,

v

Pinewood Park Apartments, a South Carolina Limited Partnership, Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group, Inc , AmReal Corporation a/k/a and f/k/a USS Corporation a/k/a and f/k/a U S Shelter Corporation, ISTC Corporation, N Barton Tuck, Jr , and John Doe, a generic designation for a party or parties whose true identity is unknown,

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below, he served counsel for the Appellants with a copy of *MOTION FOR EXTENSION OF TIME TO FILE RESPONDENTS REPLY MEMORANDUM IN SUPPORT OF RESPONDENTS MOTION TO DISMISS* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses

ORIGINAL

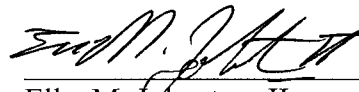
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FEB 02 2011
SC Court of Appeals

Appellants,

Respondents

Thomas A Pendarvis
Pendarvis Law Offices, P C
500 Carteret Street, Suite A
Beaufort, South Carolina 29902-5066

Joel D Bailey
The Bailey Law Firm, P A
PO Box 1437
Beaufort, South Carolina 29901-1437


Ellis M Johnston, II

February 1, 2011
Greenville, South Carolina

GREENVILLE

CHARLESTON

COLUMBIA

FLORENCE

Haynsworth
Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW

75 BEATTIE PLACE 11TH FLOOR (29601 2119)
POST OFFICE BOX 2048 (29602 2048)
GREENVILLE SOUTH CAROLINA
TELEPHONE 864 240 3200
FACSIMILE 864 240 3300
WEBSITE www.hsblawfirm.com

ELLIS M. JOHNSTON II
DIRECT DIAL NUMBER 864 240 3217
EMAIL ejohnston@hsblawfirm.com

February 1, 2011

VIA FEDERAL EXPRESS

The Honorable Tanya Gee
Clerk of Court
South Carolina Court of Appeals
P O Box 11629
Columbia, SC 29211

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SC Court of Appeals

Re *Carolina Management Corporation of Beaufort et al v Pinewood
Park Apartments et al*
Case No 2010180088

Dear Ms Gee

With regard to the above-referenced matters enclosed please find an original and six (6) copies of the *Motion for Extension of Time to File Respondents Reply Memorandum in Support of Respondents Motion to Dismiss* and *Proof of Service* for same with regard to the above-captioned appeal I also enclose our Firm's check in the sum of \$25 for the cost of the filing fee I would appreciate your filing these at your earliest convenience and returning the additional enclosed copy, file-stamped to me in the self-addressed, stamped envelope

With kind regards, I remain

Very truly yours,

HAYNSWORTH SINKLER BOYD, P A



Ellis M Johnston, II

EMJ II jmb
Enclosures

cc Joel D Bailey, Esquire
Thomas A Pendarvis, Esquire



BAILEY LAW FIRM

APPELLATE DIVISION
OF THE SOUTH CAROLINA COURT OF APPEALS

POST OFFICE BOX 1157 BEAUFORT SOUTH CAROLINA 29501-1457

EMAIL ADDRESS
BAILEYLAWFIRM@aol.com

PHONE 843 625 6090
FAX 843 625 6070

November 3 2010

Lisa H Davenport, Court Reporter
P O Box 165,
Aiken SC 29802

RE Davis *et al* v Parkview Apartments, *et al* (Beaufort C/A No 03 CP-07 723)
Davis *et al* v Palmetto Apartments *et al* (Beaufort C/A No 05-CP-07 1989)
Carolina Management Corp of Beaufort *et al* v Pinewood Park Apartments, *et al*,
(Beaufort C/A No 05 CP-07 1990)
Rentz *et al* v Orleans Gardens *et al*, (Charleston C/A No 05-CP 10 4229)
Davis *et al* v Roosevelt Gardens, *et al* (Orangeburg C/A No 05 CP-38-1131)

Dear Ms Davenport

Please be advised that the above-referenced cases are being appealed and we will be in need of transcripts of hearings conducted by Judge Doyet A Early III Circuit Court Judge concerning these matters. According to my records on July 1 2008 December 9 2008 and July 6 2009 Judge Early held hearings in the above-referenced matters. The hearings on July 1 2008 and December 9 2008 were in Bamberg County. The hearing on July 6 2009 was held in Barnwell. My records indicate that you were the court reporter for these hearings.

Please provide me with a transcript of the entire proceedings for each hearing. I agree to pay the per page charge for these transcripts as provided by Rule 607 SCACR.

Please feel free to contact me should you have any questions. Thank you for your attention to this matter. With kindest regards I am

Very truly yours

THE BAILEY LAW FIRM, P A

Joel D Bailey
JDB/shb

RECEIVED

JAN 24 2011

SC Court of Appeals

cc Calvin T Vick Esquire
Ellis M Johnston Esquire
Anne Ross Rosen Esquire
Marvin H Infinger Esquire
Thomas A Pendarvis Esquire
South Carolina Court Administration
Honorable Tanya Cree Clerk South Carolina Court of Appeals

RAHLEY ASSURANCE



THE
BAILEY LAW FIRM

A PROFESSIONAL ASSOCIATION
1001 ALBANY ROAD

POST OFFICE BOX 1657 FAYETTEVILLE SOUTH CAROLINA 29501-1457

EMAIL ADDRESS
BAILEYLAWFIRM@GMAIL.COM

PHONE 843 525 6090
FAX 843 525 6070

November 3 2010

Harriet P. Bennett, Reporter
PO Box 86
Ladson, SC 29456

RE Davis, *et al* v Parkview Apartments *et al* (Beaufort C/A No 03-CP-07-723)
Davis, *et al* v Palmetto Apartments *et al* (Beaufort C/A No 05 CP 07-1989)
Carolina Management Corp of Beaufort, *et al* v Pinewood Park Apartments, *et al*
(Beaufort C/A No 05 CP-07 1990)
Rentz, *et al* v Orleans Gardens *et al* (Charleston C/A No 05-CP-10 4229)
Davis, *et al* v Roosevelt Gardens, *et al*, (Orangeburg C/A No 05-CP-38-1131)

Dear Ms Bennett

Please be advised that the above-referenced cases are being appealed, and we will be in need of transcripts of hearings conducted by Judge Doyet A. Farly III Circuit Court Judge concerning these matters. According to my records on November 19 2007 a hearing was held before Judge Early in Bamberg County in the above-referenced matters. My records indicate that you were the court reporter for that hearing.

Please provide me with a transcript of the entire proceeding. I agree to pay the per page charge for this transcript as provided by Rule 607, SCACR.

Please feel free to contact me should you have any questions. I thank you for your attention to this matter. With kindest regards I am

Very truly yours

THE BAILEY LAW FIRM, P A

Joel D. Bailey
JDB/shb

RECEIVED
JAN 24 2011
SC Court of Appeals

cc Calvin T Vick Esquire
Ellis M Johnston Esquire
Anne Ross Rosen Esquire
Marvin H Infinger Esquire
Thomas A Pendarvis Esquire
South Carolina Court Administration
Honorable Tanya Gee Clerk South Carolina Court of Appeals



THE
BAILEY LAW FIRM

A PROFESSIONAL ASSOCIATION

510 RIBAUT ROAD

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EMAIL ADDRESS
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PHONE 843 525-6090
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January 20, 2011

Ms Elizabeth Carter
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

RE Laurance H Davis, Jr, et al vs Pinewood Park Apartments, et al
Case Tracking # 2010180088

Dear Ms Carter

Pursuant to our telephone conversation today, and per your request, enclosed please find copies of the letters that were sent to the court reporters requesting copies of the transcripts with regard to the above-referenced appeal. The transcripts of the hearings are the same for each of the five appeals which we have pending, as the trial judge's rulings with respect to the hearings applied to each of these cases. I understand that the letters were previously filed only in the Orleans Garden appeal. Accordingly, as requested, I am enclosing copies of the letters for filing in the above-referenced appeal, as well.

For your information, the last transcripts were received from Lisa Davenport on January 5, 2011. This date should be applicable to the appeals in all five cases. Thank you for your assistance with this matter.

With kindest regards, I am

Very truly yours,

THE BAILEY LAW FIRM, P A

Joel D Bailey

JDB/shb
enclosures

cc Ellis M Johnston, II, Esquire (w/enclosures)
Calvin T Vick, Jr, Esquire (w/enclosures)
Jesse C Belcher, Jr, Esquire (w/enclosures)
Anne Ross Rosen, Esquire (w/enclosures)
Marvin D Infinger, Esquire (w/enclosures)
Thomas A Pendarvis, Esquire (w/enclosures)

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JAN 24 2011

SC Court of Appeals



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE (803) 734 1890
FAX (803) 734 1839
www.sccourts.org

January 5, 2011

Thomas A. Pendarvis, Esquire
Pendarvis Law Offices, PC
500 Carteret St. Ste. A
Beaufort, SC 29902

Re: Carolina Management v. Pinewood
Case Tracking # 2010180088

Dear Mr. Pendarvis:

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

Please be advised that the order you are appealing features an abbreviated case caption. Within ten days of the date of this letter, please provide a copy of any order issued in this matter which shows the complete case caption.

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

PLEASE BE ADVISED that, pursuant to Rule 207 of the South Carolina Appellate Court Rules, the transcript must be ordered within ten (10) days of the proof of service of the Notice of Appeal and you must provide this Court, opposing counsel, and the Office of Court Administration with all correspondence regarding the transcript. It is also Appellant's responsibility to make satisfactory arrangements (including agreement regarding payment for the transcript) with the Court Reporter for furnishing the transcript. You are reminded of the notification requirements of Rule 207(a)(5), SCACR, also, please advise the Court in writing upon receipt of the transcript.

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

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

Very truly yours,

V. Elaine Allen, Deputy
Tanya A Gee
CLERK

TAG/ec

cc Joel D Bailey, Esquire
Ellis M Johnson, Esquire
Calvin T Vick, Esquire
Jesse C Belcher, Esquire
Marvin D Infinger, Esquire
Anne Ross Rosen, Esquire



The South Carolina Court of Appeals

TANYA A GEE
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

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www.sccourts.org

January 5, 2011

Thomas A Pendarvis, Esquire
Pendarvis Law Offices, PC
500 Carteret St Ste A
Beaufort, SC 29902

Re Carolina Management v Pinewood
Case Tracking # 2010180088

Dear Mr Pendarvis

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

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

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/ec

cc Joel D Bailey, Esquire
Ellis M Johnson, Esquire
Calvin T Vick, Esquire
Jesse C Belcher, Esquire
Marvin D Infinger, Esquire
Anne Ross Rosen, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Doyet A Early, III, Circuit Court Judge

Case No 2005-CP-07-1990

Carolina Management Corporation of Beaufort, James B Jackson Whaley R Hinnant Jr Mary Gasser Rawl and Rhoda G Rentz, individually and in their capacities as the Limited Partners of Pinewood Park Apartments a South Carolina Limited Partnership

Appellants,

vs

Pinewood Park Apartments a South Carolina Limited Partnership Apartment Investment and Management Company a/k/a AIMCO Insignia Financial Group, Inc , AmReal Corporation a/ka and f/k/a USS Corporation a/k/a and f/k/a U S Shelter Corporation ISTC Corporation, N Barton Tuck, Jr , and John Doe, a generic designation for a party or parties whose true identity is unknown

Respondents

NOTICE OF APPEAL

Appellants Carolina Management Corporation of Beaufort, James B Jackson Whaley R Hinnant, Jr Mary Gasser Rawl and Rhoda G Rentz appeal the following orders

- 1 ORDER denying Plaintiffs motion to compel #6, dated August 18 2008 a copy of which is attached as Exhibit 1
- 2 ORDER DENYING PLAINTIFFS MOTION TO COMPEL #2 dated December 17, 2008, a copy of which is attached as Exhibit 2

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DEC 06 2010

SC Court of Appeals

- 3 ORDER GRANTING DEFENDANTS MOTION TO COMPEL DATED NOVEMBER 6, 2008,
dated March 3, 2009 a copy of which is attached as Exhibit 3
- 4 ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO
COMPEL, DATED JULY 29, 2005, dated March 3, 2009, a copy of which is
attached as Exhibit 4
- 5 ORDER ADOPTING FINDINGS AND CONCLUSIONS OF SPECIAL MASTER CLARY
dated June 2, 2009, a copy of which is attached as Exhibit 5
- 6 ORDER DENYING PLAINTIFFS MOTION TO ALTER OR AMEND ORDER GRANTING
DEFENDANTS' MOTION TO COMPEL DATED NOVEMBER 6, 2008, dated June 16
2009, a copy of which is attached as Exhibit 6
- 7 ORDER AMENDING COURT S ORDER DATED JUNE 2 2009 dated July 28, 2009,
a copy of which is attached as Exhibit 7
- 8 ORDER GRANTING DEFENDANTS TWO MOTIONS FOR SANCTIONS, FINDING
PLAINTIFFS IN CONTEMPT OR COURT, AND DISMISSING THE ABOVE-CAPTIONED
ACTIONS AS SANCTIONS FOR PLAINTIFFS CONTEMPT dated April 6, 2010, a
copy of which is attached as Exhibit 8
- 9 ORDER denying Plaintiffs' motion for reconsideration dated September 16,
2010, filed on September 20, 2010, and receipt of written notice of entry of
which was received by Counsel for Appellants on November 29, 2010 a
copy of which is attached as Exhibit 9

The above Orders were issued by the Honorable Doyet A Early, III

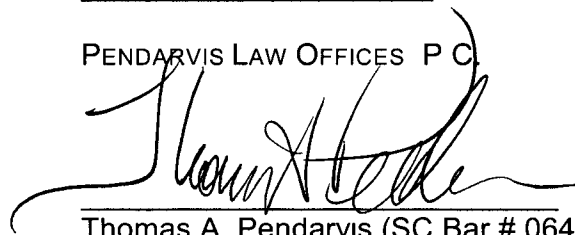
- 10 ORDER appointing the Honorable Doyet A Early, III to hear and decide all
matters pertaining to these cases, dated March 7 2006 issued by Chief

Justice Jean Hoefer Toal a copy of which is attached as Exhibit 10

Respectfully submitted,

Joel D Bailey
THE BAILEY LAW FIRM, P A
PO Box 1437
Beaufort SC 29901-1437
(843) 525-6090 tele
(843) 525-6070 fax
baileylawfirm@charter.net

PENDARVIS LAW OFFICES P C



Thomas A Pendarvis (SC Bar # 064918)
500 Carteret St Suite A
Beaufort SC 29902-5066
843 524 9500 tel
843 524 9501 fax
Thomas@PendarvisLaw.com

Counsel for Appellants

December 3 2010

Beaufort, South Carolina

OTHER COUNSEL OF RECORD

Ellis M Johnston Jr J D
Calvin T Vick, J D
Jesse C Belcher J D
HAYNSWORTH SINKLER BOYD P A
P O Box 2048
Greenville SC 29602

Marvin D Infinger, J D
Anne Ross Rosen, J D
HAYNSWORTH SINKLER BOYD, P A
134 Meeting Street, 3rd Floor
Charleston SC 29401

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Doyet A Early III Circuit Court Judge

Case No 2005-CP-07-1990

Carolina Management Corporation of Beaufort, James B Jackson, Whaley R Hinnant, Jr Mary Gasser Rawl and Rhoda G Rentz individually and in their capacities as the Limited Partners of Pinewood Park Apartments, a South Carolina Limited Partnership

Appellants

vs

Pinewood Park Apartments a South Carolina Limited Partnership Apartment Investment and Management Company a/k/a AIMCO Insignia Financial Group, Inc , AmReal Corporation a/ka and f/k/a USS Corporation a/k/a and f/k/a U S Shelter Corporation, ISTC Corporation, N Barton Tuck Jr and John Doe a generic designation for a party or parties whose true identity is unknown

Respondents

PROOF OF SERVICE

I Thomas A Pendarvis, an attorney with PENDARVIS LAW OFFICES, P C , certify that I have served one (1) copy of NOTICE OF APPEAL on counsel for Respondents by depositing a copy of the same in the United States Mail, postage prepaid on the 3rd day of December, 2010 addressed to

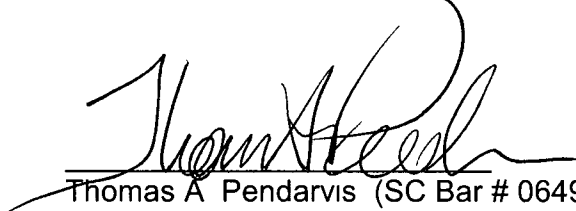
Ellis M Johnston, II, J D
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Greenville, SC 29602

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Ann Ross Rosen J D
HAYNSWORTH SINKLER BOYD, PA
134 Meeting Street, 3rd Floor
Charleston SC 29401

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DEC 06 2010

PENDARVIS LAW OFFICES, P C

A handwritten signature in black ink, appearing to read "Thomas A. Pendarvis", written over a horizontal line.

Thomas A Pendarvis (SC Bar # 064918)

500 Carteret St Suite A

Beaufort, SC 29902-5066

(843) 524 9500 tel

(843) 524 9501 fax

Thomas@PendarvisLaw.com

December 3, 2010

Beaufort, SC 29902



PENDARVIS LAW OFFICES, P C
500 CARTERET STREET, SUITE A
BEAUFORT, SOUTH CAROLINA 29902-5066

THOMAS A PENDARVIS, J D
ADMITTED IN SC AND GA
THOMAS@PENDARVISLAW.COM

TEL 843 524 9500
FAX 843 524 9501
WWW.PENDARVISLAW.COM

December 3 2010

Tanya Gee, Clerk
SC Court of Appeals
PO Box 11629
Columbia SC 29211

Re Carolina Management, et al v Pinewood Park Apartments et al
Civil Action No 2005-CP-07-1990

Dear Ms Gee

Enclosed for filing please find the original and one copy of Plaintiffs-Appellants NOTICE OF APPEAL, which include the subject Orders attached as exhibits, and a PROOF OF SERVICE in connection with the above referenced matter. Also enclosed please find check no 1011 in the amount of \$100.00 representing the filing fee. Please return a date-stamped copy of the enclosed documents using the pre-paid return envelope also enclosed for your convenience.

Should you have any questions or concerns, please do not hesitate to contact my office. With kind regards, I remain

Sincerely

PENDARVIS LAW OFFICES, P C

Thomas A Pendarvis, J D

TAP/jac
Enclosures

cc Beaufort County Clerk of Court (w/enclosures)
Joel D Bailey, JD (w/enclosures)
Ellis M Johnston, II, JD (w/enclosures)
Calvin T Vick Jr JD (w/enclosures)
Jesse C Belcher, Jr, JD (w/enclosures)
Marvin D Infinger, JD (w/enclosures)
Ann Ross Rosen, JD (w/enclosures)

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SC Court of Appeals

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Tanya Gee, Clerk
SC Court of Appeals
PO Box 11629
Columbia SC 29211-1629

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Parkview Apartments, a South Carolina Limited
Partnership, *et al* , Defendants

)
)
)
)

Beaufort County
C A No 2003-CP-07-726

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Roosevelt Gardens, a South Carolina Limited
Partnership, *et al* , Defendants

)
)
)
)

Orangeburg County
C A No 2005-CP-38-1131

RECEIVED

DEC 06 2010

Rhonda G Rentz, *et al* , Plaintiffs,
v
Orleans Gardens, a South Carolina Limited
Partnership, *et al* , Defendants

)
)
)
)

Charleston County
C A No 2005-CP-10-4229

SC Court of Appeals

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Palmetto Apartments, a South Carolina Limited
Partnership, *et al* , Defendants

)
)
)
)

Beaufort County
C A No 2005-CP-07-1989

Carolina Management Corporation of Beaufort,
et al , Plaintiffs,
v
Pinewood Park Apartments, a South Carolina
Limited Partnership, *et al* , Defendants

)
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)

Beaufort County
C A No 2005-CP-07-1990

ORDER

This matter is before the court upon Plaintiffs' Motion to Compel #6 dated June 12, 2008 seeking discovery of certain financial information from Defendants which Plaintiffs deem necessary for their expert to give opinions on the appropriate level of punitive damages that might be awarded. The court finds that there is sufficient information publicly available through filings with the Securities and Exchange Commission to satisfy this request, and therefore denies Plaintiffs' Motion to Compel #6 dated June 12, 2008.

WAE
H



IT IS SO ORDERED



The Honorable Doyet A. Early, III,
Judge, 2nd Judicial Circuit

Dated this 18 day of August, 2008

Greenville South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

Laurance H Davis Jr *et al* Plaintiffs
v
Parkview Apartments a South Carolina Limited
Partnership *et al* Defendants

)
) Beaufort County
) C A No 2003-CP-07-726
)

Laurance H Davis, Jr *et al* Plaintiffs
v
Roosevelt Gardens a South Carolina Limited
Partnership *et al* Defendants

)
) Orangeburg County
) C A No 2005 CP-38-1131
)

Rhonda G Rentz, *et al* Plaintiffs
v
Orleans Gardens a South Carolina Limited
Partnership, *et al* Defendants

)
) Charleston County
) C.A No 2005 CP-10-4229
)

Laurance H Davis Jr, *et al* Plaintiffs
v
Palmetto Apartments, a South Carolina Limited
Partnership *et al* Defendants

)
) Beaufort County
) C A No 2005 CP 07 1989
)

Carolina Management Corporation of Beaufort,
et al Plaintiffs
v
Pinewood Park Apartments a South Carolina
Limited Partnership *et al* Defendants

)
) Beaufort County
) C A No 2005 CP-07-1990
)

ORDER DENYING
PLAINTIFFS' MOTION TO COMPEL # 2

THESE MATTERS COME BEFORE THE COURT on Plaintiffs Motion to Compel Production, dated November 7 2007 (hereinafter Motion) in each of the above captioned actions The Court has considered the parties memoranda and other submissions, including the Defendants Privilege Log a copy of which was provided to the Court and to Plaintiffs counsel in connection with the Motion (hereinafter Defendants Privilege Log) as well as the oral argument of the parties' counsel at the hearing held on November 19 2007 The Court finds that

MAE
#1



the documents identified in the Defendants Privilege Log are privileged and that the Defendants shall not be compelled to produce such documents to Plaintiffs

Further, the Court finds that Plaintiffs Motion is not ripe with respect to questions that may be asked at the depositions of certain attorneys that previously represented the Defendants, such depositions having not yet taken place

WHEREFORE Plaintiffs Motion is hereby DENIED Further, Plaintiffs' request for an award of reasonable expenses of the Motion including their attorneys fees pursuant to Rule 37 SCRPC, is DENIED

IT IS SO ORDERED

This 17 day of Dec 2008
Bontus South Carolina

Doyet A. Early, III
Doyet A. Early, III Circuit Court Judge

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Parkview Apartments, a South Carolina Limited
Partnership, *et al* , Defendants

)
)
) Beaufort County
) C A No 2003-CP-07-726
)

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Roosevelt Gardens, a South Carolina Limited
Partnership, *et al* , Defendants

)
)
) Orangeburg County
) C A No 2005-CP-38-1131
)

Rhonda G Rentz, *et al* , Plaintiffs,
v
Orleans Gardens, a South Carolina Limited
Partnership, *et al* , Defendants

)
)
) Charleston County
) C A No 2005-CP-10-4229
)

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Palmetto Apartments, a South Carolina Limited
Partnership, *et al* , Defendants

)
)
) Beaufort County
) C A No 2005-CP-07-1989
)

Carolina Management Corporation of Beaufort,
et al , Plaintiffs,
v
Pinewood Park Apartments, a South Carolina
Limited Partnership, *et al* , Defendants

)
)
) Beaufort County
) C A No 2005-CP-07-1990
)

ORDER GRANTING DEFENDANTS'
MOTION TO COMPEL, DATED NOVEMBER 6, 2008

THESE MATTERS COME BEFORE THE COURT on Defendants' Motion to Compel, dated November 6, 2008 (the "Motion"), which concerns Defendants' Interrogatories and Requests for Production, dated August 28, 2008 (the "Discovery Requests"), and Plaintiffs' responses to such Discovery Requests. The Court has considered the Defendants' memorandum in support of the Motion, which was filed on December 8, 2008 ("Defendants' Memorandum"), and the oral argument of the parties' counsel at the hearing held on December 9, 2008, as well as

YAE
TH



the additional written materials submitted by the parties since the hearing on December 9, 2008, including Plaintiffs' Supplemental Response to Defendants' Discovery to All Plaintiffs Dated August 28, 2008 ("Supplemental Response") The Plaintiffs did not submit a memorandum in opposition to the Motion

The Court finds that the Defendants served the Discovery Requests upon Plaintiffs on August 28, 2008, and the Defendants subsequently granted Plaintiffs a 30-day extension to serve their responses, such that Plaintiffs' responses were due to be served by October 27, 2008 Plaintiffs failed to timely serve their responses to the Discovery Requests, and Defendants filed the Motion on November 6, 2008 Plaintiffs then served their initial responses to the Discovery Requests on November 14, 2008, but Defendants elected to proceed with the Motion, claiming that the Plaintiffs' responses to the Discovery Requests were incomplete and inadequate

The subject matter of the Motion can be broken into two distinctive sets of issues The first set of issues concerns whether Plaintiffs should be compelled to produce documents identified on their Privilege Log, and these issues were referred by the Court to Gary E Clary, as Special Master, for *in camera* inspection of the subject documents Special Master Clary's report to the Court concerning his findings is pending at this time, and those issues shall be addressed in a separate Order of this Court The second set of issues concerns whether Plaintiffs should be compelled to provide full and complete responses to certain Interrogatories, which were identified in the Defendants' Memorandum, and whether Plaintiffs should be compelled to produce documents (separate and apart from the documents listed on Plaintiffs' Privilege Log) in response to certain Requests for Production, which were also identified in Defendants' Memorandum At the hearing of the Motion, the Court directed the parties to make further attempts to resolve the discovery disputes presented by this second set of issues, but the parties'

attempts have not resulted in a resolution of their disputes

On January 29, 2009, Plaintiffs served their Supplemental Response to the Discovery Requests, as well as documents Bates stamped Davis 007134-007192. Though the Defendants' Discovery Requests were directed to each of the Plaintiffs in the five (5) above-captioned actions, the Plaintiffs' Supplemental Response expressly provides that it is made only by the Plaintiffs in the Parkview action, and that the Plaintiffs in the other actions will supplement their responses to the Discovery Requests "at a later date." Further, the documents produced along with the Supplemental Response were the financial statements of only one of the Plaintiffs, Laurance Davis. As for the content of the Supplemental Response, very little additional information is provided, and Plaintiffs reaffirm their objections contained in their previous responses to the Discovery Requests.

The Defendants seek to compel the Plaintiffs to provide full and complete answers to the following Interrogatories Nos. 3, 6-18, 20, and 22-23. The Court finds that the Plaintiffs' responses to these Interrogatories are incomplete and inadequate, and the Plaintiffs are hereby compelled to provide full and complete responses to these Interrogatories, subject only to the limitations stated herein.

The Defendants also seek to compel the Plaintiffs to produce all documents in their possession, custody or control, which are responsive to the following Requests for Production Nos. 1-8, 10-16, 19-34, 36-43, and 45-48. The Court finds that the Plaintiffs' responses to these Requests for Production are incomplete and inadequate, and the Plaintiffs are hereby compelled to produce all documents in their possession, custody or control, which are responsive to these Requests, subject only to the limitations stated herein.

Where Plaintiffs can fully and completely respond to such Interrogatories or Requests for

Production by reference to documents that have been produced by Plaintiffs in these lawsuits, and all such documents have been Bates stamped for tracking and identification purposes,¹ Plaintiffs may so state. Any information or documents withheld on the grounds of attorney-client privilege or work product must be specifically identified, as discussed further below. With respect to Interrogatory No. 6, if the experts identified by Plaintiffs have produced written reports setting forth the opinions held by the experts and the bases for such opinions, Plaintiffs may produce such reports in response to this Interrogatory to the extent the reports contain all of the information requested. If the reports do not contain all of the requested information, Plaintiffs must supplement the information contained in the reports so as to fully and completely answer Interrogatory No. 6. If the Plaintiffs' experts have not produced such written reports, Plaintiffs must provide a summary of the important opinions held by each expert (i.e. the opinion testimony the expert is expected to give in these cases), as well as the factual bases for such opinions. A description of the expert's general experience is not sufficient.

In response to each and every Interrogatory and Request for Production, the Plaintiffs incorporate numerous general objections, which are set out in their initial discovery response and Supplemental Response prior to the Plaintiffs' specific responses to the Discovery Requests ("General Objections"). This blanket method of objecting to all of the Discovery Requests, coupled with Plaintiffs' subsequent failure to respond in any meaningful way to the particular complaints raised in Defendants' Memorandum, make it impossible for Defendants to know if

¹ Though the parties are not required to Bates stamp all documents produced, as a matter of law the parties have agreed to Bates stamp the documents produced in these cases for purposes of tracking and identification. Due to the volume of documents produced by the parties in these cases as a practical matter, it is unfair and ambiguous for the Plaintiffs to respond to discovery requests by merely stating that responsive documents have already been produced or are already in the possession of Defendants or their counsel leaving open the question as to whether the referenced documents are among the Bates stamped documents produced by Plaintiffs. While the Court has not required the parties to identify the specific documents or pages by reference to specific Bates numbers when responding in this fashion the responding party must at least identify the group of documents in a readily discernable fashion such as 'Bates stamped documents produced in these cases by Plaintiffs'.

responsive information and/or documents are being withheld, and, if so, based on which specific grounds To the extent that Plaintiffs have withheld any information or documents that would otherwise be responsive to the Discovery Requests on the grounds of attorney-client privilege or work product, such information and documents shall be sufficiently identified in Plaintiffs' Privilege Log or by other written means, so as to afford Defendants a reasonable opportunity to assess the applicability of the privilege or protection, as required by Rule 26(b)(5), SCRCP To the extent that Plaintiffs have withheld any information or documents that would otherwise be responsive to the Discovery Requests on the grounds of any of the other General Objections contained in Plaintiffs' discovery responses, Plaintiffs are hereby compelled to provide full and complete responses to all such Interrogatories and to produce the documents responsive to all such Requests for Production The Court notes that Defendants have withdrawn Request for Production No 44, so no further response to that Request is required

Plaintiffs' response to Interrogatory No 24 indicates that each of the Plaintiffs in the above-captioned actions may not have participated in answering the Interrogatories Each and every Plaintiff is required to provide all information reasonably available to him or her, which would be responsive to any of the Interrogatories Further, each and every Plaintiff is required to produce all documents in his or her possession, custody or control, which would be responsive to any of the Requests for Production

Plaintiffs shall fully comply with the terms of this Order within thirty (30) days of the date of this Order

WHEREFORE, Defendants' Motion is GRANTED, as stated above Further, Defendants' request for an award of reasonable expenses of the Motion, including their attorneys' fees, pursuant to Rule 37, SCRCP, is GRANTED ~~Defendants shall submit evidence~~

*held in abeyance pending
resolution of all discovery disputes -
5 DNE*

~~of the amount of their reasonable expenses of the Motion, including their attorneys' fees, within~~
~~twenty (20) days of the date of this Order~~ Def

IT IS SO ORDERED

This 3rd day of March, 2009
Bamberg, South Carolina

Doyet A. Early, III
Doyet A. Early, III, Circuit Court Judge

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Parkview Apartments, a South Carolina Limited
Partnership, *et al* , Defendants

)
) Beaufort County
) C A No 2003-CP-07-726
)

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Roosevelt Gardens, a South Carolina Limited
Partnership, *et al* , Defendants.

)
) Orangeburg County
) C A No 2005-CP-38-1131
)

Rhonda G Rentz, *et al* , Plaintiffs,
v
Orleans Gardens, a South Carolina Limited
Partnership, *et al* , Defendants

)
) Charleston County
) C A No 2005-CP-10-4229
)

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Palmetto Apartments, a South Carolina Limited
Partnership, *et al* , Defendants

)
) Beaufort County
) C A No 2005-CP-07-1989
)

Carolina Management Corporation of Beaufort,
et al , Plaintiffs,
v
Pinewood Park Apartments, a South Carolina
Limited Partnership, *et al* , Defendants

)
) Beaufort County
) C A No 2005-CP-07-1990
)

ORDER GRANTING IN PART AND DENYING IN PART
PLAINTIFFS' MOTION TO COMPEL, DATED JULY 29, 2005

THESE MATTERS COME BEFORE THE COURT on Plaintiffs' Motion to Compel, dated July 29, 2005 ("Motion"), which concerns Defendants' responses to Plaintiffs' Interrogatories and Request for Production, dated April 22, 2003, in the Parkview action. The Court has considered the parties' memoranda, and the oral argument of the parties' counsel at the hearing held on July 1, 2008, as well as the additional written materials submitted by the parties since the hearing on July 1, 2008.

[Handwritten signature]



It appears to the Court that the only remaining issue arising out of the Plaintiffs' Motion is the reasonable and appropriate scope of Plaintiffs' Interrogatory No 12, Interrogatory No 24 and Request for Production No 6. In accordance with the Court's previous instructions to the parties, counsel for the Plaintiffs and Defendants have attempted to reach an agreement as to the reasonable and appropriate scope of such discovery requests, but have been unable to do so. The subject discovery requests, and Defendants' responses to such requests, are set forth below.

Interrogatory No 12

For each complaint, claim or lawsuit initiated against the responding Defendant, state

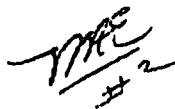
- (a) The title and date of each such complaint, claim or lawsuit,*
- (b) Outline the contents of the complaint, claim or lawsuit filed in each such action.*
- (c) The name and address of the court involved, if any, including the case number or civil action number assigned to the action, and*
- (d) The name and address of the complaining party, if applicable, and the name and address of the attorney for such party in each such complaint, claim or lawsuit.*

ANSWER Defendants object to this interrogatory on the grounds that it is vague and ambiguous, overly broad, unduly burdensome, and seeks information that is not reasonably calculated to lead to the discovery of admissible evidence. Defendants further object to Interrogatory No 12 to the extent it seeks historical information as to entities which no longer exist. Defendants further object on the basis that, to the extent such is public information, such is as easily available to Plaintiffs as Defendants. AIMCO is producing a list of lawsuits from its database.

Interrogatory No 24

Has the responding Defendant been investigated, reprimanded, criticized, cited or sanctioned by any governmental entity or organization with respect to the ownership, management and/or operation of any apartment complex? If so, set forth the names, addresses and telephone numbers of each such entity or organization, together with the precise nature of the investigation, reprimand, criticism, citation or sanction, and the form in which such activity occurred.

ANSWER Defendants object to this interrogatory on the grounds that it is vague and ambiguous, overly broad, unduly burdensome, and to the extent it seeks discovery of information that is not reasonably calculated to lead to the discovery of admissible evidence. For instance, the responding Defendants are subject to a vast array of rules and regulations of federal, state and local agencies.

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Request for Production No. 6

Originals or complete copies of any and all documentation relating to any lawsuits or other legal claims made against the responding Defendant by any limited partner of any other limited partnership in which the Defendant is or has been involved while also acting as a general partner in the Defendant Parkview Apartments Limited Partnership

RESPONSE *Defendants object to this Request on the grounds that it is improper, overly broad, unduly burdensome and seeks discovery of information that is not reasonably calculated to lead to the discovery of admissible evidence. Defendants further object to this request to the extent that it seeks documents readily available in the public domain and already in the possession of Plaintiffs or their attorneys*

The Court finds that each of the above discovery requests is overly broad and unduly burdensome, and seeks information that will be inadmissible at the trial of this action and is not reasonably calculated to lead to the discovery of admissible evidence. As such, the above discovery requests are beyond the scope of permissible discovery, pursuant to Rule 26(b), SCRCP. However, rather than flatly denying Plaintiffs' Motion with respect to these discovery requests, the Court orders the Defendants AIMCO, AmReal and Barton Tuck ("Tuck") to produce the following information and documents that are reasonably available to them, within thirty (30) days of the date of this Order:

- (1) Identify each lawsuit known to the Defendants AIMCO, AmReal or Tuck, which was initiated against AmReal or Tuck between 1984 and 2004, or initiated against AIMCO between 1994 and 2004, and which involved each of the following:
 - (a) claims by limited partners of a limited partnership, as plaintiffs, against the Defendants AIMCO, Tuck or AmReal, as general partners of the same limited partnership,
 - (b) allegations that the Defendants AIMCO, Tuck or AmReal breached fiduciary duties owed to the plaintiff limited partners, and
 - (c) allegations that the plaintiff limited partners' claims arise out of or are related to the said Defendants' ownership, management and/or operation of low-income apartment housing

The scope of this discovery does not include lawsuits based on tenant or prospective tenant complaints of any kind, employment disputes, construction disputes, vendor disputes, violation of any applicable environmental laws or regulations, claims of personal injury or property

damage, claims of simple breach of contract unrelated to the general partner-limited partner fiduciary relationship, or similar claims that are wholly unrelated to the subject matter of these cases. Defendants may comply with this discovery by providing a listing of the litigation with sufficient descriptors such that Plaintiffs can locate the court filings. The Court notes that Defendants have informed it and the Plaintiffs that, with respect to information that is reasonably available to Defendants AIMCO, AmReal and Tuck, the lawsuits responsive to this discovery have been previously identified to the Plaintiffs.

(2) Identify all formal administrative proceedings initiated by the United States Department of Housing and Urban Development ("HUD") against Defendants AmReal or Tuck between 1984 and 2001, or against Defendant AIMCO between 1994 and 2001, which involved or resulted in each of the following:

- (a) fines, financial penalties or financial settlements paid to HUD by Defendants AIMCO, AmReal or Tuck, and
- (b) alleged violation of HUD regulations by Defendants AIMCO, AmReal or Tuck in the course of their ownership, management and/or operation of any low income apartment housing.

For the purposes of this discovery, "administrative proceedings" shall be limited to those matters in which HUD sought administrative relief for the violation of a federal regulation or other law. The scope of this discovery does not include proceedings based on tenant or prospective tenant complaints of any kind, employment disputes, construction disputes, vendor disputes, violation of any applicable environmental laws or regulations, claims of personal injury or property damage or similar claims that are wholly unrelated to the subject matter of these cases. In lieu of identifying the administrative proceedings responsive to this discovery by written response, Defendants may produce documents that would be responsive to this discovery.

WHEREFORE, Plaintiffs' Motion is GRANTED, in part, with respect to the information or documents that Defendants are required to produce to Plaintiffs, as stated above. Except as expressly provided above, the Motion is DENIED. Further, Plaintiffs' request for an award of reasonable expenses of the Motion, including their attorneys' fees, pursuant to Rule 37, SCRCP, is DENIED.

IT IS SO ORDERED.

This 3rd day of March, 2009
Burke, South Carolina

Doyet A. Early, III
Doyet A. Early, III, Circuit Court Judge

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Parkview Apartments, a South Carolina Limited
Partnership, *et al* , Defendants

Beaufort County
C A No 2003-CP-07-726

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Roosevelt Gardens, a South Carolina Limited
Partnership, *et al* , Defendants

Orangeburg County
C A No 2005-CP-

Rhonda G Rentz, *et al* , Plaintiffs,
v
Orleans Gardens, a South Carolina Limited
Partnership, *et al* , Defendants

Charleston County
C A No 2005-CP-10-4229

Laurance H Davis, Jr , *et al* , Plaintiffs,
v
Palmetto Apartments, a South Carolina Limited
Partnership, *et al* , Defendants

Beaufort County
C A No 2005-CP-07-1989

Carolina Management Corporation of Beaufort,
et al , Plaintiffs,
v
Pinewood Park Apartments, a South Carolina
Limited Partnership, *et al* , Defendants

Beaufort County
C A. No 2005-CP-07-1990

2009 JUN -4 PM 12:45
ELECTED
CLERK OF COURT
BEAUFORT COUNTY S.C.
M. SMITH

ORDER ADOPTING FINDINGS AND CONCLUSIONS OF SPECIAL MASTER CLARY

By Orders of this Court dated December 30, 2008, January 31, 2009, and April 9, 2009 (collectively, "Prior Orders"), the Court appointed the Honorable Gary E Clary as Special Master in these actions for the purposes set forth in such Prior Orders Pursuant to the Prior Orders, which are incorporated herein by reference, Special Master Clary issued his Reports to the Court, dated April 14, 2009 and April 22, 2009 (collectively, "Reports") The Reports contain Special Master Clary's findings and conclusions with respect to the matters referred to

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him Counsel for the parties have advised the Court that they wish to be heard concerning their respective arguments and objections to the findings and conclusions contained in the Reports

The Reports are hereby adopted verbatim as an Order of the Court The Reports, which are attached hereto, are incorporated herein by reference This action is taken without prejudice to the parties' rights to make any arguments or objections concerning the findings and conclusions contained in the Reports, or the subject matter thereof, via Motion(s) to Alter or Amend this Order, pursuant to Rule 59(e), SCRPC As requested by the parties' counsel, the Court will grant a hearing on any Rule 59(e) Motion filed by the parties with respect to this Order and will afford the parties full consideration of any arguments or objections stated in such Motion(s), if any

IT IS SO ORDERED

This 3 day of June, 2009
Barney, South Carolina

Doyet A. Early, III
Doyet A. Early, III, Circuit Court Judge

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

Case No 2003-CP-07-726

Davis, et al

V. Parkview Apartments LP, et al

Plaintiff(s)

BEAUFORT COUNTY
CLERK OF COURT
BEAUFORT, S C

Defendant(s)

CHECK ONE

☐ JURY VERDICT This action came before the court for a trial by jury The issues have been tried and the verdict has been rendered

☒ DECISION BY 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

IT IS ORDERED AND ADJUDGED

☐ See attached order, ☒ Statement of Judgment by Court

After carefully reviewing all evidence before me and my prior order in the above-referenced matter, the Applicant's Motion to Alter or Amend Order Granting Defendant's Motion to Compel, dated November 6, 2008, Pursuant to Rule 59(e), SCRPC, is hereby DENIED.

Dated at Aiken, South Carolina, Date June 16, 2009 Judge W.B. Early Jr.

This judgment was entered on the 16th Day of June, 20 09, and a copy mailed this 22 Day of June, 20 09, to attorneys of record or to parties as follows

Attorney for Plaintiff(s)
Joel D Bailey
Bailey Law Firm
Post Office Box 1437
Beaufort, SC 29901-1437

Thomas A Pendarvis
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Haynesworth, Sinkler, Boyd
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Greenville, SC 29602-2048

Calvin T Vick, Jr
Haynsworth Sinkler Boyd, P A
Post Office Box 2048
Greenville, SC 29602-2048



[Signature]

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

Laurance H Davis Jr *et al* Plaintiffs
v
Parkview Apartments, a South Carolina Limited
Partnership *et al* Defendants

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Beaufort County
C A No 2003-CP-07 726

Laurance H Davis Jr *et al* Plaintiffs
v
Roosevelt Gardens, a South Carolina Limited
Partnership, *et al* Defendants

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Orangeburg County
C A No 2005-CP-38 1131

Rhonda G Rentz *et al* Plaintiffs,
v
Orleans Gardens a South Carolina Limited
Partnership *et al* Defendants

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)

Charleston County
C A No 2005-CP-10 4229

Laurance H Davis Jr *et al* Plaintiffs
v
Palmetto Apartments, a South Carolina Limited
Partnership *et al* Defendants

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)
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)

Beaufort County
C A No 2005-CP 07 1989

Carolina Management Corporation of Beaufort
et al Plaintiffs,
v
Pinewood Park Apartments a South Carolina
Limited Partnership *et al* , Defendants

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Beaufort County
C A No 2005-CP 07-1990

ORDER AMENDING COURT'S ORDER DATED JUNE 2, 2009

These matters are before the Court on the Plaintiffs Motion to Alter or Amend dated June 11 2009 and the Defendants Motion to Alter or Amend, dated June 15, 2009 In their respective motions the Plaintiffs and the Defendants request that the Court amend its Order dated June 2 2009 which adopted Special Master Clary's reports verbatim The parties motions were timely filed pursuant to Rule 59(e) SCRPC, and the Court has carefully considered the parties' memoranda exhibits oral arguments of all counsel at the July 6, 2009

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hearing and Special Master Clary's reports which were incorporated into the Court's June 2, 2009 Order by reference. The motions of the Plaintiffs and the Defendants are granted, in part, and denied, in part as set forth herein.

The Court's June 2, 2009 Order and the Special Master's reports incorporated therein are sustained in all aspects, except for the following amendments thereto:

(1) With regard to the Plaintiffs' argument that the fiduciary duty exception applies to Defendants' privileged documents, the Court finds that the requisite mutuality of interest between the parties ceased to exist as of December 9, 1999, which is the date of Mr. Weinberg's first letter to a general partner threatening litigation (AMREAL 014864 attached to Defendants' Memorandum as Exhibit 1). Accordingly, the fiduciary duty exception is not available to the Plaintiffs with regard to any privileged document dated (i.e. created) after December 9, 1999, and the following privileged documents which were previously designated for production shall not be produced:

Defendants' Documents (listed on pp. 12-14 of the Special Master's April 14, 2009 report)

1	AMREAL 00573-00576
20	AMREAL 004865-004867
23	GWB 000011
60	GWB 000271
76	GWB 000458-000459
78	GWB 000484

"Bryan Cave" Documents (listed on pp. 14-17 of the Special Master's April 14, 2009 report)

2	AMREAL 014670-014671
3	AMREAL 014672-014681
16	AMREAL 014875

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17	AMREAL 014876
18	AMREAL 014877-014879
19	AMREAL 014880-014886
20	AMREAL 014887-014890
21	AMREAL 014891-014892
22	AMREAL 014893-014894
24	AMREAL 014896-014897
26	AMREAL 014899
27	AMREAL 014900-014902
28	AMREAL 014903-014904
30	AMREAL 014906
31	AMREAL 014907
32	AMREAL 014908
33	AMREAL 014909
34	AMREAL 014910-014912
36	AMREAL 014914
37	AMREAL 014915
59	AMREAL 015060-015061
60	AMREAL 015062-015066
62	AMREAL 015068-015071
63	AMREAL 015072-015074
64	AMREAL 015075-015077
66	AMREAL 015079-015081
67	AMREAL 015087
68	AMREAL 015091-015092
69	AMREAL 015093-015095
70	AMREAL 015100-015103
71	AMREAL 015104-015107
72	AMREAL 015118-015119
73	AMREAL 015120-015122
74	AMREAL 015123-015126
75	AMREAL 015136-015138
76	AMREAL 015139-015140
77	AMREAL 015141-015144
78	AMREAL 015145-015151
79	AMREAL 015152-015153
81	AMREAL 015157-015167
87	AMREAL 015209-015213
89	AMREAL 015256
90	AMREAL 015257
91	AMREAL 015258
92	AMREAL 015259-015261
93	AMREAL 015262-015263
94	AMREAL 015268-015269
95	AMREAL 015272-015273

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96	AMREAL 015276-015277
97	AMREAL 015278-015279
98	AMREAL 015282-015283
99	AMREAL 015284
100	AMREAL 015285-015286
101	AMREAL 015287-015297
102	AMREAL 015298-015306
103	AMREAL 015307-015316
104	AMREAL 015317-015332
108	AMREAL 015341-015342
109	AMREAL 015343-015344
110	AMREAL 015345-015346
112	AMREAL 015350-015352
113	AMREAL 015353-015357
114	AMREAL 015358-015362
115	AMREAL 015363-015366
116	AMREAL 015367-015369
129	AMREAL 015423-015426
130	AMREAL 015427-015430
131	AMREAL 015431-015436
132	AMREAL 015437-015442
133	AMREAL 015443-015445

(2) The Court finds that the limited power of attorney from Mary Jane Pike to Jim Pike and/or Jane Miller was valid and there was no waiver of privilege as a result of documents being provided to Jim Pike and/or Jane Miller. The subject documents are identified in Special Master Clary's reports as Plaintiffs' documents 8, 9, 46, 54, 59, 100 and 103. However, two of these documents (46 - Bailey 3735, dated 2/14/01, 54 - Bailey 4019-4020 dated 9/19/02) are subject to production under paragraph 4 below so they shall be produced as previously ordered. The net result of the Court's findings is that the following documents, which were previously designated for production shall not be produced:

8	Parkview 2114-2115
9	Parkview 2143
59	Bailey 4055
100	Bailey 4874-4875

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(3) The Special Master concluded that documents involving communications with prospective clients of Mr Bailey were not privileged and should be produced, because Mr Bailey lacked the necessary attorney client relationship with such prospective clients. Plaintiffs argue that the attorney-client privilege extends to communications between Mr Bailey and prospective clients such as Warren Griffin, a limited partner in Lincoln Limited Partnership who did not retain Mr Bailey and is not a party to these lawsuits. The Court agrees with the Plaintiffs. Communications that are solely between Mr Bailey and prospective clients, who are not parties (or their predecessors or successors) to these lawsuits, are privileged and should not be produced. However, after reviewing the Special Master's reports and the Plaintiffs' Privilege Log, it appears that there are no such documents. There are, however, communications between Mr Bailey and his current clients (Plaintiffs) concerning, in whole or in part, Lincoln Limited Partnership. Mr Griffin is a party to some of these communications, but his participation does not, itself, destroy the privilege. Such documents are privileged unless the privilege has been impliedly waived by the Plaintiffs as described in paragraph 4 below (i.e., Plaintiffs have impliedly waived privilege as to documents dated more than three years prior to the filing of these lawsuits). The Court finds that two of the documents concerning the Lincoln Limited Partnership, which were designated for production by the Special Master, are privileged and are not subject to the implied waiver described in paragraph 4. These documents are communications occurring in 2004 between Mr Bailey and Plaintiffs, Rentz and Hodge. Accordingly, the following documents, which were previously designated for production, shall not be produced.

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83	Bailey 4593

(4) The Court finds that the statute of limitations is a major issue in these cases, and as shown in the Defendants' Memorandum and exhibits thereto, that the Plaintiffs impliedly waived their claims of privilege with respect to documents dated (i e , created) more than three years prior to the filing of these lawsuits. As a result the following documents, which were previously designated for protection, shall be produced

12	Bailey 3059
13	Bailey 3060
14	Bailey 3067 3069
15	Bailey 3070-3072
17	Bailey 3077-3078
18	Bailey 3082
19	Bailey 3105
20	Bailey 3148
21	Bailey 3151
22	Bailey 3152
23	Bailey 3153
24	Bailey 3154
25	Bailey 3155 3156
26	Bailey 3180
27	Bailey 3209-3212
28	Bailey 3215
29	Bailey 3216
30	Bailey 3217
31	Bailey 3316
34	Bailey 3321
38	Bailey 3333
39	Bailey 3334-3335
40	Bailey 3512
41	Bailey 3526-3528
42	Bailey 3695
43	Bailey 3715-3719
44	Bailey 3721-3726
45	Bailey 3731-3732
47	Bailey 3737
48	Bailey 3738

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49	Bailey 3754-3755
51	Bailey 3758-3759
52	Bailey 3768
53	Bailey 3799
66	Bailey 4218-4219
77	Bailey 4560
85	Bailey 4783
86	Bailey 4785-4787
87	Bailey 4804
88	Bailey 4808-4809
89	Bailey 4810
91	Bailey 4827
93	Bailey 4837
94	Bailey 4842
95	Bailey 4843
97	Bailey 4847-4851
98	Bailey 4854
99	Bailey 4859-4868
110	Bailey 4999
111	Bailey 5002 5004
112	Bailey 5008-5012
113	Bailey 5016
114	Bailey 5024
116	Bailey 5028
117	Bailey 5056
118	Bailey 5062
119	Bailey 5064
120	Bailey 5065-5069
121	Bailey 5071
122	Bailey 5073
123	Bailey 5074
124	Bailey 5080-5081
125	Bailey 5088 5089
126	Bailey 5092

(5) The Court finds that the Defendants privileged documents identified as Bryan Cave documents Nos 2 and 3 (listed on p 15 of the Special Master's April 14 2009 report) are not subject to the fiduciary duty exception, because these documents are not communications between a general partner acting in that capacity and the Limited Partnerships' attorneys

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Rather these documents concern communications between AIMCO, acting in its individual capacity and AIMCO's separate counsel Art Hessel who did not represent the Limited Partnerships. As a result the following documents, which were previously designated for production shall not be produced

2	AMREAL 014670-014671
3	AMREAL 014672-014681

The Court's June 2, 2009 Order and the Special Master's reports incorporated therein, are hereby amended as set forth above. In sum, pursuant to the Court's June 2, 2009 Order, as amended herein, the Plaintiffs and Defendants are ordered to produce the following documents within seven (7) days of the date of this Order.

Plaintiffs Shall Produce

1	Parkview 1951-1952
5	Parkview 2083
12	Bailey 3059
13	Bailey 3060
14	Bailey 3067-3069
15	Bailey 3070-3072
16	Bailey 3073
17	Bailey 3077-3078
18	Bailey 3082
19	Bailey 3105
20	Bailey 3148
21	Bailey 3151
22	Bailey 3152
23	Bailey 3153
24	Bailey 3154
25	Bailey 3155-3156
26	Bailey 3180
27	Bailey 3209-3212
28	Bailey 3215
29	Bailey 3216
30	Bailey 3217

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31	Bailey 3316
32	Bailey 3317
33	Bailey 3320
34	Bailey 3321
35	Bailey 3325
36	Bailey 3326 3327
37	Bailey 3328
38	Bailey 3333
39	Bailey 3334-3335
40	Bailey 3512
41	Bailey 3526-3528
42	Bailey 3695
43	Bailey 3715-3719
44	Bailey 3721-3726
45	Bailey 3731-3732
46	Bailey 3735
47	Bailey 3737
48	Bailey 3738
49	Bailey 3754-3755
50	Bailey 3756-3757
51	Bailey 3758 3759
52	Bailey 3768
53	Bailey 3799
54	Bailey 4019-4020
66	Bailey 4218-4219
71	Bailey 4467-4468
72	Bailey 4471
73	Bailey 4473
74	Bailey 4540 4543
75	Bailey 4547
76	Bailey 4548
77	Bailey 4560
78	Bailey 4565
79	Bailey 4572-4575
80	Bailey 4576-4577
81	Bailey 4580 4582
84	Bailey 4763
85	Bailey 4783
86	Bailey 4785-4787
87	Bailey 4804
88	Bailey 4808-4809
89	Bailey 4810
90	Bailey 4811
91	Bailey 4827
92	Bailey 4831

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93	Bailey 4837
94	Bailey 4842
95	Bailey 4843
96	Bailey 4846
97	Bailey 4847-4851
98	Bailey 4854
99	Bailey 4859 4868
104	Bailey 4885-4886
105	Bailey 4968
106	Bailey 4980
107	Bailey 4993
108	Bailey 4995 (identified as 4996 on Plaintiffs Privilege Log)
109	Bailey 4998
110	Bailey 4999
111	Bailey 5002 5004
112	Bailey 5008 5012
113	Bailey 5016
114	Bailey 5024
115	Bailey 5025
116	Bailey 5028
117	Bailey 5056
118	Bailey 5062
119	Bailey 5064
120	Bailey 5065-5069
121	Bailey 5071
122	Bailey 5073
123	Bailey 5074
124	Bailey 5080-5081
125	Bailey 5088-5089
126	Bailey 5092

Defendants Shall Produce

70	GWB 000380
71	GWB 000381-000421
Bryan Cave	
6	AMREAL 014865
7	AMREAL 014866
8	AMREAL 014867
9	AMREAL 014868
10	AMREAL 014869
11	AMREAL 014870

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12	AMREAL 014871
13	AMREAL 014872
14	AMREAL 014873
39	AMREAL 014917-014922
41	AMREAL 014924-014928
42	AMREAL 014939-014944
43	AMREAL 014945-014949
44	AMREAL 014950-014953
45	AMREAL 014954-014959
46	AMREAL 014960-014964
47	AMREAL 014965-014968
48	AMREAL 014984-014989
49	AMREAL 014990-014994
50	AMREAL 014995-014998
51	AMREAL 014999-015004
52	AMREAL 015005-015009
53	AMREAL 015010-015013
54	AMREAL 015020-015024
55	AMREAL 015044-015049
56	AMREAL 015050-015054
57	AMREAL 015055-015058

IT IS SO ORDERED

This 28th day of July 2009

Banker, South Carolina

Doyet A. Early III

Doyet A. Early III Circuit Court Judge

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

Laurance H Davis, Jr , *et al* , Plaintiffs,)

v)
Parkview Apartments, a South Carolina Limited)
Partnership, *et al* , Defendants)

Beaufort County

C A No 2003-CP-07-726

Laurance H Davis, Jr , *et al* , Plaintiffs,)

v)
Roosevelt Gardens, a South Carolina Limited)
Partnership, *et al* , Defendants)

Orangeburg County

C A No 2005-CP-38-1131

Rhonda G Rentz, *et al* , Plaintiffs,)

v)
Orleans Gardens, a South Carolina Limited)
Partnership, *et al* , Defendants)

Charleston County

C A No 2005-CP-10-4229

Laurance H Davis, Jr , *et al* , Plaintiffs,)

v)
Palmetto Apartments, a South Carolina Limited)
Partnership, *et al* , Defendants)

Beaufort County

C A No 2005-CP-07-1989

Carolina Management Corporation of Beaufort,)
et al , Plaintiffs,)

v)
Pinewood Park Apartments, a South Carolina)
Limited Partnership, *et al* , Defendants)

Beaufort County

C A No 2005-CP-07-1990

**ORDER GRANTING DEFENDANTS' TWO MOTIONS FOR SANCTIONS, FINDING
PLAINTIFFS IN CONTEMPT OF COURT, AND DISMISSING THE ABOVE-
CAPTIONED ACTIONS AS SANCTIONS FOR PLAINTIFFS' CONTEMPT**

This matter comes before the Court on Defendants' two Motions for Sanctions, dated July 24, 2009 and August 10, 2009 For the reasons set forth below, the Court grants Defendants' Motions The Court finds and hereby declares that Plaintiffs in each of the above-captioned actions are in contempt of court as a result of their willful failure to comply with the Court's Order dated July 28, 2009 (which amended the Court's Order dated June 2, 2009), and

DATE #1

EXHIBIT

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dismisses each of the above-captioned actions with prejudice as sanctions for such contempt, pursuant to Rule 37(b), SCRPC. The Court further finds and declares that Plaintiffs in each of the above-captioned actions are in contempt of court for the separate and additional reason that they have willfully disobeyed the Court's Order dated March 3, 2009. The Court dismisses each of the above-captioned actions with prejudice as sanctions for Plaintiffs' contempt with regard to the March 3, 2009 Order, as well. The Court also finds that Defendants should receive a monetary award to compensate them for the reasonable costs and attorneys' fees incurred in connection with their Motion to Compel Discovery and their two Motions for Sanctions, and the Court will enter a subsequent order declaring the amount of the award, as provided in this Order. Plaintiffs may purge the sanctions of dismissal of these actions by fully complying with both of the Court's discovery Orders, dated March 3, 2009 and July 28, 2009, within twenty-five (25) calendar days of the date of this Order.

FINDINGS OF FACT

1 General Background

By Order of the Supreme Court of South Carolina, dated March 7, 2006, these five (5) cases were assigned to the Undersigned to hear and decide all pre-trial motions and other matters pertaining to these cases, including the trial and post-trial motions. The matters before the Court concern two separate discovery disputes that date back to the summer of 2008. The first discovery dispute concerned Plaintiffs' failure to provide adequate responses to discovery requests served on August 28, 2008, and the dispute resulted in the Court's March 3, 2009 Order ("General Discovery Order"). The second discovery dispute concerned Defendants' challenges to Plaintiffs' claims of privilege for documents identified in Plaintiffs' July 28, 2008 Privilege Log, which resulted in the Court's July 28, 2009 Order ("Privilege Discovery Order"). Plaintiffs

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have failed to comply with either of the Court's discovery orders, resulting in Defendants' two Motions for Sanctions, dated July 24, 2009 (relating to General Discovery Order) and August 10, 2009 (relating to Privilege Discovery Order) The trial in the Parkview action was scheduled to commence on May 18, 2009, and again on January 19, 2010, but the trial had to be continued both times on account of Plaintiffs' failure to comply with the South Carolina Rules of Civil Procedure, the General Discovery Order and/or the Privilege Discovery Order

Before taking the actions set forth in this Order, the Court has considered at length all of the motions, memoranda, arguments, reports, letters from counsel, proposed orders, and orders relating to the underlying discovery disputes and the current Motions for Sanctions, including without limitation the following Defendants' Motion to Compel Discovery, dated November 6, 2008, all memoranda filed by the parties concerning Defendants' Motion to Compel, Plaintiffs' Responses to Defendants' Discovery Requests to All Plaintiffs, dated November 14, 2008, the oral argument of counsel at the December 9, 2008 hearing on Defendants' Motion to Compel, this Court's Orders dated December 30, 2008, January 31, 2009 and April 14, 2009, concerning the appointment of Special Master Clary, as well as the scope of the *in camera* review of documents by him, Plaintiffs' Supplemental Responses to Defendants' Discovery Requests to All Plaintiffs, dated January 26, 2009, this Court's Order dated March 3, 2009, Plaintiffs' Motion to Alter or Amend Order Granting Defendants' Motion to Compel, dated March 13, 2009, and all memoranda filed by the parties concerning Plaintiffs' Motion to Alter or Amend, Special Master Clary's reports to this Court, dated April 14, 2009 and April 22, 2009, this Court's Order dated June 2, 2009, the Plaintiffs' Motion to Alter or Amend the Court's Order, dated June 11, 2009, the Defendants' Motion to Alter or Amend the Court's Order, dated June 15, 2009, all memoranda filed by the parties concerning their respective motions to alter or

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amend the June 2, 2009 Order; the oral argument of counsel at the July 6, 2009 hearing on the parties' respective motions to alter or amend the June 2, 2009 Order; this Court's Order dated July 28, 2009 (amending the June 2, 2009 Order), Defendants' Motion for Sanctions, dated July 24, 2009, Defendants' Second Motion for Sanctions, dated August 10, 2009, all memoranda (including supplemental memoranda) filed by the parties concerning either or both of Defendants' Motions for Sanctions, the oral argument of counsel at the August 24, 2009 hearing on Defendants' two Motions for Sanctions, including Plaintiffs' oral motion for reconsideration of the July 28, 2009 Order (denied), Plaintiffs' Second Supplemental Response to Defendants' Discovery Requests to All Plaintiffs, dated August 24, 2009, the oral argument of counsel at the January 14, 2010 hearing on Defendants' two Motions for Sanctions, Plaintiffs' Third Supplemental Responses to Defendants' Discovery Requests to All Plaintiffs, dated January 25, 2010, and Plaintiffs' Motions for Relief from July 28, 2009 Order, dated January 28, 2010, and all memoranda filed by the parties concerning Plaintiffs' Motions for Relief from July 28, 2009 Order

2 Background and Findings of Fact Defendants' First Motion for Sanctions (General Discovery Order)

Defendants' first Motion for Sanctions concerns Plaintiffs' failure to comply with the Court's General Discovery Order, which compelled Plaintiffs to fully and completely answer Defendants' August 28, 2008 discovery requests within thirty (30) days of the Order. The Court makes the following findings of fact relevant to the first Motion for Sanctions

Defendants served the subject discovery requests ("Discovery Requests") on Plaintiffs on August 28, 2008, and granted Plaintiffs a 30 day extension to respond, making the responses due October 27, 2008. After receiving no responses from Plaintiffs, Defendants filed their Motion to

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Compel Discovery on November 6, 2008. Plaintiffs then served their responses and objections to the Discovery Requests on November 14, 2008. As the Court would later find in the General Discovery Order, Plaintiffs' responses to numerous document requests and interrogatories were "incomplete and inadequate." Defendants sent Plaintiffs' counsel a 12-page letter, dated December 4, 2008, discussing in detail the various deficiencies in Plaintiffs' discovery responses. Plaintiffs responded, by letter dated December 8, 2008, summarily dismissing the concerns and complaints raised in Defendants' counsel's letter. On that same date, Defendants filed and served their Memorandum in Support of Motion to Compel, which essentially addressed the same deficiencies noted in Defendants' counsel's December 4, 2008 letter.

On December 9, 2008, the Court heard oral argument from counsel on Defendants' Motion to Compel. The Court, with the agreement of the parties' counsel, essentially bifurcated the issues presented in the Motion to Compel. The Motion to Compel dealt primarily with two issues: (1) Plaintiffs' failure to provide full and complete responses to interrogatories and to produce non-privileged documents that were responsive to the Discovery Requests, and (2) Plaintiffs' failure to produce documents that they had withheld under claims of privilege, which had been challenged by Defendants. As to the first issue, the Court instructed the parties to attempt to resolve their dispute without Court intervention. Failing that, they were to return to the Court for its decision. As to the second issue (disputed claims of privilege), the Court and the parties agreed to enlist the assistance of a former Circuit Court Judge, Gary E. Clary, who would review the subject documents *in camera* and report his findings to the Court before the Court proceeded to rule on the privilege issues. The privilege issues pertain to Defendants' Second Motion for Sanctions, which is discussed separately in this Order.

In the weeks following the December 9, 2008 hearing, the parties' attorneys conferred

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about the resolution of the discovery dispute, and Plaintiffs' counsel advised that Plaintiffs would serve supplemental responses to the Discovery Requests by Christmas, which would address the issues raised by Defendants. Christmas came and went with no supplemental responses from Plaintiffs. Defendants' counsel inquired as to when Plaintiffs would provide their supplemental responses, and Plaintiffs' counsel advised that they would provide the supplemental responses by January 19, 2009. Plaintiffs did not serve their Supplemental Responses until January 26, 2009, and when they did, Defendants found that they did not address the deficiencies previously raised by Defendants. The parties informed the Court of the impasse, and the Court instructed the parties to submit proposed orders on the Motion to Compel with regard to the adequacy of Plaintiffs' responses to the Discovery Requests. On March 3, 2009, pursuant to Defendants' motion, the Court issued the General Discovery Order, which required Plaintiffs to "fully comply with the terms of this Order within thirty (30) days of the date of this Order." Further, the Order stated that the "Defendants' request for an award of reasonable expenses of the Motion, including their attorneys' fees, pursuant to Rule 37, SCRCP, is held in abeyance pending resolution of all discovery disputes."

On March 13, 2009, Plaintiffs filed and served their Motion to Alter or Amend the Court's March 3, 2009 Order, thereby staying the 30-day period for compliance with the General Discovery Order. Due to Plaintiffs' continuing failure to respond to discovery (and the ongoing dispute over alleged privileged materials), the Court was forced to continue the trial of the Parkview action from the May 18, 2009 term. On or about June 3, 2009, the parties' counsel received written notice that the Court had denied Plaintiffs' Motion to Alter or Amend as of that

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date¹ On July 21, 2009, having received no further responses from Plaintiffs, Defendants' counsel gave Plaintiffs written notice of their intent to file a motion for sanctions if Plaintiffs did not immediately comply with the General Discovery Order Plaintiffs' counsel replied, via letter, that they "hope" to provide complete discovery responses by the end of July Defendants filed their Motion for Sanctions on July 24, 2009, as a result of Plaintiffs' complete failure to comply with the General Discovery Order On July 28, 2009, during a conference call between and among the Court and the parties' counsel, the Court advised the parties that the new trial date for the Parkview action would be January 19, 2010 During that call, Plaintiffs' counsel again indicated that Plaintiffs would comply with the General Discovery Order, at least in piecemeal fashion, by the end of July

Despite Plaintiffs' assurances, they failed to provide any supplemental responses by the end of July Thus, the Court was required to hold a hearing on, *inter alia*, Defendants' Motion for Sanctions on August 24, 2009 At the hearing, Plaintiffs' counsel informed the Court that they were then serving Plaintiffs' Second Supplemental Response to the Discovery Requests (including two boxes of documents), and that such supplemental response constituted full compliance with the Court's General Discovery Order Based upon Plaintiffs' representation, the Court took the Motion for Sanctions under advisement Three days later, on August 27 2009, Defendants filed and served their Supplemental Memorandum in Support of Defendants' Motions for Sanctions, showing that Plaintiffs had not, in fact, complied with the General Discovery Order, and identifying the numerous deficiencies that remained in Plaintiffs' discovery responses As a result of Plaintiffs' continuing failure to comply with the Court's

¹ That June 3, 2009 Order was apparently lost during transmission from the Court to the Clerk of Court, so the Court issued a new order denying Plaintiffs' Motion to Alter or Amend on June 16, 2009, and the parties received written notice of the entry of that order soon thereafter Giving Plaintiffs the benefit of the doubt, the 30-day period for compliance with the General Discovery Order recommenced on or about June 16, 2009

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discovery orders, the Court was compelled to continue the scheduled trial of these cases from the January 19, 2010 trial term, by Order dated January 4, 2010²

On January 14, 2010, the Court held a second hearing on the record concerning Defendants' Motions for Sanctions, which was the fourth hearing on the record concerning Plaintiffs' discovery deficiencies³. At the hearing, Plaintiffs once again represented to the Court that their latest responses (i.e., Second Supplemental Responses to Discovery Requests) fully complied with the General Discovery Order. Contrary to such representation, the Court found that the Plaintiffs had not complied with the General Discovery Order, but granted Plaintiffs' request for an additional ten (10) days to fully comply. On January 25, 2010, Plaintiffs in the Parkview case served their Third Supplemental Responses to the Discovery Requests, supplementing their answers to Interrogatory Nos. 6, 18 and 19. None of the other Plaintiffs provided any supplemental response. Defendants responded by filing and serving their Second Supplemental Memorandum in Support of Motion for Sanctions Re General Discovery Order, identifying the continuing failure of all Plaintiffs, including the Parkview Plaintiffs, to comply with the General Discovery Order.

The Court finds that, despite the numerous opportunities afforded to Plaintiffs over the last year, the Plaintiffs have persistently failed to comply with the General Discovery Order and have failed to provide any legitimate excuse for their non-compliance. Plaintiffs' continuous non-compliance is well documented in the Memorandum in Support of Defendants' Two Motions for Sanctions, dated August 21, 2009 (pp. 2-6, 12-13), Supplemental Memorandum in

² The Court took no further action concerning the Motions for Sanctions between September and December, because the Plaintiffs filed a petition in the Supreme Court (denied), and a Notice of Appeal in the Court of Appeals (dismissed), seeking immediate review of the Privilege Discovery Order. The Court of Appeals issued remittitur on December 17, 2009.

³ In addition to the hearings on the record, the Court and the parties' counsel have discussed Plaintiffs' discovery deficiencies during several telephone conference calls and in-person meetings over the last 14 months.

DAE #8

Support of Defendants' Motions for Sanctions, dated August 27, 2009, and Defendants' Second Supplemental Memorandum in Support of Motion for Sanctions Re General Discovery Order, dated February 11, 2010. Plaintiffs' failure to comply with the General Discovery Order includes the following deficiencies:

- Contrary to the explicit instructions contained in the General Discovery Order, Plaintiffs have still not disclosed the relevant opinions held by their testifying expert witnesses or the bases for said opinions in response to Interrogatory No. 6 (the Parkview Plaintiffs' Third Supplemental Responses fall well short of what is required by the General Discovery Order, as shown in Defendants' Second Supplemental Memorandum at pp. 9-14, Plaintiffs in the other cases have provided even less),⁴
- Contrary to the express terms of the General Discovery Order, Plaintiffs have still not provided full and complete responses to Interrogatory Nos. 9, 10 and 12, which seek information concerning the *first* communications between two or more Plaintiffs, and/or between a Plaintiff and an attorney, regarding the investigation or pursuit of legal claims against any of the Defendants, and the date(s) upon which each of the Plaintiffs agreed to retain Joel Bailey, their attorney in these actions, to represent such Plaintiff or to provide legal services concerning the investigation or pursuit of claims against the Defendants (Plaintiffs refuse to answer these interrogatories, relying on groundless objections or answering that they "do not recall", see Defendants' Second Supplemental Memorandum

⁴ Though the General Discovery Order addresses Plaintiffs' failure to provide adequate responses to the August 28, 2008 Discovery Requests, the answers compelled to Interrogatory No. 6 (discovery of expert witnesses' opinions and basis for same) would be responsive to discovery served in the Parkview case on November 17, 2004, as well (see Interrogatory No. 10 in November 17, 2004 discovery requests).

at pp 3-8 and Supplemental Memorandum at pp 11-12),⁵

- Contrary to the express terms of the General Discovery Order, Plaintiffs have still not provided a full and complete response to Interrogatory No 3, which requests, for each case, an itemized statement of all damages claimed to have been sustained by Plaintiffs (see Defendants' Supplemental Memorandum at pp 9-10),
- Contrary to the express terms of the General Discovery Order, Plaintiffs continue to refuse to identify which documents were actually in the possession of each of the Plaintiffs, which is clearly relevant to Defendants' statute of limitations defense (i.e. what did each Plaintiff know, and when) (see Supplemental Memorandum at pp 7-8), and
- Contrary to the express terms of the General Discovery Order, Plaintiffs only provide partial responses to Interrogatory Nos 8, 18 (except as to Plaintiffs Davis, Pike, Reynolds and Rentz, who supplemented their response to No 18 in the Parkview Plaintiffs' Third Supplemental Responses) and 20 (see Supplemental Memorandum at pp 10-13)

The above findings are based upon evidence appearing in the record of these cases, including the various motions, memoranda and transcripts of the hearings identified on pp 3-4 of this Order

3 Background and Findings of Fact Defendants' Second Motion for Sanctions (Privilege Discovery Order)

Defendants' Second Motion for Sanctions concerns Plaintiffs' failure to comply with the Court's Privilege Discovery Order, which compelled Plaintiffs to produce ninety-six (96)

⁵ Even if each of the Plaintiffs has no independent recollection of these matters, as Plaintiffs apparently contend, it is clear they could provide responses that are more complete by reviewing information readily available to them (e.g., the numerous documents from that time period that are identified on Plaintiffs' Privilege Log). The fact of consultation with an attorney, and the subject matter of the consultation, are not privileged.

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documents identified in the Order within seven (7) days of the Order. The Court makes the following findings of fact relevant to the Second Motion for Sanctions:

The underlying discovery dispute began when Plaintiffs, pursuant to this Court's verbal order during a July 1, 2008 hearing, produced a complete privilege log to Defendants on July 30, 2008 ("Privilege Log").⁶ The Privilege Log identified ninety (90) documents, dated (i.e., created) between 1998 and 2004, which had not been previously identified in this litigation. On October 8, 2008, Defendants' counsel sent a letter to Plaintiffs' counsel, challenging Plaintiffs' claims of attorney-client privilege and/or work product protection for most of the documents listed on the Privilege Log. The parties were not able to resolve their differences as to whether various documents listed on the Privilege Log were privileged or subject to discovery. Defendants filed a Motion to Compel Discovery on November 6, 2008 (same as the Motion to Compel discussed above concerning the General Discovery Order), and argued, among other things, that various documents on Plaintiffs' Privilege Log were not protected by privilege and should be produced to Defendants.⁷

On December 9, 2008, this Court heard oral argument from counsel concerning Defendants' Motion to Compel Discovery. With respect to Defendants' claims that documents on Plaintiffs' Privilege Log should be produced in discovery, the Court, Plaintiffs' counsel and Defendants' counsel all agreed that an *in camera* review of the subject documents was in order.

⁶ Plaintiffs had provided a privilege log to Defendants on or about July 21, 2005 (identifying 44 documents), in response to discovery requests served by Defendants in the Parkview case on November 17, 2004, but Plaintiffs had since acknowledged that the privilege log needed to be supplemented to identify additional documents relevant to the subject matter of these actions. These additional documents were identified in Plaintiffs' July 30, 2008 Privilege Log.

⁷ After producing their July 28, 2008 Privilege Log, Plaintiffs subsequently produced revised privilege logs dated November 14, 2008 and December 31, 2008. All three are similar in content (same documents identified), but the December 31, 2008 version was the primary version considered in the parties' arguments and the Court's deliberations leading to the entry of the Privilege Discovery Order.

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Further, the Court advised the parties that it would also order the *in camera* review of documents identified in Defendants' privilege log, which Plaintiffs had unsuccessfully sought to obtain in their own motion to compel. Specifically, the Court and the parties' counsel agreed that the Court would enlist the assistance of a retired Circuit Court Judge, Gary E. Clary, to review the subject documents (of both Plaintiffs and Defendants) *in camera* and to report his findings and conclusions to this Court, whereupon the Court would issue an order ruling on the privilege disputes. This Court then entered an Order, dated December 30, 2008, appointing Gary Clary as Special Master for the limited purpose of reviewing *in camera* the documents identified on the parties' respective privilege logs and to issue a report of his findings and conclusions to the Court.

To be clear, the Court did not refer the actions themselves, or any cause of action asserted in these actions, to Special Master Clary. The scope of documents and privilege issues to be reviewed *in camera* by Special Master Clary was later expanded by a Consent Order, dated January 31, 2009, and by this Court's Order dated April 9, 2009. Importantly, these orders amended the December 30, 2008 Order to expressly provide: "The subject Order is further amended to provide that Special Master Clary is to provide this Court with a Report setting forth his findings and conclusions." See Orders dated January 31, 2009 and April 9, 2009. These orders, the *in camera* review performed by Special Master Clary pursuant to these orders, and the issuance of the Special Master's reports to the Court were all the subject of agreement between and among the Court and the parties' counsel.

After meeting on several occasions with the parties' counsel and completing his *in camera* review of the various documents identified on the parties' respective privilege logs, Special Master Clary provided this Court with his Report, dated April 14, 2009, and a

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Supplemental Report, dated April 22, 2009 After a discussion with the parties' counsel, this Court entered its Order, dated June 2, 2009, adopting the findings and conclusions contained in Special Master Clary's Reports, and incorporating the Reports therein As specifically requested by counsel for the Plaintiffs and the Defendants, the Court included the following language in its Order

"This action is taken without prejudice to the parties' rights to make any arguments or objections concerning the findings and conclusions contained in the Reports, or the subject matter thereof, via Motion(s) to Alter or Amend this Order, pursuant to Rule 59(e), SCRCP As requested by the parties' counsel, the Court will grant a hearing on any Rule 59(e) Motion filed by the parties with respect to this Order and will afford the parties full consideration of any arguments or objections stated in such Motion(s), if any "

See Order dated June 2, 2009 Plaintiffs then timely filed their Motion to Alter or Amend the June 2, 2009 Order, on June 11, 2009 Defendants also timely filed their Motion to Alter or Amend the June 2, 2009 Order, on June 15, 2009 On July 2, 2009, Plaintiffs and Defendants each served their memoranda in support of their respective motions to amend the June 2, 2009 Order, and the Court heard oral argument from the parties' counsel during a lengthy hearing on July 6, 2009

On July 28, 2009, this Court entered the Privilege Discovery Order, amending the June 2, 2009 Order, and granting in part and denying in part each of the parties' Rule 59(e) Motions In the Order, the Court specifically designated, by Bates number, the documents to be produced by Plaintiffs and the documents to be produced by Defendants Because the designated documents were readily available to the parties for production, having been previously Bates numbered and provided for *in camera* inspection, the Court ordered the parties to produce the documents within seven (7) days of the date of the Order See Order dated July 28, 2009 Defendants served a copy of the Privilege Discovery Order on Plaintiffs' counsel, via U S mail, on July 30, 2009

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See Defendants' Certificate of Service, dated July 30, 2009 Defendants also provided an electronic copy of the Order to Plaintiffs' counsel via e-mail on July 30, 2009 See Memorandum in Support of Defendants' Two Motions for Sanctions, dated August 21, 2009, at Exhibit F

Pursuant to the terms of the Privilege Discovery Order, Defendants produced their designated documents to Plaintiffs on August 3, 2009 See Memorandum in Support of Defendants' Two Motions for Sanctions, dated August 21, 2009, at Exhibit G Plaintiffs, however, failed to produce their designated documents as required by the Court's Order On August 10, 2009, having received no documents from Plaintiffs, nor any indication as to when and if Plaintiffs intended to comply with the Court's Order, Defendants filed and served their Second Motion for Sanctions

Defendants served their Memorandum in Support of Defendants' Two Motions for Sanctions on August 21, 2009, and the Court heard oral argument from the parties' counsel on August 24, 2009 At the hearing, Plaintiffs' counsel confirmed that the Plaintiffs had not produced any of the ninety-six (96) documents they were compelled to produce in the Privilege Discovery Order In response to the Court's inquiries, Plaintiffs' counsel informed the Court that the individual Plaintiffs had still not determined whether they would produce the subject documents in compliance with the Order or refuse to produce the documents and seek to appeal the Order Plaintiffs' counsel informed the Court that they had consulted with the Plaintiffs on this matter, and that some or all of the Plaintiffs had also consulted with other attorneys as to whether they should comply with the Privilege Discovery Order or pursue an appeal of the Order It is well settled that the claim of privilege belongs to the client, of course, and not his attorney The Plaintiffs alone must decide whether they will comply with the Court's Order or

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face sanctions for their failure to comply. At the August 24, 2009 hearing, the Court informed the parties' counsel that it was taking the matter under advisement, but warned that, if Plaintiffs' failure to comply with the Court's Order continued, the Court would likely dismiss the lawsuits pursuant to Rule 37(b), SCRPC. Plaintiffs made an oral motion for reconsideration of the Privilege Discovery Order at the conclusion of the hearing, which this Court denied.

On August 27, 2009, during a conference call among the parties' attorneys and the Court, the Court informed the parties' counsel that it intended to grant Defendants' Second Motion for Sanctions and dismiss the actions, but such sanctions would be vacated if Plaintiffs complied with the Privilege Discovery Order within twenty-five (25) days. The Court instructed Defendants' counsel to submit a proposed order and instructed Plaintiffs' counsel to immediately inform each of the Plaintiffs of the Court's intention to sign such an order in the next week. During a September 2, 2009 conference call with the parties' attorneys, the Court informed Plaintiffs' counsel that it would sign the aforementioned sanctions order that day. However, hours after the conference call concluded, and before the Court issued the written sanctions order, the Court was informed that Plaintiffs had filed that morning a Petition in the Supreme Court of South Carolina, seeking a Writ of Prohibition and/or a Writ of Certiorari concerning the Privilege Discovery Order and/or the sanctions order. The Court informed the parties that, in light of Plaintiffs' Petition to the Supreme Court, it would hold in abeyance the signing of the sanctions order. On September 10, 2009, Plaintiffs filed a Notice of Appeal to the Court of Appeals of South Carolina, seeking immediate review of the Privilege Discovery Order. On October 6, 2009, Plaintiffs sent a letter to Chief Justice Toal, requesting that these cases be transferred from the Undersigned to the Business Court. Chief Justice Toal denied Plaintiffs' request for a transfer on November 3, 2009. The Supreme Court denied Plaintiffs Petition on

DAE#15

November 19, 2009 The Court of Appeals dismissed Plaintiffs' appeal as premature on December 2, 2009, and issued remittitur on December 17, 2009

On January 14, 2010, the Court held a second hearing on Defendants' Motions for Sanctions, which was the fourth hearing concerning Plaintiffs' discovery deficiencies⁸ Plaintiffs' counsel acknowledged that Plaintiffs still had not complied with the Privilege Discovery Order, and the Court instructed Defendants' counsel to revise the proposed order granting Defendants' Second Motion for Sanctions to account for the passage of time since the Court first stated it would sign the sanctions order The Court also advised Plaintiffs' counsel that they would have ten (10) days from the date Defendants' counsel submitted the revised proposed order to respond to the proposed order Defendants' counsel submitted the revised proposed order, with a copy to Plaintiffs' counsel, and Plaintiffs' counsel responded within the ten (10) day period, sending a letter to the Court (copied to Defendants' counsel) with alternative proposed orders and filing and serving Motions for Relief from July 28, 2009 Order Amending Court's Order Dated June 2, 2009 in each of the above-captioned cases Plaintiffs' motions purported to be motions made under Rule 60(b), SCRCP

The above findings are based upon evidence appearing in the record of these cases, including the various motions, memoranda and transcripts of the hearings identified on pp 3-4 of this Order

DISCUSSION OF APPLICABLE LAW AND CONCLUSIONS

1. Civil Contempt

At this time, Plaintiffs have given the Court no reason to believe that they intend to

⁸ In addition to the hearings on the record on December 9, 2008, July 6, 2009, August 24, 2009 and January 14, 2010, the Court and the parties' counsel have discussed Plaintiffs' discovery deficiencies on several other occasions, including conference calls and meetings off the record

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comply with either the General Discovery Order or the Privilege Discovery Order. Indeed, their time for compliance under the terms of the two discovery orders passed many months ago. Plaintiffs have steadfastly refused to comply with the terms of the Privilege Discovery Order. The Court has afforded Plaintiffs many opportunities over the last year to comply with the terms of the General Discovery Order, but they have persistently failed to do so. They have been presented with a road map for compliance many times, through the plain terms of the General Discovery Order, the detailed memoranda served by Defendants, which specifically identify the manner in which Plaintiffs have failed to comply, and the Court's oral comments and rulings concerning the same. Further, the Plaintiffs, through their counsel, have been repeatedly warned that sanctions, including the sanctions of dismissing these actions, were not only a possible consequence, they were the likely consequence if the Plaintiffs persisted in their disobedience of the Court's orders. The Court even advised Plaintiffs that it was signing an order dismissing the actions as sanctions six (6) months ago. The Court can not escape the conclusion that Plaintiffs' failure to comply with the General Discovery Order and the Privilege Discovery Order is willful.

It is clear to the Court that Plaintiffs' failure to comply with either or both of the discovery orders has caused, and would continue to cause, extreme prejudice to Defendants. Plaintiffs' willful disobedience has deprived Defendants of critical discovery that is necessary to the presentment of their full defenses to Plaintiffs' claims. Plaintiffs' failure to produce the ninety-six (96) documents compelled in the Privilege Discovery Order, many of which appear relevant to Defendants' statute of limitations defense in these actions, continues to impede the Defendants' ability to complete discovery and prepare for trial. Defendants are similarly impacted by Plaintiffs' failure to provide complete responses to interrogatories concerning Plaintiffs' first communications with one another or with an attorney concerning the

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investigation or pursuit of claims against any of the Defendants Defendants are also deprived of a fair opportunity to defend against Plaintiffs' claims as a result of Plaintiffs' failure to provide meaningful responses concerning the opinions held by their expert witnesses, the bases for such experts' opinions, or the damages claimed in these cases

Further, it is inescapable that Plaintiffs' failure to obey the discovery orders has directly challenged and obstructed the Court's ability to control the administration of these cases The trial in the Parkview action had been scheduled to commence on January 19, 2010, but had to be continued due to Plaintiffs' failure to comply with the Court's discovery orders Plaintiffs' failure to comply with the General Discovery Order (in addition to the ongoing discovery dispute concerning the privilege issues) was a primary cause of the Court's earlier continuance of the Parkview trial from the May 18, 2009 term The Court's and the public's interests in the orderly, prompt and efficient administration of justice can little afford to have these cases, which were filed in 2003 and 2005, held hostage by Plaintiffs' continuing failure to comply with the Court's General Discovery Order and Privilege Discovery Order In addition to the obvious prejudice to Defendants, Plaintiffs' refusal to obey the Court's discovery orders impedes the Court's ability to control and efficiently manage its docket

After considering the record in these cases, the Court concludes that all Plaintiffs in these actions are in contempt of court "Contempt results from the willful disobedience of a court order, and before a court may find a person in contempt, the record must clearly and specifically reflect the contemptuous conduct A willful act is 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 " Ex Parte. David G Cannon, In Re. The Estate of James Brown, 685 S E 2d 814, 824 (Cl App 2009) (internal quotation marks and citations

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omitted) The record clearly shows that all of the Plaintiffs in the above-captioned actions have willfully disobeyed both the General Discovery Order and the Privilege Discovery Order Plaintiffs' persistent failure to comply with such orders has been both voluntary and intentional Plaintiffs could produce the documents as required by the Privilege Discovery Order, but they choose not to do so Plaintiffs could provide complete and intelligible responses to the interrogatories as required by the General Discovery Order, but they have chosen not to do so despite numerous opportunities Instead, they have remained deliberately evasive and ambiguous in their responses

While the Court is entering a finding of civil contempt, and imposing sanctions for the purpose of coercing compliance with the discovery orders and compensating and indemnifying Defendants (award of attorneys' fees), the record clearly reflects that Plaintiffs' persistent disobedience has, in fact, undermined the Court's administration of justice in these cases "In addition, courts have the inherent power to punish for offenses that are calculated to obstruct, degrade, and undermine the administration of justice Judges have the authority to *sua sponte* use contempt proceedings to preserve the authority and dignity of their courts" Id. (internal quotation marks and citations omitted)

"Once the moving party has made out a prima facie case for contempt, the burden then shifts to the respondent to establish his defense and inability to comply with the order" Id. (internal quotation marks and citations omitted) Civil contempt "must be proven by clear and convincing evidence" Id. The Court concludes that, as shown in its findings of fact, there is clear and convincing evidence of Plaintiffs' contempt (i.e., willful disobedience of both discovery orders), and Defendants have clearly made out a prima facie case for contempt

DAE #19

Plaintiffs have provided no defense, nor have they shown an inability to comply with either of the discovery orders. Their repeated representations that they have complied with the General Discovery Order, without more, is no defense at all in light of the clear evidence to the contrary. They freely admit that they have not complied with the terms of the Privilege Discovery Order. Instead, Plaintiffs have persisted in arguing, by way of untimely motions for reconsideration and otherwise, that the Privilege Discovery Order was wrongly decided. Plaintiffs continue to ask the Court to vacate or amend the Privilege Discovery Order, arguing, *inter alia*, that there are questions as to the effect of the implied waiver in the Orleans and Roosevelt cases, that the Court's Privilege Discovery Order was the result of mistakes of fact and law, and that the Court must now undertake a review of the 96 documents themselves. First, the Court disagrees with Plaintiffs' arguments. Once privilege was waived as to the documents (by mere filing of the suits and/or by reason of the allegations in the Orleans and Roosevelt complaints), they were subject to discovery in all five cases. There is no question that the 96 documents are relevant to the subject matter of these actions.⁹ At the July 6, 2009 hearing, which preceded the entry of the Privilege Discovery Order, in view of Special Master Clary's reports and the information contained in the parties' privilege logs, the Court did not find it necessary to review the documents themselves, nor did the parties request, or even suggest, such a review. The factual bases for the Court's rulings on the privilege issues have not changed. Second, and most importantly, Plaintiffs' dissatisfaction with the Court's rulings in the discovery orders are not an excuse for their willful disobedience of those orders. If Plaintiffs' disobedience

⁹ Plaintiffs briefly raised the question of relevance with respect to a few documents concerning Lincoln Limited Partnership in their June 11, 2009 Rule 59(e) motion, but the Court determined that the documents concerning Lincoln are relevant (see July 28, 2009 Order at p. 5). Special Master Clary's report did not find, and Plaintiffs have not contended (except as noted regarding Lincoln), that any of the 96 documents lack relevance to the subject matter of these actions.

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were excused by reason of their disagreement with the Court's rulings, a finding of contempt would never be appropriate in any case

"In determining whether the contempt is civil or criminal, the major factor to consider is the purpose for which the power is exercised, including the nature of the relief and the purpose for which the sentence is imposed. The purpose of civil contempt is to coerce the defendant to do the thing required by the order for the benefit of the complainant, while the primary purposes of criminal contempt are to preserve the court's authority and to punish for disobedience of its orders. If it is for civil contempt, the punishment is remedial and for the benefit of the complainant. If it is for criminal contempt, the sentence is punitive and meant to vindicate the authority of the court. When sanctions are conditioned on compliance with the court's order, the contempt is civil in nature." Id. (internal quotation marks and citations omitted). The Court finds and declares that Plaintiffs are in civil contempt, due to their willful disobedience of the General Discovery Order, and due to their willful disobedience of the Privilege Discovery Order. The sanctions of dismissal imposed in this Order are intended to coerce Plaintiffs' compliance with the discovery orders, allowing them to purge the dismissal sanctions if they comply with the discovery orders within twenty-five (25) calendar days of this Order. The sanction of awarding Defendants their expenses, including attorneys' fees, of the motions necessitated by Plaintiffs' misconduct in discovery is remedial, intended to compensate Defendants and indemnify them from the losses incurred due to Plaintiffs' misconduct.

2. Rule 37 Sanctions: Grounds for Dismissal

The General Discovery Order and the Privilege Discovery Order are orders compelling discovery, made under Rule 37(a), SCRPC, in response to the Defendants' Motion to Compel Discovery. It is clear that Plaintiffs have failed to comply with either of these orders and,

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therefore, Rule 37(b)(2), SCRPC, applies. The Rule provides, in part

"If a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following

(C) An order striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust "

Rule 37(b)(2), SCRPC

In light of Plaintiffs' refusal to comply with the Court's discovery orders, and the extreme prejudice suffered by Defendants as a result of Plaintiffs' non-compliance, the only sanction that can achieve justice is the dismissal of the lawsuits. Plaintiffs' non-compliance simply deprives Defendants of their ability to defend against Plaintiffs' claims, based on the statute of limitations defense and otherwise. Most of the documents that Plaintiffs were compelled to produce in the Privilege Discovery Order are dated (i.e., were created) more than three (3) years prior to the filing of these lawsuits, and they are likely relevant to Defendants' statute of limitations defense in these actions. Plaintiffs have failed to provide the dates that they first consulted an attorney regarding (or first discussed among themselves) the investigation or pursuit of claims against any of the Defendants. The Court compelled Plaintiffs to answer interrogatories seeking this information in its General Discovery Order (Interrogatory Nos. 9, 10 and 12), but Plaintiffs have refused to provide adequate responses. The Court has already found that "the statute of limitations is a major issue in these cases." See Order dated July 28, 2009, at

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The other sanctions available to the Court are either inadequate or would lead to the exact same result as the sanction of dismissal. Further, lesser sanctions are incapable of addressing the additional prejudice (i.e., prejudice to defenses unrelated to the statute of limitations), which Defendants have likely suffered but can not specifically identify due to Plaintiffs' refusal to provide the relevant documents and information. "Overly lenient sanctions are to be avoided where they result in inadequate protection of discovery." Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213, 217 (Ct. App. 1997). Refusing to disclose the substance of the Plaintiffs' expert witnesses' opinions, and the bases for such opinions, is clearly prejudicial to the Defendants. A lesser sanction aimed at this particular failure to comply with the Court's General Discovery Order, such as exclusion of expert witness testimony, would lead to the same result, because expert witness testimony as to the value of the subject properties is vital to the Plaintiffs' cases given the nature of this litigation. When a party is deprived of his rights to discovery, "prejudice must be presumed." See id. The party refusing to submit to discovery must bear the burden of proving lack of prejudice. See id. Plaintiffs have not proven a lack of prejudice on the Defendants' part.

In imposing the sanctions of dismissal, the Court has considered the various factors set forth in the applicable case law. For the reasons set forth above, the Court finds that, under these circumstances, the sanction of dismissal is reasonable, it does not go beyond the necessities of the situation to foreclose a decision on the merits of the cases, and it is aimed at the specific misconduct of the Plaintiffs. See Karppi v. Greenville Terrazzo Co., Inc., 327 S.C. 538, 489 S.E.2d 679, 682 (Ct. App. 1997). Further, the sanction imposed serves to protect the rights of discovery provided by the Rules of Civil Procedure. See id. If Plaintiffs are going to file

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lawsuits, engage in discovery under the Rules of Civil Procedure and receive the benefits thereof, but repeatedly refuse to produce their documents or provide full and meaningful responses to reasonable discovery requests after being ordered to do so by the Court, then their lawsuits should be dismissed in order to, among other things, protect the rights of discovery under the Rules

The Court has also considered the following factors in imposing the sanctions of dismissal (1) the "precise nature of the discovery," (2) "the discovery posture of the case," (3) "willfulness," and (4) "degree of prejudice" See Griffin Grading and Clearing, Inc. v Tire Service Equipment Mfg. Co., Inc., 334 S C 193, 551 S E 2d 716, 719 (Cl App 1999) (citing Laney v. Hefley, 262 S C 54, 202 S E 2d 12 (1974)) The discovery compelled by the Court is directed at, among other things the statute of limitations issue in these cases (the 96 documents to be produced may be responsive to a myriad of other discovery requests served in these actions by Defendants), the critical issue of the value of the properties (Plaintiffs claim the properties had substantial value and Defendants breached their fiduciary duties by not taking them back, whereas Defendants claim the properties lacked value net of indebtedness and accepting a return of the properties would not have been in the Limited Partnerships' best interests), and the basic issue of damages or the lack thereof The trial in the Parkview action was set to commence on January 19, 2010, but had to be continued due to Plaintiffs' failure to comply with the Court's discovery orders, and the Parkview action is almost seven (7) years old The other cases are more than four (4) years old Considering that Plaintiffs did not identify ninety (90) of the documents listed on their Privilege Log until July 30, 2008, Defendants could not have challenged Plaintiffs' claims of privilege earlier than they did Many of the documents first identified in July 2008 are among the documents Plaintiffs have been compelled to produce Nor

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could Defendants have acted more expediently in addressing Plaintiffs' failure to provide adequate responses to the Discovery Requests

The willfulness of the Plaintiffs' failure to comply with the discovery orders is abundantly clear, as discussed above. Plaintiffs have made the conscious choice to disobey the Court's discovery orders. The prejudice to the Defendants is also clear, as discussed above. As for the relative prejudice to the Plaintiffs, clearly it is prejudicial to dismiss Plaintiffs' actions. However, the prejudice to Plaintiffs if the cases are dismissed is not out of balance with the prejudice to Defendants as a result of Plaintiffs' failure to comply with the Court's General Discovery Order and Privilege Discovery Order. The prejudice to Plaintiffs is reasonable and necessary in order to counter the specific prejudice to Defendants. Further, the Court has afforded Plaintiffs ample opportunity to avoid the imposition of these sanctions, and Plaintiffs can purge the dismissal of these actions by complying with the General Discovery Order and the Privilege Discovery Order within twenty-five (25) days of the date of this Order. Plaintiffs control whether these cases stand permanently dismissed.

"Where the sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction." Griffin, 551 S.E.2d at 719. There is no question that Plaintiffs have willfully disobeyed the Court's discovery orders. By refusing to provide the Defendants with the documents and information as required by the Court's orders, Plaintiffs have also exhibited gross indifference to Defendants' rights in discovery. Defendants have carried their burden in showing that dismissal of the actions is the appropriate sanction under these circumstances. As to whether Plaintiffs have acted in bad faith, there is ample evidence that they have. Plaintiffs agreed to the entire process that ultimately resulted in the Court's Privilege Discovery Order, received benefits

DAE #25

from this process, and it now appears that they never intended to produce the documents they claimed to be privileged if the Court ordered them to do so. Further, Plaintiffs' initial responses to the Discovery Requests, as well as their First, Second and Third Supplemental Responses, are persistently evasive, ambiguous, incomplete and/or non-responsive. Plaintiffs have repeatedly been given a road map as to how to comply with the General Discovery Order, and the Court has afforded them many opportunities over the course of a full year to do so, but they have willfully and intentionally disobeyed the General Discovery Order at every turn.

3 Award of Expenses, Including Attorneys' Fees

In each of their Motions for Sanctions, Defendants request that they be awarded their reasonable expenses, including attorneys' fees, incurred as a result of Plaintiffs' failure to comply with the Court's General Discovery Order and Privilege Discovery Order. Further, in the General Discovery Order, the Court held in abeyance the Defendants' request for an award of reasonable expenses of their Motion to Compel Discovery, including attorneys' fees, pursuant to Rule 37(a)(4), SCRCP. The Court finds that Defendants should receive a monetary award to compensate them for the expenses, including attorneys' fees, that they have incurred in connection with their Motion to Compel (i.e., expenses incurred in order to obtain the General Discovery Order, pursuant to Rule 37(a)(4)) and each of their Motions for Sanctions. "Courts, by exercising their contempt power, can award attorneys' fees under a compensatory contempt theory. The award of attorneys' fees is not a punishment but an indemnification to the party bringing the action. However, any component of a sanction must be directly related to the contemptuous conduct and the loss incurred by the offended party." Ex Parte Cannon, 685 S.E.2d at 827 (internal quotation marks and citations omitted). The award of expenses is remedial and civil, even though the Plaintiffs will have no opportunity to purge themselves of the

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award See id. ("A fine may also be 'remedial and civil if paid to the complainant even though the contemnor has no opportunity to purge himself of the fine'" (citations omitted))

In order that the Court may determine the proper amount of expenses, including attorneys' fees, required for indemnification of the Defendants, the Court will accept evidence of such expenses as follows. Within fifteen (15) calendar days of the date of this Order, Defendants shall submit to the Court an affidavit in support of their requests for expenses. Beginning on the date Defendants serve their affidavit, Plaintiffs shall have fifteen (15) calendar days to respond by affidavit or at a hearing, if a hearing is requested. The Court shall retain jurisdiction over Defendants' requests for an award of expenses, and will enter a separate order as to the amount of the award at the appropriate time. The time allotted to Defendants to file their supporting affidavit, and for Plaintiffs' response to the same, shall not affect the running of the twenty-five (25) day period in which Plaintiffs may fully comply with the Orders dated March 3, 2009 and July 28, 2009, in order to purge the sanctions of dismissal entered herein.

4 Plaintiffs' Pending Motions for Relief from July 28, 2009 Order Are Denied

On January 28, 2010, Plaintiffs filed Motions for Relief from July 28, 2009 Order Amending Court's Order Dated June 2, 2009 in each of the above-captioned actions. These motions, which purport to be motions under Rule 60(b), SCRCP, are actually untimely motions for reconsideration subject to Rule 59(e), SCRCP. The Court's July 28, 2009 Order is an interlocutory discovery order, not a final order. As such, the Privilege Discovery Order is not subject to review by the trial court under Rule 60(b), SCRCP. Instead, the trial court may consider Plaintiffs' mislabeled motions as being additional motions for reconsideration of the Privilege Discovery Order under Rule 59(e), SCRCP (Plaintiffs previously made an oral motion

DAE #27

for reconsideration on August 24, 2009, which the Court denied) Further, Plaintiffs' motions are clearly untimely under Rule 59(e), which requires that such a motion be served "not later than 10 days after receipt of written notice of the entry of the order " Rule 59(e), SCRPC Plaintiffs' motions are inappropriate and are, therefore, denied

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT both of the Defendants' Motions for Sanctions are hereby GRANTED, the Court finds and hereby declares that the Plaintiffs in the above-captioned actions are in CONTEMPT of court, each of the above-captioned actions is hereby DISMISSED WITH PREJUDICE as sanctions for Plaintiffs' contempt, and pursuant to Rule 37(b)(2), SCRPC, subject to the terms stated herein, and the Court finds and hereby declares that Defendants are entitled to an award of reasonable expenses, including attorneys' fees, incurred in connection with their Motion to Compel Discovery and each of their two Motions for Sanctions, and that a subsequent order shall be entered as to the amount of the award Plaintiffs may purge the sanctions of dismissal with prejudice by showing the Court that they have fully complied with the Court's Orders dated March 3, 2009 and July 28, 2009 within twenty-five (25) calendar days of the date of this Order (i.e., the date this Order is signed, set forth below) Further, Plaintiffs' Motions for Relief from July 28, 2009 Order, which purport to be motions under Rule 60(b), SCRPC, but are actually untimely motions for reconsideration, are DENIED

IT IS SO ORDERED

This 4th day of April, 2010
Chen, South Carolina

Doyet A. Early, III
Doyet A. Early, III, Circuit Court Judge

RECEIVED NOV 29 2010

STATE OF SOUTH CAROLINA ^{085P-20 Pii 3 52}

IN THE COURT OF COMMON PLEAS

Laurance H Davis, Jr, *et al*, Plaintiffs, ¹⁻¹⁻³⁶

v

Parkview Apartments, a South Carolina
Limited Partnership, *et al*, Defendants

Laurance H Davis, Jr, *et al*, Plaintiffs,

v

Roosevelt Gardens, a South Carolina
Limited Partnership, *et al*, Defendants

Rhonda G Rentz, *et al*, Plaintiffs,

v

Orleans Gardens, a South Carolina
Limited Partnership, *et al*, Defendants

Laurance H Davis, Jr, *et al*, Plaintiffs,

v

Palmetto Apartments, a South Carolina
Limited Partnership, *et al*, Defendants

Carolina Management Corporation of
Beaufort, *et al*, Plaintiffs,

v

Pinewood Park Apartments, a South Carolina
Limited Partnership *et al*, Defendants

Beaufort County
C A No 2003-CP-07-726

Orangeburg County
C A No 2005-CP-38-1131

Charleston County
C A No 2005-CP-10-4229

Beaufort County
C A No 2005-CP-07-1989

Beaufort County
C A No 2005-CP-07-1990

ORDER

Plaintiffs have filed a motion seeking reconsideration of this court's order dated April 6, 2010, pursuant to Rule 59, SCRCP. The order was signed after Plaintiffs repeatedly failed to comply with orders dealing with discovery dated March 3, 2009 and July 28, 2009. Each of those orders have resulted from numerous hearings, motions, memoranda, arguments and rulings, including rulings denying Plaintiffs Rule 59/60 motions seeking reconsideration of these orders.



The court has carefully reconsidered all of Plaintiff's arguments in support of their motion, revisited all prior orders and the cases, memoranda and exhibits presented at each hearing, the court is still of the opinion that the previous orders were a correct application of the law to this factual matter

Therefore Plaintiff's motion is DENIED

IT IS SO ORDERED



The Honorable Doyet A. Early, III

Sept 16, 2010
Beaumont, South Carolina



State of South Carolina
The Circuit Court of the Second Judicial Circuit

Doyet A Early, III
Judge

Post Office Box 90
Bamberg SC 29003
Phone (803) 245 4004
Fax (803) 245 2983
dearlyj@sccourts.org

September 16, 2010

The Honorable Jeri Ann Roseneau
Post Office Box 1128
Beaufort, South Carolina 29901-1128

Re Laurance H Davis, Jr et al v Parkview Apartments 03 CP 07 726
Laurance H Davis Jr et al v Palmetto Apartments 05 CP 07 1989
Carolina Management Corp of Beaufort et al v Pinewood Park Apartments 05 CP 07 1990

Dear Ms Roseneau

Please find enclosed for filing my orders in the above cases Please file and serve all interested parties

Sincerely,


D A Early, III

DAE khc
Enclosures

cc Joel Bailey, Esquire
Ellis Johnston, Esquire
Thomas Pendarvis, Esquire

The Supreme Court of South Carolina

Lawrence H Davis, Jr , et al ,

v

Parkview Apartments, et al ,

Beaufort County
2003-CP-07-0723

Plaintiffs,

Defendants

Lawrence H Davis, Jr , et al ,

v

Palmetto Apartments, et al ,

Beaufort County
2005-CP-07-1989

Plaintiffs,

Defendants

Carolina Management Corporation of Beaufort, et al ,

v

Pinewood Park Apartments,

Beaufort County
2005-CP-07-1990

Plaintiffs,

Defendants

Rhoda G Rentz, et al ,

v

Orleans Gardens, et al ,

Charleston County
2005-CP-10-4229

Plaintiffs,

Defendants

Lawrence H Davis, Jr , et al ,

v

Roosevelt Gardens,

Orangeburg County
2005-CP-38-1131

Plaintiffs,

Defendants

ORDER

Pursuant to the provisions of S C CONST Art V, § 4, I find that assigning a single circuit judge to dispose of all matters arising out of the apartment management litigation currently pending and to be filed in the state court system will

promote the effective and expeditious disposition of this litigation by uniform rulings and will conserve the resources of the parties, their counsel, and the judiciary Therefore,

IT IS ORDERED that the Honorable Doyet A Early, III is assigned to hear and decide all pre-trial motions and other matters pertaining to these cases, including the trial and post-trial motions Judge Early may schedule necessary hearings at any time

S/Jean Hoefer Toal

Jean Hoefer Toal
Chief Justice

March 7, 2006
Columbia, South Carolina