

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY **S.C. Supreme Court**
Court of Common Pleas

Stephanie P. McDonald, Circuit Judge for The Ninth Judicial Circuit

Case No. 2013-000407

Alan Sheppard.....Petitioner

v.

William O. Higgins, Russell Bennett, Ronald C. Owens, Charles P. Darby,
Lynn McCants and Kiawah Resort Associates, LP.....Defendants

Of whom Russell Bennett, Ronald C. Owens, Charles P. Darby, and Kiawah
Resort Associates LP..... Respondents

PETITIONER'S APPENDIX VOL. 2

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In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Judge for The Ninth Judicial Circuit.

Case No. 2013-000407

Alan Sheppard.....Appellants

v.

Lynn McCants, Ronald C. Owens, Russell Bennett, Charles P. Darby,
Kiawah Resort Associates LP.....Respondents

APPELLANT'S REPLY BRIEF

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South Carolina Rule Civil Procedure Rule 15

STATEMENT OF ISSUES ON APPEAL

- I. ALLEGATIONS MADE BY THE APPELLANT IN THE RECORD BEFORE THE TRIAL COURT CONSTITUTE A CAUSE OF ACTION THAT COULD NOT BE BARRED BY RES JUDICATA OR THE STATUTE OF LIMITATIONS.**

ARGUMENT

I. ALLEGATIONS MADE BY THE APPELLANT IN THE RECORD BEFORE THE TRIAL COURT CONSTITUTE A CAUSE OF ACTION THAT COULD NOT BE BARRED BY RES JUDICATA OR THE STATUTE OF LIMITATIONS.

The standard review of this Court is the same standard as that of the Trial Court. *Williams v. Condon* 347, S.C. 227, 553 S.E.2d 496 (Ct. App 2000). If there are factual allegations that would entitle a Plaintiff to relief on any theory, the case should not be dismissed. *Baird v. Charleston County* 333 S.C. 519, 511, S.E. 2d 69 (1999). A complaint should not be dismissed merely because the court has doubts that the Plaintiff will prevail. *Toussaint v. Ham* 292 S.C. 415, 357 S.E. 2d 8 (1987).

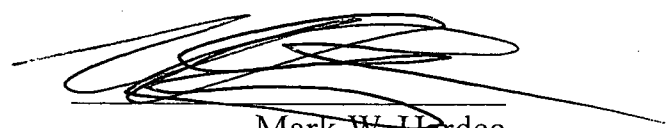
The Plaintiff clearly made allegations to the Court, which would clearly set forth a cause of action, which would not be barred by either res judicata or the statute of limitations. Just because the Appellant was *pro se* in the underlining proceedings, he should not be penalized because he did not use the magic words of "Amend my Complaint", which pursuant to the *Rule 15 of South Carolina Rules of Civil Procedure*, should have been freely granted.

The court reviewed the allegations made by the Plaintiff, which clearly constitutes a cause of action that could not have been barred by the Statute of Limitations or res judicata, since the allegations accrued after both the Order relied on by the Respondents, within the statute of limitations. The Plaintiffs status as a *pro se* litigant, clearly effects his attempt to make these allegations in an artful manner. However, this court should look at substance over form.

CONCLUSION

Based on the above, the Appellant would pray that the Order of Dismissal be overturned and that this case be remanded for trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mark W. Hardee", written over a horizontal line.

November 19, 2013

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CERTIFICATE OF SERVICE

I, Vicky McCarter, an employee with the law firm of The Hardee Firm., do hereby certify that I have this date served a copy of the following pleading upon the individual named below, by placing a copy in the United States Mail, postage prepaid and return address clearly indicated to the address below:

COUNSEL SERVED:

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PLEADING:

Appellants Reply Brief

A handwritten signature in cursive script, appearing to read "McCarter", written over a horizontal line.

Vicky McCarter

Columbia, South Carolina
November 19, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Case No. 2011-CP-10-4537
Appellate Case No.: 2013-000407

Alan Sheppard,

Appellant,

v.

William O. Higgins, Russell Bennett,
Ronald C. Owens, Charles P. Darby,
Lynn McCants, and Kiawah Resort
Associates, L.P.,

Defendants,

Of whom Russell Bennett, Ronald C.
Owens, Charles P. Darby, Lynn McCants,
and Kiawah Resort Associates, L.P.,

are the Respondents.

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STATEMENT OF ISSUES ON APPEAL

- I. Should this Court undertake any review the lower court's grant of a Motion for Judgment on the Pleadings where the sole issue raised by Appellant on appeal relates to a claim that was not even pled in the Complaint in light of the applicable legal standard that the motion must be resolved on the pleadings alone?

- II. Should the decision of the lower court be affirmed where, even if the unpled claim were to be reviewed on appeal, Appellant fails to assert a viable claim for fraud against Respondents, fails to plead fraud with particularity, fails to plead any of the nine required elements to state a claim for fraud, and otherwise fails to state a claim for which relief could be granted?

- III. Should Appellant be allowed to assert a claim for fraud in his individual capacity when he lacks standing to assert the claim due to the fact that the claimed damages from the alleged fraud relate to an asset that was owned by a limited liability company and not by Appellant?

- IV. Should the lower court's decision to grant the Motion for Judgment on the Pleadings be affirmed where all claims pled in the Complaint were barred by *res judicata*, prior release, and statute of limitations?

STATEMENT OF THE CASE

Appellant Alan Sheppard ("Sheppard") filed this action ("Second Action") against Respondents on June 27, 2011, asserting claims for "public corruption" and "conspiring to commit fraud" relating to claims that were previously asserted and resolved in a prior lawsuit ("Prior Action") (R. pp. 8-12). Respondents filed an Answer (R. pp. 13-17) and, subsequently by right, an Amended Answer (R. pp. 18-22) in the Second Action attaching several exhibits from the Prior Action, including the Settlement and Release Agreement and the executed Stipulation of Dismissal with Prejudice. Having incorporated the exhibits into the pleadings under Rule 8(c), SCRCP, Respondents promptly filed a Motion for Judgment on the Pleadings on November 22, 2011 on the basis that the Second Action was barred by *res judicata*, prior release, the applicable statute of limitations, and failure to state a claim of any kind against Respondents Kiawah Resort Associates, L.P. ("KRA") and Charles Darby. (R. pp. 23-63).

On April 25, 2012, the lower court held a hearing on Respondents' Motion. At the hearing, Sheppard presented an "Overview" submission to the lower court (R. pp. 64-107), which Sheppard and the lower court twice confirmed would be accepted as a "Brief in Opposition" to Respondents' Motion for Judgment on the Pleadings. (R. pp. 371:8-28; R. pp. 398:8 - 399:7). At the close of the hearing, the lower court took the matter under advisement. On October 12, 2012, the lower court issued a letter ruling to all parties by electronic mail indicating that Respondents' Motion for Judgment on the Pleadings was granted and instructing counsel for Respondents to submit a proposed order to chambers five (5) days after first submitting it to Sheppard. (R. p. 449). Counsel for Respondents

did as instructed by the lower court, preparing and submitting the proposed order to Sheppard on October 23, 2012, and then submitting it to the lower court on October 29, 2012. Thereafter, Sheppard filed a “Reply to Motion to Dismiss and Supporting Memorandum Affidavit” on November 2, 2012. (R. pp. 128-347). Although the lower court accepted Sheppard’s “Overview” submission dated April 25, 2012 at the hearing as a brief in opposition, the lower court had already ruled when Sheppard submitted his Reply to Motion to Dismiss and Supporting Memorandum Affidavit on November 2, 2012, which was six (6) months after the record was closed.

On January 25, 2013, the lower court signed and entered a final order (“Final Order”) granting Respondents’ Motion for Judgment on the Pleadings on the same grounds articulated in the lower court’s letter ruling. (R. pp. 1-6). Sheppard filed a Motion for New Trial on January 25, 2013, which the lower court denied on February 20, 2013. This appeal followed.

FACTS

In 2004, Wando River, LLC (“Wando River”), a South Carolina limited liability company, approached Respondents KRA and Russell Bennett (“Bennett”) for assistance in facilitating Wando River’s purchase of two tracts of real property (“Property”) located in Berkeley County, South Carolina. The members of Wando River were Sheppard and Julian Simmons (“Simmons”). KRA and Bennett agreed to act as guarantors for Wando River in exchange for specific rights and interests that were memorialized in an Agreement and a Warrant (“Agreement and Warrant”). Although this action admittedly relates to damages incurred by Wando River, the entity is not a party to this action or appeal. Sheppard purported to bring this action in his own name.

In early 2008, KRA and Bennett were required to file a civil action (“Prior Action”) against Wando River, Sheppard and Julian Simmons due to actions taken in violation of the Agreement and Warrant. (R. pp. 30-39). Specifically, Wando River was attempting to sell the Property to a third party, Wando E, LLC (“Wando E”), in violation of the rights of KRA and Bennett. Wando River, Sheppard and Simmons asserted counterclaims in the Prior Action against KRA and Bennett, including all of the allegations relating to the D.R. Horton earnest money deposit and other issues that Sheppard has attempted to re-litigate in his own name in this action. (R. pp. 40-47).

The Prior Action was resolved by consent through a Settlement and Release Agreement signed June 26, 2008. (R. pp. 48-53). The underlying basis of the settlement was to allow Wando River to proceed with the sale of the Property to a third-party, Wando E, LLC (“Wando E”), provided that the compromise amounts stipulated in the Settlement and Release Agreement were paid to KRA and Bennett at the closing

("Closing"). *Id.* The Settlement and Release Agreement included a stipulation, on the part of both Sheppard and Respondents, that the agreement was intended "to memorialize a compromise enforcement of prior agreements" and "to fully resolve and discharge all rights and obligations" among the parties. (R. pp. 50-51).

Within two days, on June 28 2008, the Closing occurred. Lynn McCants, Esq., who served as counsel for Wando E, handled the Closing and disbursed the funds in accordance with the settlement agreement. (R. pp. 44:19-45:7). Eighteen (18) days after the Closing, on July 15, 2008, the Prior Action was dismissed by way of a Stipulation of Dismissal with Prejudice that was signed by Cotton Harness, as counsel for Wando River, Sheppard, and Simmons, and by the undersigned, as counsel for KRA and Bennett. (R. pp. 55-56).

Three years passed. Then, on June 27, 2011, in violation of the Settlement and Release Agreement and Stipulation of Dismissal with Prejudice, Sheppard re-filed the claims that had been released and dismissed with prejudice in the Prior Action relating to an earnest money deposit. (R. pp. 8-12). The final events relating to the earnest money dispute occurred in September 2006. (R. pp. 57-60; R. pp. 61-62). The Complaint indicates that Sheppard was asserting causes of action for "Public Corruption" and "Fraud," although the Complaint did not include any allegations relating to the elements required to state a claim for fraud. Sheppard did not serve Respondents with the Complaint until October 2011.

After filing an Answer and an Amended Answer, Respondents filed a Motion for Judgment on the Pleadings on November 22, 2011 on the basis that the claims were barred by *res judicata*, prior release, and the statute of limitations. A hearing on

Respondents' Motion for Judgment on the Pleadings was held on April 25, 2012. On the day of the hearing, Sheppard submitted an "Overview," which he asked the lower court to accept as a Brief in Opposition. On two separate occasions during the hearing, the lower court and Sheppard both confirmed that the Overview was intended and was accepted as a brief in opposition to Respondents' Motion. At no time during the proceedings did Sheppard ever file an amended Complaint or seek leave of court to amend his Complaint.

After taking the matter under advisement, the lower court ruled in favor of Respondents and granted judgment on the pleadings. Sheppard has brought this appeal, claiming that the lower court should have considered a different claim of fraud that Sheppard had devised but had never pled in his Complaint ("Unpled Claim"). According to Sheppard, the Unpled Claim would circumvent the lower court's grounds for dismissal of the Complaint because it related to the Closing but, according to Sheppard, did not arise until the 48-hour period between the execution of the Settlement Agreement and the Closing. The Complaint, filed three (3) years after the alleged date of the Unpled Claim, contains no references, circumstances or allegations relating to the June 28, 2008 Closing or any claim for fraud relating to the Closing.

ARGUMENTS

I. BY FAILING TO ASSERT THE UNPLED CLAIM IN HIS COMPLAINT, APPELLANT FAILED TO PRESERVE ANY ISSUE FOR REVIEW BY THIS COURT.

Sheppard concedes that any and all claims that existed which he could assert in his own name up through June 26, 2008, the date when the Settlement and Release Agreement was executed, were properly dismissed by the lower court, as no argument to the contrary is set forth in Appellant's Brief. This concession is highly relevant,

however, as the only claims that were pled in the Complaint all arose prior to June 26, 2008. When the lower court ruled, it ruled upon Sheppard's actual Complaint, as it must. The Court did not rule upon the Unpled Claim because it was not pled. Specifically, the Complaint did not include a claim for fraud relating to the June 28, 2008 closing. The fraud claim pled in the Complaint relating to an earnest money issue that occurred in 2006. During the twenty (20) months that this action was pending before the lower court, and the five (5) years that have passed since the Closing, Sheppard never pled a claim for fraud relating to the June 28, 2008 Closing, but this Unpled Claim is the sole purported basis of Sheppard's appeal.

This appeal should be summarily denied. The lower court cannot consider any unpled claims when ruling upon a motion for judgment on the pleadings. In fact, if the lower court were to do so, this would be error. In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, "the trial court must base its ruling solely on allegations set forth in the complaint." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). During the hearing, the lower court confirmed that this specific, binding legal standard would be the basis upon which the motion would be resolved:

What their motion addresses today is judgment on the pleading which is the paper you filed to get into court, the complaint, that form. I am bound to look at what you claim in that form and what they claim in response to it.

(R. pp. 370:25 - 371:4). The lower court did as it indicated it would and as it was obligated to do; relying upon the pleadings themselves to resolve the motion. Sheppard specifically agreed with the lower court's statement and confirmed that his brief in opposition had to do with "case law" and not "facts." (R. p. 51:4-12). Having confirmed

for the lower court that his brief in opposition was simply a brief relating to case law, Sheppard cannot argue on appeal that it should be “bootstrapped” into an amended complaint or a request for leave to amend. *See, e.g., Dunes West Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280; 302 737 S.E.2d 601, 612, n. 11 (2013). By failing to plead the Unpled Claim, Sheppard failed to preserve any issue for review on appeal as the lower court could not and did not rule upon the Unpled Claim in connection with Respondents’ Motion for Judgment on the Pleadings.

At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). It is “axiomatic that an issue cannot be raised for the first time on appeal.” *Id.* In resolving the Motion for Judgment on the Pleadings, the lower court did not consider the Unpled Claim because it was outside of the pleadings, which should preclude any review of the issue on appeal. *See Roeder v. American Postal Workers Union, AFL-CIO*, 180 F.3d 733, 737 n.4 (1st Cir. 1999) (holding that claims not pled in the Complaint at the time the lower court heard motion for summary judgment were not within the permissible scope of review by the appellate court).

It is the Complaint as filed that must be reviewed by the lower court, as opposed to a hypothetical pleading. A plaintiff cannot amend his pleadings through briefs formulated in response to a motion to dismiss or motion for judgment on the pleadings. *See Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984) (stating that it is “axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss”). “To hold otherwise would mean that a party could unilaterally amend a complaint at will.” *Morgan Distrib. Co., Inc. v. Unidynamic Corp.*, 868 F.2d

992, 995 (8th Cir. 1989). This is true even where a party is proceeding *pro se* and seeks indulgences from the lower court. *See, e.g., McDonald v. Hall*, 610 F.2d 16, 19 (1st Cir. 1979) (the duty to be “less stringent” with *pro se* complaints does not require the court “to conjure up unpled allegations”). On this basis, as well as compelling considerations of due process and judicial economy, the decision of the lower court should be affirmed. Because the Unpled Claim could not be considered by the lower court in making its ruling, it was not ruled upon by the lower court. As a result, there is no preserved issue appropriate for review relating to the Unpled Claim.

II. EVEN IF THE UNPLED CLAIM COULD BE CONSIDERED IN RESOLVING A MOTION FOR JUDGMENT ON THE PLEADINGS, DISMISSAL WAS PROPER BECAUSE THE UNPLED CLAIM DOES NOT STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED.

If this Court were to consider the issue of the Unpled Claim to be appropriate for appellate review, the lower court’s dismissal of the action should still be affirmed because the Unpled Claim is not supported by factual allegations sufficient to form a viable claim for fraud upon which relief could be granted. The lower court did not address the factual sufficiency of the Unpled Claim, for the very reason that it was unpled. However, the insufficiency of the Unpled Claim may be raised by Respondents on appeal as an additional reason why this Court should affirm the lower court’s ruling. *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419-20, 526 S.E.2d 716, 723 (2000). If this Court were to indulge Sheppard’s Unpled Claim, the record as a whole fails to include sufficient allegations to state even a minimally viable claim for fraud under South Carolina law that could survive a motion for judgment on the pleadings. As a result, the ruling of the lower court should be affirmed on this additional ground.

In order to recover in an action for fraud, “the following elements must be shown by clear, cogent and convincing evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. Failure to prove any one of the foregoing elements is fatal to recovery.” *M. B. Kahn Const. Co., Inc. v. South Carolina Nat. Bank of Charleston*, 275 S.C. 381, 384, 271 S.E.2d 414, 415 (1980). Additionally, claims for fraud are subject to heightened pleading standards. Under the South Carolina Rules of Civil Procedure, “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” Rule 9(b), SCRCP. It is also well-settled that “[a] complaint is fatally defective if it fails to allege all nine elements of fraud.” *Ardis v. Cox*, 314 S.C. 512, 516, 431 S.E.2d 267, 269 (Ct. App. 1993).

The pleading failure with regard to Unpled Claim is not limited to one or two of the required elements for fraud. It encompasses all nine. First, Sheppard has never identified any underlying representation(s) made to him by each Respondent after June 26, 2008, the date when the Settlement and Release was signed. This defect alone is dispositive, but there is a similar absence of any allegations with regard to the other eight required elements. There are no indications of representations made by each Respondent to Sheppard that were false and material. Similarly, there are no allegations in the record that would show that each Respondent knew that any unspecified representation made to Sheppard was false or that each Respondent acted in reckless disregard of the falsity. Sheppard presented no factual allegations of intent on the part of each Respondent that

Sheppard act upon the unalleged representations, or that he was ignorant of the falsity of the representations and had a right to rely upon them. Finally, Sheppard has failed to identify any damages that he incurred as a consequent and proximate result of any representation by each Respondent, as the Property was an asset owned by Wando River, not Sheppard.

Sheppard's allegation at the hearing was that unspecified Respondents told him prior to closing that "he" would clear a certain amount of funds at the Closing, which at the time would have had to have been a future event. These vague allegations are patently insufficient to state a claim that could survive the applicable legal standard. Respondents were neither the buyer nor the seller of the Property and, therefore, did not control the disbursement of proceeds from the Closing. Notwithstanding the invented allegations underlying the Unpled Claim, Sheppard was not the seller either and, therefore, would not have received any proceeds at Closing. Furthermore, if taken as true, they did not relate to any existing fact at the time they were made. In any action for actual fraud, the alleged representation must be one of existing fact, not merely promises or statements as to future events which later were unfulfilled. *Schie v. Gay & Taylor, Inc.*, 290 S.C. 31, 34, 347 S.E.2d 910, 912 (Ct. App. 1986). Unless the plaintiff can show that a defendant made a promise of future action with no intention of fulfilling the promise at the time it was made, the representation cannot be the basis of an action for fraud. *Id.* The truth or falsity of a representation must be determined as of the time it was made or acted on and not at some later date. *Winburn v. Insurance Co. of North America*, 287 S.C. 435, 440, 339 S.E.2d 142, 146 (Ct. App. 1985); *Woods v. State*, 314 S.C. 501, 506, 431 S.E.2d 260, 263 (Ct. App. 1993).

Under South Carolina law, “a false prediction or promise of future events generally cannot be a basis for fraud because it is not a representation, there is no right to rely on it, and it is not false when made... misrepresentation of future profits, a type of opinion and prediction of future events, generally cannot constitute fraud.” See *Miller v. Premier Corp.*, 608 F.2d 973, 981 (4th Cir. 1979). Any predictions relating to the amounts that made by Respondents are also not actionable under South Carolina law as they relate to future events. *Koontz v. Thomas*, 333 S.C. 702, 713, 511 S.E.2d 407, 413 (Ct. App. 1999) (holding trial court properly granted motion for summary judgment on negligent misrepresentation claim where plaintiff’s alleged representations “related to future events, not existing facts”); *Emerson v. Powell*, 283 S.C. 293, 296, 321 S.E.2d 629, 631 (Ct. App. 1984) (“As a general rule... the fraudulent misrepresentation must relate to a present or preexisting fact and it cannot ordinarily be based on unfulfilled promises or statements as to future events.”). Thus, even under the legal standard applicable upon a motion for judgment on the pleadings, Sheppard’s claim lacks any potential merit.

Additionally, Sheppard’s argument that the Closing constituted a “fraud” is untenable due to the fact that a party cannot recover for a fraudulent misrepresentation which induces him to perform an act he was legally obligated to perform. *M. B. Kahn Const. Co., Inc. v. S. Carolina Nat. Bank of Charleston*, 275 S.C. 381, 384, 271 S.E.2d 414, 415 (1980). Wando River, through Sheppard, signed a contract to sell the Property to Wando E as well as a Settlement and Release Agreement confirming that the Property would be sold to Wando E and that certain funds would be paid at closing to Respondents KRA and Bennett. The events that Sheppard belatedly asserts somehow constitute a “fraud” are actually the mere performance and execution of contractual duties on the part

of the various parties concerned. Because Wando River, and Sheppard as its member, were legally obligated to sell the Property, it is impermissible for Sheppard to assert a claim for fraud relating to the Closing.

III. IN ACCORDANCE WITH RULE 220(C), SCACR, THE LOWER COURT'S RULING SHOULD BE AFFIRMED ON THE ADDITIONAL GROUND THAT APPELLANT CANNOT ASSERT CLAIMS BELONGING TO WANDO RIVER, LLC IN HIS INDIVIDUAL CAPACITY.

Sheppard brings this appeal in his individual capacity, but has no standing to assert claims on behalf of Wando River, the limited liability company that was the actual owner of the Property. As Sheppard was not the "Seller" and has a legal existence distinct from the LLC in which he was a member, he has no standing to assert a claim that Respondents should not have taken any proceeds from the sale. Due to the already sufficient grounds for dismissal of Sheppard's Complaint, this specific argument was not addressed in the proceedings below. However, Respondents may raise it freely on appeal as an additional reason why the appellate court should affirm the trial court's ruling as it appears in the record on appeal. *On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (S.C. 2000); *see also* S.C. App. Ct. R. 208(c) ("[t]he appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal").

The South Carolina Limited Liability Company Act provides that, "[e]xcept as provided in Section 12-2-25 for single-member limited liability companies, a limited liability company is a legal entity distinct from its members." *See* S.C. Code Ann. § 33-44-201. Sheppard's lawsuit violates this fundamental principle, as he plainly has attempted to assert a claim in his own name for alleged damages incurred by the entity in

connection with the sale of the Property that was owned by the entity. This is impermissible. An individual member cannot pursue a claim in his own name for damages suffered by the limited liability company. *See, e.g., Park Regency, LLC v. R&D Development of the Carolinas, LLC*, 402 S.C. 401, 418, 741 S.E.2d 528, 537 (Ct. App. 2012) (ruling that a claim for damages arising from alleged harm to a limited liability company belongs to the entity and cannot be asserted by its individual members), *citing* S.C. Code § 33-44-201; *see also Kelly v. Porter, Inc.*, 687 F.Supp.2d 632, 638 (E.D. La. 2010) (sole member of LLC had no ownership in vessel owned by LLC and thus had no standing to pursue action for damages to vessel).

It is undisputed that Wando River was the owner of the Property. Wando River is not a party to this action, but was a party to the Settlement and Release Agreement that was fully performed. Sheppard filed the Complaint *pro se* solely in his own name. (R. pp. 8-12). The monetary damages alleged, whether they be \$500,000.00, \$2,800,000.00, or \$19,000,000.00,¹ would indisputably be alleged damages suffered by Wando River, not Sheppard. Therefore, any hypothetical claim relating to these damages could only be brought by Wando River, not Sheppard. For this additional reason, the decision of the trial court should be affirmed.

IV. THE LOWER COURT DID NOT ERR IN GRANTING JUDGMENT ON THE PLEADINGS ON THE BASIS THAT THE COMPLAINT WAS BARRED BY RES JUDICATA, PRIOR RELEASE, AND THE STATUTE OF LIMITATIONS.

The lower court was correct to grant Respondents' Motion for Judgment on the Pleadings, which is reviewed under the same general legal standard as is a motion to

¹ These are three iterations of the alleged damages that Sheppard has claimed in this action.

dismiss. In deciding whether the trial court properly granted the motion to dismiss based on a failure to state facts sufficient to constitute a cause of action, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. *Rice-Marko v. Wachovia Corp.*, 398 S.C. 301, 307, 728 S.E.2d 61, 64-65 (Ct. App. 2012). When the Complaint in this action is so viewed, it is clear that dismissal by the lower court was proper.

Under South Carolina law, a dismissal with prejudice constitutes adjudication on the merits and, operating as *res judicata*, precludes subsequent litigation to the same extent as if the action had been tried to a final adjudication. See *Nunnery v. Branley Constr. Co., Inc.*, 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986); see also *Nelson v. QHG of S.C., Inc.*, 354 S.C. 290, 311 580 S.E.2d 171, 182 (Ct. App. 2003) (affirming grant of motion to dismiss on basis of *res judicata* for parties who were omitted from the initial action but were related to the parties included), *aff'd in part and rev'd in part on other grounds*, 362 S.C. 421, 608 S.E.2d 855 (2005).

Following an extended review of the arguments presented, the lower court determined that *res judicata* applied to these facts and barred Appellant from pursuing his Complaint against Respondents. To establish *res judicata*, Respondents were required to prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. See, e.g., *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). Regarding the first element, Appellant, KRA, and Bennett were named parties in the Prior Action, while Darby and Owens are officers or agents of KRA and are therefore considered “parties” for purposes of *res judicata* on the basis of their relationship to the named parties.

Second, there is identity of subject matter between the two actions. Both the Prior Action and Appellant's Complaint relate specifically to the Wando River Property, allegations of interference with the sale of the Wando River Property, and allegations that Respondents should not have received the earnest money for the Wando River Property. Third, the entry of a Stipulation of Dismissal with Prejudice is specifically considered a prior "adjudication" of the issues under South Carolina law, satisfying the third element. See, e.g., *Nunnery*, 289 S.C. at 209 345-S.E.2d at 743. On this basis, the lower court was correct in ruling that the Complaint was barred by res judicata. Sheppard has failed to preserve and present any issue in this regard.

The lower court also ruled that the Complaint should be dismissed on the basis of the mutual release set forth in the Settlement and Release Agreement dated June 26, 2008: A release is reviewed under the same legal standards as are other contracts. See *Hyman v. Ford Motor Co.*, 142 F.Supp.2d 735, 741 (D.S.C. 2001). In construing terms in contracts, this Court must first look at the language of the contract to determine the intentions of the parties. *C.A.N. Enterprises, Inc. v. South Carolina Health & Human Services Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). As noted by the lower court, the Mutual Release was intended as a voluntary and mutual waiver of all claims relating not only to the Wando River Property but also to any other subject matter. The Mutual Release was intended specifically to cover each Respondent, as indicated by its terms. Because the Complaint attempts to assert claims that were released by Appellant under the Mutual Release, the Complaint was barred. The lower court acted properly in dismissing it.

Finally, the lower court was also correct that the Complaint was barred by the applicable statute of limitations. As indicated by the pleadings, the events relating to the \$500,000 in earnest money that were previously litigated by Wando River occurred during or prior to September 2006. (R. pp. 57-60; R. pp. 61-62). Appellant first asserted the claims relating to the earnest money in April 2008, before he settled and released the claims in June 2008. After three years passed, Appellant filed his Complaint on June 27, 2011. This filing comes nearly five years after the actual events relating to the earnest money issue occurred. Accordingly, Appellant did not commence this action until more than three years after the alleged claims accrued (notwithstanding the fact that the claims were previously settled and dismissed with prejudice). The applicable statute of limitations for the claim asserted in the Complaint against Respondents Owens and Bennett (conversion of the earnest money) is three years,² such that the statute of limitations for any such claim expired on September 18, 2009.

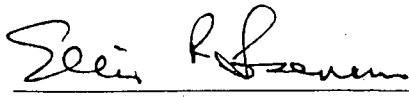
CONCLUSION

Respondents request that the lower court's Order dated January 25, 2013 be affirmed and that this Court issue an order requiring Appellant to pay Respondents all allowable attorney's fees and costs incurred in connection with this improper appeal.

[Signature page to follow]

²See S.C. Code Ann. § 15-3-530(5).

Respectfully submitted,

By:  _____

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Lesemann & Barks LLC
80 Alexander Street, Second Floor
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(843) 724-5155
Attorney for Respondents

February 20, 2014
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Case No. 2011-CP-10-4537
Appellate Case No.: 2013-000407

Alan Sheppard,

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V. FEB 21 2014

Appellant.

William O. Higgins, Russell Bennett,
Ronald C. Owens, Charles P. Darby,
Lynn McCants, and Kiawah Resort
Associates, L.P.,

SC Court of Appeals

Defendants,

Of whom Russell Bennett, Ronald C.
Owens, Charles P. Darby, Lynn McCants,
and Kiawah Resort Associates, L.P.,

are the Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

By: 

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February 20, 2014
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge.

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RECEIVED

FEB 21 2014

SC Court of Appeals

Alan Sheppard,

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William O. Higgins, Russell Bennett,
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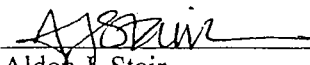
Of whom Russell Bennett, Ronald C.
Owens, Charles P. Darby, Lynn McCants,
and Kiawah Resort Associates, L.P.,

are the Respondents.

PROOF OF SERVICE

I hereby certify that I have this date, mailed, postage prepaid, a true and correct copy of
the **Final Brief of Respondents** to the following counsel of record:

Mark W. Hardee, Esquire
The Hardee Law Firm
2301 Devine Street
Columbia, SC 29205
Attorney for Appellant

By: 
Alden J. Stair

February 20, 2014
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
FEB 28 2014
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Judge for The Ninth Judicial Circuit

Case No. 2013-000407

Alan Sheppard.....Appellant

v.

William O. Higgins, Russell Bennett, Ronald C. Owens, Charles P. Darby,
Lynn McCants and Kiawah Resort Associates, LP.....Defendants

Of whom Russell Bennett, Ronald C. Owens, Charles P. Darby, and Kiawah
Resort Associates LP.....Respondents

APPELLANT'S FINAL BRIEF

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II. The Trial Court Erred in Finding that the Appellant’s Claims Are Barred by the Statue of Limitations, Since the Appellant’s Claims of Respondents’ Wrongdoing Arise from a Closing that Accured on July 28, 2008, and the Lawsuit was Filed on July 27, 2011.

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STATEMENT OF ISSUES ON APPEAL

- I. The Trial Court Erred in Finding that the Appellant's Claims are Barred by Res Judicata and Release, Since the Appellant's Claims Arise Out of a Closing, Which Accured on July 28, 2008, After the Settlement and Release Ending the Prior Lawsuit.

- II. The Trial Court Erred in Finding that the Appellant's Claims Are Barred by the Statue of Limitations, Since the Appellant's Claims of Respondents' Wrongdoing Arise from a Closing that Accured on July 28, 2008, and the Lawsuit was Filed on July 27, 2011.

STATEMENT OF THE CASE

The Appellant filed a *Pro se* Complaint on July 27, 2011. (R. pp. 8) The Respondents¹ Answered (R. pp. 13) and filed a Motion to Dismiss on February 5, 2013. (R. pp. 108) A hearing was held on April 25, 2012, in front of the Honorable Stephanie P. McDonald. Respondent McCants was dismissed by consent, at that time. The Judge accepted additional material from the Appellant to “know what happened” and to tell whether what [he] said here “lets [him] go forward”. (R. pp. 64; 363, 371-373, 379, 391-392, 399-401) Trial Court issued an Order dismissing the Respondents Ronald Owens, Russell Bennett, Charles Darby, and Kiawah Resort Associates LP on January 18, 2013, and issued an Order dismissing Respondents Higgins on January 18, 2013. The Appellant filed a Notice of Appeal *Pro Se* against both Orders. The Appellant has dismissed the Appeal as to Respondent, Higgins and proceeds with this Appeal as to Respondents Ronald Owens, Russell Bennett, and Charles Darby and Kiawah Resort Associates LP only.

2.

¹ The Appeal of the Order as to original Respondent Higgins has been withdrawn, therefore, from this point forward, Respondents shall apply to Respondents Owens, Bennett, Darby and Kiawah Resort Associates LP only.

Facts

The Appellant controlled an entity Wando River LLC which held a contract on valuable property in Charleston County. (Wando Property) The Respondants Russell Bennett, Ronald Owens, and Charles Darby through their entity Kiawah Resorts Associates. LP entered in a joint venture with Appellant to develop or sell the property. (R. pp. 404; 64-73, 85-92) The Appellant's group Wando River LLC. held the controlling interest in the project. The Respondents began taking actions that breached their fiduciary duty to the joint venture and the Appellant, and eventually the Respondents filed a lawsuit in Berkley County, to enforce a contract of sale of the Wando property to a third party relating to the Wando property. (R. pp. 404; 64-73, 85-92) The Appellant asserted Counter Claims for Interference with Contractual Relationship, Breach of Duty, Interference with the Contract, and Breach of Implied Duty of Good Fair and Dealing. (R. pp. 435) That case was settled and memorialized in the terms of a Settlement and Release Agreement, dated July 26, 2011, which allowed for the Appellant's group Wando River LLC. to sell the Wando property to a third party. (R. pp. 443) A Stipulation of Dismissal with Prejudice was filed with the Berkley County

Clerk of Court. (R. pp. 441) Importantly, the closing between the Appellant's entity and the third party regarding the Wando River property took place on July 28, 2008. (R. pp. 443; 92-94) At that closing, the Respondents again breached their duties to the Appellant and took actions, knowing that they had economic advantage over the Appellant, forcing the Appellant to take far less from the closing than what was contemplated by the prior settlement. (R. pp. 92-94) The Appellant was forced to close on the property, under economic duress and in an effort to mitigate his damages, on July 28, 2008. (R. pp. 92-94) This was after both the Stipulation of Dismissal and Settlement Agreement in the prior action. The Appellant commenced this lawsuit on July 27, 2011, within the three statute of limitation period.

ARGUMENT

- I. **The Trial Court Erred in Finding that the Appellant's Claims are Barred by Res Judicata and Release, Since the Appellant's Claims Arise Out of a Closing, Which Accured on July 28, 2008, After the Settlement and Release Ending the Prior Lawsuit.**

The Respondents moved for Judgment on the Pleadings pursuant to Rule 12(c) SCRCF. [Motion] During the hearing on that Motion, the trial court allowed additional material to be considered including, a submission by the Appellant with attachments. (R. pp. 64; 349) Even though the trial court accepted and reviewed material outside of the pleadings, its Order of January 18, 2012 does not convert the motion as one for Summary Judgment pursuant to Rule 56 SCRCF. It appears from the transcript of the hearing that the Court considered the submission by the Appellant to be an Amendment to his Complaint, which had been filed *pro se*, and was not artfully drafted, so she could “know what happened” and to “look at whether... what you said lets you go forward”. (R. pp. 363; 371-373; 379, 391-392, 399-401) If the Appellant’s submission is to be treated as part of the Complaint in this matter, than all facts alleged in the submission are considered true, and are admitted as far as Motion to Dismiss is concerned. *Rosenthal v. Unarco Indus, Inc.* 278 S.C. 420, 297 S.E.2d 638(1982). *Baker Hosp. v. Firemans Fund ins. Co.* 314 S.C. 98, 441 S.E.2d 822(1994). [R. pp 64; Order]

Nowhere in the Trial Courts Order dismissing the Appellants Complaint, does it mention the July 28, 2008 closing on the Wando Property

to a third party, and the activities complained of by the Appellant in this case. (R. pp 64; 443) Obviously, actions by the Respondents on July 28, 2008 could not be the subject of either *Res Judicata*, or subject to the Settlement and Release, as both the Settlement and Release of the prior action, and the Stipulation of Dismissal with Prejudice were signed prior to the alleged misconduct. (R. pp. 443; 441) These allegations of misconduct must be assumed as admitted and true at this stage of the proceedings. *Baker Hosp. v. Firemans Fund Ins. Co.* 314 S.C. 98, 441 S.E.2d 822(1994).

Therefore, the trial court was in error in finding that the Appellant's claims were barred by *Res Judicata* and by Release. The Appellant stated in his Reply to Motion to Dismiss and Supporting Memorandum Affidavit:

"The closing that took place on July 28, 2008 was the final act under duress that Wando River had to deal with. It was at this point that [Respondents] accumulated their acts of fraud" [92-93] It is clear that at least part of the activities complained of by the Appellant, accrued after the Dismissal of the prior proceedings, and subsequent to the Settlement and Release.

Therefore, the activities of the Respondents could have not have been

considered, and or adjudicated in the prior action. *See Nunnery v. Brantley Constr. Co. Inc.* 289 S.C. 205, 209, 345 S.E.2d 740, 743(Ct. App.1986)
Nelson v. QHG of SC Inc. 354 S.C. 290, 311 580 S.E.2d 171,182(Ct. App. 2003)

The Appellant states in his submission to the Trial Court:

Closing finally occurred on June 28, 2008 at a price of 5.57 million after numerous attempts. All the terms that I as Managing Member for Wando River LLC agreed to and signed for are simple thrown aside by Mr. Bennett, Mr. Darby. They simply take 110%of proceeds and leave all the documents to be taken care of when I get back. The laws according to Bennett and Darby. He who has the cash rules. (R. pp. 92-93)

Since the Appellant has alleged misconduct by the Respondent subsequent to the Stipulation of Dismissal, this case does not fall under the second and third prong of the *Res Judicata* test; the identity of the subject matter could not have been adjudicated in the prior suit, as that issue did not exist at that time. *See Plum Creek Dev. Co. v. City of Conway* 334 S.C. 30, 34 512 S.E.2d 106, 109(1999)

I. The Trial Court Erred in Finding that the Appellant's Claims Are barred by the Statue of Limitations, Since the Appellant's Claims of Respondents' Wrongdoing Arise from a Closing that Accured on July 28, 2008, and the Lawsuit was Filed on July 27, 2011.

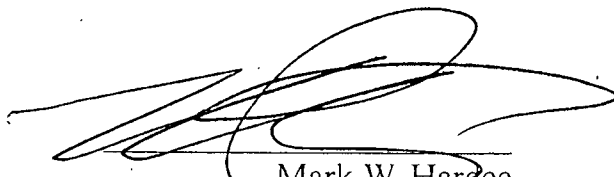
As stated above, the Appellant has complained of activities by the Respondent that accrued at the closing of the Wando property, which was being sold to a third party, with the proceeds to be divided between the Respondents and the Appellant. (R. pp 443; 363, 371-373, 379, 391-392, 399-401) The Appellant has alleged that the Respondents, during the June 25, 2008 closing, wrongfully took advantage of the Appellant's economic disadvantage at the time, forcing him to close on the property and accept less proceeds than he was entitled, due to the Appellant's economic disadvantage, and in an effort to mitigate damages. (R. pp 443; 92-93) The Summons and Complaint was filed by the Appellant on July 27, 2011, within the three year Statute of Limitation period. *SC Code section 15-3-530*. Therefore, the Court erred in finding that "Appellant has not made any allegations relating to causes of

action arising on or after July 27, 2008, and therefore the Complaint is barred under the Statute of Limitations". [Order] In fact, the Appellant has made allegations that the Respondent acted wrongfully on July 28, 2008, therefore the Complaint was filed within the Statute of Limitations. (R. pp. 443; 64-107)

CONCLUSION

Based on the above, the Appellant acerts that the trial court erred in issuing its Order of Dismissal, and this case should be remanded to trial court for further proceedings.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Mark W. Hardee', written over a horizontal line.

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Attorney for Appellant

February 20, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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SC Court of Appeals

Appellate Case No. 2013-000407

Alan Sheppard.....Appellant

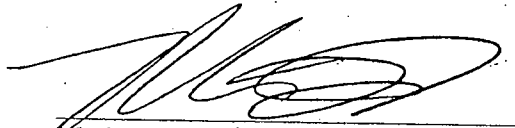
v.

William O. Higgins, Russell Bennett, Ronald C. Owens, Charles P. Darby,
Lynn McCants and Kiawah Resort Associates, LP.....Defendant

Of whom Russell Bennett, Ronald C. Owens, Charles P. Darby, and Kiawah
Resorts Associates LP.....Respondents

CERTIFICATE OF COUNSEL

The undersigned certified that this Appellant's Final Brief complies with Rule 211(b),
SCACR.



Mark W. Hardee
Hardee Law Firm
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Columbia, South Carolina 29205
(803) 799-0905
Attorney for Appellant

November 20, 2014

CERTIFICATE OF SERVICE

I, Vicky McCarter, an employee with the law firm of The Hardee Firm., do hereby certify that I have this date served a copy of the following pleading upon the individual named below, by placing a copy in the United States Mail, postage prepaid and return address clearly indicated to the address below:

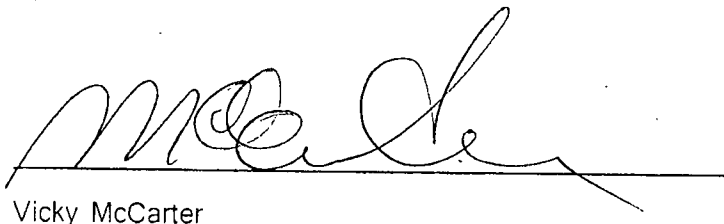
COUNSEL SERVED:

Ellis Reed-Hill Lesemann
80 Alexandria Dr. 2nd Floor
Charleston, SC 29401

PLEADING:

Appellant's Final Brief

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FEB 28 2014
SC Court of Appeals



Vicky McCarter

Columbia, South Carolina
February 27, 2014

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

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

Alan Sheppard, Appellant,

v.

William O. Higgins, Russell Bennett, Ronald C. Owens,
Charles P. Darby, Lynn McCants, and Kiawah Resort
Associates, L.P., Defendants,

Of whom Russell Bennett, Ronald C. Owens, Charles P.
Darby, Lynn McCants, and Kiawah Resort Associates,
L.P., are the Respondents.

Appellate Case No. 2013-000407

Appeal From Charleston County
Stephanie P. McDonald, Circuit Court Judge

Unpublished Opinion No. 2014-UP-387
Submitted September 1, 2014 – Filed November 5, 2014

AFFIRMED

Mark Weston Hardee, of The Hardee Law Firm, of
Columbia, for Appellant.

Ellis Reed-Hill Lesemann, of Lesemann & Barks LLC,
of Charleston, for Respondents Russell Bennett, Ronald

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Stephanie P. McDonald, Circuit Judge for The Ninth Judicial Circuit

Case No. 2013-000407

Alan Sheppard.....Appellant

v.

William O. Higgins, Russell Bennett, Ronald C. Owens, Charles P. Darby,
Lynn McCants and Kiawah Resort Associates, LP.....Defendants

Of whom Russell Bennett, Ronald C. Owens, Charles P. Darby, and Kiawah
Resort Associates LP.....Respondents

APPELLANT'S PETITION FOR REHEARING

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Attorney for Appellant

The Appellant Alan Sheppard hereby petitions for a rehearing in the above matter. The grounds for this motion are that the Court overlooked or misapprehended that the Record in this matter includes a short and plain statement of facts showing that the Appellant is entitled to relief. The Appellant submitted to the trial court, as a *pro se* litigant, that a real estate closing occurred on June 28, 2008, within the three year Statute of Limitations, that violated the parties' previous agreement, and that these actions by the Respondents were not subject to any prior actions, and therefore were not barred by res judicata or by release.

Although the Appellant, who was acting *pro se* at the time, did not call his submission an "Amended Complaint", clearly from reading the transcript, this is what the Appellant was attempting to do. (R.p.363; 371-; 373; 379, 391-392, 399-401).

The Court erred taking an over-technical position on this filing, by a *pro se* litigant, depriving him of his due process rights to be heard under both the United States and South Carolina constitutions. *Pro se*' litigants are not to be held to the same high standards of perfection in procedural matters as lawyers. *Hines v. Kerner* 404 US 520; 92 Sup.Ct. 594 (1971), *Maty v. Grasselli Chemical Co.* 303 US 197; 58 Sup.Ct. 507 (1938)

CONCLUSION

Appellant Alan Sheppard is entitled to a rehearing in this matter, based on the above, and a reversal of the trial court's Order of Dismissal.

Respectfully submitted,

November 20, 2014



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CERTIFICATE OF SERVICE

I, Vicky McCarter, an employee with the law firm of The Hardee Firm., do hereby certify that I have this date served a copy of the following pleading upon the individual named below, by placing a copy in the United States Mail, postage prepaid and return address clearly indicated to the address below:

COUNSEL SERVED:

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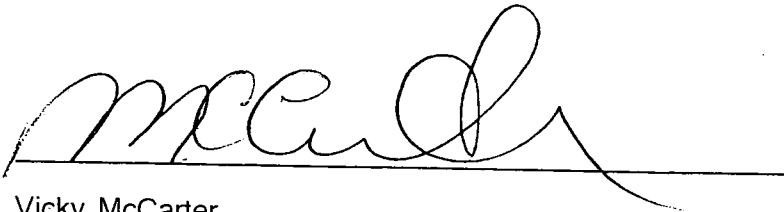
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NOV 20 2014

SC Court of Appeals

PLEADING:

Appellant's Petition for Rehearing



A handwritten signature in cursive script, appearing to read 'Vicky McCarter', is written over a horizontal line.

Vicky McCarter

Columbia, South Carolina
November 20, 2014

The South Carolina Court of Appeals

Alan Sheppard, Appellant,

v.

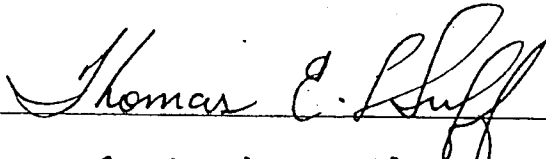
William O. Higgins, Russell Bennett, Ronald C. Owens,
Charles P. Darby, Lynn McCants, and Kiawah Resort
Associates, L.P., Defendants,

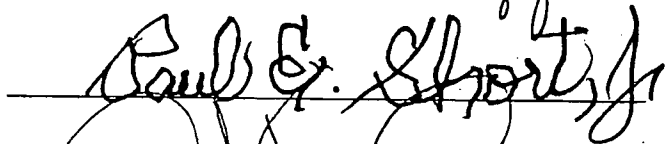
Of whom Russell Bennett, Ronald C. Owens, Charles P.
Darby, Lynn McCants, and Kiawah Resort Associates,
L.P., are the Respondents.

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ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 J.

 J.

 J.

Columbia, South Carolina

FILED

January 23, 2015

cc: John Julius Pringle, Jr., Esquire
Ellis Reed-Hill Lesemann, Esquire
John Lynn Mccants, Esquire
Mark Weston Hardee, Esquire
The Honorable Stephanie P. McDonald