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FORM 4

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

JUDGMENT IN A CIVIL CASE  
CASE NUMBER 2014-00110  
*St. George of Appeals*

Marjorie Cato Burton  TE Cato Estate LLC	David A Burton	Carroll M Pitts Jr	Robinson Bradshaw & Hinson PA
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PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):  Rule 12(b), SCRCP;  Rule 41(a), SCRCP (Vol. Nonsuit);  
 Rule 43(k), SCRCP (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):  Rule 40(j) SCRCP;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):  
 Affirmed;  Reversed;  Remanded;  Other:

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

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

ORDER INFORMATION

This order  ends  does not end the case.  
Additional information for the Clerk: ORDER

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

s/ John C. Hayes, III.  
Circuit Court Judge

2049  
Judge Code

4/3/2015  
Date

**For Clerk of Court Office Use Only**

This judgment was entered on **April 3, 2015**, and a copy mailed first class or placed in the appropriate attorney's box on **April 3, 2015**, to attorneys of record or to parties (when appearing pro se) as follows:

**Roger B. Jellenik** 1106 Little Street Camden, SC 29020  
**Matthew B. Rosbrugh** MBR Law, LLC PO Box 292290  
Columbia, SC 29229

**Samuel W. Outten** Poinsett Plaza, Suite 900 104 South Main  
Street Greenville, SC 29601

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**ATTORNEY(S) FOR THE PLAINTIFF(S)**

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**ATTORNEY(S) FOR THE DEFENDANT(S)**

David Hamilton

**Court Reporter**

**David Hamilton - Clerk of Court**

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

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

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STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF YORK )  
 )  
 Marjorie Cato Burton as Trustee of the )  
 Sloan Marvin Burton and Marjorie Cato )  
 Burton, AB Living Trust by and through )  
 David A. Burton as Attorney-in-Fact, )  
 Individually and in the right and on )  
 behalf of T.E. Cato Estate, LLC, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 Carroll M. Pitts, Jr., Esq. and Robinson )  
 Bradshaw & Hinson, P.A., )  
 )  
 Defendants. )

IN THE COURT OF COMMON PLEAS  
 SIXTEENTH JUDICIAL CIRCUIT

Civil Action No. 2010-CP-46-2267

**ORDER**

FILED-RECEIVED  
 2015 APR -3 PM 3:44  
 DAVID HAMILTON  
 C.C.C.P. & GS  
 YORK COUNTY, SC

Prologue

This legal malpractice/professional negligence case was heard by the undersigned on its merits without a jury. Working on this case reminded the undersigned of a quote from a speech by Bishop John Maury Allin, presiding Bishop of the Episcopal Church in America at the time. Bishop Allin stated "being head of the church is like putting together a jigsaw puzzle while riding on a roller coaster." There are a myriad of issues weaving through this litigation. Hopefully, this Order will fully address them all even though some have no effective impact on the ultimate findings of the Court.

Facts<sup>1</sup>

This legal malpractice lawsuit/professional negligence arises out of the formation of a limited liability corporation and a commercial real estate transaction. The real estate transaction

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<sup>1</sup> There are collateral matters that stem from the facts herein that will not be visited as they are, hopefully, resolved by other Orders of the Court, subject to possible appeal.

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closed in December 2007 in York County. In early 2007, James Thomas "Tommy" Cato ("Mr. Cato") engaged Carroll M. Pitts, Esq., of Robinson, Bradshaw, and Hinson, P.A. (Collectively referred to as Pitts herein, unless context otherwise suggests) to form an LLC (the "LLC") and to draft a deed that would convey certain property owned by the heirs of the T.E. Cato Estate into that LLC so that the property could be marketed and sold. The property at issue was to include all of the property owned by the T.E. Cato Estate.

After T.E. Cato Estate LLC (the "LLC" herein) was formed, each of the five heirs who had an interest in the property executed a deed into the LLC.<sup>2</sup> As planned, Mr. Cato marketed the property to several developers and subsequently entered into a contract to sell the property for one-million dollars to the developer who made the highest offer, Thomasson Apartments, LLC ("TAL").

The closing was scheduled for December 2007. Before the closing, a question arose regarding the title to a strip of land (the "Roadbed Tract") that was situated within the property to be sold. To resolve that question, the closing attorney, Joshua Vann, Esq., of Morton & Gettys, LLC, prepared a quitclaim deed to be signed by each member of the LLC, including the Burton Trust.<sup>3</sup> Although every other member of the LLC signed the quitclaim deed, the Burton Trust elected not to sign the deed absent certain issues being addressed as more fully noted herein below.

The closing went forward on December 12, 2007. Mr. Vann prepared an amendment to the contract of sale that allocated \$100,000 of the one-million dollar price to the Roadbed Tract. TAL paid the LLC \$900,000 for the property conveyed, and the remaining \$100,000 was to be

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<sup>2</sup> This "fact" is based on earlier rulings by the Court. The Court is aware that the deed was signed prior to the LLC's complete formation.

<sup>3</sup> Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust

*J. Vann*  
2

paid upon the resolution of the Roadbed Tract issue. The Burton Trust received \$124,200 for its 20% interest in the property conveyed.

Thereafter, a Partition Action was filed by Mr. Pitts on behalf of six<sup>4</sup> of the LLC members who sought to compel the Burton Trust to transfer its interest in the Roadbed Tract in order to complete the transaction with TAL. This group of Plaintiffs included all of the interest (80%) in the Roadbed Tract save the interest of the Burton Trust. The Partition Action settled by agreement of all of the interests in the Roadbed Tract. Under the terms of the Settlement Agreement, the Burton Trust executed a quitclaim deed<sup>5</sup> to complete the sale to TAL in exchange for a payment of an additional \$249,000 and four undeveloped lots. No other party to the Partition Action received a monetary settlement or real property.

All of the findings herein are based on the greater weight (the preponderance) of the evidence. I find all witnesses who testified to be credible.

In actuality the facts in the case are quite simple and pretty much without contention. The gravamen of this case is how and to what degree, if any, do the facts relate to Defendants' relationship with and duties to Plaintiff relative to the heirs of T.E. Cato's divesting themselves of jointly owned inherited property.

#### The Effect of the Partition Action Settlement

Defendants assert the current claims asserted against them by Plaintiff<sup>6</sup> were extinguished by the settlement of the Partition action in 2008-CP-46-3171. The Burton Trust executed a Settlement Agreement and accompanying Assignment Agreement (collectively the Settlement

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<sup>4</sup> By devolution at the time of the institution of the Partition Action, not including Plaintiff, two heirs had a 20% interest in the T.E. Cato Estate and four heirs held 10% each.

<sup>5</sup> The quitclaim deed included the entire property.

<sup>6</sup> Hereafter where the Court uses the term "Plaintiff," the term applies to Burton Trust. References to T.E. Cato Estate, LLC, will continue to be referenced as the "LLC."

JE #3  
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Agreement)(Plaintiff's exhibit 38(c) and (d)) on or about April 4, 2013, to resolve the Partition Action that was filed to complete the commercial real estate transaction underlying this case.

David Burton as trustee signed the agreement on behalf of the Burton Trust. In relevant part, the Settlement Agreement states as follows:

WHEREAS, the parties have now amicable resolved their differences and disputes and by this Settlement Agreement, the parties wish to memorialize that resolution, to resolve the Action, to dismiss the claims asserted against each other with prejudice, and to waive and renounce *any and all claims* the parties have asserted against each other or could have asserted against each other in the Action or *in any way related to the subject property, the Cato Deed, the Letter of Intent, the Amendment to Contract, the Thomasson Deed, the creation or operation of Cato, LLC*, or the claims asserted in the Action, and to confirm that Thomasson shall henceforth own Areas A, B, C, and D and the Roadbed Tract free and clear of any right, title, claim, or interest of any of the other parties herein. *(emphasis added)*

In consideration for executing the Settlement Agreement, the Burton Trust was paid \$249,000 and receive four undeveloped lots. No other heir received any monetary proceeds or real property under the terms of the Settlement Agreement.

Defendants argue that the Settlement Agreement's sentence structure evinces an intent that the parties thereto are releasing not only claims between themselves but also all collateral claims as to non-parties to the Settlement Agreement.

Defendants argue additionally that acceptance of the consideration for the Settlement Agreement by Plaintiff constitutes a full and final compromise adjustment and settlement of all claims growing out of the issue highlighted in the language from the Settlement Agreement set forth above.

Plaintiff argues, correctly, that the Defendants did not comply with Rule 8(c) SCRCP in their failure to assert the Settlement Agreement as an affirmative defense. While Rule 8(c) does

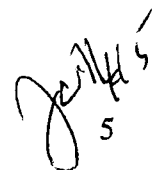
  
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not mention settlement as an affirmative defense, the advancing of the settlement as a preclusion to Plaintiff's recovery is a matter constituting an avoidance or affirmative defense. That is to say, the argument relating to the settlement as a bar to recovery is an issue outside the issue raised by the pleadings which are, in the first instance, have or have not Defendants committed malpractice or professional negligence. The issue of the effect of the settlement on Plaintiff's right to recover is not an issue within the parameters of the legal malpractice and professional negligence claims and thus is not raised by a general or qualified general denial.

Even though not plead, the undersigned addresses the settlement issue on its merits. Defendants assert the Settlement Agreement constitutes a *Bartholomew* satisfaction. *Bartholomew v. McCartha*, 255 S.C. 489, 179 S.E.2d 912 (Sup. Ct. 1971). I find that a fair reading of the Settlement Agreement does not evince an intention by the by the parties to release non-parties. Unlike the language at issue in *Bowers v. Dep't of Transp.*, 360 S.C. 149, 600 S.E.2d 543 (Ct. App. 2004), I do not find the instant language to be "a clear, explicit, and unequivocal indication of the parties' intent that all claims arising" (360 S.C. at 545) from the listed transaction and events are, by the Settlement Agreement, barred.

In spite of Defendants well-argued grammatical parsing of the Settlement Agreement language, I read the agreement as a release of the highlighted issue or claim to be limited to resolutions of the parties "differences and disputes" as set forth in the first five lines of the Settlement Agreement.

Since the Settlement Agreement does not reach Defendants it is not possible for the Court to analyze, at least under this argument, that the consideration Plaintiff received in the Settlement Agreement was a full and fair compromise of any claims Plaintiff asserts in this litigation.

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Without finding merit to Plaintiff's claim, I find the Settlement Agreement from the Partition Action does not preclude Plaintiff's right to assert their claims of the LLC. However, as set forth herein below, the right to assert the claim is of no real value to Plaintiff as the Court finds the LLC claims provide no avenue of recovery by Plaintiff against Defendant.

Assignment of Legal Malpractice Claim

Plaintiff attempted to proceed on behalf of T.E. Cato Estate LLC based on two theories, assignment<sup>7</sup> and statutory authority. The latter is dealt with herein below.

In the settlement of the Partition Action, Plaintiffs in that action (all the members of the T.E. Cato LLC save the Burton Trust) assigned any legal malpractice or other claims the LLC had against Defendants to the Burton Trust.

Plaintiff sought to add a cause of action against Defendant based on the Settlement Agreement by motion dated September 6, 2013 over three months after the LLC dissolved as of May 12, 2013 (*see* Defendants' exhibit 6). While a reading of the Order disposing of the motion could be clearer the motion was denied in toto by Order of October 22, 2013 which was affirmed by the Court's Order dated November 14, 2013 denying partial reconsideration of the denial as to Defendants.

Based on the above, there is no issue before the Court regarding the assignment as the Court did not allow Plaintiff to amend their complaint to include such claims. However in the interest of trying to cover all issues related to the assignment, the Court will further address the efficacy of any putative claim Plaintiff asserts based on the assignment.

The assignment is of any and all claims and is thus not restricted to claims arising from or related to the Partition Action itself. The assignment is general and assigns to the Burton Trust

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<sup>7</sup> The matter of assignment through the Settlement Agreement is discussed elsewhere herein.

*J. A. H. C.*  
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the assets of Cato LLC. The assignment is also specific and assigns to the Burton Trust certain named claims including any against the Defendants.

In the instant action, Plaintiff's claim is not based on any legal malpractice on behalf of Defendants by virtue of Partition litigation itself.<sup>8</sup> The claims genesis is the formation of the LLC by Defendants and the preparation of the deed of property from the LLC members to the LLC. In the analysis here this fact may be a distinction without a difference, but the undersigned believes the nature of the LLC claims should be noted.

Recognizing the Order has no precedential value the undersigned has taken the liberty of using the Honorable J.C. Nicholson's Order, in *Pavilion Dev. Corp. & Larry McNair v. Nexsen Pruet, LLC*, CA 2011-CP-10-05774<sup>9</sup>, as good compendium of the treatment of this issue by Courts of all jurisdictions and a good analysis of same.

At this point the Court must point out an interesting twist in this case. That is that the Burton Trust asserts direct claims for legal malpractice and claims on its own and the other LLC members through assignment. In essence, at least to a degree, recognizing the independent corporate status of the LLC, the Trust has assigned to itself claims in which the Trust had an interest as a member of the LLC.

The linchpin of the analysis of the right of assignment of a legal malpractice claim seems to be the argument that such assignments violate public policy. This is not the sole reason, but seems to be at the core of other arguments against such assignments.

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<sup>8</sup> This precise and narrow issue of assignment of a legal malpractice claim arising from litigation between the assignor and assignee has been certified by the District Court to the South Carolina Supreme Court. This is not the same fact pattern here at issue. See *Skipper v. ACE Prop. & Cas. Ins. Co.*, 2014 WL 4700220 (D.S.C. Sept. 19, 2014). *Skipper* is scheduled for oral arguments before the Supreme Court on April 7, 2015.

<sup>9</sup> Judge Nicholson's Order is on appeal. Oral arguments are scheduled before the South Carolina Supreme Court on May 6, 2015.

JCH#7  
7

*Black's Law Dictionary*, as to the context here, defines public policy as "[b]roadly, principles and standards regarded by...the courts as being of fundamental concern to the state and the whole of society." (*Black's Law Dictionary*, 7<sup>th</sup> Ed. p.1245).

Judge Nicholson's Order cites eighteen jurisdictions, including one of our sister states, North Carolina, as adopting the majority view that legal malpractice claims are void as against public policy. The Order cites nine jurisdictions, including our sister state of Georgia as adopting the minority, or case-by-case approach for evaluating whether or not a particular assignment is void.

Under the fact pattern here, the undersigned cannot find the assignment at issue to be void against public policy. This conclusion is reached utilizing the minority case-by-case approach. The undersigned cannot find that assignment of a legal malpractice claim by an LLC to a member of the LLC violates public policy.

Nothing in this analysis presupposes the merit of the assigned claim. This analysis is restricted to the right to assign and therefore the right to pursue putative legal malpractice claims.

Finally, the statute of limitations ran as to claims the LLC may have against Defendants.<sup>10</sup> It must be kept in mind that, as elsewhere discussed, Plaintiff may not pursue a derivative claim, but if they could pursue any claim it would be on the claimed transfer of an LLC asset (the claims against Defendants) and therefore any defense Defendants would have as to the asset (the malpractice claim) would apply to the asset in the hands of the Trust. The statute of limitations as to the claim of malpractice against Defendants, I find commenced to run at the time the LLC learned of the existence of a possible claim. I find this occurred when the

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<sup>10</sup> The effect of a statute of limitations is an affirmative defense. In this case as set forth above, the Court did not allow Plaintiff to amend its complaint to include a cause of action based on the assignment. Therefore there exists, in this litigation, no vehicle by way of which the statute of limitations defense could have been asserted. This issue is, while moot, addressed.

J. H. S.  
8/1/8

LLC discovered the heir's deed into the LLC did not accomplish the purpose for which the LLC was formed and the deed into the LLC was signed. Therefore the statute of limitations, as to the LLC, ran at least from the time of notice of an error in the deed. This exact date is unclear to the Court, but this issue surfaced at the latest by October 22, 2007 when the General Manager of the LLC, Thomas James Cato, notified the members of the LLC of the error in the deed into the LLC (Plaintiff's exhibit 22).<sup>11</sup>

The statute of limitations for a legal malpractice action is three years. S.C. Code Ann. § 15-3-530(5) (2005); *see also Kelly v. Logan, Jolley, & Smith, L.L.P.*, 383 S.C. 626, 632, 682 S.E.2d 1, 4 (Ct. App. 2009). The statute of limitations is subject to the discovery rule, which requires commencement of an action "within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." S.C. Code Ann. § 15-3-535 (2005). As stated in *Epstein v. Brown*, 363 S.C. 372, 610 S.E.2d 816 (2005),

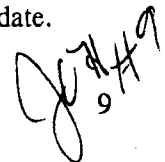
[t]he exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party *might* exist. *The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed.*

*Id.* at 818 (emphasis in original). "The date on which discovery should have been made is an objective, not subjective, question. In other words, whether the particular plaintiff actually knew he had a claim is not the test." *Majstorich v. Gardner*, 361 S.C. 513, 604 S.E.2d 728, 732 (Ct. App. 2004).

Therefore, Plaintiff is not entitled to recover from Defendants based on any theory based on the assignment as 1) the LLC does not exist and did not exist at the time Plaintiff attempted to

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<sup>11</sup> This is a date earlier than that set forth in this Court's Order dated December 16, 2014 in *Burton v. Vann*, C.A. No.: 2013-CP-46-3523. The *Vann* date is noted to be the "latest" date. Plaintiff's exhibit 22 was not of record in the *Vann* motion.



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add a cause of action based on the assignment, 2) the Court denied Plaintiff's motion to add any claim based on the assignment, and 3) any claims the LLC had are barred by the statute of limitations.

Derivative Action

Plaintiff seeks recovery on behalf of the LLC by virtue of §33-44-1101, South Carolina Code of Law, 1976 as amended. Plaintiff cannot pursue this derivative action for two reasons, although the first in order renders the second superfluous.

Initially I find the LLC was dissolved as of May 17, 2013 as evinced by articles of correction dated October 4, 2013 (*see* Defendant's exhibit 6). Therefore, after that date and currently there is no legal entity known as the T.E. Cato Estate, LLC. Pursuant to §33-44380(a)(3), upon the termination of a limited liability company the legal existence of the LLC has been terminated. The law does not allow litigation by or against a phantom entity.

Additionally, as noted the LLC was dissolved as of May 17, 2013 (see articles of corrections dated October 4, 2013). Plaintiff argues that their claim is based on a transfer of the assets from the LLC to the Trust pursuant to the Settlement Agreement. Thus Plaintiff, whether intending to or not, is basing its claim not on behalf of the LLC but directly pursuant to the Assignment Agreement. Therefore, the Trust's claim is not based on assets (claim against Defendants) owned by the non-existing LLC, but directly on Plaintiff's own behalf as owner of the asset.

Therefore, Plaintiff cannot pursue a derivative claim on behalf of the LLC pursuant to §33-44-1101, S.C. Code of Laws, 1976, as amended.

*JFA*  
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The Effect of Judge Alford's Order of June 1, 2009

Plaintiff moved in the Partition Action<sup>12</sup> for disqualification of attorney Pitts from representation of the Plaintiffs in that action (all Cato heirs except the Trust). The Honorable Lee S. Alford heard the motion to disqualify Pitts and denied same by a Form 4 Order of June 1, 2009 which stated "motion denied at this point in the action."

I find Judge Alford's Order to be equivocal. It could be argued, and Defendants do argue, the language constitutes a finding that attorney Pitts did not have a conflict of interest in representing the Plaintiffs in the Partition Action against the Trust which by implications would constitute a finding that no attorney-client relationship existed between the Trust and attorney Pitts. On the other hand, arguably the language used by Judge Alford is analogous to a denial without prejudice.<sup>13</sup>

I therefore find Judge Alford's Order is not controlling on the issue of attorney-client relationship and does not address to any degree a claim of professional negligence.

Causation

Even if the Court were to find that an attorney-client relationship existed between Defendants and Plaintiff or that absent such relationship, Defendants owed a duty to Plaintiff as alleged and argued by Plaintiff, such would not have been the proximate cause of any of the damages claimed by Plaintiff.

In their arguments and presentation, Plaintiff brings up several issues that it claims were pivotal to its decision not to sign the quit claim deed. These primarily were Thomas Cato's failure to have a survey or appraisal of the property sold to TAL, LLC. Incongruously, they have

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<sup>12</sup> As noted, Plaintiff was the Defendant in the Partition action.

<sup>13</sup> Black's Law Dictionary (10th ed. 2014), defines "without prejudice" as: [w]ithout loss of any rights; in a way that does not harm or cancel the legal rights or privileges of a party.

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argued or at least appear to argue, that these omissions somehow are to be laid at Defendants' feet. Defendants had no obligation or duty to obtain an appraisal or survey. In fact, they had no right to do so as they had no interest in the subject property. By the exchange of emails, it is clear that the survey/appraisal issue was one Plaintiff felt laid in Mr. Cato or the LLC's lap. Never does Plaintiff suggest that Mr. Cato or the LLC should have elicited Defendant's input as to a survey or appraisal.

However, in Plaintiff's email to T.E. Cato (November 30, 2007) (Defendant's exhibit 13), under the subject "Requirement for signing of Cato SCDOT quitclaim deed" not one of the above issues are raised as being an impediment to the sale of the LLC property to TAL. The email acknowledges a willingness, if not a desire, to proceed with the TAL transaction. In fact, Mrs. Marjorie C. Burton, in this email, says she agrees to sign the quitclaim, thus affecting the sale to the TAL if certain conditions (none addressing the issues above) are met.

In the November 30, 2007 email, Mrs. Burton's concerns were her (and Helen's) capital gains; payment for her and her son Bud's investment of time, efforts and energy in handling the taxes and efforts to develop the subject property and a concern about side agreements. The email also includes an offer by Mrs. Burton and her husband to buy Areas A and C under a right of first refusal.<sup>14</sup> Mrs. Burton closes the email thusly, "I am willing to sign the last piece of Area B, quitclaim deed in order for all the other heirs to finish this deal, but the [stated issues] will have to be ironed-out first before that signing occurs."

Mrs. Burton sent an email to Mr. Cato bearing date November 24, 2011 (Plaintiff's exhibit 48). This email is directed to the Trust's questioning of the sale price negotiated with

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<sup>14</sup> This apparently is a reference to an August 1, 2007 email from Mr. Cato to the members of the LLC (Plaintiff's exhibit 18) as the Operating Agreement (as alleged in the email) contains no such provision.

JH #12  
12

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TAL and requests Mr. Cato to obtain an appraisal. In the email Mrs. Burton stated she regretted her participation in the formation of the LLC. This email is devoid of any content which would support the Trust's claim of an attorney-client relationship with Pitts. It is pointed out that assessing such a relationship in the context of the email, save possibly references to the quit claim deed, establishes no grounds for a claim of legal malpractice. As noted elsewhere, the error in the deed was not the result of any legal malpractice by Pitts. The record does contain emails from and to Pitts and to and from Mr. Cato (Plaintiff's exhibit 24 & 29) prior to discovery of the deed error. These emails do not evince anything which would have put Pitts on notice of any dispute as to Mr. Cato's authority.

While the error in the deed into the LLC is this case's linchpin, the error in the deed did not create or necessitate the Partition action. The sole proximate cause of the need for the partition action was Plaintiff's use of the error in an effort to cut for itself a better deal. Of course Plaintiff had every right to avail itself of the opportunity created by the deed error, but its use of the deed error to leverage a better deal for itself was a matter of its own genesis. It seems somewhat paradoxical that the error which Plaintiff was able to successfully wield as a weapon is the same on which it now bases its claim for alleged damages incurred by it based on its choice to do so.

Plaintiff had every right to use whatever means available to enhance its position in the sale of the family property. However, by so doing the Plaintiff held hostage the LLC from accomplishing something 80% of the interest in the land wish to have timely resolved and which prevented the LLC from accomplishing the purpose for which it was formed.

The record clearly supports the Court's affirmative finding that the error did not *per se* cause injury or damage to Plaintiff. In something of an anomaly, Plaintiff required the other

*per H 13*  
13

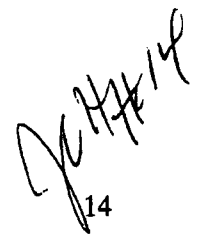
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members of the LLC to sue it based on Plaintiff's recalcitrance in signing the quit claim deed. The anomaly is that when the LLC was formed and the deed into the LLC was signed the intention of all of the parties, including Plaintiff, was to sell all of the properties the heirs had inherited. That is, Plaintiff decided to divest itself of the property at issue, participate in the establishment of a vehicle to do so (the LLC) and then in contravention of the Trust's clear intention, based on its participation in the formation of the LLC, chose to thwart the LLC's efforts to consummate the LLC and Plaintiff's original intentions.

Plaintiff's in their Reply Brief dated March 11, 2015 at the "Brief ID" No. 8 catalog the reasons it asserts the deed error proximately caused its claimed damages. However, the argued facts do not, in the undersigned's opinion, establish by the greater weight of the evidence that any claimed damages were proximately caused by any malpractice or professional negligence of Defendants.

Plaintiff alleges damages based on the deed into the LLC being a general warranty deed. The trial testimony of Professor Freeman ascribes damages caused by legal fees for the Partition Action and damages based on the differences in Plaintiff's alleged value at the time of the sale to TAL and the price paid by TAL. Professor Virzi did not address any impact the general warranty deed would have on the parties. In any event, the title to the property is not an issue. The damages claimed are based on the value of the land and the legal fees in the Partition Action. There is no testimony that the nature of the deed in to the LLC impacted either.

As set forth above, I find to the extent Defendants committed legal malpractice or professional negligence such did not proximately cause Plaintiff's claimed damages.

  
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### Expert Testimony (General)

Plaintiff presented two expert witnesses who testified that Defendants actions relative to the Cato LLC and related deeds constituted legal malpractice. I find both Professor John Freeman and Michael James Virzi are impeccably qualified to testify on issues involving attorney ethics, attorney-client relationships, standards of care, and breaches of standards.

I find the testimony of Plaintiff's experts credible, well researched, well thought out, sincere, and well presented. I find the same to be true of Defendant's expert.

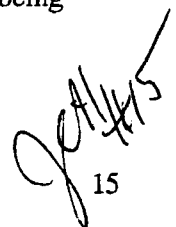
The testimony of experts is not binding on the fact finder. Expert testimony may be rejected or accepted in whole or in part.

Based on the facts here extant I find that Plaintiff has failed to carry its burden of proof as to its claim of legal malpractice. This is based on my finding, discussed herein below that no attorney-client relationship ever existed between Plaintiff and Defendants and that Pitts did not commit legal malpractice.

### Professional Negligence

Plaintiff also complains as to the ambiguity of the LLC documents relative to the manager-managed and member-managed provisions of the Article of Incorporation vis-a-vis, the operating agreement.

As to professional negligence, I find Defendants had a duty to all of the members of the LLC to establish the LLC with clarity as to how the LLC was to be managed. The Articles of Organization provided for a manager managed LLC with James Thomas Cato designated as the manager. The Operating Agreement (Plaintiff's exhibit 3) provided for both a member managed LLC (article 6.1) and manager managed LLC (article 6.6(a)) with James Thomas Cato being named as the General Manager.

  
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Based on the testimony as to why the LLC was formed it appears the intention was that the LLC would be a member managed LLC with James Thomas Cato as General Manager. The LLC as ultimately formed left unclear as to how the LLC was to be managed. By drafting an unclear document, Pitts breached his duty to establish the LLC as the members intended. However, this inconsistency resulted in no harm whatsoever to Plaintiff. That is, the inconsistencies did not proximately result in any harm or damages to Plaintiff. This is clear to the Court as the email from Plaintiff to James Thomas Cato of November 30, 2007 assigns no fault to James Thomas Cato based on any concerns as to how the LLC was to be or was being managed.

I find Pitts owed a duty to all the putative members of the LLC in the formation of the LLC. I find a breach of that duty by virtue of the inconsistent management provisions contained in the Articles of Organization and the Operating Agreement. I therefore find Plaintiff has proven by the greater weight of the evidence professional negligence on the part of Defendants.

I find that even though Plaintiff has proven professional negligence it has not proven by a preponderance of the evidence any proximately resulting damages as a result thereof.

As to Pitts' duty to the heirs, Mr. Cato advised the heirs of consultations with Pitts and Pitts' recommendation of an LLC to "protect and empower heirs" (Plaintiff's exhibit 16(a)). While these are Mr. Cato's words, not Pitts', it is evidence of Pitts' advice as to the heirs' best solution to disposing of the Cato Estate property. I find that while this duty was breached it in no way was a proximate cause of any damages to Plaintiff. This finding is two pronged. First, for the reasons set forth above I find no action by Defendants proximately resulted in any damages to Plaintiff; and second, nowhere in the exchange between the Plaintiff and T.E. Cato is the ambiguity cited as a reason the Trust would not sign the quitclaim deed. Marjorie Burton does

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address her understanding that unanimity was required for a sale of the subject property, but she nowhere postures this as an impediment to the sale and rather catalogues her concerns in the November 30, 2007 email.

### Attorney-Client Relationship

I turn now to the issue of whether or not Plaintiff has proven an attorney-client relationship between the Trust and Carroll Pitts. Professor Freeman presented a litany of actions or inactions attributable to Pitts. The Court finds none of these rises to a level which created an attorney-client relationship between Plaintiff and Pitts. These actions/inactions include, in no order:

1. Pitts had an attorney-client relationship with the LLC and therefore, with its members (the LLC is "just People").
2. The Deed to the LLC predated the formulation of the LLC.
3. The purpose of the LLC was to protect Thomas James Cato from the family and the family from Thomas James Cato.
4. Pitts had an obligation to make sure those establishing the LLC understood what they were doing.
5. Pitts was not a mere scrivener.
6. Pitts failed to understand the expectations of the Burton Trust.
7. Pitts did not do a title search (but charged a fee for same)
8. Pitts did not obtain or require a survey.
9. Pitts did not obtain or require an appraisal.
10. Pitts ignored the operations requirement of unanimity.
11. The putative members of the LLC never met.
12. Pitts engaged in bad drafting.
13. Pitts failed to understand the scope of his representation.

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14. Pitts had a duty to communicate with the putative LLC members.
15. Pitts failed to pass on information.
16. Pitts did not "protect everyone."
17. This lawsuit

In addition to the above catalogue of concerns, Professor Freeman found numerous deficiencies in Pitts' "representation" of the LLC post its inception. The latter in no way establishes an attorney-client relation between Plaintiff and Defendants nor could they.

Professor Virzi, like Professor Freeman, presented a litany of actions or inactions attributable to Pitts.<sup>15</sup> The Court finds none of these rises to a level which creates an attorney-client relationship between Plaintiff and Pitts. These actions/inactions include, in no order:

1. The "clients" belief.
2. Thomas Cato's request that Pitts "protect" all the heirs, which was in essence a request by Thomas Cato, that Pitts represent all of the heirs, a request Pitts accepted (notably an argument that Pitts could and did force himself as attorney for six individuals/Trusts without their required consent).
3. Thomas Cato's referring to Pitts as "our" attorney.
4. Pitts did not "reach out" to the heirs.
5. Pitts knew Thomas Cato was passing on Pitts' advice to the heirs.
6. Pitts failed to clarify to [REDACTED] heirs who he was representing.
7. Pitts failed to clarify the problem of the LLC's management.
8. Presenting a deed to Plaintiff and other heirs to sign (Professor

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<sup>15</sup> It is of interest that Professor Virzi's affidavit attached to Plaintiff's complaint contains no support for the establishment of an attorney-client relationship. Professor Virzi's affidavit presupposes an attorney-client relationship between Plaintiff and Defendant and focuses on alleged "acts and omissions" by Defendant "in their representation of Plaintiff." (Exhibit K to Complaint).

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Virzi testified this created an attorney-client relationship).

9. Pitts failed to ascertain what the other heirs "wanted."
10. Pitts' action left the Burton Trust with no protection.
11. Pitts should have intervened in "a dispute as to Thomas James<sup>16</sup> Cato's authority."
12. Pitts did not do a title search.
13. Pitts failed to advise the heirs of the import of a general warranty deed.

While perhaps not dispositive of the attorney-client relationship based on the testimony of Professors Freeman and Virzi it must be pointed out that Thomas Cato testified Pitts represented him individually and that the LLC was not Pitts' client.

As to Professor Virzi's number 12, the record is void of evidence that Pitts knew of the dispute as to Mr. Cato's authority during the dispute. The first document which could relate to this issue is Defendant's exhibit 4. This exhibit bears RBH bate stamp 000043. As noted elsewhere, this email, while to a degree questioning Mr. Cato's authority, is as discussed elsewhere a list of demands to Mr. Cato. This email (and when it was provided to Pitts is not of record) is, bottom line an agreement to proceed with the sale to TAL when the issues raised therein are "ironed-out."

Professor Virzi set forth four ways in which an attorney-client relationship could be established; by contract; explicitly or implicitly through an agent; or through undertaking legal services on behalf of someone. Interestingly, after cataloguing these, Professor Virzi testified the focus is based on the expectation of the would-be client. In this case, there is no evidence Mrs.

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<sup>16</sup> The record contains numerous documents with RBH's (Defendant) bate stamp. The following do not: 1. Mrs. Burton's email of August 4, 2007 (Plaintiff's exhibit 19); 2. Mrs. Burton's email of August 24, 2007 (Plaintiff's exhibit 21); 3. Mrs. Burton's email of November 7, 2007 (Plaintiff's exhibit 23); 4. Mrs. Burton's email of November 27, 2007 (Plaintiff's exhibit 48).

Burton or the Burton Trust thought Pitts represented them at the time the deed into the LLC was signed nor at the time the LLC documents were signed. There is nothing in the record that would suggest Plaintiff thought, at the time of the formation of the LLC, Pitts represented the Trust or the LLC members individually directly or through Mr. Cato as their agent.

The testimony supports the fact that Pitts was engaged to represent Mr. Cato individually not as an agent to the Cato heirs. Both Professor Freeman and Professor Virzi, in the Court's opinion, rely heavily on what occurred after the formation of the LLC and the deed into it in reaching their opinions. The events for the most part would, if anything, relate to a breach of an attorney-client relationship, not the formation of same. Professor Freeman's item 1 is the only event, in the undersigned's opinion, which could relate to the establishment of an attorney-client relationship as opposed to a breach of same. This item however is not evidence of facts but is a conclusory statement. There is no testimony that the Trust or any members of the LLC had any belief that Pitts was their attorney as to the formation of the LLC and the preparation and execution of the deed into the LLC.

An unfortunate and sad aspect of this case is that at the time Plaintiff is asserting an attorney-client relationship with the Trust the current trustee, David A. Burton was not trustee of the Trust. David A. Burton did not become trustee of the Trust until April 1, 2011 and prior to that time Marjorie Cato Burton was acting on the Trust's behalf along with Sloan Marvin Burton. The Court recognizes that Marjorie Cato Burton was unable to present testimony at this trial. However, this fact weighs on the evidence presented by Plaintiff as at all of the pertinent times in question David A. Burton was a third party to the transaction. The exchange of emails between Mr. Cato and Dr. Burton establish his deep interest and involvement in matters dealing with the subject property. The November 30, 2007 email to Mr. Cato is noted to be from "Your Aunt,

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Marjorie C. Burton" although David Burton testified that he helped Mrs. Burton compose the email.

In the email of November 30, 2007 Mrs. Burton, in issue 2, (remuneration) asserts the only problem she had with James Thomas Cato's handling of the affairs of the LLC was that she should be compensated for the time she and her son Bud had spent managing their property. Mrs. Burton refers to Thomas James Cato's service as "similar" to hers of "attempting several years ago to handle the development of Cato Estates."

David Burton testified that he did not know the scope of Pitts' involvement at the inception of the LLC other than Pitts was supposed to look out for the LLC. This testimony is important to a degree. First, it is his understanding of Pitts' involvement with the Cato heirs. Second, it is a statement of belief as to Pitts' relationship to the LLC not to Plaintiff. The observation may be gratuitous, but for Professor Virzi's reliance on the "client's" believe as one of the reasons he believed Pitts had an attorney-client relationship with the Trust. There is simply no evidence in the record to support such reliance.

Professor Freeman confirmed testimony from his deposition that the fact Plaintiff had brought this suit is evidence that Plaintiff believed, at the pertinent times, Pitts was its attorney.<sup>17</sup> I find this suit is, and could not be any credible finding of evidence with any weight as to the attorney-client relationship issue. In fact this theory does not dovetail with direct evidence in the record.

As to Professor Virzi's number 6, there is nothing in the record that supports the theory that Pitts had any obligation, save the theory itself, to communicate with anyone other than Mr. Cato. As to Professor Virzi's number 4, this issues has been addressed by earlier rulings and, at

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<sup>17</sup> See Professor Freeman's deposition testimony. (Freeman Deposition of July 28, 2014 p. 39 I-4).  
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least at this stage, is a moot issue. Both professors rely heavily on emails and conduct of third parties most of which were not of privity to Pitts. Those within Pitts' ken, according to Professor Virzi, created an attorney-client relationship by virtue of Pitts' silence. I affirmatively find that Pitts had no obligation to fire off disclaimers of representation based on conduct and comments by third parties.

The testimony of Thomas Cato was that the deed into the LLC was to include "all" of the T.E. Cato property in existence. Thomas Cato testified he could not recall why no title search was performed prior to the transfer of the property into the LLC. It is important that Pitts testified that he used for the deed's property description the legal description he got from Mr. Cato. I find use of such legal description without a title search under the facts of this case does not constitute legal malpractice.

It must be noted that on this issue that David Burton, who at the times at issue was assisting his mother, Marjorie Cato Burton, testified that he did not know the "scope" of Pitts involvement in the creation of the LLC and the deeding of the Cato Estate properties other than Pitts was to "look out" for the LLC.

Pitts testified that at the time of his involvement with the creation of the LLC and deed into it he did not know Marjorie Cato Burton or David Burton. Pitts testified his role was to setup the LLC and prepare the deed of the Cato Estate property into the LLC. As noted above the legal description Pitts utilized in preparing the deed was that provided by Mr. Cato. Pitts testified he was not asked to do a title search of the Cato Estate property. He testified no title search was necessary as this was a family to family interest conveyance.<sup>18</sup> Pitts testified his

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<sup>18</sup> Pitts' bill included an entry for a title search, which while unexplained is not dispositive of this issue.

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scope of work did not include obtaining any necessary signatures for any documents and that this was solely to be handled by Mr. Cato.

The Court agrees that the preparation of a deed and perhaps preparation of LLC documents constitutes the practice of law. *See State v. Buyers Serv. Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987). In the instant case, there is no contention that Pitts was not functioning as an attorney in preparation of the Cato documents. The issue is whether or not at the time Pitts drafted the documents he had an attorney-client relationship with Plaintiff. *See also In re Duncan*, 83 S.C. 186, 65 S.E. 210 (1909).

Professor Freeman cited *Matters of Solomon* 307 S.C. 1, 413 S.E.2d 808 (1992) and *Matter of Morgan* 288 S.C. 401, 343 S.E.2d 29 (1986) as to the mere scrivener issue. These cases support Professor Freeman's position that an attorney is not a mere scrivener when the attorney prepares legal documents. However, as stated above, Pitts has not taken the position he was a mere scrivener in preparing the deed and LLC documents. Pitts concedes he acted as an attorney in the preparation of the documents. The issue here is, as observed, in whether acting as attorney in preparations of the documents Pitts did so in the context of an attorney-client relationship with Plaintiff.

Even if there was proof of an attorney-client relationship between Plaintiff and Pitts, Pitts utilization of the legal description is well within the conduct expected of a reasonable attorney under the same or similar circumstances. Pitts, as to the deed, was tasked with preparing a deed based on a legal description presented by Mr. Cato, his client. Following the instructions of his client is not malpractice and is the antithesis of same.

Plaintiff points to Mr. Cato's email to Marjorie Burton (and her husband Marion) dated August 20, 2007 (Plaintiff's exhibit 20) as proof of an attorney-client relationship between Pitts

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and the Trust. First, the email is a unilateral statement by Mr. Cato and as such cannot create an attorney-client relationship between the LLC and Pitts. Second, the email refers to Pitts (Mr. Cato testified this was his intention) as the "corporate attorney" and in no way can this reference create or ever recognize an attorney-client relationship between Pitts and Plaintiff. Third, the email was generated over two months after Marjorie Burton (as trustee) signed the Articles of Incorporation (Plaintiff's exhibit 6) and was a response by Mr. Cato to an email from Mrs. Burton dated August 4, 2007 (Plaintiff's exhibit 19). At this point, the error in the deed was not an issue and it appears from the evidence that Plaintiff was first notified of the error by handwritten letter from Mr. Cato to the Cato heirs dated October 22, 2007 (Plaintiff's exhibit 22).

As set forth above, I find the evidence presented by Plaintiff does not establish the creation of an attorney-client relationship between Pitts and the Burton Trust. There is no direct evidence on this point and the circumstantial evidence weighs against the creation of an attorney-client relationship as Plaintiff contends.

#### Ratification

Defendants assert that the Burton Trust is precluded from pursuing its claim as the Trust has ratified the 2007 closing by accepting and negotiating the check it received for its 20% interest in the proceeds of the sale of the subject property to TAL.

Plaintiff argues, in essence, the Trust was faced with something of a "Hobson's choice." The Trust could either not negotiate the check and use other resources to pay taxes on the property sale which it would be required to pay regardless of the underlying dispute, or, do as the Trust did, negotiate the check, retain its proceeds less that need to pay the taxes on the sum of money which constituted a taxable gain to the Trust.

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Ratification, as the term implies, is the adoption of one person of an act done by another under such circumstances that one would not have been bound but by their subsequent assent. *Brazzell Bros. Contractors v. Hill*, 245 S.C. 69, 138 S.E.2d 835 (S. Ct. 1964). To ratify is to sanction, or affirm, or to give validity to something done for one by another. *Id.* The necessary "circumstances" would be such as those indicating an intention to adopt the unauthorized act or an affirmative election to do so. See *Lincoln v. Aetna Casualty & Surety Co.*, 300 S.C. 188, 386 S.E.2d 801 (Ct. App. 1989).

I find that the facts here do not support either such circumstances or an affirmative election by the Trust to adopt the act of the LLC in the December 2007 sale to TAL. Therefore, I find the negotiation of the check by the Trust does not act as ratification by it of the LLC's sale of property to TAL in December 2007.

#### Set Off

The issue of setoff is moot since the Court makes no award to Plaintiff.

#### Holdings

As to this olio of issues I find by a preponderance of the evidence:

1. Plaintiff has not proven any attorney-client relationship between it and the Defendants.
2. While of no effect based on the ultimate rulings herein the LLC could assign any legal malpractice or professional negligence as it had to Plaintiff.
3. The sole proximate cause of any of Plaintiff's alleged injury and damage was its opting to take advantage of an error in the deed into the LLC in contravention of the wishes of eighty percent of the members of the LLC and its own intentions in the formations of the LLC.

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4. Plaintiff did not ratify the sale to TAL by negotiating the check representing its percentage interest in the sale.
5. Defendants committed professional negligence in the formation of the LLC, however such negligence was not a proximate cause of any damage or injury to Plaintiff or the LLC.
6. The issue of any setoff is moot.


Base the findings above contain what may be called peripheral issues<sup>19</sup> which are moot and will not be addressed other than by recognizing these are according to Plaintiff's complaint:

1. Failure to give individual advice to the putative members of the LLC as to the formation of the LLC and significance of the deed into the LLC.
2. Failure to establish the LLC prior to the date of the deed into the LLC.
3. Failure to avoid representation which constituted a conflict of interest as to Plaintiff and the other LLC members.

Therefore, I find for the Defendant against the Plaintiff and Cato Estate, LLC.

AND IT IS SO ORDERED

April 3<sup>rd</sup>, 2015  
York, South Carolina

  
*John C. Hayes, III*  
John C. Hayes, III  
Seventeenth Judicial Circuit  
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<sup>19</sup> These are the duties set forth at paragraph 18(a) of Plaintiff's complaint.