

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas
John C. Hayes III, Circuit Court Judge

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Appellate Case No. 2015-001053
Case No. 2010-CP-46-02267

SC Court of Appeals

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,..... Appellant,

v.

Carroll M. Pitts, Jr., Esq. and Robinson Bradshaw &
Hinson, P.A.,..... Respondents.

INITIAL BRIEF OF RESPONDENTS

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COUNTER-STATEMENT OF ISSUES ON APPEAL

1. Should Appellant's appeal be dismissed because it is untimely?
2. Did the trial court correctly conclude that Appellant failed to establish any damages proximately caused by any act or omission of Respondents?
3. Did the trial court properly determine that Appellant failed to prove that it suffered any damages?
4. Did the trial court correctly conclude that no attorney-client relationship existed between Respondents and Appellant Burton Trust?
5. Did the trial court properly determine that any claims Appellant sought to assert on behalf of T.E. Cato Estate, LLC were extinguished upon the LLC's termination?
6. Did the trial court correctly conclude that the claims Appellant attempted to assert on behalf of the LLC were barred by the statute of limitations?
7. Did the trial court properly exercise its discretion in denying Appellant's motion to amend the Complaint to add claims and parties?
8. Does the Record support a conclusion, as an additional sustaining ground, that Respondents did not commit legal malpractice/professional negligence?
9. Does the Record support a conclusion, as an additional sustaining ground, that the Settlement Agreement arising from the Partition Action released the claims asserted in this litigation?
10. Does the Record support a conclusion, as an additional sustaining ground, that the Assignment Agreement, which assigned malpractice claims from the T.E. Cato Estate, LLC to the Appellant, was void against public policy and no assignment could be made as a matter of law?
11. Does the Record support a conclusion, as an additional sustaining ground, that due to Appellant's ratification of the sale of the Cato property, the claims are barred?

COUNTER-STATEMENT OF THE CASE

This is a legal malpractice/professional negligence case, which was heard by the Honorable John C. Hayes, III without a jury. Appellant filed this action on May 27, 2010, alleging two counts for legal malpractice. (Complaint ¶¶ 17–28; R. pp. __.) Appellant alleges these claims arose out of the formation of a limited liability company and a commercial real estate transaction.¹ (*Id.*)

When T.E. Cato died in 1957, he left certain real property in York County to his children. (Trial Transcript (“Tr.”) 23:2–24:5; R. pp. __.) The property consisted of nine parcels in total—five lots and four tracts commonly referred to as “the Areas” Parcels A, B, C, and D. (Tr. 22:12–23:7, 168:14–24; R. pp. __.)

After two of his children died, the property passed to their children, leaving seven individuals with an ownership interest: Donn S. Johnson (20%), Marjorie Cato Burton (“Marjorie Burton”) (20%),² Helen Cato Jones (20%), Robert Lee Cato (10%), James Thomas Cato (“Tommy Cato”) (10%), Cathy Cato Evans (10%), and Jane Cato West (10%) (collectively the “Cato heirs”). (*See* Pl.’s Ex. 7, Operating Agreement of T.E. Cato Estate, LLC pp. 20–21; R. pp. __.) Over the years, several heirs made attempts to try and sell their interests to other heirs in order to consolidate ownership. (Tr. 25:10–22; R. p. __.) These attempts were rebuffed. (Tr. 23:2–24:5; R. pp. __.)

Despite the failure in consolidating ownership, various heirs continued to voice their belief that the property should be sold. (Tr. 26:24–27:12; R. pp. __.) Accordingly,

¹ Although Respondents participated in the formation of the LLC, they did not handle the closing of the real estate transaction. (See Tr. 232:10–14; R. p. __.)

² Marjorie Burton’s interest in the land was placed into the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust (the “Burton Trust”) on January 19, 2007. (Pl.’s Ex. 4, Declaration of Trust; R. pp. __.) One of Marjorie Burton’s sons, Dr. David Burton (“Dr. Burton”), is prosecuting this case in his capacity as Successor Trustee of the Burton Trust after Marjorie Burton’s death. (Order Denying Motion to Dismiss; Tr. 245:24–246:2; R. pp. __.)

Tommy Cato took the lead in trying to obtain the consent of all of the heirs to sell a portion of the property. (*Id.*) His efforts began in 1999 and continued through early 2007, when he finally received 100% agreement to market and sell a portion of the property. (*Id.*) Tommy Cato listened to the concerns of each of the owners and offered to work on selling the property. (Tr. 27:7–12; R. p. __.) His goal was getting “as much money as I could out of it and distribute it” so that the owners could get a little bit of money and not have to worry about paying property taxes each year. (*Id.*) Each of the heirs agreed to give Tommy Cato sole responsibility to market and sell the portion of the property called “the Areas”—Parcels A, B, C, and D: (Tr. 25:23–26:8, 32:10–25; R. pp. __.)

In order to facilitate this process, Tommy Cato consulted Carroll M. Pitts, Esq. (“Attorney Pitts”), an attorney at Robinson Bradshaw & Hinson, P.A. (“Robinson Bradshaw”). (Tr. 32:10–25, 33:12–19; R. pp. __.) Tommy Cato asked his advice in setting up an entity that would be able to meet the Cato heirs’ objectives, and Attorney Pitts recommended a limited liability company with Tommy Cato as general manager. (Tr. 33:12–21; R. p. __.) Attorney Pitts prepared Articles of Organization for the LLC and an Operating Agreement. (Tr. 387:22–388:12; Pl.’s Ex. 6, Certificate of Existence and Articles of Organization of T.E. Cato Estate, LLC; Pl.’s Ex. 7, Operating Agreement for T.E. Cato Estate, LLC; R. pp. __.)

The name of the newly formed LLC was the T.E. Cato Estate, LLC (“the LLC”). (Pl.’s Ex. 6, Certificate of Existence and Articles of Organization of T.E. Cato Estate, LLC; R. pp. __.) Each Cato heir was given an ownership interest in the LLC equal to his

or her percentage ownership in the land, and Tommy Cato was named general manager.³ (Pl.'s Ex. 7, Operating Agreement for T.E. Cato Estate, LLC p. 10; R. pp. __.) Attorney Pitts also prepared a deed conveying all of the heirs' interests into the LLC. (Tr. 387:18–21; R. pp. __.) Each of the heirs executed the documents necessary to form the LLC and deed the property into it. (Tr. 399:12–400:1; R. pp. __.) Tommy Cato's understanding was that Attorney Pitts solely represented him during this process of forming the LLC and deeding the property into the LLC, and was not being hired to advise the LLC after formation or in any other capacity. (Tr. 37:9–25; R. p. __.) Dr. Burton also testified that Attorney Pitts never represented him or his mother individually. (Tr. 321:17–25; R. p. __.) Attorney Pitts and Robinson Bradshaw were not retained to conduct a title search. (Tr. 164:12–15; R. p. __.)

After the interests were all deeded into the LLC, Tommy Cato began working on finding a buyer for the property. (Tr. 172:22–173:18; R. pp. __.) He ultimately entered into a Letter of Intent to sell Parcels A, B, C, and D for \$1,000,000 to the developer who made the highest offer, Thomasson Apartments, LLC (“Thomasson”).⁴ (Tr. 102:13–103:16; Pl.'s Ex. 9, Letter of Intent; R. pp. __.) Thomasson issued the Letter of Intent on July 25, 2007. (Pl.'s Ex. 9, Letter of Intent; R. pp. __.) Prior to executing the Letter of Intent, Tommy Cato offered each heir the opportunity to buy the property at the same

³ The trial court found that an ambiguity arose from the LLC documents regarding Tommy Cato's authority. The Articles of Organization provided for a manager-managed LLC with Tommy Cato designated as the manager. (Pl.'s Ex. 6, Certificate of Existence and Articles of Organization of T.E. Cato Estate, LLC p. 3; R. p. __.) The Operating Agreement, however, provided for both a member-managed LLC in Article 6.1 and a manager-managed LLC in Article 6.6(c), with Tommy Cato as the General Manager with CEO authority. (Pl.'s Ex. 7, Operating Agreement for T.E. Cato Estate, LLC pp. 8, 10; R. pp. __.) The trial court noted the testimony at trial demonstrated that it appeared the intention was the LLC would be member-managed with Tommy Cato as general manager. (Final Order at 16; R. p. __.) The trial court found, however, that the LLC documents ultimately left the issue unclear. (*See id.*)

⁴ Five lots remained and were not subject to the Letter of Intent and sale to Thomasson. (Tr. 168:14–24; R. p. __.)

price offered by Thomasson, but received no response. (Pl.'s Ex. 18, Aug. 1, 2007 Email; R. pp. __.) Accordingly, he signed the letter on behalf of the LLC, as general manager, on August 3, 2007. (Pl.'s Ex. 9, Letter of Intent; R. pp. __.) The closing was initially scheduled for December 2007. (Pl.'s Ex. 18, Aug. 1, 2007 Email; R. pp. __.)

Thomasson retained attorney Josh Vann ("Attorney Vann") to conduct the closing. (Tr. 232:10–14; R. p. __.) A few weeks before the closing, Attorney Vann discovered through a title search a potential issue with a small strip of land within Area B referred to as the Old Roadbed (the "Roadbed Tract"). (Tr. 90:9–91:15; R. pp. __.)

The South Carolina Department of Transportation ("SCDOT") originally held title to the Roadbed Tract. (Tr. 93:5:3–19; R. pp. __.) In 2004, SCDOT sought an exchange with the Cato heirs of the Roadbed Tract for a different tract, referred to as the New Roadbed, on the same parcel. (Tr. 94:3–19; R. p. __.) The Cato heirs deeded the New Roadbed to SCDOT on March 12, 2004. (Pl.'s Ex. 5, Deed of New Roadbed to SCDOT; R. pp. __.) In exchange, SCDOT deeded the Roadbed Tract to the Cato heirs on October 24, 2006. (Pl.'s Ex. 3, Deed of Old Roadbed to Cato Heirs; Tr. 97:1–22; R. pp. __.) However, one of the grantees—a revocable trust of Marjorie Burton's—was revoked prior to that date on October 19, 2006. (Pl.'s Ex. 2, Revocation of Trust; Tr. 97:23–98:21; R. pp. __.) Thus, the Roadbed Tract had been deeded to a revoked trust. (*See id.*)

This created a cloud over whether the deed into the LLC had properly transferred title to the Roadbed Tract. (*See id.*) To rectify this issue, Attorney Vann prepared a quitclaim deed to be signed by each member of the LLC, including the Burton Trust. (Defs.' Ex. 18, Quitclaim Deed to Thomasson Signed by All Heirs Except Burton Trust;

Tr. 656:5–15; R. pp. __.) The quitclaim deed was designed to solve the title issue, with the heirs quitclaiming any interest they may have had in the Roadbed Tract to the LLC, and allow the sale to move forward as scheduled. (Tr. 109:8–16, 656:5–15, 657:22–658:3; R. pp. __.)

Every member of the LLC signed the quitclaim deed except for the Burton Trust. (Tr. 110:9–14; R. pp. __.) On November 30, 2007, Marjorie Burton sent an email to Tommy Cato under the subject “Requirement for signing of Cato SCDOT quitclaim deed.” (Defs.’ Ex. 4, Nov. 30, 2007 Email; R. p. __.) This email stated that she would agree to sign the quitclaim deed on behalf of the Burton Trust, thus effectuating the sale to Thomasson, if certain conditions were met. These conditions related to addressing her potential capital gains tax liability, possibly obtaining payment for her and her son Bud’s investment of time, efforts, and energy in handling the taxes and attempting to develop the subject property, and ensuring there were no side deals. (*Id.*) At the end of the email, she again expressed her willingness to sign the deed and move forward with the sale, provided her concerns were addressed. (*Id.*)

The closing went forward on December 12, 2007. (Tr. 123:14–124:3; R. p. __.) As of that date, the Burton Trust still had yet to sign the quitclaim deed as to the Roadbed Tract. (Tr. 638:4–12; R. p. __.) Therefore, Attorney Vann prepared an amendment to the contract of sale that allocated \$100,000 of the \$1,000,000 purchase price to the Roadbed Tract. (Pl.’s Ex. 11, Amendment to Contract; Tr. 640:10–642:16; R. pp. __.) Thomasson paid the LLC \$900,000 for the property conveyed, and the remaining \$100,000 was to be paid upon conveyance of the Roadbed Tract. (*Id.*) The Burton Trust received an initial

payment of \$124,200 for its 20% interest in the property conveyed following the closing. (Tr. 190:1–13; Defs.’ Ex. 5, Cancelled Check in Amount of \$124,200; R. pp. __.)

After the closing, the Burton Trust continued to refuse to sign the quitclaim deed as to the Roadbed Tract. (Pl.’s Ex. 24, Dec. 12, 2007 Email; Tr. 152:13–20; R. pp. __.) Due to the Burton Trust’s refusal to sign the quitclaim deed and convey the Roadbed Tract, the other Cato heirs were forced to file a partition action against the Burton Trust (“the Partition Action”). (Tr. 124:4–20; R. p. __.) Attorney Pitts filed the Partition Action on August 3, 2008, on behalf of six of the LLC members, seeking to compel the Burton Trust to transfer its interest in the Roadbed Tract to Thomasson. (Pl.’s Ex. 14, Petition for Partition; R. pp. __.) The Burton Trust filed a third-party complaint against Tommy Cato and Thomasson in the Partition Action. (See Defs.’ Ex. 19, Third-Party Complaint; Defs.’ Ex. 20, Amended Third-Party Complaint; R. pp. __.)

After approximately four years of litigation, the Partition Action was resolved via a Settlement Agreement on April 4, 2013. (Defs.’ Ex. 12, Release and Settlement Agreement; R. pp. __.) Under the terms of the Settlement Agreement, the Burton Trust executed a quitclaim deed to convey the Roadbed Tract to Thomasson. (*Id.* at 6; R. p. __.) The Burton Trust received an additional monetary payment of \$249,000, and also received four undeveloped lots.⁵ (*Id.*; Tr. 190:19–23; R. pp. __.) No other party to the Partition Action received a monetary settlement or real property pursuant to the Settlement Agreement. (Tr. 192:1–6; R. p. __.) The parties also executed an Assignment Agreement in conjunction with the Settlement Agreement. (Pl.’s Ex. 38D, Assignment Agreement; R. pp. __.) The Assignment Agreement assigned the four lots to the Burton

⁵ This brought the total monies received by the Burton Trust to \$373,200 from the sale of Parcels A, B, C, and D.

Trust, along with any claims the LLC may have against Attorney Pitts and Attorney Vann and their law firms. (*Id.* at 2; R. p. __.) Dr. Burton signed the Settlement Agreement and Assignment Agreement on behalf of the Burton Trust as trustee. (Defs.' Ex. 12, Release and Settlement Agreement at 23; Pl.'s Ex. 38D, Assignment Agreement; R. pp. __.)

Appellant filed this malpractice action on May 27, 2010. (*See* Complaint; R. pp. __.) The Complaint alleged causes of action on behalf of the Burton Trust for legal malpractice/professional negligence against Attorney Pitts and Robinson Bradshaw. (*Id.*) The Complaint also purported to bring a derivative claim on behalf of the LLC. (*See id.*) On September 6, 2013, the Burton Trust filed a motion to amend the Complaint to: (1) add as defendants the closing attorney, Attorney Vann, and his law firm, Morton & Gettys, LLC and (2) to assert claims in the LLC's own right pursuant to an assignment agreement. (Motion to Amend; R. pp. __.) The Court denied this motion via Order dated October 22, 2013. (Order Denying Motion to Amend; R. pp. __.) Appellant moved for partial reconsideration of this Order, but the Court denied that motion. (Motion to Reconsider; Order Denying Motion to Reconsider; R. pp. __.)

This case proceeded to a bench trial before Judge Hayes from December 16–18, 2014 and January 26–27, 2015. On April 3, 2015, the Court entered an Order finding in Respondents' favor. (Final Order; R. pp. __.) The Court first found that the Settlement Agreement from the Partition Action does not preclude Appellant's right to assert claims on behalf of the LLC, while noting that it found no merit to the LLC's claims. (*Id.* at 6; R. pp. __.) The Court also found that there was no public policy reason for invalidating the assignment of claims at issue in this case. (*Id.* at 8; R. pp. __.) The Court again noted that this was not a reflection on the merits of any claims. (*Id.*) The Court continued with

its analysis, finding that the statute of limitations ran as to claims the LLC may have had against Attorney Pitts and Robinson Bradshaw. (*Id.*) The Court also found that Appellant was not entitled to recovery on any theory related to the assignment because: (1) the LLC does not exist and did not exist at the time Appellant attempted to add a cause of action based on the assignment and (2) the Court denied Appellant's motion to add any claim based on the assignment. (*Id.* at 8–9.)

Appellant also sought to bring a derivative suit on behalf of the LLC pursuant to S.C. Code Ann. § 33-44-111. The Court found that Appellant could not bring this claim because the LLC dissolved on May 17, 2013, as evinced by Articles of Termination filed on October 4, 2013. (*Id.* at 10; Defs.' Ex. 6, Articles of Termination; R. pp. __.) Therefore, after that date there was no legal entity known as T.E. Cato Estate, LLC. (Final Order at 10; R. p. __.) The Court noted that the law does not allow litigation by or against a phantom entity. (*Id.*) Therefore, the Court found that Appellant could not pursue a derivative claim. (*Id.*)

The Court then examined the effect of the motion to disqualify Attorney Pitts filed by Appellant in the Partition Action. (Defs.' Ex. 14, Motion to Disqualify; R. pp. __.) Judge Alford denied that motion via Form 4 Order, stating only that the motion was “denied at this point in the action.” (Defs.' Ex. 17; Order Denying Motion to Disqualify; R. pp. __.) The Court found that this was “equivocal” and not controlling on the issue of an attorney-client relationship. (Final Order at 11; R. p. __.)

The Court determined, however, that regardless of whether there was an attorney-client relationship, Appellant failed to establish proximate cause. (*Id.*) The Court noted that Appellant advanced several issues it claimed were pivotal to its decision not to sign

the quitclaim deed. (*Id.*) The Court found the evidence presented simply failed to establish any connection between the Respondents' actions and the alleged harm. (*Id.* at 11–14; R. pp. __.) The impediments preventing the parties from finalizing the sale of the subject property and conveying the Roadbed Tract bore no relation to the alleged acts of omissions of Attorney Pitts. (*Id.*) Rather, the Court explained, the sole proximate cause of the Partition Action was the Appellant's own exploitation of the title issue in an effort to obtain a better deal. (*Id.* at 13; R. p. __.)

The Court found that Attorney Pitts did owe a duty to all of the members of the LLC to establish the LLC with clarity, which was breached by the ambiguity the Court found in the LLC documents. (*Id.* at 15–17; R. p. __.) The Court noted the testimony established that the intention appeared to be to form a member-managed LLC with Tommy Cato as General Manager. (*Id.* at 16; R. p. __.) However, the LLC documents ultimately left an ambiguity regarding how the LLC was to be managed.⁶ (*Id.*) Despite the ambiguity, the Court reiterated its finding that Appellant failed to prove by a preponderance of the evidence any damages proximately caused by this ambiguity. (*Id.*) The ambiguity in the LLC documents was never cited as a reason for the Burton Trust refusing to sign the quitclaim deed, and no action of Respondents resulted in any damages to Appellant. (*Id.* at 16–17; R. pp. __.)

The Court then examined whether an attorney-client relationship existed between the Burton Trust and Attorney Pitts. (*Id.* at 17–24.; R. pp. __.) After conducting an exhaustive analysis of the record evidence and the testimony of the parties' expert witnesses, the Court found that the evidence presented by Appellant did not prove the

⁶ As detailed more fully in Footnote 2, the Articles of Organization provided for a manager-managed LLC with Tommy Cato as manager, while the Operating Agreement provided for both a member-managed LLC and a manager-managed LLC, with Tommy Cato as general manager with CEO authority.

existence of an attorney-client relationship between Attorney Pitts and the Burton Trust. (*Id.*)

Finally, the Court determined that the Burton Trust's negotiation of the check it received as an initial payment from the December 2007 closing did not constitute a ratification of that transaction.⁷ (*Id.* at 17–24.)

Appellant filed a motion to reconsider the Court's April 3, 2015 Order on April 16, 2015. The Court denied this motion on April 30, 2015 on the merits, but also explained that the motion was untimely. The Court explained that its ruling on the motion was addressing it as though it was viable, while not waiving any issues related to Rule 59(g). This appeal followed. Appellant filed its Notice of Appeal on May 14, 2015.

ARGUMENT

The trial court's ultimate decision in favor of Respondents should be affirmed for several reasons. First and foremost, Appellant's appeal is untimely and should be dismissed. Moreover, the trial court's determinations that Appellant failed to establish any damages proximately caused by Respondents' alleged acts or omissions or the existence of an attorney-client relationship are supported by the evidence. The trial court also correctly found that any derivative claims were extinguished upon the termination of the LLC, and that any claims of the LLC were barred by the statute of limitations. Accordingly, the trial court properly exercised its discretion in denying Appellant's motion to amend to add non-derivative claims on behalf of the LLC in its own right. Finally, the Record contains additional sustaining grounds including: that Attorney Pitts did not commit malpractice/professional negligence; the settlement agreement in the Partition Action released any claims the Burton Trust may have had against Respondents;

⁷ The trial court also found that the issue of setoff was moot, as the Court made no award to Appellant.

the assignment agreement between the LLC and the Burton Trust was void against public policy and the claims are barred as a matter of law; and the Burton Trust ratified the December 2007 sale of the subject property by negotiating the check for its share of the proceeds.

THE COURT LACKS JURISDICTION

I. Appellant's appeal is untimely and should be dismissed.

A. Appellant failed to timely file its motion to alter or amend pursuant to Rule 59(e), SCRPC and, as a result, its appeal is untimely.

A motion to reconsider is untimely when it is served more than 10 days after "receipt of written notice of entry of the order." Rule 59(e), SCRPC. The Supreme Court has explained that the "written notice of the entry of judgment" starts the clock, not the receipt of the order:

Petitioners assert their Rule 59 Motion, filed 10 days after receipt of the written order on February 5, 1998, as opposed to within 10 days of their receipt of notice of entry of judgment, was timely. We disagree. There is simply no language in the rule permitting the motion to be served 10 days after receipt of the written order; it states 10 days after receipt of written notice of the entry of judgment.

Ackerman v. 3-V Chem., Inc., 349 S.C. 212, 214–15, 562 S.E.2d 613, 615 (2002).

Written notice can be received through informal means, such as a fax or letter from opposing counsel. *See Canal Ins. Co. v. Caldwell*, 338 S.C. 1, 5, 524 S.E.2d 416, 418 (Ct. App. 1999) (finding a Rule 59 motion was untimely when, although counsel did not receive the trial court's original form order, "there [wa]s no question that he received written notice of entry of the judgment, including the judgment roll number, from opposing counsel" by fax and mail). Recently, this Court unequivocally held that an email from a Judge's chambers containing a copy of an order as an attachment

“constitutes written notice of entry of the order under Rule 203(b)(1).” *Wells Fargo Bank, N.A. v. Fallon Properties S.C., LLC*, 413 S.C. 642, 643, 776 S.E.2d 575, 576 (Ct. App. 2015) (per curiam).

Rule 203(b), SCACR requires that a party serve his or her notice of appeal within 30 days after receiving written notice of the entry of a final order or judgment. Rule 203(b), SCACR. Failure to do so divests this Court of subject matter jurisdiction and requires dismissal of the appeal. *Caldwell*, 338 S.C. at 5–6, 524 S.E.2d at 418 (citing *First Carolina Nat’l Bank v. A & S Enters., Inc.*, 272 S.C. 339, 251 S.E.2d 762 (1979); *Burnett v. S.C. State Highway Dep’t*, 252 S.C. 568, 167 S.E.2d 571 (1969)).

On April 3, 2015, counsel for Appellant received written notice of the entry of judgment through an email sent by Judge Hayes’ law clerk. (See Emails dated April 3, 2015 between J. Alfieris and R. Jellenik, *et. al.*; R. pp. __.) The Court’s email included a copy of the Order and stated that “[l]ater today, I will be taking the Order to the Clerk of Court’s office to be filed.” (*Id.*) Appellant’s counsel replied to this Court’s email 24 minutes later, indicating his receipt of the same. (*Id.*) However, Appellant’s motion for reconsideration was not served upon counsel for Robinson Bradshaw or filed with the Court until April 16, 2015 — two days past the ten-day deadline which expired on April 14, 2015. (See Mot. for Reconsideration, Certificate of Service; R. p. __.)

Because the Rule 59(e) motion was untimely, the time for appeal was not tolled. See *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004) (“A *timely* post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCPC, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion.” (emphasis added)). Thus,

Appellant, in order to timely appeal, had to file its notice of appeal on or before May 4, 2015. It did not. (Notice of Appeal; R. p. __.)

Fallon Properties is on point. In *Fallon Properties*, the parties received an email from the Master-in-Equity, which had the Master's order attached. *Fallon Properties*, 413 S.C. at 643, 776 S.E.2d at 576. The email indicated that the order was placed in the mail on the same day. *Id.* The appellants filed their notice of appeal twenty-eight days after they received the printed copy of the order in the mail, but thirty-one days after they received the email. *Id.* at 644, 776 S.E.2d at 576. The respondents moved to dismiss the appeal as untimely, and the court granted the motion. *Id.* The appellants filed a petition for rehearing, but the court denied the petition, explaining that the email constituted written notice of entry of the Order under Rule 203(b)(1). The only difference between the present case and *Fallon Properties* is the Master-in-Equity's email in *Fallon Properties* had a clocked copy of the order attached, whereas here the trial court attached a copy of the order and said it would be filed later that day. This is a distinction without a difference, as in both cases the parties were on written notice of the court's entry of its final order, received a copy of the order, and were informed of its filing that day.

Appellant's suggestion that the Rule 59(e) motion was timely confuses "receipt of written notice of entry of the order" with "receipt of the written order." Appellant's counsel's email dated April 3, 2015 demonstrates that he received written notice of the entry of the judgment—along with a copy of the final order—six days prior to his receipt of the written order, and thirteen days prior to serving his Rule 59(e) motion. Because Appellant's motion for reconsideration was not served within ten days of the receipt of written notice of the entry of the judgment, it was time-barred pursuant to Rule 59(e),

SCRCF. As a result of the Rule 59(e) motion being untimely, the time for filing an appeal was not stayed. Therefore, the time to file an appeal expired on May 4, 2015. Appellant did not serve its notice of appeal until May 14, 2015. Accordingly, this Court lacks jurisdiction over this appeal, and the appeal must be dismissed.

STANDARD OF REVIEW

For nonjury actions such as this one, the “trial court’s findings of fact . . . should not be disturbed on appeal unless they are without evidentiary support.” *Hunt v. Forestry Comm’n*, 358 S.C. 564, 569, 595 S.E.2d 846, 848–49 (Ct. App. 2004) (emphasis added); *see also Okatie River, L.L.C., v. Se. Site Prep, L.L.C.*, 353 S.C. 327, 334, 577 S.E.2d 468, 479 (2003) (“In an action at law, tried without a jury, the appellate court standard of review extends only to the correction of errors of law.”); *State Farm Mut. Auto. Ins. Co. v. Moorer*, 330 S.C. 46, 51, 496 S.E.2d 875, 878 (Ct. App. 1998) (“In legal actions, our scope of review extends only to the correction of errors of law.”). Therefore, Appellant must overcome a high burden to show the trial court erred in making a certain factual finding.

II. The trial court correctly concluded that Appellant failed to establish any damages proximately caused by any act or omission of Respondents.

Even if Appellant’s appeal were timely filed, it fails on the merits because Appellant failed to prove multiple elements of its claims for legal malpractice at trial. Critically, Appellant failed to show any proximately cause damages.

A. The trial court’s findings on proximate cause are well supported by the record evidence.

To prevail on a legal malpractice claim, the plaintiff must satisfy the following four elements: (1) the existence of an attorney-client relationship; (2) breach of duty by

the attorney; (3) damage to the client; and (4) proximate causation of client's damage by the breach. *Holy Loch Distribs., Inc. v. Hitchcock*, 340 S.C. 20, 26, 531 S.E.2d 282, 285 (2000). Because proximate cause is so critical to Appellant's appeal and the trial court's findings, Respondents address this element first.

The question of proximate cause is a question of fact. *Vinson v. Hartley*, 324 S.C. 389, 402, 477 S.E.2d 715, 721 (Ct. App. 1996). It is only where "the evidence is susceptible to only one inference" that proximate cause becomes a matter of law. *Id.* at 402, 477 S.E.2d at 722. Proximate cause requires proof of both: (1) causation in fact and (2) legal cause. *Bramlette v. Charter-Medical-Columbia*; 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990). "Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence." *Id.* Legal cause is proven by establishing foreseeability. *Id.* A plaintiff proves legal cause "by establishing the injury in question occurred as a natural and probable consequence of the defendant's negligence." *Id.*

1. The Partition Action was a direct result of the Burton Trust's own actions, rather than a dispute over Tommy Cato's authority as general manager under the LLC documents.

Appellant contends that the trial court erred in determining that there were no proximately caused damages. Appellant bases its argument on the theory that Attorney Pitts' alleged negligence in drafting the LLC formation documents was the genesis of all subsequent events, ultimately harming Appellant. (Initial Brief of Appellant at 15.) Appellant contends it was foreseeable that the alleged errors in the LLC documents would lead to litigation about how the LLC was to operate and make decisions. (*Id.* at 17.) Appellant argues that the resulting litigation caused damages in the form of legal fees and diminution in value of the LLC property. (*Id.* at 21.)

Appellant attempts to reargue the facts to this Court. This is not the appropriate inquiry at the appellate level. This Court does not conduct a *de novo* review of the facts. *See Okatie River, L.L.C.*, 353 S.C. at 334, 577 S.E.2d at 479. Rather, Appellant is tasked with showing that the trial court's findings were without evidentiary support. In its final Order, the trial court set forth multiple reasons why Appellant failed to prove proximate cause, and provided factual support for its findings. In its brief, Appellant attempts to create a tenuous connection between the actions of Attorney Pitts and the alleged harm that it suffered. The question for this Court, however, is not whether there is an argument that proximate cause exists, but rather whether the trial court's rulings on proximate cause and that the Burton Trust refused to sign the Quitclaim Deed have any evidentiary support. For the reasons set forth in its Order, the trial court's findings were well supported by the evidence.

As the trial court properly determined, Appellant cannot escape the fact that its own decision not to sign the quitclaim deed conveying the Roadbed Tract was the "but for" cause of the Partition Action and its alleged damages.⁸ (Final Order at 11–14; R. pp. __.) As the trial court explained, at trial Appellant raised several issues which it claimed were pivotal to its decision not to sign the quitclaim deed, such as Tommy Cato's failure to obtain a survey or appraisal. (*Id.* at 11–12; R. p. __.) As the trial court reasoned, however, Appellant failed to establish any connection between the failure to obtain a

⁸ Appellant cites to *Tuten v. Joel*, 410 S.C. 104, 763 S.E.2d 54 (Ct. App. 2014) noting that it is "informative" as the court rejected the defendant lawyer's superseding or intervening cause argument because the root cause of the injury was the attorney's negligence. *Tuten* is distinguishable from the present action. The root cause of Appellant's injury in this matter was its own refusal to sign the quitclaim deed, not any act or omission of Attorney Pitts. Moreover, in *Tuten* the defendant lawyer attempted to absolve himself from malpractice liability by blaming another attorney at his firm for the negligence. *See Tuten*, 410 S.C. at 117, 763 S.E.2d at 61. This Court rejected that argument, finding that the defendant lawyer was negligent for the same reason as the other attorney, and thus could not avoid liability by placing the blame on her. *Id.*

survey or appraisal and the actions of Respondents. (*Id.* at 12; R. p. __.) No evidence supports the notion that either Tommy Cato or the LLC should have elicited Respondents' input over obtaining a survey or appraisal. (*Id.*)

As the trial court further explained, the record evidence suggests that Marjorie Burton and the Burton Trust were ready to move forward with the transaction arranged by Tommy Cato, even after the Roadbed Tract needed to be conveyed by quitclaim deed. In her November 30, 2007 email to Tommy Cato, Marjorie Burton specifically noted that she would "agree to sign over the last quitclaim deed" and effect the sale to Thomasson provided certain concerns were addressed. (Defs.' Ex. 4, Nov. 30, 2007 Email, R. p. __.) The concerns that she raised in that email related to: (1) attempting to secure what she believe to be an equal capital gains liability for all parties, (2) possible payment for her and her son Bud's investment of time and effort in handling the taxes and developing the property, particularly in the event Tommy Cato was compensated, and (3) ensuring that no side agreements or "side deal" existed with Thomasson. (*Id.*) This email did not raise any concerns regarding the propriety of the potential transaction or Respondents' performance. Critically, at no point did she question Tommy Cato's authority. She concluded her email by explaining that, "[a]gain, I am willing to sign the . . . quitclaim deed in order for all the other heirs to finish this deal," but that these issues "will have to be ironed out first before that signing occurs." (*Id.*)

Appellant contends a previous email, sent on August 1, 2007, establishes that Marjorie Burton had concerns over Tommy Cato's authority. (Pl.'s Ex. 53, Emails between Burton Trust and Tommy Cato; R. pp. __.) In this prior email, Marjorie Burton noted that "any final decision to sell or not to sell . . . still rests with all of the heirs

coming to a unanimous decision,” and communicated her desire that Tommy Cato not “proceed too far in the negotiating process without the proper authorization from the heirs.” (*Id.*) This letter, however, could at most be considered a reminder to Tommy Cato that he was working on behalf of all the Cato heirs. It was sent prior to Tommy Cato entering into the Letter of Intent with Thomasson, and prior to Marjorie Burton being informed about the terms of the deal. After learning the terms of the deal, Marjorie Burton made no further mention of Tommy Cato’s authority, and did not challenge the LLC’s ability to move forward with the transaction.⁹ Quite the opposite, she expressed her intent to sign the quitclaim deed of the Roadbed Tract, assuming the items she raised were ironed out. (*See* Defs.’ Ex. 4, Nov. 30, 2007 Email; R. p. __.)

The trial court’s findings, therefore, were supported by the evidence. Ultimately, the root cause of the alleged “damages” suffered by Appellant was the Burton Trust’s own refusal to sign the deed in an attempt to get more out of the deal. As the trial court correctly determined, the record evidence does not support that the Burton Trust’s decision not to sign the quitclaim deed was in any way related to Tommy Cato’s authority under the LLC documents.¹⁰

Appellant asserts that the November 30, 2007 email relied on by the Trial Court was at most a “settlement offer” to accept an arrangement to which she was not in

⁹ The only other communication from Marjorie Burton between the August 1, 2007 email and the November 30, 2007 email was an email sent on November 24, 2007. (*See* Pl.’s Ex. 48, Nov. 24, 2007 Email; R. p. __.) This email primarily communicated a request that Tommy Cato obtain an independent appraisal of the property. Notably, in this email Marjorie Cato acknowledged that she signed the first quitclaim deed “turning over [her] rights” in order to have “T.E. Cato Estate LLC negotiate on my behalf.” (*Id.*) She also acknowledged the heirs’ role as limited partners and Tommy Cato’s role as general partner. (*Id.*)

¹⁰ Defendants’ expert, William O. Higgins, reached the same conclusion. He testified that, in his opinion, the Burton Trust’s “failure to agree . . . and sign the quitclaim deed” was the sole cause of the Partition Action. (Tr. 1003:19–24; R. p. __.) Thus, he explained, no act or omission of Attorney Pitts proximately caused any damages to Appellant. (Tr. 1014:14–1015:2; R. p. __.)

agreement. (Initial Brief of Appellant at 25.) Moreover, it contends that this email cannot be read in a vacuum and must be examined in light of the various emails exchanged between Marjorie Burton and Tommy Cato. (*Id.* at 28.) These arguments invite this Court to speculate and read secondary meaning into the record evidence, which is unwarranted in light of the fact that the trial court's finding was supported by the very language of the email. Appellant also suggests that Attorney Pitts was "aware" of a dispute over Tommy Cato's authority, and that he did nothing to intervene. (*Id.* at 20, 22.) Appellant contends that Attorney Pitts had "full knowledge" of a dispute among the heirs regarding the issue of authority to bind the LLC, yet failed to act. (*Id.*) Again, Appellant seeks to retry the case to this Court. In any event, this argument lacks merit. As the trial court explained, there is no evidence of a dispute over Tommy Cato's authority, particularly in light of the fact that the Burton Trust was willing to proceed with signing the quitclaim deed and finalizing the transaction if its concerns were addressed. (*See* Final Order at 12–13; R. pp. __.) Appellant has attempted to manufacture a dispute, but is unable to point to evidence demonstrating that the Burton Trust refused to sign the deed because it believed Tommy Cato exceed his authority in arranging the deal.¹¹ Because there was no dispute, there was no issue for Attorney Pitts to correct.¹²

¹¹ Appellant contends that Attorney Pitts was aware of a dispute over Tommy Cato's authority because he was copied on the August 2007 emails between Tommy Cato and Marjorie Burton. (Initial Brief of Appellant at 18–19.) Marjorie Cato's August 1, 2007 email, however, merely reminded Tommy Cato that any final decision must be agreed upon by all of the heirs. (Pl.'s Ex. 53; August 2007 Emails; R. pp. __.) Tommy Cato's response did not dispute this fact. Moreover, he testified at trial that he understood that "major decisions" would require unanimous consent of the LLC members. (Tr. 72:24–73:9, R. pp. __.) The Trial Court properly determined that there was no active dispute over Tommy Cato's authority.

¹² Appellant also argues that Attorney Pitts represented the "last clear chance" to avoid the harm in this matter. (Initial Brief of Appellant at 20.) This doctrine only relates to comparative negligence situations, and has been subsumed by the doctrine of comparative negligence in any event. *See Spahn v. Town of Port Royal*, 330 S.C. 168, 499 S.E. 205 (1998). This doctrine has no application here. Rather, as the Trial Court

The evidence establishes that the but-for cause of Appellant's alleged harm was the Partition Action, not any act or omission of Attorney Pitts. The Burton Trust's decision to hold out on conveying the Roadbed Tract was the but-for cause of the Partition Action. The chain of events that occurred in this matter was not a natural and probable consequence of the alleged malpractice. Appellant has not met its burden of showing that the trial court's findings were without evidentiary support.

2. The conveyance of the Roadbed Tract by quitclaim deed did not arise as a result of any act or omission by Attorney Pitts and thus was not the proximate cause of any harm to Appellant.

Appellant also contends that the deed of the property into the LLC that Attorney Pitts prepared was defective and that this also proximately caused its damages. (Initial Brief of Appellant at 23.) Appellant argues that the deed prepared by Attorney Pitts was "flawed and defective," because it left out property the heirs owned and included property they did not own. (*Id.*) Appellant suggests that Attorney Pitts should have conducted a title search, and notes that if the original deed had been correct, there would have been no need for the quitclaim deed. (*Id.* at 23–24.) This is not correct.

The trial court properly determined that the Roadbed Tract was not conveyed by the general warranty deed, but that did not create or necessitate the Partition Action. The trial court reiterated the same point as it did with the alleged errors in the LLC documents: the sole proximate cause of the Partition Action was the Appellant's use of the title issue on the Roadbed Tract to obtain a better deal. (Final Order at 13; R. p. __.) Appellant wielded the title issue as a sword to obtain a greater payment than it would have otherwise in connection with the sale of the property. (*Id.*) As the trial court noted,

found, the Burton Trust's own actions were the proximate cause of its alleged harm.

it seems paradoxical that Appellant seeks to base its damages on the same title issue which it previously exploited. (*Id.*)

When Attorney Pitts prepared the deed, he used the tax map numbers provided by Tommy Cato to identify the property that was being conveyed. (Tr. 164:16–165:2; R. pp. __.) Tommy Cato did not authorize Attorney Pitts to conduct a title search. (Tr. 164:12–16; R. p. __.) Attorney Pitts did consult probate records to confirm the derivation provided by Tommy Cato. (Tr. 525:16–526:16; R. pp. __.) As Tommy Cato testified, the error in the deed was completely unexpected, as “everybody in the family including [him]self” believed that the family had proper title to all of the relevant property. (*See* Tr. 89:10–18; R. pp. __.)

Attorney Pitts was under no obligation to conduct a title search. A title search was not requested and was not necessary, as this property had been in the family for several generations and none of the heirs were aware of any potential problems with the title. (*Id.*) As Attorney Pitts testified, in this situation the family was supposed to have already owned the entirety of the property—and owned it for several generations—and this transaction was merely meant to transfer title from the multiple family member-owners to a single family-owned entity. (Tr. pp. 480:11–25; R. pp. __.) If there was a title problem, it already existed and it existed from the time the property was acquired by the family. (*Id.*) Thus, a title search was not requested or necessary for the purposes of the transfer to the LLC. (Tr. pp. 508:13–16; R. p. __.)

Defense expert William O. Higgins, Esq. testified to this as well. As he noted, with a transaction like the one at issue in this case, the family members “just can’t imagine that they would pay you or pay a title abstractor to search the title to their own

property.” (Tr. pp. 962:8–963:9; R. pp. __.) Thus, the attorney would typically take information from the family members, do enough research to obtain a derivation, and then proceed with preparing the deed. (*Id.*) He testified that Attorney Pitts did not breach the standard of care in preparing the deed this way. (Tr. 992:8–993:9; R. pp. __.)

The issue with the deed into the LLC, therefore, was not caused by any act or omission of Attorney Pitts. Moreover, even if it was, the Burton Trust’s own actions were the but-for cause of the Partition Action. Hence, the Burton Trust’s exploitation of the title issue was not a natural and probable consequence of Attorney Pitts’ preparation of the deed into the LLC.

III. The trial court properly determined that Appellant failed to prove that it suffered any damages.

Appellant failed to prove that it suffered damages as a result of any act or omission of Respondents because: (1) Appellant did not establish that it received less than fair market value for its share of the property and (2) attorneys’ fees are not recoverable under the facts of this case. Appellant in fact benefitted from its refusal to sign the quitclaim deed.

The amount of damages is also a question of fact. *See Stevens v. Allen*, 336 S.C. 439, 451, 520 S.E.2d 625, 631 (Ct. App. 1999) (“South Carolina law requires a jury determine all issues of fact including the proper amount of damages.” (emphasis added)). Therefore, the proper analysis for this point is also whether the trial court’s finding was supported by the evidence.

A. Appellant failed to prove it received less than fair market value for its share of the property.

Appellant first contends that it suffered damages in the form of diminished property value. (Initial Brief of Appellant at 21.) “Damage to property is measured by the difference between what such property is worth and what it should have been worth but for the attorney’s negligence.” Mallen & Smith, *Legal Malpractice* § 21.4 (2014 ed.). In legal malpractice cases involving land transactions, South Carolina courts measure damages using the difference in the value received and fair market value. The Supreme Court affirmed that damages were properly measured by “the difference between the value of the actual property received and the value of the property which would have been received” when a client was injured by his real estate attorney’s negligence in *Jennings v. Lake*, 267 S.C. 677, 680, 230 S.E.2d 903, 905 (1976). Here, Appellant failed to prove damages and thus this matter should be affirmed for that separate reason. See *Brandt v. Gooding*, 368 S.C. 618, 627, 630 S.E.2d 259, 263 (2006) (plaintiff failed to prove damages).

The testimony and evidence presented at trial establishes that the Burton Trust received \$373,200 for its 20% interest in the property purchased by Thomasson. (Tr. 280:17–281:8; R. pp. __.) This far exceeds the amount of proceeds the Burton Trust would have received for its 20% stake in the property in the event it did not hold out. If the trust had signed the quitclaim deed, it would have received \$200,000 of the \$1,000,000 purchase price. Therefore, the trust received an extra \$173,200 by filing the partition action, in addition to the four undeveloped lots it received pursuant to the Settlement Agreement. Therefore, the trial court properly determined that the Appellant failed to prove any damages as a result of Attorney Pitts’ alleged acts or omissions.

The appraisals of both parties support this finding as well. The independent appraisal requested by the Respondents valued the property at \$1,016,000 – within 1.6% of the \$1,000,000 price paid by Thomasson. (See Defs.’ Ex. 25, Appraisal of H. Corbin Haskell, MAI; Tr. 899:10–900:11; R. pp. __.) Additionally, the appraiser hired by the Burton Trust valued the property at \$1,311,000. (See Defs.’ Ex. 7, Amended Appraisal of George E. Knight, Jr., MAI; Tr. 738:17–23; R. pp. __.) Moreover, Thomasson’s \$1,000,000 price equates to a “market appraisal” because that was the highest offer Tommy Cato received after marketing the property to seven developers. (Tr. 172:22–173:18, 200:2–19; R. pp. __.) According to each of these appraisals, the Burton Trust received more than fair market value for its share of the property because the \$373,200 it received exceeds 20% of the total value of each appraisal by more than \$100,000.¹³ When presented with this evidence at trial, Dr. Burton agreed that the Burton Trust had been overpaid according to its own expert’s appraisal. (Tr. 308:8–309:19; R. pp. __.)

The Burton Trust failed to prove it was damaged by any alleged act or omission of Respondents. The formation of the LLC documents and the deed into the LLC had no bearing on the property value. Moreover, as detailed above, the Appellant received a greater share of the proceeds than its 20% interest warranted. Accordingly, the trial court’s finding that the Burton Trust suffered no damages was supported by the record.

B. Attorneys’ fees are not recoverable under the facts of this case.

Appellant also contends that it suffered damages in the form of attorneys fees. (Initial Brief of Appellant at 21–22.) The recovery of attorneys’ fees in a legal malpractice case is limited to legal expenses “reasonably incurred outside the malpractice

¹³ For Appellant’s appraisal 20% would amount to \$262,200, for Respondents’ appraisal 20% would amount to \$203,200, and for the “market” appraisal established by the purchase price 20% would amount to \$200,000.

action itself as a result of a lawyer's misconduct." Restatement (Third) of the Law Governing Lawyers § 53, cmt. f (2000); *see also, e.g., Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Research Corp.*, 299 S.W.3d 106, 122 (Tex. 2009) ("The better rule, and the rule we adopt, is that a malpractice plaintiff may recover damages for attorney's fees paid in the underlying case to the extent the fees were proximately caused by the defendant attorney's negligence." (emphasis added)). For example, "if a lawyer's negligent title search causes a client to buy land with an unclear title and as a result to incur legal expenses defending the title against a challenger, the client may recover those expenses from the negligent lawyer." Restatement (Third) of the Law Governing Lawyers § 53, cmt. f.

In this case, the buyer of the land did not challenge the title, and the legal expenses incurred by the Burton Trust were not incurred to defend the title. On the contrary, the Burton Trust was the challenger and the legal expenses it incurred were caused by its refusal to sign the quitclaim deed. The trial court properly found that the Burton Trust's own refusal to sign the quitclaim deed resulted in the Partition Action, not any act or omission of Attorney Pitts.

The Burton Trust responded to the filing of the Partition Action by asserting six third-party claims against Tommy Cato and Thomasson. (*See* Defs.' Ex. 19, Third-Party Complaint; Defs.' Ex. 20, Amended-Third Party Complaint; R. pp. __.) The filing of the third-party complaint then spawned a fourth-party complaint by Thomasson against T.E. Cato Estate, LLC. (*See* Defs.' Ex. 21, Fourth-Party Complaint; R. pp. __.) By asserting these third-party claims, the Burton Trust caused the Partition Action to grow into a complex lawsuit that was litigated for more than four years. Therefore, the lion's share

of Mr. Jellenik’s fees that the Burton Trust sought to recover resulted not from the defense of the Partition Action, but from the Burton Trust’s prosecution of unnecessary third-party claims. Similarly, Attorney Lucy McDow (“Attorney McDow”) was hired by the LLC to defend it against the fourth-party claim brought by Thomasson—a claim that never would have been made but for the Burton Trust filing a Third-Party Complaint against Thomasson. (See Defs.’ Ex. 21, Fourth-Party Complaint ¶¶ 59, 67, 70; Tr. 104:22–105:10, 130:6–13; R. pp. __.)

The attorneys’ fees incurred during the Partition Action were the result of the Burton Trust’s refusal to sign the quitclaim deed, and its decision to prosecute six third-party claims against Tommy Cato and Thomasson. The attorneys’ fees incurred in that action were not recoverable against Respondents. Therefore, the trial court properly found the Appellant suffered no damage and could not recover attorneys’ fees.

C. Even if attorneys’ fees were recoverable, Appellant failed to introduce any evidence supporting its alleged damages.

Furthermore, even if attorneys’ fees were recoverable in this action, the Appellant failed to introduce any evidence of its damages at trial. As the Supreme Court of the United States has explained, “[t]he party seeking an award of [attorneys’] fees should submit evidence supporting the hours worked and rates claimed.” *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *see also Funai Elec. Co. v. Daewoo Elecs. Corp.*, No. C-04-01830 JCS, 2009 WL 1110825, at *1 (N.D. Cal. Apr. 24, 2009) (finding that a plaintiff “must provide [the defendants] with redacted time sheets so that [the defendants] have a meaningful opportunity to challenge the reasonableness of the fees requested”). “Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation.” *Carlyle v. Tuomey Hosp.*, 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991).

The billing records produced by the Burton Trust at trial were insufficient evidence to support its claim for attorneys' fees.¹⁴ Specifically, Mr. Jellenik's time entries do not indicate whether his time was spent defending the Partition Action, prosecuting third-party claims, or prosecuting this action against Respondents. (*See generally* Pl.'s Ex. 32, Attorney Invoices; R. pp. __.) This is fatal in light of the fact that the Partition Action and the present litigation overlapped for three years. The trial court was left only to speculate as to the nature and reasonableness of these entries and, therefore, the records fail to provide a sufficient basis upon which Respondents could be found to be responsible for fees. Moreover, the Burton Trust failed to produce any evidence, such as a cancelled check or bank statement, to prove that it paid Mr. Jellenik's bills. Therefore, it failed to establish whether the bills were actually paid.

The trial court's determination that the damages claimed by Appellant were not proximately caused by any act of omission of Respondents was supported by the evidence. Moreover, even if it established proximate cause, Appellant failed to provide sufficient evidentiary support as to any resulting damages. As a result, the trial court should be affirmed.

¹⁴ As argued by Respondents at the time these documents were introduced, the billing records should have been excluded from evidence because they were not timely produced during discovery despite multiple discovery requests expressly seeking any evidence of damages. (Tr. 140:9-21; R. p. __.)

IV. Aside from its proper findings that Attorney Pitts caused no injury and that Appellant failed to establish damages, the trial court correctly concluded that no attorney-client relationship existed between Respondents and Appellant Burton Trust.

The existence of an attorney-client relationship is a question of fact. *See McNair v. Rainsford*, 330 S.C. 332, 343, 499 S.E.2d 488, 494 (Ct. App. 1998) (“Here, there is a factual dispute as to whether an attorney-client relationship existed between Tucker and the McNairs.”); *see also Sheet Metal Workers Int’l Ass’n v. Sweeney*, 29 F.3d 120 (4th Cir. 1994) (“The district court’s conclusions as to the non-existence of any attorney-client privilege and expectation of confidentiality rest essentially on determinations of fact, which we review for clear error.”).

Under South Carolina law, “[t]he attorney-client relationship cannot be assumed since the relationship is created by the consent of the parties. The client cannot unilaterally impose the relationship upon the attorney, and neither can the attorney create the relationship without the client’s consent.” 1 S.C. Jur. *Attorney and Client* § 18; *see also Argoe v. Three Rivers Behavioral Center*, No. 2007-CP-32-1981, 2008 WL 8185836 (S.C. Comm. Pl. July 3, 2008) *aff’d*, 388 S.C. 394, 697 S.E.2d 551 (2010) (same). Stated differently, “[a]n individual’s subjective belief that he is represented is not alone sufficient to create an attorney-client relationship.” *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333, 339 (4th Cir. 2005); *see also* Mallen & Smith, *Legal Malpractice* § 8:3 (2014 ed.) (“The claimant’s subjective belief does not establish an attorney-client relationship unless the lawyer reasonably induced that belief.”). As explained in The Restatement (Third) of The Law Governing Lawyers, an attorney-client relationship is premised upon mutual manifestation of consent. As the Restatement notes, a relationship of client and lawyer arises when:

a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either the lawyer manifests to the person consent to do so; or the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or a tribunal with power to do so appoints the lawyer to provide the services.

Restatement (Third) of the Law Governing Lawyers § 14 (2000); *see also Volkswagen Aktiengesellschaft v. Novelty, Inc.*, 247 F. Supp. 2d 1076, 1080 (S.D. Ind. 2003) (“[A]n attorney-client relationship is established only by mutual assent.”).

A. The Burton Trust never manifested the intent to form an attorney-client relationship to Attorney Pitts.

The trial court properly concluded there is no evidence in the record demonstrating that either Marjorie Burton or the Burton Trust believed that Attorney Pitts represented them at the time the LLC documents and the deed into the LLC were prepared and signed. Rather, the testimony supports the fact that Attorney Pitts was engaged to represent Tommy Cato as general manager of the LLC.

Tommy Cato testified his understanding was that Attorney Pitts represented him alone during the formation of the LLC and the transfer of the property into the LLC. (Tr. 36:16–37:25; R. pp. __.) He testified that he hired Attorney Pitts to advise him personally, and that he did not hire Attorney Pitts to represent the LLC or act in any other capacity. (*Id.*) This was Attorney Pitts's understanding as well. He testified that his representation was of Tommy Cato as general manager of the LLC. (Tr. 387:5–15; R. pp. __.) He denied that he ever represented the LLC itself. (Tr. 482:19–25, 486:2–7; R. pp. __.) Attorney Pitts explained that he did not even have contact with Marjorie Burton

or anyone associated with the Burton Trust until the Roadbed Tract issue arose. (Tr. 395:18–396:21; R. pp. __.)

Dr. Burton also testified that the Burton Trust never communicated directly with Attorney Pitts about the work he did in forming the LLC and deeding the property to it. (Tr. 315:6–17; R. p. __.) Further, Dr. Burton testified that neither he nor his mother ever emailed or otherwise attempted to communicate with Attorney Pitts. (*Id.*) In fact, Dr. Burton testified that Attorney Pitts never represented him or his mother individually. (Tr. 321:17–25; R. p. __.) Conversely, Dr. Burton’s purported understanding was that Attorney Pitts was, at most, the attorney for the LLC. (*Id.*) Dr. Burton admitted, however, that he did not know the scope of Attorney Pitts’ involvement and services at the inception of the LLC. (Tr. 314:5–13; R. p. __.)

Ultimately, as the trial court correctly noted, there is no testimony that the Burton Trust or any other members of the LLC had any belief that Attorney Pitts was their attorney with regard to the formation of the LLC and the deed into the LLC. As the Court explained, Appellant’s experts relied on events that occurred after the formation of the LLC and deed into the LLC to support their conclusion that an attorney-client relationship existed. For example, Professor Freeman’s testimony that the fact Appellant brought this suit demonstrated it believed Attorney Pitts was its attorney is without merit. (Tr. 611:7–11; R. p. __.) The trial court properly determined that this has no bearing on whether an attorney-client relationship existed. The filing of a malpractice lawsuit after the fact cannot serve as competent evidence that the would-be client manifested the intent to form an attorney-client relationship to the attorney. Fundamentally, as Mr. Virzi testified, the belief that an attorney-client relationship exists must be contemporaneous

with the existence of the alleged relationship. (Tr. 819:1–5; R. p. __.) Therefore, this lawsuit (which was filed over two years after the alleged malpractice occurred) cannot form the basis for the existence of an attorney-client relationship between the Burton Trust and Attorney Pitts.

Because the Burton Trust never manifested the intent to form an attorney-client relationship to Attorney Pitts, no attorney-client relationship existed between them.

B. Attorney Pitts never consented to the formation of an attorney-client relationship with the Burton Trust.

“Because the relationship is contractual, the predicate is that both lawyer and client have consented, expressly or impliedly, to its formation.” *Mallen & Smith, Legal Malpractice* § 8:3 (2014 ed.); *see also* 1 S.C. Jur. *Attorney and Client* § 18 (“The attorney-client relationship cannot be assumed since the relationship is created by the consent of the parties.”) Attorney Pitts neither expressly nor implicitly consented to an attorney-client relationship with the Burton Trust; therefore, no attorney-client relationship existed between them.

1. Attorney Pitts never expressly consented to represent the Burton Trust.

Attorney Pitts never had any conversation with any of the heirs (aside from Tommy Cato), including the Burton Trust. (Tr. 395:18–24, 456:11–18, 534:12–18; R. p. __.) He did not talk on the phone with Marjorie Burton or meet with her in person. (*See id.*) Attorney Pitts communicated solely with Tommy Cato in his capacity as General Manager of the LLC. (*See* Tr. 385:5–8; R. p. __.) Attorney Pitts testified that “the Burtons had their own attorney.” (Tr. 469:8–470:7; R. p. __.) Therefore, Attorney Pitts

never consented to an attorney-client relationship with the Burton Trust and he never communicated directly with its trustees.

In addition, the email sent to Tommy Cato from Attorney Pitts where he stated “[f]eel free to share my opinions” fails to prove that Attorney Pitts consented to the formation of an attorney-client relationship with the Burton Trust. (Pl.’s Ex. 53, Email dated Nov. 8, 2007; R. pp. __.) In this email, Attorney Pitts simply offered that Tommy Cato could share his opinion with the LLC members that \$1,000,000 was a good price for the property if Tommy Cato desired to do so—he did not manifest any consent to represent the Burton Trust. Further, even if Tommy Cato forwarded the email to the Burton Trust, this action would be insufficient to prove the existence of an attorney-client relationship because the email lacks any indicia that Attorney Pitts consented to representing the Burton Trust individually. *See In re Ducane Gas Grills, Inc.*, 320 B.R. 312 (Bankr. D.S.C. 2004) (finding that forwarding a letter from a lawyer to a third party did “not sufficiently demonstrate that [the p]laintiffs were also clients of [the law firm] because nothing in the [] letter indicated that [the p]laintiffs were actively seeking legal advice *for themselves* from [the law firm]”).

2. Attorney Pitts never implicitly consented to represent the Burton Trust.

There is also no credible basis for arguing that Attorney Pitts implicitly consented to an attorney-client relationship with the Burton Trust. Attorney Pitts never directly communicated with the Burton Trust (or any other heir except Tommy Cato). Further, Tommy Cato’s communications clearly and consistently stated that Attorney Pitts was the “Corporation Attorney”; therefore, there is no reasonable basis to conclude the Burton Trust was induced to believe Attorney Pitts consented to represent it individually based

on them. (*See, e.g.*, Pl.'s Ex. 20, Email dated Aug. 20, 2007; Pl.'s Ex. 24, Email dated Nov. 16, 2007; R. pp. ___.)

The two emails which Appellant claims that show a dispute over Tommy Cato's authority do not establish that an attorney-client relationship existed at the time of the formation of the LLC and deed into the LLC. Critically, both of these emails were sent after Attorney Pitts drafted the Articles of Organization, the Operating Agreement, and the deed into the LLC. Any belief regarding an attorney-client relationship the Burton Trust held based on these emails, therefore, was formed after Attorney Pitts completed the tasks he was engaged to perform. The Burton Trust thus did not have the purported belief that Attorney Pitts represented it at the time the alleged negligent acts or omissions occurred.

3. Appellant has not established that the Burton Trust reasonably believed that an attorney-client relationship existed.

Appellant's final argument regarding the attorney-client privilege contends that Marjorie Burton had a reasonable, contemporaneous belief that Attorney Pitts represented her or the Burton Trust. (Initial Brief of Appellant at 35.) Appellant contends that Marjorie Burton's April 28, 2009 motion to disqualify Attorney Pitts establishes that she believed Pitts was her attorney during the formation of the LLC and the deed into the LLC. (*Id.* at 35–36.)

The record evidence, however, demonstrates that the Burton Trust never manifested a reasonable belief that Attorney Pitts was its attorney at the time of the LLC formation and deed into the LLC. The Burton Trust never asked Attorney Pitts any questions about any of the work that he did on behalf of the LLC. (Tr. 315:6–9; R. p. ___.) The Burton Trust never attempted to set up a meeting with Attorney Pitts, and never

emailed or otherwise attempted to communicate with him. (Tr. 315:10–17; R. p. __.) In fact, Dr. Burton testified that Attorney Pitts never represented him or his mother individually. (Tr. 371:20–25; R. p. __.) Additionally, the Burton Trust’s expert witness, Michael Virzi, testified that there was no evidence in the record to demonstrate that Marjorie Burton manifested any belief Attorney Pitts was her attorney, aside from the filing of this lawsuit. (Tr. 818:18–820:8; R. pp. __.) Attorney Pitts testified that he never communicated with Marjorie Burton and that she was not his client. (Tr. 395:18–24, 486:2–15; R. p. __.) The fact that the Burton Trust filed a motion to disqualify over a year later is not evidence that the Burton Trust held a reasonable belief that an attorney-client relationship existed at the time of the LLC formation and deed into the LLC.

Appellant contends that Judge Alford’s order denying the motion to disqualify Attorney Pitts “at that time” could only be construed as recognizing a conflict and giving Attorney Pitts an opportunity to voluntarily withdraw. This is not correct. Rather, by denying the Motion, the Court ruled that Attorney Pitts did not previously represent the Burton Trust—as that was the basis for the Motion—and no conflict of interest existed. (See Defs.’ Ex. 14, Pl.’s Motion to Disqualify; Defs.’ Ex. 17, Order Denying Motion to Disqualify; R. pp. __.) If Judge Alford had determined that Attorney Pitts previously represented the Burton Trust, he would have had no choice but to disqualify Attorney Pitts because a lawyer cannot represent a client “if the representation involves a concurrent conflict of interest.” *See* Rule 1.7(a)(2), SCRPC. Judge Alford made no such finding and denied the motion. Appellant did not move for reconsideration of that ruling, seek to appeal from it, or seek a writ on it.

Based on the foregoing, the trial court properly determined that no attorney-client relationship existed between Respondents and Appellant, and there is evidence of record reasonably supporting this determination

V. The trial court properly determined that any claims Appellant sought to assert on behalf of the T.E. Cato Estate, LLC were extinguished upon the LLC's termination.

The Complaint filed by the Burton Trust appeared to assert a derivative cause of action on behalf of the LLC, in addition to the direct claim it attempted to assert on its own behalf under the assignment agreement. (See Compl. ¶¶ 23–28.) Specifically, the Burton Trust alleged that Attorney Pitts breached the standard of care owed to the LLC by: (1) executing the Deed prior to the formation of the LLC, and (2) failing to assure that the LLC members understood applicable statutory requirements for selling substantially all of the LLC's assets. (See *id.* ¶¶ 25–26.) The Burton Trust alleged it is entitled to bring a derivative claim on behalf of the LLC because any effort to cause the LLC to commence a legal malpractice action against Attorney Pitts was unlikely to succeed. (*Id.* ¶¶ 15–16.) After this lawsuit was filed, the LLC dissolved upon the filing of the Articles of Termination on June 25, 2013. (Defs.' Ex. 6, Articles of Termination; R. p. ___.) The LLC no longer exists as a separate legal entity.

The trial court properly found the Burton Trust cannot assert a derivative claim on behalf of the LLC because the LLC has dissolved. “A derivative action is a suit brought by a stockholder to enforce a corporate right. A suit brought by a stockholder is a derivative action if the gravamen of the complaint is injury to the corporation and not injury to the individual interests of the stockholder.” *Ward v. Griffin*, 295 S.C. 219, 2201, 367 S.E.2d 703, 704 (Ct. App. 1988) (internal citation omitted).

A “derivative” claim could not be maintained on behalf of the LLC because the LLC dissolved on June 25, 2013, and, as a result, no longer had a corporate right to be enforced. As the trial court explained, the law does not allow litigation by or against a phantom entity. (Final Order at 10; R pp. __.) Further, the corporate entity should be the recipient of any award from a derivative action. Because the LLC has dissolved, it no longer exists to receive the benefit of any award obtained on its behalf and, therefore, it would be futile to allow a derivative action to be asserted in its right.¹⁵

VI. The trial court correctly concluded that the claims Appellant attempted to assert on behalf of the LLC were barred by the statute of limitations.

Appellant contends that the trial court improperly determined that the claims it attempted to assert on behalf of the LLC were barred by the statute of limitations.¹⁶ Issues related to the applicable statute of limitations are typically questions of fact. *See Dunbar v. Carlson*, 341 S.C. 261, 269, 533 S.E.2d 913, 917 (Ct. App. 2000); *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 338, 534 S.E.2d 672, 681 (2000) (“Application of the discovery rule contained in S.C. Code Ann. § 15-3-535, as well as the determination of the date the statute began to run in a particular case, are questions of fact. . . .”). Therefore, this issue also turns on whether there is any evidence supporting the trial court’s finding.

¹⁵ An additional sustaining ground for this point is that the Burton Trust would not fairly and adequately represent the interests of the LLC’s members. Under the South Carolina Rules of Civil Procedure, a “derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.” Rule 23(b)(1), SCRPC; *see also Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 437, 673 S.E.2d 448, 458 (2009) (disallowing a derivative claim for failure of LLC member to comply with requirements of S.C. R. Civ. P. 23(b)). The Burton Trust would not fairly and adequately represent the interests of the LLC because: (1) the other heirs (holding an 80% interest combined) were forced to sue the Burton Trust to complete the sale of the property while the Burton Trust was the lone holdout and the only LLC member that lodged a complaint over the sale; (2) the Burton Trust was the only member of the LLC to receive any monetary recovery in the partition action; and (3) no other member of the LLC joined the Burton Trust in making this claim against Attorney Pitts on behalf of the LLC.

¹⁶ Because the Trial Court did not allow Appellant to amend its complaint to include causes of action based on the assignment, Respondents had no vehicle by which this defense could be asserted.

The South Carolina Code provides a three year statute of limitations for legal malpractice lawsuits. *See* S.C. Code Ann. § 15-3-530. Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows, or should know by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct. *See* S.C. Code Ann. § 15-3-535; *Dean v. Ruscon Corp.*, 321 S.C. 360, 363–64, 468 S.E.2d 645, 647 (1996). “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.” *Snell v. Columbia Gun Exch., Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981).

The trial court addressed the statute of limitations in its final order despite noting that it previously denied Appellant’s motion to amend to add these claims and motion for partial reconsideration of that denial. (Final Order at 8, R. pp. __.) The trial court found, however, that even if it had allowed Appellant to assert the claims received under the Assignment Agreement, they would have been time-barred. The trial court determined that the statute of limitations began to run as of the time the LLC learned of the existence of a possible claim. (Final Order at 8, R. p. __.) The trial court explained that this occurred when the LLC received notice of the title problem, which caused the issues with the deed into the LLC. This occurred on October 22, 2007 at the very latest. October 22, 2007 was the date Tommy Cato notified the members of the LLC of the problem with the deed into the LLC. (Final Order at 10, R. pp. __; Pl.’s Ex. 22, Letter; R. pp. __.) This finding was supported by the record evidence.

Appellant argues that the statute of limitations ran on October 21, 2010, and that the claims of the LLC would have been timely because this action was filed on May 27,

2010. (Initial Brief of Appellant at 37.) Appellant, however, did not seek to amend its complaint to assert claims on behalf of the LLC until 2013, after it received the right pursuant to the Assignment Agreement. Therefore, even if the Court had granted Appellant's motion to amend, the claims would not have been timely. Appellant has not pointed to any authority to show that the statute of limitations was tolled.

To avoid the timeliness issue, Appellant is forced to argue that its Complaint as originally drafted would encompass both its derivative claim and the claims on behalf of the LLC in its own right. (Initial Brief of Appellant at 37–38.) This argument is without merit. The Complaint in this matter was filed in 2010, over four years before the Assignment Agreement came into existence. To contend that this Complaint could operate to assert claims which the Appellant had no legal right to prosecute is meritless. As the discussion in Section V details, the allegations of the Complaint quoted in Appellant's brief were clearly designed to state a derivative claim. Accordingly, the trial court properly denied the motion to amend, and its determination that the LLC's claims would have been time barred was supported by the evidence.

VII. The trial court properly exercised its discretion in denying Appellant's motion to amend the Complaint to add claims and parties.

Appellant contends that the trial court “misunderstood” the proposed amended complaint and the “impact” that it would have had. (Initial Brief of Appellant at 41–42.) Appellant argues that the proposed amended complaint was solely designed to “clarify” the causes of action asserted in the initial complaint. (*Id.* at 42.) Appellant also contends that it was not aware of Attorney Vann's involvement in the sale of the property until Tommy Cato's deposition. (*Id.*) Moreover, Appellant admits that it did not have standing to assert claims outside of the derivative cause of action on behalf of the LLC

until receiving the right pursuant to the assignment. (*Id.* at 42.) Appellant also asserts that Respondents and proposed Defendants Attorney Vann and his law firm would not have been prejudiced by allowing the amendment. (*Id.* at 43.) These parties are not parties to the appeal.

The trial court did not abuse its discretion in denying Appellant's motion to amend. See *Duncan v. CRS Serrine Eng'rs, Inc.*, 337 S.C. 537, 542, 524 S.E.2d 115, 118 (Ct. App. 1999) ("The trial judge's finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred."). Rule 15(a) of the South Carolina Rules of Civil Procedure allows a party to amend his pleading "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice the other party." Rule 15(a), SCRPC. The power to amend "shall not be used indiscriminately or to prejudice or surprise another party, [and] and the decision to allow an amendment is within the sound discretion of the trial court." *Duncan*, 337 S.C. at 541, 524 S.E.2d at 118 (quoting *Berry v. McLeod*, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997)).

Attorney Pitts and Robinson Bradshaw would have been prejudiced if the Court granted Appellant's proposed amendment, which occurred three years after the original Complaint was filed and after almost all written discovery had taken place. The amendment sought to add claims against two new parties and would have resulted in this case effectively starting over, significantly delaying the resolution of a case that had already been pending for more than three years. The parties would have had to engage in additional discovery and likely conduct further depositions. Moreover, if Appellant's proposed amendment was permitted, Respondents would have been compelled to

reconsider their defenses and strategy to defend the additional causes of action on behalf of T.E. Cato Estate, LLC and the members of the LLC. The defense of these claims would have likely required additional or different evidence than that which Attorney Pitts and Robinson Bradshaw previously identified.

Justice did not require amendment of the Complaint; to the contrary, justice required that it be denied. The true motivation behind amendment was that, after years of protracted litigation, the Partition Action was finally resolved, and Appellant desired to try and use that settlement to employ new theories against Respondents and to add new parties. This was improper, as the settlement of the Partition Action did not give rise to any new facts which could have established liability on the part of Respondents or the proposed new defendants. Appellant was aware of the facts alleged in the proposed Amended Complaint well before the filing of the original Complaint in 2010.

Moreover, as discussed above, all of Appellant's amended claims were barred by the statute of limitations and/or laches and, therefore, the trial court properly determined that they should not be permitted because amendment would be futile. *See Higgins v. Med. Univ. of S.C.*, 326 S.C. 592, 604–05, 486 S.E.2d 269, 275 (Ct. App. 1996).

In this case, the purported wrongful conduct took place in 2007. However, Appellant waited almost six years before seeking to add the closing attorney to the real estate transaction as a party and to assert claims on behalf of the LLC and its members against Attorney Pitts. The fact that Appellant did not settle the Partition Action, and therefore did not receive an assignment of rights from the LLC and its members until 2013, makes no difference under the statute of limitations. The statute of limitations began running at the point when Appellant knew or should have known the facts

supporting its alleged causes of action, which was at the time the real estate transaction occurred in late 2007. There exists no legal principle to support the proposition that the statute of limitations is tolled when a party receives an assignment of rights to bring a lawsuit in a context such as exists here.

VIII. The Record supports a conclusion, as an additional sustaining ground, that Respondents did not commit legal malpractice/professional negligence.

An additional sustaining ground is that Attorney Pitts did not breach the standard of care, as he competently performed the tasks he was engaged to perform.¹⁷ As the promoter of the LLC, Tommy Cato engaged Attorney Pitts to draft the documents necessary to the formation of the LLC, and to draft a deed that would convey certain property into the LLC. (Tr. 33:9–35:6; R. p. __.) Attorney Pitts did in fact draft the Articles of Organization and the Operating Agreement for the LLC, and the Cato heirs executed these documents. (Tr. 387:22–388:12, 399:12–15; R. pp. __.) Attorney Pitts then filed the Articles of Organization with the Secretary of State to complete the formation of the LLC. (Tr. 399:16–400:1; R. pp. __.)

Additionally, Attorney Pitts drafted a deed to convey certain property from the heirs into the LLC. Attorney Pitts used tax map numbers provided by Tommy Cato to identify the property that was to be conveyed. (Tr. 164:16–165:2; R. pp. __.) He consulted probate records to confirm the derivation. (Tr. 525:16–526:16; R. pp. __.) Each heir executed the deed into the LLC and Attorney Pitts properly recorded the executed deed. (Tr. 399:12–400:1; R. pp. __.)

¹⁷ As this Court has explained, “[a] respondent ‘may raise on appeal any additional reason the appellate court should affirm the lower court’s ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.’” *Sims v. Amisub of S.C., Inc.*, 408 S.C. 202, 214–15, 758 S.E.2d 187, 194 (Ct. App. 2014), *aff’d*, 777 S.E.2d 379 (S.C. 2015) (quoting *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000)). Moreover, an appellate court “may affirm any ruling, order, or judgment upon any ground(s) appearing in the record.” *Id.* at 214, 758 S.E.2d at 194 (quoting Rule 220(c), SCACR).

The record confirms that Attorney Pitts met the standard of care. The overriding goal of the Cato heirs was to form an LLC for the purposes of marketing and selling their property. This goal was accomplished. As Defendants' expert testified, the success of this objective is evidence that Attorney Pitts did not breach the standard of care. (Tr. 984:8–986:9; R. pp. __.) Further, the Burton Trust acknowledged the existence of the LLC and the validity of the deed into it through the execution of the Settlement Agreement during the Partition Action. (Defs.' Ex. 12, Release and Settlement Agreement, ¶¶ 4–5; R. pp. __.) This is further evidence that Attorney Pitts competently completed the tasks he was engaged to perform. And it is undisputed that Attorney Pitts did not conduct the December 2007 closing—Attorney Vann was the only attorney present at that closing. (Defs.' Ex. 8, Complaint in *Burton v. Vann* ¶ 18(b); R. pp. __.) At trial, Dr. Burton acknowledged his deposition testimony where he admitted that he does not know of what Attorney Pitts' malpractice consisted. (Tr. 372:1–11; R. p. __.) Thus, he failed to identify how Attorney Pitts breached the standard of care. (*See id.*) Therefore, the evidence in the record proves that Attorney Pitts did not breach the standard of care.

The trial court found that Attorney Pitts owed a duty to the members of the LLC to establish the LLC with clarity as to how the LLC was to be managed, and that he breached this duty by drafting unclear documents. The trial court explained, however, as detailed above, that the Burton Trust suffered no damages. “The law does not require that an attorney be infallible and simply because an attorney has made a mistake does not establish negligence or malpractice as a matter of law.” *Cianbro Corp. v. Jeffcoat & Martin*, 804 F. Supp. 784, 789 (D.S.C. 1992); *see also Bass v. Farr*, 315 S.C. 400, 404,

404, 434 S.E.2d 274, 277 (1993) (noting that the fact that an attorney was incorrect about something does not establish that he was negligent). As the *Cianbro* court explained, it is only “when an attorney’s negligence or dereliction of duty prejudices a client’s rights or position, [that] the attorney must be held accountable for his or her conduct.” *Cianbro*, 804 F. Supp. at 789. Attorney Pitts’ alleged negligence did not prejudice Appellant’s rights or position. Thus, he did not breach the standard of care.

IX. The Record supports a conclusion, as an additional sustaining ground, that the settlement agreement arising from the Partition Action released the claims asserted in this litigation.

The Record supports a conclusion that the Burton Trust is precluded from asserting a malpractice claim against Respondents because this claim was extinguished by the Settlement Agreement. The terms of the Settlement Agreement are clear and unambiguous—the Burton Trust waived and renounced any and all claims in any way related to the subject property. This is demonstrated by analyzing the choice and placement of the coordinating conjunctions “and” and “or.” When diagrammed according to sentence structure, it is easy to see that the clause contains five items the parties “wish to” do (*i.e.*, memorialize, resolve, dismiss, waive, and confirm), and also contains a list of three types of claims the parties “waive and renounce,” as shown below:

WHEREAS, the parties have now amicably resolved their differences and disputes and by this Settlement Agreement, the parties wish:

- (1) to memorialize that resolution,
- (2) to resolve the Action,
- (3) to dismiss the claims asserted against each other prejudice, and
- (4) to *waive and renounce any and all claims:*
 - a. the parties have asserted against each other or

- b. could have asserted against each other in the Action or
 - c. *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*
- (5) 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.

(Def.'s Ex. 12, Release and Settlement Agreement; R. pp. __.)

The coordinating conjunction “or” links together a set of alternatives, which, in this case, is a list of three different types of claims that the parties wish to renounce. Therefore, in relevant part, the clause states that the Burton Trust renounced any and all claims “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.” (*Id.*) In his deposition testimony, Dr. Burton appeared to understand the implication of this renunciation, noting that the Settlement Agreement “[did] away with everyone’s complaint against the other; legal complaints, etc.” (Def.’s Trial Brief – This Claim was Extinguished by the Settlement Agreement, Dep. of David Burton (May 12, 2014) 16:4–6; R. pp. __.)

By executing the Settlement Agreement, the Burton Trust released the claim it seeks to assert here which is without question, “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.” (Def.’s Ex. 12, Release and Settlement Agreement; R. pp. __.) The record proves that this release was intentional because the language was reviewed by the Burton Trust’s attorneys. Dr. Burton testified at his deposition that his

attorneys reviewed the Settlement Agreement and consulted with him before it was executed. (Defs.' Trial Brief – This Claim was Extinguished by the Settlement Agreement, Dep. of David Burton (May 12, 2014) 11:7–17; R. pp. __.) Further, he testified that he was in constant communication with his lawyers about the material terms of the Settlement Agreement. (*Id.* at 14:12–17, R. p. __.) Furthermore, as a practical matter, there is no unfairness to the Burton Trust in enforcing the release in the Settlement Agreement because it profited \$249,000 under its terms (in addition to the \$124,200 it previously received from the December 12, 2007 closing).

Additionally, under South Carolina law, a release of one tortfeasor releases other parties who contributed to the plaintiff's injuries when the plaintiff either intended to do so or when he has "received full compensation amounting to a satisfaction." *Bartholomew v. McCartha*, 255 S.C. 489, 491, 179 S.E.2d 912, 913 (1971). Where "a party accepts 'a full and final compromise adjustment and settlement of any and all claims,' such amounts to a *Bartholomew* satisfaction, thereby extending the preclusive effect of the release to nonparties to the instrument." *Bowers v. Dep't of Transp.*, 360 S.C. 149, 154, 600 S.E.2d 543, 546 (Ct. App. 2004).

Dr. Burton's deposition testimony proves that the Burton Trust received full compensation in the settlement of the Partition Action. When asked whether the Burton Trust benefitted economically from the Partition Action, Dr. Burton testified that "[i]t got its fair share. Let's put it that way." (Defs.' Trial Brief – This Claim was Extinguished by the Settlement Agreement, Dep. of David Burton (May 12, 2014) 88:4–8; R. p. __.) Further, he testified that the Burton Trust "received [the] money . . . for the sale of the land that [he] felt [the Burton Trust] was entitled to." (*Id.* at 88:25–89:6; R. p. __.) The

Burton Trust was fully compensated by the settlement it received in the underlying transaction and, therefore, the preclusive effect of the Settlement Agreement extends to this claim brought against Respondents.

Accordingly, the release contained in the settlement agreement is an additional sustaining ground for the trial court's finding in Defendants' favor.

X. The Record supports a conclusion, as an additional sustaining ground, that the Assignment Agreement, which assigned malpractice claims from the T.E. Cato Estate, LLC to the Appellant, was void against public policy and no assignment could be made as a matter of law.

The trial court properly denied Appellant's motion to amend the complaint to add claims on behalf of T.E. Cato Estate, LLC. Even if the Court allowed the amendment, the claims would still have not been proper. An additional sustaining ground in this matter is that the assignment of the malpractice claims as part of the Settlement Agreement violated public policy pursuant to the Supreme Court's recent decision in *Skipper v. Ace Property & Casualty Insurance Co.*, 413 S.C. 33, 775 S.E.2d 777 (2015).

Skipper presented the following certified question to the Supreme Court: "Can a legal malpractice claim be assigned between adversaries in litigation in which the alleged legal malpractice arose?" *Id.* at 34, 775 S.E.2d at 54. The Court acknowledged that the majority rule prohibits such assignments, typically out of concern that allowing assignment would lead to collusion between the parties. *Id.* at 36, 775 S.E.2d at 55. The Court further explained that allowing these assignments could threaten the attorney-client relationship by creating conflicts of interest. *Id.* at 37, 775 S.E.2d at 55–56. Such assignments could lead to disreputable role reversals, with the plaintiff-assignee taking a position diametrically opposed to the one that he or she took in the previous litigation. *Id.* at 37, 775 S.E.2d at 56. Ultimately, the Court formally adopted the majority rule and

held that “in South Carolina, the assignment of a legal malpractice claim between adversaries in litigation in which the alleged malpractice arose is prohibited.” *Id.* at 38, 775 S.E.2d at 56.

The trial court distinguished the present matter from the fact pattern then pending decision in *Skipper*. The trial court explained that *Skipper* only concerned the “precise and narrow issue of assignment of a legal malpractice claim arising from litigation between the assignor and assignee.” (Final Order at 7 n.10; R. p. __.) The court noted the Assignment Agreement at issue in this case concerned any and all claims, not just those arising out of the Partition Action. The trial court reasoned that the alleged malpractice arose from the formation of the LLC documents rather than the Partition Action itself. Therefore, the court concluded that the malpractice claim did not arise directly from litigation where the Burton Trust and the LLC were adversaries.

The holding in *Skipper*, however, applies here. The Burton Trust, the assignee of the malpractice claim, was an adversary of the assigning parties in the Partition Action. Moreover, the alleged malpractice claim arose out of the litigation involving these parties. The Burton Trust alleges that the dispute between the parties to the Partition Action and this resulting malpractice suit were direct results of Attorney Pitts’ alleged malpractice.

Contrary to the trial court’s finding, therefore, the holding in *Skipper*, as well as the policy behind that holding, would be equally applicable to the present litigation. Therefore, an additional sustaining ground for affirming the trial court’s ruling is the fact that the assignment was void as against public policy.

XI. The Record supports a conclusion, as an additional sustaining ground, that due to Appellant's ratification of the sale of the Cato property, its claims are barred.

The trial court rejected Respondents' argument that the Burton Trust 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. Although the trial court reached this conclusion, the Burton Trust did in fact ratify the closing. Such a conclusion appears in the Record.

The Burton Trust's acceptance and retention of the proceeds from the December 2007 closing ratified that transaction, and therefore precluded Appellant from recovering against Respondents in this lawsuit. "Ratification, as the term implies, is the adoption by one person of an act done or bargain made for him by another under such circumstances that he would not have been bound but for his subsequent assent." *Brazell Bros. Contractors v. Hill*, 245 S.C. 69, 74, 138 S.E.2d 835, 837 (1964). The three essential elements necessary to prove ratification are (1) acceptance by the principal of the benefits of the agent's acts; (2) full knowledge of the facts; and (3) circumstances or an affirmative election indicating an intention to adopt the unauthorized arrangements. *Lincoln v. Aetna Cas. & Sur. Co.*, 300 S.C. 188, 191, 386 S.E.2d 801, 803 (Ct. App. 1989).

Each of the elements of ratification was satisfied here. First, there is no question that the Burton Trust accepted and retained the benefits of Attorney Pitts' acts by negotiating the proceeds of the sale to Thomasson. (See Defs.' Ex. 5, Cancelled Check; R. p. __.) Second, the Burton Trust had full knowledge of the facts at the time it negotiated the check in April 2008 because this was five months after the closing was

completed, and additionally, it consulted attorneys Dale Dove and Doug Gay before negotiating this check. (Defs.' Trial Brief – The Plaintiff's Ratification of the Underlying Transaction Precludes this Claim, Dep. of David Burton (May 10, 2010) 131:15–25; R. p. ___.) Third, the Burton Trust never tendered the check back to the LLC, and thus its retention of the proceeds was an affirmative election indicating its intent to adopt the sale to Thomasson. Therefore, the Burton Trust's acceptance and retention of the proceeds of the sale to Thomasson ratified the underlying transaction and the work completed by Attorney Pitts.

Because the Burton Trust's acceptance and retention of the proceeds of the sale to Thomasson ratified the underlying transaction, the Burton Trust was precluded from recovering against Respondents in this lawsuit. This is an additional sustaining ground for affirming the trial court's ruling in Respondents' favor.

CONCLUSION

For the forgoing reasons, Respondents respectfully request that this Court affirm the Trial Judge's Order finding in Respondents' favor.

Signature on Following Page

Respectfully submitted,

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Attorneys for Respondents Carroll M. Pitts, Jr., Esq.
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December 14, 2015
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM YORK COUNTY
Court of Common Pleas
John C. Hayes III, Circuit Court Judge

DEC 14 2015

SC Court of Appeals

Appellate Case No. 2015-001053
Case No. 2010-CP-46-02267

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,, Appellant,

v.

Carroll M. Pitts, Jr., Esq. and Robinson Bradshaw &
Hinson, P.A., Respondents.

PROOF OF SERVICE

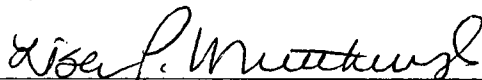
I, the undersigned Administrative Assistant of the law offices of Nelson Mullins
Riley & Scarborough LLP, attorneys for Respondents, do hereby certify that I have
served all counsel in this action with a copy of the pleading(s) hereinbelow specified by
mailing a copy of the same by United States Mail, postage prepaid, to the following
address(es):

Pleadings:

Initial Brief of Respondents

Counsel Served:

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Lisa P. Whitehurst
Administrative Assistant

December 14, 2015

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December 14, 2015

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DEC 14 2015

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: 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 v. Carroll M. Pitts, Jr., Esq. and Robinson Bradshaw & Hinson, P.A.
Civil Action No. 2010-CP-46-2267
Appellate Case No. 2015-001053
NMRS File No. 03297/01500

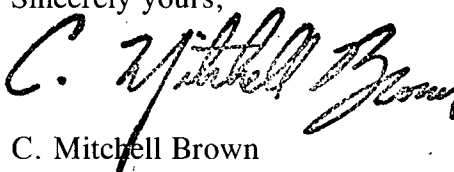
Dear Ms. Kitchings:

Enclosed please find the original and one copy each of the Initial Brief of Respondents and Designation of Matter to be Included in the Record on Appeal. We would ask that you file the originals and return clocked-in copies to us via our courier.

By copy of this letter to counsel of record, we are serving him with copies.

With kind regards, I remain

Sincerely yours,



C. Mitchell Brown

CMB:lpw

Enclosures

cc: Matthew B. Rosbrugh, Esquire