THE STATE OF SOUTH CAROLINA
In the Court of Appeals



APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III

Case No. 2014-CP-07-1732

Marilyn W. Bunn, a person *non compos mentis* by and through her guardian, Denise Suddes, and Margaret Bunn Lochmandy.....Respondents,

v.

Douglas S. Delaney, as Trustee and in his individual capacity, Alan Wilson, the South Carolina Attorney General, Sacred Heart-Griffin High School, St. Joseph's Home, Quincy University, Notre Dame, The Lawrenceville School, All Saints Catholic Church, and Habitat for Humanity c/o All Saints Catholic Church.....Defendants,

Of Whom Douglas S. Delaney is the.....Appellant.

# APPELLANT'S INITIAL REPLY BRIEF

Sean Michael Bolchoz
Bolchoz Law Firm, PA
6 Buckingham Plantation Drive, Suite B
Post Office Box 828
Bluffton, South Carolina 29910
(843) 836-3033
Attorney for Appellant

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## ARGUMENT

### I. The Brief of Respondents contains misleading and irrelevant material.

In their Statement of the Case, the Respondents make reference to items that have nothing to do with the matter on appeal, as an apparent distraction from the sole issue at hand, to wit: whether summary judgment should have been granted by the trial court in light of various disputed issues of material fact.

On page 5 of their Brief, the Respondents assert that Appellant Douglas Delaney ("Delaney") charged a trustee fee of $3,000.00 per month, which equates to an annual trustee fee of $36,000.00. Delaney informed Marilyn Bunn, Margaret Lochmandy and Kelly Bunn in 2013 that his monthly trustee fee was being increased to $3,000.00 per month and, given that such increase was approved by Marilyn Bunn, Lochmandy and Kelly Bunn, this is a non-issue.

Also at page 5 of their Brief, the Respondents claim that, by letter dated September 11, 2013, their counsel requested documents from Delaney on behalf of "Lochmandy and Kelly Bunn, as successor trustees" of the CRT, suggesting that Lochmandy and Kelly Bunn had taken steps to accept the trusteeship as of the date of the letter. A careful review of the letter, though, reveals that counsel is requesting documents primarily on behalf of Denise Suddes, the recently-appointed guardian for the Settlor, Marilyn Bunn. Lochmandy and Kelly Bunn are mentioned in the letter merely as "interested persons" who happen to be "listed as successor trustees;" the letter does not identify Lochmandy and Kelly Bunn as successor individual trustees, even though Respondents now argue that the appointment of Suddes made such appointment automatic. Indeed, in an earlier letter dated June 3,

Lochmandy and Kelly Bunn are identified in the same manner as in the letter sent after Suddes' appointment: "interested persons . . . listed as successor trustees." This strongly suggests that both before and after the appointment of Suddes, neither the Respondents nor their counsel knew precisely what, if anything, this designation in the CRT meant for Lochmandy and Kelly Bunn, which may explain why they never took any steps to accept the trusteeship.[1] That the Respondents argue otherwise reflects, of course, a disputed issue of material fact, which should have precluded summary judgment.

The reference on page 6 of the Brief to an unrelated lawsuit in which Delaney was a party (as were certain Respondents) is irrelevant, and unavailing. The Respondents neglect to mention that said lawsuit was initiated by Delaney, as cotrustee, against two other cotrustees for an accounting and declaratory judgment; certain Respondents here intervened in that case to assert baseless and unproven allegations against Delaney. Further, as the Respondents admit in their own Brief, the said lawsuit was settled without any admission of wrongdoing or negligence on the part of Delaney. Had the Respondents herein believed they could prove the allegations they had made against Delaney, presumably, they would not have settled the lawsuit.

Lastly, the mention at page 6 of the Respondents' Brief to an unrelated matter pending before the Commission on Lawyer Conduct is immaterial to this appeal, cited by the Respondents solely to denigrate Delaney. Suffice it to say that Delaney is and remains a

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[1]It is noteworthy that the first time Respondents' counsel expressly refers to Lochmandy as "Successor Individual Trustee" is in a letter to Delaney's counsel dated June 30, 2014, sent two weeks after the Respondents received Delaney's Appointment of Successor Individual Trustee document.

member in good standing of the South Carolina Bar.

## II. The language in the document prepared by Delaney does not change the South Carolina Trust Code or South Carolina law.

The Respondents' self-serving interpretation of the language contained in Delaney's Appointment of Successor Individual Trustee document, dated June 17, 2014 ("Appointment"), does not alter the applicable law.

Delaney's Appointment, and its detailed and extensive recitation of the factors leading up to the same, presents very clearly Delaney's position that neither Lochmandy nor Kelly Bunn accepted the position of successor individual trustee. His statement to the effect that Lochmandy "became" the successor individual trustee of the charitable remainder trust (CRT) obviously describes a putative situation, contingent upon Lochmandy's acceptance of the position, which ultimately did not take place. The Respondents' conjecture about Delaney's "true feelings" notwithstanding, Lochmandy did not automatically become successor individual trustee under the Trust, nor did she accept such position and, indeed, by her actions, rejected the trusteeship. To the extent this issue is disputed, it is one of material fact, which should have precluded summary judgment.

## III. The Respondents' conclusion that the trustee appointment is automatic misconstrues the South Carolina Trust Code.

The Respondents' reliance on S.C. Code Ann. Section 62-7-704 is misplaced, as their interpretation of this statute conflates two different types of events.

At page 9 of their Brief, the Respondents aver that Section 62-7-704 dictates that the appointment of successor individual trustee is "automatic." This contention equates what should be considered a *trigger* event with an *acceptance* event. That a vacancy in a trusteeship is to be filled in the priority set forth under Section 704 is not in dispute; however, such position must be filled with persons who are willing to perform the fiduciary duty of trustee and, further, who accept such a fiduciary position. As Delaney has previously argued and as the statutory and case law makes clear, a person cannot be forced into a fiduciary obligation and, moreover, has the power to reject an offer of same. Lochmandy and Kelly Bunn were the putative successor individual trustees upon the vacancy created by the appointment of Suddes (the *trigger* event); however, they did not accept the trusteeship and actually rejected it – the *acceptance* event never took place – which led to Delaney appointing himself as sole successor individual trustee. To the extent this issue is disputed, it is one of material fact, which should have precluded summary judgment.

## IV. Whether Lochmandy accepted her role as successor individual trustee remains a disputed issue of material fact.

Lochmandy's acceptance or non-acceptance/rejection is a material issue of disputed fact, and the Respondents' efforts to deflect this issue, by a misreading of the pleadings and misstating the case thus far, is unavailing.

The Respondents state, at pages 9 and 12 of their Brief, that in his Answer, Delaney asserts that the successor individual trusteeship was not accepted because "formal measures" were not taken. This is incorrect. What Delaney asserted in paragraph 12 of his Answer was

that neither Lochmandy, Kelly Bunn, nor Suddes "actually accepted the position . . . nor did they take any steps to assume such position." Delaney has conceded that "formal measures" are not required for acceptance; however, as South Carolina law makes plain, an individual can, through inaction (that is, by failure to take *any* steps), reject a trusteeship. No party is arguing that "formal measures" of acceptance are required, and the Respondents' claim to the contrary is merely a distraction from the obvious conclusion that Lochmandy and Kelly Bunn's acceptance and/or rejection of the trusteeship is a disputed issue of material fact that should have precluded summary judgment.

The Respondents' assertion that "Lochmandy did not have authority to remand custody of the CRT assets or to exercise control over the management/investment of the CRT assets" is disingenuous. In 2014, the CRT's financial advisor, Wells Fargo, decided to "freeze out" Delaney by refusing to take any further instruction from him as successor independent trustee. Wells Fargo informed the Respondents, by letter dated July 10, 2014,[2] that Wells Fargo would take no further instructions from either party until a formal ruling of a court as to the current trusteeship. Despite the Respondents' argument that Lochmandy had no authority in this matter, even after Judge Brooks Goldsmith's order of August 16, 2014 held that Delaney was the current successor independent trustee, and notwithstanding Wells Fargo's letter of July 10, Respondents' counsel subsequently directed Wells Fargo to make certain payments, via letter dated September 24, 2014, and Wells Fargo immediately complied, ignoring its own pledge that it would take no further instructions "from either

[2]Delaney was not copied on this letter, despite his undisputed position as successor independent trustee, and only learned of the letter when Respondents' counsel attached a copy of same to his motion for injunctive relief, which was denied by Judge Goldsmith.

party." For the Respondents to claim at this late date that they lacked authority or control over the Trust assets – or over Wells Fargo itself – strains credulity.

Lastly, the Respondents' bald assertion on page 11 of the Brief that "Lochmandy's actions evidence her acceptance of the role as successor individual trustee" further underscores that the question of acceptance or rejection of the trusteeship is a disputed issue of material fact that should have precluded summary judgment.

## V. Summary judgment should not have been granted before discovery was completed.

Whether the Georgia Probate Court Final Order ("Georgia Order") is entitled to full faith and credit as a judgment of this State has no bearing on whether the trial erred in granting summary judgment to the Respondents, because discovery should have been completed before the summary judgment motion was taken up.

Summary judgment is a drastic remedy which should be cautiously invoked so that no one is improperly deprived of a trial of disputed factual issues. This means that summary judgment must not be granted until the non-movant has had a full and fair opportunity to complete discovery. *Jones ex rel Jones v. Enterprise Leasing Company-Southeast*, 383 S.C. 259, 678 S.E.2d 819 (Ct.App. 2009), *citing Baughman v. Am. Tel. & Tel Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991).

In response to the Respondents' continuing attempt to use the Georgia Order as a shield against any effort on Delaney's part to uncover the relevant facts in this case, it should be noted that Delaney was given no notice of the date and time of the hearing that led to the

Georgia Order in the first place. The Order specifically states that Suddes should have the authority to "remove and replace current trustees" of the CRT and "pursue damages arising out of the conduct of one or more of the trustees . . ." At the time of the Georgia Order, Delaney was the CRT's *only* trustee, so this language obviously refers to him. A judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit. *Hospitality Management Associates, Inc. v. Shell Oil Co.*, 356 S.C. 644 (2004). Yet the Respondents now argue that Delaney is bound by an Order stemming from a matter in which he was not named, and was given no notice or opportunity to be heard.

Whether the Georgia Order should be afforded full faith and credit, however, is beside the point. The question is whether discovery and depositions (of Marilyn Bunn, among others) should have been completed before summary judgment was granted. There is nothing in the Georgia Order that would prohibit Marilyn Bunn from sitting for a deposition in this case. The Order removes from the ward (Marilyn Bunn) the power to "[b]ring or defend any action at law or equity." By sitting for a deposition, Marilyn Bunn is merely providing testimony; she is no more "bringing" or "defending" an action than is a witness compelled to a deposition by subpoena. Surely, if Marilyn Bunn has sufficient capacity to switch her bank accounts on her own (after her guardian's refusal to do so), she should be able to answer some questions concerning her intent as Settlor with regard to the trustee succession terms of the CRT.

Even if the trial court were to ultimately determine that Marilyn Bunn is unavailable for a deposition due to her alleged incapacity, summary judgment for the Respondents was premature, as there may be others whose testimony could shed light on the Settlors' intent

regarding trustee succession.

## V. The Respondents' attempt to determine the Settlors' intent by interpreting the language of the CRT is not a substitute for discovering the facts.

There is no need to determine the Settlors' intent from the language of the CRT, both because the language is plain on its face and, even if it is not, because intent can be determined by deposing the remaining Settlor, Marilyn Bunn, herself.

The Respondents' newfound argument that the clause found in Article III, Section 3 of the CRT (that the Settlors or individual trustee may "remove the corporate trustee at any time or times with or without cause") is dispositive of the issue continues the Respondents' quest to parse the language in order to avoid the necessity of confronting disputed issues of fact.

Under the Respondents' reading of the CRT, once the corporate trustee is replaced, that replacement is a successor independent trustee, which the Settlors could replace again (as it could the corporate trustee) at any time "or times." Despite the Respondents' interpretation of this clause, given that the CRT deliberately uses the separate terms *corporate trustee* and *successor independent trustee* throughout the document, the reader should presume that the Settlors intended for the words to have specific meaning. In this instance, it is just as reasonable to interpret this passage to mean that the *corporate* trustee might be replaced at any time "or times" with *another corporate* trustee; but once a *successor independent* trustee was installed, that would be the end of any such replacements.

This is entirely consistent with Delaney's previous testimony to the effect that the Settlors did not intend that he, as the successor independent trustee, be subject to the same removal provisions as the previous corporate trustee. (Delaney Affidavit, dated August 4, 2014).[3] There could be several possible reasons for including this term.[4] Discovery, including depositions of the parties, would be critical for determining the intent behind this language.

## CONCLUSION

For the reasons contained hereinabove, as well as those found in Appellant's Initial Brief, the trial court's order granting partial summary judgment should be reversed.

Sean Michael Bolchoz
Bolchoz Law Firm, PA
6 Buckingham Plantation Drive, Suite B
Post Office Box 828
Bluffton, South Carolina 29910
(843) 836-3033
Attorney for Appellant

Bluffton, South Carolina
February 29, 2016

[3]This evidence was disregarded by the trial court in its grant of summary judgment to the Respondents.

[4]When the CRT was initially prepared in December of 1993, it was not uncommon for practitioners to utilize various trustee succession terms in order to accomplish the goals of the trust, such as, for example, income tax reporting status under the grantor trust rules of the Internal Revenue Service Code.

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Of Whom Douglas S. Delaney is the.....Appellant.

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## PROOF OF SERVICE

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I certify that I have served Respondents with the Appellant's Initial Reply Brief and Designation of Matter to be Included in the Record on Appeal, by depositing a copy of same in the United States Mail, postage prepaid on February 29, 2016, addressed to their attorney of record, Robert E. Sumner, Esquire at Moore & Van Allen, PLLC, Post Office Box 22828, Charleston, South Carolina 29413.

February 29, 2016

Sean Michael Bolchoz
Bolchoz Law Firm, PA
6 Buckingham Plantation Drive, Suite B
Post Office Box 828
Bluffton, South Carolina 29910
(843) 836-3033
Attorney for Appellant

BOLCHOZ
LAW FIRM, PA
www.bolchozlaw.com

**Sean Michael Bolchoz***
**Attorney at Law**
** Certified Circuit Court Mediator*

***Mailing:***
Post Office Box 828
Bluffton, South Carolina 29910
***Office:*** (843) 836-3033

***Physical:***
6 Buckingham Plantation Drive, Suite B
Bluffton, South Carolina 29910
***Facsimile:*** (843) 836-3035

February 29, 2016



The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

***RE:*** ***In Re: John M. Bunn and Marilyn W. Bunn Charitable Remainder Trust Under Agreement Dated December 16, 1993; Marilyn W. Bunn,* et al. *v. Douglas S. Delaney,* et al.**
***Case No. 2014-CP-07-1732***
***Appellate Case No. 2015-001813***

Dear Ms. Kitchings:

Please find enclosed the original and one copy each of the Appellant's Initial Reply Brief, Designation of Matter to be Included in the Record on Appeal and Proof of Service for the above-captioned case. I would appreciate it if you would file the originals and return the clocked-copies to me via the enclosed self-addressed, stamped envelope.

By copy of this letter, I am serving copies of the aforesaid documents upon all counsel of record, pursuant to the applicable South Carolina Appellate Court rules.

If you have any questions, please do not hesitate to contact me.

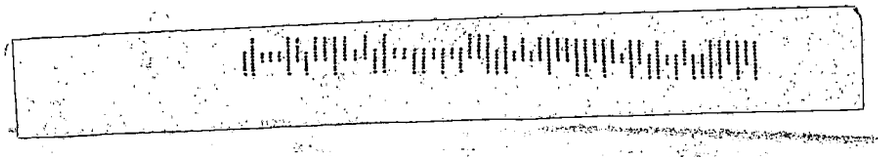
With kind, personal regards, I am

Sincerely,

BOLCHOZ LAW FIRM, PA

Sean Michael Bolchoz
SENDER'S E-MAIL ADDRESS:
SBOLCHOZ@BOLCHOZLAW.COM

SMB/lfo
Enclosures
cc: Robert E. Sumner, Esquire (w/encl.)
Douglas S. Delaney, Esquire (via email only to doug@delaneylawfirmsc.com)
H:\D to G Clients\Delaney - 2716\John & Marilyn W. Bunn CRT - 11\Appeal\Correspondence - Misc\Kitchings ltr - initial reply brief - designation of matter.wpd

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MON 29 FEB 2016 AM

BOLCHOZ
LAW FIRM, PA
Post Office Box 828, Bluffton, SC 29910

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SC Court of Appeals

**The Honorable Jenny Abbott Kitchings**
**Clerk, South Carolina Court of Appeals**
**Post Office Box 11629**
**Columbia, SC 29211**