THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
FEB 23 2016
SC Court of Appeals

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

Appellate Case No. 2015-001053

Majorie Cato Burton as Trustee of the Sloan Marvin Burton and Majorie Cato Burton, AB Livir Trust by and through David A Burton as Attorney-in-Fact, Individually and in the right an on behalf of T.E. Cato Estate, LLC,

Appellant,

v.

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

Respondents.

RECORD ON APPEAL VOLUME 1 OF 5

MBR LAW, LLC
Matthew B. Rosbrugh
Post Office Box 292290
Columbia, South Carolina 29229
Telephone: 803.753.2532
Attorney for Appellant

Samuel Outten
Nelson Mullins Riley & Scarborough, LLP
Post Office Box 10084
Greenville, SC 29603-0084
(864) 250-2300

C. Mitchell Brown
A. Mattison Bogan
Blake T. Williams
Nelson Mullins Riley & Scarborough, LLP
Post Office Box 11070
Columbia SC 29211
(803) 799-2000
Attorneys for Respondents

INDEX

VOLUME 1

Order Granting Motion to Dismiss and Denying Motion for Substitution of Parties, dated August 29, 2011 1

Order Granting Motion to Reconsider and Denying Motion to Dismiss, dated December 14, 2011 12

Order Denying Motion to Amend, dated October 24, 2013 16

Order Denying Reconsideration, dated November 15, 2013 20

Final Order, dated April 3, 2015 23

Order Denying Motion to Reconsider, dated April 30, 2015 51

Summons and Complaint 57

Answer 134

Defendants' Motion to Dismiss, dated January 28, 2011 140

Plaintiff's Motion for Substitution of Parties, dated May 10, 2011 144

Defendants' Memorandum in Opposition to Motion for Substitution of Parties, dated May 16, 2011 148

Defendants' Memorandum in Support of Motion to Dismiss, dated July 8, 2011 189

Plaintiff's Motion to Reconsider Order Granting Motion to Dismiss, dated September 9, 2011 198

Defendant's Memorandum in Opposition to Motion to Reconsider, filed October 26, 2011 271

Plaintiff's Motion to Amend Complaint, dated September 9, 2013 278

Defendants' Memorandum in Opposition to Motion to Amend Complaint, dated October 7, 2013 336

Plaintiff's Amended Brief in Support of Motion to Amend Complaint, dated October 17, 2013 345

Plaintiff's Motion to Reconsider, dated November 7, 2013 353

Plaintiff's Motion to Reconsider, dated April 16, 2014.....357

Defendants'' Motion to Exclude Testimony of Michael J. Virzi, dated July 18, 2014 365

Defendants' Motion in Limine, dated July 18, 2014 379

Plaintiff's Memorandum in Opposition to Motion to Exclude Testimony of Michael J. Virzi, dated November 21, 2014 397

Plaintiff's Memorandum in Opposition to Motion in Limine, dated November 21, 2014.....409

Defendants' Oral Motion for Nonsuit, argued January 26, 2015 (pp.860-885 of Trial Transcript) 424

VOLUME 2

Defendants' Trial Brief – The Plaintiff Cannot Assert this Assigned Claim, dated January 30, 2015.....450

Defendants' Trial Brief - The Plaintiff Cannot Prove it was Damaged by any Act or Omission of RBH, dated January 30, 2015 and February 4, 2015 557

Defendants' Trial Brief - Plaintiff Cannot Assert a Claim on behalf of the T.E. Cato, Estate, LLC, dated February 4, 2015.....651

Defendants' Trial Brief – This Claim was Extinguished by the Settlement Agreement, dated February 4, 2015 733

Defendants' Trial Brief – The Plaintiff's Ratification of the Underlying Transaction Precludes this Claim, dated February 4, 2015 762

Defendants' Trial Brief – The Plaintiff's Recovery in the Underlying Action Acts as a Setoff, dated February 4, 2015.....776

Defendants' Trial Brief – The Actions of the Burton Trust Caused the Partition Action, dated February 4, 2015 802

Defendants' Trial Brief – This Court Previously Ruled that No Attorney-Client Relationship Existed with the Burton Trust, dated February 4, 2015 809

Defendants' Trial Brief – No Attorney-Client Relationship Existed between the Burton Trust and RBH, dated February 4, 2015 832

Plaintiff's Reply Brief, dated March 11, 2015 847

Plaintiff's Motion to Reconsider and Certificate of Service, dated April 16, 2015 871

Notice of Appeal and Certificate of Service, dated May 18, 2015 878

Excerpts from Transcripts:

Transcript of Hearing on Plaintiff's Motion for Substitution of Parties and Defendants' Motion to Dismiss, dated July 20, 2011 884

VOLUME 3

Transcript of Hearing on Plaintiff's Motion to Amend, dated October 9, 2013 919

Trial Transcript Volume I, December 16-18, 2014 964

James Thomas Cato
Direct Examination 970
Cross Examination 1060
Redirect Examination 1070

David Burton
Direct Examination 1083
Cross Examination 1117
Redirect Examination 1135

Caroll Pitts
Direct Examination 1136

John Freeman
Direct Examination 1208
Cross Examination 1212
Redirect Examination 1234

Joshua Vann
Direct Examination 1238
Cross Examination 1247
Redirect Examination 1248

Trial Transcript Volume II, January 26-27, 2015 1251

Matthew Thomasson
Cross Examination 1252

George Knight
Direct Examination 1255

Michael Virzi
Direct Examination 1256

Corbin Haskell
Direct Examination 1260
Cross Examination 1260

William Higgins
Cross Examination 1261

Plaintiff's Exhibits

2 1267
3 1269
4 1273
5 1294
6 1305
7 1309
8 1331
9 1341
11 1342
12 1353
13 1357
14 1367
16-A 1376
16-B 1378
17-A 1382
17-B 1397
18 1404
19 1405
20 1407
21 1409
22 1410
23 1411
24 1416
27 1418

VOLUME 4

29 1419
32 1421
32(d) 1634

34.....1636
38.....1670
38-D.....1673
48.....1684
50.....1687
53.....1688
55.....1691
56.....1692
59.....1693
61.....1694
62.....1702
63.....1771

Defendants' Exhibits

4.....1776
5.....1777
6.....1778
7.....1780
8.....1848
12.....1887

VOLUME 5

14.....1913
17.....1940
18.....1941
19.....1950
20.....1960
21.....1970
24.....1985
25.....1989

Emails dated April 3, 2015 between J. Alferis and R. Jellenik, *et al.* 2083

Certificate of Appellant.....2085

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2010CP4602267

Marjorie Cato Burton *vs.* Carroll M Pitts Jr

CHECK ONE:

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

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other:

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

IT IS ORDERED AND ADJUDGED: ☒ See attached order; ☐ Statement of Judgment by the Court:

Order

Dated at York, South Carolina, this 11th day of August, 2011.

Court Reporter:

s/John C. Hayes, III

PRESIDING JUDGE - JOHN C. HAYES, III

This judgment was entered on the 29th day of August, 2011, and a copy mailed first class this 29th day of August, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Roger B. Jellenik Roger B. Jellenik Attorney at Law 1111 Broad St., Box J Camden, SC 29020
George Hunter McMaster Tompkins & McMaster, LLP P.O. Box 7337 Columbia, SC 29202

ATTORNEY(S) FOR THE PLAINTIFF(S)

Samuel W. Outten Womble Carlyle Sandridge & Rice, PLLC P.O. Box 10208 Greenville, SC 29603-0208

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, by and through David A. Burton as Attorney-in-Fact, Individually and in the right and on Behalf of T.E. Cato Estate, LLC,

Plaintiffs,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE SIXTEENTH JUDICIAL CIRCUIT

C.A. No. 2010-CP-46-2267

ORDER

FILED-RECEIVED
2011 AUG 29 PM 2:38
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

This matter came before the Court for a hearing on Wednesday, July 20, 2011, on the Defendants Carroll M. Pitts, Jr. and Robinson Bradshaw & Hinson, P.A.'s (collectively, "RBH") Motion to Dismiss Plaintiffs' Complaint and the Plaintiffs' Motion for Substitution of Parties. RBH appeared and was represented by Samuel W. Outten of Womble Carlyle Sandridge & Rice, PLLC. The Plaintiffs appeared and were represented by Roger B. Jellenik and George H. McMaster.

After careful consideration of the record in this case, this Court grants RBH's Motion to Dismiss, and denies Plaintiffs' Motion for Substitution of Parties for the reasons set forth below.

PROCEDURAL POSTURE

On May 27, 2010, Plaintiffs filed the Complaint in this action alleging, in general, legal malpractice claims against RBH. On January 25, 2011, RBH filed a Motion to Dismiss Plaintiffs' Complaint on grounds that David A. Burton lacks authority to bring this lawsuit on behalf of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust (the "Trust"),

pursuant to a Power of Attorney executed by Marjorie Cato Burton because that Power of Attorney does not grant David A. Burton the power to act on behalf of the Trust. In April 2011, RBH received the First Amendment to the Sloan Marvin Burton and Marjorie Cato Burton AB Living Trust ("First Amendment") signed by Sloan Marvin Burton and David A. Burton as Marjorie Cato Burton's Attorney-in-Fact, and an Affirmation, Ratification and Consent signed by Sloan Marvin Burton as Co-Trustee. The First Amendment and Affirmation, Ratification and Consent purported to substitute David A. Burton for Marjorie Cato Burton as Co-Trustee of the Trust. Through their Motion for Substitution of Parties, Plaintiffs contend that the First Amendment and David A. Burton's purported substitution as Co-Trustee remedies the deficiency raised in RBH's Motion to Dismiss.

ANALYSIS

1. RBH has standing, under SCRCP 17, to contest whether Plaintiffs are the real parties in interest in this case.

Rule 17 of the South Carolina Rules of Civil Procedure states, in pertinent part, that "[e]very action shall be prosecuted in the name of the real party in interest." Plaintiffs assert that RBH lacks standing to contest the application of this rule. This Court disagrees. RBH has an absolute right to assurance that the party suing them is a real party in interest. Bardoon Prop., NV v. Eidolon Corp., 326 S.C. 166, 170 (1997) ("The purpose of a real party in interest provision is to assure that a defendant is required only to defend an action brought by a proper party and that such an action need be defended only once"). This is not a question of the operation of the Trust between the parties thereto, but of the inherent right of a party who is sued to know that any verdict in the suit, for or against the party, is a verdict with finality. The duty of the Court, and the essence of Rule 17, is to ensure that litigation results in a final resolution of the issues raised by the lawsuit. The Court cannot allow a party who is not the proper party, that

is, the real party in interest, to be a party to litigation that does not ensure the litigation's resolution ends the matter at issue.

Therefore, RBH has standing to contest Plaintiffs' alleged position as the real parties in interest in this case.

2. David A. Burton lacks authority to bring this lawsuit on behalf of the Sloan Marvin Burton and Marjorie Cato Burton AB Living Trust based on the Durable Power of Attorney.

Having established RBH's right to challenge the Plaintiffs' authority to bring this case, this Court has reviewed the documents upon which the Plaintiffs base that authority. Specifically, this Court has reviewed Marjorie Cato Burton's Durable Power of Attorney for Financial Management ("Power of Attorney"), dated February 29, 2008, which appoints David A. Burton to serve as her Attorney-in-Fact with respect to her individual financial affairs. While the operation of the Trust is not the issue before the Court, the Court must ensure that David A. Burton may bring a lawsuit on behalf of the Trust. Plaintiffs assert that David A. Burton has a right to bring this lawsuit on behalf of the Trust by virtue of the Power of Attorney. However, an Attorney-in-Fact can act only within the power granted in the appointing document, in this case the Power of Attorney. The Power of Attorney presented to this Court extends limited power to the Attorney-in-Fact relative to trusts. Specifically, the Power of Attorney limits Burton's power to trusts under which the principal, Marjorie Cato Burton, is entitled "as a beneficiary, to a share or payment." (Power of Attorney, Paragraph 13(7)).

The plain language of Ms. Burton's Power of Attorney states: "I Marjorie Cato Burton, appoint the person named below as my attorney-in-fact to act for *me* in any lawful way with respect to the powers delegated in Part 4 below" (emphasis added). The face of the Power of Attorney document shows Marjorie Cato Burton as "Principal." It does *not* show Ms. Burton in

her separate, fiduciary capacity as trustee of any trust. Ms. Burton's signature block on the document states only her name, indicating that she acted only in her individual capacity rather than in any separate fiduciary capacity as a trustee generally, or as the Co-Trustee for the Trust at issue, in executing the document.

Although the Power of Attorney may authorize Ms. Burton's Attorney-in-Fact to act for her *in her capacity as an individual trust beneficiary*, it cannot and does not confer the power to act in a separate fiduciary capacity as Co-Trustee on the Trust's behalf. Paragraph 4 of the Power of Attorney entitled "Powers of Attorney-in-Fact" states, in pertinent part: "These powers are defined in Part 13, below." Paragraph 13 ("Definition of Powers Granted to Attorney-in-Fact"), subsection 7, states, in pertinent part: "My attorney-in-fact may act for *me* in all matters that affect a trust, (from which I am, may become or claim to be entitled *as a beneficiary*.... My Attorney-in-Fact's authority includes the power to disclaim any assets which I am, may become, or claim to be entitled, *as a beneficiary*, to any share or payment." Id. The Attorney-in-Fact's authority is limited to acting for Ms. Burton in her individual capacity as a beneficiary, not in a separate fiduciary capacity as Co-Trustee.

The Trust at issue existed at the time Ms. Burton signed the Power of Attorney. Paragraph 13(8) of the Power of Attorney limits the Attorney-in-Fact's power relative to the Trust to transfer of Ms. Burton's property interests to "the Trustee" of the Trust. Paragraph 13(9) of the Power of Attorney does extend to the Attorney-in-Fact authority to act in legal actions in favor of or against Ms. Burton. However, the instant action is not an action in favor of or against Ms. Burton; rather, it is an action brought by the Trust.

Plaintiffs incorrectly assert that by virtue of the Power of Attorney, David A. Burton can perform all acts Ms. Burton could perform as Co-Trustee. In support of their position, Plaintiffs

offered an affidavit from a North Carolina attorney, to which RBH's counsel objected. The affidavit is in essence a brief which the Court has considered to the limited extent of the following observations. The affidavit acknowledges that the "plain language" of the Power of Attorney does not give David A. Burton authority to act as Trustee of the subject Trust. The attorney, after such acknowledgment, opines that David A. Burton could do what Ms. Burton could do under the Trust in her individual capacity. Because the plain language of the Power of Attorney does not give Mr. Burton authority to act as Trustee, the Court finds the former observation correct and the latter without merit.

For these reasons, David A. Burton lacked legal authority to act as Successor Co-Trustee in executing the April 1, 2011 purported First Amendment on Ms. Burton's behalf. Because he lacked the authority to sign the First Amendment, David A. Burton's signature on the First Amendment is ineffective and renders that document void and of no legal effect. David A. Burton therefore cannot bring this lawsuit on the Trust's behalf, and he fails to meet the requirement of SCRCP 17 that every action shall be prosecuted in the name of the real party in interest (in this case, the Trust).

3. **The law of principal and agency does not allow Marjorie Cato Burton's delegation of Trust fiduciary powers by virtue of the Durable Power of Attorney.**

As a matter of principal and agency law, the principal cannot delegate more authority than she originally possessed. See 3 Am. Jur. 2d Agency § 74 ("[t]he implied and incidental authority of an agent may not be extended beyond its legitimate scope and includes only such powers as are practically indispensable and essential in order to carry out the duties actually delegated to the agent"). The purpose of a durable power of attorney is to delegate the principal's power over their personal, individual affairs as specified in the document. An individual's power of attorney cannot delegate Trust fiduciary powers not expressly granted by

the Trust document. See N.C. Gen. Stat. Ann. § 36C-8-807(a)(2) (requiring a delegating trustee to define and limit the scope of an agent's power and requiring the delegation to conform to the terms of the trust); see, e.g., Buse v. First Am. Title Ins. Co., No. C-08-0510-MJP, 2009 WL 1543994, at *3 (W.D. Wash. May 29, 2009) (unpublished) ("[A] trustee can delegate some but not all of its powers to an agent"). The terms of the Trust document or a Court appointment of Successor Co-Trustee (*not* Marjorie Cato Burton's personal Power of Attorney), would be the proper mechanism for any Successor Co-Trustee appointment.

4. **Pursuant to North Carolina law and the plain language of the Trust, David A. Burton is not a Successor Co-Trustee.**

The Trust document is specific as to Trustee appointments and amendments. It provides the only instance in which David A. Burton is to be a Successor Co-Trustee in Paragraph 3(b). The conditions precedent for David A. Burton to become a Successor Co-Trustee have not been met. As explained below, North Carolina law and the Trust's plain language do not permit the Trust amendment which purports to appoint David A. Burton as Successor Co-Trustee.

Although the question as to whether the real party in interest is named as the plaintiff in this lawsuit is a South Carolina procedural question, the Trust document itself is a North Carolina Trust, executed in North Carolina, recorded in North Carolina, and governed and construed by North Carolina law. N.C. Gen. Stat. Section 36C-7-704(b) states:

> If one or more co-trustees remain in office, a vacancy in trusteeship need not be filled. A vacancy in trusteeship must be filled if the trust has no remaining trustee.

Sloan Marvin Burton remains in office as Co-Trustee of the Trust. There is no evidence that Sloan Marvin Burton is unable to continue serving as Trustee. Therefore, no vacancy has occurred in that trusteeship, and no appointment of any Successor Co-Trustee is necessary.

The responsibility of enforcing a claim on behalf of a trust belongs to the trustee or co-trustees of a trust. N.C. Gen. Stat. Ann. Section 36C-8-811 (2006) ("A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust"). Absent explicit language in the trust document, a trustee may not delegate her duty to file suit on behalf of the trust. E.g., Braddock Fin. Corp. v. Washington Mut. Bank, 637 F.Supp. 2d 924, 931 (D. Colo. 2009) ("In most cases, the trustee has *exclusive* authority to maintain an action on behalf of the trust against a third party") (emphasis added); In re Frontier Ins. Group, Inc. Securities Litigation, 172 F.R.D. 31, 42 (E.D.N.Y. 1997) ("[A] suit of behalf of a trust... normally must name the trustee as plaintiff"). Thus, the question becomes, has David A. Burton been granted the power to act as Successor Co-Trustee under the Trust? The answer is no.

Article 2(a) of the Trust allows the Grantors (Sloan Marvin Burton and Marjorie Cato Burton) to "*jointly* amend or modify" the Trust (emphasis added). Ms. Burton's undisputed mental incapacity/incompetence prevents her from acting as Co-Trustee; therefore, she and her husband cannot "*jointly*" amend or modify the Trust to allow David A. Burton's service as Successor Co-Trustee. Article 2 allows one Trustee to act only if the other is deceased; Marjorie Cato Burton is not deceased. Id. Sloan Marvin Burton's signature on the First Amendment to the Trust and on the Affirmation, Ratification and Consent does not substitute David A. Burton as a Successor Co-Trustee because, under the terms of the Trust, he cannot unilaterally amend or modify the Trust. Thus, the First Amendment and Affirmation, Ratification and Consent are legally invalid and void.

Article 2(b) of the Trust allows the *Grantors* (plural) to appoint, substitute or otherwise change designated Trustees/Successors Trustees. Id. Ms. Burton's undisputed mental incapacity/incompetence renders her unable to act as Co-Trustee. Since the Trust requires that

both Co-Trustees act, and Ms. Burton cannot do so, David A. Burton cannot be appointed or substituted as Successor Co-Trustee under Article 2(b).

Further, Article 3(b) allows David A. Burton to serve as Successor Co-Trustee only if *both* Sloan Marvin Burton and Marjorie Cato Burton cannot serve due to death, disability or incapacity. Article 3(a) of the Trust states in pertinent part:

> In the event of a physical o[r] mental incapacity or death of one of the Trustees, the survivor Trustee shall continue as the sole Trustee with full authority to exercise all of the powers and rights accorded to a Trustee under this Declaration of Trust.

Id. Article 3(a) allows Sloan Marvin Burton to continue serving as sole Trustee, but it does not allow David A. Burton to serve as Successor Co-Trustee. Because there has been no allegation by Plaintiffs that Sloan Marvin Burton is deceased or incapacitated in any way, there is no reason to believe that he cannot serve as the sole Trustee of the Trust.

Therefore, David A. Burton has not been appointed as a Successor Co-Trustee pursuant to the terms of the Trust.

5. David A. Burton has no authority to bring this lawsuit on behalf of the T.E. Cato Estate, LLC.

While the T.E. Cato Estate, LLC is listed as a Plaintiff in this litigation, the Complaint sets forth no authority vested in David A. Burton to pursue an action on behalf of the LLC. It must be interpreted by the way the case caption reads, as though David A. Burton is exerting his right to proceed on behalf of the LLC pursuant to the Trust, as well. This could be the only way he could pursue such claim, as the chronology of the documents reveal that at the time of the formation of the LLC the property there involved was in the Trust and it is the Trust, not Ms. Burton individually, which is a member of the LLC. Exhibit K of Plaintiffs' Complaint, the

LLC formation document, is signed by Mrs. Burton "as Trustee" – not in her individual capacity.

Accordingly, David A. Burton has no authority to bring this lawsuit on behalf of the T.E. Cato Estate, LLC, and therefore, he is not a real party in interest under Rule 17.

CONCLUSION

The Court does not find that it lacks subject matter jurisdiction over the action (SCRCP 12(b)(1)), nor does it find that the Complaint fails to state facts sufficient to state a cause of action on its face (SCRCP 12(b)(6)). However, this Court does find that David A. Burton lacks authority to bring this action on behalf of the subject Trust and the LLC. David A. Burton does not have the requisite legal standing to bring this lawsuit.

SCRCP 17 states, in pertinent part, that "[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest *until a reasonable time* has been allowed, after objection, for ratification of commencement of the action by, or joinder of, the real party in interest" (emphasis added). RBH filed its Motion to Dismiss on January 25, 2011. Plaintiffs waited almost four months before filing their Motion for Substitution of Parties, and the document purporting to remedy the fact that the Plaintiffs are not the real parties in interest is legally invalid and unenforceable. It would be futile to grant Plaintiffs' Motion for Substitution of Parties because, in light of my ruling, that would not remedy the SCRCP 17 deficiency which exists in this case. At the time of filing the Motion for Substitution of Parties, this lawsuit had been pending for approximately 11 months. Under the circumstances, this Court finds that Plaintiffs have had a reasonable amount of time to join the real party in interest, but have failed to do so.

JC Ex #9

For the reasons set forth above, RBH's Motion to Dismiss is granted, and Plaintiffs' Motion for Substitution of Parties is denied. This case is hereby dismissed with prejudice.

AND IT IS SO ORDERED.

John C. Hayes III

The Honorable John C. Hayes, III
16th Judicial Circuit

#10

Date: 8/11/11

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2010CP4602267

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

Submitted by: | Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

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

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

Order

This order ☐ ends ☐ does not end the case.

ORDER INFORMATION
Additional Information for the Clerk:

INFORMATION FOR THE PUBLIC INDEX
Complete all information below when the judgment affects title to real property and provide the amount should not be enrolled. Do not provide information for judgments checked in the boxes below.

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

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

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

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

2049 — Judge Code

12/14/11 — Date

CPFORM4M
SCCA SCRCP Form 4C (Revised 10/2011)

For Clerk of Court Office Use Only

This judgment was entered on **December 14, 2011**, and a copy mailed first class or placed in the appropriate attorney's box on **December 14, 2011**, to attorneys of record or to parties (when appearing pro se) as follows:

Roger B. Jellenik Roger B. Jellenik Attorney at Law 1111 Broad St., Box J Camden, SC 29020
George Hunter McMaster Tompkins & McMaster, LLP P.O. Box 7337 Columbia, SC 29202

ATTORNEY(S) FOR THE PLAINTIFF(S)

Samuel W. Outten Womble Carlyle Sandridge & Rice, PLLC P.O. Box 10208 Greenville, SC 29603-0208

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

Court Reporter

CPFORM4M
SCCA SCRCP Form 4C (Revised 10/2011)

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, by and through David A. Burton as Attorney-in-Fact, Individually and in the right and on Behalf of T.E. Cato Estate, LLC,
Plaintiffs,

v.

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

IN THE COURT OF COMMON PLEAS

FOR THE SIXTEENTH JUDICIAL CIRCUIT

C.A. No. 2010-CP-46-2267

ORDER

FILED-RECEIVED
2011 DEC 14 PM 4:09
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

ORDER

This matter comes before me by Plaintiff's Rule 59 motion to reconsider this Court's Order dated August 29, 2011. In reaching this decision, I have examined that motion and order as well as the pleadings; Defendants' Motion to Dismiss dated January 25, 2011; the Declaration of Trust ["Declaration"] of the Sloan Marvin Burton and Marjorie Cato Burton AB Living Trust ["Trust"], dated January 19, 2007; the Durable Power of Attorney ["POA"] for Financial Management of Marjorie Cato Burton ["Ms. Burton"], dated February 29, 2008; the First Amendment to the Sloan Marvin Burton and Marjorie Cato Burton AB Living Trust, dated April 1, 2011 ["First Amendment"]; the Affirmation, Ratification and Consent, dated April 1, 2011 ["Ratification"]; Plaintiff's Motion to Substitute, dated May 6, 2011; and briefs filed and arguments made by the parties.

The issue here is whether David A. Burton as Successor Trustee ["Dr. Burton"] is a real party in interest entitled to pursue the captioned action. This issue arises by virtue of Rule 17(a), SCRCP, and Defendants' Motion to Dismiss. After my review, I find that:

1. The documents at issue control the operation of the Trust. Section 13(7) of the POA authorizes Dr. Burton to act for Ms. Burton in "all matters that affect a Trust ... from which [Ms. Burton] may ... claim to be entitled, as a beneficiary, to a share or payment." In that regard, section 2(c) of the Declaration entitles the Grantors "to all income" from certain Trust property; section 2(a) allows the Grantors to amend,

modify, or revoke the Trust; and section 2(b) allows the Grantors to change Trustees at any time. Dr. Burton is therefore authorized to act for Ms. Burton in appointing a Successor Trustee. Further, the First Amendment and the Ratification, coupled with Rules 1 and 17(a), SCRCP, afford the Trust standing through Dr. Burton as Successor Trustee to pursue this action, and the power to do so under the First Amendment and the Ratification relate back to the commencement of this action.

2. Rule 17(a), SCRCP, allows a "reasonable time" to cure an objection. Defendants made their Motion to Dismiss on January 25, 2011, 180 days after their Answer. The First Amendment and the Ratification were executed on April 1, 2011, 67 days after Defendants' Motion to Dismiss, and Plaintiff made its Motion for Substitution, dated May 6, 2011, 102 days after the Motion to Dismiss. These time periods meet the reasonable time requirement in Rule 17(a). Further, Defendants present no argument that they would suffer any prejudice were the Court to deny their Motion to Dismiss.

3. Without determining the merits, based upon the pleadings and the foregoing analysis, Dr. Burton can pursue this action in his capacity as Successor Trustee rather than as attorney-in-fact. Further, based upon Section 33-44-1101 of the S.C. Code of Laws, 1976, as amended, paragraph 16 of the Complaint, and Section 6.1 of the Operating Agreement for T.E. Cato Estate, L.L.C., Dr. Burton may maintain this action in the right and on behalf of T.E. Cato Estate, L.L.C. While Section 6.6(c) of the Operating Agreement names James Thomas Cato as General Manager, his status does not trump the members' powers under Section 6.1.

Accordingly, the prior Order granting Defendants' Motion to Dismiss is withdrawn, that Motion is now denied based upon the findings set forth above, and the Plaintiff's Motion for Substitution is therefore moot.

AND IT IS SO ORDERED.

The Honorable John C. Hayes, III
Presiding Judge
Sixteenth Judicial Circuit

This 14th day of December, 2011.

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2010CP4602267

PLAINTIFF(S)		DEFENDANT(S)	
Marjorie Cato Burton	David A Burton	Carroll M Pitts Jr	Robinson Bradshaw & Hinson PA
TE Cato Estate LLC		Joshua B Vann	Morton & Gettys Llc

Submitted by: The Court

Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

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

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

ORDER INFORMATION

Order Denying Plaintiff's Motion to Amend Complaint

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

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

2049 — **Judge Code**

102/22/2013 — **Date**

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

For Clerk of Court Office Use Only

This judgment was entered on **October 24, 2013**, and a copy mailed first class or placed in the appropriate attorney's box on **October 24, 2013**, to attorneys of record or to parties (when appearing pro se) as follows:

Roger B. Jellenik 1111 Broad St., Box J Camden, SC 29020-3611
George Hunter McMaster PO Box 7337 Columbia, SC 29202

ATTORNEY(S) FOR THE PLAINTIFF(S)

Samuel W. Outten PO Box 10208 Greenville, SC 29603-0208

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

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

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

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, by and through David A. Burton as Attorney-in-Fact, Individually and in the right and on Behalf of T.E. Cato Estate, LLC,

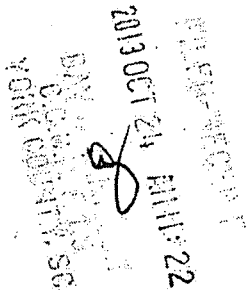
Plaintiffs

-V-

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

Defendants

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT



Order

File Number: 2010-CP-46-2267

ORDER DENYING PLAINTIFF'S MOTION TO AMEND COMPLAINT

This matter is before the court on Plaintiffs' motion to amend its complaint in the above-captioned matter. In this motion, Plaintiffs request that they be granted leave to amend their complaint in order to add Joshua B. Vann, Esq., and Morton & Gettys, LLC, as defendants to this action. The Court finds that the addition of these parties to this action at this point in time would be prejudicial to Defendants Robinson Bradshaw & Hinson, P.A. (RBH) and Carroll J. Pitts, Jr., Esq. (Mr. Pitts) Therefore, this motion to amend is DENIED.

Rule 15(a) of the South Carolina Rules of Civil Procedure provides that after thirty days have elapsed since the filing of the original complaint, a party may amend its complaint "only by leave of court or by written consent of the adverse party." Additionally, "leave shall be freely given when justice so requires and does not prejudice the other party." It is well established that a motion to amend is addressed to the discretion of the trial judge, and the party opposing the motion has the burden of establishing prejudice. *Tanner v. Florence County Treasurer*, 336 S.C. 552, 521 S.E.2d 153 (1999). The prejudice Rule 15 envisions is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it. *Id.*

Here, the alleged wrongful conduct occurred in December 2007 and the Plaintiffs instituted litigation by filing a complaint in May 2010. The addition of two new parties more than three years after the original complaint was filed and well over five years after the alleged wrongful conduct occurred would prejudice Defendants RBH and Mr. Pitts. Plaintiffs have had

ample time to add new parties to this action since the commencement of this litigation in 2010. Plaintiffs knew or should have known who all was involved in the transactions giving rise to this lawsuit since the commencement of this litigation. The motion to add two new parties is not based on any recently discovered information; rather, it is based on the same common set of facts that have been known to Plaintiffs for several years. The addition of these parties at this point in the action would significantly delay the resolution of this case and prejudice Defendants by effectively starting the case all over again.

Plaintiffs argue that while they could pursue Mr. Vann and Morton and Gettys in a separate lawsuit, the judicial economy weighs in favor of allowing these two putative defendants to be added to the instant suit. The Court finds the interest in judicial economy in this instance does not outweigh the disruption and prejudice which the addition of these two parties to this suit would occasion.

This ruling is not based on the Statute of Limitations although it would appear to the Court that this would be an appropriate defense for Mr. Vann and Morton & Gettys to assert. However, it is not before the court at this time; rather, it is an affirmative defense. As to Mr. Vann and Morton & Gettys, the Statute of Limitations would arise only in a suit against them in which such defense was raised.

In regard to the "Assignment Agreement" assigning relevant claims, the Court finds that allowing these claims would also prejudice Mr. Pitts and Morton & Gettys because these parties were not involved in the partition litigation and did not participate in discovery relating to those claims.

In regard to the relation back argument raised by Plaintiffs, the Court finds that the claims do not relate back. Even if the Court was to allow the complaint to be amended it finds that the claims would not relate back as to any issues involving the added parties. In Jackson v. Doe, 342 S.C. 552, 558, 537 S.E.2d 567, 570 (Ct. App. 2000), the Court held that "the addition of a party is not the same as a substitution or change of party." The Court will allow for relation back when a party is *substituted* but not when a party is *added* while retaining a party named in the original suit. *Id.* Here, Plaintiffs are attempting to add Mr. Vann and Morton & Gettys rather than substitute them as defendants to this action. There is an important distinction between adding parties to an action and substituting parties to an action. Therefore, the claims asserted against Mr. Vann and Morton & Gettys would not relate back.

THEREFORE, IT IS HEREBY ORDERED that Plaintiff's "Motion to Amend Complaint" is DENIED.

BY ORDER OF THE COURT

10/22, 2013

York, S.C.

John C Hayes II

FOR York COUNTY

#2

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2010CP4602267

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

Submitted by: | Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: ORDER DENYING PLAINTIFF'S MOTION TO RECONSIDER

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

s/ John C. Hayes, III. | 2049 | 11/15/2013

Circuit Court Judge | **Judge Code** | **Date**

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

For Clerk of Court Office Use Only

This judgment was entered on **November 15, 2013**, and a copy mailed first class or placed in the appropriate attorney's box on **November 15, 2013**, to attorneys of record or to parties (when appearing pro se) as follows:

Roger B. Jellenik 1111 Broad St., Box J Camden, SC 29020-3611
George Hunter McMaster PO Box 7337 Columbia, SC 29202

ATTORNEY(S) FOR THE PLAINTIFF(S)

Samuel W. Outten PO Box 10208 Greenville, SC 29603-0208

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

David Hamilton

David Hamilton - Clerk of Court

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

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

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, by and through David A. Burton as Attorney-in-Fact, Individually and in the right and on Behalf of T.E. Cato Estate, LLC,

Plaintiffs

-V-

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

Defendants

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

2013 NOV 15 PM 9:57
CLERK OF COURT & CCS
YORK COUNTY, SC

Order

File Number: 2010-CP-46-2267

ORDER DENYING PLAINTIFF'S MOTION TO RECONSIDER

Now before the Court is Plaintiff's Motion to Reconsider. The Court issued an order on October 22, 2013, and Plaintiff timely filed notice to reconsider. Upon due consideration, this motion to reconsider is denied.

THEREFORE, IT IS HEREBY ORDERED that Plaintiff's "Motion to Reconsider" is DENIED.

BY ORDER OF THE COURT

11/14, 2013

York, S.C.

John C. Hayes

FOR York COUNTY

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2010CP4602267

PLAINTIFF(S)	DEFENDANT(S)
Marjorie Cato Burton David A Burton TE Cato Estate LLC	Carroll M Pitts Jr Robinson Bradshaw & Hinson PA
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: **ORDER**

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

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

2049 — **Judge Code**

4/3/2015 — **Date**

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

For Clerk of Court Office Use Only

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

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

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

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

David Hamilton

David Hamilton - Clerk of Court

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

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

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT
Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust by and through David A. Burton as Attorney-in-Fact, Individually and in the right and on behalf of T.E. Cato Estate, LLC, Plaintiff, v. Carroll M. Pitts, Jr., Esq. and Robinson Bradshaw & Hinson, P.A., Defendants.	)	Civil Action No. 2010-CP-46-2267 **ORDER**

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

Prologue

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

Facts[1]

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

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

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

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

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

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

[2] This "fact" is based on earlier rulings by the Court. The Court is aware that the deed was signed prior to the LLC's complete formation.
[3] Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust

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

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

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

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

The Effect of the Partition Action Settlement

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

---

[4] By devolution at the time of the institution of the Partition Action, not including Plaintiff, two heirs had a 20% interest in the T.E. Cato Estate and four heirs held 10% each.
[5] The quitclaim deed included the entire property.
[6] Hereafter where the Court uses the term "Plaintiff," the term applies to Burton Trust. References to T.E. Cato Estate, LLC, will continue to be referenced as the "LLC."

Agreement)(Plaintiff's exhibit 38(c) and (d)) on or about April 4, 2013, to resolve the Partition Action that was filed to complete the commercial real estate transaction underlying this case. David Burton as trustee signed the agreement on behalf of the Burton Trust. In relevant part, the Settlement Agreement states as follows:

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

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

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

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

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

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

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

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

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

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

Assignment of Legal Malpractice Claim

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

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

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

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

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

[7] The matter of assignment through the Settlement Agreement is discussed elsewhere herein.

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

Derivative Action

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

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

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

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

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

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

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

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

Causation

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

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

[12] As noted, Plaintiff was the Defendant in the Partition action.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7/7/14

Expert Testimony (General)

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

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

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

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

Professional Negligence

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

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

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

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

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

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

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

Attorney-Client Relationship

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

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

14. Pitts had a duty to communicate with the putative LLC members.

15. Pitts failed to pass on information.

16. Pitts did not "protect everyone."

17. This lawsuit

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

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

1. The "clients" belief.

2. Thomas Cato's request that Pitts "protect" all the heirs, which was in essence a request by Thomas Cato, that Pitts represent all of the heirs, a request Pitts accepted (notably an argument that Pitts could and did force himself as attorney for six individuals/Trusts without their required consent).

3. Thomas Cato's referring to Pitts as "our" attorney.

4. Pitts did not "reach out" to the heirs.

5. Pitts knew Thomas Cato was passing on Pitts' advice to the heirs.

6. Pitts failed to clarify t[redacted] heirs who he was representing.

7. Pitts failed to clarify the problem of the LLC's management.

8. Presenting a deed to Plaintiff and other heirs to sign (Professor

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

Virzi testified this created an attorney-client relationship).

9. Pitts failed to ascertain what the other heirs "wanted."

10. Pitts' action left the Burton Trust with no protection.

11. Pitts should have intervened in "a dispute as to Thomas James[16] Cato's authority."

12. Pitts did not do a title search.

13. Pitts failed to advise the heirs of the import of a general warranty deed.

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

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

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

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

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

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

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

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

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

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

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

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

[17] *See* Professor Freeman's deposition testimony. (Freeman Deposition of July 28, 2014 p. 39 l. 1-4).

least at this stage, is a moot issue. Both professors rely heavily on emails and conduct of third parties most of which were not of privy to Pitts. Those within Pitts' ken, according to Professor Virzi, created an attorney-client relationship by virtue of Pitts' silence. I affirmatively find that Pitts had no obligation to fire off disclaimers of representation based on conduct and comments by third parties.

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

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

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

[18] Pitts' bill included an entry for a title search, which while unexplained is not dispositive of this issue.

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

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

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

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

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

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

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

Ratification

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

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

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

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

Set Off

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

Holdings

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

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

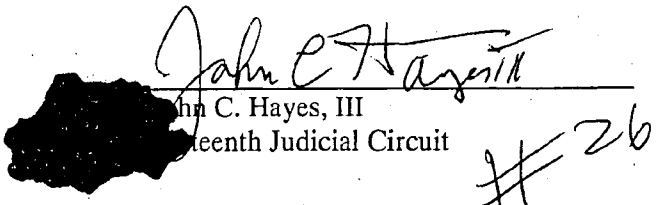
4. Plaintiff did not ratify the sale to TAL by negotiating the check representing its percentage interest in the sale.
5. Defendants committed professional negligence in the formation of the LLC, however such negligence was not a proximate cause of any damage or injury to Plaintiff or the LLC.
6. The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

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

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

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

AND IT IS SO ORDERED



hn C. Hayes, III
teenth Judicial Circuit

#26

April 3rd, 2015
York, South Carolina

[19] These are the duties set forth at paragraph 18(a) of Plaintiff's complaint.

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2010CP4602267

PLAINTIFF(S)		DEFENDANT(S)	
Marjorie Cato Burton TE Cato Estate LLC	David A Burton	Carroll M Pitts Jr	Robinson Bradshaw & Hinson PA
Submitted by:		Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

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

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: **ORDER**

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

s/ John C. Hayes, III. — 2049 — 4/28/2015

Circuit Court Judge — **Judge Code** — **Date**

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

For Clerk of Court Office Use Only

This judgment was entered on **April 30, 2015**, and a copy mailed first class or placed in the appropriate attorney's box on **April 30, 2015**, to attorneys of record or to parties (when appearing pro se) as follows:

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

Samuel W. Outten Poinsett Plaza, Suite 900 104 South Main Street Greenville, SC 29601
Everett Eugene McMillian 1320 Main Street Columbia, SC 29201

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

David Hamilton

David Hamilton - Clerk of Court

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

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

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT
Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust by and through David A. Burton as Attorney-in-Fact, Individually and in the right and on behalf of T.E. Cato Estate, LLC, Plaintiff, v. Carroll M. Pitts, Jr., Esq. and Robinson Bradshaw & Hinson, P.A., Defendants.	)	Civil Action No. 2010-CP-46-2267 **ORDER**

FILED-RECEIVED
2015 APR 30 AM 10:06
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

This Court issued an Order in this matter dated April 3, 2015. Pursuant to the South Carolina Rules of Civil Procedure, David Alan Burton individually and as Successor Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust individually and in the right and on behalf of T.E. Cato Estate, LLC (hereinafter "Plaintiff ") timely filed a Rule 59(e) motion for reconsideration.

Rule 59(g) SCRCP provides that a Rule 59(e) motion shall be provided to the trial judge within 10 days of the filing of the motion. The word "shall" is generally interpreted to be a mandatory term however it can be precatory. *See* "shall," *Black's Law Dictionary*, 7th Ed. p. 1379. In the context of Rule 59(b) it is mandatory. *See* Rule 59(b)(c)(e) and (f) SCRCP.

Rule 59 is a rule of limitations, not of jurisdiction. *In re Beard*, 359 SC 351, 597 S.E.2d 835 (Ct. App. 2004). Rule 59 places a requirement for consideration of Rule 59 motions. The reason for the Rule is noted to be "to help insure that the judge is promptly notified that the motion has been filed." The undersigned discovered the Plaintiff's Rule 59(e) motion simply

because it anticipated such and inquired after 10 days as to whether or not such motions had been filed. But for the initiative of the Court based on the firm belief that the case would not end with the Order of April 3, 2015, the Plaintiff's motion for reconsideration would, up to and including this date, be buried in the Court's file to languish until someone at some point in the future was concerned that the motion had not been addressed.

As noted, the limitations of Rule 59(g) is not jurisdictional, but limiting. The undersigned is not sure exactly where this postures the motion, dead or alive. The Court will below address the motion as alive and dispose of on its merits. However, the ruling herein is not to be deemed a waiver (if such is indeed possible) of Rule 59(g) but an exercise of caution.

The undersigned will address each of the numbered and lettered issues raised in Plaintiff's motion by reference to its number or letter.

1. Taken as a whole the operative, necessary facts, and facts pertinent to the Court's Order are set forth therein. Other facts raised by the evidence presented at trial were not developed as such did not impact the Court's analysis and holdings.
2. This item simply requests the Court reverse its findings and holdings in the Order and enter findings favorable to Plaintiff. The Court denies this requested alteration of the April 3, 2015 Order.
3. See 2
4. See 2
5. See 2
6. This assertion regarding the statute of limitation is true and noted in the Order. At the worst, the language regarding the statute of limitations is surplusage and had no impact on the Court's holdings as set forth in the April 3, 2015 Order.

7. See 2

8. See 2

9. See 2

10. See 2

11. See 2

12. Based on the Court's findings and holdings the set-off issue is moot.

13. See 2

14. See 2. Also, as set forth in the April 3, 2015 Order, there exists in this case, based on the record, no issue relating to the character or quality of the general warranty deed into the LLC.

15. See 2 (also this issue is a collateral issue, see below)

16. See 2

Additionally:

A. The collateral matters/issues are any matters/issues germane to this litigation which have resulted in an Order from the Court. Collateral matters would include, but are not necessarily limited to the following issues:

   1. Deed predating organization of the LLC;
   2. Plaintiff's motion to amend the complaint;
      a. As to adding Joshua Vann and Morton and Gettys as parties Defendant.
      b. To add Plaintiff's claim based on an assignment.
   3. Discovery Order of March 13, 2014;
   4. Order of the undersigned dated August 11, 2011;
   5. Order of the undersigned dated December 9, 2011.

B. The Court has assessed, reviewed, studied, and considered the relevant testimony and court filings extensively. Counsel has had ample time to address all of the issues it asserts prior to the Court's issuance of the April 3, 2015 Order and has voluminously done so. Further memoranda, briefs, or arguments are not necessary and of course the record is closed.

For the above reasons, Plaintiff's Rule 59(e), SCRCP, motion is DENIED.

IT IS SO ORDERED

John C. Hayes, III
Sixteenth Judicial Circuit

#4

April 28th 2015
York, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS FOR THE SIXTEENTH JUDICIAL CIRCUIT
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 and in the Right and on Behalf of T.E. Cato Estate, LLC, Plaintiff	)	Case No. 2010-CP-46- 2267
v.	)	COMPLAINT
Carroll M. Pitts, Jr., Esq., and Robinson Bradshaw & Hinson, P.A. Defendants	)	

FILED-RECEIVED
2010 MAY 27 PM 4:40
DAVID A. BARRON
CLERK OF COURT
YORK COUNTY, SC

COMPLAINT

The Plaintiff, Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust by and through David A. Burton as her attorney-in-fact, hereinafter referred to as "Plaintiff", complaining of the Defendants Carroll M. Pitts, Jr., Esq. ("Defendant Pitts"), and Robinson Bradshaw & Hinson, P.A. ("Defendant RBH"), hereinafter collectively referred to as "Defendants", alleges and says that:

ALLEGATIONS OF FACT: THE PARTIES

1. Plaintiff was born on February 28, 1918, is 91 years of age, resides in Raleigh, North Carolina, and suffers from various infirmities of age.
2. On February 29, 2008, Plaintiff executed a durable power of attorney, a copy of which is attached hereto as Exhibit A, appointing her son, David A. Burton, as her attorney-in-fact.
3. Plaintiff is a Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust ("the Trust"), which was created pursuant to the laws of the State of North Carolina by a Declaration of Trust dated January 19, 2007.
4. Upon information and belief, Defendant RBH is a law firm with its principal offices located at 101 North Tryon Street, Suite 1900, in the City of Charlotte, County of Mecklenberg, State of North

Carolina, with offices for the practice of law in the State of South Carolina located at 140 East Main Street, Suite 420, in the City of Rock Hill, County of York, State of South Carolina.

5. Upon information and belief, Defendant Pitts is an attorney admitted to the practice of law in the State of South Carolina employed by or otherwise affiliated with Defendant RBH with an office located at 140 East Main Street, Suite 420, in the City of Rock Hill, County of York, State of South Carolina.

COMMON ALLEGATIONS OF FACT

6. The allegations of fact set forth in paragraphs 1 through 5 are incorporated herein.

7. Sometime during the first quarter of 2007, Defendants undertook the legal representation of James Thomas Cato ("Mr. Cato") and six other members of a family, one of whom was Plaintiff, seeking to form a limited liability company.

8. Upon information and belief, the purpose of forming the limited liability company, which became known as T.E. Cato Estate, L.L.C. ("CatoLLC"), was to establish a single legal entity that could negotiate with one or more developers for the potential sale of certain parcels of real property owned by the descendants of T.E. Cato, deceased.

9. Upon information and belief, Mr. Cato duly informed the family members that Defendants or either of them had been retained to assist with the formation of a limited liability company.

10. Upon information and belief, Defendants or either of them thereafter

    a. Prepared articles of organization ("Articles"), attached as Exhibit B, and an operating agreement ("Agreement"), attached as Exhibit C, for formation of CatoLLC;

    b. Prepared a general warranty deed ("Deed into CatoLLC"), attached as Exhibit D, purporting to convey real property from the individual family members into CatoLLC; and

    c. Released the Articles, Agreement, and Deed into CatoLLC to Mr. Cato for execution by the family members.

11. As to the Articles,

    a. The document listed Plaintiff and Plaintiff signed the document as an organizer of CatoLLC;

    b. The document was filed on June 26, 2007, with the office of the South Carolina Secretary of State, upon information and belief, by or through Defendants or either of them; and

    c. The Secretary of State issued a certificate of existence for the limited liability company on June 28, 2007.

12. As to the Agreement, it was entered into by each individual family member as of the date of formation of CatoLLC.

13. As to the Deed into CatoLLC,

    a. In the course of its preparation and upon information and belief thereafter, Defendants did not perform or request a title search or examination concerning the real property to be conveyed;

    b. It was executed by each individual family member during a period of time from and after May 28, 2007, up through and including June 16, 2007; and

    c. It was recorded in the office of the Clerk of Court for York County on July 10, 2007.

14. Upon information and belief, in addition to legal services related to formation of CatoLLC, Defendants acted as attorney for CatoLLC during all or some portion(s) of the period from and after its formation, during negotiations with one or more developers for the sale of real property and thereafter, as evidenced by the following facts:

    a. A "Letter of Intent", attached as Exhibit E, for sale of the "remaining acreage" purportedly owned by CatoLLC was signed by Mr. Cato for CatoLLC on August 3, 2007, without Plaintiff's knowledge or consent.

    b. By e-mail dated August 20, 2007, attached as Exhibit F, replying to an e-mail from Plaintiff, Mr. Cato wrote Ms. Burton and one or more other family members that he took no action without the advice of the "corporate attorney";

    c. By e-mail dated November 8, 2007, attached as Exhibit G, Defendant Pitts expressed his own opinion, to be shared with all family members, on the Letter of Intent transaction;

    d. By e-mail dated December 8, 2007, attached as Exhibit H, Mr. Cato wrote Ms. Burton that he had retained an accountant to oversee Mr. Cato's conduct of operations as General Manager of CatoLLC and to protect the individual members of CatoLLC and that he had retained the attorney, upon information and belief the Defendants, for the same purposes.

    e. A discovery response from a party in separate litigation, attached as Exhibit I, states that, prior to December 12, 2007, a packet of proposed closing documents was sent, upon information and belief by the buyer's attorney, for review to Defendant RBH as the seller's attorney.

    f. A closing on four parcels of real property ("the Areas") purportedly owned by CatoLLC was held on December 12, 2007, without Plaintiff's knowledge or consent. The seller's settlement statement from that closing, attached as Exhibit J, notes that a payment outside closing ("POC") was made to Defendant RBH as attorney for the seller, CatoLLC.

g. On or about August 8, 2008, without Plaintiff's consent, Defendants, representing all other members of CatoLLC individually, filed a petition in the York County Court of Common Pleas against Plaintiff seeking partition of a right-of-way through the Areas known as the Roadbed Tract, which petition was served on Plaintiff in January 2009.

ALLEGATIONS OF FACT: SC CODE 33-44-1101

15. The allegations of fact set forth in paragraphs 1 through 14 are incorporated herein.

16. Plaintiff is in part commencing this action in the right of CatoLLC inasmuch as any effort to cause Mr. Cato as General Manager to commence this action is unlikely to succeed because:

a. Mr. Cato has initiated and is party to a related adversarial legal action against Plaintiff, Case No. 2008-CP-46-3171, dealing with the same real property that is in part the subject of this case;

b. Mr. Cato is a third party defendant in Case No. 2008-CP-46-3171 and would be determining whether to seek redress for his own acts and omissions and/or recovery from himself; and

c. Upon information and belief, the legal issues presented herein have arisen in part as a direct result of Mr. Cato's continuing course of conduct, and Mr. Cato has evidenced no desire or intent to alter that course of conduct.

FIRST CAUSE OF ACTION

(Legal Malpractice as to Marjorie Cato Burton or, in the Alternative, Professional Negligence)

17. The allegations of fact set forth in paragraphs 1 through 16 are incorporated herein.

18. Plaintiff was entitled to view herself as, and indeed was, a client of Defendants and to view Defendants as her attorney(s) at least, but not necessarily only, for the period of time during which CatoLLC was formed and the Articles, Agreement, and Deed into CatoLLC were being reviewed, executed, and filed. Under such circumstances,

a. Defendants had duties to Plaintiff

i. To conduct or request a title search of the real property sought to be conveyed by the Deed into CatoLLC;

ii. To advise Plaintiff as to the legal significance of the Articles, the Agreement, and Deed into CatoLLC prepared by Defendants for Plaintiff's execution;

iii. To advise Plaintiff as to her duties and risks pursuant to the Articles, Agreement, and Deed into CatoLLC;

iv. To assure that CatoLLC existed before the Deed into CatoLLC was executed; and

v. To avoid engaging in a representation that constituted a conflict between Plaintiff's interests and the interests of other members of CatoLLC.

b. As to Plaintiff, Defendants failed to carry out their duties in that

i. Plaintiff was given no legal advice whatsoever as to the significance of the Articles, the Agreement, or the Deed into CatoLLC or her rights and duties pursuant to any of those documents;

ii. Defendants failed to communicate at all with Plaintiff other than through Mr. Cato; and

iii. Defendants failed to assure that CatoLLC existed at the time that the Deed into CatoLLC was executed or recorded; and

iv. In representing the petitioners in the partition action, Defendant failed to avoid a conflict implicating Plaintiff's interests.

19. Alternatively, if Plaintiff was not a client of Defendants, nevertheless, Defendants had those professional duties to Plaintiff described in paragraph 18a, items i - iv, and, under such circumstances, Defendants failed to carry out those duties as set forth in paragraph 18b, items i - iii.

20. As a result of Defendants' failures,

a. Plaintiff remained ignorant of her rights and responsibilities as to CatoLLC, as to other parties, and as to subsequent real estate transactions;

b. Plaintiff has been exposed to potential liability due to her execution of the Deed into CatoLLC;

c. Plaintiff has been exposed to the legal fees, costs, and expenses of being made party to a partition action now pending under Case No. 2008-CP-46-3171 in the Court of Common Pleas for the County of York, State of South Carolina; and

d. Plaintiff has been exposed to the legal fees, costs, and expenses of having to file a third party complaint under the same case number asserting multiple causes of action including but not limited to the purported sale by CatoLLC of real property in violation of applicable law.

21. The supporting Affidavit of Michael J. Virzi, Esq., is attached as Exhibit K in satisfaction of applicable statutory requirements.

22. Under these circumstances, Plaintiff is informed and believes that she is entitled to an order allowing recovery for any liability, loss, damage, cost or expense suffered or to be suffered by her by reason of Defendants' failures.

SECOND CAUSE OF ACTION

(Legal Malpractice as to T.E. Cato Estate, L.L.C., or, in the Alternative, Professional Negligence)

23. The allegations of fact set forth in paragraphs 1 through 22 above are incorporated herein.

24. As attorney for what was to and did in fact become CatoLLC, Defendants had a duty to assure the validity of conveyances of real property into CatoLLC in line with the expectations of its members.

25. However, because the deeds were executed prior to formation of CatoLLC, Defendants failed to assure that the deeds prepared by Defendants would not be void.

26. Further, by failing to assure that the members and particularly Mr. Cato as CatoLLC's General Manager understood applicable statutory requirements for selling substantially all of CatoLLC's assets, Defendants exposed CatoLLC and its members to potential legal liability to one or more members and to the purchaser of substantially all of CatoLLC's real property assets.

27. The supporting Affidavit of Michael J. Virzi, Esq., is attached as Exhibit K in satisfaction of applicable statutory requirements.

28. Under these circumstances, Plaintiff is informed and believes that CatoLLC is entitled to an order allowing recovery for any liability, loss, or damage suffered or to be suffered by CatoLLC by reason of Defendants' failures.

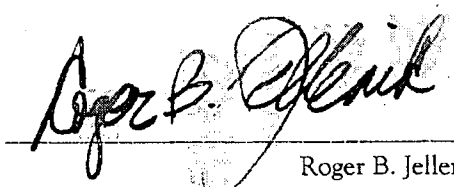
WHEREFORE, Plaintiff respectfully requests that

A. The Court grant Plaintiff the relief requested in the Plaintiff's first cause of action;

B. The Court grant Cato LLC the relief requested in the Plaintiff's second cause of action; and

C. The Court award such other and further relief as it deems justice may require.

Dated this 26th day of May, 2010.



Roger B. Jellenik
Attorney for Plaintiff
SC Bar No. 13546

Roger B. Jellenik
Attorney at Law
1111 Broad Street, Box J
Camden, SC 29020
803-424-1919
803-424-1922
rbjatty@mac.com

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS FOR THE SIXTEENTH JUDICIAL CIRCUIT
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 and in the Right and on Behalf of T.E. Cato Estate, LLC, Plaintiff	)	Case No. 2010-CP-46-
v.	)	VERIFICATION
Carroll M. Pitts, Jr., Esq., and Robinson Bradshaw & Hinson, P.A. Defendants	)	

FILED/RECEIVED
2010 MAY 27 PM 4:40
YORK COUNTY, SC
CLERK OF COURT
C.C.P. & G.S.

VERIFICATION

David A. Burton, first being duly sworn, deposes and says that he is the attorney-in-fact for the Plaintiff named herein above, that he has read the foregoing Complaint and that the same is true to his own knowledge, except as to those matters alleged therein upon information and belief, and as to those matters, he believes them to be true.

David A. Burton as Attorney-in-Fact
for Marjorie Cato Burton as Trustee

Sworn to and subscribed before me this 26th day of May, 2010.

Jacqueline H. Porter
Notary Public of North Carolina
My Commission Expires: Nov 25, 2011

RECEIVED
MAY 27 2010
ROGER B. JELLENIK
ATTORNEY AT LAW

8
00063

EXHIBIT A

DURABLE POWER OF ATTORNEY FOR FINANCIAL MANAGEMENT

WARNING TO PERSON EXECUTING THIS DOCUMENT

THIS IS AN IMPORTANT LEGAL DOCUMENT. IT CREATES A DURABLE POWER OF ATTORNEY. BEFORE EXECUTING THIS DOCUMENT, YOU SHOULD KNOW THESE IMPORTANT FACTS:

THIS DOCUMENT MAY PROVIDE THE PERSON YOU DESIGNATE AS YOUR ATTORNEY-IN-FACT WITH BROAD LEGAL POWERS, INCLUDING THE POWERS TO MANAGE, DISPOSE, SELL AND CONVEY YOUR REAL AND PERSONAL PROPERTY AND TO BORROW MONEY USING YOUR PROPERTY AS SECURITY FOR THE LOAN.

THESE POWERS WILL CONTINUE TO EXIST EVEN IF YOU BECOME DISABLED OR INCAPACITATED. THESE POWERS WILL EXIST UNTIL YOU REVOKE OR TERMINATE THIS POWER OF ATTORNEY. YOU HAVE THE RIGHT TO REVOKE OR TERMINATE THIS POWER OF ATTORNEY AT ANY TIME.

THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL OR OTHER HEALTH CARE DECISIONS FOR YOU.

IF THERE IS ANYTHING ABOUT THIS FORM THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU.

WAKE COUNTY, NC 3
LAURA M RIDDICK
REGISTER OF DEEDS
PRESENTED & RECORDED ON
03/12/2008 AT 08:36:02

BOOK:012997 PAGE:01592 - 01603

1. Principal and Attorney-in-Fact

PRINCIPAL

Marjorie Cato Burton
4300 Boxwood Road
Raleigh, North Carolina 27615

ATTORNEY-IN-FACT

David Alan Burton
412 Kaywoody Court
Raleigh, North Carolina 27615
Day phone: 919-834-8951
Evening phone: 919-870-5228

SUCCESSOR ATTORNEY-IN-FACT

I name the following person to act as my attorney-in-fact if the named attorney-in-fact dies, resigns, or is otherwise unable to serve.

Sharon Harris Burton
412 Kaywoody Court
Raleigh, North Carolina 27615
Day phone: 919-870-5228
Evening phone: 919-870-5228

2. Delegation of Authority

My attorney-in-fact may delegate, in writing, any authority granted under this durable power of attorney to a person he or she selects. Any such delegation shall state the period during which it is valid and specify the extent of the delegation.

3. Effective Date

This power of attorney is effective immediately, and shall continue in effect if I become incapacitated or disabled.

4. Powers of Attorney-in-Fact

I grant my attorney-in-fact power to act on my behalf in the following matters, as indicated by my initials next to each granted power.

INITIALS

X_____(1) Real estate transactions.

X_____(2) Tangible personal property transactions.

X_____(3) Stock and bond, commodity, option and other securities transactions.

X_____(4) Banking and other financial institution transactions.

X_____(5) Business operating transactions.

X_____(6) Insurance and annuity transactions.

X_____(7) Estate, trust, and other beneficiary transactions.

X_____(8) Living trust transactions.

X_____(9) Legal actions.

X_____(10) Personal and family care.

X_____(11) Government benefits.

X_____(12) Retirement plan transactions.

X_____(13) Tax matters.

X_____(14) Gift transactions.

These powers are defined in Part 13, below.

5. Waiver of Attorney-in-Fact's Duty to File and Render Accounts

I waive the requirement, set out in North Carolina Gen. Stat. &#167 32A-11, that my attorney-in-fact file this power of attorney with the clerk of the superior court and render inventories and accounts, after my incapacity or mental incompetence, to the clerk of the superior court.

6. Compensation and Reimbursement of Attorney-in-Fact

My attorney-in-fact shall not be compensated for services, but shall be entitled to reimbursement, from my assets, for reasonable expenses. Reasonable expenses include but are not limited to reasonable fees for information or advice from accountants, lawyers or investment experts relating to my attorney-in-fact's responsibilities under this power of attorney.

7. Personal Benefit to Attorney-in-Fact

My attorney-in-fact may not benefit personally from any transaction engaged in on my behalf.

8. Commingling by Attorney-in-Fact

My attorney-in-fact may not commingle any of my funds with any funds of his or hers.

9. Liability of Attorney-in-Fact

My attorney-in-fact shall not incur any liability to me, my estate, my heirs, successors or assigns for acting or refraining from acting under this document, except for willful misconduct or gross negligence. My attorney-in-fact is not required to make my assets produce income, increase the value of my estate, diversify my investments or enter into transactions authorized by this document, as long as my attorney-in-fact believes his or her actions are in my best interests or in the interests of my estate and of those interested in my estate. A successor attorney-in-fact shall not be liable for acts of a prior attorney-in-fact.

10. Nomination of Conservator or Guardian of Estate

If, in a court proceeding, it is ever resolved that I need a conservator, guardian or other person to supervise my estate, I nominate my attorney-in-fact to serve in that capacity. If my attorney-in-fact cannot serve, I nominate the successor attorney-in-fact named in Part 1, above, to serve.

11. Reliance on This Power of Attorney

Any third party who receives a copy of this document may rely on and act under it. Revocation of the power of attorney is not effective as to a third party until the third party has actual knowledge of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

12. Severability

If any provision of this document is ruled unenforceable, the remaining provisions shall stay in effect.

13. Definition of Powers Granted to Attorney-in-Fact

The powers granted in Part 4, above, authorize my attorney-in-fact to do the following:

(1) Real estate transactions

My attorney-in-fact may act for me in any manner to deal with all or any part of any interest in real property that I own at the time of execution of this document or later

acquire, under such terms, conditions and covenants as my attorney-in-fact deems proper. My attorney-in-fact's powers include but are not limited to the power to:

(a) Accept as a gift, or as security for a loan, reject, demand, buy, lease, receive or otherwise acquire ownership or possession of any estate or interest in real property.

(b) Sell, exchange, convey with or without covenants, quitclaim, release, surrender, mortgage, encumber, partition or consent to the partitioning of, grant options concerning, lease, sublet or otherwise dispose of any interest in real property.

(c) Maintain, repair, improve, insure, rent, lease, and pay or contest taxes or assessments on any estate or interest in real property I own or claim to own.

(d) Prosecute, defend, intervene in, submit to arbitration, settle and propose or accept a compromise with respect to any claim in favor of or against me based on or involving any real estate transaction.

(2) Tangible personal property transactions

My attorney-in-fact may act for me in any manner to deal with all or any part of any interest in personal property that I own at the time of execution of this document or later acquire, under such terms as my attorney-in-fact deems proper. My attorney-in-fact's powers include but are not limited to the power to lease, buy, exchange, accept as a gift or as security for a loan, acquire, possess, maintain, repair, improve, insure, rent, convey, mortgage, pledge, and pay or contest taxes and assessments on any tangible personal property.

(3) Stock and bond, commodity, option and other securities transactions

My attorney-in-fact may do any act which I can do through an agent, with respect to any interest in a bond, share, other instrument of similar character or commodity. My attorney-in-fact's powers include but are not limited to the power to:

(a) Accept as a gift or as security for a loan, reject, demand, buy, receive or otherwise acquire ownership or possession of any bond, share, instrument of similar character, commodity interest or any investment with respect thereto, together with the interest, dividends, proceeds or other distributions connected with it.

(b) Sell (including short sales), exchange, transfer, release, surrender, pledge, trade in or otherwise dispose of any bond, share, instrument of similar character or commodity interest.

(c) Demand, receive and obtain any money or other thing of value to which I am or may become or may claim to be entitled as the proceeds of any interest in a bond, share, other instrument of similar character or commodity interest.

(d) Agree and contract, in any manner, and with any broker or other person and on any terms, for the accomplishment of any purpose listed in this section.

(e) Execute, acknowledge, seal and deliver any instrument my attorney-in-fact thinks useful to accomplish a purpose listed in this section, or any report or certificate required by law or regulation.

(4) Banking and other financial institution transactions

My attorney-in-fact may do any act that I can do through an agent in connection with any banking transaction that might affect my financial or other interests. My attorney-in-fact's powers include but are not limited to the power to:

(a) Continue, modify and terminate any deposit account or other banking arrangement, or open either in the name of the agent alone or my name alone or in both our names jointly, a deposit account of any type in any financial institution, rent a safe deposit box or vault space, have access to a safe deposit box or vault to which I would have access, and make other contracts with the institution.

(b) Make, sign and deliver checks or drafts, and withdraw my funds or property from any financial institution by check, order or otherwise.

(c) Prepare financial statements concerning my assets and liabilities or income and expenses and deliver them to any financial institution, and receive statements, notices or other documents from any financial institution.

(d) Borrow money from a financial institution on terms my attorney-in-fact deems acceptable, give security out of my assets, and pay, renew or extend the time of payment of any note given by or on my behalf.

(5) Business operating transactions

My attorney-in-fact may do any act that I can do through an agent in connection with any business operated by me that my attorney-in-fact deems desirable. My attorney-in-fact's powers include but are not limited to the power to:

(a) Perform any duty and exercise any right, privilege or option which I have or claim to have under any contract of partnership, enforce the terms of any partnership agreement, and defend, submit to arbitration or settle any legal proceeding to

which I am a party because of membership in a partnership.

(b) Exercise in person or by proxy and enforce any right, privilege or option which I have as the holder of any bond, share or instrument of similar character and defend, submit to arbitration or settle a legal proceeding to which I am a party because of any such bond, share or instrument of similar character.

(c) With respect to a business owned solely by me, continue, modify, extend or terminate any contract on my behalf, demand and receive all money that is due or claimed by me and use such funds in the operation of the business, engage in banking transactions my attorney-in-fact deems desirable, determine the location of the operation, the nature of the business it undertakes, its name, methods of manufacturing, selling, marketing, financing, accounting, form of organization and insurance, and hiring and paying employees and independent contractors.

(d) Execute, acknowledge, seal and deliver any instrument of any kind that my attorney-in-fact thinks useful to accomplish any purpose listed in this section.

(e) Pay, compromise or contest business taxes or assessments.

(f) Demand and receive money or other things of value to which I am or claim to be entitled as the proceeds of any business operation, and conserve, invest, disburse or use anything so received for purposes listed in this section.

(6) Insurance and annuity transactions

My attorney-in-fact may do any act that I can do through an agent, in connection with any insurance or annuity policy, that my attorney-in-fact deems desirable. My attorney-in-fact's powers include but are not limited to the power to:

(a) Continue, pay the premium on, modify, rescind or terminate any annuity or policy of life, accident, health, disability or liability insurance procured by me or on my behalf before the execution of this power of attorney. My attorney-in-fact cannot name himself or herself as beneficiary of a renewal, extension or substitute for such a policy unless he or she was already the beneficiary before I signed the power of attorney.

(b) Procure new, different or additional contracts of health, disability, accident or liability insurance on my life, modify, rescind or terminate any such contract and designate the beneficiary of any such contract.

(c) Sell, assign, borrow on, pledge, or surrender and receive the cash surrender value of any policy.

(7) Estate, trust and other beneficiary transactions

My attorney-in-fact may act for me in all matters that affect a trust, probate estate, guardianship, conservatorship, escrow, custodianship or other fund from which I am, may become or claim to be entitled, as a beneficiary, to a share or payment. My attorney-in-fact's authority includes the power to disclaim any assets which I am, may become or claim to be entitled, as a beneficiary, to a share or payment.

(8) Living trust transactions

My attorney-in-fact may transfer ownership of any property over which he or she has authority under this document to the trustee of a revocable trust I have created as settlor. Such property may include real property, stocks, bonds, accounts with financial institutions, insurance policies or other property.

(9) Legal actions

My attorney-in-fact may act for me in all matters that affect claims in favor of or against me and proceedings in any court or administrative body. My attorney-in-fact's powers include but are not limited to the power to:

(a) Hire an attorney to assert any claim or defense before any court, administrative board or other tribunal.

(b) Submit to arbitration or mediation or settle any claim in favor of or against me or any litigation to which I am a party, pay any judgment or settlement and receive any money or other things of value paid in settlement.

(10) Personal and family care

My attorney-in-fact may do all acts necessary to maintain my customary standard of living, and that of my spouse and children and other persons customarily supported by or legally entitled to be supported by me. My attorney-in-fact's powers include but are not limited to the power to:

(a) Pay for medical, dental and surgical care, living quarters, usual vacations and travel expenses, shelter, clothing, food, appropriate education and other living costs.

(b) Continue arrangements with respect to automobiles or other means of transportation, charge accounts, discharge of any services or duties assumed by me to any parent, relative or friend, contributions or payments incidental to membership or affiliation in any church, club, society or other organization.

(11) Government benefits

My attorney-in-fact may act for me in all matters that affect my right to government benefits, including Social Security, Medicare, Medicaid, or other governmental programs, or civil or military service. My attorney-in-fact's powers include but are not limited to the power to:

(a) Prepare, execute, file, prosecute, defend, submit to arbitration or settle a claim on my behalf to benefits or assistance, financial or otherwise.

(b) Receive the proceeds of such a claim and conserve, invest, disburse or use them on my behalf.

(12) Retirement plan transactions

My attorney-in-fact may act for me in all matters that affect my retirement plans. My attorney-in-fact's powers include but are not limited to the power to select payment options under any retirement plan in which I participate, make contributions to those plans, exercise investment options, receive payment from a plan, roll over plan benefits into other retirement plans, designate beneficiaries under those plans and change existing beneficiary designations.

(13) Tax matters

My attorney-in-fact may act for me in all matters that affect my local, state and federal taxes. My attorney-in-fact's powers include but are not limited to the power to:

(a) Prepare, sign and file federal, state, local and foreign income, gift, payroll, Federal Insurance Contributions Act returns and other tax returns, claims for refunds, requests for extension of time, petitions, any power of attorney required by the Internal Revenue Service or other taxing authority, and other documents.

(b) Pay taxes due, collect refunds, post bonds, receive confidential information, exercise any election available to me and contest deficiencies determined by a taxing authority.

(14) Gift Transactions

My attorney-in-fact may make gifts and other transfers of my property without consideration or with less than full consideration, including forgiveness of debts owed to me and completion of charitable pledges that I have made. However, the recipients of such gifts shall be limited to Haley Marie Burton.

My attorney-in-fact shall not (i) appoint, assign or designate any of my assets.

interests or rights directly or indirectly to himself or herself, or his or her estate or creditors, or the creditors of his or her estate, (ii) disclaim assets to which I would otherwise be entitled if the effect of the disclaimer is to cause such assets to pass directly or indirectly to my attorney-in-fact or his or her estate, or (iii) use my assets to discharge any of his or her legal obligations, including any obligation of support owed to others, excluding me and those I am legally obligated to support.

I understand the importance of the powers I delegate to my attorney-in-fact in this document. I recognize that the document gives my attorney-in-fact broad powers over my assets, and that these powers will become effective as soon as I sign this document and continue indefinitely unless I revoke this durable power of attorney.

Signed this 1-9 day of January, 2015

State of North Carolina, County of Wake

Signature: Tiffany Ott Burton

Social Security number: 250-07-8311

WITNESSES

On the date written above, the principal declared to me that this instrument is her durable power of attorney, and that she willingly executed it as a free and voluntary act. The principal signed this instrument in my presence.

Signature: Candace J Bulbuck

Print Name: CANDACE L BULEBUSH

Address: 2401 Blue Ridge Rd, Raleigh NC

Signature: Felicia J Stanley

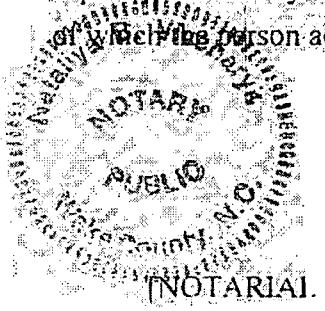
Print Name: Felicia J Stanley

Address: 2401 Blue Ridge Rd, Raleigh NC

CERTIFICATE OF ACKNOWLEDGMENT OF NOTARY PUBLIC

State of North Carolina)
) ss.
County of Wake)

On January 19, 2011 before me, Marcella Wenrich a notary public in and for said state, personally appeared Virginia Lee Barton personally known to me (or proved on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same in her authorized capacity and that by her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.



WITNESS my hand and official seal.

Marcella Wenrich
Notary Public for the State of North Carolina

[NOTARIAL SEAL]

My commission expires: November 5, 2011

STATE OF SOUTH CAROLINA
SECRETARY OF STATE

ARTICLES OF ORGANIZATION
LIMITED LIABILITY COMPANY

TYPE OR PRINT CLEARLY IN BLACK INK

The undersigned delivers the following articles of organization to form a South Carolina limited liability company pursuant to Sections 33-44-202 and 33-44-203 of the 1976 South Carolina Code of Laws, as amended.

1. The name of the limited liability company which complies with Section 33-44-105 of the South Carolina Code of 1976, as amended is T. E. Cato Estate, LLC

2. The address of the initial designated office of the Limited Liability Company in South Carolina is

1083 Valley Forge Road
Street Address

Lake Wylie — 29710
City — Zip Code

3. The initial agent for service of process of the Limited Liability company is

James Thomas Cato.
Name

James Thomas Cato
Signature

and the street address in South Carolina for this initial agent for service of process is

1083 Valley Forge Road
Street Address

Lake Wylie, SC — 29710
City — Zip Code

4. The name and address of each organizer is

(a) Marjorie Cato Burton, Trustee
Name

4300 Boxwood Road — Releigh
Street Address — City

NC — 27612
State — Zip Code

(b) Helen Cato Trust, by Albert M. Jones, Trustee

070627-0041 FILED: 06/28/2007
T. E. CATO ESTATE, LLC
Filing Fee: $110.00 ORIG

00076

Mark Hammond — South Carolina Secretary of State

R-94777v1 50005.00001

T. E. Cato Estate, LLC
Name of Limited Liability Company

5. ☐ Check this box only if the company is to be a term company. If so, provide the term specified: _____

6. ☒ Check this box only if management of the limited liability company is vested in a manager or managers. If this company is to be managed by managers, specify the name and address of each initial manager:

(a) James Thomas Cato
Name

1083 Valley Forge Road — Rock Hill
Street Address — City

SC — 29710
State — Zip Code

7. ☐ Check this box only if one or more of the members of the company are to be liable for its debts and obligations under section 33-44-303(c). If one or more members are so liable, specify which members, and for which debts, obligations or liabilities such members are liable in their capacity as members.

_____

_____

8. Unless a delayed effective date is specified, these articles will be effective when endorsed for filing by the Secretary of State. Specify any delayed effective date and time:

_____

9. Set forth any other provisions not inconsistent with law which the organizers determine to include, including any provisions that are required or are permitted to be set forth in the limited liability company operating agreement.

_____

10. Signature of each organizer

Marjorie Cato Burton, Trustee

Helen Cato Jones

Donn S. Johnson

James Thomas Cato

Jane Cato West

Robert Lee Cato

Cathy Cato Evans

Date June 16, 2007

EXHIBIT C

COPY FOR
ROGER B. JELLENIK

OPERATING AGREEMENT
OF
T. E. CATO ESTATE, LLC
A SOUTH CAROLINA LIMITED LIABILITY COMPANY

COPY

THIS OPERATING AGREEMENT for **T. E. CATO ESTATE, LLC**, a South Carolina limited liability company, is entered into, and shall be effective as of the date of the formation of the Company, by and among the undersigned parties and all other persons who hereafter shall become members of the Company pursuant to the provisions of the South Carolina Uniform Limited Liability Company Act of 1996. The Company filed Articles of Organization with the South Carolina Secretary of State on June 26, 2007. In consideration of the mutual promises made herein, it is agreed as follows:

ARTICLE I

DEFINITIONS

Capitalized words and phrases used herein shall have the meanings set forth below:

1.1 "Act" means the South Carolina Uniform Limited Liability Company Act of 1996.

1.2 "Additional Members" is defined in Section 3.3.

1.3 "Additional Units" means the Units issued pursuant to Section 3.3.

1.4 "Affiliate" of a specified Person means any other Person who directly or indirectly controls, is controlled by, or is under common control with such specified Person. For this purpose, "control" of a Person means possession, directly or indirectly (through one or more intermediaries), of the power to direct or cause the direction of management and policies of such Person through ownership of voting securities (or other ownership interests), contract, voting trust or otherwise.

1.5 "Agreement" means this Operating Agreement as amended from time to time.

1.6 "Approval" means, with respect to a Member, either the written consent of such Member or the affirmative vote of that Member at a meeting, as the case may be, to do that for which the Approval of such Member is given. "Approve" means, with respect to a Member, giving Approval for any such action. To be Approved by or receive the Approval of the Members requires the requisite level of Approval of the Members provided in Article VI of this Agreement or as otherwise expressly provided by this Agreement, the Act or other applicable law.

RECEIVED
FEB 27 2009
ROGER B. JELLENIK
ATTORNEY AT LAW

1.7 "Assignee" means a Person to whom all or part of a Member's Interest has been transferred, but who has not been admitted as a Substituted Member.

COPY

00079

1.9 "Capital Account" means, with respect to a Member, the account determined pursuant to Section 3.5 to reflect such Member's capital interest in the Company.

1.10 "Capital Contribution" means, with respect to a Member, the amount of cash and the fair market value (as determined by the Members) of the Property (other than cash) (net of any liabilities secured by such Property or to which the Property is subject as provided by Regulations section 1.704-1(b)(2)(iv)(b)(2)) contributed to the Company with respect to such Member's Interest. "Capital Contributions" means, with respect to a Member, all part of such Member's Capital Contribution made at a given time.

1.10 "Code" means the Internal Revenue Code of 1986.

1.11 "Company" means T. E. Cato Estate, LLC, a South Carolina limited liability company formed under the Act or any successor limited liability company.

1.12 "Dissolution Event" is defined in Section 9.1.

1.13 "Distribution" or "Distributions" means any cash or other Property (net of any liabilities secured by such Property or to which such Property is subject as provided by Regulations section 1.704-1(b)(2)(iv)(b)(5)) distributed to a Member by the Company on account of that Member's Interest as provided in Article V or Section 9.2(b). "Distribute" means to make one or more Distributions.

1.14 "Fiscal Year" means the annual accounting period of the Company, which shall be the calendar year or such portion of a calendar year during which the Company is in existence.

1.15 "General Manager" means that chief executive officer of the Company appointed by the Members pursuant to Section 6.6(c).

1.16 "Interest" of a Member at any time means the entire ownership interest of such Member in the Company at such time, including all benefits to which the owner of such Interest is entitled under this Agreement and applicable law, together with all obligations of such Member under this Agreement and applicable law.

1.17 "Majority-in-Interest" of the Members as of any particular time means the Members then owning more than 50% of the Units owned by all Members as of such time.

1.18 "Members" means the parties hereto and those Persons who subsequently are admitted as Additional Members or Substituted Members. "Member" means any one of the Members.

1.19 "Percentage Interest" means, with respect to a Member, as of any particular time, that fraction, expressed as a percentage, having as its numerator the number of Units owned by such Member and having as its denominator the total outstanding number of Units owned by all of the Members.

1.20 "Person" means any natural person or organization. "Organization" means any corporation, partnership, joint venture, limited liability company, unincorporated association, trust, estate or other entity.

1.21 "Property" means all (or such lesser amount as indicated by the context used herein) property -- real, personal, tangible and intangible -- owned from time to time by the Company as a result of Capital Contributions, operations or otherwise.

1.22 "Pro Rata" means in proportion to the Members' respective Percentage Interests.

1.23 "Regulations" means the final and temporary regulations of the U.S. Department of the Treasury promulgated under the Code.

1.24 "Reserves" means funds or amounts set aside or otherwise allocated for working capital and for any taxes, insurance, debt service, repairs, replacements, renewals, capital improvements and acquisitions, and future, anticipated, unforeseen and contingent obligations and all other costs and expenses incident to the Company's operations and ownership of the Property. The amount of Reserves shall be established by the Members from time to time based on their good faith estimates of the reasonable needs of the Company therefor.

1.25 "Substituted Member" means any Person who is admitted as a Substituted Member pursuant to Section 8.1(a).

1.26 "Transfer" means (a) as a noun, any voluntary or involuntary transfer, sale, assignment, alienation, gift, donation, grant, conveyance, lease, exchange, mortgage, pledge, encumbrance, hypothecation or other disposition of any kind, including dispositions by operation of law or legal process, and (b) as a verb, the act of making any voluntary or involuntary Transfer.

1.27 "Units" means the shares into which Interests are divided.

ARTICLE II

ORGANIZATION AND TERM

2.1 Company Purpose. The purpose of the Company is to engage in any lawful business for which a limited liability company may be organized under the Act.

2.2 Place of Business. The principal place of business of the Company shall be located at 1083 Valley Forge Road, Lake Wylie, SC 29710. The Members at any time may establish and close other offices and places of business and change the principal place of business of the Company to any other place.

2.3 Filings and Fees. The General Manager, or other appropriate officer, shall execute and file for recordation in the office of the appropriate authorities such reports (including the annual report to be filed with the Secretary of State in accordance with Section 33-44-211 of the Act), disclosures, certificates and other forms, schedules, instruments or documents as are required by applicable law or regulation or which otherwise may be necessary or appropriate

with respect to the formation of, and conduct of business by, the Company. The General Manager, or other appropriate officer, also shall cause the Company to pay all fees, taxes and other charges, including professional fees, incurred in connection with the preparation and filing of such reports, certificates, disclosures, forms, schedules, instruments or other documents (collectively, "fees"). Each Member may make, or cause to be made, any such filing and have the Company pay any of such fees.

2.4 Title to Property. The Property shall be owned by the Company as an entity and no Member shall have any ownership interest in the Property in that Member's individual name or right, and each Member's interest shall be personal property for all purposes. The Company shall hold the Property in the name of the Company and not in the name of any Member.

2.5 Duty of Loyalty. Each Member acknowledges that, by operation of sections 33-44-409(b) and 33-44-603(b)(3) of the Act, such Member shall:

(a) Company Opportunities. Account to the Company and hold for it as trustee any property, profit or benefit derived by such Member in the conduct or winding up of the Company's business or derived from a use by such Member of the Company's Property, including the appropriation of an opportunity of the Company;

(b) Adverse Interests. Refrain from dealing with the Company in the conduct or winding up of the Company's business as or on behalf of a party having an interest adverse to the Company;

(c) Noncompetition. Refrain from competing with the Company in the conduct of the Company's business before the dissolution of the Company; and

(d) Dissociation. Upon dissociation from the Company, continue to exercise the duties of loyalty listed in subsections (a) and (b) of this Section 2.5 with regard to matters arising and events occurring before such Member's dissociation, unless such Member participates in winding up the Company's business pursuant to section 33-44-803 of the Act. The duty of loyalty listed in subsection (c) of this Section 2.5 shall, upon dissociation, terminate in accordance with section 33-44-603(b)(2) of the Act.

The Members, however, further acknowledge that if not otherwise precluded by the Act, they would have elected not to have the restrictions under sections 33-44-409(b)(1), (2) and (3) and 33-44-603(b)(3) of the Act restated above in this Section 2.5 apply; and they hereby express their intent for each Member to be able to engage in any other investment and business activity (whether or not deemed in competition with or related to the business of the Company) to the fullest extent permitted under applicable law. Additionally, pursuant to section 33-44-103(b)(2)(ii) of the Act, the Members hereby agree that the Members may authorize or ratify, after full disclosure of all material facts, by a vote of a majority of the Members, a specific act or transaction that otherwise would violate the duty of loyalty as defined by the Act. Members hereby agree that an individual Member's participation in real estate investment or management other than that of the Company is not restricted by this Agreement or the Act.

2.6 Limitation of Liability. Except as otherwise expressly provided herein or required by applicable law, no Member, as such, shall be bound by, or be personally liable for, the

liabilities or obligations of the Company or other Members, or be required to lend any funds to (or provide any guarantees on behalf of) the Company, without the prior written consent of such Member. No Member shall have any obligation to make Capital Contributions to the capital of the Company except Capital Contributions required pursuant to Sections 3.2 and 3.3 or that may be required (a) to return the amount of any "wrongful distribution," within the meaning of section 33-44-406 of the Act, received by such Member, (b) under Section 3.4 with respect to the withholding by the Company of income taxes, or (c) under the circumstances described in Sections 6.7 and 7.8 for the indemnification of the Company by such Member.

2.7 Expenses. The Company shall pay all costs and expenses arising from the organization and operations of the Company. The Company shall reimburse the General Manager and other officers of the Company for reasonable out-of-pocket expenses so incurred by them on behalf of the Company.

ARTICLE III

MEMBERS' CAPITAL CONTRIBUTIONS AND UNITS

3.1 Names, Addresses and Percentage Interests of Members. The name, address, taxpayer identification number, number of Units issued to, and Percentage Interest of each Member as of the date of Schedule 1 hereto, as amended from time to time, are as set forth thereon. In the event of any change with respect to the information stated on Schedule 1 hereto, the General Manager shall promptly (a) amend Schedule 1 to reflect such change and (b) provide a copy of the revised Schedule 1 to each of the Members; provided, however, the failure of the Company to amend Schedule 1 or provide a revised copy of Schedule 1 to the Members shall not prevent the effectiveness of or otherwise affect the underlying adjustments that would be reflected in such an amendment to Schedule 1.

3.2 Initial Capital Contributions. Concurrently with the execution of this Agreement, each Member shall make the initial Capital Contributions provided in Schedule 2 hereto and shall be credited in exchange therefor with (a) the number of Units originally specified on Schedule 1 hereto and (b) the aggregate agreed net value of such Capital Contributions in the computation of such Member's Capital Account. Schedule 2 shall set forth the particular assets each Member is contributing to the Company, such Member's adjusted federal income tax basis in each such asset, the amount the Members agree to be the fair market value of such asset as of the date of its contribution to the Company, and the liabilities of such Member that the Company will assume or to which such assets contributed are subject.

3.3 Additional Capital Contributions. The Members may Approve the issuance or sale (or the contracting for the sale) of Additional Units and determine the price per Additional Unit, to whom they are to be issued (without the current Members having preemptive or similar rights), and other terms relative to the issuance or sale thereof (including whether payment for some or all such Additional Units may be made in the form of property other than cash or cash equivalents). Those Persons who were not previously Members who receive Additional Units pursuant to this Section 3.3 shall, upon satisfying such conditions that may be required by the Members to the issuance of such Additional Units, be admitted as Members ("Additional Members") with all rights, duties, privileges and obligations thereof.

3.4 Withholding of Income Taxes. If the Company is required to withhold and remit any federal, state, foreign or local income taxes levied on all or part of a Member's allocable share of net income and gains, such withholding by the Company shall be treated as a Distribution to the Member for whom such withholding is made and shall proportionately reduce the amount of Distributions to be paid directly to such Member. If the Members determine that the Company lacks sufficient funds to make Distributions in an aggregate amount that would allow for any such withholding, the Member for whom such withholding is to be made shall make Capital Contributions of cash or immediately available funds in the amount needed by the Company after said Distributions have been made to satisfy such withholding liability within 10 days after being so notified by the Company. Should a Member fail to timely make any such Capital Contributions, such Member shall be in default and shall indemnify and hold the Company and the other Members harmless for any costs, penalties, payments or damages incurred by the Company or the other Members as a result of such failure, and such Member shall pay the Company interest in respect to any disbursements by the Company as a result of such Member failing to timely make the Capital Contributions required by this Section 3.4 at the lower of 18% per annum, compounded monthly, or the highest rate of interest allowed by applicable law. The Company shall have the authority to apply any Distributions to which such defaulting Member would otherwise be entitled towards the satisfaction of the liabilities incurred by such Member under this Section 3.4 to the Company.

3.5 Capital Accounts. There shall be established on the books and records of the Company a separate Capital Account for each Member. The Capital Account of each Member shall be determined and maintained in the manner provided in section 1.704-1(b)(2)(iv) of the Regulations.

ARTICLE IV

ALLOCATION OF PROFITS AND LOSSES

The Company's net income, gains, losses, expenditures, deductions, or items thereof, for each Fiscal Year, shall be allocated Pro Rata to the respective Capital Accounts of the Members (including Persons who were Members during such Fiscal Year); provided, however, the General Manager is authorized and directed to make any adjustments to such allocations as the Company determines to be necessary or advisable to cause the Member's respective Capital Account balances, and the allocations made thereto, to conform (to the extent possible) to the principles of Section 704 of the Code and the Regulations promulgated thereunder or other applicable federal income tax principles.

ARTICLE V

NONLIQUIDATING DISTRIBUTIONS

5.1 Available Cash. Available cash shall be Distributed Pro Rata to the Members at such time and in such amounts as determined by the Members. For this purpose, "available cash" means all cash funds of the Company from operations, refinancings or otherwise at any particular time available for Distribution after the Members make reasonable provision for

(a) payment of all operating expenses of the Company as of such time, (b) payment of all outstanding and unpaid current obligations of the Company as of such time and (c) Reserves.

5.2 Non-Cash Distributions. Except as otherwise provided in this Section 5.2, each Member must look solely to the Property of the Company for the return of that Member's Capital Contribution and shall have no right or power to demand or receive Property other than cash from the Company. However, the Members may have the Company Distribute Property other than cash, provided that such non-cash Distributions, for each asset (or group of assets that are entirely fungible), are made Pro Rata among the Members and otherwise conform with the principles of Section 5.1.

ARTICLE VI

MEMBERS AND MANAGEMENT

6.1 Management and Control. All power and authority of the Company shall be exercised by, or under the direction and control of, the Members in a manner consistent with this Agreement and the Act. By virtue of their status as such, the Members shall be the "managers" (within the meaning of the Act) of the Company, vested with the exclusive control of the management of the business and affairs of the Company. Each Member may use the title of manager when transacting business on behalf of the Company in accordance with this Agreement.

6.2 Duties and Obligations of the Members.

(a) General. The Members shall take or cause to be taken all actions which may be necessary or appropriate for the conduct of the Company's business in accordance with this Agreement and applicable laws.

(b) Operation of Company as a Separate Enterprise. The Members shall cause the Company to conduct its business separate from that of any of the Members or their Affiliates (i) segregating Company assets and not allowing them to be commingled with the funds or other assets of a Member or any Affiliate of a Member; (ii) maintaining books and records of the Company separate from those of any Member and Affiliate of a Member; (iii) causing the Company to pay its liabilities from the Company's assets; (iv) causing the Company to conduct its dealings with third parties in its own name and as a separate and independent legal entity; and (v) engaging in transactions with any Member or Affiliate of any Member only on arm's length terms.

(c) Time Devoted to Company Business; Standard of Care; Fiduciary Duty. The Members, in accordance with this Article VI, shall conduct the business of the Company in good faith and with the care that an ordinary prudent person would exercise in a like position, under similar circumstances, and in the manner that they reasonably believe to be in the best interests of the Company. The Members, however, shall not be required to devote their full time to the business of the Company, although the General Manager and other Company officers shall devote such time to the affairs of the Company as is necessary to manage and supervise the operations and business of, and otherwise discharge their responsibilities to, the Company. The Members may employ other Persons to operate and manage all or any portion of the Property or

to provide any service relating to the Company's business, subject to the control of such person by the Members.

(d) Bank Accounts; Investment of Company Funds. The Members shall cause one or more bank accounts to be maintained in the name of the Company in which shall be deposited all funds and receipts of the Company. The Members shall designate the individual or individuals upon whose signature or signatures withdrawals from such bank accounts may be made. The Members may invest the Company funds in any manner which the Members deem appropriate.

6.3 Manner of Acting. Except as otherwise provided in this Agreement or required by the Act or other applicable law, the Approval at a meeting of a Majority-in-Interest of the Members shall be the act of the Members; provided, however, no such act of the Members not otherwise expressly authorized by this Agreement may enlarge the obligations of any Member, including requiring any additional contribution, assessment or payment by a Member without the written consent of such Member.

6.4 Major Decisions. The Approval of all Members shall be required to constitute the act of the Members with respect to each of the following matters (collectively, "Major Decisions"):

(a) Subject Members to Personal Liability. Knowingly perform any act that would subject the Members to liability in their capacity as Members;

(b) Disproportionate Non-Cash Distributions. Make Distributions of an asset of the Company (or group of assets that are entirely fungible) in a manner that is not Pro Rata as provided in Section 5.2; and

(c) Certain Amendments to the Agreement and Articles of Organization. Amend, or alter the effect of, Articles IV, V, VI (other than Sections 6.5 and 6.6), VII and IX and Sections 2.5, 2.6, 3.3 of this Agreement and paragraphs 6 and 7 of the articles of organization of the Company, a copy of which is attached hereto as Exhibit A (the "Articles of Organization").

6.5 Meetings.

(a) Right of Members to Call a Meeting. A meeting of the Members may be called by any Member in accordance with this Section 6.5.

(b) Notice of Meetings. The Member or Members calling a meeting of the Members shall give notice thereof to the other Members. Such notice shall state the time, date and purpose or purposes of the proposed meeting and shall be given to the other Members in a manner that causes it to be received by the other Members no later than two (2) business days, and no earlier than sixty (60) calendar days, prior to the meeting. "Business day" for this purpose means any day other than Saturday, Sunday or any other day on which national banking associations in the State of South Carolina generally are closed for commercial banking business.

(c) Waiver of Notice. Any notice required to be given to any Member under the Act or this Agreement may be waived in writing by the Member entitled to such notice (whether before or after the meeting). A Member's attendance at a meeting shall also constitute a waiver

of any required notice to him or her of the meeting, unless the Member at the beginning of the meeting objects to holding the meeting or transacting particular business at the meeting.

(d) Place of Meetings; Quorum; Organization; Costs. All meetings of the Members shall be held at the principal office of the Company unless the Members designate another place for the meeting. Persons representing a Majority-in-Interest of the Members, in person or by proxy, shall be required to constitute a quorum at all Members' meetings. Each meeting of Members shall be presided over by the General Manager or, in the absence or at the request of the General Manager, by such other Person as the General Manager may designate, or in the absence of the General Manager and such designation, by any Person selected to preside by a majority of the votes cast for such purpose by the Members at the meeting. The costs of calling and holding a meeting of the Members shall be paid by the Company.

(e) Voting; Proxies. Each Member shall be entitled to one vote for each Unit that such Member holds. At all meetings of the Members and for purposes of written consents executed in lieu thereof in accordance with Section 6.5(g), a Member may vote in person or by proxy executed in writing by the Member and exercised by that Member's duly authorized representative.

(f) Participation by Conference Telephone. Any one or more Members may participate in a meeting of the Members by means of a conference telephone or similar communication device that allows all persons participating in the meeting to simultaneously hear each other during the meeting, and such participation in the meeting shall be the equivalent of being present in person at such meeting.

(g) Action by Members Without a Meeting. Any action required or permitted to be taken at a meeting of the Members may be taken without a meeting if one or more proposed written consents, setting forth the action so taken or to be taken, (i) is sent to all Members (in the manner provided in Section 11.1), (ii) is signed by those Members (or the duly authorized representative or representatives of any such Member or Members as provided by Section 6.5(e)) owning the voting interest required to Approve such action, and (iii) such signed written consent(s) is delivered to the General Manager to be included in the Company's permanent records. Action taken under this Section 6.5(g) shall be effective when all Members have been provided a copy of the proposed written consent in the manner provided in Section 11.1 and the Members (or such duly authorized representatives thereof) needed to Approve such action have signed the proposed written consent, unless the written consent specifies that it is effective as of an earlier or later date. The written consent on any matter pursuant to this Section 6.5(g) has the same force and effect as if such matter was voted upon at a duly called meeting of the Members and may be described as such in any document or instrument.

6.6 Officers.

(a) General. The Company may have the officers described in, and who shall have the authority and duties prescribed by, this Section 6.6.

(b) Appointment, Term, Compensation and Removal. The officers of the Company shall be appointed from time to time by the Members. The officers shall serve, subject to the

provisions of this Agreement, until their respective successors are duly appointed and qualified. Any officer may be removed by the Members at any time with or without cause; but such removal shall not itself affect the contractual rights, if any, of the officer so removed. The compensation of all officers shall be fixed by the Members or as prescribed by this Agreement.

(c) General Manager. Subject to the direction and control of the Members, the General Manager shall supervise and control the management of the Company and the conduct of its day-to-day operations and affairs, take such actions as may be necessary or appropriate to execute the policies, directives and requirements of the Members and this Agreement, and have such other authority and duties as are normally incident to the position of the chief executive officer of a corporation and such other authority and duties as may be prescribed from time to time by the Members. The General Manager may be given such title as the Members may prescribe. The initial General Manager shall be James Thomas Cato.

(d) Other Officers. The Members may appoint such other officers with such titles, powers, duties, compensation and other terms as they may determine to be necessary or appropriate.

(e) Reimbursement of Expenses. The Company shall reimburse each officer of the Company for all reasonable out-of-pocket expenses properly incurred by such officer in connection with the discharge of that officer's obligations in accordance with this Agreement or otherwise properly incurred on behalf of the Company.

6.7 Exculpation and Indemnification.

(a) Generally. The Members (including those serving as officers of the Company) shall, to the fullest extent permitted under the Act, be exculpated from and indemnified by the Company against any liability loss, damage, penalty, action, claim, judgment, settlement, cost, expense of any kind or nature whatsoever (including all reasonable attorneys' fees, costs and expenses of defense, appeal and settlement of any proceedings instituted against such Member or the Company and all costs of investigation in connection therewith) that in any way relates to or arises out of, or is alleged to relate to or arise out of, any action or inaction on the part of the Company or a Member acting on behalf of the Company.

(b) Indemnification Rights Limited to Company Assets. The satisfaction of the obligations of the Company under Section 6.7(a) shall be from, and limited to, the assets of the Company and no Member shall have any personal liability on account thereof.

(c) Nonexclusivity of Rights. The right to indemnification and the advancement and payment of expenses conferred in this Section 6.7 shall not be exclusive of any other right which a Member may have or hereafter acquire under law or equity, provision of this Agreement, or otherwise.

6.8 Scope of Members' Authority. Except as otherwise provided in this Article VI to the contrary, no Member shall have any authority to act for, or to assume any obligation or responsibility on behalf of, the Company or any Member. Any act of a Member in violation of this Section 6.8 shall be null and void and without force or effect. Each Member shall indemnify and hold the Company harmless for any costs and damages incurred by the Company as a result

of, or which are wholly or partly attributable to, that Member's unauthorized action on behalf of the Company; and, in addition to any other remedies available to the Company, the Company may apply any Distributions to which such Member that acted without authority would otherwise be entitled towards the satisfaction of that Member's liability to the Company under this Section 6.8.

6.9 Maintenance of Entity Status. The Members and the officers of the Company at all times shall use their reasonable, best efforts (a) to cause the Company to comply with such conditions as may be required from time to time to cause the Company not to be classified as an association taxable as a corporation for federal income tax purposes, (b) to take all action which shall be necessary or appropriate for the continuation of the Company's valid existence as a limited liability company under the laws of the State of South Carolina and any other jurisdiction in which it does business and (c) not to take any action which would adversely affect the limited liability of the Members.

ARTICLE VII

BOOKS AND RECORDS

7.1 Books and Records. The Company shall maintain at its principal place of business books of accounts for the Company which shall show a complete and accurate record of the assets, liabilities, operations, transactions and financial condition of the Company, in accordance with federal income tax accounting rules as provided in this Agreement. To the extent inconsistent therewith, the Members may also have the Company's books of account maintained in accordance with generally accepted accounting principles. Whatever accounting method or methods are adopted by the Members hereunder shall be consistently applied.

7.2 Annual Reports for Members. Within ninety (90) days after the end of each Fiscal Year and at such time as Distributions are made to the Members pursuant to Section 9.2(b) following the occurrence of a Dissolution Event, the Company shall cause to be prepared and furnished to each Member financial statements, in accordance with the Company's method of accounting including: (a) a copy of the balance sheet of the Company as of the last day of such Fiscal Year, (b) a statement of income or loss for the Company for such Fiscal Year, (c) a statement of each Member's Capital Accounts and changes therein for such Fiscal Year, and (d) a statement of the Company's cash flow for such Fiscal Year.

7.3 Audits; Right of Inspection. No formal independent audit of the books of account of the Company shall be required to be undertaken at the expense of the Company unless determined otherwise by the Members. Each Member or the authorized representative(s) thereof, however, shall have access to and may inspect and photocopy all books, records and materials of the Company. In addition, any Member may, at such Member's option and expense, conduct audits of the books, records and accounts of the Company. An audit by a Member may be conducted by any Person or Persons that such Member selects.

7.4 Tax Returns and Information. The Company shall cause all tax returns that the Company is required to file to be prepared and timely filed (including extensions) with the appropriate authorities. Within ninety (90) days after the end of each Fiscal Year, the Company

shall cause to be delivered to each Member information pertaining to the Company for the previous Fiscal Year that is necessary for the Members to accurately prepare their respective federal and state income tax returns for such Fiscal Year.

7.5 Annual Report for Secretary of State. Pursuant to the requirements set forth in section 33-44-211 of the Act, the General Manager shall cause to be delivered, between January 1 and April 1 of each calendar year (beginning the year following the calendar year in which the Company was organized), to the Secretary of State for filing an annual report that sets forth the following information, which information must be current as of the date the annual report is signed on behalf of the Company: (a) the name of the Company and the State or country under whose law it is organized; (b) the address of its designated office and the name and address of its agent for service of process in this State; (c) the address of its principal office; and (d) the names and business addresses of any managers.

ARTICLE VIII

TRANSFERS OF INTERESTS; WITHDRAWAL

8.1 Transfers of Interests.

(a) Restriction on Transfers. Except as provided in Sections 8.1(b) and 8.2 of this Article VIII, no Member shall Transfer any portion of that Member's Interest except upon the written consent of the Member or Members owning a majority of the outstanding Units, excluding the Member seeking to make the Transfer and all Units owned by such Member. Such written consent may specify the rights and obligations the transferee shall have, including whether the transferee is to be admitted as a Substituted Member or Assignee; if, however, the written consent does not specify otherwise, the transferee shall be admitted as an Assignee. The grant or denial of a Member's written consent to a proposed Transfer may be made in such Member's sole and absolute discretion.

(b) Transfers to Members. Notwithstanding the provisions of Section 8.2 of this Article VIII, a Member may freely Transfer to any other Member(s) all or part of that Member's Interest, and shall have the right to fully substitute the transferee Member(s) as the owner for all purposes and in all respects of the Transferred Interest (including conveying to the transferee Member(s) all rights denied an Assignee pursuant to Section 8.3).

(c) Rights and Obligations of Transferor and Substituted Member. A Substituted Member shall have all the rights and powers, and shall be subject to all the restrictions and liabilities, of the Member from whom the Transferred Interest was acquired relative to such Transferred Interest. The admission of a Substituted Member, without more, shall not release the transferor Member from any liability with respect to the Transferred Interest (or otherwise) that may have existed prior to the substitution of membership.

8.2 Unauthorized Transfers. Any purported Transfer (an "Unauthorized Transfer") of any Member's Interest which does not comply with the conditions set forth in Section 8.1(a) shall be null and void and of no force or effect whatsoever, provided, however, that if the Company is required by a court of competent jurisdiction to recognize an Unauthorized Transfer or if the Member or Members owning a majority of the remaining outstanding Units, excluding

the transferor and all Units owned by the transferor at the time of such Unauthorized Transfer, elect to recognize such Unauthorized Transfer for the limited purposes provided in this Section 8.2), the Person to whom such Interest is Transferred shall have only the rights of an Assignee with respect to the Transferred Interest. Any Distributions with respect to such Transferred Interest may be applied (without limiting any other legal or equitable rights of the Company) towards the satisfaction of any debts, obligations, or liabilities for damages that the transferor or transferee of such Interest may have to the Company.

8.3 Rights of Assignees. An Assignee shall be entitled only to allocations pursuant to Article IV and Distributions in accordance with this Agreement with respect to the Units (and the interest in the Company that such Units represent) Transferred to such Assignee. An Assignee shall (a) have no right to vote or otherwise participate in company matters (including having no right to vote on the matters set forth in Article VI), (b) take no part in the management of the Company's business and affairs or transact any business on behalf of the Company, (c) have no right to any notices provided hereunder, (d) have no power to sign on behalf of, or to bind, the Company, (e) have no right to any information or accounting of the affairs of the Company, (f) not be entitled to inspect the books or records of the Company and (g) not have any other rights of a Member under the Act or this Agreement other than those described in the first sentence of this Section 8.3.

8.4 Withdrawal of Members. Except as provided herein or as required by section 33-44-601(6) of the Act, a Member shall have no right to dissociate, withdraw, or withdraw such Member's capital from the Company. This Section 8.4 is intended to apply in lieu of any withdrawal rights a Member might otherwise have under the Act.

ARTICLE IX

DISSOLUTION AND WINDING UP

9.1 Dissolution Events. The Company shall dissolve and commence winding up and liquidating upon the first to occur of any of the following (each a "Dissolution Event"):

(a) The close of the Company's business on the date, if any, specified in the Company's Articles of Organization as the latest date on which the Company is to dissolve;

(b) The sale or other disposition of all or substantially all of the Property (other than cash and cash equivalents);

(c) The written consent of a Majority-in-Interest of the Members;

(d) The withdrawal (as provided in section 33-44-601(1) of the Act) or death or dissolution of all Members;

(e) Pursuant to section 33-44-801(b)(4) of the Act, the occurrence of an event that makes it unlawful for all or substantially all of the business of the Company to be continued, but any cure of illegality within ninety (90) days after notice to the Company of the event is effective retroactively to the date of the event for purposes of this Section 9.1(e); or

(f) The entry of a decree of judicial dissolution of the Company under section 33-44-801(b)(5) of the Act.

Dissolution of the Company pursuant to Subparagraphs (b), (c), (d), (e) or (f) of this Section 9.1 shall be effective on the date such Dissolution Event occurs, but the Company shall not terminate until the Property has been Distributed as provided herein. Except as provided in this Section 9.1, the Company shall not dissolve due to the death, retirement, resignation, expulsion, bankruptcy or dissolution of a Member.

9.2 Winding Up. Upon the occurrence of a Dissolution Event, the Company shall continue solely for the purposes of winding up its affairs in an orderly manner, liquidating its assets and satisfying the claims of its creditors and Members, and the Members shall not take any action that is inconsistent with, or not necessary to or appropriate for, the winding up of the Company's business and affairs. To the extent not inconsistent with the foregoing, all covenants and obligations in this Agreement shall continue in full force and effect until such time as the Property has been distributed pursuant to this Section 9.2 and the Company is terminated in accordance with the Act. The General Manager (or liquidator, as the case may be) shall be responsible for overseeing the winding up and dissolution of the Company, shall take full account of the Company's liabilities and Property, shall cause the Property to be liquidated as promptly as is consistent with obtaining the fair value thereof, and shall cause the proceeds therefrom, to the extent sufficient therefor, to be applied and Distributed in the following order and priority:

(a) Creditors. First, to the payment (or reasonable provision therefor) of all of the Company's debts and liabilities to creditors of the Company (including the Members who are creditors, if any) in the order of priority provided by law, whether by payment or the making of reasonable provision for payment thereof, which may include the setting up of such Reserves as the General Manager (or liquidator, as the case may be) may deem necessary, and the General Manager (or liquidator) may hold such Reserves for such period that she shall deem advisable for the payment of such obligations and liabilities as they become due and at the expiration of such period, the balance of such Reserves, if any, shall be Distributed as provided in this Section 9.2 and;

(b) Liquidating Distributions. The balance, if any, Pro Rata to the Members.

The costs and expenses relating to the winding up of the Company shall be borne by the Company.

9.3 Final Accountings. Upon both the dissolution and termination of the Company, a proper accounting shall be made by the Company from the date of the last previous accounting to the date of the dissolution or termination, as the case may be.

9.4 No Capital Account Deficit Balance Restoration Obligation. In no event shall any Member be liable with respect to, or be required to contribute capital to restore, a negative or deficit balance in such Member's Capital Account upon the dissolution or liquidation or at any other time of either the Company or such Member's Interest except to the extent such Member expressly agrees thereto in writing to the Company.

ARTICLE X

REPRESENTATIONS AND WARRANTIES

Each Member, for the benefit of the other Members and the Company, hereby makes each of the following representations, warranties and covenants:

10.1 Investigation. Such Member (a) is financially able to bear all the risks of holding the Units being acquired for an indefinite period of time; (b) has such knowledge and experience in financial and business matters to be able to evaluate the merits and risks of the acquisition of such Interest and of making an informed investment decision with respect thereto; (c) has been provided by (or has had access to) all information such Member has requested of the Company and its managers or promoters in connection with the acquisition of such Interest; (d) has been afforded the opportunity to ask questions of and receive answers from, the managers or promoters of the Company concerning the terms and conditions of this Agreement and the purchase of such Interest; (e) has been given the opportunity to obtain any additional information necessary to verify the accuracy of the information furnished by the Company; and (f) is acquiring such Interest based upon such Member's own investigation of such relevant information (including the foregoing) that such Member deems to be necessary or desirable and in connection therewith has received the full cooperation of and assistance from the Company. The exercise by such Member of rights and the performance of obligations under this Agreement will be based upon that Member's own investigation, analysis and expertise.

10.2 Purchase for Own Account. Such Member's acquisition of said Units is being made for that Member's own account for investment, and not with a view to the sale or distribution thereof. Such Member acknowledges that the Units, and the Interests that they represent, have not been registered under the Securities Act of 1933 or any state or other federal securities laws, and, in addition to, the other restrictions contained herein, any Transfer or offer to Transfer thereof may require appropriate registration or the availability of an exemption from such registration under said laws and the regulations issued thereunder and, therefore, is aware that the financial risks of such investment must be borne for an indefinite period of time.

ARTICLE XI

MISCELLANEOUS

11.1 Notices. Any notice, payment, demand or communication (collectively a "Notice") required or permitted to be given by this Agreement or applicable law shall be in writing, and sent by first class mail, overnight courier, hand delivery or telephone conversation or facsimile; except, unless waived by the recipient, if such notice is made by telephone conversation or facsimile, such telephone conversation or facsimile shall be followed within 24 hours thereof by written notice sent by first class mail, overnight courier or hand delivery. Charges for any notice hereunder shall be prepaid and addressed as follows, or to such other address as such Person may from time to time specify by notice to the Members or the Company, as the case may be:

(a) If to the Company, to the Company at the address of its principal place of business set forth in Section 2.2; and

(b) ... a Member, to the address set forth in Schedule 1 hereto unless the General Manager has been notified in the manner provided in this Section 11.1 by a Member of a change in such Member's address for receiving notices hereunder, then to the address most recently designated by such Member in the manner provided in this Section 11.1(b).

Unless otherwise indicated herein, any notice shall be deemed to be delivered, given and received for all purposes as of the date delivered, or if sent by first class mail, five (5) days after the date on which the same was deposited in a receptacle regularly maintained by the United States Postal Service for the deposit of mail, whichever occurs first.

11.2 Tax Matters.

(a) Tax Matters Partner. Should the unified audit rules of subchapter C of Chapter 63 of Subtitle F of the Code be applicable (at the election of the Members or otherwise), the General Manager shall be the "Tax Matters Partner" of the Company in accordance with section 6231(a)(7) of the Code.

(b) Elections. Except as otherwise provided herein, the Members shall make any and all elections and other determinations for federal, state, local and foreign tax purposes, on behalf of the Company.

11.3 No Third Party Beneficiaries. This Agreement is made solely and specifically among and for the benefit of the Members and their respective successors and assigns, and no other Person, unless express provision is made herein to the contrary, shall have any rights, interests or claims hereunder or be entitled to any benefits under or on account of this Agreement as a third party beneficiary or otherwise.

11.4 References to this Agreement; Headings; Scope. Unless otherwise indicated, "Articles," "Sections," "Subsections," and "Clauses" mean and refer to the Articles, Sections, Subsections, and Clauses of this Agreement. Words such as "herein," "hereby," "hereinafter," "hereof," "hereto," and "hereunder" refer to this Agreement as a whole, unless the context otherwise requires. All headings in this Agreement are for convenience of reference only and are not intended to define or limit the scope or intent of this Agreement. This Agreement constitutes the entire understanding of the Members with respect to the subject matter hereof and supersedes all prior understandings and agreements in regard hereto. All exhibits, schedules, instruments and other documents referred to herein, and as the same may be amended from time to time, are by this reference made a part hereof as though fully set forth herein.

11.5 Construction. Common nouns and pronouns and any variations thereof shall be deemed to refer to masculine, feminine, or neuter, singular or plural, as the identity of the Person, Persons or other reference in the context requires. Every covenant, term and provision of this Agreement shall be construed simply according to its fair meaning and not strictly for or against any Member. Any reference to the Act, Code or other statutes, laws, or regulations (including the Regulations), forms or schedules shall include the amendments, modifications, or replacements thereof. Whenever used herein, "or" shall include both the conjunctive and disjunctive, "any" shall mean "one or more," and "including" shall mean "including without limitation." Unless the context indicates otherwise, "member" or "members" and "limited

liability company" or "limited liability companies" shall be substituted in and for references to partner" or "partners" and "partnership" or "partnerships," respectively, in the Code, Regulations and any pronouncements by the Internal Revenue Service.

11.6 Construction Relative to Assignees. To the limited extent of the provision for the rights of Assignees as provided in Section 8.3, reference herein to Members shall be extended to include Assignees. For example, for purpose of allocations under Article IV, the references to Units shall include all Units Transferred to Assignees so that an Assignee's Percentage Interest for such purposes shall be that fraction, expressed as a percentage, having as its numerator the Units Transferred to such Assignee and having as its denominator the total outstanding Units.

11.7 Validity of Agreement; Severability. If any provision hereof is invalid or unenforceable for any reason whatsoever, such provision will be fully severable; this Agreement shall be construed and enforced as if such invalid or unenforceable provision were not a part of this Agreement, and the remaining provisions of this Agreement will remain in full force and effect and will not be affected by the invalid or unenforceable provision or by its severance from this Agreement. Further, in lieu of such illegal, invalid, or unenforceable provision, there will be automatically as part of this Agreement, a provision as similar in terms to such invalid or unenforceable provision as may be possible and be valid and enforceable.

11.8 Further Action. Each Member, upon the request of either the Members or the General Manager, agrees to perform all further acts and execute, acknowledge, or deliver any instruments or documents and to perform such additional acts as may be reasonably necessary, appropriate or desirable to carry out the provisions of this Agreement.

11.9 Governing Law. The internal laws of the State of South Carolina shall govern the validity, construction and interpretation of this Agreement.

11.10 Costs of Litigation. In any legal or arbitration proceedings, or other actions between the Members to enforce any of the terms or conditions of this Agreement or of any other contract relating to the Company, or any action in any other way pertaining to Company affairs or this Agreement, the prevailing party, in addition to any other damages or compensation received, shall be entitled to recover that party's litigation or arbitration costs, including reasonable attorney's fees, expenses and costs of any appeals.

11.11 Cumulative Remedies. Each right, power, and remedy of a Member provided herein or which exists at law or in equity shall be cumulative and in addition to every other right, power, or remedy such Member may have.

11.12 Counterpart Execution. This Agreement may be executed in any number of counterparts with the same effect as if the Members had signed the same document.

11.13 Specific Performance. Each Member agrees that the Company and the other Members would be irreparably damaged if any of the provisions of this Agreement are not performed in accordance with their specific terms and that monetary damages would not provide an adequate remedy in such event. Accordingly, it is agreed that, in addition to any other remedy to which the Company and each Member may be entitled, at law or in equity, each Member shall

be entitled to injunctive relief to prevent or remedy breaches of the provisions, of this Agreement and to specifically enforce the terms and provisions hereof.

11.14 No Implied Waiver. The Members and the Company shall have the right at all times to enforce the provisions of this Agreement in strict accordance with the terms hereof, and no waiver of any provision of this Agreement shall constitute a waiver of any other provision, nor shall any waiver constitute a continuing waiver unless otherwise provided in writing.

[SIGNATURES ON THE FOLLOWING PAGE]

IN WITNESS WHEREOF, the Members and the Company have entered into this Operating Agreement, as of the formation of the Company, and hereunto set their hand and seal.

MEMBER:

_____ [SEAL]
Marjorie Cato Bunon, as Trustee

_____ [SEAL]
Helen Cato Jones

_____ [SEAL]
Donn S. Johnson

_____ [SEAL]
James Thomas Cato

_____ [SEAL]
Jane Cato West

_____ [SEAL]
Robert Lee Cato

_____ [SEAL]
Cathy Cato Evans

COMPANY:
T. E. CATO ESTATE, L.L.C.

By: _____
James Thomas Cato
Its General Manager

SCHEDULE 1

_____, 2007

Member Information

Names and Addresses of the Members	Taxpayer ID Number	Units	Percentage Interest
Marjorie Cato Burton, Trustee 4300 Boxwood Road Raleigh, NC 27612-3612		200	20%
Helen Cato Jones 8910 Tolman Road Richmond, VA 23229		200	20%
Donn S. Johnson 400 Red Fern Trail Simpsonville, SC 29681-4959		200	20%
James Thomas Cato 1083 Valley Forge Road Lake Wylie, SC 29710 James Thomas Cato		100	10%
Jane Cato West 2311 Abiewood Road Rock Hill, SC 29730 Jane Cato West		100	10%

Robert Lee Cato 2105 Sparre Drive Kinston, NC 28504 Robert Lee Cato	100	10%
Cathy Cato Evans 2310 Ablewood Road Rock Hill, SC 29730 Cathy Cato Evans	100	10%
TOTAL	1000	100%

EXHIBIT D

000362311
RECORDED 07/10/2007 11:40:55AM
Bk:09248 Pg:00133 Pages:10
Fee:14.00 State:0.00
County:0.00 Exempt:_____
David Hamilton, Clerk of Court
York County, SC

RECORDED
YORK COUNTY
TAX ASSESSOR'S OFFICE
DATE 7/10/07
TAX MAP NO. 592-2-1-1
INITIALS TS KJ

AFTER RECORDING, MAIL TO:
Robinson, Bradshaw & Hinson, P.A.
Post Office Drawer 12070
Rock Hill, SC 29731
Attn: Carroll M. Pitts, Jr.

ROBINSON, BRADSHAW & HINSON, P.A.
Attorneys at Law
140 East Main Street,, Suite 420
Rock Hill, South Carolina 29730

THE STATE OF SOUTH CAROLINA

TITLE TO REAL ESTATE 592-2-1-69, 70, 93, 112, 63, 64, 164, 110

County of York

KNOW ALL MEN BY THESE PRESENTS, That we, Marjorie Cato Burton, as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust; Helen Cato Jones; Donn S. Johnson; James Thomas Cato; Jane Cato West; Robert Lee Cato and Cathy Cato Evans in consideration of the sum of One Dollar to us in hand paid at and before the sealing of these presents by T. E. Cato Estate, LLC, 1083 Valley Forge Road, Lake Wylie, SC 29710, have granted, bargained, sold and released and by these Presents do grant, bargain, sell and release unto the said T. E. Cato Estate, LLC, its successors and assigns, the following described property, to wit:

All those certain pieces, parcels or lots of land, lying, being and situate in Ebenezer Township, York County, South Carolina and being described as Lots 42, 14, 13, 98, 175, and Areas A, B, C, and D as shown on that certain plat of property entitled "Composite Plat Showing Subdivision of T. E. Cato Est." drawn by R. H. Marett, RLS on December 20, 1967, as revised July 15, 1968, and recorded in Plat Book 33 at Page 192 in the Office of the Clerk of Court for York County, South Carolina. (TMS#s 592-02-01-001, 069, 070, 093, 112, 063, 064, 164, and 110)

DERIVATION: Estate of T. E. Cato, filed in Case 403, File 12,633; Estate of Elizabeth Cato Johnson; Estate of Edgar Louis Cato filed in Case 531, File 16,229 in the Office of the Probate Court for York County, South Carolina; Estate of James Carson Cato who died in 1966 with the Estate being administered in Mecklenburg County, North Carolina with exemplified copies found in Case 507, File 15476; see also Record Book 9066 at Page 98 in the Office of the Clerk of Court for York County, South Carolina

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular the said premises before mentioned unto the said T. E. Cato Estate, LLC, it successors and assigns forever.

And we do hereby bind ourselves and our successors, to warrant and forever defend all and singular the said premises unto the said T. E. Cato Estate, LLC, it successors and assigns

against us and our successors and against every other person whomsoever lawfully claiming, or to claim the same, or any part thereof.

Witness my hand and seal this 1 day of June in the year of our Lord Two Thousand Seven (2007) and in the two hundred and thirty-first year of the Sovereignty and Independence of the United States of America.

Signed, sealed and delivered
in the presence of:

Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust

Candace K. Bielebush
(Witness #1)

BY: Marjorie Cato Burton (SEAL)
Marjorie Cato Burton, As Trustee

Teresa C. Reich
(Witness #2 who also signs as Notary below)

STATE OF NORTH CAROLINA)
COUNTY OF Wake)

The forgoing instrument was acknowledged before me this 1 day of June 2007 by Marjorie Cato Burton, as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, on behalf of the trust

Teresa C. Reich Teresa C. Reich
Notary Pubic for North Carolina
My Commission Expires: Dec. 4, 2010

[NOTARIAL SEAL]

Witness my hand and seal this 16th day of June in the year of our Lord Two Thousand Seven (2007) and in the two hundred and thirty-first year of the Sovereignty and Independence of the United States of America.

Signed, sealed and delivered
in the presence of:

Bettye McSwain Jones
(Witness #1)

BY: Helen Cato Jones (SEAL)
Helen Cato Jones

Angela M. Martin
(Witness #2 who also signs as Notary below)

STATE OF TENNESSEE)
COUNTY OF Shelby)

The forgoing instrument was acknowledged before me this 16 day of June 2007 by Helen Cato Jones.

Angela M. Martin
Notary Public for Tennessee
My Commission Expires: Sept 28, 2010

[NOTARIAL SEAL]

Witness my hand and seal this 4TH day of June in the year of our Lord Two Thousand Seven (2007) and in the two hundred and thirty-first year of the Sovereignty and Independence of the United States of America.

Signed, sealed and delivered
in the presence of:

(Witness #1)

Donn S. Johnson (SEAL)

(Witness #2 who also signs as Notary below)

STATE OF SOUTH CAROLINA)
COUNTY OF Greenville)

The forgoing instrument was acknowledged before me this 4TH day of June 2007 by Donn S. Johnson.

Notary Pubic for South Carolina
My Commission Expires:

[NOTARIAL SEAL]

Witness my hand and seal this 30 day of May in the year of our Lord Two Thousand Seven (2007) and in the two hundred and thirty-first year of the Sovereignty and Independence of the United States of America.

Signed, sealed and delivered
in the presence of:

Cathy Cato Evans
(Witness #1)

Dina S. Ludlam
Dina S. Ludlam
(Witness #2 who also signs as Notary below)

James Thomas Cato (SEAL)
James Thomas Cato

STATE OF SOUTH CAROLINA)
COUNTY OF York)

The foregoing instrument was acknowledged before me this 30th day of May 2007 by James Thomas Cato.

Dina S. Ludlam Dina S. Ludlam
Notary Pubic for South Carolina
My Commission Expires:

[NOTARIAL SEAL]

Witness my hand and seal this 30 day of May in the year of our Lord Two Thousand Seven (2007) and in the two hundred and thirty-first year of the Sovereignty and Independence of the United States of America.

Signed, sealed and delivered
in the presence of:

Cathy Cato Evans
(Witness #1)

Jane Cato West (SEAL)
Jane Cato West

Tina A. Ludlam
(Witness #2 who also signs as Notary below)

STATE OF SOUTH CAROLINA)
COUNTY OF York)

The forgoing instrument was acknowledged before me this 30th day of May 2007 by Jane Cato West.

Tina A. Ludlam
Notary Pubic for South Carolina
My Commission Expires:

[NOTARIAL SEAL]

Witness my hand and seal this 31st day of May in the year of our Lord Two Thousand Seven (2007) and in the two hundred and thirty-first year of the Sovereignty and Independence of the United States of America.

Signed, sealed and delivered
in the presence of:

Bonnie Carnell
(Witness #1)

Robert Lee Cato (SEAL)
Robert Lee Cato

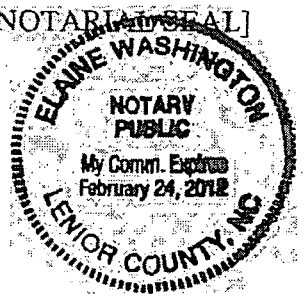
Elaine Washington
(Witness #2 who also signs as Notary below)

STATE OF NORTH CAROLINA)
COUNTY OF Lenoir)

The forgoing instrument was acknowledged before me this 31st day of May 2007 by Robert Lee Cato.

Elaine Washington
Notary Pubic for North Carolina
My Commission Expires:

[NOTARIAL SEAL]



Witness my hand and seal this 30 day of May in the year of our Lord Two Thousand Seven (2007) and in the two hundred and thirty-first year of the Sovereignty and Independence of the United States of America.

Signed, sealed and delivered
in the presence of:

(Witness #1)

Cathy Cato Evans (SEAL)
Cathy Cato Evans

(Witness #2 who also signs as Notary below)

STATE OF SOUTH CAROLINA)
COUNTY OF York)

The forgoing instrument was acknowledged before me this 30th day of May 2007 by Cathy Cato Evans

Notary Pubic for South Carolina
My Commission Expires:

[NOTARIAL SEAL]

LETTER OF INTENT

7-25-2007

J. T. Cato
1083 Valley Forge Road
Lake Wylie, SC 29710

RE: Remaining Acreage of Cato Estates

Dear Mr. Cato:

We are pleased to present to you this letter which sets forth the terms on which Thomasson Apartments, LLC ("Buyer") is willing to purchase the land commonly known as the remaining acreage of Cato Estates (the "Land") in Rock Hill, South Carolina 29732.

Land: The four parcels listed as Areas A, B, C & D on the attached plat.
Area "A" – 4.35 Acres having Tax Map Number 5920201063
Area "B" – 6.78 Acres having Tax Map Number 5920201064
Area "C" – 10.50 Acres having Tax Map Number 5920201164
Area "D" – 7.65 Acres having Tax Map Number 5920201110

Price: Thomasson Apartments, LLC is offering One Million Dollars ($1,000,000.00) for the purchase of the four parcels of land described above with Fee Simple Title and free of any encumbrances, liens, subdivision restrictions or deed restrictions.

Contingency: This sale is dependent on the sale, closing & *1031 tax deferred exchange approval* of Thomasson Apartments, LLC (d.b.a. Carriage Hills Apartments) in Rock Hill, SC.

This Proposal of Intent shall terminate, unless accepted by Seller, on or before August 3, 2007 at 5:00 p.m.

BUYER:

Accepted and agreed to this 3 day of August, 2007.

SELLER:

Name: James Thomas Cato

Title: General Manager
T. E. Cato Estate L. L. C.

RECEIVED

00109

EXHIBIT F

FINAL

Subj: **Burton questions on "TECato L&C letter of 8/1/07"**
Date: 8/20/07 2:51 P.M. Eastern Daylight Time
From: CharlinOff
To: [illegible]

Dear Marjie and Marvin,

Sorry its taken a couple of weeks to answer your e-mail. Cookie has recovered well from the loss of her Mother. Thanks for your patience.

I'll try and answer your questions and will follow your paragraph numbering.

1. Because some heirs and children of heirs have expressed interest in owning land. In particular, David Burton and I had a long conversation on 3/19/07 to the effect that he never wanted to sell that land. Tom and Bob offered to sell out our interest in Granddaddy's property to David, but he did not take us up on that offer to be a 20% owner. Others on the family also have the money and may like to be developers of the entire site. That opportunity was made available four months later to everybody. I was trying to be fair. Also, in April of 1985, Jane, Cathy, Sarah, Bob, and Tommy made a written offer to Lib, Marjie, and Helen to buy those five out of their combined 40% ownership. The offer letter and two of the three replies are on file. So, everyone in the family has had a shot at buying parts or the whole.

2. That price is the highest offer I've been able to squeeze from the eight developers I've been working with over the last six months. It's the result of appraisals and competitive offers and counter-offers. I played one off against the other as a strategy that you and Marvin discussed with me at your house on 6/1/07. It wouldn't be fair to allow one of our relatives to buy at less than we've been offered. Please refer to the details of those negotiations in the nine letters and reports I've sent you (so far).

3. Your concerns about fifths is valid. The net effect would be as you suggest. That land is owned by the Corporation. Any buying and selling among the partners would be monitored by an attorney to protect everyone else in the Corporation.

4. See your "#1". My intentions are to follow the consensus instructions that I received from each heir during surveys, correspondence, e-mails, conferences, telephone calls, and including personal visits like the 10-hour meeting (including the lunch you shared with me) that you and Marvin and I had going over all the documents of the L. L. C. while at your dining room table on 6/1/07. Since no one in our extended families showed any interest in owning the property in part or in total, a Letter of Intent to Purchase was accepted by the Corporation on 8/3/07 at 2:01 P.M. - giving an extra two hours past the 12:00 noon deadline. I really thought your family might want to buy the property and develop it, everyone else wants out and wants to sell and quit paying property taxes.

5. David was the only one to receive two letters. Everyone else got only one. I sent him a duplicate copy of the e-mail through the U.S. Mail as an explanation and apology for leaving his name(but of course not his e-mail name and address that was included with all the others) from the 13-name list of relatives. So, everyone was treated the same but David got one more than anyone else.

6. The same presentation of the L. L. C., deed, and S. C. License Application was given the same way to each signatory. The percentages of ownership were included in the L. L. C. document and you and I

and Marvin reviewed them. There was no questioning of ownership percentages by any heir I met with - I guess it's pretty straight forward. The implementation of a Corporation is what you and Marv in have been working on for 30 years - I kept all those typewritten copies all this time! Bud Button was ready to implement a L. L. C. per his letter to "Cato Family Members (and heirs)" dated 4/23/98 and 3/25/99 - I kept those, too. The 3/25/99 letter from Bud promised L. L. C. implementation. Everyone signed off and supposed that Dale Dove was to set up the L. L. C. and also was going to buy the property for a flipped-for $613,699.00 according to Bud's report (I have that). Everyone agreed to the Dale Dove deal. Now, all the heirs have agreed that Tommy's turn has come to be in charge and that interests in the Corporation are the same as the percentages of ownership. In the Corporation, no one has "veto power" over the majority.

I really appreciate your concern for liability from exposure to developers, but nothing I do is without consultation with the Corporation Attorney and the Corporation C.P.A. Since I am neither an attorney nor a C.P.A., their oversight and involvement (as I've stated over and over in letters to the heirs to seek their input and to seek their advice) is necessary to protect the partners and to protect the Corporation. Continuing and ongoing consultations take time and money, but these "consults" represent insurance against risk. Anyway, these activities were outlined during all our planning letters, meetings, and phone calls as we all agreed on this present course of action. I'm trying to stay that course. Be assured, no one misunderstands the authority of the Corporation.

J. Yep. I was in the process of getting a copy of everything into a fat 3-ring binder for you (as promised). It will contain a new map, Corps Waterway maps, gulleys, new roadway, etc. It has so much in it that it weighs about four pounds! It'll be a central place for all the "stuff".

Thanks for writing me,
Tommy

Letter references from:

Bud	11/16/96,4/23/98, 4/28/98,8/10/98, 3/25/99,3/31/99,12/31/04
Margie & Marvin	6/2/97,7/31/98,2/28/99,5/5/94,11/26/99,3/20/07,3/21/07
Tommy	2/24/97,4/9/97,6/21/07,7/12/07,7/18/07,7/20/07,7/31/07,8/3/07,8/16/07

Get a sneak peek of the all-new AOL.com.

EXHIBIT G

EXHIBIT 89

Subj: **Cato Estates comments**
Date: 11/8/07 2:54:02 P.M. Eastern Standard Time
From: CPitts@rbh.com
To: CharInsOff@aol.com
CC: CPitts@rbh.com

OPINION LTR OF RENAISSANCE ATTACHED W/ 45 YRS EXPERIENCE

Tom, I have a few comment as an outsider.
Cato Estates is not a "hot" area for development. To my knowledge, there is not a list of potential purchasers just waiting to purchase any piece or all of the property.

1. Individual home site lots. The are probably the easiest to dispose of and should bring decent prices. However, potential purchasers are probably limited to persons who already know someone who live there. Speculative builder are more likely to go into a new subdivision.

2. Celanese/Twin Lakes property is basically a hole in the ground next to a bigger hole in the ground owned by Thomasson. If he bought the Cato lot to go with his own lot, it would improve both, and Broadus is one of the few people who can make bad property work for his development.

3. Ebenezer Road property is probably the most valuable and if one could find the right buyer for the right purpose, it would bring a nice price. The property across Ebenezer Road has developed pretty nicely, but on the Plantation Road side, nothing much has happened.

4. Ten acre tract. If I were offered a Deed for free, I would probably not take it. I don't know how one can developed it. It has to be used for residential only and probably only for free standing houses as opposed to multifamily housing such as townhouses. My guess is that when someone starts to developed this tract, there will be no less that 5 adjoining owners who will come forward and say "Mr. Cato said this would never be developed".

As I said months ago, if I were the owner and some one offered a million dollars for all of it, I wouldn't stop running until it was in my bank.

Feel free to share my opinions.

Carroll

EXHIBIT H

Subj: Re: Fw: Requirements for signing of Cato SCDOT quitclaim deed
Date: 12/8/07 6:19:03 P.M. Eastern Standard Time
From: [redacted]
To: [redacted]

Dear Aunt Marjie,

Thank you for specifying your conditions for approving the Quit Claim that will clear title for Area B Four of your requirements are numbered but the last paragraph isn't. Let's call that one "Paragraph #5"

#1 Bob, Donn, Cathy, Jane, and I do not consent to pay your taxes nor to pay Helen's taxes I surveyed each and their responses were clear. The answer to that requirement is "no".

#2 Cash payments to you from the Corporation would be extraordinary. Such requests for cash disbursements would properly be submitted to the partners for a special vote I assume your 20% interest would approve Each of the other partners would vote their percent interest. I will submit such a request to a vote when such a request is received

#3. I can assure you that there are no felonious activities on my part. The charge to the Corporation C P A was to make sure each partner was protected from every other partner In particular to make sure the actions of the General Manager were all proper The Corporation Attorney was similarly instructed As has been emphasized in several of our letters and was discussed with you and Marvin in June, all of the G.M actions are approved in advance by counsel and by accountants. Cathy, Jane, Bob, and Donn are not interested in protesting their innocence. My position is that I am innocent until proven guilty Like you, I yearn to believe that our relatives are honorable people, but to require a affidavit to their innocence does not have 100% acquiescence Also, your requirement is prior restraint against future activities not related to our present effort.

#4. Each partner was offered an opportunity to buy all or part of the property in August. Even extended family members were given that opportunity No one took the opportunity to meet or exceed the offer that was on the table No one expressed any interest. No one asked for additional time. So, the afternoon of August 3, 2007 the Intent to Purchase Agreement was signed with the Thomasson Company for the four parcels Unless the contracted buyer releases the L. L. C from that agreement, the L. L. C cannot agree to sell any of those four parcels to anyone. If another buyer were to be a partner, then the G M. would be compelled to submit that proposal to a vote of all partners.

#5. It is unlikely that the buyer would put himself at risk that you would wait until April 2008 to decide whether or not to sign the Quit Claim Deed clearing title to Area B. I can't say he won't, just it's unlikely

In summation, it appears your demands cannot be satisfied Sorry

I hope you will please go ahead and sign and notarize the Quit Claim Deed for the "old roadbed" across Area B so that the partners can proceed.

Regards,

Your nephew,
Tommy Cato

Sunday, December 09, 2007 America Online CharlinsOff

EXHIBIT I

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS
James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato and Cathy Cato Evans, Plaintiffs, vs. Marjorie Cato Burton, as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, Defendant.	)	Case No. 2008-CP-46-3171
David Alan Burton, as Attorney-In-Fact for Marjorie Cato Burton, as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, and in the right and on behalf of T.E. Cato Estate, LLC, Third-Party Plaintiff, vs. James Thomas Cato and Thomasson Apts., LLC, Third-Party Defendants.	)	**THIRD-PARTY DEFENDANT THOMASSON APTS., LLC'S RESPONSES TO THIRD-PARTY PLAINTIFF'S FIRST SET OF REQUESTS FOR ADMISSION**
Thomasson Apts., LLC, Fourth-Party Plaintiff, vs. T. E. Cato Estate, LLC, Fourth-Party Defendant.	)	

TO: ROGER B. JELLENIK, ESQUIRE, Attorney for Third-Party Plaintiff:

Pursuant to Rule 36 of the South Carolina Rules of Civil Procedure, Third-Party Defendant Thomasson Apts., LLC ("Thomasson") hereby responds to Third-Party Plaintiff Marjorie Cato Burton's First Set of Requests for Admission.

DEFINITIONS:

A. The term "Petitioners" as used herein shall be taken in the singular and plural and mean the Plaintiffs named in the Petition for Partition filed in the Office of the Clerk of Court for York County under the caption herein.

B. The term "Petition" as used herein shall mean the Petition for Partition filed in the Office of the Clerk of Court for York County under the caption herein.

C. The term "Seller" as used herein shall mean the T.E. Cato Estate, LLC.

RESPONSES TO REQUEST FOR ADMISSION

REQUEST 1.

Please admit that the Roadbed Tract was initially included, along with or as part of the Areas, in the Letter of Intent dated July 25, 2007, that you issued for the purchase of the Areas and the Roadbed Tract.

RESPONSE: Admitted.

REQUEST 2.

Please admit that you were informed that Third Party Plaintiff never consented to

a. The sale of the Areas; or

b. The sale of the Roadbed Tract.

RESPONSE:

a. Thomasson was first informed that Third Party Plaintiff did not consent to the sale of the Areas upon receipt by Thomasson of Third Party Plaintiff's Petition.

b. Thomasson became aware that Third Party Plaintiff did not consent to the sale of the Roadbed Tract when the Third Party Plaintiff failed to sign the Amendment to the Contract or the Quitclaim Deed to convey the Roadbed Tract to Thomasson.

REQUEST 3.

Please admit that you have worked with Petitioners for the purpose of acquiring title in and to the Areas despite knowing that the Third Party Plaintiff has never consented to its sale.

RESPONSE: Thomasson worked with James Thomas Cato, as Manager of T.E. Cato Estate, LLC, to acquire title to the Areas. Thomasson denies it had knowledge that Third Party Plaintiff did not consent to the sale of the Areas prior to Thomasson's receipt of the Third Party Plaintiff's Petition.

REQUEST 4.

Please admit that you have worked with Petitioners for the purpose of acquiring title in and to the Roadbed Tract despite knowing that the Third Party Plaintiff has never consented to its sale.

RESPONSE: Thomasson has worked with Petitioners for the purpose of acquiring title in and to the Roadbed Tract through partition, which is compellable under South Carolina law.

REQUEST 5 (improperly numbered as the second Request No. 4)

Please admit that, on or about December 12, 2007, your attorney, Joshua L. Vann, Esq., conducted the closing on the Areas and that no other attorney any other party participated in that closing.

RESPONSE: Joshua B. Vann, Esquire, conducted the closing of the Areas on behalf of Thomasson on or about December 12, 2007, however, the Seller's closing and conveyance documents had been forwarded to Caroll Pitts, Jr., Esquire for review and approval on behalf of Seller.

CALLISON TIGHE & ROBINSON, LLC

Demetri K. Koutrakos
Jennifer N. Stone
1812 Lincoln Street, Suite #200
P. O. Box 1390
Columbia, SC 29202-1390
Telephone: 803-256-2371
Facsimile: 803-256-6431

ATTORNEYS FOR THIRD-PARTY DEFENDANT THOMASSON APTS., LLC

October 30, 2009
1020.528\RTA.MCB-Resp.draft2

James Thomas Cato, *et al.*
vs.
Marjorie Cato Burton, *et al.*
Case No. 2008-CP-46-3171

CERTIFICATE OF SERVICE

I, Tiffany D. Burgess, an employee of Callison Tighe & Robinson, LLC, do hereby certify that, on this date, I served the foregoing **Third-Party Defendant Thomasson Apts., LLC's Responses to Third-Party Plaintiff's First Set of Requests for Admission,** upon all counsel of record, via electronic mail and by depositing a copy of the same in the United States mail with proper first-class postage affixed thereon, addressed as follows:

Roger B. Jellenik, Esquire
1111 Broad Street
Box J
Camden, SC 29020
Email: rbjatty@mac.com
(Attorneys for Third-Party Plaintiff David Alan Burton, as Attorney-In-Fact for Marjorie Cato Burton, as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust)

Carroll M. Pitts, Jr., Esquire
Robinson, Bradshaw & Hinson, PA
140 East Main Street, Suite #420
P. O. Box 12070
Rock Hill, SC 29731
Email:cpitts@rbh.com
(Attorneys for Plaintiffs/Petitioners)

Joshua B. Vann, Esquire
Morton & Gettys
334 Oakland Avenue
P. O. Box 707
Rock Hill, SC 29731
Email: joshua.vann@mortongettys.com

William T. Moody, Esquire
Morton & Gettys
30 North Congress, Suite #200
York, SC 29745
Email: william.moody@mortongettys.com

Lucy L. McDow, Esquire
514 Oakland Avenue, 2nd Floor
P. O. Box 767
Rock Hill, SC 29731-6767
Email: lucylmcdow@mcdowlaw.com

Tiffany D. Burgess
TIFFANY D. BURGESS

October 30, 2009
G:\1000\1020.528\Discovery\COS - Request to Admit.wpd

EXHIBIT J

EXHIBIT K

STATE OF SOUTH CAROLINA)
)
COUNTY OF COUNTY OF RICHLAND)

AFFIDAVIT

FILED/RECEIVED
2010 MAY 27 P 4:10
YORK COUNTY, SC

NOW COMES Michael J. Virzi, and states, under oath, the following:

1. I am offering this affidavit, pursuant to S.C. Code Ann. § 15-36-100(b), as an expert witness on behalf of 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 (collectively "Plaintiff") to support her Complaint against Carroll M. Pitts, Jr., Esq., and Robinson, Bradshaw & Hinson, P.A., (collectively "Defendants") for professional negligence.

2. My qualifications to give expert testimony include the following:

A. I am a lawyer licensed to practice law in South Carolina, and my practice focuses almost exclusively on matters of legal malpractice and legal ethics;

B. I am a former Assistant Disciplinary Counsel to the South Carolina Supreme Court and current Chairman of the South Carolina Bar Ethics Advisory Committee;

C. I have authored two published articles and numerous published Ethics Advisory Opinions on matters involving lawyer ethics and malpractice;

D. I am a frequent CLE speaker and law school guest lecturer on the topics of legal malpractice and ethics, and I am one of three instructors for the ongoing South Carolina Bar and Supreme Court's Ethics School; and

E. I am familiar with the standard of care applicable to lawyers in the circumstances involved in this case.

3. My opinion is based on review of the following documents:

A. Complaint captioned "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

RECEIVED
MAY 26 2010
ROGER B. JELLENIK
ATTORNEY AT LAW

MJV

T.E. Cato Estate, LLC, Plaintiff v. Carroll M. Pitts, Jr., Esq., and Robinson, Bradshaw & Hinson, P.A. Defendants" and bearing Cause of Action Number "2010-CP-46-";

B. Articles of Organization for T. E. Cato Estate, LLC;

C. Operating Agreement of T. E. Cato Estate, LLC;

D. Title to Real Estate from Marjorie Cato Burton, as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust; Helen Cato Jones; Donn S. Johnson; James Thomas Cato; Jane Cato West; Robert Lee Cato and Cathy Cato Evans to T. E. Cato Estate, LLC, recorded in York County on July 10, 2007, at Book 9248, Page 138;

E. July 25, 2007, Letter of Intent regarding "Remaining Acreage of Cato Estates";

F. December 6, 2007, "Amendment to Contract" between Thomason Apts., L.L.C. and T.E. Cato Estates, L.L.C.;

G. General Warranty Deed from T. E. Cato Estate, LLC, to Thomasson Apts., LLC, recorded in York County on December 17, 2007, at Book 9673, Page 150;

H. "Closing Statement" labeled "CTR255" and "CTR256";

I. "Closing Statement" labeled "CTR257" and "CTR258";

J. "Schedule 1 Summary of Receipts and Disbursements" labeled "CTR0261" and "CTR262";

K. Hand-written documents labeled "Expenses of General Manager T. E. Cato Estate, LLC 9-14-07 – 12-24-07" and numbered "Page 4 of 7" and "Page 5 of 7";

L. Hand-written document labeled "Expenses 2/8/07 – 9/14/07" and numbered "Page 11 of 15";

M. July 6, 2008, Petition (Non-Jury) captioned "James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, and Cathy Cato Evans, Petitioner, v. Marjorie Cato Burton, as Trustee Of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, Respondents" and bearing Cause of Action Number "2008-CP-46-3171";

MJV

N. July 7, 2008, Lis Pendens captioned "James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, and Cathy Cato Evans, Petitioners, v. Marjorie Cato Burton, as Trustee Of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, Respondents" and bearing Cause of Action Number "2008-CP46_____";

O. March 2, 2009, Answer and Third Party Complaint captioned "James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, and Cathy Cato Evans Petitioners v. Marjorie Cato Burton, as Trustee Of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust Respondent" and bearing Cause of Action Number "2008-CP-46-";

P. April 29, 2009, Third Party Complaint captioned "David Allen Burton as Attorney-in-Fact for Marjorie Cato Burton, as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust Pliantiff v. James Thomas Cato and Thomasson Apts., L.L.C. Defendants" and bearing Cause of Action Number "2008-CP-46-3171";

Q. June 24, 2009, Answer of Third-Party Defendant Thomasson Apts., LLC, captioned "James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, and Cathy Cato Evans, Plaintiffs, vs. Marjorie Cato Burton, as Trustee Of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, Defendant. David Allen Burton as Attorney-in-Fact for Marjorie Cato Burton, as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, Third-Party Pliantiff, vs. James Thomas Cato and Thomasson Apts., LLC, Third-Party Defendants" and bearing Cause of Action Number "2008-CP-46-3171";

R. June 29, 2009, Answer of Third Party Defendant James Thomas Cato captioned "David Allen Burton as Attorney-in-Fact for Marjorie Cato Burton, as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust Pliantiff v. James Thomas Cato and Thomasson Apts., L.L.C. Defendants" and bearing Cause of Action Number "2008-CP-46-3171";

S. July 29, 2009, Amended Third Party Complaint captioned "David Allen Burton as Attorney-in-Fact for Marjorie Cato Burton, as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust and in the Right and on Behalf of T.E. Cato Estate, LLC, Pliantiff v. James Thomas Cato and Thomasson Apts., L.L.C., Defendants" and bearing Cause of Action Number "2008-CP-46-3171";

T. August 24, 2009, Third-Party Defendant Thomasson Apts., LLC's Answer To Amended Third-Party Complaint, Counterclaim and Fourth-Party Complaint captioned "James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, and Cathy Cato Evans, Plaintiffs, vs. Marjorie Cato Burton, as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, Defendant. David Allen Burton as Attorney-in-Fact for Marjorie Cato Burton, as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, and in the right and on behalf of T.E. Cato Estate, LLC, Third-Party Pliantiff, vs. James Thomas Cato and Thomasson Apts., LLC, Third-Party Defendants. Thomasson Apts., LLC, Fourth-Party Plainitiff, vs. T.E. Cato Estate, LLC, Fourth-Party Defendant" and bearing Cause of Action Number "2008-CP-46-3171";

U. October 1, 2009, Answer of Fourth-Party Defendant T. E. Cato Estate, LLC captioned "James Thomas Cato et al., Plaintiffs, vs. Marjorie Cato Burton as Trustee, etc. Defendants. David Alan Burton, as Attorney-in-Fact, etc. Third-party plaintiff, vs. James Thomas Cato et al., Third-party defendants. Thomasson Apts., LLC, Fourth-party plaintiff, vs. T.E. Cato Estate, LLC, Fourth-party defendant" and bearing Cause of Action Number 05-CP-46-308";

V. Third Party Plaintiff's Reply to Third Party Defendant Thomasson Apts., L.L.C.'s Counterclaims captioned "David Alan Burton as Attorney-in-Fact for Marjorie Cato Burton, as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust Third Party Plaintiff v. James Thomas Cato and Thomasson Apts., L.L.C., Third Party Defendants" and bearing Cause of Action Number "2008-CP-46-3171";

W. Hand-written document labeled "JT Cato 10/19/09 Interrogatory • Requests for Admission Case # 2008-CP-46-3171" and numbered "Page 1 of 4" through "Page 4 of 4";

X. Third-Party Defendant Thomasson Apts., LLC's Responses to Third-Party Plaintiff's First Set of Requests for Admission in Case No. 2008-CP-46-3171, dated October 30, 2009;

Y. Transcript of March 8, 2010, hearing before the Honorable Lee S. Alford, Judge, York County Court of Common Pleas;

Z. August 20, 2007, email from "CharInsOff" (signed "Tommy") to "MarjieandMarvin," "David," "Sara," "Albert," "Donn," and "Bob";

MSV

AA. November 8, 2007, email from "CPitts@rbh.com" to "CharInsOff@aol.com";

BB. December 8, 2007, email from "CharInsOff@aol.com" to "SloanMBurton@hotmail.com";

4. These factual and legal materials are of the type reasonably relied upon by experts in the field of legal malpractice in forming their opinions.

5. Based on my experience, education, training, knowledge of the standard of care for lawyers, and on my review of the above-listed documents, it is my opinion that Defendants engaged in negligent acts and omissions in their representation of the Plaintiff including the following:

A. failure to provide competent and diligent representation to clients;

B. failure to reasonably consult with clients about the means by which their objectives were to be accomplished;

C. failure to explain matters to the extent reasonably necessary to permit the clients to make informed decisions regarding the representation; and

D. representing a client against another client or former client in the same or a substantially related matter.

In particular, Defendants failed to explain the significance of, rights and obligations appurtenant to, and potential consequences of executing a general warranty deed as a grantor, conveying property to a business entity prior to the formation of that entity, and disposing of substantially all of the assets of an entity, both as a matter of law and as a matter of private contract. Having represented Plaintiff and other of her family members in the formation of T. E. Cato Estate, LLC, and in the preparation and execution of the documents referenced in paragraph 3.B-D hereinabove, Defendants then represented several of those family members in a civil action against Plaintiffs that potentially involves the interpretation and enforcement of rights stemming from those same documents.

MJV

6. It is apparent from the above-listed documents that Defendants prepared a deed for Plaintiff to execute and obtained her signature thereon as a grantor without explaining the future warranties contained in the document, to which such execution bound her, nor the risks and available alternatives, instead leaving all direct communication with and instructions to Plaintiff to one of the other grantors named in the deed. Furthermore, Defendants failed to perform a title search without explaining to Plaintiff the risks of executing a general warranty deed without a title search. Drafting deeds is generally regarded as creating an attorney-client relationship between drafter and grantor. However, even in the absence of such an attorney-client relationship, a lawyer drafting a deed has a duty to the grantor to do so competently in light of the facts and circumstances presented. Whether regarded as malpractice or as negligence, Defendants' conduct fell below the standard of care in this regard.

7. It further appears that Defendants represented the family-member organizers of T. E. Cato Estate, LLC, in the formation of that entity, specifically the drafting and execution of the Articles of Incorporation and the Operating Agreement. However, Defendants failed to consult with Plaintiff regarding the means by which Plaintiff's objectives were to be accomplished, instead leaving all direct communication with and instructions to Plaintiff to one family-member organizer. Forming a closely-held business entity is generally regarded as creating an attorney-client relationship between the lawyer and any organizer/incorporator to whom the lawyer gives any reason to believe an attorney-client relationship is created, unless the lawyer takes affirmative steps to reasonably explain who is and is not a client. Thus, Defendants breached their duties of competence, diligence, and communication to Plaintiff as an organizer of the LLC.

MJV

8. It further appears that Defendants attempted to convey to T. E. Cato Estate, LLC, certain property (which was the subject of the above-referenced deed executed by Plaintiff) prior to Defendants' own formation of that LLC. By failing to diligently and competently time the formation of the LLC and conveyance of the property, Defendants subjected their clients to the risk of the deed being void. These risks included subjecting Plaintiff to the costs associated with remaining the owner of property she intended to convey and subjecting the LLC to warranty liability for later attempting to convey property it may not have owned.

9. It further appears that Defendants represented T. E. Cato Estate, LLC, in a real estate transaction in which the LLC executed a deed as grantor despite Defendants' having actual or constructive notice of a potential cloud or clouds on the LLC's title. Nevertheless, Defendants again failed to explain the significance and risks of future warranties, particularly under these circumstances. Defendants also apparently failed to advise their clients regarding the requirements for selling substantially all of the assets of the LLC in that transaction, potentially subjecting the LLC to additional civil liability.

10. Finally, it appears Defendants represented, and continue to represent, several family-member organizers of T. E. Cato Estate, LLC, against Plaintiff, advocating positions directly adverse to Plaintiff on the very matters in which Defendants had represented Plaintiff but without any consultation with or consent from Plaintiff regarding the conflict, thus abandoning the duty of loyalty.

11. As a result, it is my opinion that Defendants' conduct fell below the standard of care, skill, competence, diligence, communication, and loyalty expected of lawyers.

MIV

12. The opinions in this affidavit are given to a reasonable degree of certainty and are specifically based on the evidence listed above. I reserve the right to alter, amend, modify, reduce, or expand these opinions if and when additional information is presented.

Further affiant sayeth naught.

Michael J. Virzi, Esq.

State of South Carolina
County of Richland

Sworn and subscribed before me
This 20th day of May, 2010

Rebekah K. Maxwell
Notary Public of Richland Co

My Commission Expires : Jan 4, 2016

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, by and through David A. Burton as Attorney-in-Fact, Individually and in the right and on Behalf of T.E. Cato Estate, LLC,

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE SIXTEENTH JUDICIAL CIRCUIT

C.A. No. 2010-CP-46-2267

ANSWER OF CARROLL M. PITTS, JR. AND ROBINSON BRADSHAW & HINSON, P.A.

FILED-RECEIVED
2010 JUL 20 AM 9:32
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

Carroll M. Pitts, Jr. ("Pitts") and Robinson Bradshaw & Hinson, P.A. ("RBH"), answering the Complaint of the Plaintiff, would respectfully show unto the Court that:

1. Each and every allegation not expressly admitted is denied.

FOR A FIRST DEFENSE

2. Pitts and RBH admit the allegations of paragraphs 1, 2 and 3 upon information and belief.

3. With respect to the allegations of paragraph 4, RBH admits that it is a law firm with offices located in Charlotte, North Carolina, and in Rock Hill, South Carolina.

4. With respect to the allegations of paragraph 5, Pitts admits that he is an attorney admitted to practice law in the State of South Carolina, and that he is employed by RBH in Rock Hill, South Carolina.

5. With respect to the allegations of paragraph 6, Pitts and RBH reallege the allegations of paragraphs 1 through 4.

6. With respect to the allegations of paragraph 7, Pitts and RBH admit that they undertook the representation of James Thomas Cato ("Cato"). The remaining allegations of paragraph 7 are denied.

7. Pitts and RBH admit the allegations of paragraphs 8, 9, 10, and 11.

8. The allegations of paragraph 12 state a legal conclusion to which no response is required.

9. With respect to the allegations of paragraph 13, Pitts and RBH admit that they did not perform a title search or examination on the subject property and allege that this was not requested of them. A title examination was performed by counsel for the buyers, and this was disclosed to, and agreed upon, by all parties. The remaining allegations of paragraph 13 are admitted.

10. With respect to the allegations of paragraph 14, Pitts and RBH did perform certain legal services for Cato and Cato LLC. Pitts and RBH also admit that they performed legal services for Cato and Cato LLC during negotiations with one or more developers for the sale of real property. Further, with respect to the allegations of paragraphs 14, including subparagraphs a, b, d, e, f and g, no response is required to these allegations. Pitts and RBH admit that a part of Exhibit G is an email sent by Pitts. The remaining allegations of paragraph 14 are denied.

11. With respect to the allegations of paragraph 15, Pitts and RBH reallege the allegations of paragraphs 1 through 10.

12. With respect to the allegations of paragraph 16, including subparagraphs a, b, and c, Pitts and RBH are informed and believe that no response is required. To the extent a response is required, those allegations are denied.

13. With respect to the allegations of paragraph 17, Pitts and RBH reallege the allegations of paragraphs 1 through 12.

14. Pitts and RBH deny that an attorney/client relationship existed between them and Marjorie Cato Burton. Pitts and RBH deny the allegations of paragraph 18 and 18 a, including subparagraphs i, ii, iii, iv and v. Further, Pitts and RBH deny the allegations of paragraph 18 and 18 b, including subparagraphs i, ii, iii, and iv.

15. Pitts and RBH deny the allegations of paragraphs 19 and 20, including the allegations of subparagraphs a, b, c and d of paragraph 20.

16. The allegations of paragraph 21 state a conclusion of law to which no response is required.

17. Pitts and RBH deny the allegations of paragraph 22.

18. With respect to the allegations of paragraph 23, Pitts and RBH reallege the allegations of paragraphs 1 through 17.

19. With respect to the allegations of paragraph 24, Pitts and RBH are without sufficient information to admit or deny what was in line with the expectation of its members. Pitts and RBH admit that they had a duty to assure the validity of the conveyance of real property into Cato LLC, and allege that they complied with this duty.

20. Pitts and RBH deny the allegations of paragraphs 25 and 26.

21. The allegations of paragraph 27 state a conclusion of law to which no response is required.

22. Pitts and RBH deny the allegations of paragraph 28, and the allegations contained in the Plaintiff's Prayer for Relief.

FOR A SECOND DEFENSE

23. The allegations of paragraphs 1 through 22 not inconsistent are incorporated by reference.

24. The Second Cause of Action of the Plaintiff fails to state facts sufficient to constitute a cause of action as required under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

25. The allegations of paragraphs 1 through 24 not inconsistent are incorporated by reference.

26. The representation provided by Pitts and RBH conformed to, and was in full compliance with, the applicable standard of care. Consequently, the Plaintiff is barred from recovery against Pitts and RBH.

FOR A FOURTH DEFENSE

27. The allegations of paragraphs 1 through 26 not inconsistent are incorporated by reference.

28. The Plaintiff is barred from recovery against Pitts and RBH because she, either directly or through her Attorney in Fact, consented to the transactions referenced in the Complaint.

FOR A FIFTH DEFENSE

29. The allegations of paragraphs 1 through 28 not inconsistent are incorporated by reference.

30. The Plaintiff has negotiated the proceeds she received from the sale of the property referenced in the Complaint.

31. The Plaintiff has ratified this transaction by her conduct.

32. This defense of ratification is pled as a complete and total defense to the claims of the Plaintiff.

WHEREFORE, Carroll M. Pitts, Jr. and Robinson Bradshaw & Hinson, P.A. respectfully request that the Complaint of the Plaintiff be dismissed with costs and such other and further relief as the Court deems just and proper.

Dated this the 19 day of July, 2010.

Samuel W. Outten (SC Bar No. 4295)
WOMBLE CARLYLE SANDRIDGE & RICE
a Professional Limited Liability Company
550 S. Main Street, Suite 400
P.O. Box 10208
Greenville, SC 29603
(864) 255-5400
Attorney for Defendants Carroll M. Pitts, Jr. and Robinson Bradshaw & Hinson, P.A.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 19th day of July, 2010, she mailed a copy of the attached ANSWER OF CARROLL M. PITTS, JR. AND ROBINSON BRADSHAW & HINSON, P.A. by first-class mail, proper postage affixed, addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es):

Roger B. Jellenik
Attorney at Law
1111 Broad Street, Box J
Camden, SC 29020

Julie A. Curll
Legal Assistant to Samuel W. Outten

FILED-RECEIVED
2010 JUL 20 AM 9:32
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

FILED-RECEIVED
2011 JAN 28 PM 2:29
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

IN THE COURT OF COMMON PLEAS
16TH JUDICIAL CIRCUIT

CASE NO.: 2010-CP-46-2267

Marjorie Cato Burton, et al., Plaintiff,

vs.

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

MOTION AND ORDER INFORMATION FORM AND COVERSHEET

Plaintiff's Attorney:	Defendant's Attorney:
Roger B. Jellenik, Bar No. _____ Address: 1111 Broad Street, Box J, Camden, SC 29020 Phone: 803.424.1919Fax _____ E-mail: rbjatty@mac.comOther: _____	Samuel W. Outten, Bar No. 4295 Address: PO Box 10208, Greenville, SC 29603-0208 Phone: 864.255.5421 Fax864.239.5842 E-mail: soutten@wcsr.com Other: _____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Dismiss
Estimated Time Needed: One Hour Court Reporter Needed: ☒ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Samuel W. Outten
Signature of Attorney for ☐ Plaintiff /☒ Defendant

January 25, 2011
Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ _____
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE CODE _____
Date: _____

CLERK'S VERIFICATION

Collected by: SG Date Filed: 1-28-11
☒ MOTION FEE COLLECTED: $ 25
☐ CONTESTED – AMOUNT DUE: $ _____

00140

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, by and through David A. Burton as Attorney-in-Fact, Individually and in the right and on Behalf of T.E. Cato Estate, LLC,

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE SIXTEENTH JUDICIAL CIRCUIT

C.A. No. 2010-CP-46-2267

MOTION TO DISMISS

FILED-RECEIVED
2011 JAN 28 PM 2:29
DAVID HAMILTON
C.C.C.P.&GS
YORK COUNTY, SC

Carroll M. Pitts, Jr. ("Pitts") and Robinson Bradshaw & Hinson, P.A. ("RBH"), respectfully move the Court for an order dismissing the Complaint in this case pursuant to S.C.R.C.P. 12(b)(1), S.C.R.C.P. 12(b)(6), and S.C.R.C.P. 17.

The grounds for this Motion are that David Burton does not have the authority to bring this claim on behalf of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, pursuant to the Power of Attorney attached to the Complaint as Exhibit A. Because Mr. Burton lacks authority to bring this case, this Court should dismiss the Complaint.

Rule 17 of the South Carolina Rules of Civil Procedure states that "[e]very action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought...." S.C.R.C.P. 17(a). The Plaintiff in this case does not meet the requirements of S.C.R.C.P. 17.

The Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust is governed by North Carolina law. The responsibility of enforcing a claim on behalf of a trust belongs to the trustee or co-trustees of a trust. N.C. Gen. Stat. Ann. § 36C-8-811 (2006) ("A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust"). Absent explicit language in the trust document, a trustee may not delegate her duty to file suit on behalf of the trust. See, e.g., Braddock Fin. Corp. v. Washington Mut. Bank, 637 F. Supp. 2d 924, 931 (D. Colo. 2009) ("In most cases, the trustee has *exclusive* authority to maintain an action on behalf of the trust against a third party") (emphasis added); In re Frontier Ins. Group, Inc. Securities Litigation, 172 F.R.D. 31, 42 (E.D.N.Y. 1997) ("[A] suit on behalf of a trust . . . normally must name the trustee as plaintiff").

While § 36C-8-807 of the North Carolina Code permits a trustee to delegate some of its duties and powers to an agent, a trustee may not delegate all of its authority by way of a power of attorney. See § 36C-8-807(a)(2) (requiring a delegating trustee to define and limit the scope of an agent's power and requiring the delegation to conform to the terms of the trust); see, e.g., Buse v. First Am. Title Ins. Co., No. C-08-0510-MJP, 2009 WL 1543994, at *3 (W.D. Wash. May 29, 2009) (unpublished) ("[A] trustee can delegate some but not all of its powers to an agent").

In the event a trustee is unable to perform her duties and/or ceases to serve, the incapacitated trustee must be replaced in accordance with the terms of the trust document. N.C. Gen. Stat. Ann. § 36C-7-704. A non-acting trustee, through a power of attorney, cannot appoint an attorney-in-fact to act on behalf of the trust, essentially appointing the attorney-in-fact as the successor trustee. Thus, David A. Burton as Attorney-in-Fact is not the proper party to sue on behalf of the Sloan Marvin Burton and

Marjorie Cato Burton, AB Living Trust, and therefore, pursuant to Rule 17, Rule 12(b)(1), and Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, Plaintiffs' Complaint should be dismissed.

WHEREFORE, Pitts and RBH respectfully request that this Court issue an order dismissing the Complaint in this case.

Dated this the 25 day of January, 2011.

Samuel W. Outten

Samuel W. Outten (SC Bar No. 4295)
Catherine R. Atwood (SC Bar No. 77367)
WOMBLE CARLYLE SANDRIDGE & RICE
a Professional Limited Liability Company
550 S. Main Street, Suite 400
P.O. Box 10208
Greenville, SC 29603
(864) 255-5400
Attorneys for Defendants Carroll M. Pitts, Jr. and Robinson Bradshaw & Hinson, P.A.

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

MARJORIE CATO BURTON) CASE NO.
☒ Plaintiff) 2010-CP-46-2267

v.) MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Carroll M. Pitts, Jr., Esq, Et Al.)
☐ Defendant.)

Plaintiff's Attorney:	Defendant's Attorney:
George H. Mcmaster, Bar No.	, Bar No.
Address:	Address:
PO Box 7337; Columbia, SC 29202	
phone: 803-799-4499 fax: 803-252-2240	phone: fax:
e-mail: ghm@tmmlaw.com other: bap@tmmlaw.com	e-mail: other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: MOTION FOR SUBSTITUTION OF PARTIES
Estimated Time Needed: 15 MINUTES Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☐ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant — May 6, 2011 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

FILED-RECEIVED
2011 MAY 10 AM 10:59
DAVID HAMILTON
C.C.C.P. & G.S.
YORK COUNTY, SC

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	JUDGE
☐ Other:	CODE: Date:

CLERK'S VERIFICATION

Collected by: Leigh Ann Alexander Date Filed: 5-10-11

☑ MOTION FEE COLLECTED: 25.00
☐ CONTESTED – AMOUNT DUE:

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS FOR THE SIXTEENTH JUDICIAL CIRCUIT
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 and in the Right and on Behalf of T.E. Cato Estate, LLC, Plaintiff v. Carroll M. Pitts, Jr., Esq., and Robinson Bradshaw & Hinson, P.A., Defendants	)	Case No. 2010-CP-46-2267

FILED-RECEIVED
2011 MAY 10 AM 10:59
DAVID HAMILTON
C.C.C.P. & G.S.
YORK COUNTY, SC

Notice of Motion
And
Motion for Substitution
Of Parties

YOU WILL PLEASE TAKE NOTICE that Counsel for the Plaintiff, will by and through its undersigned attorney, on the 17th day of May, at 11:00 a.m., or at such time as counsel may be heard, move before the Presiding Judge of the Court of Common Pleas of York County, for an Order substituting David Alan Burton, as successor Trustee of The Sloan Marvin Burton and Marjorie Cato Burton AB Living Trust as Plaintiff in the matter above named.

This motion is based on the following grounds:

1. That pursuant to that First Amendment of the Sloan Marvin Burton and Marjorie Cato Burton AB Living Trust that David Alan Burton is now the successor Trustee and, thereby, is substituted as Plaintiff in the cause above.

The grounds for this Motion are:

1. Rule 17 of the South Carolina Rules of Civil Procedure;

2. Rule 25 of the South Carolina Rules of Civil Procedure;

3. That First Amendment of the Sloan Marvin Burton and Marjorie Cato Burton AB Living Trust dated the 1st day of April, 2011;

4. And such other matters as may be properly presented.

And I So Move.

George Hunter McMaster
TOMPKINS & McMASTER, LLP
1530 Richland Street
Post Office Box 7337
Columbia, South Carolina 29202
(803) 799-4499 (Phone)
(803) 252-2240 (Fax)
Columbia, South Carolina

May 6, 2011

Columbia, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS FOR THE SIXTEENTH JUDICIAL CIRCUIT
Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, by and through David A. Burton as Attorney-in-Fact, Individually and in the Right and on Behalf of T.E. Cato Estate, LLC, Plaintiff v. Carroll M. Pitts, Jr., Esq., and Robinson Bradshaw & Hinson, P.A., Defendants	)	Case No. 2010-CP-46-2267 **CERTIFICATE OF MAILING**

FILED-RECEIVED
2011 MAY 10 AM 10:59
DAVID HAMILTON
C.C.C.P. & G.S.
YORK COUNTY, SC

I, Tammy T. David of Tompkins and McMaster, do hereby certify that I have this 6th day of May, 2011, served the following:

1. **Motion for Substitution of Parties**

and by depositing a copy of the same in the U.S. Post Office addressed as follows:

Samuel W. Outten, Esq.
Womble Carlyle Sandridge & Rice, PLLC
Post Office Box 10208
Greenville SC 29603-0208

Tammy T. David

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, by and through David A. Burton as Attorney-in-Fact, Individually and in the right and on Behalf of T.E. Cato Estate, LLC,

Plaintiffs,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE SIXTEENTH JUDICIAL CIRCUIT

C.A. No. 2010-CP-46-2267

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUBSTITUTION OF PARTIES

FILED - RECEIVED
2011 MAY 16 AM 10:31
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

Carroll M. Pitts, Jr. and Robinson Bradshaw & Hinson, P.A. (collectively, "RBH") submit the following memorandum of law in opposition to Plaintiffs' Motion for Substitution of Parties.

INTRODUCTION

On January 25, 2011, RBH filed a Motion to Dismiss Plaintiffs' Complaint on the grounds that David A. Burton does not have the authority to bring this claim on behalf of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust (the "Trust"), pursuant to the Power of Attorney attached to the Complaint as Exhibit A. In April, 2011, RBH, through its counsel, received the First Amendment to the Sloan Marvin Burton and Marjorie Cato Burton AB Living Trust ("First Amendment") signed by Sloan Marvin Burton and David A. Burton as Marjorie Cato Burton's Attorney-in-Fact and an Affirmation, Ratification and Consent signed by Sloan Marvin Burton as Co-Trustee. Through their Motion for Substitution of Parties, Plaintiffs contend that the First Amendment remedies the pleading deficiency pointed out by RBH's

Motion to Dismiss. By implication, Plaintiffs claim that David Burton's substitution as Co-Trustee is not only valid, but also that it cures the real party in interest issue that is present in this case as currently pled. Because the plain language of the Trust does not empower David A. Burton to act in Marjorie Cato Burton's stead as successor Co-Trustee, David Burton continues to lack standing to bring this lawsuit, and therefore, the Complaint should be dismissed.

ARGUMENT

I. The Plain Language of Marjorie Cato Burton's Durable Power of Attorney Does Not Empower David A. Burton to Act in Her Stead as Successor Co-Trustee of the Trust.

Ms. Burton's February 29, 2008 Durable Power of Attorney for Financial Management appoints David Burton to serve as her Attorney-in-Fact with respect to her *individual* financial affairs. Nowhere does the document's plain language empower David A. Burton to act for the Trust as Successor Co-Trustee. Ms. Burton's individual financial affairs are separate and distinct from the Trust's financial and legal affairs. Otherwise, the Trust would be a sham and would not warrant favorable tax treatment or other asset protections afforded by a Trust structure.

The document's plain language states: "I Marjorie Cato Burton, appoint the person named below as my attorney-in-fact to act for *me* in any lawful way with respect to the powers delegated in Part 4 below" (emphasis added). See Power of Attorney, attached as **Exhibit A**. The face of the Durable Power of Attorney document shows Marjorie Cato Burton as "Principal;" it does *not* show Ms. Burton in her separate, fiduciary capacity as Trustee of any Trust. Ms. Burton's signature block on the document states only her name, indicating that she acted only in her individual capacity rather than in any separate fiduciary capacity as Co-Trustee in executing the document. The Durable Power of Attorney does not contain any language referencing the Trust dated January 19, 2007. The Trust is attached as **Exhibit B**.

Although the Durable Power of Attorney may authorize Ms. Cato's Attorney-in-Fact to act for her *in her capacity as an individual trust beneficiary*, it cannot and does not confer power to act in a separate fiduciary capacity as Co-Trustee. Paragraph 4 of the Power of Attorney entitled "Powers of Attorney-in-Fact" states, in pertinent part: "These powers are defined in Part 13, below." See Exhibit A. Paragraph 13 ("Definition of Powers Granted to Attorney-in-Fact"), subsection 7, states, in pertinent part: "My attorney-in-fact may act for *me* in all matters that affect a trust...from which I am, may become or claim to be entitled *as a beneficiary*.... My Attorney-in-Fact's authority includes the power to disclaim any assets which I am, may become, or claim to be entitled, *as a beneficiary*, to any share or payment." Id. The Attorney-in-Fact's authority is limited to acting for Ms. Cato in her individual capacity rather than in a separate fiduciary capacity as Co-Trustee.

For the same reasons stated above, David A. Burton lacked legal authority to act as Successor Co-Trustee in executing the April 1, 2011 purported First Amendment on Ms. Burton's behalf. Because he lacked the authority to sign the First Amendment, David A. Burton's signature on the First Amendment is ineffective and renders that document invalid, void and of no legal effect.

II. The Law of Principal and Agency Does Not Allow Marjorie Cato Burton's Alleged Delegation of Trust Fiduciary Powers by Virtue of Her Durable Power of Attorney.

As a matter of principal and agency law, the principal cannot delegate more authority than she originally possessed. See 3 Am. Jur. 2d Agency § 74 ("[t]he implied and incidental authority of an agent may not be extended beyond its legitimate scope and includes only such powers as are practically indispensable and essential in order to carry out the duties actually delegated to the agent"). The purpose of a durable power of attorney is to delegate the principal's power over their personal, individual affairs as specified in the document. An

individual's power of attorney cannot delegate Trust fiduciary powers not expressly granted by the Trust document. See N.C. Gen. Stat. Ann. § 36C-8-807(a)(2) (requiring a delegating trustee to define and limit the scope of an agent's power and requiring the delegation to conform to the terms of the trust). The Trust document or a Court appointment of Successor Co-Trustee (*not* Marjorie Cato Burton's personal Durable Power of Attorney), would be the proper mechanism for any Successor Co-Trustee appointment. Plaintiffs fail to offer any credible legal authority to support their position that the First Amendment satisfies this burden.

III. David A. Burton is Not Successor Co-Trustee Under the Plain Language of the Trust and Factual Circumstances.

The Trust's plain language does not permit Trust amendment or modification to empower David A. Burton as Successor Trustee under the factual circumstances of this case. Article 2(a) of the Trust allows the Grantors (Sloan Marvin Burton and Marjorie Cato Burton) to "*jointly* amend or modify" the Trust (emphasis added). See Exhibit B. Ms. Burton's undisputed mental incapacity/incompetence prevents her from acting as Co-Trustee; therefore, she and her husband cannot "*jointly*" amend or modify the Trust to allow David Burton's service as Successor Co-Trustee. Article Two allows one Trustee to act only if the other is deceased; Marjorie Cato Burton is not deceased. Id.

Article 2(b) of the Trust allows the *Grantors* (plural) to appoint, substitute or otherwise change designated Trustees/Successors Trustees. Id. Ms. Burton's undisputed mental incapacity/incompetence renders her unable to act as Co-Trustee. Since the Trust requires multiple Co-Trustees to act, and Ms. Burton cannot do so, David Burton cannot be appointed or substituted as Successor Co-Trustee under Article 2(b).

Further, Article 3(b) allows David A. Burton to serve as Successor Co-Trustee only if *both* Sloan Marvin Burton and Marjorie Cato Burton cannot serve due to death, disability or incapacity. Article 3(a) of the Trust states in pertinent part:

> In the event of a physical o[r] mental incapacity or death of one of the Trustees, the survivor Trustee shall continue as the sole Trustee with full authority to exercise all of the powers and rights accorded to a Trustee under this Declaration of Trust.

Id. Article 3(a) allows Sloan Marvin Burton to continue serving as sole Trustee, but it does not allow David Burton to serve as Successor Co-Trustee.

The Trust is a North Carolina Trust, executed in North Carolina, recorded in North Carolina, and governed and construed by North Carolina law. N.C. Gen. Stat. Section 36C-7-704(b) states:

> If one or more co-trustees remain in office, a vacancy in trusteeship need not be filled. A vacancy in trusteeship must be filled if the trust has no remaining trustee.

Sloan Marvin Burton remains in office as Co-Trustee of the Trust. There is no evidence that Sloan Marvin Burton is unable to continue serving as Trustee. Therefore, no vacancy has occurred in that trusteeship, and no appointment of any Successor Co-Trustee is necessary.

IV. David A. Burton Cannot Serve as Successor Co-Trustee Without Court Appointment, and the York County Court of Common Pleas Lacks Subject Matter Jurisdiction to Make Such an Appointment.

David A. Burton has no power to serve as Co-Trustee for the reasons stated above. As a procedural matter, Court appointment would be necessary in order for Mr. Burton to act as Co-Trustee. The York County Court of Common Pleas lacks subject matter jurisdiction to make any such Trustee appointment.

In South Carolina, the Probate Courts have exclusive original jurisdiction over all subject matter related to trusts, including the appointment of successor trustees. S.C. Code Ann. Section

62-1-302(a)(3); see also, S.C. Code Ann. Section 62-7-201(a)(4). The South Carolina Circuit Courts do not have concurrent jurisdiction over internal trust matters such as appointment of Successor Trustees, particularly in a situation such as this, involving a North Carolina Trust. (Article 9(b) of the Trust designates this Trust as a North Carolina Trust. See Exhibit B).

CONCLUSION

Plaintiffs' Motion for Substitution of Parties should be denied because the document purporting to appoint David A. Burton as Successor Co-Trustee of the Trust is legally invalid. The plain language of the Trust, as well as North Carolina statutory law, does not allow David A. Burton to sue on behalf of the Trust, and therefore, he has no legal standing to bring this lawsuit. Rule 17 of the South Carolina Rules of Civil Procedure states that "[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest *until a reasonable time* has been allowed, after objection, for ratification of commencement of the action by, or joinder of, the real party in interest" (emphasis added). RBH filed its Motion to Dismiss on January 25, 2011. Plaintiffs waited almost four months before filing a Motion for Substitution of Parties, and the document purporting to remedy the real party in interest issue remains legally invalid. Plaintiffs' delay in filing the Motion for Substitution of Parties is unwarranted and unreasonable. Therefore, in the interest of judicial economy and public policy, this Court should deny Plaintiffs' Motion for Substitution of Parties and grant RBH's Motion to Dismiss the Complaint.

Respectfully submitted,

Samuel W. Outten, SC Bar No. 4295
Catherine R. Atwood, SC Bar No. 77367
Womble Carlyle Sandridge & Rice, PLLC
550 South Main Street, Suite 400 (29601)
Post Office Box 10208
Greenville, SC 29603-0208
Telephone: (864) 255-5400
Attorneys for Carrol M. Pitts, Jr. and Robinson Bradshaw & Hinson, P.A.

This 13th day of May, 2011.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 18th day of May, 2011, she mailed a copy of the attached **DEFENDANTS' MEMORANDUM IM OPPOSITION TO PLAINTIFFS' MOTION FOR SUBSTITUTION OF PARTIES** by first-class mail, proper postage affixed, addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es):

Roger B. Jellenik
Attorney at Law
1111 Broad Street, Box J
Camden, SC 29020

George Hunter McMaster
Tompkins & McMaster LLP
PO Box 7337
Columbia, SC 29202

Julie A. Curll
Legal Assistant to Catherine R. Atwood

FILED - RECEIVED
2011 MAY 16 AM 10:31
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

EXHIBIT A

DURABLE POWER OF ATTORNEY FOR FINANCIAL MANAGEMENT

WARNING TO PERSON EXECUTING THIS DOCUMENT

THIS IS AN IMPORTANT LEGAL DOCUMENT. IT CREATES A DURABLE POWER OF ATTORNEY. BEFORE EXECUTING THIS DOCUMENT, YOU SHOULD KNOW THESE IMPORTANT FACTS:

THIS DOCUMENT MAY PROVIDE THE PERSON YOU DESIGNATE AS YOUR ATTORNEY-IN-FACT WITH BROAD LEGAL POWERS, INCLUDING THE POWERS TO MANAGE, DISPOSE, SELL AND CONVEY YOUR REAL AND PERSONAL PROPERTY AND TO BORROW MONEY USING YOUR PROPERTY AS SECURITY FOR THE LOAN.

THESE POWERS WILL CONTINUE TO EXIST EVEN IF YOU BECOME DISABLED OR INCAPACITATED. THESE POWERS WILL EXIST UNTIL YOU REVOKE OR TERMINATE THIS POWER OF ATTORNEY. YOU HAVE THE RIGHT TO REVOKE OR TERMINATE THIS POWER OF ATTORNEY AT ANY TIME.

THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL OR OTHER HEALTH CARE DECISIONS FOR YOU.

IF THERE IS ANYTHING ABOUT THIS FORM THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU.

WAKE COUNTY, NC 3
LAURA M RIDDICK
REGISTER OF DEEDS
PRESENTED & RECORDED ON
03/12/2008 AT 08:36:02

BOOK:012997 PAGE:01592 - 01603

1. Principal and Attorney-in-Fact

PRINCIPAL

Marjorie Cato Burton
4300 Boxwood Road
Raleigh, North Carolina 27615

I, Marjorie Cato Burton, appoint the person named below as my attorney-in-fact to act for me in any lawful way with respect to the powers delegated in Part 4. below.

ATTORNEY-IN-FACT

David Alan Burton
412 Kaywoody Court
Raleigh. North Carolina 27615
Day phone: 919-834-8951
Evening phone: 919-870-5228

SUCCESSOR ATTORNEY-IN-FACT

I name the following person to act as my attorney-in-fact if the named attorney-in-fact dies. resigns. or is otherwise unable to serve.

Sharon Harris Burton
412 Kaywoody Court
Raleigh. North Carolina 27615
Day phone: 919-870-5228
Evening phone: 919-870-5228

2. Delegation of Authority

My attorney-in-fact may delegate. in writing, any authority granted under this durable power of attorney to a person he or she selects. Any such delegation shall state the period during which it is valid and specify the extent of the delegation.

3. Effective Date

This power of attorney is effective immediately, and shall continue in effect if I become incapacitated or disabled.

4. Powers of Attorney-in-Fact

I grant my attorney-in-fact power to act on my behalf in the following matters, as indicated by my initials next to each granted power.

INITIALS

X_____(1) Real estate transactions.

X_____(2) Tangible personal property transactions.

X_____(3) Stock and bond, commodity, option and other securities transactions.

X_____(4) Banking and other financial institution transactions.

X_____(5) Business operating transactions.

X_____(6) Insurance and annuity transactions.

X_____(7) Estate, trust, and other beneficiary transactions.

X_____(8) Living trust transactions.

X_____(9) Legal actions.

X_____(10) Personal and family care.

X_____(11) Government benefits.

X_____(12) Retirement plan transactions.

X_____(13) Tax matters.

X_____(14) Gift transactions.

These powers are defined in Part 13, below.

5. Waiver of Attorney-in-Fact's Duty to File and Render Accounts

I waive the requirement, set out in North Carolina Gen. Stat. &#167 32A-11, that my attorney-in-fact file this power of attorney with the clerk of the superior court and render inventories and accounts, after my incapacity or mental incompetence, to the clerk of the superior court.

6. Compensation and Reimbursement of Attorney-in-Fact

My attorney-in-fact shall not be compensated for services, but shall be entitled to reimbursement, from my assets, for reasonable expenses. Reasonable expenses include but are not limited to reasonable fees for information or advice from accountants, lawyers or investment experts relating to my attorney-in-fact's responsibilities under this power of attorney.

///

////

7. Personal Benefit to Attorney-in-Fact

My attorney-in-fact may not benefit personally from any transaction engaged in on my behalf.

8. Commingling by Attorney-in-Fact

My attorney-in-fact may not commingle any of my funds with any funds of his or hers.

9. Liability of Attorney-in-Fact

My attorney-in-fact shall not incur any liability to me, my estate, my heirs, successors or assigns for acting or refraining from acting under this document, except for willful misconduct or gross negligence. My attorney-in-fact is not required to make my assets produce income, increase the value of my estate, diversify my investments or enter into transactions authorized by this document, as long as my attorney-in-fact believes his or her actions are in my best interests or in the interests of my estate and of those interested in my estate. A successor attorney-in-fact shall not be liable for acts of a prior attorney-in-fact.

10. Nomination of Conservator or Guardian of Estate

If, in a court proceeding, it is ever resolved that I need a conservator, guardian or other person to supervise my estate, I nominate my attorney-in-fact to serve in that capacity. If my attorney-in-fact cannot serve, I nominate the successor attorney-in-fact named in Part 1, above, to serve.

11. Reliance on This Power of Attorney

Any third party who receives a copy of this document may rely on and act under it. Revocation of the power of attorney is not effective as to a third party until the third party has actual knowledge of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

12. Severability

If any provision of this document is ruled unenforceable, the remaining provisions shall stay in effect.

13. Definition of Powers Granted to Attorney-in-Fact

The powers granted in Part 4, above, authorize my attorney-in-fact to do the following:

(1) Real estate transactions

My attorney-in-fact may act for me in any manner to deal with all or any part of any interest in real property that I own at the time of execution of this document or later

acquire, under such terms, conditions and covenants as my attorney-in-fact deems proper. My attorney-in-fact's powers include but are not limited to the power to:

(a) Accept as a gift, or as security for a loan, reject, demand, buy, lease, receive or otherwise acquire ownership or possession of any estate or interest in real property.

(b) Sell, exchange, convey with or without covenants, quitclaim, release, surrender, mortgage, encumber, partition or consent to the partitioning of, grant options concerning, lease, sublet or otherwise dispose of any interest in real property.

(c) Maintain, repair, improve, insure, rent, lease, and pay or contest taxes or assessments on any estate or interest in real property I own or claim to own.

(d) Prosecute, defend, intervene in, submit to arbitration, settle and propose or accept a compromise with respect to any claim in favor of or against me based on or involving any real estate transaction.

(2) Tangible personal property transactions

My attorney-in-fact may act for me in any manner to deal with all or any part of any interest in personal property that I own at the time of execution of this document or later acquire, under such terms as my attorney-in-fact deems proper. My attorney-in-fact's powers include but are not limited to the power to lease, buy, exchange, accept as a gift or as security for a loan, acquire, possess, maintain, repair, improve, insure, rent, convey, mortgage, pledge, and pay or contest taxes and assessments on any tangible personal property.

(3) Stock and bond, commodity, option and other securities transactions

My attorney-in-fact may do any act which I can do through an agent, with respect to any interest in a bond, share, other instrument of similar character or commodity. My attorney-in-fact's powers include but are not limited to the power to:

(a) Accept as a gift or as security for a loan, reject, demand, buy, receive or otherwise acquire ownership or possession of any bond, share, instrument of similar character, commodity interest or any investment with respect thereto, together with the interest, dividends, proceeds or other distributions connected with it.

(b) Sell (including short sales), exchange, transfer, release, surrender, pledge, trade in or otherwise dispose of any bond, share, instrument of similar character or commodity interest.

(c) Demand, receive and obtain any money or other thing of value to which I am or may become or may claim to be entitled as the proceeds of any interest in a bond, share, other instrument of similar character or commodity interest.

(d) Agree and contract, in any manner, and with any broker or other person and on any terms, for the accomplishment of any purpose listed in this section.

(e) Execute, acknowledge, seal and deliver any instrument my attorney-in-fact thinks useful to accomplish a purpose listed in this section, or any report or certificate required by law or regulation.

(4) Banking and other financial institution transactions

My attorney-in-fact may do any act that I can do through an agent in connection with any banking transaction that might affect my financial or other interests. My attorney-in-fact's powers include but are not limited to the power to:

(a) Continue, modify and terminate any deposit account or other banking arrangement, or open either in the name of the agent alone or my name alone or in both our names jointly, a deposit account of any type in any financial institution, rent a safe deposit box or vault space, have access to a safe deposit box or vault to which I would have access, and make other contracts with the institution.

(b) Make, sign and deliver checks or drafts, and withdraw my funds or property from any financial institution by check, order or otherwise.

(c) Prepare financial statements concerning my assets and liabilities or income and expenses and deliver them to any financial institution, and receive statements, notices or other documents from any financial institution.

(d) Borrow money from a financial institution on terms my attorney-in-fact deems acceptable, give security out of my assets, and pay, renew or extend the time of payment of any note given by or on my behalf.

(5) Business operating transactions

My attorney-in-fact may do any act that I can do through an agent in connection with any business operated by me that my attorney-in-fact deems desirable. My attorney-in-fact's powers include but are not limited to the power to:

(a) Perform any duty and exercise any right, privilege or option which I have or claim to have under any contract of partnership, enforce the terms of any partnership agreement, and defend, submit to arbitration or settle any legal proceeding to

which I am a party because of membership in a partnership.

(b) Exercise in person or by proxy and enforce any right, privilege or option which I have as the holder of any bond, share or instrument of similar character and defend, submit to arbitration or settle a legal proceeding to which I am a party because of any such bond, share or instrument of similar character.

(c) With respect to a business owned solely by me, continue, modify, extend or terminate any contract on my behalf, demand and receive all money that is due or claimed by me and use such funds in the operation of the business, engage in banking transactions my attorney-in-fact deems desirable, determine the location of the operation, the nature of the business it undertakes, its name, methods of manufacturing, selling, marketing, financing, accounting, form of organization and insurance, and hiring and paying employees and independent contractors.

(d) Execute, acknowledge, seal and deliver any instrument of any kind that my attorney-in-fact thinks useful to accomplish any purpose listed in this section.

(e) Pay, compromise or contest business taxes or assessments.

(f) Demand and receive money or other things of value to which I am or claim to be entitled as the proceeds of any business operation, and conserve, invest, disburse or use anything so received for purposes listed in this section.

(6) Insurance and annuity transactions

My attorney-in-fact may do any act that I can do through an agent, in connection with any insurance or annuity policy, that my attorney-in-fact deems desirable. My attorney-in-fact's powers include but are not limited to the power to:

(a) Continue, pay the premium on, modify, rescind or terminate any annuity or policy of life, accident, health, disability or liability insurance procured by me or on my behalf before the execution of this power of attorney. My attorney-in-fact cannot name himself or herself as beneficiary of a renewal, extension or substitute for such a policy unless he or she was already the beneficiary before I signed the power of attorney.

(b) Procure new, different or additional contracts of health, disability, accident or liability insurance on my life, modify, rescind or terminate any such contract and designate the beneficiary of any such contract.

(c) Sell, assign, borrow on, pledge, or surrender and receive the cash surrender value of any policy.

(7) Estate, trust and other beneficiary transactions

My attorney-in-fact may act for me in all matters that affect a trust, probate estate, guardianship, conservatorship, escrow, custodianship or other fund from which I am, may become or claim to be entitled, as a beneficiary, to a share or payment. My attorney-in-fact's authority includes the power to disclaim any assets which I am: may become or claim to be entitled, as a beneficiary, to a share or payment.

(8) Living trust transactions

My attorney-in-fact may transfer ownership of any property over which he or she has authority under this document to the trustee of a revocable trust I have created as settlor. Such property may include real property, stocks, bonds, accounts with financial institutions, insurance policies or other property.

(9) Legal actions

My attorney-in-fact may act for me in all matters that affect claims in favor of or against me and proceedings in any court or administrative body. My attorney-in-faot's powers include but are not limited to the power to:

(a) Hire an attorney to assert any claim or defense before any court, administrative board or other tribunal.

(b) Submit to arbitration or mediation or settle any claim in favor of or against me or any litigation to which I am a party, pay any judgment or settlement and receive any money or other things of value paid in settlement.

(10) Personal and family care

My attorney-in-fact may do all acts necessary to maintain my customary standard of living, and that of my spouse and children and other persons customarily supported by or legally entitled to be supported by me. My attorney-in-fact's powers include but are not limited to the power to:

(a) Pay for medical, dental and surgical care, living quarters, usual vacations and travel expenses, shelter, clothing, food, appropriate education and other living costs.

(b) Continue arrangements with respect to automobiles or other means of transportation, charge accounts, discharge of any services or duties assumed by me to any parent, relative or friend, contributions or payments incidental to membership or affiliation in any church, club, society or other organization.

(11) Government benefits

My attorney-in-fact may act for me in all matters that affect my right to government benefits, including Social Security, Medicare, Medicaid, or other governmental programs, or civil or military service. My attorney-in-fact's powers include but are not limited to the power to:

(a) Prepare, execute, file, prosecute, defend, submit to arbitration or settle a claim on my behalf to benefits or assistance, financial or otherwise.

(b) Receive the proceeds of such a claim and conserve, invest, disburse or use them on my behalf.

(12) Retirement plan transactions

My attorney-in-fact may act for me in all matters that affect my retirement plans. My attorney-in-fact's powers include but are not limited to the power to select payment options under any retirement plan in which I participate, make contributions to those plans, exercise investment options, receive payment from a plan, roll over plan benefits into other retirement plans, designate beneficiaries under those plans and change existing beneficiary designations.

(13) Tax matters

My attorney-in-fact may act for me in all matters that affect my local, state and federal taxes. My attorney-in-fact's powers include but are not limited to the power to:

(a) Prepare, sign and file federal, state, local and foreign income, gift, payroll, Federal Insurance Contributions Act returns and other tax returns, claims for refunds, requests for extension of time, petitions, any power of attorney required by the Internal Revenue Service or other taxing authority, and other documents.

(b) Pay taxes due, collect refunds, post bonds, receive confidential information, exercise any election available to me and contest deficiencies determined by a taxing authority.

(14) Gift Transactions

My attorney-in-fact may make gifts and other transfers of my property without consideration or with less than full consideration, including forgiveness of debts owed to me and completion of charitable pledges that I have made. However, the recipients of such gifts shall be limited to Haley Marie Burton.

My attorney-in-fact shall not (i) appoint, assign or designate any of my assets,

interests or rights directly or indirectly to himself or herself, or his or her estate or creditors, or the creditors of his or her estate, (ii) disclaim assets to which I would otherwise be entitled if the effect of the disclaimer is to cause such assets to pass directly or indirectly to my attorney-in-fact or his or her estate, or (iii) use my assets to discharge any of his or her legal obligations, including any obligation of support owed to others, excluding me and those I am legally obligated to support.

I understand the importance of the powers I delegate to my attorney-in-fact in this document. I recognize that the document gives my attorney-in-fact broad powers over my assets, and that these powers will become effective as soon as I sign this document and continue indefinitely unless I revoke this durable power of attorney.

Signed this 9 day of February, 2005

State of North Carolina, County of Wake

Signature: Margaret Cato Burton

Social Security number: 250-07-8311

WITNESSES

On the date written above, the principal declared to me that this instrument is her durable power of attorney, and that she willingly executed it as a free and voluntary act. The principal signed this instrument in my presence.

Signature: Candace L Bullock

Print Name: CANDACE L BULLOCK

Address: 2401 Blue Ridge Rd, Raleigh NC

Signature: Felicia J Stanley

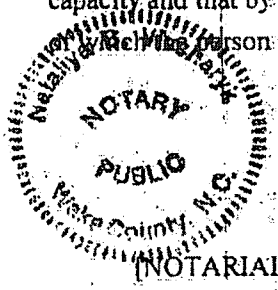
Print Name: Felicia J Stanley

Address: 2401 Blue Ridge Rd, Raleigh NC

CERTIFICATE OF ACKNOWLEDGMENT OF NOTARY PUBLIC

State of North Carolina)
) ss.
County of Wake)

On January 29, 2008, before me, Natalina Vivanco, a notary public in and for said state, personally appeared Marjorie Lina Burton, personally known to me (or proved on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same in her authorized capacity and that by her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.



WITNESS my hand and official seal.

Natalina Vivanco
Notary Public for the State of North Carolina

[NOTARIAL SEAL]

My commission expires: November 3, 2011

EXHIBIT B

DECLARATION OF TRUST

The Sloan Marvin Burton and Marjorie Cato Burton AB Living Trust (the "Trust")

This DECLARATION OF TRUST is made and executed on the date below by and between the herein named Grantors and Trustees:

WITNESSETH:

1. TRUST PROPERTY

(a) Funding of Trust. The Grantors declare that they have set aside and caused the transfer of all of their rights, title and interest in and to the property described in Annex A, Annex B and Annex C to the Trust for the use, benefit and enjoyment of the Beneficiaries named herein. The Grantors, at any time hereafter, may transfer to the Trust any other real or personal property. This Trust may also receive property from any other source, including pursuant to either of the Grantor's Last Will and Testament.

(b) Character of Property. While both Grantors are alive, property transferred into this Trust, including any income that it generates, shall retain its original character (unless gifted from one Grantor to the other Grantor). The joint property contributed to this Trust is set forth in Annex A. The separate property of Sloan Marvin Burton contributed to this Trust is set forth in Annex B. The separate property of Marjorie Cato Burton contributed to this Trust is set forth in Annex C. Each annex may be amended and revised from time to time to reflect the contribution of additional property or the re-allocation or distribution of property. If this Trust is revoked, the Trustees shall distribute the Trust property to the Grantors based on the same ownership rights they had before the property was transferred to the Trust.

2. AUTHORITY, POWER and RIGHTS OF GRANTORS

(a) Amend and Revoke. Either Grantor has the authority, power and right to revoke the Trust hereby created. So long as both Grantors are alive, the Grantors may jointly amend or modify any provision of this Trust. If one

Grantor has deceased, the surviving Grantor alone may amend or modify any provision of this Trust. All amendments, notices or other documents and instruments affecting or furthering the purposes of this Declaration of Trust shall be in writing.

(b) Appointment of Trustee. The Grantors may at any time appoint, substitute or otherwise change the person designated to act as Trustee or Successor Trustee hereunder. No prior notice to, or consent of, any such Trustee, Successor Trustee or Beneficiary shall be required.

(c) Right to Income. The Grantors, during their lifetime, shall be exclusively entitled to all income accruing from, the Trust's property set forth in Annex A. During such Grantor's lifetime, Sloan Marvin Burton shall be exclusively entitled to all income accruing from the Trust's property set forth in Annex B. During such Grantor's lifetime, Marjorie Cato Burton shall be exclusively entitled to all income accruing from the Trust's property set forth in Annex C. No Beneficiary named herein shall have any claim upon such trust income or profits.

(d) Homestead. The Grantors reserve the right to reside in any real property conveyed or transferred to this Trust rent-free and without charge (except for taxes, insurance, maintenance and other related expenses) during each of their lifetimes, it being the intent of this provision to preserve the requisite beneficial interest and possessory right of each Grantor in and to such real property in accordance with the applicable provisions of state Homestead or similar laws.

3. APPOINTMENT OF TRUSTEE

(a) Sloan Marvin Burton and Marjorie Cato Burton (each also referred to as an "initial Trustee") shall each be a Trustee of this Trust and each subtrust of this Trust (if any), with all of the rights, privileges and responsibilities set forth herein. Either Trustee may exercise all of the powers and rights accorded to a Trustee under this Declaration of Trust, without the requirement of acting in unison. In the event of a physical of mental incapacity or death of one of the Trustees, the survivor Trustee shall continue as the sole Trustee with full authority to exercise all of the powers and rights accorded to a Trustee under this Declaration of Trust.

(b) If at any time both Sloan Marvin Burton and Marjorie Cato Burton cannot serve due to death, disability or incapacity, David Alan Burton shall be the successor Trustee. If such designee is unable or unwilling to serve for any reason, Sharon Harris Burton shall be the successor Trustee. The successor Trustee shall assume the active administration of this Trust in compliance with those provisions set forth herein.

(c) The successor Trustee's authority and power may be subsequently terminated by any Grantor without the consent of, or prior notice to, the successor Trustee if any initial Trustee has sufficiently recovered from any medical or mental impairment which prevented the initial Trustee from being able to fully and competently administer this Trust.

(d) As used in this Declaration of Trust, the singular term "Trustee" shall also include the plural. In addition, the terms "disability" and "incapacity" shall refer to a physical or mental inability to properly manage his or her own financial affairs, as established by the written opinion of two licensed doctors.

(e) Any health care provider shall be authorized to disclose to the "successor Trustee" any pertinent individually identifiable health information sufficient to determine whether the Trustee is physically or mentally capable of managing his or her own financial affairs. This release authority applies to any information governed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) or similar state laws, and each successor Trustee shall constitute a Trustee's "Personal Representative" as defined by HIPAA.

4. POWERS AND DUTIES OF TRUSTEE

(a) General Powers and Duties. The Trustee under this Declaration of Trust shall have all of the powers deemed necessary and appropriate to administer this Trust, including all powers granted under North Carolina law, to the maximum extent of the law, subject to the fiduciary duties to the Grantors and Beneficiaries and any restrictions or limits set forth under North Carolina law. The Trustee may exercise all powers without the approval or supervision of any court, the Grantor or any Beneficiary.

(b) Specific Powers. In furtherance of subsection (a) above, the powers of the Trustee include, but are not limited to, the powers to:

1. Collect, hold, manage and administer assets of the Trust as if the Trustee was the absolute owner of it;

2. Sell, trade, deal, encumber, mortgage, pledge, option, lease, lend or improve the assets of the Trust;

3. Invest, reinvest and make purchases with the profits and principal of the Trust in every kind of property, asset and investment;

4. Borrow money and purchase insurance;

5. Employ and pay reasonable fees to counsel, accountants, financial advisors and any other professional deemed necessary or advisable for the proper administration of the Trust;

6. Enter into contracts and otherwise sign and execute any instrument on behalf of the Trust;

7. Establish bank, brokerage and other financial and non-financial accounts for and on behalf of the Trust and to sign any and all documents on the Trust's behalf in relation thereto, including any resolutions, certification or certificate required for such account;

8. Distribute or divide the assets of the Trust in accordance with this Declaration of Trust (subject to any restrictions or limits set forth under North Carolina law), and to execute any documents necessary to administer any trust or subtrust created by this Declaration of Trust;

9. Receive additional property into the Trust.

10. Continue, operate, expand, manage and sell any business of the Grantor that is part of the Trust.

11. Commence, defend, arbitrate and settle legal claims or actions concerning the Trust or the assets and property in the Trust.

12. Exercise voting rights, give proxies and enter into voting agreements with respect to stock and other business ownership interests held by the Trust.

13. Prepare tax returns and take any necessary or desirable actions with governmental agencies.

14. Purchase and modify insurance.

15. Pay or disburse such sums from the assets of the Trust as may be required, necessary or desirable to maintain the comfort and welfare of the Grantor in the event the Grantor is unable to actively and competently exercise judgment over financial matters by reason of a medical illness or mental impairment.

16. Upon the death of the Grantor, to pay any just debts and expenses of the Grantor.

(c) Compensation. The Trustee may receive reasonable compensation for services under this Declaration of Trust.

(d) Payments to Grantors. The Trustee shall be fully authorized to pay over or disburse to the Grantors from time to time any amounts requested by the Grantors from the income or principal of the Trust.

(e) Resignation. Any Trustee may resign by providing 30 day's written notice to the Beneficiaries.

5. DEATH OF A GRANTOR

(a) Definitions. For the purposes of this Declaration of Trust, the following definitions apply:

"Property of Sloan Marvin Burton" means (i) the Trust property owned by Sloan Marvin Burton at the time it was contributed to the Trust, (ii) all property transferred by Marjorie Cato Burton to Sloan Marvin Burton, either by gift or through the provisions of this Declaration of Trust, and (iii) all accumulated income and profits on the foregoing property. The Property of Sloan Marvin Burton includes the property listed on Annex B, as well as Sloan Marvin Burton's share of the Trust property listed on Annex A.

"Property of Marjorie Cato Burton" means (i) the Trust property owned by Marjorie Cato Burton at the time it was contributed to the Trust, (ii) all property transferred by Sloan Marvin Burton to Marjorie Cato Burton, either by gift or through the provisions of this Declaration of Trust, and (iii) all accumulated income and profits on the foregoing property. The Property of Marjorie Cato Burton includes the property listed on Annex C, as well as Marjorie Cato Burton's share of the Trust property listed on Annex A.

"Property of the deceased Grantor" shall mean either "Property of Sloan Marvin Burton" or "Property of Marjorie Cato Burton" depending on which Grantor is the first to decease.

(b) Death of the First Grantor. Upon the death of the first of the Grantors, the surviving Grantor shall divide this Trust into two separate and distinct trusts. The Trustee shall be the trustee for all of the separate trusts created hereby.

The designation of each trust shall be as follows: (i) Trust A shall be a revocable trust, and (ii) Trust B shall be an irrevocable trust, also known as a "Credit Shelter Trust." For purposes of this Declaration of Trust, the term "Trust" shall include Trust A and Trust B.

The Trustee shall not be required to physically segregate the property placed into Trust A and Trust B.

1. Trust A Allocation. Trust A shall be allocated the Property of the surviving Grantor, plus any Property of the deceased Grantor transferred to the surviving Grantor in any specific bequest pursuant to Section 6(a)(1) or 6(b)(1), as the case may be. Trust A shall thereafter be continued as a revocable living trust incorporating all of the applicable authorities, powers, rights and provisions set forth in this Declaration of Trust.

2. Trust B Allocation. Trust B shall be allocated the Property of the deceased Grantor, including any property that may be subject to the applicable provisions of the deceased Grantor's Last Will and Testament, if any, or otherwise subject to an estate management proceeding, less any Property of the deceased Grantor transferred in any specific bequest pursuant to Section 6(a)(1) or 6(b)(1), as the case may be.

Trust B shall thereafter be continued as an irrevocable trust, specifically, terminating those authorities, powers, rights and provisions granted to the Grantors to amend, modify or revoke any beneficiary designation and Trust property contribution or distribution.

The surviving Grantor shall retain a life estate in the property in Trust B. The Trustee may pay to or spend for the surviving Grantor all or a portion of the income produced by the property included in Trust B. The Trustee may also pay to or spend for the surviving Grantor such sums from the principal of Trust B any amount necessary for the support and maintenance of the surviving Grantor's accustomed manner of living, including those amounts necessary to pay his or her medical expense.

The surviving Grantor may withdraw annually from the principal of Trust B an amount not exceeding $5,000 or 5 percent of the principal value of the Trust Corpus, whichever is greater, without regards to any other sums withdrawn for the support and maintenance of Grantor's accustomed manner of living. All sums withdrawn under this provision shall be on a non-cumulative basis.

(c) Death of the Second Grantor. Upon the death of the second of the Grantors, the property in Trust A and Trust B shall be distributed as set forth in Section 6 below.

(d) Simultaneous Death of Grantors. In the event both Grantors die in, or as a result of, a common accident or disaster, or under such circumstances that the order of their deaths cannot be established by proof, then it shall be conclusively presumed that both died simultaneously, and neither shall be presumed to have survived the other for purposes of this Declaration of Trust.

6. BENEFICIARIES

(a) Beneficiaries of Sloan Marvin Burton. Subject to the creation of any children's subtrusts, upon the death of Sloan Marvin Burton, the Trustee shall distribute the Property of Sloan Marvin Burton to the Beneficiaries named below, at the time and in the manner provided below, after the payment of any just debts and funeral expenses:

1. Specific Bequests

The following specific bequests shall be made upon the death of Sloan Marvin Burton, regardless of whether Sloan Marvin Burton is the first or second of the Grantors to pass away.

Sloan Marvin Burton Junior, the Grantor's son, shall be given the specific sum of $5.00 (five dollars) to be the total amount he receives from the Grantor's estate.

Philip Douglas Burton, the Grantor's son, shall be given the specific sum of $5.00 (five dollars) to be the total amount he receives from the Grantor's estate.

2. Residual Property After Specific Bequests.

i. If Sloan Marvin Burton is the first of the Grantors to decease, then all residual Property of Sloan Marvin Burton shall be distributed to Trust B. Upon the death of Marjorie Cato Burton, all of the property in Trust B shall be distributed to the Beneficiaries set forth in subsection (iii) below in the percentage set forth below.

ii. If Sloan Marvin Burton is the second of the Grantors to decease, the Beneficiaries set forth in subsection (iii) below shall receive, in the percentage set forth below, all residuary Property of Sloan Marvin Burton.

iii. Name: David Alan Burton
Relation: Son
Percentage: 100%

In case such Beneficiary does not survive the Grantor, then that share of the Trust Property which would have been given to such Beneficiary shall be distributed to: Sharon Harris Burton.

(b) Beneficiaries of Marjorie Cato Burton. Subject to the creation of any children's subtrusts, upon the death of Marjorie Cato Burton, the Trustee shall distribute the Property of Marjorie Cato Burton to the Beneficiaries named below, at the time and in the manner provided below, after the payment of any just debts and funeral expenses:

1. Specific Bequests

The following specific bequests shall be made upon the death of Marjorie Cato Burton, regardless of whether Marjorie Cato Burton is the first or second of the Grantors to pass away.

Sloan Marvin Burton Junior, the Grantor's son, shall be given the specific sum of $5.00 (five dollars) to be the total amount he receives from the Grantor's estate.

Philip Douglas Burton, the Grantor's son, shall be given the specific sum of $5.00 (five dollars) to be the total amount he receives from the Grantor's estate.

2. Residual Property After Specific Bequests.

i. If Marjorie Cato Burton is the first of the Grantors to decease, then all residual Property of Marjorie Cato Burton shall be distributed to Trust B. Upon the death of Sloan Marvin Burton, all of the property in Trust B shall be distributed to the Beneficiaries set forth in subsection (iii) below in the percentage set forth below.

ii. If Marjorie Cato Burton is the second of the Grantors to decease, the Beneficiaries set forth in subsection (iii) below shall receive, in the percentage set forth below, all residuary Property of Marjorie Cato Burton.

iii. Name: David Alan Burton
Relation: Son
Percentage: 100%

In case such Beneficiary does not survive the Grantor, then that share of the Trust Property which would have been given to such Beneficiary shall be distributed to: Sharon Harris Burton.

(c) Inalienability of Beneficiary's Interest. The interest of the Beneficiaries under this Trust shall be inalienable. Such Beneficiaries cannot assign, sell, pledge, encumber or otherwise transfer their inalienable interest in the assets of the Trust to a third party. Nor can such interest be attached,

garnished, levied upon or otherwise subjected to any proceedings whether at law or in equity.

(d) Beneficiaries' Proportionate Liability for Estate Taxes. Each Beneficiary hereunder shall be liable for their proportionate share of any estate taxes that may be levied upon the total value of the Trust and distributed to said Beneficiary.

(e) Revocation of Beneficiary. The Grantors reserve the right to revoke, at any time, the designation of a herein named Beneficiary, without prior notice to or the consent of any such Beneficiary. In addition, at any time, the Grantors may designate a new Beneficiary to replace a previously revoked Beneficiary or designate an additional Beneficiary. No prior notice to or the consent of any other Beneficiary is required.

7. SPECIAL DIRECTIVES CLAUSE

Notwithstanding any other provision of this Trust, including those express directives in section 6 above, the Grantors further direct that:

Sloan Marvin Burton Junior is to receive ONLY $5.00 (Five dollars) from the Grantors' estate.

Philip Douglas Burton is to receive ONLY $5.00 (Five dollars) from the Grantors' estate.

8. NON-LIABILITY OF THIRD PARTIES

(a) This Trust is created with the express interest and understanding that any third parties, including agents, employees or vendors, who, upon the written request of the Grantors, or under the color of authority granted to the Trustee in this Declaration of Trust, perform any duties or render any services in the furtherance of the purposes and intents of this Trust, absent any showing of fraud or bad faith, shall be under no liability for the proper administration of any assets or properties being the subject of the said third party's acts.

(b) This limitation of liability gives specific protection to any third party who acts, performs or renders any services pursuant to any notice, instrument or document believed (and represented) to be genuine, and to have been signed and presented by the proper parties.

(c) It is further the express intent of this Trust that the non-liability of all third parties be given broad and prospective application. In particular, a depository, custodial agent or financial institution, or any other person or entity acting in a fiduciary capacity with regards to any assets or property of the Trust, shall suffer no liability, nor incur any express or implied obligations when acting in the capacity of a transferor, upon proper request, of any assets or property either sought to be, or constructively comprising the assets or properties of the Trust.

9. MISCELLANEOUS

(a) Bonds. The Trustee under this Declaration of Trust shall service without bond.

(b) Governing Law. This Declaration of Trust shall be construed and enforced in accordance with the laws of the state of North Carolina.

(c) Severability. If a court of competent jurisdiction shall at any time invalidate or find unenforceable any provisions of this Declaration of Trust, such invalidation shall not be construed as invalidating the whole of this Declaration of Trust. All of the remaining provisions shall be undisturbed as to their legal force and effect. If a court finds that an invalidated or unenforceable provision would become valid if it is limited, then such provision shall be deemed to be written, deemed, construed and enforced as so limited.

(d) Perpetuities Savings. Despite any other provision of this Declaration of Trust to the contrary, the Trust shall terminate no later than 21 years after the death of the last surviving Beneficiary who is living at the time of the death of the Grantors.

IN WITNESS WHEREOF, the Grantors have executed this Declaration of Trust on the date written below.

Signature of Sloan Marvin Burton, as Grantor

Date: January 19, 2007

Signature of Marjorie Cato Burton, as Grantor

Date: January 19, 2007

Signature of Sloan Marvin Burton, as Trustee
of The Sloan Marvin Burton and
Marjorie Cato Burton AB Living Trust

Date: January 19, 2007

Signature of Marjorie Cato Burton, as Trustee
of The Sloan Marvin Burton and
Marjorie Cato Burton AB Living Trust

Date: January 19, 2007

Annex A

Shared Trust Property

All of the Grantors' interest in the following property is transferred into the Trust:

The real property located at:

4300 Boxwood Road
Raleigh, North Carolina 27612
Type of Property: Home

The funds in the following bank accounts:

- Allied First Bank
  387 Shuman Boulevard, Suite 290E
  Naperville, Illinois 60563
  Type: Certificate of Deposit

- State Employees Credit Union
  2401 Blue Ridge Road
  Raleigh, North Carolina 27607
  Type: Share Account

The cash, funds and securities in the following brokerage accounts:

- AIM Investment Services, Inc.
  P.O. Box 4739
  Houston, Texas 77210-4739

- Scottrade
  6308 Falls of Neuse Road, #107
  Raleigh, North Carolina 27615

The following certificated stocks and/or bonds:

- 207 shares of stock issued by Mattel Corporation
  Certificate Numbers: NYS 127357, 239487, 121271, 153708, 215948, ZQ16783

- 34 certificates, $100.00 dollars each, of Series EE Savings Bonds issued by the United States Federal Government
  Certificate Numbers: C2251069EE, C3872531EE, C15808926EE, C22275578EE, C26268314EE, C34738298EE, C35061190EE, C44253023EE, C49586561EE, C56599863EE, C56921168EE, C48749279EE, C77139114EE, C64511888EE, C91841088EE, C105151678EE, C110565533EE, C130436605EE, C133912456EE, C141487517EE, C161505195EE, C159244452EE, C180183864EE, C196442163EE, C207643525EE, C226392558EE, C238217255EE, C255601447EE, C268144319EE, C290385423EE, C3040711432EE, C330944901EE, C366980639EE, C345530390EE

Annex B

Separate Property of Sloan Marvin Burton

All of Sloan Marvin Burton's interest in the following property is transferred into the Trust:

The funds in the following bank accounts:

- State Employees Credit Union
  2401 Blue Ridge Road
  Raleigh, North Carolina 27607
  Type: Share Account, Money Market

- Corus Bank
  2401 North Halsted Street
  Chicago, Illinois 60614
  Type: Certificate of Deposit

  Needs to be on Annex A

- ING Direct
  1 South Orange Street
  Wilmington, Delaware 19801
  Type: Money Market

The cash, funds and securities in the following brokerage accounts:

- Smith Barney
  700 Spring Forest Road
  Raleigh, North Carolina 27609

The following certificated stocks and/or bonds:

- 20 certificates, $500.00 dollars each, of Series E Savings Bonds issued by the United States Treasury Department
  Certificate Numbers: ED204552693, D204552694E, D204552695E, D204552696E, D204552697E, D204552698E, D204552699E, D204552700E, D204762320E, D204762321E, D204762322E, D204762323E, D204762324E, D204762326E, D204762327E, D204762328E, D204762329E, D204762330E, D204762331E, D204762333E

- 2431.3221 shares of Common Stock issued by Progress Energy
  Certificate Number: 3511973 SMB – MM – MCB

- 6 certificates, $10,000.00 dollars each, of Series I Bonds issued by the United States Treasury Department
  Certificate Numbers: X001274363I, X001274364I, X001274365I, X001274366I, X001274367I, X001274368I

- 4 certificates, $100.00 dollars each, of Series E Savings Bonds issued by the United States Treasury Department
  Certificate Numbers: C2005152780E, C2064708795E, C2083281113E, C2098803312E

Annex C

Separate Property of Marjorie Cato Burton

All of Marjorie Cato Burton's interest in the following property lying, being and situate in Ebenezer Township, York County, South Carolina is transferred into the Trust:

The real property located at:

- 592-02-01-042
  Rock Hill, South Carolina 29732-9485
  Type of Property: Vacant Lot

- 592-02-01-043
  Rock Hill, South Carolina 29732-9485
  Type of Property: Vacant Lot

- 592-02-01-052
  Rock Hill, South Carolina 29732-9485
  Type of Property: Vacant Lot

- 592-02-01-059
  Rock Hill, South Carolina 29732-9485
  Type of Property: Vacant Lot

- 592-02-01-062
  Rock Hill, South Carolina 29732-9485
  Type of Property: Vacant Lot

- 592-02-01-089
  Rock Hill, South Carolina 29732-9485
  Type of Property: Vacant Lot

- 592-02-10-117
  Rock Hill, South Carolina 29732-9485
  Type of Property: Vacant Lot

- 592-02-01-124
  Rock Hill, South Carolina 29732-9485
  Type of Property: Vacant Lot

- 592-02-01-152
  Rock Hill, South Carolina 29732-9485
  Type of Property: Vacant Lot

- 592-02-01-153
  Rock Hill, South Carolina 29732-9485
  Type of Property: Vacant Lot

The funds in the following bank accounts:

- State Employees Credit Union
  2401 Blue Ridge Road
  Raleigh, North Carolina 27607
  Type: Share Account, Money Market

The cash, funds and securities in the following brokerage accounts:

- Smith Barney
  700 Spring Forest Road
  Raleigh, North Carolina 27609

The following additional property:

- 20% share of all those certain pieces, parcels or lots of land, lying, being and situate in Ebenezer Township, York County, South Carolina, being held jointly by Grantor herein and other heirs of T. E. Cato, and being more particularly described as Lots 42 (TMS# 592-02-01-001), 14 (TMS# 592-02-01-069), 13 (TMS# 592-02-01-070), 98 (TMS# 592-02-01-093), 175 (TMS# 592-02-01-112), and Areas A (TMS# 592-02-01-063), B (TMS# 592-02-01-064), C (TMS# 592-02-01-164), and D (TMS# 592-02-01-110) as shown on that certain plat of property entitled "Composite Plat Showing Subdivision Of T.E. Cato Est." , drawn by R. H. Marett, RLS on December 20, 1967, as revised July 15, 1968 and recorded in Plat Book 33 at page 192 in the Office of the Clerk of Court for York County, South Carolina.

ACKNOWLEDGMENT

State of North Carolina

County of Wake

On this 19th day of January, 2007 before me, RACHEL WILSON personally appeared Sloan Marvin Burton and Marjorie Cato Burton, personally known to me (or proved to me on the basis of satisfactory evidence) to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same in their authorized capacities and that by their signatures on the instrument the persons executed the instrument.

WITNESS my hand and official seal.

Rachel Wilson RACHEL WILSON
Notary Public

My Commission Expires: March 25, 2009

ATTESTATION AND DECLARATION OF WITNESSES

In our presence the Grantors above named have declared or signified that this instrument is their Declaration of Trust and have signed and executed the instrument, and in the presence of the Grantors and each other we have hereunto subscribed our names on the date set forth under our signature.

1. Felicia J Stanley
(Signature of witness)

Date: 01/19/2007

Felicia J. Stanley
(Print Name)

2401 Blue Ridge Rd
(Address)

Raleigh NC 27607
(City, State, ZIP)

2. Brooklyn Parrish
(Signature of witness)

Date:

Brooklyn Parrish
(Print Name)

2401 Blvd Ridge Rd
(Address)

Raleigh NC 27607
(City, State, ZIP)

3. Candace L Bullock
(Signature of witness)

Date: 01-19-07

Candace L Bullock
(Print Name)

2401 Blue Ridge Rd
(Address)

Raleigh NC 27607
(City, State, ZIP)

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, by and through David A. Burton as Attorney-in-Fact, Individually and in the right and on Behalf of T.E. Cato Estate, LLC,

Plaintiffs,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE SIXTEENTH JUDICIAL CIRCUIT

C.A. No. 2010-CP-46-2267

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

FILED-RECEIVED
2011 JUL -8 AM 9:06
DAVID HAMILTON
C.C.C.P.&GS
YORK COUNTY, SC

Carroll M. Pitts, Jr. and Robinson Bradshaw & Hinson, P.A. (collectively, "RBH") submit the following memorandum of law in support of their Motion to Dismiss Plaintiffs' Complaint.

INTRODUCTION

On January 25, 2011, RBH filed a Motion to Dismiss Plaintiffs' Complaint on the grounds that David A. Burton does not have the authority to bring this claim on behalf of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust (the "Trust"), pursuant to the Power of Attorney attached to the Complaint as Exhibit A. In April, 2011, RBH, through its counsel, received the First Amendment to the Sloan Marvin Burton and Marjorie Cato Burton AB Living Trust ("First Amendment") signed by Sloan Marvin Burton and David A. Burton as Marjorie Cato Burton's Attorney-in-Fact and an Affirmation, Ratification and Consent signed by Sloan Marvin Burton as Co-Trustee. Through their Motion for Substitution of Parties, Plaintiffs contend that the First Amendment remedies the pleading deficiency pointed out by RBH's

Motion to Dismiss. By implication, Plaintiffs claim that David Burton's substitution as Co-Trustee is not only valid, but also that it cures the real party in interest issue that is present in this case as currently pled. Because the plain language of the Trust does not empower David A. Burton to act in Marjorie Cato Burton's stead as successor Co-Trustee, David Burton continues to lack standing to bring this lawsuit, and therefore, the Complaint should be dismissed.

ARGUMENT

I. David Burton Does Not Have the Authority to Bring This Claim on Behalf of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, pursuant to the Durable Power of Attorney.

Rule 17 of the South Carolina Rules of Civil Procedure states that "[e]very action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought...." S.C.R.C.P. 17(a). The Plaintiff in this case does not meet the requirements of S.C.R.C.P. 17.

The Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust is governed by North Carolina law. The responsibility of enforcing a claim on behalf of a trust belongs to the trustee or co-trustees of a trust. N.C. Gen. Stat. Ann. § 36C-8-811 (2006) ("A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust"). Absent explicit language in the trust document, a trustee may not delegate her duty to file suit on behalf of the trust. See, e.g., Braddock Fin. Corp. v. Washington Mut. Bank, 637 F. Supp. 2d 924, 931 (D. Colo. 2009) ("In most cases, the trustee has *exclusive* authority to maintain an action on behalf of the trust against a third party") (emphasis added); In re Frontier Ins. Group,

Inc. Securities Litigation, 172 F.R.D. 31, 42 (E.D.N.Y. 1997) ("[A] suit on behalf of a trust . . . normally must name the trustee as plaintiff").

While § 36C-8-807 of the North Carolina Code permits a trustee to delegate some of its duties and powers to an agent, a trustee may not delegate all of its authority by way of a power of attorney. See § 36C-8-807(a)(2) (requiring a delegating trustee to define and limit the scope of an agent's power and requiring the delegation to conform to the terms of the trust); see, e.g., Buse v. First Am. Title Ins. Co., No. C-08-0510-MJP, 2009 WL 1543994, at *3 (W.D. Wash. May 29, 2009) (unpublished) ("[A] trustee can delegate some but not all of its powers to an agent").

In the event a trustee is unable to perform her duties and/or ceases to serve, the incapacitated trustee must be replaced in accordance with the terms of the trust document. N.C. Gen. Stat. Ann. § 36C-7-704. A non-acting trustee, through a power of attorney, cannot appoint an attorney-in-fact to act on behalf of the trust, essentially appointing the attorney-in-fact as the successor trustee. Thus, David A. Burton as Attorney-in-Fact is not the proper party to sue on behalf of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, and therefore, pursuant to Rule 17 of the South Carolina Rules of Civil Procedure, Plaintiffs' Complaint should be dismissed.

II. The Plain Language of Marjorie Cato Burton's Durable Power of Attorney Does Not Empower David A. Burton to Act in Her Stead as Successor Co-Trustee of the Trust.

Ms. Burton's February 29, 2008 Durable Power of Attorney for Financial Management appoints David Burton to serve as her Attorney-in-Fact with respect to her *individual* financial affairs. Nowhere does the document's plain language empower David A. Burton to act for the Trust as Successor Co-Trustee. Ms. Burton's individual financial affairs are separate and distinct

from the Trust's financial and legal affairs. Otherwise, the Trust would be a sham and would not warrant favorable tax treatment or other asset protections afforded by a Trust structure.

The document's plain language states: "I Marjorie Cato Burton, appoint the person named below as my attorney-in-fact to act for *me* in any lawful way with respect to the powers delegated in Part 4 below" (emphasis added). See Power of Attorney, attached as **Exhibit A**. The face of the Durable Power of Attorney document shows Marjorie Cato Burton as "Principal;" it does *not* show Ms. Burton in her separate, fiduciary capacity as Trustee of any Trust. Ms. Burton's signature block on the document states only her name, indicating that she acted only in her individual capacity rather than in any separate fiduciary capacity as Co-Trustee in executing the document. The Durable Power of Attorney does not contain any language referencing the Trust dated January 19, 2007. The Trust is attached as **Exhibit B**.

Although the Durable Power of Attorney may authorize Ms. Cato's Attorney-in-Fact to act for her *in her capacity as an individual trust beneficiary*, it cannot and does not confer power to act in a separate fiduciary capacity as Co-Trustee. Paragraph 4 of the Power of Attorney entitled "Powers of Attorney-in-Fact" states, in pertinent part: "These powers are defined in Part 13, below." See Exhibit A. Paragraph 13 ("Definition of Powers Granted to Attorney-in-Fact"), subsection 7, states, in pertinent part: "My attorney-in-fact may act for *me* in all matters that affect a trust...from which I am, may become or claim to be entitled *as a beneficiary*.... My Attorney-in-Fact's authority includes the power to disclaim any assets which I am, may become, or claim to be entitled, *as a beneficiary*, to any share or payment." Id. The Attorney-in-Fact's authority is limited to acting for Ms. Cato in her individual capacity rather than in a separate fiduciary capacity as Co-Trustee.

For the same reasons stated above, David A. Burton lacked legal authority to act as Successor Co-Trustee in executing the April 1, 2011 purported First Amendment on Ms. Burton's behalf. Because he lacked the authority to sign the First Amendment, David A. Burton's signature on the First Amendment is ineffective and renders that document invalid, void and of no legal effect.

III. The Law of Principal and Agency Does Not Allow Marjorie Cato Burton's Alleged Delegation of Trust Fiduciary Powers by Virtue of Her Durable Power of Attorney.

As a matter of principal and agency law, the principal cannot delegate more authority than she originally possessed. See 3 Am. Jur. 2d Agency § 74 ("[t]he implied and incidental authority of an agent may not be extended beyond its legitimate scope and includes only such powers as are practically indispensable and essential in order to carry out the duties actually delegated to the agent"). The purpose of a durable power of attorney is to delegate the principal's power over their personal, individual affairs as specified in the document. An individual's power of attorney cannot delegate Trust fiduciary powers not expressly granted by the Trust document. See N.C. Gen. Stat. Ann. § 36C-8-807(a)(2) (requiring a delegating trustee to define and limit the scope of an agent's power and requiring the delegation to conform to the terms of the trust). The Trust document or a Court appointment of Successor Co-Trustee (*not* Marjorie Cato Burton's personal Durable Power of Attorney), would be the proper mechanism for any Successor Co-Trustee appointment. Plaintiffs fail to offer any credible legal authority to support their position that the First Amendment satisfies this burden.

IV. David A. Burton is Not Successor Co-Trustee Under the Plain Language of the Trust and Factual Circumstances.

The Trust's plain language does not permit Trust amendment or modification to empower David A. Burton as Successor Trustee under the factual circumstances of this case. Article 2(a)

of the Trust allows the Grantors (Sloan Marvin Burton and Marjorie Cato Burton) to "*jointly* amend or modify" the Trust (emphasis added). See Exhibit B. Ms. Burton's undisputed mental incapacity/incompetence prevents her from acting as Co-Trustee; therefore, she and her husband cannot "*jointly*" amend or modify the Trust to allow David Burton's service as Successor Co-Trustee. Article Two allows one Trustee to act only if the other is deceased; Marjorie Cato Burton is not deceased. Id.

Article 2(b) of the Trust allows the *Grantors* (plural) to appoint, substitute or otherwise change designated Trustees/Successors Trustees. Id. Ms. Burton's undisputed mental incapacity/incompetence renders her unable to act as Co-Trustee. Since the Trust requires multiple Co-Trustees to act, and Ms. Burton cannot do so, David Burton cannot be appointed or substituted as Successor Co-Trustee under Article 2(b).

Further, Article 3(b) allows David A. Burton to serve as Successor Co-Trustee only if *both* Sloan Marvin Burton and Marjorie Cato Burton cannot serve due to death, disability or incapacity. Article 3(a) of the Trust states in pertinent part:

> In the event of a physical o[r] mental incapacity or death of one of the Trustees, the survivor Trustee shall continue as the sole Trustee with full authority to exercise all of the powers and rights accorded to a Trustee under this Declaration of Trust.

Id. Article 3(a) allows Sloan Marvin Burton to continue serving as sole Trustee, but it does not allow David Burton to serve as Successor Co-Trustee.

The Trust is a North Carolina Trust, executed in North Carolina, recorded in North Carolina, and governed and construed by North Carolina law. N.C. Gen. Stat. Section 36C-7-704(b) states:

> If one or more co-trustees remain in office, a vacancy in trusteeship need not be filled. A vacancy in trusteeship must be filled if the trust has no remaining trustee.

Sloan Marvin Burton remains in office as Co-Trustee of the Trust. There is no evidence that Sloan Marvin Burton is unable to continue serving as Trustee. Therefore, no vacancy has occurred in that trusteeship, and no appointment of any Successor Co-Trustee is necessary.

V. David A. Burton Cannot Serve as Successor Co-Trustee Without Court Appointment, and the York County Court of Common Pleas Lacks Subject Matter Jurisdiction to Make Such an Appointment.

David A. Burton has no power to serve as Co-Trustee for the reasons stated above. As a procedural matter, Court appointment would be necessary in order for Mr. Burton to act as Co-Trustee. The York County Court of Common Pleas lacks subject matter jurisdiction to make any such Trustee appointment.

In South Carolina, the Probate Courts have exclusive original jurisdiction over all subject matter related to trusts, including the appointment of successor trustees. S.C. Code Ann. Section 62-1-302(a)(3); see also, S.C. Code Ann. Section 62-7-201(a)(4). The South Carolina Circuit Courts do not have concurrent jurisdiction over internal trust matters such as appointment of Successor Trustees, particularly in a situation such as this, involving a North Carolina Trust. (Article 9(b) of the Trust designates this Trust as a North Carolina Trust. See Exhibit B).

CONCLUSION

RBH's Motion to Dismiss should be granted because the document purporting to appoint David A. Burton as Successor Co-Trustee of the Trust is legally invalid. The plain language of the Trust, as well as North Carolina statutory law, does not allow David A. Burton to sue on behalf of the Trust, and therefore, he has no legal standing to bring this lawsuit. Rule 17 of the South Carolina Rules of Civil Procedure states that "[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest *until a reasonable time* has been allowed, after objection, for ratification of commencement of the action by, or joinder of, the real

party in interest" (emphasis added). RBH filed its Motion to Dismiss on January 25, 2011. Plaintiffs waited almost four months before filing a Motion for Substitution of Parties, and the document purporting to remedy the real party in interest issue remains legally invalid. Plaintiffs' delay in filing the Motion for Substitution of Parties is unwarranted and unreasonable. Therefore, in the interest of judicial economy and public policy, this Court should deny Plaintiffs' Motion for Substitution of Parties and grant RBH's Motion to Dismiss the Complaint.

Respectfully submitted,

Samuel W. Outten

Samuel W. Outten, SC Bar No. 4295
Catherine R. Atwood, SC Bar No. 77367
Womble Carlyle Sandridge & Rice, PLLC
550 South Main Street, Suite 400 (29601)
Post Office Box 10208
Greenville, SC 29603-0208
Telephone: (864) 255-5400
Attorneys for Carrol M. Pitts, Jr. and Robinson Bradshaw & Hinson, P.A.

This 7 day of July, 2011.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 7th day of July, 2011, she mailed a copy of the attached **DEFENDANTS' MEMORANDUM IM SUPPORT OF MOTION TO DISMISS** by first-class mail, proper postage affixed, addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es):

Roger B. Jellenik
Attorney at Law
1111 Broad Street, Box J
Camden, SC 29020

George Hunter McMaster
Tompkins & McMaster LLP
PO Box 7337
Columbia, SC 29202

FILED-RECEIVED
2011 JUL -8 AM 9:06
DAVID HAMILTON
C.C.C.P.&GS
YORK COUNTY, SC

Julie A. Curll
Legal Assistant to Catherine R. Atwood

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

MARJORIE CATO BURTON) CASE NO.
☒ Plaintiff) 2010-CP-46-2267

v.) MOTION AND ORDER INFORMATION
) FORM AND COVER SHEET
Carroll M. Pitts, Jr., Esq, Et Al.)
☐ Defendant.)

Plaintiff's Attorney:	Defendant's Attorney:
George H. Mcmaster, Bar No. Address: PO Box 7337; Columbia, SC 29202 phone: 803-799-4499 fax: 803-252-2240 e-mail: ghm@tmmlaw.com other: bap@tmmlaw.com	, Bar No. Address: phone: fax: e-mail: other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: MOTION FOR RECONSIDERATION
Estimated Time Needed:30 MINUTES Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

_____ _____
Signature of Attorney for ☐Plaintiff / ☐Defendant Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

FILED-RECEIVED
2011 SEP -9 AM 11:21
YORK COUNTY, SC
C.C.P. & G.S.

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

_____
JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Collected by: Leigh Ann Alexander Date Filed: 9/9/11

☑ MOTION FEE COLLECTED: 25.00
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, by and through David A. Burton as Attorney-in-Fact, Individually and in the right and on Behalf of T.E. Cato Estate, LLC,

Plaintiffs,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE SIXTEENTH JUDICIAL CIRCUIT

C.A. No. 2010-CP-46-2267

PLAINTIFF'S MOTION PURSUANT TO RULE 59 TO ALTER, AMEND AND/OR RECONSIDER THE AUGUST 29 ORDER

FILED
2011 SEP -9 AM 11:21
YORK COUNTY, S.C.
RECEIVED

Plaintiff respectfully motions this Court to alter, amend, and/or reconsider its August 29 Order. That Order erroneously concludes that Dr. David A. Burton is not entitled to represent his mother in this action via her Durable Power of Attorney. It further concludes that he is not entitled to represent his mother's trust in this action via his appointment as trustee. It further concludes that other trustee, Sloan Marvin Burton, who is Mrs. Burton's husband, is not entitled to represent the trust in this matter. These are errors.

The Order further contradicts itself. Its holding that Dr. David Burton is not entitled to represent his mother via the Durable Power of Attorney rests on its conclusion that the role of "Trustee" is a special fiduciary duty separate and apart from Mrs. Burton *in pro per.*; its holding that David Burton has not been appointed trustee rests on exactly

the opposite supposition. Its implicit unwillingness to appoint a Guardian ad Litem contradicts its declaration that Mrs. Burton is incapacitated/incompetent.

Throughout, the Order overlooks basic principles of construction and conflicts with Rules of Civil Procedure designed to promote the speedy resolution of dispute.

BACKGROUND: GENERAL PRINCIPLES

The Order's various holdings rest predominately on its reading of three documents. Those documents are Sloan Marvin Burton's April 1, 2011 "AFFIRMATION, RATIFICATION AND CONSENT," (Ex. 1); the January 19 "DECLARATION OF TRUST" of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, (Ex. 2); and Mrs. Burton's "DURABLE POWER OF ATTORNEY FOR FINANCIAL MANAGEMENT," signed February 29, 2008 (Ex. 3). Accordingly, some discussion of the rules of construction is appropriate.

A. The Overarching Rule of Construction Is to Determine the Drafter's Intent.

The polestar in interpreting a document is the drafter's intent. This is true under the law of both North Carolina and South Carolina. *See, e.g., Day v. Rasmussen*, 177 N.C. App. 759, 764, 629 S.E.2d 912, 915 (2006) (quoting *L'Argent v. Barnett Bank, N.A.*, 730 So. 2d 395, 397 (Fla. App. 1999) ("'The polestar of trust interpretation is the settlors' intent.'"); *Whitford v. Gaskill*, 345 N.C. 475, 479, 480 S.E.2d 690, 691 (1997) (interpreting short-form power of attorney in accord with "the intent of the principal"); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134, 276 S.E.2d 304, 306 (1981) (interpreting statute in accord with "the intent of the drafters"); *Epstein v. Coastal Timber Co.*, – S.C. –, 711 S.E.2d 912, 917 (2011) (similar). Similarly, interpretations are to be avoided that would

render a word, a phrase, or even worse, an entire document, a nullity. *Cf. Dorman v. S.C. Dep't of Health & Envtl. Control*, 350 S.C. 159, 166 (Ct. App. 2002) (rejecting interpretation that would render a statute a nullity.)

B. Special Solicitude Is to Be Provided to Incompetents.

As argued in more depth below, courts are to show special solicitude to those who are incapacitated/incompetent. *See, e.g., S.C. Dep't of Soc. Servs. v. McDow*, 276 S.C. 509, 510, 511, 280 S.E.2d 208, 208 (1981); *South Carolina Dept. of Social Services v. Roe*, 371 S.C. 450, 463, 639 S.E.2d 165, 172 (Ct. App. 2006). The Order refers to "Ms. Burton's undisputed mental incapacity/incompetence," p. 7. It does so twice on page 7 in identical language. As argued below, the failure to appoint a Guardian for one of undisputed incapacity/incompetence is reversible error. More generally, the Order never acknowledge the rules requiring special solicitude for incompetents, and, instead, employs an overly-technical approach to deny her representation by those she has chosen to represent her interests. This too is error.

C. The Order Conflicts with Rule 1, SCRCP.

The Rules of Civil Procedure are to be construed so as promote the just, speedy and inexpensive determination of every action. Rule 1, SCRCP. Throughout, the Order conflicts with this Rule.

I. THE ORDER CONFLICTS WITH ITS OWN FINDINGS AS TO MS. BURTON'S CAPACITY.

The operative part of the Order runs afoul of the well-established principle that courts are to show solicitude to those under a disability. *See, e.g., South Carolina Dept. of Social Services v. Roe*, 371 S.C. 450, 463, 639 S.E.2d 165, 172 (Ct. App. 2006) (holding

that an exception to the rule that an unpreserved issue will not be considered on appeal exists where the interests of minors or incompetents are involved).

The Court's prior Order signed April 21, 2010, and filed April 22, 2010, states, p. 5,

> The Court has not set any deposition for Marjorie Cato Burton and based on a letter from her doctor, there is no reason for her to be deposed as nothing of value could be obtained. The doctor's letter should put the parties on notice that perhaps it is time for the appointment of a Guardian ad Litem on Ms. Burton's behalf, as her competency to adequately represent her own interest in this matter is highly suspect.[1]

Accordingly, within the week, i.e., on April 29, 2010, an application for Dr. Burton's appointment as Guardian ad Litem was filed with the Court, but no Order was ever issued in response.

"Where a court adjudicates the rights of a person who is not mentally competent without appointing a guardian ad litem, any judgment rendered by the court adverse to the person who is not competent is defective." *Rouvet v. Rouvet*, 388 S.C. 301, 311, 696 S.E.2d 204, 209 (Ct. App. 2010). In *S.C. Dep't of Soc. Servs. v. McDow*, 276 S.C. 509, 510, 511, 280 S.E.2d 208, 208 (1981), "no application was made for the appointment of guardians ad litem and no such appointment was made." The Supreme Court raised the issue of competency *ex mero motu* and remanded for a determination of whether McDow was sufficiently competent to proceed without the appointment of a guardian ad litem. The Supreme Court explained,

> To divest incompetent persons of any rights, the proceedings must comply strictly with the law. *Ex parte Hineline,* 166 S.C. 352, 164 S.E. 887 (1932). Section 15-5-310, Code of Laws of South Carolina (1976), provides in part that "[a] mentally incompetent person, . . ., shall appear by guardian *ad litem* in an action by or

[1] This letter, incidentally, was never seen by the parties; it was sent directly to the Court.

> against him." The procedure for appointment of guardians *ad litem* for persons *non compos mentis* and the method whereby the rights of such persons may be adjudicated is set forth in Section 15-5-360, Code of Laws of South Carolina (1976). In cases where a court adjudicates the rights of mentally incompetent persons without appointing guardians *ad litem*, any judgment rendered by the court adverse to the incompetent person is void for want of jurisdiction. *Ex parte Kibler,* 53 S.C. 461, 31 S.E. 274 (1898); *Ex parte Roundtree,* 51 S.C. 405, 29 S.E. 66 (1898). *See also Lister v. Gossett,* 239 S.C. 22, 121 S.E. (2d) 235 (1961). That an incompetent person may have been adequately represented in a legal proceeding by an attorney does not cure the jurisdictional defect. *See Roundtree, supra.* As no guardian *ad litem* was appointed to represent Willie Haggins, we must vacate the order terminating his parental rights and remand the case for the appointment of a guardian *ad litem* and a new termination hearing. Although Ella Ree McDow has never been judicially determined incompetent, the petition and other evidence presently before the Court indicates there is some question concerning her mental condition. Accordingly, we also vacate the order with respect to her. Prior to the new termination hearing, the lower court should consider and determine whether Ella Ree McDow is sufficiently competent mentally to proceed without the appointment of a guardian *ad litem*, and if, in fact, she is not, appoint such guardian *ad litem* for her.

See also S.C. Dep't of Soc. Servs. v. Powell, 278 S.C. 79, 79-80, 292 S.E.2d 299, 300 (1982):

> Although appellant has never been determined incompetent by a court, the record raises serious questions concerning her mental condition. This Court has held that under these circumstances the trial court should at the outset determine whether the party involved is sufficiently competent mentally to proceed without appointment of a guardian ad litem. *South Carolina Department of Social Services v. McDow*, 280 S.E. (2d) 208 (1981). Since the trial court neither appointed a guardian for appellant nor determined whether one was needed, we vacate the order and remand the case for proceedings consistent with *McDow*.

Thus, the Order is void.

Moreover, under the Supreme Court precedent cited above, and because the South Carolina Rules of Civil Procedure are to "be construed to secure the just, speedy, and

inexpensive determination of every action," Rule 1, SCRCP; the proper approach is to amend the Order, appoint a Guardian ad Litem, and allow the present case to proceed.

II. THE ORDER MISREADS THE RATIFICATION BY TRUSTEE SLOAN MARVIN BURTON. THAT RATIFICATION SUFFICES TO AVOID DISMISSAL.

A. The Proper Analysis.

Sloan Marvin Burton's Ratification suffices to substitute Sloan Marvin Burton as Plaintiff. The "AFFIRMATION, RATIFICATION AND CONSENT," (Ex. 1), signed by Sloan Marvin Burton on April 1, 2011, and duly notarized, states, in pertinent part (emphasis added), "Sloan Marvin Burton, Co-Trustee of the [Trust], does hereby acknowledge, *ratify* and consent to the actions taken on behalf of the Trust and its Trustees . . . by David Alan Burton in the defense and prosecution of . . . *Burton as Trustee v. Pitts et al.*, Case No. 2010-CP-46-2267".

This suffices to avoid dismissal. *See, e.g., Thomas v. Grayson*, 318 S.C. 82, 87, 456 S.E.2d 377, 379-80 (1995) (quoting Rule 17, SCRCP) (emphasis added):

> No actions shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after objection, for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and *such ratification*, joinder, or substitution *shall have the same effect as if the action had been commenced in the name of the real party in interest.*

Sloan Marvin Burton's ratification, therefore, has the same effect as if the action had been commenced in his name. That suffices. Under the Trust, either Sloan Marvin Burton or Marjorie Cato Burton, alone or together, are entitled to bring suit. "Either Trustee may exercise all of the powers and rights accorded to a Trustee under this

Declaration of Trust, without the requirement of acting in unison." Declaration of Trust (Ex. 2), ¶ 3(a).

The Order sharply divides Trustees from others; it holds that only a Trustee may be the real party in interest and only a Trustee may bring suit. By the Order's logic, then, Trustee Sloan Marvin Burton is now the Plaintiff, and the case may not be dismissed.

B. The Order's Erroneous Analysis.

The Order repeatedly refers to the Ratification; however, it consistently errs in so doing. The Order inexplicably and erroneously reads the Ratification as going to, and going only to, the attempted Amendment of the Trust. That Amendment was intended to enable David Burton to serve as a Trustee. The Order consistently declares that the *Ratification* failed to establish David Burton as Trustee. *E.g.*, Order at 7 ("Sloan Marvin Burton's signature on the First Amendment to the Trust and on the Affirmation, Ratification and Consent does not substitute David A. Burton as a Successor Co-Trustee because, under the terms of the Trust, he cannot unilaterally amend or modify the Trust.") The plain words of the Ratification, however, ratify David A. Burton's actions in prosecuting the suit, which is a different matter altogether.

Similarly, the Order consistently appears to read (A) the Affirmation, Ratification and Consent, notarized April 1, and (B) the First Amendment, notarized the same day, as if the two were one document. They are not one document. The Affirmation, Ratification, and Consent is not concerned with modifying the Trust; it is concerned with affirming, ratifying, and consenting to the actions Dr. David Burton took in prosecuting this case (and in defending other cases). Sloan Marvin Burton has ratified, and that suffices.

III. THE ORDER ERRONEOUSLY BLAMES PLAINTIFF FOR DELAYS.

A. The Order Erroneously Blames Plaintiff for Delays.

The Order dismisses Plaintiff's Complaint with prejudice due to an alleged 11 month delay assessed against Plaintiff. It is respectfully submitted that this action is contrary to the content and purpose of Rule 17(a), SCRCP. Rule 17(a) states that "No actions shall be dismissed ... [hereunder] until a reasonable time has been allowed, after objection, for ratification of commencement of the action by ... the real party in interest; and such ratification ... shall have the same effect as if the action had been commenced in the name of the real party in interest." The Order ignores this language and therefore violates Rule 17 for the following reasons:

• The Order measures a delay of 11 months from the date of filing of the Plaintiff's Complaint, not from the date of the Defendant's objection. This time period needlessly and inexplicably inflates the time period defined in Rule 17(a), SCRCP.

• The Order ignores the Plaintiff's good faith effort to resolve the "real party in interest" issue and the Defendant's role in the alleged delay. See Ex. 4. The Defendant's role here implicates the doctrine of estoppel in that Defendant's e-mail representation that "These look fine" was material, was reasonably relied upon by Plaintiff, and was the basis for Plaintiff's change of position in having the appointment and ratification executed and filed with the Court. Accordingly, under these circumstances, Defendant should be estopped from securing a dismissal without any allowance to Plaintiff for a reasonable time to cure any defect that the Court declares to exist.

• The Order ignores the ratification applicable to this case filed July 11, 2011, nine days before the hearing that led to the Court's Order here. See Ex. 1.

• The Order ignores the following language from the "Notes" discussing Rule 17(a): "This Rule 17(a) is current Federal Rule 17(a). ... The last sentence of the rule is intended to prevent forfeiture in those cases in which the determination of the proper party to sue is difficult or when there has been an honest mistake." An example of the application of the Federal rule can be found in *R.F. v. M.M.*, 789 N.W.2d 723 (N.D. 2010). There, the Supreme Court of North Dakota addressed Federal Court interpretations of Rule 17, FRCP. After noting that North Dakota's rule is also derived from Fed.R.Civ.P. 17, the Court's opinion stated that

> Federal courts have said the rule should be liberally applied to allow joinder or substitution of the real party in interest when the change is merely formal and does not alter the complaint's factual allegations as to the events or participants. *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 20 (2d Cir.1997).

B. The Order Erroneously Ignores Plaintiff's Attempt to Resolve the Matter Prior to Any Objection Via Filing for Appointment Of a Guardian Ad Litem.

Moreover, well before Defendant's Motion to dismiss was filed, Plaintiff had filed a Motion to appoint a Guardian ad Litem—which, if acted upon, would have resolved the entire matter even *before* Defendant filed its Motion. Plaintiffs are to be allowed reasonable time even after defendants object to the identity of the party; here, Plaintiff had acted even before Defendants objected. There is thus no merit to any conclusion that Plaintiff unreasonably delayed.

IV. THE ORDER VIOATES BASIC PRINCIPLES OF CONSTRUCTION. IN SO DOING, IT ERRONEOUSLY REJECTS DR. DAVID BURTON'S CLAIM TO BE ENTITLED TO BRING THIS SUIT DIRECTLY PURSUANT TO THE DURABLE POWER OF ATTORNEY.

As discussed above, the cardinal rule of construction is to determine the drafter's intent. Ignoring these well-established principles, the Order employs an overly-technical

approach to defeat Marjorie Cato Burton's intent. The reading goes against the plain language of the documents. Such a highly technical reading is especially problematic here.

At the time of the preparation and signing of the Durable Power of Attorney, Ms. Burton was an elderly woman, attempting to ensure that her financial matters would be in the capable hands of her son were she to become less than competent.

The Durable Power of Attorney is concerned only with her finances; it concerns nothing else. The Order grasps upon the single word "trustee" and ignores other language. It assumes the Trust here is a standard Trust. It is not. It is a *revocable* trust. Mrs. Burton could, at any time, withdraw the property from the trust. The Trust itself states, "While both Grantors e alive, property transferred into this Trust .... shall retain its original character" unless gifted from one Grantor to the other. Paragraph 1(b) (entitled "Character of Property"). The trust provides no asset protection for claims against Mrs. Burton. NCGS § 36C-5-505 (no asset protection for a revocable trust); *Pilkington v. West*, 246 NC 575, 580, 99 SE2d 798, 802 (1957) (similar). The Trust provides no tax advantage. The tax status is succinctly explained on the IRS website, http://www.irs.gov/businesses/small/article/0,,id=106551,00.html (Ex. 5): "All 'revocable trusts' are by definition grantor trusts. . . . If a trust is a grantor trust, then the grantor is treated as the owner of the assets, the trust is disregarded as a separate tax entity, and all income is taxed to the grantor." Thus, Mrs. Burton even pays income taxes on the income the trust assets generate.

In short, there is no distinction, under either federal or North Carolina law, between the Trust and Mrs. Burton.

But, reasons the Order, "The face of the Power of Attorney document shows Marjorie Cato Burton as 'Principal.' It does not show Ms. Burton in her separate, fiduciary capacity as trustee of any trust." Order, pp. 3-4. With respect, the conclusion the Order draws is erroneous. It is true that the document did not say, "And as trustee for assets in a trust that I can revoke at any time." The Order employs an overly exacting reading of the Durable Power of Attorney. The DPOA sensibly lists the "Principal" and the "Attorney-in-Fact" not to distinguish Mrs. Burton's trust assets from her other assets, but to make clear that the DPOA was to allow Dr. David Burton to act as the agent for his mother in a principal/agent relationship.

The Order similarly observes that Mrs. Burton limited the powers granted in her Durable Power of Attorney to those trusts in which she is "entitled 'as a beneficiary, to a share or payment.'" Order, p. 3 (quoting the Durable Power of Attorney, ¶ 13(7)). The actual language from the DPOA, more fully, is, "My attorney-in-fact may act for me in *all matters that affect a trust*, probate estate, guardianship, conservatorship, escrow, custodianship or other fund which I am, may become, or claim to be entitled, as a beneficiary, to a share or payment." ¶ 13(7) (emphasis added). The Order concludes, "The Attorney-in-Fact's authority is limited to acting for Ms. Burton in her individual capacity as a beneficiary . . . ." This is error. The plain language states that the Attorney-in-Fact may act for her in any capacity as regards any trust to which she may be entitled as a beneficiary to a share or payment. Mrs. Burton is obviously a beneficiary. She receives income from the Trust. *See, e.g.*, ¶ 2(b). That she be a beneficiary is necessary, but once that minimal threshold is reached, the Attorney-in-Fact is entitled, by the plain language, to act for her "in all matters" that "affect" such trust. The current matter

clearly "affects" the Trust. Therefore, David Burton is authorized to act for his principal in this matter.

Therefore, David Burton is entitled to bring this action via the Durable Power of Attorney and the Trust documents as they stood at the time this suit was instituted. The Order errs in holding otherwise. The Order should be altered or amended accordingly.

V. THE ORDER'S CONCLUSION THAT DR. DAVID BURTON IS NOT A SUCCESSOR TRUSTEE RESTS ON MULTIPLE MISREADINGS OF THE RELEVANT DOCUMENTS.

As noted above, the Order drives an analytical wedge between Mrs. Burton's "separate, fiduciary capacity as trustee" and her other capacities. Only Trustees may bring suit, the Order reasons, e.g., p.7. The Order thus rejects David Burton's claim that the Durable Power of Attorney, itself, independently of any appointment as successor Trustee, authorizes him to bring suit. Having rested its rejection of Plaintiff's above claim on what the Order sees as an important distinction between Mrs. Burton's "separate, fiduciary capacity as trustee" and her other capacities, the Order then rejects Plaintiff's other claims by ignoring the differences between Mrs. Burton's separate capacity as trustee and her other capacities. With respect, the Order cannot have it both ways: either "Trustee" is a separate capacity, or it is not.

In this section, Plaintiff will accept, for the sake of argument, the proposition that "Trustee" is to have a special meaning separate and apart from Mrs. Burton "as Principal." Also in this section, bold will be used for emphasis added to the relevant documents by Plaintiff, to distinguish Plaintiff's emphasis from the italicized emphasis provided by Defendants.

A. The Relevant Trust Provisions

Paragraph 2(a) of the trust states, in its entirety (emphasis added):

> (a) Amend and Revoke. Either Grantor has power and right to revoke the Trust hereby created. So long as alive, **the Grantors may jointly amend or modify any provision of this Trust.** If one Grantor has deceased, the surviving Grantor alone may amend or modify any provision of this Trust. All amendments, notices or other documents and instruments affecting or furthering the purposes of this Declaration of Trust shall be in writing.

Paragraph 2(b) states, in its entirety (emphasis added):

> (b) Appointment of Trustee. The **Grantors** may at any time appoint, substitute or otherwise change the person designated to act as **Trustee or Successor Trustee** hereunder. No prior notice to, or consent of, any such Trustee, Successor Trustee or Beneficiary shall be required.

Paragraph 3(a) states, in pertinent part:

> Either **Trustee** may exercise all of the powers and rights accorded to a Trustee under this Declaration of Trust, **without the requirement of acting in unison.**

B. The Proper Analysis.

Several points are in order. First, **as Trustees,** there is no requirement to act in unison. Second, the Grantors, **as Grantors**, may substitute or appoint a Trustee. Third, while the Durable Power of Attorney may not authorize David Burton to act for his mother in her special capacity as a Trustee, there is no claim that it precludes David from acting for his mother in her role as a Grantor, nor would such a claim be credible. Fourth, the appointment of David Burton as Successor Trustee (Ex. 6) was signed by (1) Marvin Sloan Burton, in his role as **Grantor**; and (2) Marjorie Cato Burton, via her Attorney-in-Fact David Burton, in her role as **Grantor.**

Because the Grantors may jointly, and did, appoint a successor trustee, that successor trustee (David Burton) is entitled to prosecute this case.

C. Errors in the Order's Analysis.

(1) Errors in reading paragraph 2(b). The errors in the Order's analysis are perhaps seen most clearly in its discussion of ¶ 2(b). It is there that we begin.

The Order initially and properly recognizes that 2(b) applies to the Grantors *as* **grantors**. It then immediately and without explanation switches to a discussion of the role of **trustees**. The Order declares, p. 8 (bolding added by Plaintiff, italics are Defendants'):

> Article 2(b) of the Trust allows the *Grantors* (plural) to appoint, substitute or otherwise change designated Trustees/Successors Trustees. Id. Ms. Burton's undisputed mental incapacity/incompetence renders her unable to act as Co-**Trustee**. Since the Trust requires that both Co-**Trustees** act, and Ms. Burton cannot do so, David A. Burton cannot be appointed or substituted as Successor Co-Trustee under Article 2(b).

This is multiply erroneous. At the outset, this equation of the role of Trustee with other roles is directly contrary to the Order's reasons for holding that the Durable Power of Attorney, itself, did not authorize David Burton to bring this action. Second, her "undisputed mental incapacity" has no bearing on Dr. Burton's right to act for her in her role as Grantor; it is precisely because she foresaw possible mental incapacity that she issued the Durable Power of Attorney. Third, the appointment of David Burton was not signed by or for a "**trustee**;" it was signed by and for **Grantors**.

(2) Error in reading the appointment of successor trustee. Similarly, the Order simply misreads when it declares, "For these reasons, David A. Burton **lacked legal authority to act as Successor Co-Trustee** in executing the April 1, 2011 purported First

Amendment on Ms. Burton's behalf." Even a cursory glance at that document indicates that David Burton did *not* execute that Document as "Successor Co-Trustee;" he executed as Attorney-in-Fact for Mrs. Burton in her role as **Grantor**.

(3) Errors in Reading Paragraph 2(a). The Order's reading of ¶ 2(a) suffers from errors virtually identical to those in its analysis of 2(b). Here, too, the Order equates "Trustee" with other roles—eviscerating the very distinction on which the remainder of the Order rests.

The Order states, p. 7 (bolding is Plaintiff's; italics are Defendants'):

> Article 2(a) of the Trust allows the **Grantors** (Sloan Marvin Burton and Marjorie Cato Burton) to "*jointly* amend or modify" the Trust (emphasis added). Ms. Burton's undisputed mental incapacity/incompetence prevents her from acting as Co-**Trustee**; therefore, she and her husband cannot "*jointly*" amend or modify the Trust to allow David A. Burton's service as Successor Co-Trustee. If one Grantor has deceased, the surviving Grantor alone may amend or modify any provision of this Trust. Id. Sloan Marvin Burton's signature on the First Amendment to the Trust and on the Affirmation, Ratification and Consent does not substitute David A. Burton as a Successor Co-Trustee because, under the terms of the Trust, he cannot unilaterally amend or modify the Trust.

Here, too, the Order moves indiscriminately from "Grantor" to "Trustee." Assuming, for the sake of argument, that Mrs. Burton's "undisputed mental incapacity/incompetence prevents her from acting as co-**Trustee**," that is simply irrelevant, as she did not act as trustee in signing the appointment. The Order's analysis is completely undermined by the fact that the **Grantors** did "jointly" act to appoint Dr. David Burton as Successor Trustee, and did so as **Grantors**.

Because the Grantors appointed Dr. David Burton as successor Trustee, he is successor trustee, and is a proper party to bring this case. The Order should be altered to reflect this and to Deny the Motion to Dismiss.

VI. THE ORDER'S ALTERNATE GROUNDS FOR HOLDING THAT DR. DAVID BURTON IS NOT A TRUSTEE RESTS ON MISREADING OF OTHER PROVISIONS OF THE TRUST AND THE LAW.

A. The Relevant Provisions.

Section 3 of the Trust, entitled "Appointment of Trustee," provides in ¶ (a),

> Sloan Marvin Burton and Marjorie Cato Burton (each also referred to as an "initial Trustee") shall each be a Trustee of this Trust and each subtrust of this Trust (if any), with all of the rights, privileges and responsibilities set forth herein. Either Trustee may exercise all of the powers and rights accorded to a Trustee under this Declaration of Trust, without the requirement of acting in unison. In the event of a physical of mental incapacity or death of one of the Trustees, the survivor Trustee shall continue as the sole Trustee with full authority to exercise all of the powers and rights accorded to a Trustee under this Declaration of Trust.

It similarly provides, in ¶ (b)

> If at any time both Sloan Marvin Burton and Marjorie Cato Burton cannot serve due to death, disability or incapacity, David Alan Burton shall be the successor Trustee. If such designee is unable or unwilling to serve for any reason, Sharon Harris Burton shall be the successor Trustee. The successor Trustee shall assume the active administration of this Trust in compliance with those provisions set forth herein.

Additionally, Section 2 (discussed previously) with its procedure for appointing, changing, and substituting a Trustee or Successor Trustee is relevant.

B. The Proper Analysis.

Section 2 provides a means for the Grantors to change trustees. Section 3(a), in its final sentence, reiterates what is implicit in its penultimate sentence. The penultimate sentence states that either Trustee may act for both; the final sentence states that in the event of an incapacity or death of one Trustee, the survivor Trustee may act for both. Paragraph 3(b) provides for the automatic designation of David Burton as successor Trustee in the event that each of the "initial Trustees" become unable to serve. Paragraph

2 provides additional means for a successor Trustee to be appointed and for an initial Trustee to be replaced.

C. The Order's Erroneous Analysis.

The Order misreads a *sufficient* condition as a *necessary* requirement. Under ¶ 3(b), it suffices to make Dr. Burton a successor Trustee if both Marjorie Cato and Sloan Marvin Burton become incapacitated. This is, obviously, not the only way for Dr. Burton to become a successor Trustee, or a replacement Trustee; ¶ 2 is the preferred means to accomplish that goal. The Order inexplicably reads ¶ 3(b) as establishing that both Sloan Marvin and Marjorie Cato Burton must be incapacitated before David Burton may become a Trustee. The Order reads the trust as if Marjorie Cato and Sloan Marvin Burton intended to preclude themselves from appointing the person they prefer to serve as their replacement (David) from becoming a replacement unless they were both incapacitated, while retaining the power to appoint anyone else they wish as a replacement while they are not incapacitated. That reading is clearly erroneous.

The Order states, p. 6 (emphasis added): "The Trust document is specific as to Trustee appointments and amendments. It provides *the only instance* in which David A. Burton is to be a Successor Co-Trustee in ¶ 3(b)." That is simply wrong. Paragraph 3(b) does not provide "the only instance" via which David Burton may become successor Trustee; it provides that David is to automatically become a successor Trustee under certain conditions.

Similarly, the Order states, p. 8,

> Further, Article 3(b) allows David A. Burton to serve as Successor Co-Trustee only if *both* Sloan Marvin Burton and Marjorie Cato Burton cannot serve due to death, disability or incapacity. Article 3(a) of the Trust states in pertinent part: "In the

> event of a physical o[r] mental incapacity or death of one of the Trustees, the survivor Trustee shall continue as the sole Trustee with full authority to exercise all of the powers and rights accorded to a Trustee under this Declaration of Trust." Article 3(a) allows Sloan Marvin Burton to continue serving as sole Trustee, but it does not allow David A. Burton to serve as Successor Co-Trustee.

Paragraph 3(a) is not as the Order would have it. Paragraph 3(a) is not a ban on successor trustees being appointed until both Marjorie Cato and Sloan Marvin Burton are dead or incapacitated; it is not a ban on appointing a successor Trustee until both Trustees are incapable of appointing a successor. Its plain language is opposite to the Order's reading. Moreover, since the Trustees are Grantors, the import of the Order's reading would be that no successor Trustee could be appointed until both Grantors are dead/incompetent. Who, then, would remain to appoint the successor? The Order's reading further leads to the illogical result discussed above.

Similarly, ¶ 3(b) says that David's appointment as successor Trustee is *automatic* if each of his parents is incapable of serving as Trustee. Both parents being incapable of serving is a sufficient requirement, not a necessary requirement, for David's appointment as Trustee. The Order errs in reading 3(a) and 3(b) as banning the appointment of a successor until both Trustees/Grantors are incapable of appointing a successor.

D. The Order's Remaining Grounds Are Erroneous and Irrelevant.

Similarly, to the extent, if any, that the Order may intend to imply that North Carolina law bars David's appointment, the Order errs. The Order states, e.g., heading 4, p. 6, "Pursuant to North Carolina law and the plain language of the Trust, David A. Burton is not a Successor Co-Trustee." The Order quotes North Carolina statutory law: "'If one or more co-trustees remain in office, a vacancy in trusteeship need not be filled. A vacancy in trusteeship must be filled if the trust has no remaining trustee.'" Order, p. 6

(quoting N.C. Gen. Stat. Section 36C-7-704(b)). If this is intended to mean that North Carolina bars David's appointment, the Order again errs. (1) David's appointment was not based on there being no other trustee in office. (2) The statute does *not* state that a vacancy cannot be filled as long as one Trustee remains in office; it states only that there is no requirement that a vacancy be filled. Plaintiff has never maintained that there was a *requirement* that he or any other successor trustee be appointed, only that the Trust's terms *allowed* him to become a successor Trustee—completely consistent with the statute. (3) Even if the statute did prohibit an appointment to a vacancy when there remains a trustee—the statute contains no such prohibition, but if it did—the language of the Trust would trump, and the Trust here specifically allows for appointment of a successor trustee to fill a vacancy. N.C. Gen. Stat. § 36C-1-105(b) (2011) ("The terms of a trust prevail over any provision of this Chapter" with certain enumerated exceptions, none of which are relevant here); Trust ¶¶ 2(a), 2(b), 3(a), 3(b) (allowing for filling of vacancies and even for substitution of trustees).

Finally, the Order relies, under its heading 3 on pp. 5-6, on three authorities (one unpublished District of Washington case, one North Carolina statue, and one Am. Jur. section) which stand, in vague and general terms, for the proposition that a principal may delegate some of her powers to an agent without delegating all her powers. That proposition is neither disputed nor relevant. None of these authorities support the rather remarkable conclusion stated in that heading, i.e., that the law of principle and agency does not allow one to delegate trust duties. Under the Order's reading, a trustee of a revocable trust may not delegate her trust duties; a sole remaining capable trustee may not appoint a successor for an incapacitated trustee; a sole remaining capable trustee, who

is also a Grantor, may not combine with the Attorney-in-Fact for the other grantor/trustee to appoint a successor: rather, the Order in effect holds the Trust should be read as ensuring that it will almost certainly be, at some point, in the sole hands of an incapacitated person, because the surviving capable trustee cannot appoint a successor, and the Section 3 ascension of David Burton to become substitute Trustee can only occur after the last remaining Trustee has become incapacitated. Such an absurd reading should be avoided. Moreover, since David Burton was appointed in accord with the terms of the trust, the Order's reliance on non-delegation fails.

VII. IN THE ALTERNATIVE, DR. BURTON IS ENTITLED TO PROSECUTE THIS SUIT AS RESIDUAL BENEFICIARY.

The Trust provides no protection for Mrs. Burton, neither against creditors nor against taxes. The residual beneficiary of the trust is Dr. David Burton. He is not simply *a* residual beneficiary; he is the only residual beneficiary. There are two other beneficiaries, who each are to receive specific bequests. These are two other offspring of the Grantor. They are provided five dollars ($5.00) each. The remainder goes to Dr. Burton.

Under the plain meaning of the term, "real party in interest," Dr. Burton clearly qualifies.

Nor is there anything in Rule 17, SCRCP, that prohibits a residual beneficiary from representing a trust in litigation.[2] In Taylor v. Maile, 142 Idaho 253, 258 127 P.3d

[2] Rule 17, SCRCP, raises questions related to the issue of standing. As noted by the SC Court of Appeals, there are three elements to "standing": (1) the plaintiff must have suffered an injury-in-fact that is concrete and particularized, and actual and imminent as opposed to hypothetical; (2) the defendant's conduct complained of must be causally connected to the injury; and (3) it must be likely that the injury will be redressed by a favorable decision. *Michael P. v. Greenville County Dept. of Social Services*, 684 S.E.2d 211 (S.C. Ct. App. 2009). While admittedly not directly on point, nevertheless, the issues noted here apply to the partition action and the third party complaint --- the New Trust has been injured; there is a causal

156, 161 (2005), the Supreme Court of Idaho dealt with the issue of whether Rule 17(a), IRCP, constituted a basis for dismissal of residual beneficiaries' claims against third party purchasers of real property previously belonging to a trust:

> Rule 17(a) actually supports the Taylors' case. The first sentence of the rule states that every action shall be prosecuted in the name of the real party in interest. The second sentence provides authorization for certain fiduciaries to sue on behalf of beneficially interested parties without having to join those parties. This Court has said that, "A real party in interest 'is the person who will be entitled to the benefits of the action if successful, one who is actually and substantially interested in the subject matter.' " *Christensen Family Trust v. Christensen*, 133 Idaho 866, 870, 993 P.2d 1197, 1201 (1999) (contingent beneficiaries, having a mere expectancy, were held not to be real parties in interest because the terms of the trust allowed for its exhaustion before they might receive anything from it.) Here, one set of beneficiaries, the income beneficiaries, will receive only income during their lifetimes, leaving the corpus for the residual beneficiaries. The residual beneficiaries, not the trustees, will suffer the loss, if they prove up their claim that the property was worth $800,000 more than the Mailes paid for it. It is obvious that the residual beneficiaries are substantially interested in the subject matter and the persons entitled to the benefits of the action, if successful.

As explained in *Powell ex rel. Kelley v. Bank of Am.*, 379 S.C. 437,444, 665 S.E.2d 237, 240 (Ct. App. 2008).

> Standing refers to a "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." *Black's Law Dictionary* 1413 (7th ed. 1999). "Standing is . . . that concept of justiciability that is concerned with whether a particular person may raise legal arguments or claims." 1A C.J.S. Actions § 101 (2005). It concerns an individual's "sufficient interest in the outcome of the litigation to warrant consideration of [the person's] position by a court." *Id.*

Here, Dr. Burton certainly has a sufficient interest to have standing, in the event that the Trustee, his Mother, is unable to prosecute the suit. Nor is Plaintiff aware of

---

connection alleged between the conduct of Petitioners and the Third Party Defendant, and it is likely that the injury will be redressed by a favorable decision.

anything under North Carolina law that would preclude a residual beneficiary from bringing suit, especially where the "undisputed mental incapacity/incompetence" of the Trustee prevents her from bringing suit, and her Durable Power of Attorney does not allow her chosen Attorney-in-Fact to bring suit (as we assume to be the case under the Court's other holdings).

VIII. THE ORDER'S CONCLUSION THAT PLAINTIFF LACKS STANDING TO SUE ON BEHALF OF THE T.E. CATO ESTATE, LLC RESTS ON ITS ANALYSIS DESCRIBED ABOVE AND FAILS FOR SIMILAR REASONS.

The Order similarly reasons that "the LLC formation document, is signed by Mrs. Burton 'as Trustee'—not in her individual capacity," and that therefore, "David A. Burton has no authority to bring this lawsuit on behalf of the T.E. Cato Estate, LLC, and therefore, he is not a real party in interest under Rule 17." This argument fails for reasons similar to those above. David Burton is a real party in interest, as Attorney-in-Fact. Moreover, this reasoning fails to deny that Sloan Marvin Burton is a real party in interest; fails to deny that Marjorie Cato Burton is a real party in interest, and similarly fails for all the reasons the Order's other reasoning fails as discussed under prior headings.

IX. AS TO ALL THE ABOVE

Somebody has to be able to sue in Mrs. Burton's name. If it is not Mrs. Burton via Guardian ad Litem, it is Dr. David Burton as Attorney-in-Fact. If it is not Mrs. Burton nor Dr. David Burton as Attorney-in-Fact, it is Sloan Marvin Burton as co-Trustee or Dr. David Burton as successor Trustee. If it is none of the above, it is Dr. David Burton as residual beneficiary. Fundamental fairness, and the basics of due

process, require as much. *Fuentes v. Shevin*, 407 U.S. 67, 80(1972) (quoting *Baldwin v. Hale*, 1 Wall. 223, 233 (emphasis added) ("For more than a century the central meaning of procedural due process has been clear: '*Parties whose rights are to be affected are entitled to be heard;* and in order that they may enjoy that right they must first be notified.'")

Moreover, it would offend basic fairness were the Court to hold Mrs. Burton precluded from suing Defendants, given that Defendants are suing her in a related case, Case No. 2008-CP-46-3171

Conclusion.

For the foregoing reasons, Plaintiff requests the Court alter, amend, and/or reconsider, and grant relief, in the following order of preference:

(A) Appoint David Burton Guardian ad Litem for Mrs. Burton, and allow him to continue the present suit in her name;

(B) Declare that Mrs. Burton did indeed authorize David Burton, via the Durable Power of Attorney, to act for her in all matters affecting the Trust;

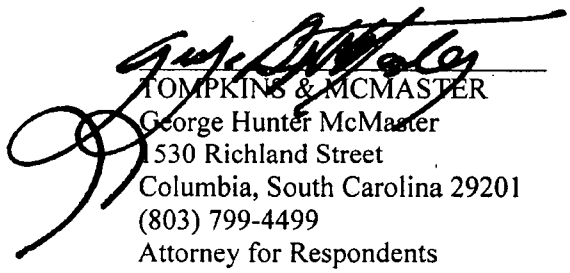
(C) Accept the appointment, by the Grantors, i.e., Sloan Marvin Burton i*n proper per,* and Marjorie Cato Burton via her Attorney-in-Fact, of David Burton as successor trustee, and allow him to continue the present suit as trustee;

(D) Accept Mr. Sloan Marvin Burton's Ratification of Mr. David Burton's prosecution of the suit, and allow Mr. Sloan Marvin Burton to continue the case;

(E) Appoint a Guardian, other than David Burton, for Mrs. Burton.

In a distinctly less favored alternative, the Court should amend the Order to make the dismissal without prejudice. Any delay that could be attributed to Plaintiff is not sufficiently egregious to justify a dismissal with prejudice.

Respectfully submitted,



TOMPKINS & MCMASTER
George Hunter McMaster
1530 Richland Street
Columbia, South Carolina 29201
(803) 799-4499
Attorney for Respondents

September 8, 2011
Columbia, South Carolina

EXHIBIT 1

Prepared by: Law Office of Joe T. Millsaps, 428 East Fourth Street, Suite 404 Charlotte, NC 28202

STATE OF NORTH CAROLINA
COUNTY OF Wake

AFFIRMATION, RATIFICATION AND CONSENT

Sloan Marvin Burton, Co-Trustee of the Sloan Marvin Burton and Marjorie Cato Burton AB Living Trust dated January 19, 2007 (hereinafter, the "Trust"), does hereby acknowledge, affirm, ratify and consent to the actions taken on behalf of the Trust and its Trustees Marjorie Cato Burton and Sloan Marvin Burton by David Alan Burton in the defense and prosecution of Cato *et al.* v. Burton as Trustee, Case No. 2008-CP-46-3171 and Burton as Trustee v. Pitts *et al.*, Case No. 2010-CP-46-2267 prior to his formal appointment as Successor Trustee by Marjorie Cato Burton.

IN WITNESS WHEREOF, Sloan Marvin Burton, Co-Trustee has executed this Affirmation by setting his hand and seal this the 1st day of April, 2011.

Sloan Marvin Burton (SEAL)
Sloan Marvin Burton, Co-Trustee

STATE OF NORTH CAROLINA
COUNTY OF Wake

I, the undersigned Notary Public of the County or City of Wake and State aforesaid, certify that **Sloan Marvin Burton** personally appeared before me this day and acknowledged the due execution of the foregoing instrument for the purposes therein expressed. Witness my hand and Notarial stamp or seal this 1st day of April, 2011.

(Affix Seal)

TIMOTHY JOHNSON NOTARY PUBLIC WAKE COUNTY, NC

Timothy Johnson
Timothy Johnson Notary Public
Notary's Printed or Typed Name
My Commission Expires: June 15, 2012

EXHIBIT 2

DECLARATION OF TRUST

The Sloan Marvin Burton and Marjorie Cato Burton AB Living Trust (the "Trust")

This DECLARATION OF TRUST is made and executed on the date below by and between the herein named Grantors and Trustees:

WITNESSETH:

1. TRUST PROPERTY

(a) Funding of Trust. The Grantors declare that they have set aside and caused the transfer of all of their rights, title and interest in and to the property described in Annex A, Annex B and Annex C to the Trust for the use, benefit and enjoyment of the Beneficiaries named herein. The Grantors, at any time hereafter, may transfer to the Trust any other real or personal property. This Trust may also receive property from any other source, including pursuant to either of the Grantor's Last Will and Testament.

(b) Character of Property. While both Grantors are alive, property transferred into this Trust, including any income that it generates, shall retain its original character (unless gifted from one Grantor to the other Grantor). The joint property contributed to this Trust is set forth in Annex A. The separate property of Sloan Marvin Burton contributed to this Trust is set forth in Annex B. The separate property of Marjorie Cato Burton contributed to this Trust is set forth in Annex C. Each annex may be amended and revised from time to time to reflect the contribution of additional property or the re-allocation or distribution of property. If this Trust is revoked, the Trustees shall distribute the Trust property to the Grantors based on the same ownership rights they had before the property was transferred to the Trust.

2. AUTHORITY, POWER and RIGHTS OF GRANTORS

(a) Amend and Revoke. Either Grantor has the authority, power and right to revoke the Trust hereby created. So long as both Grantors are alive, the Grantors may jointly amend or modify any provision of this Trust. If one

Grantor has deceased, the surviving Grantor alone may amend or modify any provision of this Trust. All amendments, notices or other documents and instruments affecting or furthering the purposes of this Declaration of Trust shall be in writing.

(b) Appointment of Trustee. The Grantors may at any time appoint, substitute or otherwise change the person designated to act as Trustee or Successor Trustee hereunder. No prior notice to, or consent of, any such Trustee, Successor Trustee or Beneficiary shall be required.

(c) Right to Income. The Grantors, during their lifetime, shall be exclusively entitled to all income accruing from, the Trust's property set forth in Annex A. During such Grantor's lifetime, Sloan Marvin Burton shall be exclusively entitled to all income accruing from the Trust's property set forth in Annex B. During such Grantor's lifetime, Marjorie Cato Burton shall be exclusively entitled to all income accruing from the Trust's property set forth in Annex C. No Beneficiary named herein shall have any claim upon such trust income or profits.

(d) Homestead. The Grantors reserve the right to reside in any real property conveyed or transferred to this Trust rent-free and without charge (except for taxes, insurance, maintenance and other related expenses) during each of their lifetimes, it being the intent of this provision to preserve the requisite beneficial interest and possessory right of each Grantor in and to such real property in accordance with the applicable provisions of state Homestead or similar laws.

3. APPOINTMENT OF TRUSTEE

(a) Sloan Marvin Burton and Marjorie Cato Burton (each also referred to as an "initial Trustee") shall each be a Trustee of this Trust and each subtrust of this Trust (if any), with all of the rights, privileges and responsibilities set forth herein. Either Trustee may exercise all of the powers and rights accorded to a Trustee under this Declaration of Trust, without the requirement of acting in unison. In the event of a physical of mental incapacity or death of one of the Trustees, the survivor Trustee shall continue as the sole Trustee with full authority to exercise all of the powers and rights accorded to a Trustee under this Declaration of Trust.

(b) If at any time both Sloan Marvin Burton and Marjorie Cato Burton cannot serve due to death, disability or incapacity, David Alan Burton shall be the successor Trustee. If such designee is unable or unwilling to serve for any reason, Sharon Harris Burton shall be the successor Trustee. The successor Trustee shall assume the active administration of this Trust in compliance with those provisions set forth herein.

(c) The successor Trustee's authority and power may be subsequently terminated by any Grantor without the consent of, or prior notice to, the successor Trustee if any initial Trustee has sufficiently recovered from any medical or mental impairment which prevented the initial Trustee from being able to fully and competently administer this Trust.

(d) As used in this Declaration of Trust, the singular term "Trustee" shall also include the plural. In addition, the terms "disability" and "incapacity" shall refer to a physical or mental inability to properly manage his or her own financial affairs, as established by the written opinion of two licensed doctors.

(e) Any health care provider shall be authorized to disclose to the "successor Trustee" any pertinent individually identifiable health information sufficient to determine whether the Trustee is physically or mentally capable of managing his or her own financial affairs. This release authority applies to any information governed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) or similar state laws, and each successor Trustee shall constitute a Trustee's "Personal Representative" as defined by HIPAA.

4. POWERS AND DUTIES OF TRUSTEE

(a) General Powers and Duties. The Trustee under this Declaration of Trust shall have all of the powers deemed necessary and appropriate to administer this Trust, including all powers granted under North Carolina law, to the maximum extent of the law, subject to the fiduciary duties to the Grantors and Beneficiaries and any restrictions or limits set forth under North Carolina law. The Trustee may exercise all powers without the approval or supervision of any court, the Grantor or any Beneficiary.

(b) Specific Powers. In furtherance of subsection (a) above, the powers of the Trustee include, but are not limited to, the powers to:

1. Collect, hold, manage and administer assets of the Trust as if the Trustee was the absolute owner of it;

2. Sell, trade, deal, encumber, mortgage, pledge, option, lease, lend or improve the assets of the Trust;

3. Invest, reinvest and make purchases with the profits and principal of the Trust in every kind of property, asset and investment;

4. Borrow money and purchase insurance;

5. Employ and pay reasonable fees to counsel, accountants, financial advisors and any other professional deemed necessary or advisable for the proper administration of the Trust;

6. Enter into contracts and otherwise sign and execute any instrument on behalf of the Trust;

7. Establish bank, brokerage and other financial and non-financial accounts for and on behalf of the Trust and to sign any and all documents on the Trust's behalf in relation thereto, including any resolutions, certification or certificate required for such account;

8. Distribute or divide the assets of the Trust in accordance with this Declaration of Trust (subject to any restrictions or limits set forth under North Carolina law), and to execute any documents necessary to administer any trust or subtrust created by this Declaration of Trust;

9. Receive additional property into the Trust.

10. Continue, operate, expand, manage and sell any business of the Grantor that is part of the Trust.

11. Commence, defend, arbitrate and settle legal claims or actions concerning the Trust or the assets and property in the Trust.

12. Exercise voting rights, give proxies and enter into voting agreements with respect to stock and other business ownership interests held by the Trust.

13. Prepare tax returns and take any necessary or desirable actions with governmental agencies.

14. Purchase and modify insurance.

15. Pay or disburse such sums from the assets of the Trust as may be required, necessary or desirable to maintain the comfort and welfare of the Grantor in the event the Grantor is unable to actively and competently exercise judgment over financial matters by reason of a medical illness or mental impairment.

16. Upon the death of the Grantor, to pay any just debts and expenses of the Grantor.

(c) Compensation. The Trustee may receive reasonable compensation for services under this Declaration of Trust.

(d) Payments to Grantors. The Trustee shall be fully authorized to pay over or disburse to the Grantors from time to time any amounts requested by the Grantors from the income or principal of the Trust.

(e) Resignation. Any Trustee may resign by providing 30 day's written notice to the Beneficiaries.

5. DEATH OF A GRANTOR

(a) Definitions. For the purposes of this Declaration of Trust, the following definitions apply:

"Property of Sloan Marvin Burton" means (i) the Trust property owned by Sloan Marvin Burton at the time it was contributed to the Trust, (ii) all property transferred by Marjorie Cato Burton to Sloan Marvin Burton, either by gift or through the provisions of this Declaration of Trust, and (iii) all accumulated income and profits on the foregoing property. The Property of Sloan Marvin Burton includes the property listed on Annex B, as well as Sloan Marvin Burton's share of the Trust property listed on Annex A.

"Property of Marjorie Cato Burton" means (i) the Trust property owned by Marjorie Cato Burton at the time it was contributed to the Trust, (ii) all property transferred by Sloan Marvin Burton to Marjorie Cato Burton, either by gift or through the provisions of this Declaration of Trust, and (iii) all accumulated income and profits on the foregoing property. The Property of Marjorie Cato Burton includes the property listed on Annex C, as well as Marjorie Cato Burton's share of the Trust property listed on Annex A.

"Property of the deceased Grantor" shall mean either "Property of Sloan Marvin Burton" or "Property of Marjorie Cato Burton" depending on which Grantor is the first to decease.

(b) Death of the First Grantor. Upon the death of the first of the Grantors, the surviving Grantor shall divide this Trust into two separate and distinct trusts. The Trustee shall be the trustee for all of the separate trusts created hereby.

The designation of each trust shall be as follows: (i) Trust A shall be a revocable trust, and (ii) Trust B shall be an irrevocable trust, also known as a "Credit Shelter Trust." For purposes of this Declaration of Trust, the term "Trust" shall include Trust A and Trust B.

The Trustee shall not be required to physically segregate the property placed into Trust A and Trust B.

1. Trust A Allocation. Trust A shall be allocated the Property of the surviving Grantor, plus any Property of the deceased Grantor transferred to the surviving Grantor in any specific bequest pursuant to Section 6(a)(1) or 6(b)(1), as the case may be. Trust A shall thereafter be continued as a revocable living trust incorporating all of the applicable authorities, powers, rights and provisions set forth in this Declaration of Trust.

2. Trust B Allocation. Trust B shall be allocated the Property of the deceased Grantor, including any property that may be subject to the applicable provisions of the deceased Grantor's Last Will and Testament, if any, or otherwise subject to an estate management proceeding, less any Property of the deceased Grantor transferred in any specific bequest pursuant to Section 6(a)(1) or 6(b)(1), as the case may be.

Trust B shall thereafter be continued as an irrevocable trust, specifically, terminating those authorities, powers, rights and provisions granted to the Grantors to amend, modify or revoke any beneficiary designation and Trust property contribution or distribution.

The surviving Grantor shall retain a life estate in the property in Trust B. The Trustee may pay to or spend for the surviving Grantor all or a portion of the income produced by the property included in Trust B. The Trustee may also pay to or spend for the surviving Grantor such sums from the principal of Trust B any amount necessary for the support and maintenance of the surviving Grantor's accustomed manner of living, including those amounts necessary to pay his or her medical expense.

The surviving Grantor may withdraw annually from the principal of Trust B an amount not exceeding $5,000 or 5 percent of the principal value of the Trust Corpus, whichever is greater, without regards to any other sums withdrawn for the support and maintenance of Grantor's accustomed manner of living. All sums withdrawn under this provision shall be on a non-cumulative basis.

(c) Death of the Second Grantor. Upon the death of the second of the Grantors, the property in Trust A and Trust B shall be distributed as set forth in Section 6 below.

(d) Simultaneous Death of Grantors. In the event both Grantors die in, or as a result of, a common accident or disaster, or under such circumstances that the order of their deaths cannot be established by proof, then it shall be conclusively presumed that both died simultaneously, and neither shall be presumed to have survived the other for purposes of this Declaration of Trust.

6. BENEFICIARIES

(a) Beneficiaries of Sloan Marvin Burton. Subject to the creation of any children's subtrusts, upon the death of Sloan Marvin Burton, the Trustee shall distribute the Property of Sloan Marvin Burton to the Beneficiaries named below, at the time and in the manner provided below, after the payment of any just debts and funeral expenses:

1. Specific Bequests

The following specific bequests shall be made upon the death of Sloan Marvin Burton, regardless of whether Sloan Marvin Burton is the first or second of the Grantors to pass away.

Sloan Marvin Burton Junior, the Grantor's son, shall be given the specific sum of $5.00 (five dollars) to be the total amount he receives from the Grantor's estate.

Philip Douglas Burton, the Grantor's son, shall be given the specific sum of $5.00 (five dollars) to be the total amount he receives from the Grantor's estate.

2. Residual Property After Specific Bequests.

i. If Sloan Marvin Burton is the first of the Grantors to decease, then all residual Property of Sloan Marvin Burton shall be distributed to Trust B. Upon the death of Marjorie Cato Burton, all of the property in Trust B shall be distributed to the Beneficiaries set forth in subsection (iii) below in the percentage set forth below.

ii. If Sloan Marvin Burton is the second of the Grantors to decease, the Beneficiaries set forth in subsection (iii) below shall receive, in the percentage set forth below, all residuary Property of Sloan Marvin Burton.

iii. Name: David Alan Burton
Relation: Son
Percentage: 100%

In case such Beneficiary does not survive the Grantor, then that share of the Trust Property which would have been given to such Beneficiary shall be distributed to: Sharon Harris Burton.

(b) Beneficiaries of Marjorie Cato Burton. Subject to the creation of any children's subtrusts, upon the death of Marjorie Cato Burton, the Trustee shall distribute the Property of Marjorie Cato Burton to the Beneficiaries named below, at the time and in the manner provided below, after the payment of any just debts and funeral expenses:

1. Specific Bequests

The following specific bequests shall be made upon the death of Marjorie Cato Burton, regardless of whether Marjorie Cato Burton is the first or second of the Grantors to pass away.

Sloan Marvin Burton Junior, the Grantor's son, shall be given the specific sum of $5.00 (five dollars) to be the total amount he receives from the Grantor's estate.

Philip Douglas Burton, the Grantor's son, shall be given the specific sum of $5.00 (five dollars) to be the total amount he receives from the Grantor's estate.

2. Residual Property After Specific Bequests.

i. If Marjorie Cato Burton is the first of the Grantors to decease, then all residual Property of Marjorie Cato Burton shall be distributed to Trust B. Upon the death of Sloan Marvin Burton, all of the property in Trust B shall be distributed to the Beneficiaries set forth in subsection (iii) below in the percentage set forth below.

ii. If Marjorie Cato Burton is the second of the Grantors to decease, the Beneficiaries set forth in subsection (iii) below shall receive, in the percentage set forth below, all residuary Property of Marjorie Cato Burton.

iii. Name: David Alan Burton
Relation: Son
Percentage: 100%

In case such Beneficiary does not survive the Grantor, then that share of the Trust Property which would have been given to such Beneficiary shall be distributed to: Sharon Harris Burton.

(c) Inalienability of Beneficiary's Interest. The interest of the Beneficiaries under this Trust shall be inalienable. Such Beneficiaries cannot assign, sell, pledge, encumber or otherwise transfer their inalienable interest in the assets of the Trust to a third party. Nor can such interest be attached,

garnished, levied upon or otherwise subjected to any proceedings whether at law or in equity.

(d) Beneficiaries' Proportionate Liability for Estate Taxes. Each Beneficiary hereunder shall be liable for their proportionate share of any estate taxes that may be levied upon the total value of the Trust and distributed to said Beneficiary.

(e) Revocation of Beneficiary. The Grantors reserve the right to revoke, at any time, the designation of a herein named Beneficiary, without prior notice to or the consent of any such Beneficiary. In addition, at any time, the Grantors may designate a new Beneficiary to replace a previously revoked Beneficiary or designate an additional Beneficiary. No prior notice to or the consent of any other Beneficiary is required.

7. SPECIAL DIRECTIVES CLAUSE

Notwithstanding any other provision of this Trust, including those express directives in section 6 above, the Grantors further direct that:

Sloan Marvin Burton Junior is to receive ONLY $5.00 (Five dollars) from the Grantors' estate.

Philip Douglas Burton is to receive ONLY $5.00 (Five dollars) from the Grantors' estate.

8. NON-LIABILITY OF THIRD PARTIES

(a) This Trust is created with the express interest and understanding that any third parties, including agents, employees or vendors, who, upon the written request of the Grantors, or under the color of authority granted to the Trustee in this Declaration of Trust, perform any duties or render any services in the furtherance of the purposes and intents of this Trust, absent any showing of fraud or bad faith, shall be under no liability for the proper administration of any assets or properties being the subject of the said third party's acts.

(b) This limitation of liability gives specific protection to any third party who acts, performs or renders any services pursuant to any notice, instrument or document believed (and represented) to be genuine, and to have been signed and presented by the proper parties.

(c) It is further the express intent of this Trust that the non-liability of all third parties be given broad and prospective application. In particular, a depository, custodial agent or financial institution, or any other person or entity acting in a fiduciary capacity with regards to any assets or property of the Trust, shall suffer no liability, nor incur any express or implied obligations when acting in the capacity of a transferor, upon proper request, of any assets or property either sought to be, or constructively comprising the assets or properties of the Trust.

9. MISCELLANEOUS

(a) Bonds. The Trustee under this Declaration of Trust shall service without bond.

(b) Governing Law. This Declaration of Trust shall be construed and enforced in accordance with the laws of the state of North Carolina.

(c) Severability. If a court of competent jurisdiction shall at any time invalidate or find unenforceable any provisions of this Declaration of Trust, such invalidation shall not be construed as invalidating the whole of this Declaration of Trust. All of the remaining provisions shall be undisturbed as to their legal force and effect. If a court finds that an invalidated or unenforceable provision would become valid if it is limited, then such provision shall be deemed to be written, deemed, construed and enforced as so limited.

(d) Perpetuities Savings. Despite any other provision of this Declaration of Trust to the contrary, the Trust shall terminate no later than 21 years after the death of the last surviving Beneficiary who is living at the time of the death of the Grantors.

IN WITNESS WHEREOF, the Grantors have executed this Declaration of Trust on the date written below.

Signature of Sloan Marvin Burton, as Grantor

Date: January 19, 2007

Signature of Marjorie Cato Burton, as Grantor

Date: January 19, 2007

Signature of Sloan Marvin Burton, as Trustee
of The Sloan Marvin Burton and
Marjorie Cato Burton AB Living Trust

Date: JANUARY 19, 2007

Signature of Marjorie Cato Burton, as Trustee
of The Sloan Marvin Burton and
Marjorie Cato Burton AB Living Trust

Date: January 19, 2007

Annex A

Shared Trust Property

All of the Grantors' interest in the following property is transferred into the Trust:

The real property located at:

4300 Boxwood Road
Raleigh, North Carolina 27612
Type of Property: Home

The funds in the following bank accounts:

- Allied First Bank
  387 Shuman Boulevard, Suite 290E
  Naperville, Illinois 60563
  Type: Certificate of Deposit

- State Employees Credit Union
  2401 Blue Ridge Road
  Raleigh, North Carolina 27607
  Type: Share Account

The cash, funds and securities in the following brokerage accounts:

- AIM Investment Services, Inc.
  P.O. Box 4739
  Houston, Texas 77210-4739

- Scottrade
  6308 Falls of Neuse Road, #107
  Raleigh, North Carolina 27615

The following certificated stocks and/or bonds:

- 207 shares of stock issued by Mattel Corporation
  Certificate Numbers: NYS 127357, 239487, 121271, 153708, 215948, ZQ16783

- 34 certificates, $100.00 dollars each, of Series EE Savings Bonds issued by the United States Federal Government
  Certificate Numbers: C2251069EE, C3872531EE, C15808926EE, C22275578EE, C26268314EE, C34738298EE, C35061190EE, C44253023EE, C49586561EE, C56599863EE, C56921168EE, C48749279EE, C77139114EE, C64511888EE, C91841088EE, C105151678EE, C110565533EE, C130436605EE, C133912456EE, C141487517EE, C161505195EE, C159244452EE, C180183864EE, C196442163EE, C207643525EE, C226392558EE, C238217255EE, C255601447EE, C268144319EE, C290385423EE, C3040711432EE, C330944901EE, C366980639EE, C345530390EE

Annex B

Separate Property of Sloan Marvin Burton

All of Sloan Marvin Burton's interest in the following property is transferred into the Trust:

The funds in the following bank accounts:

- State Employees Credit Union
  2401 Blue Ridge Road
  Raleigh, North Carolina 27607
  Type: Share Account, Money Market
- Corus Bank
  2401 North Halsted Street
  Chicago, Illinois 60614
  Type: Certificate of Deposit

Needs to be on Annex A

- ING Direct
  1 South Orange Street
  Wilmington, Delaware 19801
  Type: Money Market

The cash, funds and securities in the following brokerage accounts:

- Smith Barney
  700 Spring Forest Road
  Raleigh, North Carolina 27609

? was part of

The following certificated stocks and/or bonds:

- 20 certificates, $500.00 dollars each, of Series E Savings Bonds issued by the United States Treasury Department
  Certificate Numbers: BD204552693, D204552694E, D204552695E, D204552696E, D204552697E, D204552698E, D204552699E, D204552700E, D204762320E, D204762321E, D204762322E, D204762323E, D204762324E, D204762326E, D204762327E, D204762328E, D204762329E, D204762330E, D204762331E, D204762333E

- 2431.3221 shares of Common Stock issued by Progress Energy
  Certificate Number: 3511973

- 6 certificates, $10,000.00 dollars each, of Series I Bonds issued by the United States Treasury Department
  Certificate Numbers: X001274363I, X001274364I, X001274365I, X001274366I, X001274367I, X001274368I

- 4 certificates, $100.00 dollars each, of Series E Savings Bonds issued by the United States Treasury Department
  Certificate Numbers: C2005152780E, C2064708795E, C2083281113E, C2098803312E

Annex C

Separate Property of Marjorie Cato Burton

All of Marjorie Cato Burton's interest in the following property lying, being and situate in Ebenezer Township, York County, South Carolina is transferred into the Trust:

The real property located at:

- 592-02-01-042
  Rock Hill, South Carolina 29732-9485
  Type of Property: Vacant Lot

- 592-02-01-043
  Rock Hill, South Carolina 29732-9485
  Type of Property: Vacant Lot

- 592-02-01-052
  Rock Hill, South Carolina 29732-9485
  Type of Property: Vacant Lot

- 592-02-01-059
  Rock Hill, South Carolina 29732-9485
  Type of Property: Vacant Lot

- 592-02-01-062
  Rock Hill, South Carolina 29732-9485
  Type of Property: Vacant Lot

- 592-02-01-089
  Rock Hill, South Carolina 29732-9485
  Type of Property: Vacant Lot

- 592-02-10-117
  Rock Hill, South Carolina 29732-9485
  Type of Property: Vacant Lot

- 592-02-01-124
  Rock Hill, South Carolina 29732-9485
  Type of Property: Vacant Lot

- 592-02-01-152
  Rock Hill, South Carolina 29732-9485
  Type of Property: Vacant Lot

- 592-02-01-153
  Rock Hill, South Carolina 29732-9485
  Type of Property: Vacant Lot

The funds in the following bank accounts:

- State Employees Credit Union
  2401 Blue Ridge Road
  Raleigh, North Carolina 27607
  Type: Share Account, Money Market

The cash, funds and securities in the following brokerage accounts:

- Smith Barney
  700 Spring Forest Road
  Raleigh, North Carolina 27609

The following additional property:

- 20% share of all those certain pieces, parcels or lots of land, lying, being and situate in Ebenezer Township, York County, South Carolina, being held jointly by Grantor herein and other heirs of T. E. Cato, and being more particularly described as Lots 42 (TMS# 592-02-01-001), 14 (TMS# 592-02-01-069), 13 (TMS# 592-02-01-070), 98 (TMS# 592-02-01-093), 175 (TMS# 592-02-01-112), and Areas A (TMS# 592-02-01-063), B (TMS# 592-02-01-064), C (TMS# 592-02-01-164), and D (TMS# 592-02-01-110) as shown on that certain plat of property entitled "Composite Plat Showing Subdivision Of T.E. Cato Est." , drawn by R. H. Marett, RLS on December 20, 1967, as revised July 15, 1968 and recorded in Plat Book 33 at page 192 in the Office of the Clerk of Court for York County, South Carolina.

ACKNOWLEDGMENT

State of North Carolina

County of Wake

On this 19th day of January, 2007 before me, RACHEL WILSON, personally appeared Sloan Marvin Burton and Marjorie Cato Burton, personally known to me (or proved to me on the basis of satisfactory evidence) to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same in their authorized capacities and that by their signatures on the instrument the persons executed the instrument.

WITNESS my hand and official seal.

Rachel Wilson RACHEL WILSON
Notary Public

My Commission Expires: March 25, 2009

ATTESTATION AND DECLARATION OF WITNESSES

In our presence the Grantors above named have declared or signified that this instrument is their Declaration of Trust and have signed and executed the instrument, and in the presence of the Grantors and each other we have hereunto subscribed our names on the date set forth under our signature.

1. Felicia J Stanley
(Signature of witness)

Date: 01/19/2007

Felicia J. Stanley
(Print Name)

2401 Blue Ridge Rd
(Address)

Raleigh NC 27607
(City, State, ZIP)

2. Brooklyn Parrish
(Signature of witness)

Date:

Brooklyn Parrish
(Print Name)

2401 Blvd Ridge Rd
(Address)

Raleigh NC 27607
(City, State, ZIP)

3. Candace L Bullock
(Signature of witness)

Date: 01-19-07

Candace L Bullock
(Print Name)

2401 Blue Ridge Rd
(Address)

Raleigh NC 27607
(City, State, ZIP)

EXHIBIT 3

DURABLE POWER OF ATTORNEY FOR FINANCIAL MANAGEMENT

WARNING TO PERSON EXECUTING THIS DOCUMENT

THIS IS AN IMPORTANT LEGAL DOCUMENT. IT CREATES A DURABLE POWER OF ATTORNEY. BEFORE EXECUTING THIS DOCUMENT, YOU SHOULD KNOW THESE IMPORTANT FACTS:

THIS DOCUMENT MAY PROVIDE THE PERSON YOU DESIGNATE AS YOUR ATTORNEY-IN-FACT WITH BROAD LEGAL POWERS, INCLUDING THE POWERS TO MANAGE, DISPOSE, SELL AND CONVEY YOUR REAL AND PERSONAL PROPERTY AND TO BORROW MONEY USING YOUR PROPERTY AS SECURITY FOR THE LOAN.

THESE POWERS WILL CONTINUE TO EXIST EVEN IF YOU BECOME DISABLED OR INCAPACITATED. THESE POWERS WILL EXIST UNTIL YOU REVOKE OR TERMINATE THIS POWER OF ATTORNEY. YOU HAVE THE RIGHT TO REVOKE OR TERMINATE THIS POWER OF ATTORNEY AT ANY TIME.

THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL OR OTHER HEALTH CARE DECISIONS FOR YOU.

IF THERE IS ANYTHING ABOUT THIS FORM THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU.

WAKE COUNTY, NC 3
LAURA M RIDDICK
REGISTER OF DEEDS
PRESENTED & RECORDED ON
03/12/2008 AT 08:36:02

BOOK:012997 PAGE:01592 - 01603

1. Principal and Attorney-in-Fact

PRINCIPAL

Marjorie Cato Burton
4300 Boxwood Road
Raleigh, North Carolina 27615

I, Marjorie Cato Burton, appoint the person named below as my attorney-in-fact to act for me in any lawful way with respect to the powers delegated in Part 4. below.

ATTORNEY-IN-FACT

David Alan Burton
412 Kaywoody Court
Raleigh, North Carolina 27615
Day phone: 919-834-8951
Evening phone: 919-870-5228

SUCCESSOR ATTORNEY-IN-FACT

I name the following person to act as my attorney-in-fact if the named attorney-in-fact dies, resigns, or is otherwise unable to serve.

Sharon Harris Burton
412 Kaywoody Court
Raleigh, North Carolina 27615
Day phone: 919-870-5228
Evening phone: 919-870-5228

2. Delegation of Authority

My attorney-in-fact may delegate, in writing, any authority granted under this durable power of attorney to a person he or she selects. Any such delegation shall state the period during which it is valid and specify the extent of the delegation.

3. Effective Date

This power of attorney is effective immediately, and shall continue in effect if I become incapacitated or disabled.

4. Powers of Attorney-in-Fact

I grant my attorney-in-fact power to act on my behalf in the following matters, as indicated by my initials next to each granted power.

///
////
////
////
////
////
////
////
////
////
////
////
////

INITIALS

X_____(1) Real estate transactions.

X_____(2) Tangible personal property transactions.

X_____(3) Stock and bond, commodity, option and other securities transactions.

X_____(4) Banking and other financial institution transactions.

X_____(5) Business operating transactions.

X_____(6) Insurance and annuity transactions.

X_____(7) Estate, trust, and other beneficiary transactions.

X_____(8) Living trust transactions.

X_____(9) Legal actions.

X_____(10) Personal and family care.

X_____(11) Government benefits.

X_____(12) Retirement plan transactions.

X_____(13) Tax matters.

X_____(14) Gift transactions.

These powers are defined in Part 13, below.

5. Waiver of Attorney-in-Fact's Duty to File and Render Accounts

I waive the requirement set out in North Carolina Gen. Stat. §32A-11, that my attorney-in-fact file this power of attorney with the clerk of the superior court and render inventories and accounts, after my incapacity or mental incompetence, to the clerk of the superior court.

6. Compensation and Reimbursement of Attorney-in-Fact

My attorney-in-fact shall not be compensated for services, but shall be entitled to reimbursement, from my assets, for reasonable expenses. Reasonable expenses include but are not limited to reasonable fees for information or advice from accountants, lawyers or investment experts relating to my attorney-in-fact's responsibilities under this power of attorney.

///

////

7. Personal Benefit to Attorney-in-Fact

My attorney-in-fact may not benefit personally from any transaction engaged in on my behalf.

8. Commingling by Attorney-in-Fact

My attorney-in-fact may not commingle any of my funds with any funds of his or hers.

9. Liability of Attorney-in-Fact

My attorney-in-fact shall not incur any liability to me, my estate, my heirs, successors or assigns for acting or refraining from acting under this document, except for willful misconduct or gross negligence. My attorney-in-fact is not required to make my assets produce income, increase the value of my estate, diversify my investments or enter into transactions authorized by this document, as long as my attorney-in-fact believes his or her actions are in my best interests or in the interests of my estate and of those interested in my estate. A successor attorney-in-fact shall not be liable for acts of a prior attorney-in-fact.

10. Nomination of Conservator or Guardian of Estate

If, in a court proceeding, it is ever resolved that I need a conservator, guardian or other person to supervise my estate, I nominate my attorney-in-fact to serve in that capacity. If my attorney-in-fact cannot serve, I nominate the successor attorney-in-fact named in Part 1, above, to serve.

11. Reliance on This Power of Attorney

Any third party who receives a copy of this document may rely on and act under it. Revocation of the power of attorney is not effective as to a third party until the third party has actual knowledge of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

12. Severability

If any provision of this document is ruled unenforceable, the remaining provisions shall stay in effect.

13. Definition of Powers Granted to Attorney-in-Fact

The powers granted in Part 4, above, authorize my attorney-in-fact to do the following:

(1) Real estate transactions.

My attorney-in-fact may act for me in any manner to deal with all or any part of any interest in real property that I own at the time of execution of this document or later

acquire, under such terms, conditions and covenants as my attorney-in-fact deems proper. My attorney-in-fact's powers include but are not limited to the power to:

(a) Accept as a gift or as security for a loan, reject, demand, buy, lease, receive or otherwise acquire ownership or possession of any estate or interest in real property.

(b) Sell, exchange, convey with or without covenants, quitclaim, release, surrender, mortgage, encumber, partition or consent to the partitioning of, grant options concerning, lease, sublet or otherwise dispose of any interest in real property.

(c) Maintain, repair, improve, insure, rent, lease, and pay or contest taxes or assessments on any estate or interest in real property I own or claim to own.

(d) Prosecute, defend, intervene in, submit to arbitration, settle and propose or accept a compromise with respect to any claim in favor of or against me based on or involving any real estate transaction.

(2) Tangible personal property transactions

My attorney-in-fact may act for me in any manner to deal with all or any part of any interest in personal property that I own at the time of execution of this document or later acquire, under such terms as my attorney-in-fact deems proper. My attorney-in-fact's powers include but are not limited to the power to lease, buy, exchange, accept as a gift or as security for a loan, acquire, possess, maintain, repair, improve, insure, rent, convey, mortgage, pledge, and pay or contest taxes and assessments on any tangible personal property.

(3) Stock and bond, commodity, option and other securities transactions

My attorney-in-fact may do any act which I can do through an agent, with respect to any interest in a bond, share, other instrument of similar character or commodity. My attorney-in-fact's powers include but are not limited to the power to:

(a) Accept as a gift or as security for a loan, reject, demand, buy, receive or otherwise acquire ownership or possession of any bond, share, instrument of similar character, commodity interest or any investment with respect thereto, together with the interest, dividends, proceeds or other distributions connected with it.

(b) Sell (including short sales), exchange, transfer, release, surrender, pledge, trade in or otherwise dispose of any bond, share, instrument of similar character or commodity interest.

(c) Demand, receive and obtain any money or other thing of value to which I am or may become or may claim to be entitled as the proceeds of any interest in a bond, share, other instrument of similar character or commodity interest.

(d) Agree and contract, in any manner, and with any broker or other person and on any terms, for the accomplishment of any purpose listed in this section.

(e) Execute, acknowledge, seal and deliver any instrument my attorney-in-fact thinks useful to accomplish a purpose listed in this section, or any report or certificate required by law or regulation.

(4) Banking and other financial institution transactions

My attorney-in-fact may do any act that I can do through an agent in connection with any banking transaction that might affect my financial or other interests. My attorney-in-fact's powers include but are not limited to the power to:

(a) Continue, modify and terminate any deposit account or other banking arrangement; or open either in the name of the agent alone or my name alone or in both our names jointly, a deposit account of any type in any financial institution; rent a safe deposit box or vault space, have access to a safe deposit box or vault to which I would have access, and make other contracts with the institution.

(b) Make, sign and deliver checks or drafts, and withdraw my funds or property from any financial institution by check, order or otherwise.

(c) Prepare financial statements concerning my assets and liabilities or income and expenses and deliver them to any financial institution, and receive statements, notices or other documents from any financial institution.

(d) Borrow money from a financial institution on terms my attorney-in-fact deems acceptable, give security out of my assets, and pay, renew or extend the time of payment of any note given by or on my behalf.

(5) Business operating transactions

My attorney-in-fact may do any act that I can do through an agent in connection with any business operated by me that my attorney-in-fact deems desirable. My attorney-in-fact's powers include but are not limited to the power to:

(a) Perform any duty and exercise any right, privilege or option which I have or claim to have under any contract of partnership; enforce the terms of any partnership agreement; and defend, submit to arbitration or settle any legal proceeding to

which I am a party because of membership in a partnership.

(b) Exercise in person or by proxy and enforce any right, privilege or option which I have as the holder of any bond, share or instrument of similar character and defend, submit to arbitration or settle a legal proceeding to which I am a party because of any such bond, share or instrument of similar character.

(c) With respect to a business owned solely by me, continue, modify, extend or terminate any contract on my behalf, demand and receive all money that is due or claimed by me and use such funds in the operation of the business, engage in banking transactions my attorney-in-fact deems desirable, determine the location of the operation, the nature of the business it undertakes, its name, methods of manufacturing, selling, marketing, financing, accounting, form of organization and insurance, and hiring and paying employees and independent contractors.

(d) Execute, acknowledge, seal and deliver any instrument of any kind that my attorney-in-fact thinks useful to accomplish any purpose listed in this section.

(e) Pay, compromise or contest business taxes or assessments.

(f) Demand and receive money or other things of value to which I am or claim to be entitled as the proceeds of any business operation, and conserve, invest, disburse or use anything so received for purposes listed in this section.

(6) Insurance and annuity transactions

My attorney-in-fact may do any act that I can do through an agent, in connection with any insurance or annuity policy, that my attorney-in-fact deems desirable. My attorney-in-fact's powers include but are not limited to the power to:

(a) Continue, pay the premium on, modify, rescind or terminate any annuity or policy of life, accident, health, disability or liability insurance procured by me or on my behalf before the execution of this power of attorney. My attorney-in-fact cannot name himself or herself as beneficiary of a renewal, extension or substitute for such a policy unless he or she was already the beneficiary before I signed the power of attorney.

(b) Procure new, different or additional contracts of health, disability, accident or liability insurance on my life, modify, rescind or terminate any such contract and designate the beneficiary of any such contract.

(c) Sell, assign, borrow on, pledge, or surrender and receive the cash surrender value of any policy.

(7) Estate, trust and other beneficiary transactions

My attorney-in-fact may act for me in all matters that affect a trust, probate estate, guardianship, conservatorship, escrow, custodianship or other fund from which I am, may become or claim to be entitled, as a beneficiary, to a share or payment. My attorney-in-fact's authority includes the power to disclaim any assets which I am, may become or claim to be entitled, as a beneficiary, to a share or payment.

(8) Living trust transactions

My attorney-in-fact may transfer ownership of any property over which he or she has authority under this document to the trustee of a revocable trust I have created as settlor. Such property may include real property, stocks, bonds, accounts with financial institutions, insurance policies or other property.

(9) Legal actions

My attorney-in-fact may act for me in all matters that affect claims in favor of or against me and proceedings in any court or administrative body. My attorney-in-fact's powers include but are not limited to the power to:

(a) Hire an attorney to assert any claim or defense before any court, administrative board or other tribunal.

(b) Submit to arbitration or mediation or settle any claim in favor of or against me or any litigation to which I am a party, pay any judgment or settlement and receive any money or other things of value paid in settlement.

(10) Personal and family care

My attorney-in-fact may do all acts necessary to maintain my customary standard of living, and that of my spouse and children and other persons customarily supported by or legally entitled to be supported by me. My attorney-in-fact's powers include but are not limited to the power to:

(a) Pay for medical, dental and surgical care, living quarters, usual vacations and travel expenses, shelter, clothing, food, appropriate education and other living costs.

(b) Continue arrangements with respect to automobiles or other means of transportation, charge accounts, discharge of any services or duties assumed by me to any parent, relative or friend, contributions or payments incidental to membership or affiliation in any church, club, society or other organization.

(11) Government benefits

My attorney-in-fact may act for me in all matters that affect my right to government benefits, including Social Security, Medicare, Medicaid, or other governmental programs, or civil or military service. My attorney-in-fact's powers include but are not limited to the power to:

(a) Prepare, execute, file, prosecute, defend, submit to arbitration or settle a claim on my behalf to benefits or assistance, financial or otherwise.

(b) Receive the proceeds of such a claim and conserve, invest, disburse or use them on my behalf.

(12) Retirement plan transactions

My attorney-in-fact may act for me in all matters that affect my retirement plans. My attorney-in-fact's powers include but are not limited to the power to select payment options under any retirement plan in which I participate, make contributions to those plans, exercise investment options, receive payment from a plan, roll over plan benefits into other retirement plans, designate beneficiaries under those plans and change existing beneficiary designations.

(13) Tax matters

My attorney-in-fact may act for me in all matters that affect my local, state and federal taxes. My attorney-in-fact's powers include but are not limited to the power to:

(a) Prepare, sign and file federal, state, local and foreign income, gift, payroll, Federal Insurance Contributions Act returns and other tax returns, claims for refunds, requests for extension of time, petitions, any power of attorney required by the Internal Revenue Service or other taxing authority, and other documents.

(b) Pay taxes due, collect refunds, post bonds, receive confidential information, exercise any election available to me and contest deficiencies determined by a taxing authority.

(14) Gift Transactions

My attorney-in-fact may make gifts and other transfers of my property without consideration or with less than full consideration, including forgiveness of debts owed to me and completion of charitable pledges that I have made. However, the recipients of such gifts shall be limited to Haley Marie Burton.

My attorney-in-fact shall not (i) appoint, assign or designate any of my assets,

interests or rights directly or indirectly to himself or herself, or his or her estate or creditors, or the creditors of his or her estate, (ii) disclaim assets to which I would otherwise be entitled if the effect of the disclaimer is to cause such assets to pass directly or indirectly to my attorney-in-fact or his or her estate, or (iii) use my assets to discharge any of his or her legal obligations, including any obligation of support owed to others, excluding me and those I am legally obligated to support.

I understand the importance of the powers I delegate to my attorney-in-fact in this document. I recognize that the document gives my attorney-in-fact broad powers over my assets, and that these powers will become effective as soon as I sign this document and continue indefinitely unless I revoke this durable power of attorney.

Signed this 9 day of February, 2008

State of North Carolina, County of Wake

Signature: Virginia Cato Barton

Social Security number: 250-07-8311

WITNESSES

On the date written above, the principal declared to me that this instrument is her durable power of attorney, and that she willingly executed it as a free and voluntary act. The principal signed this instrument in my presence.

Signature: Candace L Bullard

Print Name: CANDACE L BULLBUSH

Address: 241 Blue Ridge Rd, Raleigh NC

Signature: Felicia J Stanley

Print Name: Felicia J. Stanley

Address: 241 Blue Ridge Rd, Raleigh NC

////

///

///

////

////

///

////

CERTIFICATE OF ACKNOWLEDGMENT OF NOTARY PUBLIC

State of North Carolina)
) ss.
County of Wake)

On January 19, 2011 before me, Natalina Viviani a notary public in and for said state, personally appeared Marjorie Lita Burton, personally known to me (or proved on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same in her authorized capacity and that by her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

Natalina Viviani

Notary Public for the State of North Carolina

[NOTARIAL SEAL]

My commission expires: November 3, 2011

EXHIBIT4

From: Roger B. Jellenik [mailto:rbjatty@mac.com]
Sent: Friday, April 15, 2011 6:17 PM
To: Curll, Julie
Cc: Atwood, Catherine; Outten, Samuel
Subject: Re: Marjorie Cato Burton, et al. v. Carroll M. Pitts, Jr., Esq. and Robinson Bradshaw & Hinson, P.A./C.A. No. 2010-CP-46-2267

Sam:

Thanks for your e-mail below as to which I offer the following comments:

1. My fax was intended as a courtesy following up on an e-mail exchange between Catherine and me. (Please refer to Catherine's e-mail dated March 18 and my reply dated March 18.) My understanding from that e-mail exchange was that we would follow up with a consent order, but I did not receive a reply and therefore sent the April 13 fax.
2. Your e-mail states that: "As Catherine and I have told you several times, after we have had a chance to review the pleading you filed, we will let you know whether or not it is appropriate for us to dismiss our motion." I do not know what pleading you are referring to, unless of course it's the complaint, which you no doubt reviewed long ago. Sam, at this point I do not know what your issue is or whether your e-mail means that you now are not consenting.
4. I tried to reach you by telephone very shortly after I received the e-mail below, but was informed that you, Catherine, and Julie had left. I will be in Monday morning between 9:30 and 11 AM. If you would like to discuss this matter, I hope that you or Catherine will feel free to call me at that time. Alternatively, please feel free to e-mail me if you can clarify what your intent is by that means.
5. In view of your e-mail below, if we are unable to clarify what the issue is and resolve it Monday morning, I will proceed to file the motion described in my March 18 e-mail to Catherine on a non-consent basis. If we can resolve it later, we can always fashion a consent order; otherwise, we can proceed to roster it.
7. As to the amount of time that has passed, I am sorry that you are concerned. Be assured that I will share your concern with NC counsel and my client.

Thank you for your attention to this matter, and have a good weekend.

Roger B. Jellenik
Attorney at Law
1111 Broad Street, Box J
Camden, SC 29020-3611
rbjatty@mac.com
T.803-424-1919
F.803-424-1922

This message may contain privileged, confidential, or proprietary information and is intended for the addressee(s) only. If the reader of this transmission is not the intended recipient,

1. You should destroy this message and any "hard copies", and you should delete this message from any and all storage media.

2. You are hereby notified that copying, printing, dissemination, distribution, or storage of this message or the information contained herein is strictly prohibited.

3. You should notify the sender of any unintended recipient by return e-mail.

Thank you.

On Apr 15, 2011, at 4:49 PM, Curll, Julie wrote:

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.*
C.A. No. 2010-CP-46-2267

Dear Roger,

This will acknowledge receipt of your fax of April 13, 2011.

You have inquired as to whether or not we will consent to an order withdrawing the motion. As Catherine and I have told you several times, after we have had a chance to review the pleading you filed, we will let you know whether or not it is appropriate for us to dismiss our motion. Frankly, we are concerned with the amount of time which has passed since we raised this issue.

I am happy to discuss at your convenience. Thank you.

Sam Outten

Sent on behalf of Sam Outten by:
Julie A. Curll
Legal Secretary to Samuel W. Outten, Sandi R. Wilson
and Catherine R. Atwood
Womble Carlyle Sandridge & Rice, PLLC
PO Box 10208
Greenville, SC 29603-0208
Tel: 864.239.5976
Fax: 864.255-5440

IRS CIRCULAR 230 NOTICE: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this communication (or in any attachment) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed in this communication (or in any attachment).

CONFIDENTIALITY NOTICE: This electronic mail transmission may have been sent on behalf of a lawyer. It may contain information that is confidential, privileged, proprietary, or otherwise legally exempt from disclosure. If you are not the intended recipient, you are hereby notified that you are not authorized to read, print, retain, copy or disseminate this message, any part of it, or any attachments. If you have received this message in error, please delete this message and any attachments from your system without reading the content and notify the sender immediately of the inadvertent transmission. There is no intent on the part of the sender to waive any privilege, including the attorney-client privilege, that may attach to this communication. The sender of this electronic mail transmission is not authorized to practice law and all information and materials included herewith are under the supervision of and subject to the review of counsel and should not be relied upon until such review has occurred. Thank you for your cooperation.

IRS CIRCULAR 230 NOTICE: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S tax advice contained in this communication (or in any attachment) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed in this communication (or in any attachment).

CONFIDENTIALITY NOTICE: This electronic mail transmission has been sent by a lawyer. It may contain information that is confidential, privileged, proprietary, or otherwise legally exempt from disclosure. If you are not the intended recipient, you are hereby notified that you are not authorized to read, print, retain, copy or disseminate this message, any part of it, or any attachments. If you have received this message in error, please delete this message and any attachments from your system without reading the content and notify the sender immediately of the inadvertent transmission. There is no intent on the part of the sender to waive any privilege, including the attorney-client privilege, that may attach to this communication. Thank you for your cooperation.

From: "Roger B. Jellenik" <rbjatty@mac.com>
Date: March 18, 2011 10:23:18 AM EDT
To: "Atwood, Catherine" <CAtwood@wcsr.com>
Cc: "Outten, Samuel" <SOutten@wcsr.com>
Subject: Re: Draft documents regarding real party in interest

Catherine:

Thanks for the quick response. Yes, what I discussed with Sam was a consent order substituting David Burton as the party plaintiff in this case. Unless you know a better way to do it, what I will prepare is a consent order pursuant to Rules 17 and 25.

Thanks, Catherine, and regards.

Roger B. Jellenik
Attorney at Law
1111 Broad Street, Box J
Camden, SC 29020-3611
rbjatty@mac.com
T.803-424-1919
F.803-424-1922

This message may contain privileged, confidential, or proprietary information and is intended for the addressee(s) only. If the reader of this transmission is not the intended

recipient,

1. You should destroy this message and any "hard copies", and you should delete this message from any and all storage media.

2. You are hereby notified that copying, printing, dissemination, distribution, or storage of this message or the information contained herein is strictly prohibited.

3. You should notify the sender of any unintended recipient by return e-mail.

Thank you.

On Mar 18, 2011, at 9:39 AM, Atwood, Catherine wrote:

Roger,

These look fine. Will you be amending the pleadings to comply with these changes as well? If so, could you forward along the amendment?

Thanks,

Catherine R. Atwood
Womble Carlyle Sandridge & Rice, PLLC
550 South Main Street, Suite 400
Greenville, SC 29601
Telephone: (864) 255-5420
Fax: (864) 239-5878
catwood@wcsr.com

-----Original Message-----
From: Outten, Samuel
Sent: Thursday, March 17, 2011 8:44 AM
To: Atwood, Catherine
Subject: FW: Draft documents regarding real party in interest

-----Original Message-----
From: Roger B. Jellenik [mailto:rbjatty@mac.com]
Sent: Wednesday, March 16, 2011 6:39 PM
To: Outten, Samuel
Subject: Draft documents regarding real party in interest

Sam:

As promised in our telecon earlier this afternoon, attached in .pdf format are two documents prepared by NC counsel, as follows:

1. A document appointing Dr. Burton as the successor Trustee for his mother to be executed by Dr. Burton as his mother's attorney-in-fact; and 2. A document affirming, ratifying, and consenting to that action to be executed by Dr. Burton's father and co-Trustee.

As I mentioned earlier today, these documents are not long, and we would appreciate a reasonable turnaround time. If they make sense to you, then I will prepare a consent order, we can each sign off, and then we can move on. If on the other hand you see issues, please let me know what they are. If we agree on a fix, fine; if we cannot, we can let the Court decide.

Sam, if you have any questions or wish to discuss any aspect of this e-mail or the above documents, please feel free to call. Thanks, and regards.

Roger B. Jellenik
Attorney at Law
1111 Broad Street, Box J
Camden, SC 29020-3611
rbjatty@mac.com
T.803-424-1919
F.803-424-1922

This message may contain privileged, confidential, or proprietary information and is intended for the addressee(s) only. If the reader of this transmission is not the intended recipient,

1. You should destroy this message and any "hard copies", and you should delete this message from any and all storage media.

2. You are hereby notified that copying, printing, dissemination, distribution, or storage of this message or the information contained herein is strictly prohibited.

3. You should notify the sender of any unintended recipient by return e-mail.

Thank you.

IRS CIRCULAR 230 NOTICE: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this communication (or in any attachment) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed in this communication (or in any attachment).

CONFIDENTIALITY NOTICE: This electronic mail transmission has been sent by a lawyer. It may contain information that is confidential, privileged, proprietary, or otherwise legally exempt from disclosure. If you are not the intended recipient, you are hereby notified that you are not authorized to read, print, retain, copy or disseminate this message, any part of it, or any attachments. If you have received this message in error, please delete this message and any attachments from your system without reading the content and notify the sender immediately of the inadvertent transmission. There is no intent on the part of the sender to waive any privilege, including the attorney-client privilege, that may attach to this communication. Thank you for your cooperation.
<20110316 dft Affirmation and Consent-2.pdf><20110316 dft Appointment-4.pdf>

EXHIBIT 5

IRS.gov

Abusive Trust Tax Evasion Schemes - Questions and Answers

Basic Trust Law

Q: What is a trust?

A: A trust is an entity created and governed under the state law in which it was formed. A trust involves the creation of a fiduciary relationship between a grantor, a trustee, and a beneficiary for a stated purpose. A trust may be created by any of the following methods:

- A declaration by the owner of property that the owner holds the property as trustee;
- A transfer of property by the owner during the owner's lifetime to another person as trustee;
- A transfer of property by the owner, by will or by other instrument taking effect upon the death of the owner, in trust, to another person as trustee or
- An exercise of a power of appointment to another person as trustee or an enforceable promise to create a trust.

Q: Who is a grantor of a trust?

A: The grantor (also known as trustor, settlor, or creator) is the creator of the trust relationship and is generally the owner of the assets initially contributed to the trust. The grantor generally establishes in the trust instrument the terms and provisions of the trust relationship between the grantor, the trustee, and the beneficiary. These will usually include the following:

- The rights, duties, and powers of the trustee;
- Distribution provisions;
- Ability of the grantor to amend, modify, revoke, or terminate the trust agreement;
- The designation and selection of a trustee or successor trustees; and
- The designation of the state under which the terms and provisions of the trust agreement are to be governed.

Q: What is a trustee/fiduciary?

A: The trustee obtains legal title to the trust assets and is required to administer the trust on behalf of the beneficiaries according to the express terms and provisions of the trust agreement. A fiduciary is an individual or organization charged with the duty to act for the benefit of another. A trustee is a fiduciary.

Q: What is a beneficiary?

A: The beneficiaries are those entitled to receive benefits from the trust.

Q: What is a simple trust?

A: "Simple trust" is a term used in the Internal Revenue Code to define a trust that:

- Is not a grantor trust or required to be treated as a grantor trust;
- Is required to distribute all income annually; and
- Does not distribute the corpus of the trust or make charitable contributions. (IRC Section 651).

Q: What is a complex trust?

A: A "complex trust" is a trust that is not defined as a "simple trust" or a "grantor trust" under the Internal Revenue Code.

Q: What is a grantor trust?

A: "Grantor trust" is a term used in the Internal Revenue Code to describe any trust over which the grantor or other owner retains the power to control or direct the trust's income or assets. If a grantor retains certain powers over or benefits in a trust, the income of the trust will be taxed to the grantor, rather than to the trust. (Examples, the power to decide who receives income, the power to vote or to direct the vote of the stock held by the trust or to control the investment of the trust funds, the power to revoke the trust, etc.) All "revocable trusts" are by definition grantor trusts. An "irrevocable trust" can be treated as a grantor trust if any of the grantor trust definitions contained in Internal Code §§ 671, 673, 674, 675, 676, or 677 are met. If a trust is a grantor trust, then the grantor is treated as the owner of the assets, the trust is disregarded as a separate tax entity, and all income is taxed to the grantor.

Q: What are irrevocable/revocable trusts?

A: An irrevocable trust is a trust, which, by its terms, cannot be modified, amended, or revoked. For tax purposes an irrevocable trust can be treated as a simple, complex, or grantor trust, depending on the powers listed in the trust instrument. A revocable trust may be revoked and is considered a grantor trust (IRC § 676). State law and the trust instrument establish whether a trust is revocable or irrevocable. If the trust instrument is silent on revocability, then most states consider the trust revocable.

Q: What are testamentary and Inter Vivos trusts?

A: A testamentary trust is created by a will, which begins its existence upon the death of the person making the will, when property is transferred from the decedent's estate. Testamentary trusts are generally simple or complex trusts. A testamentary trust is irrevocable by definition, as it comes into being at the death of the grantor. A living person creates an Inter Vivos trust during that person's lifetime. An Inter Vivos trust can be established as revocable or irrevocable. An Inter Vivos trust can be a simple, complex, or grantor trust depending on the trust instrument.

Trust Taxation Questions

Q: IRS Instructions for Form 1041 and Schedules A, B, D, G, I, J and K-1 provide general tax information and guidance for completing Form 1041. What law controls trust taxation?

A: Taxation of trusts can be found in subchapter J (Estates, Trusts, Beneficiaries, and Decedents - Sections 641 through 692) of the Internal Revenue Code. State law generally governs the legal standing of a trust and is important in some definitions included in the Internal Revenue Code.

Q: Do trusts have a requirement to file federal income tax returns?

A: Trusts must file a Form 1041, U.S. Income Tax Return for Estates and Trusts, for each taxable year where the trust has $600 in income or the trust has a non-resident alien as a beneficiary. However, if the trust is classified as a grantor trust, it is not required to file a Form 1041, provided that the individual grantor reports all items of income and allowable expenses on his own Form 1040, U.S. Individual Income Tax Return. Thus, the grantor/individual would pay the total tax liability upon the filing of his return for that taxable year.

Q: How does a trust compute its income tax liability?

A: A trust computes its income tax liability in much the same way that an individual does and is allowed most of the credits and deductions that an individual is allowed. Similarly, deductions not allowed to individuals are not allowed to trusts. For example, personal living expenses such as food, utilities, recreational expenses, children's education, depreciation of one's personal residence, etc. are not allowed as a trust deduction any more than as an individual deduction. Trusts are also required to prepare a Schedule K-1 for their beneficiaries, showing them the amounts distributed by the trust to them. These amounts must be reported on the beneficiaries' returns.

Q: I have been told that I can assign income to a trust and I will not be taxed on that income. Is this true?

A: No. Income that is earned by one person cannot be assigned to another for federal income tax purposes. You would still be liable for income taxes due on income earned, even though it was directly paid to the trust.

Q: May a trust deduct contributions to a charity?

A: A simple trust cannot. A complex trust may, but the deduction must meet rules similar to those for deductions by individuals (except for the percentage limitations of IRC Section 170) and be explicitly allowed in the trust instrument. Trusts that claim a charitable deduction generally must also file Form 1041-A, U.S. Information Return for Trust Accumulation of Charitable Amounts. In a grantor trust, the deduction would be attributable to the grantor and be governed by IRC Section 170, charitable deduction rules.

Q: Will I owe Federal Gift Taxes on property contributed to a trust?

A: The creation of a trust, or the contributing of property to a trust may or may not have gift tax implications, which would require the filing of Form 709, Gift Tax Return. For gift tax purposes, a gift is complete to the extent the donor (the person making the gift) has irrevocably parted with dominion and control over all or part of the transferred property, whether directly or indirectly, leaving the donor without the power to change its disposition, whether for the benefit of the donor or for the benefit of others. Where a grantor trust has been established, generally no gift tax would be due on property contributed. In situations where an Inter Vivos irrevocable trust is the recipient of property contributed, a gift tax return would generally be due. Testamentary trusts would be subject to estate and gift tax rules/filing requirements.

Q. The information presented by the promoter sounded legitimate. Now I have concerns regarding this promotion. Who do I contact to report information on the promotion and promoter?

A. Contact the Internal Revenue Service at 1-866-775-7474 or e-mail the Tax Shelter Hotline at irs.tax.shelter.hotline@irs.gov.

Q. Can I get more information on the Internet?

A. Yes. Additional information is available at the following IRS web sites:

- The Tax Scams/Fraud Alerts site provides information on tax scams and explains how to report suspected tax fraud.
- Find out some of the red flags that might be present in the Abusive Tax Shelters section on IRS.gov.
- The IRS Newsroom's page on Tax Scams/Consumer Alerts describes a number of common tax scams. If any of these apply to your investment, you should consult a tax professional not involved in promoting the investment. Or you may contact IRS to determine how it will treat such a promotion.
- Or find the following publications:
  - Publication 334, Tax Guide for Small Business
  - Publication 17, Your Federal Income Tax for Individuals
  - Publication 3995, Is it Too Good To Be True - Recognizing Illegal Tax Avoidance Schemes (PDF)

Note: This page contains one or more references to the Internal Revenue Code (IRC), Treasury Regulations, court cases, or other official tax guidance. References to these legal authorities are included for the convenience of those who would like to read the technical reference material. To access the applicable IRC sections, Treasury Regulations, or other official tax guidance, visit the Tax Code, Regulations and Official Guidance page. To access any Tax Court case opinions issued after September 24, 1995, visit the Opinions Search page of the United States Tax Court.

Return to Table of Contents

Page Last Reviewed or Updated: January 21, 2011

EXHIBIT 6

Prepared by: Law Office of Joe T. Millsaps, 428 East Fourth Street, Suite 404 Charlotte, NC 28202

STATE OF NORTH CAROLINA
COUNTY OF Wake

FIRST AMENDMENT TO THE SLOAN MARVIN BURTON AND MARJORIE CATO BURTON ABLIVING TRUST

Marjorie Cato Burton, as Grantor of the Sloan Marvin Burton and Marjorie Cato Burton AB Living Trust, by and through her attorney in fact, David Alan Burton, does hereby appoint David Alan Burton as her successor Trustee of The Sloan Marvin Burton and Marjorie Cato Burton AB Living Trust dated January 19, 2007.

This Appointment is made pursuant to the power granted to her under paragraph 2(b) of the aforesaid Trust and is intended to immediately bestow upon David Alan Burton full power as Co-Trustee thereunder, together with all the powers and duties therewith associated.

IN WITNESS WHEREOF, Grantorhas executed this First Amendment to the Sloan Marvin Burton and Marjorie Cato Burton AB Living Trust by setting her hand and sealthis the 1st day of April, 2011. Co-Trustee Sloan Marvin Burton joins in the signing of this First Amendment to affirmatively assent to the naming of David Alan Burton as successor Trustee for Marjorie Cato Burton.

Sloan Marvin Burton (SEAL)
Sloan Marvin Burton, Grantor

David Alan Burton (SEAL)
Marjorie Cato Burton, Grantor
By and through her attorney-in-fact, David Alan Burton pursuant to Power of Attorney bestowed by document dated March 12, 2008 and recorded in Book 012997 at Page 01592-01603 in the Office of the Register of Deeds for Wake County North Carolina.

RECEIVED
APR 4 - 2011
Roger B. Jellenik, Esq.

STATE OF NORTH CAROLINA
COUNTY OF Wake

I, the undersigned Notary Public of the County or City of Wake and State aforesaid, certify that **Sloan Marvin Burton** personally appeared before me this day and acknowledged the due execution of the foregoing instrument for the purposes therein expressed. Witness my hand and Notarial stamp or seal this 1st day of April, 2011.

(Affix Seal)

TIMOTHY JOHNSON NOTARY PUBLIC WAKE COUNTY, NC

Timothy Johnson
Timothy Johnson Notary Public
Notary's Printed or Typed Name
My Commission Expires: June 15, 2013

STATE OF NORTH CAROLINA,
COUNTY OF Wake

I, the Notary Public ofthe County or City of Wake and State aforesaid, do hereby certify that **David Alan Burton** personally appeared before me this day, and being by me duly sworn, says that he executed the foregoing and annexed instrument for and in behalf of **Marjorie Cato Burton** and that his authority to execute and acknowledge said instrument is contained in an instrument duly executed, acknowledged, and recorded in the office of the Register of Deeds for **Wake County**, North Carolina, on the **12th** day of **March, 2008** in Book **12997** at Page **1592** and that this instrument was executed under and by virtue of the authority given by said instrument granting him power of attorney; that the said **David Alan Burton** acknowledged the due execution of the foregoing and annexed instrument for the purposes therein expressed for and in behalf of the said **Marjorie Cato Burton.**

Witness my hand and official seal, this 1st day of April, 2011.

(Affix Seal)

TIMOTHY JOHNSON NOTARY PUBLIC WAKE COUNTY, NC

Timothy Johnson
Timothy Johnson Notary Public
Notary's Printed or Typed Name
My Commission Expires: June 15, 2013

STATE OF SOUTH CAROLINA COUNTY OF YORK Marjorie Cato Burton, et al Plaintiff, vs. Carroll M. Pitts, Jr., Esq., and Robinson Bradshaw & Hinson, P.A., Defendant.	)))))))))))	IN THE COURT OF COMMON PLEAS 16th JUDICIAL CIRCUIT CASE NO.: 2010-CP-46-2267 **MOTION AND ORDER INFORMATION FORM AND COVERSHEET**

Plaintiff's Attorney:	Defendant's Attorney:
_____, Bar No. _____ Address: _____ Phone: _____Fax _____ E-mail: _____Other: _____	Samuel W. Outten, Bar No. 4295 Address: PO Box 10208, Greenville, SC 29603 Phone: 864-255-5421 Fax864-239-5851 E-mail: soutten@wcsr.comOther: _____

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☒ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Memorandum in Opposition to Plaintiff's Motion
Estimated Time Needed: _____ Court Reporter Needed: ☐ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Samuel W Outten
Signature of Attorney for ☐ Plaintiff /☒ Defendant

October 25, 2011
Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT: $_____
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____

FILED-RECEIVED
2011 OCT 26 PM 12:25
DANIEL M. HELTON
C.C.C.P. & G.S.
YORK COUNTY, SC

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, by and through David A. Burton as Attorney-in-Fact, Individually and in the right and on Behalf of T.E. Cato Estate, LLC,

Plaintiffs,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE SIXTEENTH JUDICIAL CIRCUIT

C.A. No. 2010-CP-46-2267

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION PURSUANT TO RULE 59 TO ALTER, AMEND AND/OR RECONSIDER THE AUGUST 29 ORDER

FILED-RECEIVED
2011 OCT 26 PM 12:25
YORK COUNTY, SC

Carroll M. Pitts, Jr. and Robinson Bradshaw & Hinson, P.A. (collectively "RBH") respectfully submit this memorandum in opposition to Plaintiff's Motion Pursuant to Rule 59 to Alter, Amend and/or Reconsider the Order of this Court filed August 29, 2011.

INTRODUCTION

On July 20, 2011, the Court heard arguments in this case relating to RBH's Motion to Dismiss, and on August 29, 2011, the Court granted that Motion on a number of grounds. First, the Court found that RBH had standing to contest whether Plaintiffs are the real parties in interest in this case. Second, the Court found that David A. Burton lacked the authority to bring this lawsuit on behalf of the Sloan Marvin Burton and Marjorie Cato Burton AB Living Trust (the "Trust") because the Durable Power of Attorney ("Power of Attorney") does not relate to Marjorie Cato Burton's separate, fiduciary capacity as the trustee of any trust. Third, the Court pointed out that the plain language of the Trust provides conditions precedent for David A. Burton to become a Successor Co-Trustee of the Trust, and because those conditions had not

been met, the purported Trust amendment could not serve as David Burton's designation as Successor Co-Trustee. The Court also noted that there was no vacancy in the trusteeship, and therefore, no appointment of any Successor Co-Trustee was necessary nor would it have been proper. Finally, the Court found that David A. Burton did not have the authority to bring this lawsuit on behalf of the T.E. Cato Estate, LLC because no power was vested in Mr. Burton to act on behalf of the LLC. All of the Court's findings were clearly presented and explained in the Court's August 29 Order.

On September 8, 2011, Plaintiffs filed a Motion Pursuant to Rule 59 to Alter, Amend and/or Reconsider the August 29 Order (the "Motion"). In the Motion, Plaintiffs ask the Court to reconsider and for the first time consider various issues related to the Court's decision on RBH's Motion to Dismiss. Plaintiffs' Motion suggests that the Court got it wrong as to every issue raised at the July 20 hearing, and it brings up grounds not argued previously for the Court to consider. For the reasons set forth below, Plaintiffs' Motion should be denied.

ARGUMENT

In their motion, Plaintiffs claim that the Court should reconsider the same issues previously decided by the Court in the Judgment and Order signed and entered by Judge Hayes on August 29, 2011. However, Plaintiffs were fully heard on the issue of David A. Burton's standing to bring this lawsuit at the July 20 hearing, and Rule 59(e) does not afford Plaintiffs a second bite at the apple. "Reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly. A litigant may not use Rule 59 to re-litigate issues already decided by the court. It is an improper use of the motion to reconsider to ask the Court to rethink what the Court . . . already thought through – rightly or wrongly." *In re Cable & Wireless, PLC,* 332 F. Supp.2d 896, 899-900 (E.D. Va. 2004) (emphasis added) (citing *Clapper*

v. Chesapeake Conference of Seventh-Day Adventists, 1998 WL 904528 *3 (4th Cir. Dec. 29, 1998) ("The Rule 59(e) motion may not be used to re-litigate old matters")); *see Thompson v. Direct Impact Co.*, 63 F.Supp.2d 721, 724 (E.D. Va. 1998) ("[A] Rule 59(e) motion is not a vehicle for obtaining post judgment reargument on issues already decided."), *aff'd,* 188 F.3d 503 (4th Cir. 1999); *see also Hanover Ins. Co. v. Corrpro Cos.*, 221 F.R.D. 458, 460 (E.D. Va. 2004) ("Rule 59(e) does not entitle [plaintiffs] to a second bite at the apple.").[1] Because Plaintiff asks the Court to reconsider its analysis of David A. Burton's standing to bring this lawsuit, the Motion is improper and should be summarily denied without further briefing or hearing.

Specifically, the Court already considered and rejected Plaintiffs' arguments related to David A. Burton's authority under the Power of Attorney and as a purported Successor Co-Trustee. In its Order, the Court notes that "Although the Power of Attorney may authorize Ms. Burton's Attorney-in-Fact to act for her *in her capacity as an individual trust beneficiary*, it cannot and does not confer the power to act in a separate fiduciary capacity as Co-Trustee on the Trust's behalf.'" August 29, 2011 Order. Id. Additionally, the Order states that, because no vacancy has occurred in the trusteeship, no appointment of a Successor Co-Trustee is necessary or proper. Id. In fact, David Burton's alleged appointment as Successor Co-Trustee is invalid because, "under the terms of the Trust, [Sloan Marvin Burton] cannot unilaterally amend or modify the Trust." Id. Because the Power of Attorney and the First Amendment to the Trust which allegedly appointed David A. Burton as Successor Co-Trustee do not confer to Mr. Burton the authority to bring this lawsuit, the Court found that David A. Burton does not have the requisite legal standing to prosecute this case. The Court heard the arguments presented on this

[1] Because Federal Rule 59 is substantially similar to Rule 59 of the South Carolina Rules of Civil Procedure, the admonition of these cases is applicable. See Rule 59, S.C.R.C.P. ("This Rule is substantially the Federal Rule").

issue and ruled. Therefore, Plaintiffs' Motion is inappropriate because it simply asks the Court to consider arguments which were and could have been raised at the hearing.

Plaintiffs' also state that "*Somebody* has to be able to sue in Mrs. Burton's name," implying that the Court's Order finds that there is no one out there who has the authority to sue in Marjorie Cato Burton's name. Motion, p. 22. However, in its Order, the Court states that "Sloan Marvin Burton remains in office as Co-Trustee of the Trust. There is no evidence that Sloan Marvin Burton is unable to continue serving as Trustee. Therefore, no vacancy has occurred in that trusteeship, and no appointment of any Successor Co-Trustee is necessary." August 29, 2011 Order. The Court specifically addressed the issue of whether there exists someone with authority to bring this action at the July 20 hearing and in its Order. Therefore, Plaintiffs' Motion fails on this ground.

Plaintiffs also question the Court's reading of the Affirmation, Ratification and Consent, the Court's analysis of delay, and the Court's analysis related to Plaintiffs' lack of standing to sue on behalf of T.E. Cato Estate, LLC. Plaintiffs have failed to establish grounds for reconsideration of these issues under Rule 59 as they have not alleged that the Judgment was riddled by judicial error or misconduct of counsel or that the Judgment was against the weight of the evidence. *See* James F. Flanagan, *South Carolina Civil Procedure* at 466 (2d ed.1996). By presenting all of these issues for reconsideration, Plaintiff is doing nothing more than rehashing the arguments made at the July 20 hearing. The Court, having carefully weighed all of the issues before entering its Order, should decline to revisit them now.

Finally, Plaintiff contends that the Court should reconsider these issues because the Court ignored Plaintiffs' motion to appoint a Guardian ad Litem for Marjorie Cato Burton, and that, in the alternative, David Burton should have been permitted to prosecute this lawsuit as a residual

beneficiary of the Trust. First, Plaintiffs never filed, nor is there any motion to appoint a Guardian ad Litem for Mrs. Burton pending in this lawsuit. Therefore, Plaintiffs' argument that the Court never issued an Order on this issue is irrelevant because the issue was never raised in this case. Second, Plaintiffs never raised either of these issues at the July 20 hearing or in any of the memoranda or documents filed in support of their position at the hearing. Our courts have made it clear that "[a] party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not." *Tallent v. South Carolina Dept. of Transp.*, 363 S.C. 160, 165, 609 S.E.2d 544, 546 (Ct. App. 2005) (citing *Kiawah Prop. Owners Group v. Public Serv. Comm'n*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004)); *see also MailSource, LLC v. M.A. Bailey & Assoc.*, 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003) (holding that a party cannot raise an issue for first time in a Rule 59(e) motion which could have been raised at trial). Consequently, Plaintiffs' Motion should be denied as failing to comply with the standard for bringing a Rule 59(e) motion.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion Pursuant to Rule 59 to Alter, Amend and/or Reconsider the August 29 Order should be denied.

Respectfully submitted,

Samuel W. Outten (SC Bar No. 4295)
Catherine R. Atwood (SC Bar No. 77367)
WOMBLE CARLYLE SANDRIDGE& RICE, PLLC
550 South Main Street, Suite 400
P.O. Box 10208
Greenville, SC 29603-0208
Telephone: 864-255-5400
Facsimile: 864-239-5851
Attorneys for Carroll M. Pitts, Jr., Esq. and Robinson Bradshaw & Hinson, P.A.

October 25, 2011

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 25th day of October, 2011, she mailed a copy of the attached **DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION PURSUANT TO RULE 59 TO ALTER, AMEND, AND/OR RECONSIDER THE AUGUST 29 ORDER** by first-class mail, proper postage affixed, addressed to the person(s) hereinafter named, at the place(s) and address (es) stated below, which is/are the last known address (es):

Roger B. Jellenik
Attorney at Law
1111 Broad Street, Box J
Camden, SC 29020

George Hunter McMaster
Tompkins & McMaster LLP
PO Box 7337
Columbia, SC 29202

Connie Fuelling
Legal Assistant

FILED-RECEIVED
2011 OCT 26 PM 12:25
DAVID HAMILTON
C.C.C.P.&G.S.
YORK COUNTY, SC

Prepared by:
George Hunter McMaster, Esq.
Tompkins & McMaster, LLP

STATE OF SOUTH CAROLINA) FOR THE COURT OF COMMON PLEAS
)
COUNTY OF YORK) FOR THE SIXTEENTH JUDICIAL CIRCUIT

Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, by and through David A. Burton as Attorney-in-fact, Individually and In the right and on Behalf of T.E. Cato Estate, LLC., Plaintiff, vs. Carroll M. Pitts, Jr., Esq. and Robinson, Bradshaw & Hinson PA Defendants.	CA. No.: 2010-CP-46-2267

NOTICE OF MOTION AND MOTION TO AMEND COMPLAINT [EXPIDITED RELIEF REQUESTED]

YOU WILL PLEASE TAKE NOTICE that the Plaintiff through his attorney, George Hunter McMaster, Esquire, of Tompkins & McMaster, LLP, will on the tenth (10th) day after service hereof, or as soon thereafter as counsel can be heard, move before the Presiding Judge of the Court of Common Pleas for the Sixteenth Judicial Circuit, pursuant to Rule 15 of the South Carolina Rules of Civil Procedure, for an Order amending the Complaint in the matter above named.

A copy of the proposed Amended Complaint if attached hereto as exhibit "A".

The Motion is based on the following:

1. on and those facts as set out in exhibit "A", which include the Affidavit of John P. Freeman, Esquire;

2. that the Plaintiffs seek, *inter alia,* to add additional parties to this cause;

3. that the Amended Complaint sets out additional allegations against the parties;

4. the pleadings and depositions of the parties;

5. the record of the cause;

6. such other and further matters or may be presented to the Court.

AND WE SO MOVE

George Hunter McMaster, Esquire
Attorney for the Plaintiffs
SC BAR #2886
TOMPKINS & McMaster, LLP
Post Office Box 7337
Columbia, South Carolina 29202
Ph: (803) 799-4499
Fx: (803) 252-2240
E-mail: ghm@tmmlaw.com

At Columbia, South Carolina
This 6TH day of September, 2013

Prepared by:
George Hunter McMaster
Tompkins & McMaster
ghm@tmmlaw.com

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS FOR THE SIXTEENTH JUDICIAL CIRCUIT
David Alan Burton Individually and as Successor Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, Individually and and in the Right and on Behalf of T.E. Cato Estate LLC, Plaintiffs, v. Carroll M. Pitts, Jr., Esq., Robinson Bradshaw & Hinson, P.A., Joshua B. Vann, Esq., and Morton & Gettys, LLC Defendants	)	Case No. 2010-CP-46-2267 **AMENDED SUMMONS**

TO THE DEFENDANTS, CARROLL M. PITTS, JR. ESQ., ROBINSON BRADSHAW & HINSON, P.A., JOSHUA B. VANN, ESQ., AND MORTON & GETTYS, LLC, ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Complaint on the Plaintiff, through his attorney, George Hunter McMaster of Tompkins & McMaster, LLP, at his office at 1530 Richland Street, Columbia, South Carolina, 29201, within thirty-five (35) days after service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

Dated in Columbia, South Carolina, this 6th day of September, 2013.

[signature page to follow]

George Hunter McMaster, Esquire
Attorney for the Plaintiffs
SC BAR #2886
TOMPKINS & McMaster, LLP
1530 Richland Street
Columbia, South Carolina 29201
Ph: (803) 799-4400
Dd: (803)-255-8373
Fx: (803) 252-2240
E-mail: ghm@tmmlaw.com

Prepared by:
George Hunter McMaster
Tompkins & McMaster
ghm@tmmlaw.com

STATE OF SOUTH CAROLINA COUNTY OF YORK	IN THE COURT OF COMMON PLEAS FOR THE SIXTEENTH JUDICIAL CIRCUIT
David Alan Burton Individually and as Successor Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, Individually and and in the Right and on Behalf of T.E. Cato Estate LLC, Plaintiffs, v. Carroll M. Pitts, Jr., Esq., Robinson Bradshaw & Hinson, P.A.; Joshua B. Vann, Esq., and Morton & Gettys, LLC Defendants	Case No. 2010-CP-46-2267 **AMENDED COMPLAINT**

The Plaintiff, David Alan Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, hereinafter referred to as "Plaintiff", complaining of the Defendants Carroll M. Pitts, Jr., Esq. ("Defendant Pitts"), Robinson Bradshaw & Hinson, P.A. ("Defendant RBH"), Joshua B. Vann, Esq. ("Defendant Vann"), and Morton & Gettys, LLC ("Defendant MG"), hereinafter collectively referred to as "the Defendants", alleges and says that:

ALLEGATIONS OF FACT: THE PARTIES

1. Plaintiff is the successor Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust ("the Trust"), which was created pursuant to the laws of the State of North Carolina by a Declaration of Trust dated January 19, 2007. Please refer to Exhibit "A".

2. Formerly a Trustee of the Trust, Plaintiff's mother, Marjorie Cato Burton ("Ms. Burton"), was born on [redacted] 1918, is 95 years of age, suffers from various infirmities of age, and resides in a nursing home Raleigh, North Carolina.

3. Upon information and belief, Defendant RBH is a law firm with its principal offices located at 101 North Tryon Street, Suite 1900, in the City of Charlotte, County of Mecklenberg, State of North Carolina, with offices for the practice of law in the State of South Carolina located at 140 East Main Street, Suite 420, in the City of Rock Hill, County of York, State of South Carolina.

4. Upon information and belief, Defendant Pitts is an attorney admitted to the practice of law in the State of South Carolina previously employed by or otherwise affiliated with and now retired from Defendant RBH whose office was located at 140 East Main Street, Suite 420, in the City of Rock Hill, County of York, State of South Carolina.

5. Upon information and belief, Defendant MG is the law firm that represented TAL in the course of transactions described in this pleading, and its offices for the practice of law are located at 616 East Liberty Street, York, SC 29745, and at 334 Oakland Avenue, PO Box 707, Rock Hill, SC 29731.

6. Upon information and belief, Defendant Vann is the attorney that represented TAL in the course of transactions described in this pleading, is admitted to the practice of law in the State of South Carolina, and is employed as a partner by Defendant MG in MG's office located at 334 Oakland Avenue, PO Box 707, Rock Hill, SC 29731.

COMMON ALLEGATIONS OF FACT

7. The allegations of fact set forth in paragraphs 1 through 6 are incorporated herein.

8. Sometime during the first quarter of 2007, Defendants Pitts and RBH undertook the legal representation of James Thomas Cato ("Mr. Cato") and six other members of a family, one of whom was Plaintiff, seeking to form a limited liability company.

9. Upon information and belief, the purpose of forming the limited liability company, which became known as T.E. Cato Estate, L.L.C. ("Cato, LLC"), was to establish a single legal entity that could negotiate with one or more developers for the potential sale of certain parcels of real property known as the Areas, including four parcels --- Areas A, B, C, and D --- and the "Old Roadbed Tract" (collectively referred to hereinafter as "the Areas") owned at that time by the descendants of T.E. Cato, deceased.

10. Upon information and belief, Mr. Cato duly informed the family members that Defendants Pitts and RBH or either of them had been retained to assist with the formation of a limited liability company.

11. Upon information and belief, Defendant Pitts thereafter

    a. Prepared articles of organization ("Articles"), attached as Exhibit B, and an operating agreement ("Agreement"), attached as Exhibit C, for formation of Cato, LLC;

b. Prepared a general warranty deed ("Deed into Cato, LLC"), attached as Exhibit D, intended to convey the respective fractional interests in the Areas owned by the individual family members to Cato, LLC; and

c. Released the Articles, Agreement, and Deed into Cato, LLC to Mr. Cato for execution by the family members.

12. As to the Articles,

a. The document made reference to the Trust, and Ms. Burton as then Trustee of the Trust signed the document as an organizer of Cato, LLC;

b. The document was filed on June 26, 2007, with the office of the South Carolina Secretary of State, upon information and belief, by or through Defendants Pitts and RBH; and

c. The Secretary of State issued a certificate of existence for the limited liability company on June 28, 2007.

13. As to the Agreement, it was entered into by each individual member of Cato, LLC as of the date of formation of Cato, LLC.

14. As to the Deed into Cato, LLC,

a. Upon information and belief, Mr. Cato provided the legal description of the Areas, which legal description was not checked or confirmed by either Defendant Pitts or Defendant RBH;

b. Upon information and belief, Defendants Pitts and RBH did not request, order, or perform a title search or examination concerning the Areas;

c. It was executed by each individual member during a period of time from and after May 28, 2007, up through and including June 16, 2007; and

d. It was recorded in the office of the Clerk of Court for York County on July 10, 2007.

15. Upon information and belief, in addition to legal services related to formation of Cato, LLC, the Defendants acted as attorney(s) for Cato, LLC during all or some portion(s) of the period from and after its formation, during negotiations with one or more developers for the sale of real property and thereafter, as evidenced by the following facts:

a. A "Letter of Intent", attached as Exhibit E, for sale of the "remaining acreage" purportedly owned by Cato, LLC was issued by Thomasson Apts. Ltd., LLC ("TAL"), on or about July 25, 2007, and signed by Mr. Cato for Cato, LLC on or about August 3, 2007, without the Trust's or Ms. Burton's or Plaintiff's knowledge or consent.

b. By e-mail dated August 20, 2007, attached as Exhibit F, replying to an e-mail about the Letter of Intent from Ms. Burton dated August 4, 2007, Mr. Cato wrote Ms. Burton and perhaps one or more other family members that he took no action without the advice of the "corporate attorney";

c. Upon information and belief, sometime after August 3, 2007, TAL sought a title search of the Areas through Defendant Vann and Defendant MG, the attorney and law firm, respectively, representing TAL in TAL's efforts to acquire the Areas from Cato, LLC, as a result of which

i. Defendant Vann and/or Defendant MG determined that title to the Old Roadbed Tract was held by the members of Cato, LLC individually, not by Cato, LLC itself; and

ii. Defendant Vann, one or more representatives of TAL, and Mr. Cato met, and/or spoke by telephone, and agreed that Cato, LLC's members should each individually execute a quitclaim deed ("Quitclaim Deed"), attached as Exhibit G, prepared by or under the supervision of Defendant Vann, conveying their respective fractional interests in the Old Roadbed Tract to Cato, LLC.

d. Upon information and belief, in October and/or November 2007, as agreed, Mr. Cato circulated the Quitclaim Deed for execution by Cato, LLC's members.

e. Upon information and belief, during October or November 2007, Cato, LLC's members individually executed the Quitclaim Deed, except Ms. Burton as Trustee who declined to do so until specific concerns that she raised were addressed.

f. By e-mail dated November 8, 2007, attached as Exhibit H, Defendant Pitts advised Mr. Cato as General Manager that the $1,000,000.00 price offered by TAL to Cato, LLC for the Areas and the Old Roadbed Tract was in his opinion grounds to "run to the bank";

g. Upon information and belief, by sometime in November 2007,

i. Defendant Vann and Defendant MG were aware of and had access to the Articles, the Agreement, and the Deed into Cato, LLC,

ii. Mr. Cato told TAL and Defendant Vann that Ms. Burton objected to the pending sale of the Areas to TAL, and

iii. Mr. Cato told TAL and Defendant Vann that Ms. Burton had not executed the Quitclaim Deed.

h. Upon information and belief, Defendant Vann, one or more representatives of TAL, and Mr. Cato thereafter met, and/or spoke by telephone, and decided to circumvent Ms. Burton's failure to execute the Quitclaim Deed by utilizing a document prepared or to be prepared by Defendant Vann.

i. That document, attached as Exhibit I, entitled "Amendment to Contract" ("Amendment") and dated December 6, 2007, provided for

i. Ratification of the Letter of Intent as a contract,

ii. Closing of the sale by Cato, LLC to Defendant of the Areas alone for the arbitrarily adjusted sum of $900,000.00,

iii. Filing of an action against Ms. Burton for partition of the Old Roadbed by sale to TAL for the arbitrarily established sum of $100,000.00;

iv. TAL's approval of the attorney for the partition action, and

v. TAL's undertaking to pay legal fees and costs for the partition action up to $10,000.00.

j. By e-mail dated December 8, 2007, attached as Exhibit J, Mr. Cato wrote Ms. Burton that he had retained an accountant to oversee Mr. Cato's conduct of operations as General Manager of Cato, LLC and to protect the individual members of Cato, LLC and that he had retained an attorney,

upon information and belief Defendants Pitts and RBH, for the same purposes.

k. A discovery response from a party in separate litigation, attached as Exhibit K, states that, prior to December 12, 2007, a packet of proposed closing documents was sent, upon information and belief by Defendant Vann and/or Defendant MG, as the buyer's (TAL's) attorney, for review to Defendant Pitts as the seller's (Cato, LLC's) attorney.

l. Subsequently, in furtherance of the purported transaction in general and the Letter of Intent and the Amendment in particular,

i. On or before December 12, 2007, without the Trust's or Ms. Burton's knowledge or consent, Defendant Vann prepared a general warranty deed ("Deed out of Cato, LLC"), attached as Exhibit L, purporting to sell the Areas without the Old Roadbed to TAL "FOR AND IN CONSIDERATION of the sum of Ten Dollars ($10.00) in hand paid and other good and valuable consideration";

ii. On December 12, 2007, Defendant Vann, as closing attorney and the only attorney present, conducted the purported closing of the sale of the Areas using the Deed out of Cato, LLC that he prepared without Ms. Burton's knowledge or consent; and

iii. Defendant Vann prepared a seller's settlement statement from that closing, attached as Exhibit M, noting that a payment outside closing ("POC") was made to Defendant RBH as attorney for the seller, Cato, LLC.

m. On or about August 13, 2008, without Plaintiff's consent, Defendants Pitts and RBH, representing all other members of Cato, LLC individually, filed a petition in the York County Court of Common Pleas against Plaintiff seeking partition of the Old Roadbed Tract, which petition was, upon information and belief, not served upon Ms. Burton as Trustee until January 26, 2009. Please see Exhibit N.

n. At no time pertinent to these allegations was Ms. Burton ever given

i. A copy of the proposed or executed Letter of Intent;

ii. A copy of the proposed or executed Amendment;

iii. An independent professional appraisal of the Areas or Old Roadbed;

iv. Notice of any meeting of Cato, LLC's members to approve any sale to TAL; or

v. Notice of any vote of Cato, LLC's members regarding any sale to TAL.

o. At no time pertinent to these allegations was

i. An independent professional appraisal of the Areas or Old Roadbed ever ordered or performed;

ii. Any meeting of Cato, LLC's members held to approve any sale;

iii. Any vote of Cato, LLC's members taken regarding any sale; or

iv. Ms. Burton asked to consent to the Letter of Intent, Amendment, or Deed out of Cato, LLC.

p. At no time did Ms. Burton consent to the sale of the Areas or the Old Roadbed to TAL; execution on behalf of Cato, LLC of the Letter of Intent, the Amendment, or the Deed out of Cato, LLC; or the filing of the partition action.

q. Upon information and belief, despite the foregoing allegations and Defendant Vann's preparation of the Deed out of Cato, LLC and his role as closing attorney for the purported sale of the Areas, at no time did any of the Defendants advise Mr. Cato, Ms. Burton, any other member of Cato, LLC, or Cato, LLC itself of the risks, actual or potential, to Cato, LLC or its members of

i. Mr. Cato's execution of the Deed out of Cato, LLC as a general warranty deed;

ii. Any discrepancy(ies) between the legal descriptions in the Deed into Cato, LLC and the Deed out of Cato, LLC;

iii. Any title defects affecting the Old Roadbed Tract;

iv. Execution by Cato, LLC's members of the Deed into Cato, LLC before the formation of Cato, LLC;

v. Any possibility that Cato, LLC might have been within its rights to insist upon TAL's purchase of the Areas as deeded into Cato, LLC;

vi. The basis for the allocation of the pricing of the Areas and the Old Roadbed Tract in the Amendment that, upon information and belief, favored TAL's objectives, but underpaid Cato, LLC;

vii. Cato, LLC's and TAL's failure to address Ms. Burton's concerns about the sale of the Areas to TAL, thus exposing Cato, LLC to potential claims;

viii. Ms. Burton's actual or potential rights under the Agreement and under SC Code 33-44-404(c)(12) with respect to the purported sale of the Areas;

ix. Execution of the Quitclaim Deed or the Amendment to Contract by the individual family members who later became Petitioners and Fourth Party Defendants in the captioned partition action;

x. Commencement of the captioned partition action, the legal fees and costs of which were quite significant; or

xi. The potential for liability due to the possibility of counterclaims and third and fourth party complaints and counterclaims in response to the partition action.

ALLEGATIONS OF FACT: SC CODE 33-44-1101

16. The allegations of fact set forth in paragraphs 1 through 15 are incorporated herein.

17. Plaintiff is in part commencing this action in the right of Cato, LLC inasmuch as any effort to cause Mr. Cato as General Manager to commence this action was unlikely to succeed because

a. Upon information and belief, the legal issues presented herein arose in part as a direct result of Mr. Cato's course of conduct, and Mr. Cato

evidenced no desire or intent to alter that course of conduct when it would have mattered;

b. Mr. Cato initiated proceedings and was a Petitioner against Plaintiff, as well as a Third Party Defendant and Fourth Party Defendant, in a related adversarial legal action, Case No. 2008-CP-46-3171, dealing with the same real property that is in part the subject of this case, and his role in that case was adversarial to the role of a party plaintiff; and

c. The proceedings in Case No. 2008-CP-46-3171 are the subject of two consent orders, a settlement agreement, and an assignment agreement as a result of which that case was settled, and all assets, claims, and rights of Cato, LLC were assigned to Plaintiff.

FIRST CAUSE OF ACTION
(Against Defendants Pitts and RBH for Legal Malpractice as to the Trust and Ms. Burton as Trustee, or, in the Alternative, Professional Negligence)

18. The allegations of fact set forth in paragraphs 1 through 17 are incorporated herein.

19. Ms. Burton as Trustee was entitled to view the Trust and herself as, and indeed they were, clients of Defendant Pitts and Defendant RBH and to view them as its and her attorney(s) at least, but not necessarily only, for the periods of time during which Defendant Pitts and Defendant RBH prepared the Articles, Agreement, and Deed into Cato, LLC and filed or oversaw the filing of Cato, LLC's Articles and Agreement as well as the Deed into Cato, LLC. Under such circumstances,

a. Defendant Pitts and Defendant RBH had duties to the Trust and Ms. Burton as Trustee including but not necessarily limited to

i. Preparing the Deed into Cato, LLC in a manner that correctly identified the grantors and correctly described the Areas;

ii. Conducting or requesting a title search of the Areas described in the Deed into Cato, LLC;

iii. Advising Ms. Burton as Trustee as to the legal significance of the Articles, the Agreement, and the Deed into Cato, LLC;

iv. Advising Ms. Burton as Trustee as to the rights, duties, and risks of the Trust pursuant to the Articles, Agreement, and Deed into Cato, LLC;

v. Assuring that Cato, LLC existed before the Deed into Cato, LLC was executed; and

vi. Avoiding a representation that constituted a conflict between or among the interests of the Trust and Ms. Burton as Trustee, the interests of other members of Cato, LLC, and the interests of Cato, LLC itself.

b. As to the Trust and Ms. Burton as Trustee, Defendants Pitts and RBH failed to carry out their duties in that they failed to

i. Prepare the Deed into Cato, LLC properly in that they incorrectly identified the Trust as a Grantor and incorrectly described the Areas;

ii. Conduct or request a title search regarding the Areas;

iii. Provide any legal advice whatsoever to Ms. Burton as Trustee as to the legal significance of the Articles, the Agreement, or the Deed into Cato, LLC or the Trust's rights, duties, and risks pursuant to any of those documents;

iv. Communicate at all with Ms. Burton as Trustee, thus placing the Trust and Ms. Burton as Trustee into a position of having to rely upon Mr. Cato to answer legal questions that might arise;

v. Assure that Cato, LLC existed at the time that the Deed into Cato, LLC was executed or recorded; and

vi. In representing the Petitioners in the partition action, avoid a conflict of interest between or among the interests of the Trust and Ms. Burton as Trustee, the interests of the other members ("Other Members") of Cato, LLC, and the interests of Cato, LLC itself.

20. Alternatively, if the Trust and Ms. Burton as Trustee was not a client of Defendant Pitts and Defendant RBH, nevertheless, Defendant Pitts and Defendant RBH had those professional duties to the Trust and Ms. Burton as Trustee described in paragraph 19a, items i - v, and, under such circumstances, Defendants Pitts and RBH failed to carry out those duties as set forth in paragraph 19b, items i - v.

21. As a result of Defendant Pitts' and Defendant RBH's failures, at all times pertinent to the allegations of fact set forth in this Amended Complaint,

a. Ms. Burton as then Trustee and Plaintiff as her attorney-in-fact and then her successor Trustee remained ignorant of the Trust's rights and

responsibilities as to Cato, LLC, as to other parties, and as to subsequent real estate transactions;

b. The Trust was exposed to potential liability due to execution of the Deed into Cato, LLC by Ms. Burton as Trustee; and

c. The Trust and Ms. Burton as then Trustee and Plaintiff as her attorney-in-fact and then her successor Trustee were exposed to the risks, legal fees, costs, and expenses of being made a Defendant to the partition action and its related proceedings under Case No. 2008-CP-46-3171 in the Court of Common Pleas for the County of York, State of South Carolina.

22. The supporting Affidavits of Professor John P. Freeman and Michael J. Virzi, Esq., are attached as Exhibit O in satisfaction of applicable statutory requirements.

23. Under these circumstances, Plaintiff is informed and believes that the Trust is entitled to an order allowing recovery for any liability, loss, damage, cost or expense suffered or to be suffered by reason of Defendant Pitts' and Defendant RBH's failures specifically including but not necessarily limited to those legal fees and costs incurred by or on behalf of the Trust in connection with Case No. 2008-CP-46-3171.

SECOND CAUSE OF ACTION
(Against Defendants Pitts and RBH for Legal Malpractice as to the Other Members of Cato, LLC, or, in the Alternative, Professional Negligence)

24. The allegations of fact set forth in paragraphs 1 through 23 above are incorporated herein.

25. The Other Members were entitled to view themselves as, and indeed were, clients of Defendant Pitts and Defendant RBH and to view them as their attorney(s) at least, but not necessarily only, for the periods of time during which Defendants Pitts and RBH prepared the Articles, Agreement, and Deed into Cato, LLC and filed or oversaw the filing of Cato, LLC's Articles and Agreement as well as the Deed into Cato, LLC. Under such circumstances,

a. Defendant Pitts and Defendant RBH had duties to the Other Members including but not necessarily limited to

i. Preparing the Deed into Cato, LLC in a manner that correctly identified the grantors and correctly described the Areas;

ii. Conducting or requesting a title search of the real property sought to be conveyed by the Deed into Cato, LLC;

iii. Advising the Other Members as to the legal significance of the Articles, the Agreement, and the Deed into Cato, LLC;

iv. Advising the Other Members as to their rights, duties, and risks pursuant to the Articles, Agreement, and Deed into Cato, LLC;

v. Assuring that Cato, LLC existed before the Deed into Cato, LLC was executed; and

vi. Avoiding a representation that constituted a conflict between or among their interests, the interests of the Trust and Ms. Burton as Trustee, and the interests of Cato, LLC.

b. Upon information and belief, as to the Other Members, Defendant Pitts and Defendant RBH failed to carry out their duties in that they failed to

i. Prepare the Deed into Cato, LLC properly in that they incorrectly identified the Trust as a Grantor and incorrectly described the Areas;

ii. Conduct or request a title search regarding the Areas;

iii. Upon information and belief, provide any legal advice whatsoever to the Other Members as to the significance of the Articles, the Agreement, or the Deed into Cato, LLC or their respective rights and duties pursuant to any of those documents;

iv. Communicate at all with them other than through Mr. Cato, thus placing the Other Members into a position of having to rely upon Mr. Cato to answer legal questions that might arise;

v. Assure that Cato, LLC existed at the time that the Deed into Cato, LLC was executed or recorded; and

vi. In rendering their legal services in connection with the sale of the Areas or in connection with the partition action, avoid a conflict of interest between or among their interests, the interests of the Trust and Ms. Burton as Trustee, and the interests of Cato, LLC itself.

26. Alternatively, if the Other Members were not clients of Defendants Pitts and RBH, nevertheless, Defendants Pitts and RBH had those professional duties to them described in paragraph 25a, items i - v, and, under such circumstances, Defendants failed to carry out those duties as set forth in paragraph 25b, items i - v.

27. As a result of Defendants Pitts' and RBH's failures, at all times pertinent to the allegations of fact set forth in this Amended Complaint, the Other Members

a. Remained ignorant of their rights and responsibilities as to one another, as to the Trust and Ms. Burton as Trustee, Cato, LLC, and as to subsequent real estate transactions;

b. Were exposed to potential liability due to their execution of the Deed into Cato, LLC, their execution of the Quitclaim Deed, the Amendment to Contract, the Deed out of Cato, LLC, and the commencement of the partition action under Case No. 2008-CP-46-3171;

c. Were exposed to the risks, legal fees, costs, and expenses of being made party to the partition action and its related proceedings under Case No. 2008-CP-46-3171 in the Court of Common Pleas for the County of York, State of South Carolina.

28. The supporting Affidavits of Professor John P. Freeman and Michael J. Virzi, Esq., are attached as Exhibit O in satisfaction of applicable statutory requirements.

29. Under these circumstances, Plaintiff is informed and believes that the Other Members would be entitled to an order allowing recovery for any liability, loss, damage, cost or expense suffered by them by reason of Defendant Pitts' and Defendant RBH's failures specifically including but not necessarily limited to those legal fees and costs incurred by or on behalf of the Trust in connection with Case No. 2008-CP-46-3171, which legal fees and costs were invoiced to and paid by Cato, LLC.

30. Pursuant to the assignment agreement referred to in paragraph 17c above, Plaintiff is informed and believes that he in his capacity as Trustee is entitled to an order allowing the Trust to recover for any liability, loss, damage, cost or expense suffered by the Other Members by reason of Defendant Pitts' and Defendant RBH's failures specifically including but not necessarily limited to those legal fees and costs incurred by or on behalf of the Other Members and invoiced to and paid by Cato, LLC in connection with Case No. 2008-CP-46-3171.

THIRD CAUSE OF ACTION
(Against Defendants Pitts and RBH for Legal Malpractice as to Cato, LLC, or, in the Alternative, Professional Negligence)

31. The allegations of fact set forth in paragraphs 1 through 30 are incorporated herein.

32. Mr. Cato as its General Manager was entitled to view Cato, LLC and himself as, and indeed they were, clients of Defendant Pitts and Defendant RBH and to view them as its and his attorney(s) at least, but not necessarily only, for the periods of time during which Defendants Pitts and RBH prepared the Articles, Agreement, and Deed into Cato, LLC and filed or oversaw the filing of Cato, LLC's Articles and Agreement as well as the Deed into Cato, LLC. Under such circumstances,

a. Defendant Pitts and Defendant RBH had duties to Cato, LLC and Mr. Cato as its General Manager including but not necessarily limited to

i. Preparing the Deed into Cato, LLC in a manner that correctly identified the grantors and correctly described the Areas;

ii. Conducting or requesting a title search of the Areas described in the Deed into Cato, LLC;

iii. Advising Mr. Cato as General Manager as to the legal significance of the Articles, the Agreement, and the Deed into Cato, LLC;

iv. Advising Mr. Cato as General Manager as to Cato, LLC's rights, duties, and risks pursuant to the Articles, Agreement, and Deed into Cato, LLC;

v. Advising Mr. Cato as General Manager as to the requirements and obligations incumbent upon him and upon Cato, LLC in accordance with the provisions of applicable law including, but not necessarily limited to SC Code 33-44-404(c)(12);

vi. Assuring that Cato, LLC existed before the Deed into Cato, LLC was executed; and

vii. Avoiding a representation that constituted a conflict between or among the interests of the Trust and Ms. Burton as Trustee, the interests of other members of Cato, LLC, and the interests of Cato, LLC itself.

b. As to Cato, LLC and Mr. Cato as General Manager, Defendant Pitts and Defendant RBH failed to carry out their duties in that they failed to

i. Prepare the Deed into Cato, LLC properly in that they incorrectly identified the Trust as a Grantor and incorrectly described the Areas;

ii. Conduct or request a title search regarding the Areas;

iii. Provide proper legal advice to Mr. Cato as General Manager as to the significance of the Articles, the Agreement, or the Deed into Cato, LLC or Cato, LLC's rights, duties, and risks pursuant to any of those documents;

iv. Upon information and belief, communicate at all with any member of Cato, LLC, thus placing Mr. Cato into a position of dealing with legal questions that might arise in discussions with members of Cato, LLC;

v. Advise Mr. Cato as General Manager correctly as to the requirements and obligations incumbent upon him and upon Cato, LLC in accordance with the provisions of applicable law including, but not necessarily limited to SC Code 33-44-404(c)(12), thus leaving him with an incomplete and erroneous understanding of that law and its application to Cato, LLC's dealings with its members and with TAL;

vi. Assure that Cato, LLC existed at the time that the Deed into Cato, LLC was executed or recorded; and

vii. In representing the Petitioners in the partition action, avoid a conflict of interest between or among the interests of the Trust and Ms. Burton as Trustee, the interests of the Other Members of Cato, LLC, and the interests of Cato, LLC itself.

33. Alternatively, if Mr. Cato as Trustee was not a client of Defendants Pitts and RBH, nevertheless, Defendants Pitts and RBH had those professional duties to

Cato, LLC and Mr. Cato as its General Manager described in paragraph 32a, items i - v, and, under such circumstances, Defendants Pitts and RBH failed to carry out those duties as set forth in paragraph 32b, items i - v.

34. As a result of Defendant Pitts' and Defendant RBH's failures, at all times pertinent to the allegations of fact set forth in this Amended Complaint,

a. Mr. Cato as General Manager remained ignorant of Cato, LLC's rights and responsibilities as to TAL, as to the demands and expectations of its members, and as to the effect of subsequent real estate transactions;

b. Cato, LLC and Mr. Cato individually were exposed to potential liability due to execution of the Deed into Cato, LLC;

c. Cato, LLC was exposed to potential liability due to Mr. Cato's subsequent execution of the Deed out of Cato, LLC;

d. Mr. Cato as General Manager and individually was exposed to the legal fees, costs, and expenses of being made a counterclaim defendant and a third party defendant in Case No. 2008-CP-46-3171; and

e. Cato, LLC was exposed to the risks, legal fees, costs, and expenses of being made a Fourth Party Defendant in Case No. 2008-CP-46-3171 in the Court of Common Pleas for the County of York, State of South Carolina.

35. The supporting Affidavits of Professor John P. Freeman and Michael J. Virzi, Esq., are attached as Exhibit O in satisfaction of applicable statutory requirements.

36. Under these circumstances, Plaintiff is informed and believes that Cato, LLC and Mr. Cato as its General Manager are entitled to an order allowing recovery for any liability, loss, damage, cost or expense suffered or to be suffered by each of them by reason of Defendant Pitts' and Defendant RBH's failures specifically including but not necessarily limited to those legal fees and costs incurred by or on behalf of Mr. Cato as General Manager of Cato, LLC and Cato, LLC itself.

37. Pursuant to the assignment agreement referred to in paragraph 17c above, Plaintiff is informed and believes that he in his capacity as Trustee is entitled to an order allowing the Trust to recover for any liability, loss, damage, cost or expense suffered by Cato, LLC and Mr. Cato as its General Manager by reason of Defendant Pitts' and Defendant RBH's failures specifically including but not necessarily limited to those legal fees and costs incurred by or on behalf of Cato, LLC and Mr. Cato as its General Manager and invoiced to and paid by Cato, LLC.

FOURTH CAUSE OF ACTION
(Against Defendants Vann and MG for Legal Malpractice as to the Trust and Ms. Burton as Trustee, or, in the Alternative, Professional Negligence)

38. The allegations of fact set forth in paragraphs 1 through 37 are incorporated herein.

39. Ms. Burton as then Trustee was entitled to view the Trust and herself as, and indeed they were, clients of Defendants Vann and MG and to view them as its and her attorney(s) at least, but not necessarily only, for the periods of time during which Defendant Vann and Defendant MG prepared the Amendment to Contract, prepared for and conducted the closing of the purported sale of the

Areas to TAL, prepared the Deed out of Cato, LLC, prepared other closing documents for the purported sale of the Areas, conducted the closing of the purported sale of the Areas, and recorded the Deed out of Cato, LLC. Under such circumstances,

a. Defendant Vann and Defendant MG had duties to the Trust and Ms. Burton as then Trustee including but not necessarily limited to

   i. Assuring that the purported sale of the Areas was conducted in accordance with the provisions of applicable law including, but not necessarily limited to SC Code 33-44-404(c)(12);

   ii. Assuring that the Trust and Ms. Burton as then Trustee had notice of the Amendment to Contract and the planned closing of the purported sale of the Areas especially in view of their knowledge that Ms. Burton as then Trustee had not executed the Quitclaim Deed or consented to the purported sale of the Areas;

   iii. Given their notice of the Articles, Agreement, and Deed into Cato, LLC, advising Ms. Burton as then Trustee as to the legal significance and the rights, duties, and risks of the Trust arising out of or associated with the Amendment to Contract, the Deed out of Cato, LLC, and the planned and actual conduct of the closing of the purported sale of the Areas or, alternatively, at least advising her to seek independent legal counsel for those purposes;

   iv. Performing due diligence as reasonable under the circumstances to assure i) that Cato, LLC existed before the Deed into Cato, LLC

was executed, ii) that the Deed into Cato, LLC was a proper basis for the Deed out of Cato, LLC, and iii) that the representations, decisions, and actions of Mr. Cato as General Manager of Cato, LLC were properly authorized by Cato, LLC and the Trust;

v. Assuring that Cato, LLC existed before the Deed into Cato, LLC was executed; and

vi. Avoiding a conflict of interest in their representations for the Amendment to Contract, the preparation of the Deed out of Cato, LLC, the closing of the purported sale of the Areas, and, to the extent of their involvement, matters affecting the partition action.

b. As to Trust and Ms. Burton as then Trustee, Defendant Vann and Defendant MG failed to carry out their duties in that they failed to

i. Assure that the closing of the purported sale of the Areas was conducted in accordance with the provisions of applicable law including, but not necessarily limited to SC Code 33-44-404(c)(12);

ii. Communicate or attempt to communicate in any way with Ms. Burton as then Trustee;

iii. In the context of the closing of the purported sale of the Areas or otherwise, provide any legal advice whatsoever to Ms. Burton as Trustee as to the legal significance of the Articles, the Agreement, the Deed into Cato, LLC, the Amendment to Contract, the Deed out of Cato, LLC, or the Trust's rights, duties, and risks in connection

with any of those documents or, alternatively, at least advise her to seek independent legal counsel for those purposes;

iv. Perform due diligence as reasonable under the circumstances to assure that i) that Cato, LLC existed before the Deed into Cato, LLC was executed, ii) that the Deed into Cato, LLC was a proper basis for the Deed out of Cato, LLC, and iii) that the representations, decisions, and actions of Mr. Cato as General Manager of Cato, LLC were properly authorized by Cato, LLC and the Trust; and

v. Assure that Cato, LLC existed at the time that the Deed into Cato, LLC was executed or recorded;

vi. In rendering their legal services in connection with the Amendment to Contract, the closing of the purported sale of the Areas, or the partition action, avoid a conflict between or among their interests, the interests of the Other Members, the interests of the Trust and Ms. Burton as Trustee, the interests of Cato, LLC itself, and the interests of TAL.

40. Alternatively, if Ms. Burton as then Trustee was not a client of Defendant Vann and Defendant MG, nevertheless, Defendants Vann and MG had those professional duties to the Trust and Ms. Burton as Trustee described in paragraph 39a, items i - v, and, under such circumstances, Defendants Vann and MG failed to carry out those duties as set forth in paragraph 40b, items i - v.

41. As a result of Defendant Vann's and Defendant RBH's failures, at all times pertinent to the allegations of fact set forth in this Amended Complaint,

a. Ms. Burton as then Trustee and Plaintiff as her attorney-in-fact and then her successor Trustee remained ignorant of the Trust's rights and responsibilities as to Cato, LLC, as to other parties, and as to subsequent real estate transactions;

b. The Trust was exposed to potential liability due to execution of the Deed into Cato, LLC by Ms. Burton as then Trustee, execution of the Amendment to Contract, conduct of the closing of the purported sale of the Areas, and the subsequent filing of the partition action pursuant to the Amendment to Contract; and

c. Ms. Burton as then Trustee and Plaintiff as her attorney-in-fact and then her successor Trustee were exposed to the risks, legal fees, costs, and expenses of the Trust, Ms. Burton as then Trustee and Plaintiff as her attorney-in-fact and then her successor Trustee and Plaintiff individually being made Defendants to the partition action and/or its related proceedings under Case No. 2008-CP-46-3171 in the Court of Common Pleas for the County of York, State of South Carolina.

42. The supporting Affidavits of Professor John P. Freeman and Michael J. Virzi, Esq., are attached as Exhibit O in satisfaction of applicable statutory requirements.

43. Under these circumstances, Plaintiff is informed and believes that the Trust is entitled to an order allowing recovery for any liability, loss, damage, cost or

expense suffered or to be suffered by reason of Defendant Vann's and Defendant MG's failures specifically including but not necessarily limited to those legal fees and costs incurred by or on behalf of the Trust in connection with Case No. 2008-CP-46-3171.

FIFTH CAUSE OF ACTION
(Against Defendants Vann and MG for Legal Malpractice as to Other Members of Cato, LLC, or, in the Alternative, Professional Negligence)

44. The allegations of fact set forth in paragraphs 1 through 43 are incorporated herein.

45. The Other Members were entitled to view themselves as, and indeed were, clients of Defendant Vann and Defendant MG and to view them as their attorney(s) at least, but not necessarily only, for the periods of time during which Defendants Vann and MG prepared the Amendment to Contract, prepared for and conducted the closing of the purported sale of the Areas to TAL, prepared the Deed out of Cato, LLC, prepared other closing documents for the purported sale of the Areas, conducted the closing of the purported sale of the Areas, and recorded the Deed out of Cato, LLC. Under such circumstances,

a. Defendants Vann and MG had duties to the Other Members including but not necessarily limited to

i. Assuring that the purported sale of the Areas was conducted in accordance with the provisions of applicable law including, but not necessarily limited to SC Code 33-44-404(c)(12);

ii. Assuring that the Other Members had notice of Defendant Vann's and Defendant MG's knowledge that Ms. Burton as then Trustee

had not consented to the purported sale of the Areas and the legal issues rights, duties, and risks arising therefrom;

iii. Given their notice of the Articles, Agreement, and Deed into Cato, LLC, advising the Other Members as to the legal significance and the rights, duties, and risks of the Other Members arising out of or associated with the Amendment to Contract, the Deed out of Cato, LLC, the conduct of the closing of the purported sale of the Areas or, alternatively, at least advising them to seek independent legal counsel for those purposes;

iv. Performing due diligence as reasonable under the circumstances to assure i) that Cato, LLC existed before the Deed into Cato, LLC was executed, ii) that the Deed into Cato, LLC was a proper basis for the Deed out of Cato, LLC, and iii) that the representations, decisions, and actions of Mr. Cato as General Manager of Cato, LLC were properly authorized by Cato, LLC; and

v. Avoiding a conflict of interest in their representations for the Amendment to Contract, the preparation of the Deed out of Cato, LLC, the closing of the purported sale of the Areas, and, to the extent of their involvement, matters affecting the partition action.

b. Upon information and belief, as to the Other Members, Defendant Vann and Defendant MG failed to carry out their duties in that they failed to

i. Assure that the closing of the purported sale of the Areas was conducted in accordance with the provisions of applicable law including, but not necessarily limited to SC Code 33-44-404(c)(12);

ii. Upon information and belief, communicate or attempt to communicate in any way with the Other Members, except Mr. Cato;

iii. Upon information and belief, in the context of the closing of the purported sale of the Areas or otherwise, provide any legal advice whatsoever to the Other Members as to the legal significance of the Articles, the Agreement, the Deed into Cato, LLC, the Amendment to Contract, the Deed out of Cato, LLC, or the Trust's rights, duties, and risks in connection with any of those documents or, alternatively, at least advise them to seek independent legal counsel for those purposes;

iv. Perform due diligence as reasonable under the circumstances to assure i) that Cato, LLC existed before the Deed into Cato, LLC was executed, ii) that the Deed into Cato, LLC was a proper basis for the Deed out of Cato, LLC, and iii) that the representations, decisions, and actions of Mr. Cato as General Manager of Cato, LLC were properly authorized by Cato, LLC and the Trust; and

v. In rendering their legal services in connection with the Amendment to Contract, the closing of the purported sale of the Areas, or the partition action, avoid a conflict between or among the interests of

the Other Members, the interests of the Trust and Ms. Burton as Trustee, the interests of Cato, LLC itself, and the interests of TAL.

46. Alternatively, if the Other Members were not clients of Defendant Vann and Defendant MG, nevertheless, Defendant Vann and Defendant MG had those professional duties to them described in paragraph 45a, items i - iv, and, under such circumstances, Defendants failed to carry out those duties as set forth in paragraph 45b, items i - iv.

47. As a result of Defendant Vann's and Defendant MG's failures, at all times pertinent to the allegations of fact set forth in this Amended Complaint, the Other Members

a. Remained ignorant of their rights and responsibilities as to one another, the Trust and Ms. Burton as Trustee, Cato, LLC, and subsequent real estate transactions;

b. Were exposed to potential liability due to their execution of the Deed into Cato, LLC, their execution of the Quitclaim Deed, the Amendment to Contract, the Deed out of Cato, LLC, and the commencement of the partition action under Case No. 2008-CP-46-3171;

c. Were exposed to the risks, legal fees, costs, and expenses of being made party to the partition action and its related proceedings under Case No. 2008-CP-46-3171 in the Court of Common Pleas for the County of York, State of South Carolina.

48. The supporting Affidavits of Professor John P. Freeman and Michael J. Virzi, Esq., are attached as Exhibit O in satisfaction of applicable statutory requirements.

49. Under these circumstances, Plaintiff is informed and believes that the Other Members would be entitled to an order allowing recovery for any liability, loss, damage, cost or expense suffered by them by reason of Defendant Vann's and Defendant MG's failures specifically including but not necessarily limited to those legal fees and costs incurred by or on behalf of the Trust in connection with Case No. 2008-CP-46-3171, which legal fees and costs were invoiced to and paid by Cato, LLC.

50. Pursuant to the assignment agreement referred to in paragraph 17c above, Plaintiff is informed and believes that he in his capacity as Trustee is entitled to an order allowing the Trust to recover for any liability, loss, damage, cost or expense suffered by the Other Members by reason of Defendant Vann's and Defendant MG's failures specifically including but not necessarily limited to those legal fees and costs incurred by or on behalf of the Other Members and invoiced to and paid by Cato, LLC in connection with Case No. 2008-CP-46-3171.

SIXTH CAUSE OF ACTION
(Against Defendants Vann and MG for Legal Malpractice as to Cato, LLC, or, in the Alternative, Professional Negligence)

51. The allegations of fact set forth in paragraphs 1 through 50 are incorporated herein.

52. Mr. Cato as its General Manager was entitled to view Cato, LLC as, and indeed it was, a client of Defendant Vann and Defendant MG and to view them as its and

his attorney(s) at least, but not necessarily only, for the periods of time during which Defendants Vann and MG prepared the Amendment to Contract, prepared for and conducted the closing of the purported sale of the Areas to TAL, prepared the Deed out of Cato, LLC, prepared other closing documents for the purported sale of the Areas, conducted the closing of the purported sale of the Areas, and recorded the Deed out of Cato, LLC. Under such circumstances,

a. Defendants Vann and MG had duties to Cato, LLC and Mr. Cato as its General Manager including but not necessarily limited to

i. Assuring that the closing of the purported sale of the Areas was conducted in accordance with the provisions of applicable law including, but not necessarily limited to SC Code 33-44-404(c)(12);

ii. Assuring that Cato, LLC and Mr. Cato as its General Manager understood the legal significance of the fact that Ms. Burton as then Trustee had not consented to the purported sale of the Areas and the legal issues rights, duties, and risks arising therefrom;

iii. Given their notice of the Articles, Agreement, and Deed into Cato, LLC, advising Cato, LLC and Mr. Cato as its General Manager as to the legal significance and the rights, duties, and risks of Cato, LLC and Mr. Cato as its General Manager arising out of or associated with the Amendment to Contract, the Deed out of Cato, LLC, the conduct of the closing of the purported sale of the Areas or, alternatively, at least advising Mr. Cato as General Manager of Cato, LLC to seek independent legal counsel for those purposes;

iv. Advising Mr. Cato as General Manager as to the requirements and obligations incumbent upon him and upon Cato, LLC in accordance with the provisions of applicable law including, but not necessarily limited to SC Code 33-44-404(c)(12);

v. Performing due diligence as reasonable under the circumstances to assure i) that Cato, LLC existed before the Deed into Cato, LLC was executed, ii) that the Deed into Cato, LLC was a proper basis for the Deed out of Cato, LLC, and iii) that the representations, decisions, and actions of Mr. Cato as General Manager of Cato, LLC were properly authorized by Cato, LLC;

vi. Avoiding a conflict of interest in their representations for the Amendment to Contract, the preparation of the Deed out of Cato, LLC, the closing of the purported sale of the Areas, and, to the extent of their involvement, matters affecting the partition action.

b. As to Cato, LLC and Mr. Cato as General Manager, Defendants Vann and MG failed to carry out their duties in that they failed to

i. Assure that the closing of the purported sale of the Areas was conducted in accordance with applicable law including, but not necessarily limited to SC Code 33-44-404(c)(12);

ii. Assure that Cato, LLC and Mr. Cato as its General Manager understood the legal significance of the fact that Ms. Burton as then Trustee had not consented to the purported sale of the Areas;

iii. Upon information and belief, in the context of the closing of the purported sale of the Areas or otherwise, provide proper legal advice to Cato, LLC or Mr. Cato as its General Manager as to the legal significance of the Articles, the Agreement, the Deed into Cato, LLC, the Amendment to Contract, the Deed out of Cato, LLC, or Cato, LLCs's rights, duties, and risks in connection with any of those documents or, alternatively, at least advise Mr. Cato as Cato, LLC's General Manager to seek independent legal counsel for those purposes;

iv. Perform due diligence as reasonable under the circumstances to assure i) that Cato, LLC existed before the Deed into Cato, LLC was executed, ii) that the Deed into Cato, LLC was a proper basis for the Deed out of Cato, LLC, and iii) that the representations, decisions, and actions of Mr. Cato as General Manager of Cato, LLC were properly authorized by Cato, LLC and the Trust;

v. Advise Mr. Cato as General Manager as to the legal requirements and obligations incumbent upon him and upon Cato, LLC pursuant to the provisions of South Carolina's Limited Liability Company Law, including but not limited to the legal risk inherent in the absence of the consent of Ms. Burton as then Trustee to the sale of the Areas, thus leaving him with an incomplete and erroneous understanding of that law and its application to Cato, LLC's dealings with its members and with TAL; and

vi. In rendering their legal services in connection with the Amendment to Contract, the closing of the purported sale of the Areas, or the partition action, avoid a conflict between or among the interests of the Other Members, the interests of the Trust and Ms. Burton as Trustee, the interests of Cato, LLC itself, and the interests of TAL.

53. Alternatively, if Mr. Cato as General Manager was not a client of Defendant Vann and Defendant MG, nevertheless, Defendant Vann and Defendant MG had those professional duties to Cato, LLC and Mr. Cato as its General Manager described in paragraph 52a, items i - v, and, under such circumstances, Defendants Pitts and RBH failed to carry out those duties as set forth in paragraph 34b, items i - v.

54. As a result of Defendants Vann's and MG's failures, at all times pertinent to the allegations of fact set forth in this Amended Complaint,

a. Mr. Cato as General Manager was exposed to potential liability because he remained ignorant of Cato, LLC's rights and responsibilities as to TAL as to the demands and expectations of its members and as to the potential effects of his ignorance upon subsequent real estate transactions;

b. Cato, LLC was exposed to potential liability due to execution of the Deed into Cato, LLC;

c. Mr. Cato as General Manager and individually was exposed to the legal fees, costs, and expenses of being made a counterclaim defendant and a third party defendant in Case No. 2008-CP-46-3171; and

d. Cato, LLC was exposed to the risks, legal fees, costs, and expenses of being made a Fourth Party Defendant in Case No. 2008-CP-46-3171 in the Court of Common Pleas for the County of York, State of South Carolina.

55. The supporting Affidavits of Professor John P. Freeman and Michael J. Virzi, Esq., are attached as Exhibit O in satisfaction of applicable statutory requirements.

56. Under these circumstances, Plaintiff is informed and believes that Cato, LLC and Mr. Cato in his capacity as its General Manager are entitled to an order allowing recovery for any liability, loss, damage, cost or expense suffered or to be suffered by each of them by reason of Defendants Vann's and MG's failures.

57. Given the assignment agreement referred to in paragraph 17c above, Plaintiff believes that he in his capacity as Trustee is entitled to an order allowing the Trust to recover for any liability, loss, damage, cost or expense suffered by Cato, LLC and Mr. Cato in his capacity as its General Manager by reason of Defendants Vann's and MG's failures.

SEVENTH CAUSE OF ACTION
(Against Defendants for Legal Malpractice as to Cato, LLC, or, in the Alternative, Professional Negligence)

58. The allegations of fact set forth in paragraphs 1 through 57 are incorporated herein.

59. The proceedings in Case No. 2008-CP-46-3171 were settled among the litigants pursuant to a consent order and settlement agreement (collectively, "the Settlement") attached hereto as Exhibit P.

60. Included in the Settlement was a payment to the Trust in the amount of $249,000.00, as to which Plaintiff asserts that $240,000.00 represents compensation attributable to the Trust's twenty percent (20%) interest in the Areas and the Old Roadbed.

61. In his e-mail dated November 8, 2007, attached as Exhibit H, Defendant Pitts advised Mr. Cato as General Manager that the $1,000,000.00 price offered to Cato, LLC for the Areas and the Old Roadbed was in his opinion grounds to "run to the bank."

62. On or about December 12, 2007, Defendant Vann conducted the closing of the Areas without the Old Roadbed as a result of which Cato, LLC as seller received the sum of $900,000.00 from TAL as buyer with the sum of $100,000.00 being held to compensate Cato, LLC for an anticipated future closing on the Old Roadbed pursuant to the provisions of the Amendment to Contract. Thus, the value of the Areas and the Old Roadbed Tract pursuant to both the Letter of Intent and the Amendment to Contract was $1,000,000.00.

63. However, the value of the Areas and the Old Roadbed Tract as reflected in the Settlement payment to the Trust was $2,200,000.00 consisting of the $1,000,000.00 reflected in the Letter of Intent and the Amendment to Contract and an additional $1,200,000.00 reflected in the Settlement payment for the Trust's 20% interest.

64. Upon information and belief, the failure of the Defendants to advise Cato, LLC regarding the issues raised by Ms. Burton's refusal to consent to the sale of the Areas without an independent appraisal and to render advice to Cato, LLC

appropriate to that situation constitutes legal malpractice or professional negligence for which Cato, LLC should be entitled to recover damages in the amount of

a. the sum of, on the one hand, the value set forth in the Letter of Intent and the Amendment to Contract, *i.e.*, $1,000,000, and, on the other hand, the value as reflected in the settlement payment to the Trust, *i.e.*, $1,200,000.00; LESS

b. The settlement payment to the Trust, *i.e.*, $240,000.00; OR

c. The total amount of $960,000.00.

65. The supporting Affidavits of Professor John P. Freeman and Michael J. Virzi, Esq., are attached as Exhibit Q in satisfaction of applicable statutory requirements.

66. Under these circumstances, Plaintiff is informed and believes that Cato, LLC is entitled to an order allowing recovery of the sum of $960,000.00.

67. Given the assignment agreement referred to in paragraph 17c above, Plaintiff believes that the Trust is entitled to an order allowing recovery of the said $960,000.00.

WHEREFORE, Plaintiff respectfully requests that

a. The Court grant the relief requested in the Plaintiff's first cause of action;

b. The Court grant the relief requested in the Plaintiff's second cause of action;

c. The Court grant the relief requested in the Plaintiff's third cause of action;

d. The Court grant the relief requested in the Plaintiff's fourth cause of action;

e. The Court grant the relief requested in the Plaintiff's fifth cause of action;

f. The Court grant the relief requested in the Plaintiff's sixth cause of action;

g. The Court grant the relief requested in the Plaintiff's seventh cause of action; and

h. The Court award such other and further relief as it deems justice may require.

Dated this 6th day of September, 2013.

George Hunter McMaster, Esquire
Attorney for the Plaintiffs
SC BAR #2886
TOMPKINS & McMaster, LLP
1530 Richland Street
Columbia, South Carolina 29201
Ph: (803) 799-4400
Dd: (803)-255-8373
Fx: (803) 252-2240
E-mail: ghm@tmmlaw.com

COPYRIGHT @ 2013 BY GEORGE HUNTER McMASTER, ESQUIRE.

EXHIBIT NO. A
TOMPKINS & McMASTER

STATE OF SOUTH CAROLINA COUNTY OF YORK	IN THE COURT OF COMMON PLEAS FOR THE SIXTEENTH JUDICIAL CIRCUIT
David Alan Burton Individually and as Successor Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, Individually and in the Right and on Behalf of T.E. Cato Estate LLC, Plaintiff s	Case No. 2010-CP-46-2267
v.	AFFIDAVIT OF JOHN P. FREEMAN
Carroll M. Pitts, Jr., Esq., Robinson Bradshaw & Hinson, P.A.; Joshua B. Vann, Esq., and Morton & Gettys, LLC, Defendants	

Personally appeared before me John Freeman who first being duly sworn, deposes and states as follows:

1. The information contained herein is true and correct to the best of my knowledge, information, and belief. This affidavit relates to above-captioned lawsuit filed by Plaintiffs against: (1) two men who were at all times relevant partners in different law firms, Carroll M. Pitts, Jr. and Joshua B. Vann; and (2) the law firm of Robinson, Bradshaw & Hinson, P.A., and the firm of Morton & Gettys, LLC. Mr. Pitts is today a former partner of Robinson Bradshaw; Mr. Vann is a partner with the Morton & Gettys firm.

2. Following my graduation from the University of Notre Dame Law School in 1970, I worked at the Jones Day law firm (then known as Jones, Day, Cockley and Reavis). I left Jones Day in 1972 to take a Fellowship at the University of Pennsylvania Law School's Center for Study of Financial Institutions. I subsequently received my LL.M. from Penn Law

School. In 1973 I joined the faculty of the University of South Carolina Law School. Besides teaching at USC, I have taught at the University of Texas Law School and Loyola Law School in Chicago. I have also worked for the Securities and Exchange Commission as a special counsel. As a law school professor I specialized in business courses and legal ethics. I am familiar with lawyer disciplinary proceedings, having participated in the litigation of discipline cases as a defense lawyer, consultant to disciplinary counsel, and as an expert witness on various occasions. I have served as a member of the South Carolina Bar's Ethics Advisory Committee and have written various ethics opinions published by the Bar. Prior to my retirement from USC Law School in 2008, I taught legal ethics for 35 years at USC Law School. I have also taught legal ethics at numerous CLE programs, and at several JCLE programs. I have served as a litigation consultant, or as a testifying expert in numerous legal malpractice cases. I have lectured on the standards applicable to legal malpractice many times, and have written about the topic. I have participated in disputes as to the behavior of lawyers in handling business and property transactions and in their business dealings with clients many times, and have testified as an expert in such cases many times. I have served as an expert witness many times on questions involving lawyers' obligation to investigate relevant facts and to convey accurate, complete information, and the duty to avoid or handle properly conflicts of interest. My curriculum vitae is attached as Exhibit 1, which further establishes my qualifications.

3. This affidavit is presented under S.C. Code § 15-36-100 which requires, in a complaint against a lawyer, for the plaintiff to file "an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit."

4. In evaluating the behavior of the defendant lawyers for purposes of this affidavit,

I have conducted a review of relevant documents including the original pleadings, the deposition of Carroll M. Pitts in this matter (with exhibits), the proposed amended complaint, Judge Hayes' Order in C.A. No. 2008-CP-46-3171 filed January 6, 2012, and the settlement agreement and assignment agreement related to C.A. No. 2008-CP-46-3171. I have also consulted with Plaintiffs' legal counsel about the underlying facts. I have reviewed the defendant lawyers' conduct in light of the standard of care applicable to South Carolina lawyers, namely the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession in this State. *See Holy Loch Distribs.*, 340 S.C. 20, 26, 531 S.E.2d 282, 285 (2000). For purposes of this affidavit, I deem the actions and inactions of the defendant lawyers imputable to their respective law firms based on agency principles because it appears the defendant lawyers were acting for and on behalf of their law firms, in the scope of their employment and authority, at the time of the actions and inactions in question. For purposes of this affidavit, I accept as true the facts stated in ¶¶ 7-17 of the proposed amended complaint filed herewith.

5. Based on the facts presented, it is my opinion as an expert in the legal malpractice field that the defendant lawyers and, through them, their respective law firms, engaged in one or more negligent acts and omissions in their dealings with and on behalf of Plaintiffs, including the following:

a. Failure to investigate, understand, and make appropriate disclosure of all material facts concerning major real estate transactions devised and orchestrated by the attorneys to the affected parties who were reliant on the lawyers' professional efforts.

b. Failure to properly protect the interests of Plaintiffs

c. Failure to see to it that material transactions affecting Plaintiffs effectuated by legal counsel were properly authorized.

d. Failure to protect the interests of all parties who reposed trust in legal counsel and who were dependent upon legal counsel to protect their interests.

e. Engaging in a failure to exercise due care with the result that clients of the lawyers became embroiled in controversy causing them to bear great expense needlessly.

f. Failure to advise persons allegedly not represented by the lawyers that they were about to become affected by major transaction in which potential conflicts of interest existed as to which they had no lawyer protecting their interests, and that they needed and should seek independent counsel.

g. Improper handling of a transaction in which counsel was faced with actual or potential conflict of interest.

h. As to lawyer Pitts and his law firm, taking an adverse interest against Plaintiff Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, in a matter in which he had served as counsel for same, in violation of professional legal standards barring lawyers from attacking one co-client on behalf of others.

6. I hold these opinions because there is evidence that the defendant lawyers negligently, recklessly or knowingly participated and effectuated one or more transactions involving conflicts of interest, deception, over-reaching, and foreseeable strife, leaving plaintiffs exploited and abused. Additionally, I believe the defendant lawyers' respective law firms are accountable based on the defendant lawyer-agents' wrongful acts and inactions.

7. As the lawyers involved in devising and attempting to execute ill-conceived and poorly executed real estate transactions involving Plaintiffs, it was the defendant lawyers' job to warn of all foreseeable risks and potential conflicts and make fair and honest disclosures, promote realistic expectations, handle conflicts properly, see to it that Plaintiffs were treated fairly, and to protect the parties from unfairness and financial harm. Because of the defendant lawyers' breaches of duty, this did not happen.

8. In my opinion, the defendant lawyers' mishandling of the legal affairs in this matter fell below the standard of care, skill, diligence and loyalty expected of lawyers in South Carolina. It appears to me that this deficient conduct proximately caused injury to Plaintiffs and constitutes legal malpractice.

9. I reserve the right to amend or supplement my opinions as additional information becomes available.

10. Further affiant sayeth not.

JOHN P. FREEMAN

SWORN TO BEFORE ME this 22nd day of August, 2013

NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission expires: 7/7/2018

EXHIBIT 1

RESUME
John P. Freeman
Professor of Law Emeritus

Address and phone numbers:	2329 Wilmot Avenue Columbia, South Carolina 29205 803-254-4667 (phone) 753-9870 (fax)
Education history:	LL.M., 1976, University of Pennsylvania Law School; J.D., 1970, University of Notre Dame Law School; B.B.A., 1967, University of Notre Dame (Accounting)
Employment history:	1970-72, Attorney, Jones, Day Law Firm, Cleveland, Ohio 1972-73, Fellow, University of Pennsylvania Law School Center for the Study of Financial Institutions 1973-75, Assistant Professor of Law, University of South Carolina 1974 and 1975 (Summers), Special Counsel, Division of Investment Management, SEC, Washington, D.C. 1975-78, Associate Professor of Law, University of South Carolina; Visiting Associate Professor of Law at Loyola Law School (Chicago) Spring 1977 1978-2008, Professor of Law, University of South Carolina; Visiting Professor of Law at University of Texas Law School, summer 1978
Present:	Distinguished Professor Emeritus and John T. Campbell Chair in Business and Professional Ethics Emeritus

Honors and Awards:	Undergraduate: Member Beta Alpha Psi (Honorary Accounting Fraternity) Law School: Executive Editor, Notre Dame Lawyer; Distinguished Military Graduate
Professional:	At University of South Carolina Law School: Senior Class Annual Outstanding Faculty Award of 1975, 1976, 1977, 1984 Winston Churchill Award, South Carolina Jury Trial Foundation 1995; Distinguished Service Award, South Carolina Trial Lawyers Association 2000; Appointed Member, South Carolina Judicial Merit Selection Commission (presently serving) John Belton O'Neall Inn of Court McDonald/Rhodes Award 2010
Admitted to Practice:	Ohio; South Carolina
Teaching History Courses Taught:	Professional Responsibility, Legal Accounting, Business Associations, Corporations, Agency-Partnership, Securities Regulation, Corporate Finance, Business Planning, Legal Research and Writing, Business Crime, Legal Malpractice Component of Advanced Legal Profession Seminar

Scholarly and Professional Publications

Author, 1999-2008, Regular Legal Ethics Column for South Carolina Lawyer.

Article, Protecting Judicial Independence, 6 Charleston L. Rev. 511 (2012).

Article, Appearance of Impropriety, Recusal, and the *Segars-Andrews* Case, 62 S.C.L. Rev. 485 (2011).

Article (with Stewart Brown and Steve Pomerantz), Mutual Fund Advisory Fees: New Evidence and a Fair Fiduciary Duty Test, 61 Okla. L. Rev. 83 (2008).

Article, The Mutual Fund Distribution Fee Mess, 32 J. Corporation Law 739 (2007).

Viewpoint, Say No to Vending Machine Justice, S.C. Lawyer, July 2007, at 8.

Article, It's the Conflict of Interest, Stupid, Money Mgm't Exec., May 17, 2004, at 14.

Chapter on Legal Opinion Liability in Legal Opinion Letters A Comprehensive Guide to Opinion Letter Practice (M. John Sterba, Jr., ed. 2003) (plus annual updates).

Chapter in South Carolina Damages Treatise on Damages in Securities Cases (2004).

Article, The Ethics of Using Judges to Conceal Wrongdoing, 55 S.C.L. Rev. 829 (2004).

Article (with Stewart Brown), Mutual Fund Advisory Fees: The Cost of Conflicts of Interest, 26 J. Corporation Law 610 (2001).

Article, Liens, Fees and Taxes, South Carolina Trial Lawyer, Summer 2000, at 26.

Article, A Business Lawyer Looks at the Internet, 49 S.C.L. Rev. 903 (1998).

Article, Payments to Medical Care Providers: What Are the Lawyer's Obligations' South Carolina Lawyer, September-October 1994, at 39.

Article, Current Developments in Lawyer Liability: Coping with the Fraudulent Client, Delaware Lawyer, Winter 1993, at 27.

Article, Treble Damage Statutes Can Increase Trust Recoveries, 4 Probate Practice Reporter, June 1992, at 1.

Article (with Nathan Crystal), Scienter in Professional Liability Cases, 42 S.C.L. Rev. 783 (1991).

Article, How Computerized Databases Are Redefining Due Diligence, Carolina Lawyer (July-August 1991).

Article, When Are Lawyers' Gifts to Judges Improper' Carolina Lawyer (November-December 1990).

Article, Current Developments in Legal Opinion Liability, 1989 Col. J. Bus. L. 235.

Article, Understanding the Joint Client Exception to the Attorney-Client Privilege, Carolina Lawyer (July-August 1989).

Article, A RICO Primer, 1985 Small Business Counselor No. 4.

Article, The Use of Mutual Fund Assets to Pay Marketing Costs, 9 Loy. Chi. L.J. 553 (1978).

Article, Marketing Mutual Funds and Individual Life Insurance, 28 S.C.L. Rev. 1 124 (1976), reprinted in Nat'l Ins. L. Rev. Serv. (1977).

Article, Opinion Letters and Professionalism, 1973 Duke L.J. 371 439, reprinted in Securities Law Review 1974 (E. Folk, III, ed.).

Co-author, Multi student Survey, The Mutual Fund Industry: A Legal Survey, 44 Notre Dame Lawyer 732 983 (1969).

Case Comment, Escott v. BarChris Constr. Corp., 44 Notre Dame Lawyer, 122 40 (1968).

Other Scholarly Activities

Speeches (with accompanying outlines) presented at numerous CLE courses sponsored by various entities including the South Carolina Bar, University of South Carolina Law School and the South Carolina Supreme Court.

CLE Presentations 2004-13: Ass'n of S.C. Claimants Attorneys for Workers Compensation, Ethics Seminar March 22, 2013; SC Bar, Ethical Issues in Working with Vets and Their Families, Feb. 12, 2012; Expert Witness Participant, SC Bar-ABOTA, Masters in Trial Program, Feb. 1, 2013; SC Bar, Ethical Issues in Handling VA Appeals, Jan. 12, 2013; SC Bar, Ethical Issues in a Non-Adversarial System, Dec. 11, 2012; Richland County Bar Ass'n Ethics CLE, Nov. 9, 2012;University of South Carolina Law School, Alumni Reunion Ethics CLE, Nov. 3, 2012; General Assembly Legal Staff, Ethics for Government Lawyers, Oct. 3, 2012; Setzler Scott Law Firm (In-house CLE), West Columbia, SC, Ethics CLE, Feb. 14, 2012; Charleston Law School, Panel, Symposium on Lawyer and Judicial Fitness, Feb. 10, 2012; Charleston County Bar Ass'n, Ethics CLE, Feb. 3, 2012; SC Bar, Panel on Lawyer Confidentiality, Jan. 19, 2012; Nov. 15, 2011, SC Workers Comp. Comm., Legal Ethics; Richardson Patrick-Sponsored CLE, Charleston, SC, April 29, 2011; National Ass'n State Securities Administrators, Ethics in Securities Litigation, Charleston, Jan. 24, 20011; Richland County Legal Ethics Update, Nov. 5, 2010; S.C. Law Review Symposium, Judicial Recusal, Oct. 21, 2010; League of Women Voters, Lecture on Judicial Selection, Oct. 8, 2010, Charleston, S.C.; KershawHealth Board of Directors, Advice on Your Duties as Board Members, July 15, 2010, Camden, SC; American Ass'n of Matrimonial Lawyers, Ethics in Marital Cases, March 19, 2010 (Aruba), John Belton O'Neall Inn of Court, Ethics Lessons Taught by Lawyers, Nov. 17, 2009; South Carolina Defense Trial Lawyer's Ass'n, Judicial Selection in South Carolina, Nov. 7, 2009; Richland County Bar Ass'n, Legal Ethics, Nov. 6, 2009; South Carolina Legislature Employees, Legal Ethics Update, Oct. 21, 2009; Budget & Control Board, Ethics Lecture to SC State Employees, Oct. 2, 2009; South Carolina Bar, Family Law Ethics Update, Sept. 18, 2009; Motley Rice Law Firm, Legal Ethics Update, Sept. 11, 2009; South Carolina Judicial Selection Commission, Judicial Ethics, July 31, 2009; John Belton O'Neall Inn of Court, Ethics of Advertising Firms, Jan. 20. 2009; S.C. Bar, Ethics

Presentation "Business Lawyer Horror Stories, Nov. 21, 2008; Participant, Mutual Fund Industry Regulation Roundtable, Chicago-Kent Law School, Nov. 7, 2008; SC Legislature, Ethical Duties of Legislative Employees, Oct. 2, 2008; SC Bar, Dealing with Ethical Duties When Dealing with Pro Se Parties, Oct. 10, 2008; Richardson Patrick Local Counsel CLE, Litigation Ethics, May 2, 2008 (Charleston, SC); Inst. of Public Utilities, 39th Ann. Reg. Policy Conf., Panel on Equity and Responsibility in the Public Utilities Sector (Charleston, SC), Dec. 3, 2007; S.C. Attorney General's Office; Litigation Ethics, Nov. 9, 2007; Richland County Bar, Ethics Update, Nov. 2, 2007; SC Bar, Litigation Ethics, Oct. 26, 2007; S.C. Children's Law Center, Ethical Problems in the Child Abuse Area, Oct. 19, 2007; National Ass'n of Medicaid Fraud Control Units, Ethics and the Government Lawyer (Savannah, Ga.), Oct. 1, 2007; SCACPA Litigation Conf., Litigation Ethics (Kiawah Island, SC), Sept. 21, 2007; S.C. Circuit Court Judges, May 17, 2007, Practice Tips in Civil Litigation; Energy & Mineral Law Foundation, May 15, 2007, Panel Member, Legal Ethics, 2 hr.; S.C. Government Investigators, Ethical Duties of Investigators, Feb. 23, 2007; S.C. Bar, Employment Law Section, Ethics Update, Jan. 26, 2007; S.C. Association of Counties, Ethics Update, Dec. 8, 2006; Lexington County Bar Ass'n, Ethics Update, Dec. 6, 2006; Richland County Bar, Ethics Update, Nov. 3, 2006; S.C. State Government Lawyers, Ethics Update, Nov. 3, 2006; S.C. Judicial Merit Selection Commission, Overview of Judicial Ethics, Sept. 14, 2006 (½ hr.); Federal Bar Ass'n, SC Bar, Ethics and Professionalism, Sept. 8, 2006; Commercial Law League of America, Avoiding Grievances and Malpractice Worries in Your Practice, July 6, 2006, Asheville, N.C. (2 hours); National Structured Settlement Trade Ass'n, Ethics in Litigation, Westin Rio Mar, Puerto Rico, May 9, 2006; S.C. Chamber of Commerce, Legal Ethics for the Employment Lawyer, Hilton Head, S.C., May 6, 2006; American Ass'n Matrimonial Lawyers, Ethic Lecture, Los Cabos, Mexico, March 11, 2006; SC Bar, Legal Ethics for Health Care Providers, Jan. 28, 2006; S.C. Association of Counties, Ethics Update, Dec. 9, 2005; SCTLA, Making Money Out of Discovery Abuse, Dec. 2, 2005, Atlanta; Ass'n of S.C. Claimants Attorneys for Workers Compensation, Ethics Seminar, Nov. 4, 2005, Asheville; S.C. Bar, Ethics in Masters Court, Oct. 14, 2005; N.C. Bar-S.C. Bar Construction Law Ethics Program, Asheville, Oct. 1, 2005; S. C. Bar, Unauthorized Practice Problems in Probate Court, Sept. 16, 2005; Greenville County Solicitor's Office, Prosecutorial Ethics, May 9, 2005; Mass Tort Seminar, NYC, Discovery Abuse Issues, March 18, 2005; S.C. Ass'n of Counties, Legal Ethics, Dec. 10, 2004; Federal Bar Ass'n, S.C., Ethics CLE, Dec. 10, 2004 ½ hr.; S.C. Bar Construction Law Section, Ethics CLE on the new Oath; Dec. 3, 2004; NASAA, Salt Lake City, Legal Ethics for Securities Enforcement Lawyers, Dec. 4, 2004; DSS Ethics Training, Dec. 3, 2004; (2-hr. lecture); PIABA, Ethics for Securities Lawyers, and Comments on the Mutual Fund Mess, Oct. 20, 2004 (2 hrs.); Commercial Law League of America, Southern Region Members' Ass'n, Ethical Issues in Commercial Law, Oct. 1, 2004; S.C. Bar, Annual Probate Bench/Bar, Ethics in Probate Court, Sept. 17, 2004; Charleston Bar Ass'n, Lawyer's Oath Seminar, August 27, 2004; S.C. Government Lawyers, Legal Ethics for Government Attorneys, August 20, 2004; S.C. Judiciary, Judicial Ethics Lecture, August 19, 2004; S.C. Bar, Accounting for Non-tax Lawyers, May 2, 2004; Palmetto Land Title Ass'n, Ethics for Closing Attorneys, April, 24, 2004; Richardson, Patrick Law Firm, CLE on Legal Issues Concerning the Mutual Fund Mess, March 26, 2004; S.C. Bar, An Update on Ethical Considerations for the Guardian, March 5, 2004; S.C. Prof. Society on the Abuse of Children, Ethics and Child Abuse, Feb. 26, 2004; National Ass'n of State Boards of

Accountancy, Professionalism, Accountability and the Accounting Profession, Feb. 9, 2004; Fidelity Nat'l Title, Ethical Duties of Closing Attorneys, Feb. 5, 2004; S.C. Bar, Annual Convention, Ethical Issues in Handling the Appeal, Jan. 22, 2004 (co-presenter).

Member, ABA Section of Business Law Task Force on Legal Opinions
Participant in Conference on Legal Opinions at Silverado, California, May 31-June 3 (1989).

University and Community Service
Author, Report on Tax Sheltered Annuities to USC Faculty and Staff (1976).
Faculty Senate (1996-98)

University Committees
Promotion and Tenure
Faculty Welfare

Annuities and Insurance
Budget Committee

Law School Committees
Faculty Selection
Academic Standing
Minority Student Affairs
Executive Committee
Dean Evaluation Committee
Dean Search Committee

Chairman, Supreme Court Commission on Continuing Lawyer Competence (1980 83)

President, Leaphart Elementary School PTO (1983)
Chairman, Irmo Middle School School Improvement Council (1985)
Member, Irmo Middle School School Improvement Council (1985-89),
President, Irmo High School Parent, Teacher, Student Association (1988-89, 1992-93) Member Executive Board (1988-93)
Member, Irmo High School-School Improvement Council (1988-93)
Founder and Past-president, University of Notre Dame Club of South Carolina
Lexington District Five and South Carolina State School Volunteer of the Year 1993

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS FOR THE SIXTEENTH JUDICIAL CIRCUIT
Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, by and through David A. Burton as Attorney-in-Fact, Individually and in the Right and on Behalf of T.E. Cato Estate, LLC, Plaintiff v. Carroll M. Pitts, Jr., Esq., and Robinson Bradshaw & Hinson, P.A., Defendants	)	Case No. 2010-CP-46-2267 **CERTIFICATE OF MAILING**

I, Beverly A. Poston of Tompkins and McMaster, do hereby certify that I have this 6th day of September, 2013, served the following:

1. Motion and Order Information Form and Cover Sheet;
2. Notice of Motion and Motion to Amend Complaint [Expedited Relief Requested]; and
3. Amended Summons and Complaint; and

and by depositing a copy of the same in the U.S. Post Office addressed as follows:

Samuel W. Outten, Esq.
Womble Carlyle Sandridge & Rice, PLLC
550 South Main Street – Suite 400
Greenville SC 29601

And

John P. Gettys, Jr., Esq.
Post Office Box 707
Rock Hill, SC 29731

Beverly A. Poston

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS

MARJORIE CATO BURTON
☒ Plaintiff

v.

Carroll M. Pitts, Jr., Esq, Et Al.
☐ Defendant.

CASE NO.
2010-CP-46-2267

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:	Defendant's Attorney:
George H. Mcmaster, Bar No.	, Bar No.
Address:	Address:
PO Box 7337; Columbia, SC 29202	
phone: 803-799-4499 fax: 803-252-2240	phone: fax:
e-mail: ghm@tmmlaw.com other: bap@tmmlaw.com	e-mail: other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: MOTION TO AMEND
Estimated Time Needed:30 MINUTES Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☑ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☐ Defendant — Date submitted: June 6, 2013

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ 5.00
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

- ☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	_____ JUDGE
☐ Other:	CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (11-03)

TOMPKINS AND MCMASTER, LLP
ATTORNEYS AND COUNSELORS AT LAW
1530 RICHLAND STREET (29201)
POST OFFICE BOX 7337
COLUMBIA, SOUTH CAROLINA 29202
TELEPHONE: (803) 799-4499
TELEFAX: (803) 252-2240
WWW.TMMLAW.COM

ESTABLISHED 1868

JOHN GREGG MCMASTER
GEORGE HUNTER MCMASTER **
FRANK BARNWELL MCMASTER

**ALSO ADMITTED IN TEXAS

FRANK G. TOMPKINS
1874-1956
FRANK G. TOMPKINS, JR.
1908-1975
ELIZABETH ELDRIDGE
1894-1975

September 6, 2013

The Hon. David Hamilton
York County Clerk of Court
Post Office Box 649
York, SC 29745

Re: Majorie Cato Burton as Trustee v. Carroll M. Pitts, Jr. and RBH
C/A No.: 2010-CP-46-2267

Dear Mr. Hamilton:

Enclosed are the original and one copy of the following documents in regard to the above-referenced matter:

1. Motion and Order Information Form and Cover Sheet;
2. Notice of Motion and Motion to Amend Complaint [Expidited Relief Requested];
3. Amended Summons and Complaint; and
4. Certificate of Mailing.

Please file the original documents and return a clocked-in copy to me in the enclosed prepared envelope.

Also enclosed is a check in the amount of $25.00 for the fees associated with this Motion.

Thank you.

Yours very truly,

George H. McMaster

Enclosures
cc: Samuel W. Outten, Esquire

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, by and through David A. Burton as Attorney-in-Fact, Individually and in the right and on Behalf of T.E. Cato Estate, LLC,

Plaintiffs,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE SIXTEENTH JUDICIAL CIRCUIT

C.A. No. 2010-CP-46-2267

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO AMEND COMPLAINT

FILED-RECEIVED
2013 OCT -7 AM 9:32
DAVID HAMILTON
C.C.C.P.&G.S.
YORK COUNTY, SC

Carroll M. Pitts, Jr. ("Mr. Pitts") and Robinson Bradshaw & Hinson, P.A. ("RBH") submit this memorandum in opposition to Plaintiffs' Motion to Amend the Complaint.

INTRODUCTION

The Complaint in this matter was filed on May 27, 2010. The allegations of the Complaint are based on a real estate transaction which took place on December 12, 2007. Now, well over 3 years after the filing of the original Complaint, Plaintiffs seek to amend the Complaint by adding the closing attorney and his law firm, based on facts which the Plaintiff has known for six (6) years, far longer than the applicable statute of limitations. This Court should deny Plaintiffs' Motion to Amend Complaint because Mr. Pitts and RBH would be prejudiced by the delay in the resolution of this case which would result from granting this motion. Further, there is no justifiable reason for the Plaintiff waiting almost six (6) years to attempt to amend this Complaint by adding claims/parties which could have been asserted many years earlier.

FACTUAL BACKGROUND

T. E. Cato owned certain real property in the Ebenezer Township in York County, South Carolina. When he passed away, he left this property to the following children and grandchildren: Donn S. Johnson (20%), Marjorie Cato Burton (20%), Helen Cato Jones (20%), Robert Lee Cato (10%), James Thomas (Tommy) Cato (10%), Cathy Cato Evans (10%), and Jane Cato West (10%).

In late 2006 or early 2007, the Cato family decided to explore the possibility of selling this property. Tommy Cato was asked to take the lead in handling this transaction. Mr. Cato hired Mr. Pitts to assist him in forming a limited liability company, and in having all of the heirs deed their interests in the property into this LLC, so that it could deed the property to the buyer at closing. T. E. Cato Estate, LLC was formed for this purpose on June 26, 2007.

Mr. Cato talked with five or six different real estate developers to gauge their interest in purchasing this property. Ultimately, Thomasson Development Company (the actual buyer was Thomasson Apartments, LLC) ("Thomasson") issued a Letter of Intent on July 25, 2007. The Letter of Intent was signed by Tommy Cato on behalf of the LLC on August 3, 2007, and the closing took place on December 12, 2007. At the closing, the parties realized that a part of the property referred to as the Roadbed Tract had not been conveyed to Thomasson. The closing attorney was Josh Vann of the law firm of Morton & Gettys in Rock Hill. To address the Roadbed Tract issue, an amendment to the contract was executed in which Thomasson allocated $100,000 of the $1 million purchase price for the Roadbed Tract. All family members agreed to this except for Marjorie Cato Burton.

The heirs then brought a partition action against Marjorie Cato Burton, filed August 3, 2008, to force the sale, captioned *James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane*

Cato West, Robert Lee Cato and Cathy Cato Evans, Plaintiffs v. Marjorie Cato Burton, as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, Defendant. David Alan Burton, as Attorney-In-Fact for Marjorie Cato Burton, as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, and in the right and on behalf of T. E. Cato Estate, LLC, Third-Party Plaintiff v. James Thomas Cato and Thomasson Apts., LLC, Third-Party Defendants. Thomasson Apts., LLC, Fourth-Party Plaintiff v. T. E. Cato Estate, LLC, James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato and Cathy Cato Evans, Marjorie Cato Burton, as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, Fourth-Party Defendants (the "Partition Action"). Ms. Burton then filed a third-party claim against Tommy Cato arising from the alleged breach of his duties as the operator of the LLC, and Thomasson Apartments, LLC, who then brought a fourth-party claim against T. E. Cato Estate, LLC, alleging that any loss or damage it suffered arising out of this transaction should be borne by T. E. Cato Estate, LLC.

The Partition Action settled recently. Plaintiffs received $249,000 in the settlement of the Partition Action. The Settlement Agreement provided in relevant part that "the parties wish...to waive and renounce any 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, or the claims asserted in the Action."

ARGUMENT

I. Plaintiff's Motion to Amend Should Be Denied Based on the Standard Set Forth in Rule 15(a) of the SCRCP.

A. Plaintiff's Motion to Amend Should Be Denied Because Allowing the Amendment Would Prejudice RBH.

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." SCRCP 15(a). 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 v. CRS Sirrine Engineers, Inc.*, 337 S.C. 537 541 (Ct. App. 1999). Plaintiffs' proposed amendment, occurring three years after the original Complaint was filed and after almost all written discovery has taken place, would prejudice Mr. Pitts and his former law firm. The amendment, seeking to add two new parties, would result in this case effectively starting over, and would significantly delay the resolution of a case that has already been pending for more than three years. New discovery would have to be served by and to the new parties, and depositions will likely need to be taken again so that the additional parties will have a full and fair opportunity to question the witnesses. In addition, at this late stage, if Plaintiffs' proposed amendment were permitted, Mr. Pitts and RBH would be 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 likely require additional or different evidence than that which Mr. Pitts and RBH have previously identified. There is simply no justification for allowing an amendment which would essentially re-start the case based on facts which have been known for well over five (5) years.

B. Justice Requires that Plaintiff's Motion to Amend Be Denied.

Further, justice does not require amendment of the Complaint; to the contrary, justice requires that this motion be denied. The reason Plaintiffs are now attempting to amend the Complaint is not because they believe that new claims were warranted based on recently-discovered information; rather, after years of protracted litigation, the Partition Action has finally been resolved, and Plaintiffs are now trying to use that settlement to employ new theories against RBH and to add new parties. However, settlement of the Partition Action does not give rise to any new facts which could establish liability on the part of RBH or the proposed new defendants. Indeed, Plaintiffs have been aware of the facts alleged in the proposed Amended Complaint since well before the filing of the original Complaint in 2010. Plaintiffs are attempting to make claims on behalf of an LLC and members of that LLC who approved not only of the real estate transaction at issue in this case, but also of the work performed by Mr. Pitts. Because Plaintiffs are attempting to assert claims on behalf of parties who have no claims or damages related to this case, justice does not require that Plaintiffs' amendment be permitted.

II. Plaintiffs' Motion to Amend Should Be Denied Because Plaintiffs' Amended Claims Are Time-Barred Under the Statute of Limitations and the Doctrine of Laches.

All of Plaintiffs' amended claims are barred by the statute of limitations and/or laches and, therefore, should not be permitted. Under the discovery rule, "the statutory period of limitations begins to run when a person *could or should have known*, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto." *Burgess v. Am. Cancer Soc., S. Carolina Div., Inc.*, 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct. App. 1989) (emphasis in original). "In other words, the clock starts running when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist." *Gibson v. Bank of America, N.A.*, 383 S.C. 399, 406, 680 S.E.2d 778, 782 (Ct. App. 2009). Similarly, "[u]nder the doctrine of laches, if a party who knows his rights does not timely assert them, and by his delay, causes another party to incur expenses or otherwise detrimentally change his position, then equity steps in and refuses to enforce those rights." *Richey v. Dickinson*, 359 S.C. 609, 612, 598 S.E.2d 307, 309 (Ct. App. 2004).

In this case, the purported wrongful conduct took place in 2007. However, Plaintiffs waited almost six (6) years before seeking to add the closing attorney to the real estate transaction and to assert claims on behalf of the LLC and its members against Mr. Pitts. The fact that Plaintiffs 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 Plaintiffs knew or should have known the facts supporting their alleged causes of action, which was at the time the real estate transaction occurred in late 2007 or giving the Plaintiff every benefit of the doubt, in early

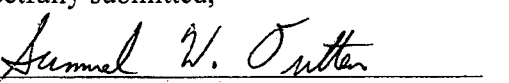
2008. There exists no case or legal principle to support the proposition that the statute of limitations is tolled when a party receives an assignment of rights to bring a lawsuit. If that were so, cases would take years to resolve, which is exactly what would happen here if this amendment were permitted.

Thus, Plaintiffs' proposed amendment comes after the statute of limitations has lapsed on all of Plaintiffs' claims, and there is no equitable basis to toll the statute of limitations, or to not impose the doctrine of laches under these facts. For these reasons, the Motion to Amend Complaint should be denied.

CONCLUSION

The South Carolina Rules of Civil Procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action." SCRCP 1. If Plaintiffs' amendment to the Complaint is permitted, Mr. Pitts and RBH will certainly be denied a "just, speedy, and inexpensive determination" of this matter. Mr. Pitts retired from law practice in 2010. He is eager to have this case decided and to put this last open item from his distinguished legal career behind him so that he can in fact move fully into retirement. If the Plaintiffs' Motion were granted, the case will effectively start over, and the parties will be forced to engage in time-consuming and expensive discovery in order to bring the additional parties up to speed – easily continuing the trial of this lawsuit by another year – into its *fifth (5th)* year. Furthermore, justice would not be served by this amendment because all claims alleged in Plaintiffs' proposed Amended Complaint are time-barred under the statute of limitations. The settlement of another case does not toll the statute of limitations. The Plaintiffs Motion to amend should be denied.

Respectfully submitted,



Samuel W. Outten, SC Bar No. 4295
Catherine R. Atwood, SC Bar No. 77367
Womble Carlyle Sandridge & Rice, PLLC
550 South Main Street, Suite 400 (29601)
Post Office Box 10208
Greenville, SC 29603-0208
Telephone: (864) 255-5400
Attorneys for Carroll M. Pitts, Jr. and Robinson Bradshaw & Hinson, P.A.

This 7th day of October, 2013.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 7th day of October, 2013, she emailed a copy of the attached **Memorandum in Opposition to Plaintiffs' Motion to Amend Complaint** to the persons hereinafter named, at the email address stated below:

George Hunter McMaster
Tompkins and McMaster, LLP
1530 Richland Street
Post Office Box 7337
Columbia, SC 29202
ghm@tmmlaw.com

Roger B. Jellenik
1111 Broad Street, Box J
Camden, SC 29020
rbjatty@mac.com

Connie Fuelling, Legal Assistant

FILED-RECEIVED
2013 OCT -7 AM 9:32
DAVID HAMILTON
C.C.C.P.&G.S.
YORK COUNTY, SC

STATE OF SOUTH CAROLINA COUNTY OF YORK	) IN THE COURT OF COMMON PLEAS) FOR THE SIXTEENTH JUDICIAL CIRCUIT
David Alan Burton Individually and as Successor Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, Individually and and in the Right and on Behalf of T.E. Cato Estate LLC, Plaintiffs	) Case No. 2010-CP-46-2267
v.	) PLANTIFF'S AMENDED BRIEF IN SUPPORT SUPPORT OF ITS MOTION TO AMEND COMPLAINT [Rule 15 SCRCP]
Carroll M. Pitts, Jr., Esq., Robinson Bradshaw & Hinson, P.A.; Joshua B. Vann, Esq., and Morton & Gettys, LLC, Defendants	)

FILED-RECEIVED
2013 OCT 17 PM 2:56
DAVID HAMILTON
C.C.C.P. & G.S.
YORK COUNTY, SC

PLAINTIFF'S BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO AMEND

The Plaintiff, David Alan Burton Individually and as Successor Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, Individually and in the Right and on Behalf of T.E. Cato Estate, LLC, submits this brief in support of the his Motion for Leave to Amend the Complaint in the captioned action.

1. *Procedural Status.* Plaintiff's Complaint was filed May 27, 2010. Defendant's Answer was filed on July 20, 2010. Plaintiff's Motion for Leave to Amend the Complaint was filed September 9, 2013. Defendant's Memorandum in Opposition was filed October 7, 2013.

2. *Facts.* The allegations in the Complaint and the Amended Complaint relate to a series of real estate transactions in 2007.

Two attorneys and their law firms were involved in these transactions, Carroll J. Pitts, Jr., Esq., of Robinson Bradshaw & Hinson (collectively, "Mr. Pitts") and Joshua B. Vann, Esq., with Morton & Gettys (collectively, "Mr. Vann").

In brief, in May and June 2007, the descendants of T.E. Cato formed a limited liability company, T.E. Cato Estate; L.L.C. ("CatoLLC"), by executing formation documents prepared by Mr. Pitts and allegedly conveyed their respective interests in several parcels of real property to CatoLLC by executing a form of deed, complete with a legal description, prepared by Mr. Pitts. The deeds of the descendants' respective interests to CatoLLC were executed before CatoLLC came into existence. Further, no title search was ordered or performed for this initial set of transactions.

A letter of intent was offered by a prospective buyer, Thomasson Apts. Ltd., LLC ("TAL"), on or about July 25, 2007, for substantially all of the parcels of real property ostensibly owned by CatoLLC, which assets were known collectively as "the Areas".

The general manager of CatoLLC signed his acceptance of that letter of intent on August 3, 2007. TAL's subsequent title search revealed that a portion of the Areas known as the "Roadbed Tract" had not been included in the descendants' conveyance of their fractional interests in the Areas to CatoLLC.

As a result of meetings among CatoLLC's general manager, TAL members, and TAL's attorney; either Mr. Pitts or Mr. Vann drafted a quitclaim deed intended to convey, among other things, the descendants' fractional interests in the Roadbed Tract to CatoLLC. However, one of the descendants, Marjorie Cato Burton ("Ms. Burton") acting as Trustee of her family trust ("the Burton Trust"), had not consented to the sale of the Areas and refused to quitclaim her interest in the Roadbed Tract or the Areas because, despite assurances of Mr. Pitts' approval of all steps taken, she was not convinced that the sale of the Areas as a whole was proceeding properly in the best interests of the descendants.

As a result, without notice to Ms. Burton, an Amendment to Contract ("Amendment") dated December 6, 2007, was prepared by either Mr. Vann or Mr. Pitts and executed by or on behalf of CatoLLC, by the descendants of T.E. Cato, other than Ms. Burton, and TAL.

That Amendment required, among other things, a closing on the Areas and a subsequent partition action intended to gain control over the Roadbed Tract despite the absence of Ms. Burton's consent to the sale of the Areas and her refusal to quitclaim the Burton Trust's interest in the Roadbed Tract. In August 2008, Mr. Pitts filed a partition action --- Case No 2008-CP-46-3171 --- aimed at Ms. Burton as Trustee. The petition in that action was finally served on Ms. Burton as Trustee in January 2009, and a long, complicated, and expensive series of proceedings followed.

During the course of events that followed, the deposition of James Thomas Cato ("Mr. Cato"), CatoLLC's general manager, was taken on November 19 and 22, 2010, and the "30(b)(6)" deposition of TAL was subsequently taken beginning in June 16, 2011 and ending on May 14, 2012. It was not until those depositions were taken that Ms. Burton as Trustee became aware of the i) the circumstances surrounding the alleged non-involvement of Mr. Pitts in the negotiation and sale of the Areas; ii) the circumstances surrounding the alleged involvement of Mr. Vann as the sole attorney who advised or consulted with Mr. Cato regarding the quitclaim deed(s), as the sole attorney who advised or consulted with Mr. Cato regarding the Amendment to Contract, and as the sole attorney for the closing of the sale of the Areas, iii) the circumstances surrounding Mr. Pitts' failure to order or perform a title search related to the descendants' conveyance of their respective fractional interests in the Areas, and iv) the circumstances surrounding Mr. Pitts' and Mr. Vann's apparent failure to advise CatoLLC's general manager or its members of statutory requirements associated with the sale of substantially all of the assets of CatoLLC. Eventually, Case No. 2008-CP-46-3171 was the subject of a Settlement Agreement and Release, an Assignment Agreement, and a Consent Order of Dismissal, joined in by each of the parties to those

proceedings (including the Successor Trustee of the Burton Trust) filed on May 14 and 15, 2013.

For purposes of this motion, it is worth noting that the Assignment Agreement assigned relevant claims possessed by the other descendants of T.E. Cato and any claims possessed by CatoLLC to the Burton Trust.

3. Pertinent Law.

a. *Leave to Amend.* Rule 15(a), SCRCP, provides in pertinent part that "a party may amend his pleading only by leave of court; and leave shall be freely given when justice so requires and does not prejudice any other party."

b. *General.* The decision to grant leave to amend is within the sound discretion of the trial judge, this Rule favors amendments, and leave to amend is freely given when justice so requires, and the other party is not prejudiced. *See, e.g.,* Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 286, 607 S.E.2d 711, 716-717 (Ct. App. 2005). Duncan v. CRS Sirrine Engineers, Inc., 337 S.C. 537, 541, 524 S.E.2d 115, 117-118 (Ct. App. 1999).

c. *Prejudice.* The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it. See Pool v. *Pool,* 329 S.C. 324, 328-9, 494 S.E.2d 820, 823 (1998) *(citing Soil & Material Eng'rs, Inc. v. Folly Assocs.*, 293 S.C. 498, 501, 361 S.E.2d 779, 781 (Ct. App. 1987)).

d. *Relation Back of Amendments.* Rule 15(c), SCRCP, provides that: Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or

attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading.

e. *Statute of Limitations.* The statute of limitations for legal malpractice is three years from the date that Plaintiff knew or reasonably should have known of the wrong. SC Code 15-3-530(5); 15-3-535.

4. Application of Law to Facts. Does the motion for leave to amend meet the requirements of Rule 15?

a. *"when justice so requires".* As a result of the settlement documentation that ended Case No. 2008-CP-46-3171, the Burton Trust believes that justice requires the motion for leave to amend because i) it is appropriate and just to recognize the role of Mr. Pitts and his potential liability to CatoLLC, which in any event was addressed by the original Complaint in this case, ii) it is appropriate and just to recognize the role of Mr. Vann and his potential liability to the Burton Trust and to CatoLLC, and iii) it is appropriate and just to recognize the responsibility for damages to the Burton Trust and CatoLLC implicit in the assignment of claims included in the settlement of Case No. 2008-CP-46-3171.

b. *Prejudice.* Still, a motion for leave to amend may be denied if the amended pleading would prejudice the defendant. However, here, it is respectfully submitted that Mr. Pitts should not be at all surprised or unable to defend as there is more than adequate time to complete discovery and there is now pending a 30(b)(6) Deposition of RBH and other discovery will follow. See, e.g. Duncan v. CRS Sirrine Engineers, Inc., 337 S.C. 537, 541, 524 S.E.2d 115, 117-118 (Ct. App. 199) [read: upon the granting of an amendment of a

pleading, there is no prejudice if the opposing party is provided adequate time to conduct discovery].

The facts of the transactions involved are the same, the wrongs alleged in the Amended Complaint, which incorporates the affidavit of Michael Virzi, Esquire have not really changed, and the identity of the Plaintiff is the same. Further, the relief sought from Mr. Vann exists as a possible alternative, as to relative culbability, to the relief sought from Mr. Pitts, not as an expansion of it. Under such circumstances, not amending the Complaint to bring in Mr. Vann would unnecessarily waste court resources, and risk inconsistent factual findings in separate trials and the attendant appeals.

5. *Statute of Limitations:* Plaintiff was not aware of the issues implicating the respective roles of Mr. Pitts and Mr. Vann during 2007 and thereafter because no one communicated their existence to Ms. Burton. Further, at no time relevant to the transactions that caused this dispute did either attorney inform, advise or even contact Ms. Burton in connection with the issues or activities related to conveyance of the Areas into Cato LLC, the letter of intent from and after July 25, 2007, the quitclaim deed during October and November 2007, the Amendment to Contract on December 6, 2007, or the closing of the sale of the Areas on December 12, 2007.

Thus, the three (3) year statute of limitations does not run until November 19, 2013, three years from the first session of the deposition of Mr. Cato noted above. Thus, Plaintiff contends that this motion was filed within the applicable statute of limitations. Period.

Nevertheless, despite the evidence to the contrary, Mr. Pitts may contend that Plaintiff should have known earlier, and therefore the statute of limitations should have run earlier. In this regard, the first (1st) paragraph of Rule 15(c), SCRCP[1], is relevant

[1] The test to be used in determining whether or not an amendment should be allowed to relate back under Rule 15(c) to the date of the original pleading to avoid the statute of

and relates the allegations back to May 27, 2010, the date of filing of the original Complaint. That filing date is within three years of all of the acts and omissions complained of in the original Complaint and the Amended Complaint.

In short, viewed either way, Plaintiff's motion is consistent with the applicable statute of limitations and, given all of the circumstances, does not present equitable grounds for denial either.

CONCLUSION

WHEREFORE, the Plaintiff, based on the foregoing, respectfully requests that the court grant it, and grant it such other and further relief as the court deems just and appropriate.

Respectfully submitted this 15th day of October, 2013.

George Hunter McMaster, Esquire
Attorney for the Plaintiff
TOMPKINS AND MCMASTER, LLP
Post Office Box 7337
Columbia, South Carolina 29202
Tel: (803) 799-4499
Fax: (803) 252-2240
e-mail: ghm@tmmlaw.net

Columbia, South Carolina
This 14th day of October, 2013
15th

limitations, is found in the language of the Rule; specifically, whether the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth in the original pleading. *Thomas v.* Grayson, 318 S.C. 82, 456 S.E.2d 377, 380 (1995).

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS FOR THE SIXTEENTH JUDICIAL CIRCUIT
Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, by and through David A. Burton as Attorney-in-Fact, Individually and in the Right and on Behalf of T.E. Cato Estate, LLC, Plaintiff v. Carroll M. Pitts, Jr., Esq., and Robinson Bradshaw & Hinson, P.A., Defendants	)	Case No. 2010-CP-46-2267 **CERTIFICATE OF MAILING**

FILED-RECEIVED
2013 OCT 17 PM 2:56
DAVID HAMILTON
C.C.C.P.&G.S.
YORK COUNTY, S.C.

I, Beverly A. Poston of Tompkins and McMaster, do hereby certify that I have this 15th day of October, 2013, served the following:

1. Plaintiff's Brief in Support of Plaintiff's Motion for Leave to Amend

and by depositing a copy of the same in the U.S. Post Office addressed as follows:

Samuel W. Outten, Esq.
Womble Carlyle Sandridge & Rice, PLLC
550 South Main Street – Suite 400
Greenville SC 29601

Beverly A. Poston

STATE OF SOUTH CAROLINA COUNTY OF YORK	) IN THE COURT OF COMMON PLEAS) FOR THE SIXTEENTH JUDICIAL CIRCUIT
David Alan Burton Individually and as Successor Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, Individually and and in the Right and on Behalf of T.E. Cato Estate LLC, Plaintiffs v. Carroll M. Pitts, Jr., Esq., Robinson Bradshaw & Hinson, P.A.; Joshua B. Vann, Esq., and Morton & Gettys, LLC, Defendants	Case No. 2010-CP-46-2267 NOTICE OF MOTION AND MOTION

NOTICE OF MOTION AND MOTION TO RECONSIDER

TO: SAMUEL W. OUTTEN, ESQ, AND THE HONORABLE JOHN C. HAYES

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, David Alan Burton individually and as Successor Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust individually and in the right and on behalf of T.E. Cato Estate, LLC (hereinafter referred to as "Plaintiff"), through the undersigned attorney will on the tenth day after service hereof at 10:00 AM, or as soon thereafter as counsel can be heard, move pursuant to Rule 59(e), SCRCP, before the Hon. John C. Hayes, Judge of the York County Court of Common Pleas, for reconsideration of his order ("Order") denying Plaintiff's Motion to Amend Complaint ("Motion to Amend").

Written notice of the Order was received by the undersigned on October 28, 2013, the Order having been executed on October 22, 2013, and filed on October 24, 2013.

The Order as presently written denies Plaintiff's Motion to Amend in its entirety.

Scope of Motion for Reconsideration.

This Motion seeks reconsideration of that part of the holdings set out in the Court's Order denying amendment of the Complaint for the purpose of clarifying and adding causes of action against the existing Defendants, Carroll M. Pitts, Jr., Esq. ("Pitts") and Robinson Bradshaw & Hinson, P.A. ("RBH") by reason of Rule 15(a) and the first paragraph of Rule 15(c), SCRCP.

Plaintiff does **not** seek reconsideration of that part of the Court's Order denying amendment of the Complaint for the purpose of adding Joshua B. Vann, Esq., and Morton & Gettys, LLC, as new parties defendant.

Grounds for Motion for Reconsideration.

According to the Order, the denial of Plaintiff's Motion to Amend is based upon the Court's conclusion that the Defendants would be prejudiced. Citing Tanner v. Florence County Treasurer, 336 S.C. 552, 521 S.E.2d 153 (1999), the Order states that "The prejudice Rule 15 envisions is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it." As to the amendments of the causes of action against the existing Defendants, the proposed amendment (i) clarifies the initial Complaint by pleading with greater particularity and (ii) adds, in a single cause of action (the Seventh Cause of Action) claims recently assigned to Plaintiff[1] but is based on the those same facts and documents as the original complaint filed April 30, 2009.

It is respectfully submitted that, as to existing Defendants, there is no prejudice whatsoever inasmuch as Defendants have been on notice of the facts alleged by Plaintiff since this action was filed in May 2010.

[1] *N.B.:* In discussing assigned claims, the Court holds that "...allowing these claims would also prejudice Mr. Pitts and Morton & Gettys as the parties were not involved in the partition litigation". Plaintiff believes that the Court intended to refer only to Mr. Vann and Morton & Gettys as Mr. Pitts was the attorney for the petitioners in the partition action.

Therefore, based upon the foregoing, Plaintiff, David Alan Burton individually and as Successor Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust individually and in the right and on behalf of T.E. Cato Estate, LLC, respectfully requests that the Court grant this motion for reconsideration by amending that Order dated October 22, 2013, denying Plaintiff's Motion to Amend Complaint by granting that part of Plaintiff's Motion to Amend which deals solely with the Defendants Carroll M. Pitts, Jr., Esq., and Robinson Bradshaw & Hinson, P.A.

Respectfully Submitted,

GEORGE HUNTER McMASTER
TOMPKINS & McMASTER, LLP
POST OFFICE BOX 7337
COLUMBIA, SC 29201
PH: (803) 799 4499
FAX: (803) 252 2240
e-mail: ghm@tmmlaw.com

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS FOR THE SIXTEENTH JUDICIAL CIRCUIT
Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, by and through David A. Burton as Attorney-in-Fact, Individually and in the Right and on Behalf of T.E. Cato Estate, LLC, Plaintiff v. Carroll M. Pitts, Jr., Esq., and Robinson Bradshaw & Hinson, P.A., Defendants	)	Case No. 2010-CP-46-2267 **CERTIFICATE OF MAILING**

I, George H. McMaster, of Tompkins and McMaster, do hereby certify that I have this 5th day of November, 2013, served the following:

1. Motion to Reconsider

and by depositing a copy of the same in the U.S. Post Office addressed as follows:

Samuel W. Outten, Esq.
Womble Carlyle Sandridge & Rice, PLLC
550 South Main Street – Suite 400
Greenville SC 29601

The Hon. John C. Hayes, III
Moss Justice Center, 2nd Floor
1675-1H York Highway
York, SC 29745-7434

George H. McMaster

STATE OF SOUTH CAROLINA COUNTY OF YORK MARJORIE CATO BURTON ☒ Plaintiff v. Carroll M. Pitts, Jr., Esq, Et Al. ☐ Defendant.	)	IN THE COURT OF COMMON PLEAS CASE NO. 2010-CP-46-2267 MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Plaintiff's Attorney:	Defendant's Attorney:
George H. Mcmaster, Bar No. Address: PO Box 7337; Columbia, SC 29202 phone: 803-799-4499 fax: 803-252-2240 e-mail: ghm@tmmlaw.com other: bap@tmmlaw.com	, Bar No. Address: phone: fax: e-mail: other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: MOTION FOR RECONSIDERATION
Estimated Time Needed:30 MINUTES Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

_____ _____
Signature of Attorney for ☐ Plaintiff / ☐ Defendant Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	_____ JUDGE CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA)
COUNTY OF York)
Burton et al.)
Plaintiff,)
vs.)
Pitts et al.)
Defendant.)

IN THE COURT OF COMMON PLEAS
JUDICIAL CIRCUIT

CASE NO.: 2010 -CP- 46 - 2267

MOTION AND ORDER INFORMATION FORM AND COVERSHEET

Plaintiff's Attorney: Roger B. Tellent, Bar No. 73546	Defendant's Attorney: Samuel W. Outten, Bar No.
Address: 1106 Little Street, Camden, SC 29020	Address: P.O. Box 10084, Greenville, SC 29603-0084
Phone: (803) 424-1919 Fax (803) 424-1922	Phone: (864) 250-2299 Fax (864) 250-2340
E-mail: rbjatty@mac.com Other:	E-mail: sam.outten@nelsonmullins.com Other:

☑ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion To Reconsider (Rule 59(e), SCRCP)
Estimated Time Needed: 1 hr. ± Court Reporter Needed: ☑ YES/☐ NO

SECTION II: Motion/Order Type

☑ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Roger B. Tellent
Signature of Attorney for ☑ Plaintiff / ☐ Defendant

04-16-2015
Date submitted

FILED-RECEIVED
2015 APR 16 PM 2:12
YORK COUNTY, S.C.

SECTION III: Motion Fee

☑ PAID – AMOUNT: $ 25.00
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter:
- ☐ Other:

JUDGE'S SECTION	JUDGE CODE
☐ Motion Fee to be paid upon filing of the attached order.	
☐ Other:	Date:

CLERK'S VERIFICATION

Collected by:_____ Date Filed:
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)

ORIGINAL

STATE OF SOUTH CAROLINA COUNTY OF YORK	IN THE COURT OF COMMON PLEAS FOR THE SIXTEENTH JUDICIAL CIRCUIT
David Alan Burton Individually and as Successor Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, Individually and and in the Right and on Behalf of T.E. Cato Estate LLC, Plaintiffs v. Carroll M. Pitts, Jr., Esq., and Robinson Bradshaw & Hinson, P.A., Defendants	*Case No. 2010-CP-46-2267* NOTICE OF MOTION AND MOTION

FILED-RECEIVED
2015 APR 16 PM 2:12
DAVID A. HAMILTON
CLERK OF COURT
YORK COUNTY, SC

NOTICE OF MOTION AND MOTION TO RECONSIDER

TO SAMUEL W. OUTTEN, ESQ., AND EVERETT E. MCMILLIAN, ESQ.:

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, David Alan Burton individually and as Successor Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust individually and in the right and on behalf of T.E. Cato Estate, LLC (hereinafter referred to as "Plaintiff"), through the undersigned attorney(s) will on the tenth day after service hereof at 10:00 AM, or as soon thereafter as counsel can be heard, move pursuant to Rule 59(e), SCRCP, before the Hon. John Hayes, Judge of the York County Court of Common Pleas, for reconsideration of his order ("Order") dated April 3, 2015. Written notice of the Order was received by the undersigned attorney on April 9, 2015, said Order having been filed on April 3, 2015, and mailed on April 6, 2015. The Order as presently written exculpates Defendants Carroll M. Pitts, Jr., Esq. ("Mr. Pitts"), and Robinson Bradshaw & Hinson, P.A ("RBH") from liability for legal malpractice and professional negligence causes of action asserted against them in Plaintiff's Complaint.

This motion seeks significant alterations in the Court's Order including but not necessarily limited to the following points:

1. Drawing upon the record of this case, Inserting a more complete and chronologically correct summary of undisputed evidence of facts than presently noted in the Order including but not necessarily limited to references to the non-binding "letter of intent" issued by TAL; the email exchanges between Marjorie Cato Burton and James Thomas Cato raising the issues of Mr. Cato's authority, land value, and the risk of litigation and Mr. Cato's statement of his instructions to Defendant Pitts; Defendants' timely receipt and knowledge of those emails; the "Amendment to Contract"; Defendants' approval on behalf of Plaintiff LLC of the closing documents at the time of the purported sale of the Areas to TAL; and the link between the damages claimed by Plaintiff Trust and Plaintiff LLC and the defects in the deed into Plaintiff LLC prepared by Defendants.
2. Deleting the Court's finding that no attorney-client relationship existed between Defendants and Plaintiff Trust and inserting in its place findings that such a relationship did exist between Defendants and Plaintiff Trust.
3. Inserting a finding by the Court that Defendants had duties to Plaintiff Trust that went beyond preparation of i) the documents intended to form Plaintiff LLC and ii) the documents intended to convey the interests of the heirs of T.E. Cato in the Areas to Plaintiff LLC.
4. Inserting a finding by the Court that Defendants committed legal malpractice or, alternatively, if the Court finds that no attorney-client relationship existed, inserting a finding that Defendants committed professional negligence with respect to Plaintiff Trust by breaching multiple duties owed by Defendants to Plaintiff Trust.
5. Deleting the Court's finding that the cause(s) of action asserted in the right and on behalf of Plaintiff LLC against Defendants no longer exist(s) because of its dissolution and inserting in its place a finding that such cause(s) of action do exist.
6. Deleting the Court's finding that Plaintiff LLC's case is barred on the grounds of the affirmative defense of statute of limitations and inserting in its place a finding that the affirmative defense of statute of limitations does not apply here because it was not pled as an affirmative defense and because the statute of limitations period had not expired.
7. Deleting the Court's finding that no attorney-client relationship existed between Defendants and Plaintiff LLC and inserting in its place a finding that such a relationship did exist between Defendants and Plaintiff LLC or, alternatively, if the Court finds that no

attorney-client relationship existed, inserting a finding that Defendants owed multiple duties to Plaintiff LLC.

8. Inserting a finding by the Court that Defendants had duties to Plaintiff LLC that went beyond preparation of i) the documents intended to form Plaintiff LLC and ii) the documents intended to convey the interests of the heirs of T.E. Cato in the Areas to Plaintiff LLC.
9. Inserting a finding by the Court that Defendants committed legal malpractice or, alternatively, if the Court finds that no attorney-client relationship existed, inserting a finding that Defendants committed professional negligence with respect to Plaintiff LLC by breaching multiple duties owed by Defendants to Plaintiff LLC.
10. Deleting the Court's finding that the proximate cause of damages to Plaintiff Trust and Plaintiff LLC was Plaintiff Trust's refusal to sign the quitclaim deed and inserting in its place a finding that the proximate cause of damages to Plaintiff Trust and Plaintiff LLC was Defendants' own acts and omissions.
11. Inserting a finding by the Court setting damages suffered by Plaintiff Trust or Plaintiff LLC for legal fees and costs and for land value in accordance with the evidence offered on behalf of Plaintiff Trust and Plaintiff LLC in the record.
12. Inserting a finding by the Court that the damages suffered by Plaintiff Trust were unaffected by any set-off attributable to the 2013 settlement of the partition action.
13. Inserting a finding by the Court that Defendants had a specific duty to furnish advice to Plaintiff Trust regarding the legal significance and effect of, and risks related to, the provisions of the Plaintiff LLC's formation documents including but not limited to the Articles of Organization and the Operating Agreement.
14. Inserting a finding by the Court that Defendants had a specific duty to furnish advice to Plaintiff Trust regarding the legal significance and effect of, and risks related to, the provisions of the general warranty deed and legal description purportedly conveying the Areas into Plaintiff LLC.
15. Inserting a finding by the Court that the general warranty deed conveying the Areas into Plaintiff LLC was void due to the fact that the grantee named in that deed did not exist at the time that it was conveyed by any of the grantors.

16. Inserting a finding by the Court that Defendants' representation of the petitioners in the partition action filed against Plaintiff Trust constituted a conflict of interest supporting Plaintiff Trust's and Plaintiff LLC's causes of action for legal malpractice.

In addition to the foregoing, Plaintiff David Alan Burton individually and as Successor Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust individually and in the right and on behalf of T.E. Cato Estate, LLC,

A. Requests that the Court identify the "collateral matters" referred to in footnote 1 of the Order so that their effect on the Court's Order can be assessed; and

B. Intends to file a memorandum in support of this motion providing more detailed grounds and rationales for the alterations in the Court's Order requested herein.

WHEREFORE, based upon the foregoing, Plaintiff, David Alan Burton individually and as Successor Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust individually and in the right and on behalf of T.E. Cato Estate, LLC, respectfully requests that the Court grant this motion for reconsideration by

Withdrawing the existing Order dated April 3, 2015, and substituting a new order granting the relief sought in the Complaint based upon the findings listed above; and

Granting such other and further relief as the Court may deem just and appropriate.

Dated this 16th day of April, 2015.

Roger B. Jellenik
Attorney for Plaintiff
SC Bar No. 13546

Roger B. Jellenik
Attorney at Law
1106 Little Street
Camden, SC 29020
Telephone: (803) 424-1919
Facsimile: (803) 424-1922
eMail: rbjatty@mac.com

Matthew B. Rosbrugh
Attorney for Plaintiff
SC Bar No. 68619

Matthew B. Rosbrugh
MBR Law
Box 292290
Columbia, SC 29229
Telephone: (803) 753-1432
Facsimile: (803) 419-9614
eMail: mrosbrugh@mindspring.com

STATE OF SOUTH CAROLINA) COUNTY OF YORK)	IN THE COURT OF COMMON PLEAS FOR THE SIXTEENTH JUDICIAL CIRCUIT
David A. Burton as Successor Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, Individually and and in the Right and on Behalf of T.E. Cato Estate, LLC, Plaintiff v. Carroll M. Pitts, Jr., Esq., and Robinson Bradshaw & Hinson, P.A., Defendants	Case No. 2010-CP-46-2267 PROOF OF SERVICE

FILED-RECEIVED
2015 APR 16 PM 2:12
DAVID HILTON
CLERK OF COURT
YORK COUNTY, SC

PROOF OF SERVICE

The undersigned, Carole L. Jellenik, hereby certifies that, on April 16, 2014, she caused to be mailed to Samuel W. Outten, Esq., Post Office Box 10084, Greenville SC 29603-0084, via first class mail, postage prepaid, from the offices of Roger B. Jellenik, Attorney at Law, in Camden, South Carolina, the Notice of Motion and Motion to Reconsider and this Proof of Service in the captioned case.

This 16th day of April, 2015.

Carole L. Jellenik

Carole L. Jellenik
Administrator

Roger B. Jellenik
Attorney at Law
1106 Little Street
Camden, South Carolina 29020
Telephone: 803-424-1919
Facsimile: 803-424-1922

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

Marjorie Cato Burton, et al.) CASE NO.
☐ Plaintiff) 2010-CP-46-2267

v.) MOTION AND ORDER INFORMATION
) FORM AND COVER SHEET

Carroll M. Pitts, Jr., Esq., et al.)
☒ Defendants.)

Plaintiff's Attorney:	Defendant's Attorney:
George H. McMaster, Bar No.	Everett E. McMillian, Bar No. 05905
Address:	Address:
P. O. Box 7337, Columbia, SC 29202	NMRS, P. O. Box 11070, Columbia, SC 29211
phone: 803-799-4499 fax: 803-252-2240	phone: (803) 799-2000 fax: 803-255-5193
e-mail: ghm@tmmlaw.net other:	e-mail: everett.mcmillian@nelsonmullins.com other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Exclude Expert Testimony of Michael J. Virzi
Estimated Time Needed: Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant — Date submitted: July 18, 2014

SECTION III: Motion Fee

☒ PAID – AMOUNT: 25.00
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:
☐ Other:

FILED-RECEIVED
2014 JUL 18 PM 1:53
DAVID HAMILTON
C.C.P.&G.S.
CLERK COURT, YORK, SC

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT
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,	)	Civil Action No. 2010-CP-46-2267
Plaintiff,	)	**MOTION TO EXCLUDE THE TESTIMONY OF MICHAEL J. VIRZI**
vs.	)	
Carroll M. Pitts, Jr., Esq. and Robinson Bradshaw & Hinson, P.A.,	)	
Defendants.	)	

FILED-RECEIVED
2014 JUL 18 PM 1:53
DAVID HAMILTON
C.C.C.P.&G.S.
YORK COUNTY, SC

Carroll M. Pitts, Jr., ("Pitts") and Robinson Bradshaw & Hinson, P.A., (collectively, "RBH") move the Court for an Order excluding the opinions of Michael J. Virzi ("Virzi"). This Motion is based on the ground that Virzi lacks the requisite experience to offer opinions on the standard of care required of a commercial real estate lawyer pursuant to Rule 702, SCRE, and *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, --- S.E.2d ---, 2014 WL 2516208 (S.C. decided June 4, 2014).

FACTUAL BACKGROUND

This legal malpractice lawsuit arises from a commercial real estate transaction which closed in December 2007 in York County. Plaintiff tendered Virzi as an expert on the standard of care of a commercial real estate lawyer.

At his deposition on May 23, 2014, Virzi admitted he does not "have any experience in doing what it is that Mr. Pitts and/or Mr. Vann [the closing attorney] were doing on behalf of

their clients in these underlying transactions." (Virzi Dep. 18:24-19:11, May 23, 2014.; **Ex. A.**)

In addition, Virzi testified as follows:

> Q. Okay. Have you ever prepared a General Warranty Deed?
> A. No.
> Q. Have you ever prepared a Quit Claim Deed?
> A. No.
> Q. Have you ever prepared a deed of any kind?
> A. No.
> Q. Have you ever been engaged in private practice by a person or an entity asking you to perform any real estate services?
> A. No.

(*Id.*, 15:5-16.) Further, Virzi has never closed a commercial real estate loan (*id.* 14:17-19), and has formed only two LLCs (*id.*, 15:3-4). Virzi is not a real estate attorney -- he is employed as a law professor and provides expert testimony as a "side business." (*Id.*, 8:1-24.) As demonstrated by his deposition testimony, Virzi has no practical experience in commercial real estate transactions.

ARGUMENT

Virzi lacks the requisite experience to testify regarding the standard of care required for a commercial real estate transaction and, therefore, the Court should exclude his opinions from the trial of this case.

Generally, "a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify . . . in the form of an opinion or otherwise." Rule 702, SCRE. More precisely, an expert must have "acquired the requisite knowledge and skill to qualify as an expert *in the particular subject matter*." *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 73, 735 S.E.2d 650, 655 (2012), *reh'g denied* (Dec. 12, 2012) (emphasis added). Recently, the South Carolina Supreme Court affirmed the trial court's exclusion of the testimony of a proposed legal

malpractice expert because she did not possess the requisite experience in the subject matter of that case. *See Holmes*, 2014 WL 2516208, at *7.

In *Holmes*, the Supreme Court upheld the circuit court's decision to exclude the testimony of an attorney in a legal malpractice lawsuit because she failed to demonstrate she had the requisite experience to testify as an expert. *Id.* In reaching this conclusion, the court explained that she had "never represented a client in federal court, let alone handled a federal anti-trust action." *Id.* Although the proposed expert was a licensed attorney, the trial court found that "the mere fact that she [wa]s licensed to practice law" was insufficient to qualify her as an expert and, therefore, excluded her expert testimony. *Id.*

Here, the Court should likewise exclude Virzi's testimony because he lacks the requisite experience to testify regarding the standard of care required for a commercial real estate transaction. As detailed above, Virzi has never closed a commercial real estate loan, prepared a deed, nor been engaged to perform any real estate services. Virzi is similarly inexperienced in the formation of an LLC, having formed only two in his career. At his deposition, Virzi confirmed that he does not:

> have any experience in doing what it is that Mr. Pitts . . . [was] doing on behalf of [his] client[] in these underlying transactions.

(Virzi Dep. 18:24-19:11.)

There is no evidence on which the Court could find that Virzi possesses the requisite experience to testify regarding the standard of care required for a commercial real estate transaction. Therefore, Plaintiff should be precluded from offering Virzi's opinions pursuant to Rule 702, SCRE, and the *Holmes* decision.

CONCLUSION

For the reasons stated above, RBH respectfully moves the Court for an Order excluding the opinions of Michael J. Virzi from the trial of this case.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

Samuel W. Outten
SC Bar No. 4295
E-Mail: sam.outten@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300
Everett E. McMillian
SC Bar No. 101310
E-Mail: everett.mcmillian@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Carroll M. Pitts, Jr. and Robinson Bradshaw & Hinson, P.A.

Columbia, South Carolina

July 18, 2014

EXHIBIT A

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF YORK SIXTEENTH JUDICIAL CIRCUIT

- - -

MARJORIE CATO BURTON as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton AB Living Trust, by and through David A. Burton as Attorney-in-Fact, Individually and in the Right and on Behalf of T.E. Cato Estate, LLC,	
Plaintiff,	CIVIL ACTION NO.: 2010-CP-46-2267
vs.	
CARROLL M. PITTS, JR., ESQ., and ROBINSON BRADSHAW & HINSON, P.A.,	
Defendants.	

DEPOSITION OF MICHAEL VIRZI

DATE TAKEN: May 23, 2014

TIME BEGAN: 10:00 a.m.

TIME ENDED: 1:30 p.m.

LOCATION: Nelson Mullins Riley & Scarborough
1320 Main Street, 17th Floor
Columbia, South Carolina

REPORTED BY: Tami I. Watters, RPR, CRR
EveryWord, Inc.
P.O. Box 1459
Columbia, South Carolina 29202
(803) 212-0012

APPEARANCES:

TOMPKINS & MCMASTER, LLP
BY: MR. GEORGE HUNTER MCMASTER
1701 Richland Street
Columbia, South Carolina 29201
(803) 799-4499
ghm@tmmlaw.net
Representing the Plaintiff

LAW OFFICES OF ROGER B. JELLENIK
BY: MR. ROGER B. JELLENIK
1111 Broad Street, Box J
Camden, South Carolina 29020
(803) 424-1919
Representing the Plaintiff

NELSON MULLINS RILEY & SCARBOROUGH, LLP
BY: MR. SAM OUTTEN
Poinsett Plaza, 9th Floor
104 South Main Street
Greenville, South Carolina 29601
(864) 250-2297
sam.outten@nelsonmullins.com
Representing the Defendants

NELSON MULLINS RILEY & SCARBOROUGH, LLP
BY: MR. EVERETT E. MCMILLIAN
1320 Main Street
17th Floor
Columbia, South Carolina 29201
(803) 255-9487
everett.mcmillian@nelsonmullins.com
Representing the Defendants

ALSO PRESENT:

CHARLES HEDGEPATH

A Well, I can only give you an answer as it relates to my side income. My side income varies each year. I have a full-time job at the University. I don't make as much on the side as I make there. I came close one year.

Q Okay.

A I don't know how else to answer it other than relative to my side income.

Q Let's go at it this way: In calendar year 2013 --

A Yes.

Q -- how much income did you make testifying as an expert witness?

A I can't say. I don't know.

Q Can you find that out?

A Sure, I can find that out.

Q Are there records that you have which show that?

A Oh, absolutely. I mean, I can go back and look at my law firm records and see how much money I made in my side business, and I could estimate that roughly half of that in the last year or close to half of that was testifying as an expert.

Q Okay. And what's the name of your law

A I guess I've published three articles at this point, I think.

Q Right.

A Yeah. I published three articles now -- well, and a book.

I'm no longer one of three instructors for the Ethics School. In fact, it's no longer called Ethics School. It's called LEAP, and Ethics School is now a one-day portion of it. And I no longer teach the Ethics School portion, I teach the Advertising School portion.

Q All right.

A And, I think, there are about six or seven of us now but there were initially three.

Yeah, that's it. That's all I can think of.

Q Have you ever closed a commercial real estate loan?

A No.

Q Have you ever formed an LLC?

A Yes.

Q Have you ever prepared an Operating Agreement for an LLC?

A Yes.

Q Have you ever prepared Articles of

Organization for an LLC?

A I don't recall whether --

Q How many LLCs have you formed?

A Two.

Q Okay. Have you ever prepared a General Warranty Deed?

A No.

Q Have you ever prepared a Quit Claim Deed?

A No.

Q Have you ever prepared a deed of any kind?

A No.

Q Have you ever been engaged in private practice by a person or an entity asking you to perform any real estate services?

A No.

Q So you don't have any practical experience in closing a commercial real estate loan --

MR. MCMASTER: Objection as to --

BY MR. OUTTEN:

Q -- and in preparing a deed?

MR. MCMASTER: Objection as to form.

BY MR. OUTTEN:

Q Is that true?

THE WITNESS: Again, the affidavit is critical of both. And the one change I would make based on new information is that he may or may not have handled the transaction out of the LLC.

If he was, in fact, their attorney in that transaction, then, yes, I remain critical of how he handled it. But my understanding is that he and Vann are pointing the finger at each other as to who represented the LLC.

BY MR. OUTTEN:

Q You don't have any practical experience to draw on to make these opinions, correct?

MR. MCMASTER: Objection as to form.

THE WITNESS: No, it's not correct. I have lots of practical experience to draw on in making these opinions.

BY MR. OUTTEN:

Q I thought you told me earlier you had never closed a commercial real estate transaction. Is that true?

A That's true.

Q So having never closed a commercial real estate transaction, you don't have any experience

in doing what it is that Mr. Pitts and/or Mr. Vann were doing on behalf of their clients in these underlying transactions, right?

MR. MCMASTER: Objection as to form.

BY MR. OUTTEN:

Q Is that right?

MR. MCMASTER: Same objection.

THE WITNESS: That's correct.

BY MR. OUTTEN:

Q Sir?

A That's correct.

Q Look at paragraph 3, please. Paragraph 3 gives us a list of the documents you reviewed in reaching your opinions in this case, correct?

A Yes.

Q Do we need to add any -- anything to this list?

A Since then I have reviewed several deposition transcripts, Carroll Pitts's individual one, his 30(b)6 transcript --

Q Let me stop you, and forgive my interruption. We need to get an accurate, updated list.

So is the first one Carroll Pitts's individual deposition?

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Carroll M. Pitts, Jr. and Robinson Bradshaw & Hinson, P.A., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by electronic mail and mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Carroll M. Pitts, Jr.'s and Robinson Bradshaw & Hinson, P.A.'s Motion to Exclude the Expert Testimony of Michael J. Virzi

Carroll M. Pitts, Jr.'s and Robinson Bradshaw & Hinson, P.A.'s Motion in Limine

Counsel Served:

George Hunter McMaster, Esquire
Tompkins and McMaster, LLP
Post Office Box 7337
Columbia, South Carolina 29202
ghm@tmmlaw.net

Roger Jellenik, Esquire
1106 Little Street
Camden, South Carolina 29020
rbjatty@mac.com

FILED-RECEIVED
2014 JUL 18 PM 1:53
DAVID W. HAMILTON
C.C.C.P.&G.S.
YORK COUNTY, SC

Deborah S. Horton
Administrative Assistant

July 18, 2014

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)
)
Marjorie Cato Burton, et al.)
☐ Plaintiff)
)
v.)
)
Carroll M. Pitts, Jr., Esq., et al.)
☒ Defendants.)

IN THE COURT OF COMMON PLEAS

CASE NO.
2010-CP-46-2267

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:	Defendant's Attorney:
George H. McMaster, Bar No.	Everett E. McMillian, Bar No. 05905
Address:	Address:
P. O. Box 7337, Columbia, SC 29202	NMRS, P. O. Box 11070, Columbia, SC 29211
phone: 803-799-4499 fax: 803-252-2240	phone: (803) 799-2000 fax: 803-255-5193
e-mail: ghm@tmmlaw.net other:	e-mail: everett.mcmillian@nelsonmullins.com other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion in Limine
Estimated Time Needed: Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

July 18, 2014
Date Submitted

FILED-RECEIVED
2014 JUL 18 PM 1:55
DAVID HAMILTON
CLERK OF C.P. & G.S.
YORK COUNTY, SC

SECTION III: Motion Fee

☒ PAID – AMOUNT: 25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: DMO

☒ MOTION FEE COLLECTED: 25
☐ CONTESTED – AMOUNT DUE:

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT
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,	)	Civil Action No. 2010-CP-46-2267
Plaintiff,	)	**MOTION IN LIMINE**
vs.	)	
Carroll M. Pitts, Jr., Esq. and Robinson Bradshaw & Hinson, P.A.,	)	
Defendants.	)	

FILED-RECEIVED
2014 JUL 18 PM 1:55
DAVID HAMILTON
C.C.C.P.&G.S.
YORK COUNTY, SC

Carroll M. Pitts, Jr., ("Pitts") and Robinson Bradshaw & Hinson, P.A., (collectively, "RBH") move the Court for an Order excluding any and all evidence regarding RBH's alleged conflict of interest in bringing the Partition Action in the trial of this case. The grounds for this motion are that an attorney's withdrawal with the consent of the Court cannot provide the basis of a legal malpractice claim, and this issue has previously been ruled upon by the Court.

FACTUAL BACKGROUND

This legal malpractice lawsuit arises out of a commercial real estate transaction which closed in December 2007 in York County. The Partition Action arose out of an issue regarding one of the tracts of land involved called the "Roadbed Tract."

During the pendency of the Partition Action, counsel for the Plaintiff filed a Motion to Disqualify Pitts as counsel for the petitioners, alleging he had a conflict of interest in bringing that lawsuit because he allegedly represented the Plaintiff in the underlying commercial real

estate transaction. After hearing arguments from both sides, the Honorable Lee S. Alford denied that motion on June 1, 2009. A copy of the Form Order denying the Motion to Disqualify is attached as **Exhibit A**.

On July 30, 2010, Pitts moved the Court to approve his withdrawal from representation of the petitioners with their consent. (Form Motion, July 30, 2010; **Ex. B**.) The Honorable Lee S. Alford granted this motion on August 5, 2010, and ordered that Brian S. McCoy, Esquire, be substituted as counsel for the petitioners. (Consent Order Substituting Counsel, August 5, 2010; **Ex. C**.) Each of the petitioners signed the Order. *Id.* The Plaintiff never sought reconsideration nor appealed these Orders.

ARGUMENT

All evidence regarding RBH's alleged conflict of interest in the Partition Action should be excluded because RBH's withdrawal with the consent of the Court cannot provide the basis of a legal malpractice claim, and this issue has previously been ruled upon by the Court.

I. The Court's Consent Order Precludes Plaintiff's Claim.

A former client cannot prevail in a legal malpractice claim against an attorney who withdraws from the underlying case with court approval. *Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard*, 324 S.C. 645, 486 S.E.2d 14 (Ct. App. 1997) *aff'd in part as modified, vacated in part,* 334 S.C. 244, 513 S.E.2d 96 (1999). In this case, the Haynsworth firm obtained court approval to withdraw from representing Lifshultz on a contingency fee basis in the underlying action, and Lifshultz replaced Haynsworth with another firm that was paid in excess of $1.3 million in hourly fees. Ultimately, Lifshultz lost the case, and then filed suit against Haynsworth claiming it was liable for the fees incurred because its withdrawal resulted in these additional fees. The circuit court granted summary judgment in

favor of Haynsworth because its withdrawal was not the proximate cause of any damages Lifshultz suffered. The court further found that the order entitling Haynsworth to withdraw was the law of the case because it was never appealed, and held that "[a]n attorney's withdrawal from a case with the court's permission and in accordance with applicable rules does not form the basis of either a malpractice or breach of contract cause of action." *Id.* at 652, 486 S.E.2d at 17.

RBH withdrew from the Partition Action with the consent of the Court and, therefore, this Action cannot form the basis of a malpractice claim against RBH. On August 5, 2010, Judge Alford signed a Consent Order approving Pitts' withdrawal and substituting McCoy for Pitts as the petitioners' counsel. None of the parties to the Partition Action, including the Plaintiff, appealed or sought reconsideration of the Consent Order. Accordingly, the Consent Order entitling RBH to withdraw is the law of the case and the Partition Action cannot form the basis of a malpractice claim against RBH. *See id.*, at 653, 486 S.E.2d at 18 (holding that because the "ruling entitling the Haynsworth Firm to withdraw from the case ha[d] not been appealed, it [was] the law of th[e] case").

II. A Previously Ruled Upon Issue Cannot form the Basis of Plaintiff's Claim.

Additionally, Pitts' alleged conflict of interest in bringing the Partition Action cannot form the basis for Plaintiff's claim against RBH because this issue was previously ruled upon by the Court. The issue came before the Court on Plaintiff's Motion to Disqualify Pitts which was argued by both sides and denied by Judge Alford on June 1, 2009. The Plaintiff never appealed this ruling, preserved the issue, or sought reconsideration of the Order. Accordingly, the issue of whether or not Pitts had a conflict of interest in bringing the Partition Action has been ruled upon by the Court and, therefore, cannot form the basis for Plaintiff's claim against RBH.

Therefore, the Court should exclude any and all evidence regarding RBH's alleged conflict of interest in bringing the Partition Action because RBH's withdrawal with the consent of the Court cannot provide the basis of a legal malpractice claim, and this issue has previously been ruled upon by the Court.

CONCLUSION

For the reasons stated above, RBH respectfully moves the Court for an Order excluding the introduction of any and all evidence regarding RBH's alleged conflict of interest in bringing the Partition Action at the trial of this matter.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

Samuel W. Outten
SC Bar No. 4295
E-Mail: sam.outten@nelsonmullins.com
104 South Main Street / Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300
Everett E. McMillian
SC Bar No. 101310
E-Mail: everett.mcmillian@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for Carroll M. Pitts, Jr. and Robinson Bradshaw & Hinson, P.A.

Columbia, South Carolina

July 18, 2014

EXHIBIT A

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

FILED-RECEIVED
2009 JUN -1 PM 3:07
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

JUDGMENT IN A CIVIL CASE

CASE NO: 2008CP4603171

James Thomas Cato *vs.* Marjorie Cato Burton

CHECK ONE:

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

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

☐ ACTION DISMISSED (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other:

☐ ACTION STRICKEN (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☒ Statement of Judgment by the Court:

Motion Denied at this point in the action.

Dated at York, South Carolina, this 1st day of June, 2009.

Court Reporter: *PHYLLIS BARRETT*

PRESIDING JUDGE - LEE S. ALFORD

This judgment was entered on the 1st day of June, 2009, and a copy mailed first class this 1st day of June, 2009, to attorneys of record or to parties (when appearing pro se) as follows:

Carroll M Pitts Jr Robinson Bradshaw & Hinson, PA P.O. Drawer 12070 Rock Hill, SC 29731

ATTORNEY(S) FOR THE PLAINTIFF(S)

Roger B. Jellenik Roger B. Jellenik Attorney at Law 1111 Broad St., Box J Camden, SC 29020

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

SCRCP APP-24/FORM 4

CPFORM4M

EXHIBIT B

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
) SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK)
)
) CASE NO.: 2008-CP-46-3171
)
James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato and Cathy Cato Evans,) **MOTION AND ORDER INFORMATION**

Plaintiff,) **FORM AND COVERSHEET**

vs.)
)
Marjorie Cato Burton, as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust)

Defendant.)

FILED-RECEIVED
2010 AUG 17 PM 4:16
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

Plaintiff's Attorney:	Defendant's Attorney:
Brian S. McCoy, Bar No. 2155 Address: 633 East Main Street Rock Hill, SC 29730 Phone: 803-366-2280 Fax 803-366-0643 E-mail: ____Other: ____	____, Bar No. ____ Address: ____ Phone: ____ Fax____ E-mail: ____Other: ____

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☒ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: ____
Estimated Time Needed: ____ Court Reporter Needed: ☐ YES/☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

B-MG 7-30-10

Signature of Attorney for ☒ Plaintiff / ☐ Defendant Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ 25
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect.
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: ____
- ☐ Other: ____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	JUDGE CODE ____
☐ Other: ____	Date: ____

CLERK'S VERIFICATION

Collected by: SG Date Filed: 8

☒ MOTION FEE COLLECTED: $ 25

☐ CONTESTED – AMOUNT DUE: $ ____

SCCA 233 (11/2003)

EXHIBIT C

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
FOR THE SIXTEENTH JUDICIAL CIRCUIT

Case No. 2008-CP-46-3171

James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato and Cathy Cato Evans,

Plaintiffs,

v.

Marjorie Cato Burton, as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust,

Defendant.

David Alan Burton, as Attorney-In-Fact for Marjorie Cato Burton, as Trustee of the Sloan Marvin Burton and Majorie Cato Burton, AB Living Trust, and in the right and on behalf of T.E. Cato Estate, LLC,

Third-Party Plaintiff,

v.

James Thomas Cato and Thomasson Apts., LLC,

Third-Party Defendants.

Thomasson Apts., LLC,

Fourth-Party Plaintiff,

v.

T.E. Cato Estate, LLC, James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato and Cathy Cato Evans, Majorie Cato Burton, as Trustee Of the Sloan Marvin Burton and Majorie Cato Burton, AB Living Trust,

Fourth-Party Defendants.

CONSENT ORDER SUBSTITUTING COUNSEL

FILED-RECEIVED
2010 AUG 17 PM 4:16
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

#1986
2800

ON MOTION AND FOR GOOD CAUSE SHOWN, and with the consent of the Plaintiff and Third-Party Defendant James Thomas Cato and the Plaintiffs Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato and Cathy Cato Evens, it is ordered that Brian S. McCoy, Esquire, of the firm of Horack Talley be substituted as counsel for the Plaintiffs and for the Third-Party Defendant James Thomas Cato and that Carroll M. Pitts of the firm Robinson, Bradshaw & Hinson, P.A. be relieved as counsel for said parties.

Presiding Judge
Sixteenth Judicial Circuit

August 5, 2010

WE SO MOVE:

Carroll M. Pitts
ROBINSON, BRADSHAW & HINSON, P.A.
140 East Main Street, Suite 420
Rock Hill, SC 29730
Telephone: (803) 325-2900
Facsimile: (803) 325-2929
bjohnson@rbh.com

Brian S. McCoy
HORACK TALLEY
633 East Main Street
Rock Hill, SC 29730
Telephone: (803) 366-2280
Facsimile: (803) 366-0643
bmccoy@horacktalley.com

WE CONSENT:

James Thomas Cato, *Plaintiff and Third-Party Defendant*

Helen Cato Jones, *Plaintiff*

Donn S. Johnson, *Plaintiff*

Jane Cato West, *Plaintiff*

Robert Lee Cato, *Plaintiff*

Cathy Cato Evans, *Plaintiff*

ON MOTION AND FOR GOOD CAUSE SHOWN, and with the consent of the Plaintiff and Third-Party Defendant James Thomas Cato and the Plaintiffs Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato and Cathy Cato Evens, it is ordered that Brian S. McCoy, Esquire, of the firm of Horack Talley be substituted as counsel for the Plaintiffs and for the Third-Party Defendant James Thomas Cato and that Carroll M. Pitts of the firm Robinson, Bradshaw & Hinson, P.A. be relieved as counsel for said parties.

_____
Presiding Judge
Sixteenth Judicial Circuit

July ____, 2010

WE SO MOVE:

Carroll M. Pitts
ROBINSON, BRADSHAW & HINSON, P.A.
140 East Main Street, Suite 420
Rock Hill, SC 29730
Telephone: (803) 325-2900
Facsimile: (803) 325-2929
bjohnson@rbh.com

Brian S. McCoy
HORACK TALLEY
633 East Main Street
Rock Hill, SC 29730
Telephone: (803) 366-2280
Facsimile: (803) 366-0643
bmccoy@horacktalley.com

WE CONSENT:

James Thomas Cato, *Plaintiff and Third-Party Defendant*

Helen Cato Jones, *Plaintiff*

Donn S. Johnson, *Plaintiff*

Jane Cato West, *Plaintiff*

Robert Lee Cato, *Plaintiff*

Cathy Cato Evans, *Plaintiff*

#3086

ON MOTION AND FOR GOOD CAUSE SHOWN, and with the consent of the Plaintiff and Third-Party Defendant James Thomas Cato and the Plaintiffs Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato and Cathy Cato Evens, it is ordered that Brian S. McCoy, Esquire, of the firm of Horack Talley be substituted as counsel for the Plaintiffs and for the Third-Party Defendant James Thomas Cato and that Carroll M. Pitts of the firm Robinson, Bradshaw & Hinson, P.A. be relieved as counsel for said parties.

_____
Presiding Judge
Sixteenth Judicial Circuit

July ____, 2010

WE SO MOVE:

Carroll M. Pitts
ROBINSON, BRADSHAW & HINSON, P.A.
140 East Main Street, Suite 420
Rock Hill, SC 29730
Telephone: (803) 325-2900
Facsimile: (803) 325-2929
bjohnson@rbh.com

Brian S. McCoy
HORACK TALLEY
633 East Main Street
Rock Hill, SC 29730
Telephone: (803) 366-2280
Facsimile: (803) 366-0643
bmccoy@horacktalley.com

WE CONSENT:

James Thomas Cato, *Plaintiff and Third-Party Defendant*

Helen Cato Jones, *Plaintiff*

Donn S. Johnson, *Plaintiff*

Jane Cato West, *Plaintiff*

Robert Lee Cato, *Plaintiff*

Cathy Cato Evans, *Plaintiff*

#4876

ON MOTION AND FOR GOOD CAUSE SHOWN, and with the consent of the Plaintiff and Third-Party Defendant James Thomas Cato and the Plaintiffs Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato and Cathy Cato Evens, it is ordered that Brian S. McCoy, Esquire, of the firm of Horack Talley be substituted as counsel for the Plaintiffs and for the Third-Party Defendant James Thomas Cato and that Carroll M. Pitts of the firm Robinson, Bradshaw & Hinson, P.A. be relieved as counsel for said parties.

Presiding Judge
Sixteenth Judicial Circuit

July ____, 2010

WE SO MOVE:

Carroll M. Pitts
ROBINSON, BRADSHAW & HINSON, P.A.
140 East Main Street, Suite 420
Rock Hill, SC 29730
Telephone: (803) 325-2900
Facsimile: (803) 325-2929
bjohnson@rbh.com

Brian S. McCoy
HORACK TALLEY
633 East Main Street
Rock Hill, SC 29730
Telephone: (803) 366-2280
Facsimile: (803) 366-0643
bmccoy@horacktalley.com

WE CONSENT:

James Thomas Cato, *Plaintiff and Third-Party Defendant*

Helen Cato Jones, *Plaintiff*

Donn S. Johnson, *Plaintiff*

Jane Cato West, *Plaintiff*

Robert Lee Cato, *Plaintiff*

Cathy Cato Evans, *Plaintiff*

ON MOTION AND FOR GOOD CAUSE SHOWN, and with the consent of the Plaintiff and Third-Party Defendant James Thomas Cato and the Plaintiffs Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato and Cathy Cato Evens, it is ordered that Brian S. McCoy, Esquire, of the firm of Horack Talley be substituted as counsel for the Plaintiffs and for the Third-Party Defendant James Thomas Cato and that Carroll M. Pitts of the firm Robinson, Bradshaw & Hinson, P.A. be relieved as counsel for said parties.

Presiding Judge
Sixteenth Judicial Circuit

July ____, 2010

WE SO MOVE:

Carroll M. Pitts
ROBINSON, BRADSHAW & HINSON, P.A.
140 East Main Street, Suite 420
Rock Hill, SC 29730
Telephone: (803) 325-2900
Facsimile: (803) 325-2929
bjohnson@rbh.com

Brian S. McCoy
HORACK TALLEY
633 East Main Street
Rock Hill, SC 29730
Telephone: (803) 366-2280
Facsimile: (803) 366-0643
bmccoy@horacktalley.com

WE CONSENT:

James Thomas Cato, *Plaintiff and Third-Party Defendant*

Douglas Edgar Jones, P.O.A. for Helen Cato Jones, *Plaintiff*

Donn S. Johnson, *Plaintiff*

Jane Cato West, *Plaintiff*

Robert Lee Cato, *Plaintiff*

Cathy Cato Evans, *Plaintiff*

#686
1 BB

CERTIFICATE OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Carroll M. Pitts, Jr. and Robinson Bradshaw & Hinson, P.A., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by electronic mail and mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Carroll M. Pitts, Jr.'s and Robinson Bradshaw & Hinson, P.A.'s Motion to Exclude the Expert Testimony of Michael J. Virzi

Carroll M. Pitts, Jr.'s and Robinson Bradshaw & Hinson, P.A.'s Motion in Limine

Counsel Served:

George Hunter McMaster, Esquire
Tompkins and McMaster, LLP
Post Office Box 7337
Columbia, South Carolina 29202
ghm@tmmlaw.net

Roger Jellenik, Esquire
1106 Little Street
Camden, South Carolina 29020
rbjatty@mac.com

FILED-RECEIVED
2014 JUL 18 PM 1:55
DAVID HAMILTON
C.C.P.&G.S.
YORK COUNTY, SC

Deborah S. Horton
Administrative Assistant

July 18, 2014

ORIGINAL

STATE OF SOUTH CAROLINA) COUNTY OF YORK)	IN THE COURT OF COMMON PLEAS FOR THE SIXTEENTH JUDICIAL CIRCUIT
David A. Burton as Successor Trustee) of the Sloan Marvin Burton and) Marjorie Cato Burton, AB Living) Trust, Individually and and in the) Right and on Behalf of T.E. Cato) Estate, LLC,) Plaintiff)) v.)) Carroll M. Pitts, Jr., Esq., and) Robinson Bradshaw & Hinson, P.A.,) Defendants)	Case No. 2010-CP-46-2267 BRIEF

FILED-RECEIVED
2014 NOV 21 PM 1:41
DAVID HAMILTON
C.C.P.&G.S.
YORK COUNTY, SC

BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE THE TESTIMONY OF MICHAEL J. VIRZI

David Alan Burton ("Plaintiff"), Individually, and as Successor Trustee of the Sloan Marvin Burton and Marjorie Cato Burton AB Living Trust, Individually and in the Right and on Behalf of T.E. Cato Estate, LLC ("CatoLLC"), submits this Brief in Opposition to the "MOTION TO EXCLUDE THE TESTIMONY OF MICHAEL J. VIRZI" ("Defendants' Motion") dated July 18, 2014, filed on behalf of Carroll M. Pitts, Jr., Esq., and Robinson Bradshaw & Hinson, P.A., Defendants ("Defendants"):

1. **Background.** This action is based upon Defendants' acts and omissions for more than three years in connection with a series of commercial real estate transactions and resulting litigation.
2. **Defendants' Argument.** Defendants argue that the testimony of Michael J. Virzi, Esq., should not be received into evidence because he "lacks the requisite experience to offer opinions on the standard of care required of a commercial real estate lawyer pursuant to Rule 702, SCRE, and Holmes v. Haynsworth, Sinkler & Boyd, P.A." 408 S.C. 620, 760 S.E.2d 399 (2014). In support of their argument, Defendants refer to Mr. Virzi's testimony in which he notes that he has little or no experience in the private practice of real estate transaction law specifically including deed preparation or the conduct of real estate closings.

3. Holmes and Rule 702, SCRE. Chief Justice Toal's opinion in Holmes refers to the following points of law regarding the issues raised by Defendants' Motion:[1]

> "The qualification of an expert witness and the admissibility of an expert's testimony are matters within the trial court's discretion" and will not be overturned absent a finding of abuse of that discretion. [citations omitted] "An abuse of discretion occurs when the circuit court's rulings 'either lack evidentiary support or are controlled by an error of law.' [citations omitted]"
>
> "'If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. Regardless of whether the expert testimony is scientific, technical or otherwise, "all expert testimony must meet the requirements of Rule 702. [citations omitted]"
>
> > In determining whether to admit expert testimony, the court must make three inquiries. First, the court must determine whether "the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury." Second, the expert must have 'acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter," although he "need not be a specialist in the particular branch of the field." Finally, the substance of the testimony must be reliable.' *Id.* (internal citations omitted) (quoting Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010)).

Chief Justice Toal then applies these premises to the facts in Holmes:[2]

> Appellant argues that the mere fact that she is a licensed attorney qualifies her as an expert in the field of the applicable standard of care in a federal anti-trust action.
>
> Regardless of her status as a licensed attorney, Appellant was required to demonstrate to the circuit court's satisfaction that she had the requisite training, experience, and education to testify as an expert witness in this case. Although Appellant is a licensed attorney, we agree Appellant was unqualified to testify as an expert regarding the applicable standard of care for attorneys handling a federal antitrust lawsuit due to the mere fact that she is licensed to

[1] 408 S.C. at 635-6, 760 S.E.2d at 407.

[2] 408 S.C. at 636-7, 760 S.E.2d at 407-8.

practice law. First, Appellant is a physician, and has not practiced law in over thirty years. She does not represent clients, and in fact, has never represented a client other than herself at various points in this litigation, and has never represented a client in federal court, let alone handled a federal anti-trust action. Under these undisputed facts, the circuit court did not abuse its discretion in disqualifying Appellant from testifying as an expert as to the standard of care in this case. [footnote omitted]

4. Plaintiff's Response.

   a. **Mr. Virzi's Testimony.** At a minimum, Mr. Virzi's testimony will be offered to "'establish both the standard of care and the deviation by the [Defendants] from such standard.'" Holmes, 408 S.C. at 636, 360 S.E.2d at 407 [citations omitted]. His testimony will relate to Defendants' duties in the context of the facts of this case and include his expert opinions and references to applicable rules of professional conduct, judicial precedents, and statutory provisions as they apply to legal malpractice, professional negligence, and the unauthorized practice of law in this case.

   b. **Issue.** The issue here is simply whether Mr. Virzi's "knowledge, skill, experience, training, or education" meets the requirements of Rule 702, SCRE.

   c. **Mr. Virzi meets the standard laid down by Rule 702.** As shown by his Second Affidavit attached hereto, Mr. Virzi is amply qualified to offer his testimony as an expert in this case.

5. Conclusions.

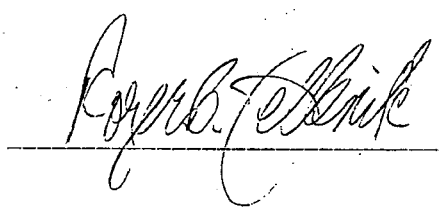
   a. Mr. Virzi is qualified as an expert under Rule 702, SCRE.

   b. Mr. Virzi's background and professional knowledge, skill, experience, training, and education are applicable to and will assist the trier of fact regarding the issues in this case.

   c. Defendants have offered no proper basis for excluding Mr. Virzi's testimony.

Accordingly, Plaintiff hereby requests that the Court deny Defendants' Motion.

Respectfully submitted this 17th day of November, 2014.



Roger B. Jellenik
Attorney for Plaintiff
S.C. Bar No. 13546

Roger B. Jellenik
Attorney at Law
1106 Little Street
Camden, South Carolina 29020
Telephone 803-424-1919
Facsimile 803-424-1922
email rbjatty@mac.com

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	
Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust by and through David A. Burton as Attorney-in-Fact, Individually and in the right and on behalf of T.E. Cato Estate, LLC,	)	C.A. No.: 2010-CP-46-2267
Plaintiffs,	)	SECOND AFFIDAVIT OF MICHAEL J. VIRZI
v.	)	
Caroll M. Pitts, Jr., Esq. and Robinson Bradshaw & Hinson, P.A.,	)	
Defendants.	)	

NOW COMES Michael J. Virzi, and states, under oath, the following:

1. I am offering this affidavit regarding my background and qualifications as an expert witness in the above-captioned matter. My current resume is attached hereto as Exhibit A and incorporated herein by reference.

2. As I stated in my deposition on May 23, 2014, I have extensive practical experience upon which to draw in forming the opinions I have offered in this case. Most of the issues surrounding the alleged acts of negligence in this case are not specifically applicable only to commercial real estate transactions but involve the standard of care for attorneys in real estate transactions generally, regardless of their commercial or residential nature, and in forming small business entities. Those issues include accurate drafting, timing of conveyancing to a newly-formed

entity, forming an entity consistent with the clients' expressed goals, and advice regarding deed warranties.

3. My experience relevant to the issues in this case includes working as a practicing attorney exclusively in the areas of lawyer ethics and malpractice for the past eleven years. Much of that work has involved real estate transactions, including representing clients in real estate transactions (although never serving as the settlement agent), investigating and auditing hundreds of residential real estate transaction closing files in civil litigation, disciplinary prosecution, disciplinary defense, private risk-management advice to closing-attorney clients, and providing expert witness testimony in legal malpractice cases involving lawyer conduct in real estate transactions both for and against the lawyer. For the past eight years, I have taught full-time at the USC School of Law and maintained a part-time private practice that focuses almost exclusively on lawyer ethics, malpractice, and discipline, including substantial work involving real estate transactions. Most of my current disciplinary defense work involves residential real estate transactions and approximately half of my expert witness work has involved real estate transactions, both residential and commercial.

4. I have also worked on many matters involving commercial real estate transactions in civil litigation. Prior to focusing my practice on lawyers' professional responsibilities when I joined the Office of Disciplinary counsel eleven years ago, I practiced for three years in the area of complex business litigation, which involved a significant amount of work in real estate, both residential and commercial, but primarily commercial. My caseload included defending a class action involving property rights in commercial and residential tracts and defending a mulit-million-dollar legal malpractice suit over the development of a large commercial tract. I worked on several private land disputes, for both plaintiffs and defendants, including both residential and commercial property, I

litigated several multi-million-dollar mortgage lending fraud cases, and my practice included bankruptcy work that often involved commercial real estate issues.

5. My business litigation practice also involved many issues surrounding the formation of business entities and the rights and responsibilities of officers and agents as set forth in the governing documents of various forms of business entities including LLCs. I have personally formed two South Carolina LLCs and assisted in the formation of others.

6. I co-authored with Prof. Stephen Spitz the only published book on South Carolina real estate transactions, which is used at both law schools in this state to teach the Real Estate Transactions course, which is the prerequisite course to both the commercial and residential closing courses. I have been invited to speak to South Carolina real estate attorneys and students at more than two dozen CLE programs and student lectures over the past ten years, including by both South Carolina law schools, the South Carolina Bar Real Estate Section, the Charleston County Real Estate Section, Stewart Title Guarantee Company, First American Title Insurance Company, Fidelity National Title Insurance Company, and the Palmetto Land Title Association.

7. During my tenure as an Assistant Disciplinary Counsel for the South Carolina Supreme Court's Office of Disciplinary Counsel, my work focused primarily on real estate transactions. It was because of my prior private practice in real estate litigation and bankruptcy, both of which involved issues of lawyer conduct in residential and commercial transactions, that I was chosen for the position of Assistant Disciplinary Counsel at a time when that office needed an attorney with experience in those practice areas. I also represented the Disciplinary Counsel twice in civil litigation before the South Carolina Supreme Court in cases in which the primary issue before the court was proper conduct in real estate transactions. MSV

Further affiant sayeth naught.

Michael J. Virzi, Esq.

State of South Carolina
County of Richland

Sworn and subscribed before me
This 17th day of November, 2014

Rebekah K. Maxwell
Notary Public

My Commission Expires : Jan 4, 2016

MICHAEL J. VIRZI
P.O. Box 50252
mjv@virzilaw.com Columbia, SC 29250 803-404-0429

EDUCATION

University of South Carolina School of Law, Columbia, SC
J.D., *cum laude*, May 2000
Honors:
- Order of the Coif
- Order of Wig & Robe
- Roy Webster Scholar
- Dean's List
- CALI Award, Business Corporations
- Articles Editor, *ABA Real Property, Probate and Trust Journal*

University of South Carolina, Columbia, SC
B.A., Political Science, May 1991

LAW PRACTICE

The Virzi Law Firm Columbia, SC
Solo practitioner (part-time), August 2006 – present
Ethics & Malpractice Consultation
Attorney Grievances

S.C. Supreme Court's Office of the Disciplinary Counsel, Columbia, SC
Assistant Disciplinary Counsel, February 2003 – August 2006
Investigated and prosecuted lawyer misconduct and incapacity, with a concentration in real estate transactions, mortgage fraud, and the unauthorized practice of law
Represented the Disciplinary Counsel in non-disciplinary legal matters

Sowell Gray Stepp & Laffitte, L.L.C., Columbia, SC
Associate Attorney, July 2001 – February 2003
Business, Commercial, and Real Estate Litigation
Bankruptcy & Creditors' Rights
Employment Litigation

Gallivan, White & Boyd, P.A., Greenville, SC
Associate Attorney, August 2000 – July 2001
Business and Real Estate Litigation
Bankruptcy & Creditors' Rights

TEACHING

University of South Carolina School of Law, Columbia, SC
Legal Writing Instructor, August 2006 – Present (adjunct 2005 – 2006)
Legal Research, Analysis & Writing I & II
Professional Responsibility
Fundamentals of Law Practice & Professionalism
Advanced Legal Writing

Midlands Technical College, Columbia, SC
Adjunct Instructor, Paralegal Degree Program, May 2003 – August 2005
Business Law I (contracts, agency)
Business Law II (payment systems, secured transactions, corporations, partnerships, LLCs)

mjv@virzilaw.com Michael J. Virzi 803-404-0429

PUBLICATIONS

- *Quality Control:* In re Wells *and the Regulation of Adverbs and Adjectives in Lawyer Advertising*, S.C. Lawyer, July 2011, at 27.
- REAL ESTATE TRANSACTIONS: CASES AND MATERIALS (2d ed. 2010) (with Stephen A. Spitz).
- *Who Can You Trust? How the TLGP, CDARS, FDIC and NCUSIF Affect the Safekeeping of Client Funds*, S.C. Lawyer, May 2009, at 14.
- *If It Walks Like a Duck...: Ethics Advisory Opinion 06-11 & the Attorney-Client Relationship in Real Estate Transactions*, S.C. Lawyer, March 2007, at 30.

SIGNIFICANT CASES

- *Doe Law Firm v. Richardson*, 371 S.C. 14, 636 S.E.2d 866 (2006).
- *Ex Parte Watson*, 356 S.C. 432, 589 S.E.2d 760 (2003) (brief only).

PROFESSIONAL ASSOCIATIONS

American Bar Association	2006 – present
Center for Professional Responsibility	2006 – present
South Carolina Bar	2000 – present
Professional Responsibility Committee	2011 – present
Ethics Advisory Committee (Chair 2007-2010)	2003 – present
Technology Committee	2001 – 2003
Association of Professional Responsibility Lawyers	2012 – present
National Institute for Teachers of Ethics and Professionalism	2010 – present
South Carolina Association of Ethics Counsel	2008 – present
Richland County Bar	2001 – present
North Carolina Bar (inactive since 2004)	2001 – present
Phi Delta Phi	1999 – present
National White Collar Crime Center	2004 – 2007
F.B.I. Multi-Jurisdictional Lending Fraud Task Force	2004 – 2006
U.S.D.C., District of South Carolina	2001 – present
U.S.D.C., Western, Middle & Eastern Districts of North Carolina	2001 – present
U.S. Court of Appeals, Fourth Circuit	2002 – present

LECTURES & SEMINARS

Ethics 2014: A Year in Review, Richland County Bar, Nov. 7, 2014

Advertising School (panelist), S.C. Bar & Supreme Court LEAPP Program, Sept. 2, 2014

Ethics of Lawyer Advertising (guest lecturer), USC School of Law, Mar. 5, 2014

Ethics in Discovery, SC Bar YLD Lunch & Learn, Oct. 28, 2013

To Fee or Not to Fee: Protecting Yourself when Collecting Fees, SCAJ Convention, Aug. 2, 2013

Fifty Ways to Lose Your License (panelist), Richland County Bar CLE, Apr. 9, 2013

Ethics of Lawyer Advertising (guest lecturer), USC School of Law, Feb. 13, 2013

Lawyer Trust Accounting (guest lecturer), USC School of Law, Feb. 13, 2013

Advertising School (panelist), S.C. Bar & Supreme Court LEAPP Program, Feb. 13, 2013

Fifty Ways to Lose Your License (panelist), S.C. Bar Convention, Jan. 26, 2013

Got a Secret, Do You Keep It? (panelist), S.C. Association of Ethics Counsel CLE, Jan. 18, 2013

Law Firm Divorces (panelist), S.C. Association of Ethics Counsel CLE, Jan. 18, 2013

LECTURES & SEMINARS (continued)

Practicing Lawyer Ethics & Grievance Defense, (guest lecturer), USC School of Law, Jan. 14, 2013
Advertising School (panelist), S.C. Bar & Supreme Court LEAPP Program, Sept. 19, 2012
Ethics & Malpractice in a Real Estate Practice (guest lecturer), Charleston School of Law, Aug. 23, 2012
Advertising School (panelist), S.C. Bar & Supreme Court LEAPP Program, Feb. 15, 2012
Law Firm Divorces, S.C. Association of Ethics Counsel CLE, Jan. 13, 2012
Ethics Update 2011, Lexington County Bar CLE, Dec. 7, 2011
Selected Ethical Issues from 2011 (panelist), USC School of Law All-Class Reunion CLE, Nov. 5, 2011
Ethics & Malpractice in a Real Estate Practice (guest lecturer), Charleston School of Law, Sept. 28, 2011
Ethics & Malpractice in a Real Estate Practice (guest lecturer), USC School of Law, Aug. 29, 2011
Ethics in Real Estate Transactions (guest lecturer), Charleston School of Law, May 14, 2011
Advertising School (panelist), S.C. Bar & Supreme Court LEAPP Program, Feb. 16, 2011
Advertising School (panelist), S.C. Bar & Supreme Court LEAPP Program, Dec. 17, 2010
Ethics & Malpractice in a Real Estate Practice (guest lecturer), Charleston School of Law, Sept. 15, 2010
Ethics & Malpractice in a Real Estate Practice (guest lecturer), USC School of Law, Aug. 30, 2010
Ethics in Real Estate Transactions (guest lecturer), Charleston School of Law, June 3, 2010
Ethics & Malpractice in a Real Estate Practice (guest lecturer), Charleston School of Law, May 26, 2010
Ethics School (panelist), S.C. Bar & Supreme Court LEAPP Program, May 14, 2010
If I Only Had A Brain: Real Estate Ethics, Fidelity National Annual Seminar, Feb. 26, 2010
(For what it's worth, I did not name this one. - MV)
Ethics School (panelist), S.C. Bar & Supreme Court LEAPP Program, Feb. 19, 2010
Ethics School (panelist), S.C. Bar & Supreme Court LEAPP Program, Oct. 15, 2009
Recent Issues in Trust Accounting and Real Estate, First American Fall Seminar, Oct. 9, 2009
Ethics School (panelist), S.C. Bar & Supreme Court LEAPP Program, June 11, 2009
UPL in Real Estate Transactions (guest lecturer), USC School of Law, Apr. 1, 2009
Ethics School (panelist), S.C. Bar & Supreme Court LEAPP Program, Feb. 12, 2009
Ethics in Real Estate Transactions (guest lecturer), Charleston School of Law, Feb. 11, 2009
Classroom Ethos: The Trophy Case and Beyond, NC/SC Legal Writing Conference, May 21, 2008
Guided Meditation for Getting in Touch with Your Inner Ethics Counsel, S.C. Bar, Apr. 11, 2008
Ethics and Beyond: Hot Topics in Foreclosure, S.C. Masters-in-Equity, Mar. 14, 2008
Ethics in Real Estate Transactions (guest lecturer), USC School of Law, Feb. 27, 2008
The Attorney Grievance Process, Part II (guest lecturer), USC School of Law, Feb. 13 2008
The Attorney Grievance Process, Part I (guest lecturer), USC School of Law, Feb. 6, 2008
Hot Topics in Ethics for Government Lawyers, SCAC Fall Seminar, Dec. 7, 2007
Practical Tips for Solo and Small-Firm Lawyers, Lexington County Bar, Dec. 5, 2007
Ethics Update for Real Estate Lawyers, Stewart Title Fall Seminar, Nov. 2, 2007
Ethics Issues in Housing Law and Beyond, S.C. Appleseed Legal Justice Center, Oct. 19, 2007
Ethics in Real Estate Transactions (guest lecturer), USC School of Law, Oct. 15, 2007
Ethics Impact of The 2006 Property Tax Reform Act, S.C. Bar, Aug. 24, 2007
Real Estate Ethics (guest lecturer), USC School of Law, Apr. 9, 2007

LECTURES & SEMINARS (continued)

Ethics in Real Estate Transactions (guest lecturer), USC School of Law, Mar. 23, 2007
The Attorney Discipline Process (guest lecturer), USC School of Law, Feb. 29, 2007
Legal Ethics of Non-Profit Corporations, S.C. Bar, Feb. 9, 2007
Real Estate Fraud, Charleston County Real Estate Section Meeting, Dec. 8, 2006
ODC's Top Ten List, S.C. Bar Solo & Small Firm Section Conference, Oct. 6, 2006
Avoiding Discipline in a Real Estate Practice, SCALA Ethics Seminar, July 27, 2006
A Closing Lawyer's Ethical Obligations (panelist), S.C. Bar Real Estate Section Update, May 12, 2006
Ethics Rules & Real Estate Practice (panelist), S.C. Bar Convention, Jan. 27, 2006
UPL Issues in Real Estate Closings, Richland County Bar Annual Ethics Seminar, Nov. 4, 2005
Real Estate Fraud & Property Flips, PLTA Fall Seminar, Sept. 13, 2005
Ethics in Real Estate Transactions, PLTA Spring Convention, May 13, 2005
Pitfalls of a Real Estate Practice (panelist), S.C. Bar Convention, Jan. 21, 2005
The Revised Lawyer's Oath (panelist), Office of the Attorney General, Aug. 20, 2004
Professionalism in the Law (panelist), USC School of Law, Aug. 17, 2004
Professionalism in the Law (panelist), USC School of Law, Aug. 19, 2003
Basics of Civil Litigation, Half-Moon Seminars, Apr. 25, 2003
Racial Discrimination & the 14th Amendment (guest lecturer), Columbia College, Apr. 9, 2003

PRESS

Stephanie Francis Ward, *Coupon, You're On: 3 Opinions Say Lawyers May Participate in Daily-Deal Websites*, ABA Journal, May 2012, at 24.

Paul Tharp, *Lawyers: Ruling Muddied Proper Handling of Flat Fees*, S.C. Law. Weekly, Mar. 14, 2011, at 1.

Diana Smith, *E-mail Marketing Presents Opportunities for Firms but Perils if Done Wrong*, S.C. Law. Weekly, Oct. 4, 2010.

Tim Smith, *High Court Puts Lawyers on Notice about Relationships*, Greenville (S.C.) News, Sept. 15, 2010.

Stephanie Francis Ward, *Grade Anxiety*, ABA Journal, Feb. 2010, at 52.

Adam Parker, *Complaint Filed in Diocese Settlement Case*, Post & Courier (Charleston, S.C.), Feb. 26, 2009.

Sandy Hodson, *After Mortgage Fraud Cases, Federal Leaders Urge Caution*, Augusta Chronicle, Dec. 28, 2008.

Bess Battle, *Battle Zone*, S.C. Law. Weekly, Sept. 1, 2008, at 6.

Gregory Froom, *Attorneys May Threaten Criminal Action While Trying to Collect on Bad Checks*, S.C. Law. Weekly, Sept. 24, 2007, at 1.

Kristy Eppley Rupon, *Lawyers Required to Oversee Refinancing*, The State (Columbia, S.C.), Nov. 6, 2006, at H23.

Michael Dayton, *Disbursement of Closing Funds Requires Attorney Supervision*, S.C. Law. Weekly, Oct. 30, 2006, at 1.

Gregory Froom, *Must Lawyers Disburse?*, S.C. Law. Weekly, Oct. 16, 2006, at 1.

ORIGINAL

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS FOR THE SIXTEENTH JUDICIAL CIRCUIT
David A. Burton as Successor Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, Individually and and in the Right and on Behalf of T.E. Cato Estate, LLC, Plaintiff v. Carroll M. Pitts, Jr., Esq., and Robinson Bradshaw & Hinson, P.A., Defendants	)	Case No. 2010-CP-46-2267 BRIEF

FILED-RECEIVED
2014 NOV 21 PM 1:41
DAVID HAMILTON
C.C.C.P.&G.S.
YORK COUNTY, SC

BRIEF IN OPPOSITION TO DEFENDANTS' MOTION IN LIMINE

David Alan Burton ("Plaintiff"), Individually, and as Successor Trustee of the Sloan Marvin Burton and Marjorie Cato Burton AB Living Trust, Individually and in the Right and on Behalf of T.E. Cato Estate, LLC ("CatoLLC"), submits this Brief in Opposition to the "MOTION IN LIMINE" ("Defendants' Motion") dated July 18, 2014, filed on behalf of Carroll M. Pitts, Jr., Esq., and Robinson Bradshaw & Hinson, P.A., Defendants ("Defendants"):

1. **Background.** The captioned action arose out of a series of transactions in 2007 related to Plaintiff's family's efforts to sell certain parcels of real property known as "the Areas" to a developer ("TAL"). All parties to the captioned action agree that, during 2007, Defendants acted as legal counsel for and represented one member of the family as promoter of a closely held limited liability company, T.E. Cato Estate, LLC ("CatoLLC"), and then CatoLLC itself after it was formed. The parties to this action disagree as to whether Defendants represented the Plaintiff trust (for purposes of the partition action, "Burton Trust") as a prospective and then actual member of CatoLLC. It is a matter of record that, on August 8, 2008, Defendants, representing several members of the family who were also members of CatoLLC, filed a petition (Case No. 2008-CP-46-3171) against the Burton Trust for partition of certain real property within the Areas known as "the Roadbed Tract" in order to complete a purported sale of the Areas to TAL. Defendants' role and course of conduct regarding i) formation of CatoLLC and related real estate transactions and ii) the partition action against the Burton Trust led the undersigned as the Burton Trust's counsel to request that Defendants withdraw voluntarily as Petitioners' counsel in the partition action. *See*

Exhibit A. When Defendants did not do so, the Burton Trust moved to have Defendants disqualified as Petitioners' counsel in the partition action for two reasons — i) because Defendant Pitts faced an actual or potential conflict of interest inasmuch as the Burton Trust believed that it was a former client, and ii) because Defendant Pitts was likely to be a witness in the partition action and related proceedings. As noted in Defendants' Motion, Judge Alford of the York County Court of Common Pleas heard the Burton Trust's motion on June 1, 2009, he denied it, and Defendants eventually withdrew anyway.[1]

2. Issues.

2.1. Whether Defendants' withdrawal as attorney for Petitioners in the partition action with the consent of the Court nullifies Plaintiff's conflict of interest claim in this action; and

2.2. Whether Judge Alford's 2009 denial of the Burton Trust's motion to disqualify Defendants as Petitioners' counsel in the partition action negates Plaintiff's conflict of interest claim here.

3. Discussion.

3.1. Defendants' Arguments. Defendants first argue that "RBH's withdrawal with the consent of the Court cannot provide the basis of a legal malpractice claim". *See* Defendants' Motion at 2. To buttress this proposition, Defendants cite Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard[2] for the proposition that "(a) former client cannot prevail in a legal malpractice claim against an attorney who withdraws from the underlying case with court approval." *See* Defendants' Motion at 2. Citing Judge Alford's Form 4 Order dated June 1, 2009, Defendants next argue that "this issue has previously been ruled upon by the Court." *See* Defendants' Motion at 2.

3.2. Plaintiff's Responses. As to Defendants' first argument, it is respectfully submitted that the facts here are readily distinguishable from the facts in Lifschultz. In Lifschultz, the Supreme Court of South Carolina issued a *Per Curiam* opinion which plainly stated: "The crux of this current action is petitioner's contention that the federal judge erred in permitting respondents to withdraw from the anti-trust suit." 334 S.C. at 245, 513 S.E.2d at 96. There is no such contention here. Further, in Lifschultz, the attorney withdrew *before being sued by a former client because of his act of withdrawal*;[3] here, Defendants withdrew *after being sued by the adverse party for other reasons*.

As to Defendants' second argument, it is misleading because the full text of Judge Alford's Form 4 ruling reads as follows: "Motion denied at this point in the action." *See* Form 4 Order dated

---

[1] *See* ¶3.2 below

[2] 324 S.C. 645, 486 S.E.2d 14 (Ct. App. 1997), affirmed in part as modified, vacated in part, 334 S.C. 244, 513 S.E.2d 96 (1999).

[3] See the recitation of the facts in 324 S.C. 645, 486 S.E.2d 14 (Ct. App. 1997).

June 1, 2009, attached as Exhibit B. In other words, at least as understood by Plaintiff and the undersigned counsel, the denial was without prejudice. Also omitted from Defendants' argument is the fact that, at the motion hearing, Judge Alford suggested to Defendant Pitts that he voluntarily withdraw. *See* Transcript of Deposition of Carroll M. Pitts, Jr., Esq., June 15, 2012, at 115:20 - 117:1, attached as Exhibit C, wherein Defendant Pitts acknowledges this fact. Defendants ignored this suggestion, continued representing Plaintiffs in the partition action, and finally withdrew as a result of a consent order signed by Judge Alford on August 5, 2010, more than fourteen months after Judge Alford's withdrawal suggestion and more than two months after Plaintiff's May 2010 filing of the captioned action.[4]

4. Conclusion. As discussed above, Defendants' arguments are not valid and ignore indisputable facts. Further, Defendants cite no rule or other applicable authority as a basis for excluding evidence of Defendants' conflict of interest. Therefore, Plaintiff respectfully submits that

4.1. Lifschultz is not dispositive here.

4.2. The Court did not rule on the existence or non-existence of a conflict of interest issue in this case as implied by Defendants' Motion.

4.3. Defendants have not presented valid arguments sufficient to preclude the introduction of evidence regarding Plaintiff's conflict of interest claims in the captioned action.

Accordingly, Plaintiff hereby requests that the Court deny Defendants' Motion.

Respectfully submitted this 18th day of November, 2014.

Roger B. Jellenik
Attorney for Plaintiff
S.C. Bar No. 13546

Roger B. Jellenik
Attorney at Law
1106 Little Street
Camden, South Carolina 29020
Telephone 803-424-1919
Facsimile 803-424-1922
email rbjatty@mac.com

[4] *See* the exhibits to Defendants' Motion.

EXHIBIT A

From: **Roger B. Jellenik** rbjatty@mac.com
Subject: Re Cato Estates
Date: February 28, 2009 at 7:54 PM
To: Carroll M. Pitts, Jr., Esq. cpitts@rbh.com

Mr. Pitts:

Attached below in .pdf format is a letter requesting your voluntary withdrawal from the partition action involving Marjorie Cato Burton. Please feel free to call me if you wish to discuss anything concerning this matter.

I regret that this case has to move forward this way, but, given your clients' position, evidently we have no choice.

Regards.

Roger B. Jellenik
Attorney at Law
rbjatty@mac.com

This message may contain confidential or proprietary information and is intended for the addressee only. Please destroy if received in error and notify the sender by return e-mail.

ROGER B. JELLENIK
ATTORNEY AT LAW

1111 Broad Street
Camden, SC 29020

Telephone 803-424-1919
Facsimile 803-424-1922
rbjatty@mac.com

Saturday, February 28, 2009

BY E-MAIL

Carroll M. Pitts, Jr., Esq.
Robinson Bradshaw & Hinson, PA
P.O. Drawer 12070
Rock, Hill SC 29731

RE: Cato et al. v. Burton as Trustee, Case No. 2008-CP-46-
Request for Voluntary Disqualification

Dear Mr. Pitts:

As discussed, at the request of her son and attorney-in-fact, David A. Burton, I represent the Respondent in the referenced case, Marjorie Cato Burton as Trustee, and you are attorney for the petitioners. However, I recently learned that you formerly represented both petitioners and my client in forming the T.E. Cato Estate, LLC ("Cato Estate LLC"), a South Carolina member managed limited liability company related to the larger issues implicated here. Also, I expect that a third party complaint will have to be filed against the Cato Estate LLC, which you evidently have also represented. Due to the nature of the claims to be asserted in the third party complaint, I believe it likely that you will, at least, be called as a witness to testify about the conduct of real estate transactions engaged in by the Cato Estate LLC and that company's governance.

As you know, I only accepted this matter quite recently for the purpose of assessing it, after which I learned of this action and the imminent default confronting my client. As we have discussed, without an extension and continuance to gain time to explore options, I have no choice but to file pleadings and otherwise act to represent my client. Therefore, in view of the circumstances set forth above, I must now ask you voluntarily to disqualify yourself from representing the petitioners in the referenced case.

Please favor me with your reply on or before 12:00 noon on March 6, and thank you for your attention to this matter.

Sincerely yours,

Roger B. Jellenik

RBJ/AMBP 02-28-2009 e-mail ltr to oa Pitts.pages

Enclosure(s): No

Distribution: Client; Chron; File

From: **Roger B. Jellenik** rbjatty@mac.com
Subject: Cato et al. v. Burton as Trustee, Case No. 2008-CP-46-3171 - Request for Information
Date: April 15, 2009 at 12:05 PM
To: Carroll M. Pitts, Jr., Esq. CPitts@rbh.com
Bcc: David Alan Burton dburton4@nc.rr.com

04-15-2009_e-mail_ltr_to_oa_Pitts.pdf

Carroll:

I hope that this e-mail finds you well. Unfortunately, I have heard no change in your client's position. Therefore, we have reached the point where further steps must now be taken on behalf of my client in the referenced action, as to which please refer to the letter attached in .pdf format. A "hard copy" of this letter will also be mailed to you today.

Please feel free to contact me if you wish to discuss anything.

Regards.

Roger B. Jellenik
Attorney at Law
rbjatty@mac.com
T.803-424-1919
F.803-424-1922

This message may contain confidential or proprietary information and is intended for the addressee only. Please destroy if received in error and notify the sender by return e-mail.

ROGER B. JELLENIK
ATTORNEY AT LAW

1111 Broad Street
Camden, SC 29020

Telephone 803-424-1919
Facsimile 803-424-1922
rbjatty@mac.com

Wednesday, April 15, 2009

BY E-MAIL AND MAIL

Carroll M. Pitts, Jr., Esq.
Robinson Bradshaw & Hinson, PA
P.O. Drawer 12070
Rock, Hill SC 29731

RE: Cato et al. v. Burton as Trustee, Case No. 2008-CP-46-3171
Request for Information

Dear Mr. Pitts:

As you know, I represent Marjorie Cato Burton through her attorney-in-fact, David A. Burton. As you may recall, during our initial telephone conversation on February 19, I requested the following documents and records:

1. A copy of any operating agreement adopted by or on behalf of the T.E. Cato Estate, LLC ("LLC"), which you very kindly sent me a copy of by e-mail later the same day; and

2. A copy of the LLC's minute book, which to date has not been received.

In addition to these items, I have since learned that my client has requested, but not received, the following documents and records from James Thomas Cato, and I am now again formally requesting them on her behalf:

3. A copy of each independent professional appraisal and market appraisal obtained by or for the benefit of the LLC in connection with the marketing of Areas A, B, C, and D ("Areas A-D");

4. A copy of the "intent to purchase" contract entered into on or about August 3, 2007, regarding the proposed acquisition of Areas A-D by or on behalf of Mr. Broaddus Thomasson; and

5. Any and all records in the possession or control of the LLC or its manager, Mr. James Thomas Cato, of the consents obtained from the LLC's members with respect to the proposed sale of Areas A-D and with respect to the proposed sale of the Roadbed Tract.

During the middle of March, you and I tried to resolve the differences between our clients amicably and toward that end we met on March 16. Regrettably, you informed me on March 20 that my client should proceed to file pleadings inasmuch as your client did not wish to obtain an appraisal that might have helped to resolve matters without costly, time-consuming, and disruptive litigation. Given your client's position, pleadings are now being prepared and, I expect, will be filed on or before May 1.

Finally, by e-mail letter dated February 28, I requested you voluntarily to disqualify yourself as attorney for the petitioners in the referenced partition action by reason of your past activity and representations regarding events material to the issues in that case. Since that time, it has become evident that issues associated with the third party complaint now being prepared will also raise questions that reinforce my prior request. Therefore, I again ask that you voluntarily disqualify yourself from acting as petitioners' counsel in the partition action now pending. If this issue has not been resolved satisfactorily by 12:00 noon on April 22, I will have no alternative but to re-file the motion with the Court seeking your disqualification. While I take no pleasure in raising this question, evidently there is no alternative.

Please feel free to contact me if you wish to discuss all or any aspect of this letter.

Sincerely yours,

Roger B. Jellenik

RBJ/AMBP 04-15-2009 e-mail ltr to oa Pitts.pages

Enclosure(s): No

Distribution: Client; Chron; File

EXHIBIT B

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

FILED-RECEIVED
2009 JUN -1 PM 3:07
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

JUDGMENT IN A CIVIL CASE

CASE NO: 2008CP4603171

James Thomas Cato *vs.* Marjorie Cato Burton

CHECK ONE:

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

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other:

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☒ Statement of Judgment by the Court:

Motion denied at this juncture the action.

Dated at York, South Carolina, this 1st day of June, 2009.

Court Reporter: ***PHYLLIS BARRETT***

PRESIDING JUDGE - LEE S. ALFORD

This judgment was entered on the 1st day of June, 2009, and a copy mailed first class this 1st day of June, 2009, to attorneys of record or to parties (when appearing pro se) as follows:

Carroll M Pitts Jr Robinson Bradshaw & Hinson, PA P.O. Drawer 12070 Rock Hill, SC 29731

ATTORNEY(S) FOR THE PLAINTIFF(S)

Roger B. Jellenik Roger B. Jellenik Attorney at Law 1111 Broad St., Box J Camden, SC 29020

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

RECEIVED
JUN 2 2009
ROGER B. JELLENIK
ATTORNEY AT LAW

SCRCP APP-24/FORM 4

EXHIBIT C

all of whom had a single purpose and completed this transaction.

Q. All right. But they're not your clients?

A. For the purpose of this petition and partition action, they were all, according to the -- it says we were attorneys for petitioner, so they would indicate we were representing that group in trying to partition this property.

Q. Is that a yes?

A. I don't know what it is, to tell you the truth.

Q. Now, you're acquainted with my colleague, Mr. Jellenik, are you not?

A. I see him sitting there.

Q. Well, have you had some correspondence with Mr. Jellenik?

A. Gosh, it was. It was five years ago or close to it.

Q. Well, I'm going show you a copy of a letter dated July 20th, 2009.

MR. MCMASTER: Mark it next in line.

(PLF. EXH. #14, Letter - 7/20/09, was marked for identification.)

BY MR. MCMASTER:

A. All right. I have the letter.

Q. Okay. Now, take a minute and read the letter, if you will, Mr. Pitts.

A. (Views document). Okay. I've read it.

Q. Now, do you remember this correspondence?

A. Vaguely.

Q. Now, what was Mr. Jellenik suggesting you do?

A. Basically, to get out of the case.

Q. Why?

A. He thought I had a conflict. That's not what the judge ruled.

MR. OUTTEN: Speak up a little bit, Carroll, so that I can hear you, too.

THE WITNESS: I said, that is not what the judge ruled on that point.

BY MR. MCMASTER:

Q. But that was the purpose of this letter?

A. That was the purpose that Mr. Jellenik was sending it to me to say that he thought I had that conflict. That matter was heard in court and the judge ruled -- in fact, he suggested that I think about withdrawing but he did not order it

and did not find a conflict.

Q. All right. And your testimony is, you're still representing these petitioners?

A. My testimony is, I represent James Thomas Cato. Not generally, not in everything he does, but just in connection with this property.

Q. Now, I have before me an enclosure of a February 17, 2010 status conference document list to the partition action.

MR. MCMASTER: Make that the exhibit next in line.

(PLF. EXH. #15, Status Conference List, was marked for identification.)

BY MR. MCMASTER:

Q. Is that your writing, Mr. Pitts?

MR. OUTTEN: Let me see that document, please, Mr. Pitts.

THE WITNESS: Sure.

BY MR. MCMASTER:

Q. Is that your writing on that document?

A. It appears to be.

Q. I've come to where I can recognize some of it.

A. Yeah. It appears to be mine.

Q. And do you remember when that was made?

INTO THE RECORD.)

MR. OUTTEN: Thank you.

MR. OUTTEN: And for the record, Your Honor, Exhibit - Defendant's Exhibit Twenty-two is the Order Denying Plaintiff's Motion to Reconsider. Defendant's Exhibit Twenty-three is the Motion to Reconsider. And Twenty-four is the original order of this Court denying Plaintiff's Motion to Amend the Complaint.

THE COURT: Now, anything else for this afternoon?

MR. ROSBRUGH: No.

MR. JELLENIK: Your Honor --

MR. ROSBRUGH: I'm sorry, Your Honor.

THE COURT: All right. Mr. Outten, you were up first.

MR. OUTTEN: Your Honor, if - if the Plaintiff has rested, then for the record, I need to make a Motion for a Non-Suit pursuant to Rule 41(b).

THE COURT: All right. Well, let me interrupt you real quick.

MR. OUTTEN: Yes, sir.

THE COURT: Because Mr. Jellenik might have something else to add.

MR. JELLENIK: No, that's - that's --

THE COURT: Well, and on housekeeping, I think according to my communications with my court reporter that we're pretty well up. There - there was a flurry of

exhibits back before Christmas, and we did some catch-up to make sure that they were in the record and she was doing some typing. She wasn't clear at one point as to whether or not everything that had been offered for identification, and then was offered into the record actually came into the record. So at some point we need - you need to coordinate with the court reporter, and you might have time to do that this afternoon, to make sure that what's in is truly in - what's supposed to be in is truly in and what's not is not.

MR. JELLENIK: All right. Thank you.

THE COURT: All right. Now, Motion for Non-Suit.

MR. OUTTEN: Yes, Your Honor. Pursuant to 41(b) we make a motion for a non-suit and there's several grounds for it.

Your Honor, with regard to the elements of a legal malpractice claim, the Plaintiff has failed to prove that an attorney/client relationship ever existed between the Burton Trust and Carroll Pitts and Robinson, Bradshaw and - and Hinson.

I'm going to try not to make this argument too long, because we do have an opportunity to - to - to finish early. But, Judge, their evidence was that Tommy Cato told the heirs that - that Carroll Pitts was going to protect them. And John Freeman said that it was emails that were sent. Well, one email was dated August 25th, 2007 and

another email was dated just before the closing, December the ---

THE COURT: 8th.

MR. OUTTEN: --- December the 8th. So they - they - they failed to prove an attorney/client relationship ever existed. Just the --the fact that Tommy Cato may have said in communications, whether written or oral, with the heirs that an attorney/client relationship existed is insufficient to prove that. That - that may have happened.

But an attorney/client relationship as Mr. Virzi said is contractual. That is an attorney/client relationship is created when I go into a lawyer's office and I say I have this legal problem, and I would like you to represent me and nothing like that ever happened here, Your Honor. And there are lots of - there's - there's lots of evidence which make it clear that no attorney/client relationship ever existed. And perhaps the best evidence was when David Burton was on the stand and he said at one point during his testimony, I realized at that point that we had a problem and we needed a lawyer.

Well, if you already have a lawyer, then - then - then why - why are you saying you need a lawyer? There's also evidence to support that that the Burton Trust hired Dale Dove to - to represent them in this transaction. There's evidence in the record that they paid Dale Dove in late

2007 and early 2008.

Well, when did the transaction close? December the 12th, 2007. So the evidence in the record is that the Burton Trust had a lawyer, but it wasn't a lawyer they sued. It wasn't Carroll Pitts and it wasn't Robinson, Bradshaw and Hinson. It was Dale Dove.

And you just heard Mr. Virzi say, well, you know, you can create an attorney/client relationship based on subjective expectations of the client. That is if the client has a subjective expectation that someone is his or her lawyer, then that can be construed as creating the relationship and I - and I heard him say that.

And then the first thing I asked him when I stood up is do you know whether or not there was a subjective expectation on behalf of Marjorie Cato Burton or the Burton Trust and he said no. So the test that he said we should use, they failed.

There's nothing in this record to suggest that an attorney/client relationship existed. We've had all the Plaintiffs' witnesses admit there was no communication whatsoever between Marjorie Cato Burton, or David Burton, and Carroll Pitts. And certainly we know from the past four or five years of litigation that they know how to call lawyers when they want to, but that never happened. They never asked him any questions. They never sent him an

email asking for a conference. They never said what is this Deed, what is this Operating Agreement, what does this mean?

So there's a complete absence of credible evidence in this record that an attorney/client relationship, Judge, ever existed between Carroll Pitts and the Burton Trust. And I challenge Plaintiffs' Counsel to hand up a case that says if a third-party - if - if - if Tommy Cato says he's going to protect your interest, that somehow that creates the relationship. The relationship has to be between lawyer and client. It can't be through a conduit, which is a word that I guess they decided to use to make their argument sound persuasive. But there is no evidence here that Mr. Pitts told Tommy Cato you go out and tell the heirs I'm going to protect them. He decided to do that.

But even if that happened, Your Honor, that can't create an attorney/client relationship. And the reason why you don't have any cases from the Plaintiffs about the creation of the relationship is 'cause there are no cases that say in this situation where there is a complete absence of communication, when there is nothing in the record to suggest that the Burton Trust thought that Carroll Pitts was representing them. When they testified they needed a lawyer, they hired somebody else, that somehow that creates an attorney/client relationship.

In fact, they acknowledged that this was a problem from the beginning, because if you read paragraph 19 of their Complaint, they say if the Court finds an attorney/client relationship doesn't exist, then we are still owed rights and obligations, and that was what I think Mr. Virzi was trying to say is that even if they're not a client, they're a beneficiary. Even though I deposed him, he never said one word about the Burton Trust being an beneficiary. It's not in his deposition. You can look on 89 and 90. It's not in there. He never said that. That's an important designation. He never said it.

So if you examine this record and look at it, you have nothing upon which the Court can make a finding, respectfully, that an attorney/client relationship ever existed between the Burton Trust and Carroll Pitts.

Now, your Honor, I don't - I'm not going to argue - I'm not going to argue about standard - let me say one more thing about - about the attorney/client relationship that we've touched on today right before I move on, and that is the Motion to Disqualify.

You've already heard enough about that today, Your Honor, but if you look at the Motion to Disqualify, the issue of whether Carroll Pitts represented the Burton Trust was placed squarely before this Court in the motion itself and the letters that were attached. In one of the letters

that was attached Mr. Jellenik said, "It's come to our attention that you represented the Burton Trust," and it says it in the motion and it references Rule 1.7 which is the rule that you go to for guidance if you're involved in a - in a case or a matter adverse to a current or former client. And we said this in our bench brief, but we think it's significant that when the issue of whether or not Carroll Pitts represented the Burton Trust was placed before this Court, Judge Alford denied the motion.

Now, I'm sure you're going to hear them try to explain that away, but I don't know how you do that. I don't know - I don't know how we do anything else as lawyers other than look at how the judge ruled, so that issue is placed before Judge Alford and he says denied. The effect of that denial is that he was ruling that there was no attorney/client relationship.

Because, Judge Hayes, if he had found that there was an attorney/client relationship between Carroll Pitts and the Burton Trust that Judge Alford would have been obligated to disqualify him. We all know that. If he had been convinced that an attorney/client relationship existed and that what was happening, which is what they say that Mr. Pitts was suing a former client, then he would have had to have grant the - granted the motion to disqualify Mr. Pitts and he didn't do that. So that's an additional

ground upon which we say, Your Honor, no attorney/client relationship ever existed between the Burton Trust and Carroll Pitts or Robinson Bradshaw.

I'm not going to talk about standard of care even though, Your Honor, we dispute vigorously that Mr. Pitts ever breached the standard of care, but I'm aware that you're the fact finder and I'm aware we've got a lot of testimony from the Plaintiffs' side on standard of care, so I'm not going to address that issue, but I do want to talk about proximate cause.

You've heard a lot from me, probably more than you wanted to hear, about the 11/30/07 email, and you've heard a lot about the effect of the Burton Trust signing the Quitclaim Deed. And I remarked to Mr. McMillian last night. I said, "The more we work on this case, the simpler it gets." And the simple fact, Judge, is that if the Burton Trust had signed the Quitclaim Deed, then the transaction would have closed completely on December the 12th, 2007 and there would have been no partition action, and there would have been no malpractice action and we know that. There's just no disputing it. David Burton testified to that. Mr. Virzi just finished testifying to that, Matt Thomasson. We all know that.

And Carroll Pitts acts or omissions have nothing to do with the Burton Trust's decision not to sign the Quitclaim

Deed.

I - I had an opening prepared, Your Honor, and then we decided not to do openings. What I was going to tell the Court is, the truth of the matter is that this is a family fight between the Cato's that quite unfortunately Carroll Pitts got caught up in. That's what it is. But if we're talking about proximate causation, there's nothing that Carroll Pitts did or failed to do which resulted in the partition action and the partition action, I think we all know, resulted in this malpractice action.

Because the Burton Trust, all they had to do was sign the Quitclaim Deed and the - the transaction would have closed, and they raised all these issues. They're all red herrings: the Operating Agreement, the authority of Tommy Cato, the LLC wasn't formed properly, the General Warranty Deed wasn't done correctly. They raise all of these issues, but we know what happened contemporaneously, because we know what's in that 11/30 email and - and, Judge, I invite the Court to - to take a minute and read that, because I think it's very important in this case.

And if you read what it's saying is - what David Burton is saying in that email is if you pay me the money I want for these fair - various different categories, then I'll sign the Quitclaim Deed. He says you - I want you to help pay capital gains tax. If you want remuneration for

being the chairman or manager of Cato Estate, LLC, I want - I want to be paid for the time that I was doing essentially the same thing.

We know that if you look, it's - it's - it's nothing - it's - it's a demand for money which is fine. I'm not - I'm not critical of David Burton for sending that - that - that email if that's what he wanted to do, but what it does is it proves that nothing that Carroll Pitts did or failed to do caused the partition action and caused this lawsuit. There - it's clear.

If you look at that email and Mr. Virzi, respectfully, didn't want to answer my questions about it. I know why he didn't want to answer 'em because he says these were all big issues, but the 11/30/07 email doesn't say anything about the Operating Agreement. It doesn't say anything about Cato. It doesn't say anything about the LLC. It doesn't say there are a bunch of legal issues in this case, and I can't figure them out. It doesn't say anything about that. It is a straightforward I want these conditions met, and then I'll sign the Deed. So I think the proximate cause analysis in this case is very straightforward.

Even if you forget about the 11/30/07 email, Judge, you still have the fact that every witness has conceded that if the Burton Trust had agreed to sign the - the - the Quitclaim Deed, then we wouldn't be here.

Now, the final thing I'm gonna to talk about is damages. And first, damages of the Burton Trust, because I know that they've sough to assert a derivative claim. But they called Jake Knight who testified this morning, a very nice man, said the value of the property was 1.311 million dollars. I believe that's correct. But what's happened is David Burton agreed when he testified that he has received more than a twenty percent share. He - If you use the original value that Jake Knight came up with, then Dr. Burton's value or his twenty percent ownership in the property is worth about Two Hundred and Sixty-nine Thousand Dollars, I believe, and he's received Three Hundred and Seventy-three Thousand. That's not in dispute. He agreed to it two or three times during his direct and cross examination. So based upon their expert, he's received about a Hundred and Four Thousand Dollars more than his twenty percent interest is worth.

Under those circumstances, Your Honor, I just don't see how he can have damages. He's already got - he's gotten a windfall really. It's amazing to me that he's here asking this Court for even more damages, because he's gotten, by his own testimony, more than his expert says the property is worth.

Now, if you use - if you use our appraiser's number, then that makes it about a Hundred and Seventy Thousand

Dollars, I believe, that is he - Dr. Burton has got a Hundred and Seventy Thousand Dollars more than his twenty percent interest in that property is worth.

But it's got to be one of the two, Your Honor. In other words, it's got to be their 1.311 or our 1.016. It's got to be one of those values or, I guess, Your Honor can choose the sales price which in my opinion is the - is the - what a willing buyer is going to buy it for and a seller - a willing seller is going to sell it for is the best indication of market price.

But be that as it may, if you use one of the two appraisals, it doesn't matter which one you use, Dr. Burton's been overpaid by well over a Hundred Thousand Dollars, so how can he have damages. Well, the answer is, he can't. He can't.

And then we move to the legal fees. They have submitted into the record legal fees for Mr. Jellenik and legal fees by Brian McCoy and Lucy McDow. Those are - those - I think most of those, if not all of those, are in the record. At least they've been marked for identification.

Well, legal fees are not recoverable in a legal malpractice action unless they're to correct the malpractice. An easy example would be if someone did a title search and found a defect in the title but failed to

disclose it to their client, and then it caused some sort of problem or damage, then if that client sued the lawyer for malpractice, then that lawyer would be liable for correcting the oversight, correcting the mistake. And I - and I acknowledge that but that's not what this is for.

Dr. Burton testified that the fees he wants for Mr. Jellenik are for handling the partition action and they can't pick a fight - that we didn't leave them with a fight, they picked a fight. They can't pick a fight, and then recover the legal fees. In other words, they've decided that they wanted to bring this partition action. Then, they decided they wanted to escalate it by a third-party complaint, an amended third-party complaint. The amended third-party complaint resulted in a fourth-party complaint against T.E. Cato Estate, LLC.

So these fees are not the type of legal fees which are recoverable in a legal malpractice case. So you can't award them fees for the partition action that they voluntarily decided that they wanted to bring. They could have avoided it by signing the Quitclaim Deed. We all know that.

Now, he says also that he's bringing a derivative action. But, Your Honor, if you look at 23(b)(1), in order to bring a derivative action, it's got to be on behalf of all members similarly situated. Well, fortunately for us

in this case, we don't have to guess about whether or not the Burton Trust represents the - the other heirs. They had to sue - the other heirs had to sue the Burton Trust. It's clear that eighty percent of members of the LLC were opposed to the Burton Trust. We know that by the filing of the partition action. This is not a proper 23(b)(1) action. You can't assert in a - in a derivative action a minority position like this.

And a proper derivative action as Your Honor knows very well is, if a stockholder sues a publically-traded corporation for - for some sort of - of fraud in - existing in the senior management or in the - the board of directors, that's a claim that's not going to be brought absent some mechanism to allow the stockholders to bring it for obvious reasons. But if you do that, then you have to be representing the shareholders generally.

In other words, you can't buy a hundred shares of Exxon and sue them and say I'm bring a derivative action against Exxon. You can't do that. And the reason why you can't do it, makes sense. You have to be asserting the majority position on behalf of the LLC, and we know in this case that this is not the majority position of this LLC.

In fact, we know just the opposite. They were in - the Burton Trust was in litigation with eighty percent of the members of the LLC for four years and signed a

settlement agreement in April of 2013.

So since they don't have a derivative claim to make, they can't recover the fees of Mr. McCoy or Ms. McDow. So when you look at all of that, Your Honor, they - they don't have a claim for any of these fees. And if you look at damage to the property, Dr. Burton's already conceded, and by the testimony of the expert appraiser he called today, that he's gotten more than his twenty percent is worth, there are no damages here.

So, Your Honor, for those reasons, and I talked longer than I - I talked longer than I - I meant to, but again there is no attorney/client relationship. There's the absence of evidence in the record and there's the ruling of Judge Alford.

The proximate cause issue we believe is analyzed properly by seeing that if they had signed the Quitclaim Deed there would have been no partition action and there would have been on legal malpractice case. So there's no proximate cause here.

And then damages, you just heard my analysis. There's no - they - they haven't proven the right to recover any of these damages.

Now, there are two additional grounds that I want to give for the record. One is ratification and that is when the Burton Trust received the Hundred and Twenty-four

Thousand, Two Hundred Dollars, they cashed the check and we submitted a bench brief on this. We believe that ratifies the transaction and precludes them from asserting this claim. That - We believe they've ratified the transaction.

And the other thing is that the settlement agreement. If you look at the settlement agreement - and this may have been inadvertent. The settlement agreement, the release in that agreement is very broad and we believe precludes the Burton Trust from proceeding here. In other words, the language in the settlement agreement is they release claims in any way related to the subject property, including the Cato Deed, the Letter of Intent, the Amendment to Contract, the Thomasson Deed and the creation or operation of Cato, LLC, and that's on page four, Your Honor, of the settlement agreement.

So on all those grounds, Your Honor, we ask that you grant our motion for a non-suit pursuant to Rule 41(b).

Thank you.

THE COURT: All right.

MR. JELLENIK: Thank you, Your Honor. It's hard to know where to start. Well, let me do this. I'm going to make some comments generally about the elements of proof and then I'm gonna want to go back to Mr. Outten's points.

First of all, Mr. Pitts was initially hired by Mr. Cato according to Mr. Pitts to represent him as general

manager of the LLC to be formed. He was also hired according to their discovery response to represent the LLC.

However, it was also understandably viewed by some folks - He was also understandably viewed as the attorney for Marjorie. Why? Because Mr. Cato who hired Mr. Pitts told Marjorie that. You've heard enough evidence on that.

He also told the heirs that he was charged - that - that Mr. Pitts was charged - with protecting all of them, including Tommy, and protecting all of them from Tommy. If the other heirs were satisfied as to that protection, that's their right to be satisfied with that protection. The other heirs are second generation heirs. They didn't - they weren't getting anything out of this. They were paying taxes. They didn't want to pay taxes. So - and that's understandable.

But in any event, the - the fact of the matter is there were only two people in Marjorie's position, Marjorie and Helen Cato Jones, and they were in - they were children of the decedent.

Now, all of this said, Tommy told the heirs that Mr. Pitts was overseeing Tommy and approving Tommy's actions. Mr. Pitts never contradicted that, and he never contradicted the allegation to protect all of them and he knew about it. And the fact that Mr. Pitts didn't do that suggested either he agreed that that was correct, or, he

knew it was incorrect and supported - I'd - I'd like to find another way to say this - but supported Tommy lying to the - to - to the Burtons and everybody else. Either way, that's not a nice thing. And we would respectfully suggest that the fact that Mr. Pitts allowed that to happen, or, thought he was doing what was called, for doesn't change the proposition that Marjorie had reason to believe that Mr. Pitts was there.

Now, it has already been mentioned, and the Court is already aware, Marjorie is dead and Marjorie suffered dementia for the last few years of her life, the last several years of her life, so we don't have testimony from Marjorie, that's correct. We don't have testimony really on detail from anybody, because it's all hearsay anyway at this point given Marjorie's demise.

All of this said, Mr. Pitts did nothing to contradict Tommy's representation, Mr. Cato's representations. He never issued a letter. He acknowledged he never communicated in any way with the Burtons. He evidently never even issued an engagement letter that described who he was representing. As I understand his testimony that there's nothing in-writing. He did issue the "run to the bank" email and said it should be shared, and he approved the closing documents way after he said he was doing anything about this.

And it also has come out in testimony during this that he was consulted by Mr. Cato as they progressed toward that closing. So it's hard against that background.

Now, let me - let me go with regard to attorney/client relationship. Mr. Outten made a few points. There was a point that Marjorie felt she needed a lawyer. Well, I think the Burtons did feel they needed a lawyer, because I don't - they didn't get the appraisal that they asked for repeatedly, and nobody did anything about the authority question. Nobody did anything in response to what they were asking, so I - I don't think it's a big leap to figure out why they may think they feel they needed a lawyer.

But what Mr. Outten implied as a consequence to that, I have to disagree with, and let me explain. He said they needed a lawyer, so they hired Dale Dove. Well, it's true, they did hire Dale Dove. They hired Dale Dove after the closing when they received the check and realized the thing closed. So yeah, they hired Dale Dove. This wasn't back during the period of time when all this was going on.

Now, in addition to that and there was another lawyer involved as well and that was hired even after Dale Dove at Dale Dove's recommendation. Conversations with Tommy Cato instead of with Mr. Pitts. Yes. Mr. Cato was the general manager. That's who they understood they were supposed to talk to. They understood Mr. Cato who's talking to Mr.

Pitts, and they understood he was getting approval from Mr. Pitts for everything he did, so I don't see anything surprising about the fact that they talked to Mr. Cato, especially in the period of time involved, because at that point, they - they were trying to make sense out of this.

And we have the conversation about the Motion to Dismiss. I suffer from a real disability here, because I think I'm the only one in the courtroom, with the exception of Mr. Pitts who was there, and with all due respect to the arguments, and I give Mr. Pitts credit for this by the way, I'm not sure the transcript contains, and I don't know why, but if I recollect correctly, I'm not sure the transcript contains the suggestion by Judge Alford that Mr. Pitts seriously consider withdrawing voluntarily. But Mr. Pitts has in his deposition acknowledged that and I give him credit for that.

In any event, there was no discussion made of - by Mr. Out ten, no points made with regard to the standard of care, and I think there's been enough testimony at this point and enough other evidence that I'm - I'm not going to take up the Court's time in a discussion of that.

Mr. Outten did get into the subject of proximate cause. He mentions the November 30th email, 2007 email. And I believe Mr. Virzi very properly characterized that as a settlement offer, because they had not gotten any

rational response to the issues that they very properly raised. The August 4th email from Marjorie says the last thing we need is a lawsuit, because, you know, we get out of control here and that's exactly what happened. They foresaw the future.

So with regard to the 11/30/07 email, the November 30th, 2007 email, I read that as, for crying out loud, we haven't made any other progress, so we'll offer to do it this way and that didn't work either.

Next, the Quitclaim Deed. The Quitclaim Deed; yes, if Marjorie had signed the Quitclaim Deed, there would not have been a partition action. If the Deed had been drawn properly to begin with there wouldn't have been a partition action. If Mr. Pitts had gotten involved and tried to referee this, there probably - there may well have not been a partition action. None of that happened and that - there has been testimony on that in this trial, so I'm not going to dwell on that. That's in the record.

This lawsuit was created by issues - this lawsuit was caused by issues that were created or allowed to fester by Mr. Pitts. It wasn't caused by the Burtons. And whether David Burton wrote an email or not, he was doing it on behalf of his mother with his mother's authorization and under her instruction, and I'm not quite sure what the implication is if - how dare David Burton write an email,

but it's irrelevant.

As to damages. Excuse me for just a moment.

All right. As to damages with regard to land value. The fact is what the Burton Trust received isn't the question. The question is what should have been paid for the property. That's the question. And, how do I say this, there was a discussion of a derivative action. The Burtons' complaint in this matter and for that matter, the Burtons' complaint in the original matter, has to do not only with the Burton Trust but also with T.E. Cato Estate, LLC.

If one looks back at the Amended Third-Party Complaint in the original partition action, it is correct that the caption does not refer to T.E. Cato Estate, LLC. That was why the - it was amended. That was my ignorance in including that in the caption, okay.

However, if you read through the complaint, it makes quite clear that the statutory section that we've discussed is in there from day-one on the third-party complaint. And I'm -- I think, I may be wrong about this, but I think the only change made when we amended that complaint was to stick it in the caption.

In any event, the appraisals both show over a million dollars. Obviously, the appraisal - the appraisals are not the same. There are issues there. But if I remember

correctly, what the Thomasson's wound up paying for the property was Nine Hundred Thousand Dollars, because as you already heard, there was a settlement agreement and I didn't hear any other money coming out of the Thomasson's during that settlement discussion or anything in the settlement agreement that talked about another Hundred Thousand Dollars being paid. So in any event --

THE COURT: Well, wouldn't though - Let me, just so I can understand, but the less they got in property just makes the disparity between what they got and their twenty percent grow, not decrease.

MR. JELLENIK: And this litigation was brought not only on behalf of the Burton Trust but also on - from day-one on behalf of T.E. Cato, LLC. Not just the original action, this one, too, and it wasn't the caption.

THE COURT: All right.

MR. JELLENIK: As to legal fees. Legal fees in this case are an element of damages coming from. We're not claiming legal fees on this. I - I wish the law were different in this state, but it isn't, so we're not claiming legal fees on this. But we are claiming legal fees that were caused by the acts - the acts or omissions of Mr. Pitts, Defendant Pitts and RBH. Well, I'm sorry, Robinson, Bradshaw and Hinson.

The Burton Trust didn't angle for a lawsuit. The

Burton Trust got sued. What it did was in reaction to getting sued. And the third-party complaint wasn't filed for oh, I don't know, a month or - probably almost two months after the answer was filed. There - Without going into detail, there - there appeared to be no alternative. Let me just say it that way.

As to the legal fees of Mr. McCoy and Ms. McDow, I don't care who they were representing, those bills were paid by T.E. Cato Estate, LLC. And, again, we're suing in the right and on behalf of that and the rights of that LLC were assigned over. So we're simply trying to recover the money that they paid, because the dispute that caused the litigation in our view was caused by the acts or omissions of Mr. Pitts.

I'm not saying that was - I'm not saying that he loved the idea of doing that. I don't mean to leave that impression. It just is what's happened.

Discussed the derivative action. And then we have the discussion of the ratification. Yes, it's correct, a Hundred and Twenty-four Thousand, Two Hundred Dollars was sent to the Burton Trust, I believe, on or about the 20th of December of 20 - of 2007. It was deposited in April of 2008. Why? Because the Burtons were advised that if they didn't pay income tax on that money, they were going to be subject to interest and penalties from the Internal Revenue

Service. So they deposited the check. They cashed the check. They paid the taxes and the money sat there from then - the remainder of the money sat there from then until this case was settled and for all I know may still be sitting there. I'm not sure, but I know it sat there at least that long. So I would not exactly call that ratification.

The settlement agreement, there was a comment about the release. The parties to the settlement agreement and the subject of the release was that all the claims that related to the parties in the partition action. It did not relate to this action. Neither Mr. Pitts nor RBH - or - I'm sorry. Neither Mr. Pitts nor Robinson, Bradshaw and Hinson were parties to that settlement.

Now, Your Honor, unless you have questions, I have --

Thank you.

THE COURT: Well, I - I'm going to deny the motion. I have to at this point look at the evidence in the light most favorable to the non-moving party which is the Plaintiff, and I think all of the issues that have been raised by both sides are the issues that are swirling around in my head.

And in addition to denying the motion while looking at the evidence in the light most favorable, I do feel that this is one of those cases that needs a complete record,

because this may not be the final stop on the train ride, so I deny the motion. The - The motion is based on the various grounds, proximate cause, damages, standard of care, negligence, whatever else.

MR. OUTTEN: The last two were ratification and dismissal through the settlement agreement, Your Honor.

THE COURT: Ratification and dismissal. Okay. All right. Now, we'll stop for today, but we've got enough - we got witnesses and we start at 9:30 in the morning?

MR. OUTTEN: Yes, sir.

THE COURT: And we should, I understand, project finishing tomorrow?

MR. OUTTEN: Yes, sir.

THE COURT: All right. I thank everybody for their courtesies and we'll start back at 9:30 in the morning and having a pleasant evening.

(COURT IN RECESS @ 04:30 P.M..)

(COURT BACK IN SESSION TUESDAY, JANUARY 27, 2014 AT 09:35 A.M..)

THE COURT: Thank you. You may take your seats. And I - I don't want this to be a reflection on anybody's presentation, but for some reason the staff has really gone through a lot of coffee this morning. Had to make a second pot already.

All right. Now, the Defense ready to go?