THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

v.

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

Appellate Case No: 2015-001053

The Honorable John C. Hayes, III
York County
Circuit Court Case No: 2010-CP-46-02267

FINAL REPLY BRIEF OF APPELLANT

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March 14, 2016

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I. Respondents' assertion that the appeal should be dismissed is without merit.

Respondent's assertion that the instant appeal should be dismissed is without merit as: the motion to reconsider and notice of appeal were timely filed. Furthermore, the case law relied upon by Respondent supports the appeal proceeding forward.

1. Appellant timely filed her Motion to Reconsider within 10 days of receipt of written notice of entry of the order.

a. Notice of entry of the order starts the clock under Rule 59(e).

By its plain language, Rule 59(e), SCRCP expressly requires notice of ***entry*** of the order. The rule states: "A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." Rule 59(e), SCRCP (emphasis added). As noted by Respondents, the South Carolina Supreme Court has made it clear that the time for filing a Rule 59 motion begins to run upon receipt of written notice of entry of the order, not upon receipt of the order. Ackerman v. 3-V Chemical, Inc., 349 S.C. 212, 215, 562 S.E.2d 613, 615 (2002) (holding that "[t]here is simply no language in the rule permitting the motion to be served 10 days after receipt of the written order; it states 10 days after receipt of written notice of the entry" of the written order).

b. Notice of an order to be filed in the future is not notice of entry of the order.

Rule 203(b)(1), SCACR governs the time for filing a notice of appeal. Like Rule 59(e), Rule 203(b)(1) provides that the time for service begins to run upon "receipt of written notice of entry of the order or judgment." Rule 203(b)(1), SCACR. In Upchurch v. Upchurch, 367 S.C. 16, 24, 624 S.E.2d 643, 647 (2006) the South Carolina Supreme Court interpreted this language according to its plain meaning and held that notice of entry

of the order, not notice of an order to be filed in the future, is the triggering event. Specifically, the court opined:

> By its plain language, Rule 203(b) requires notice of entry of the order. ***Entry of the order occurs when the clerk of court files the order. Delivery of the order to the clerk is not analogous to the entry of the order.*** Accordingly, we hold that the time to file a notice of appeal pursuant to Rule 203(b), SCACR begins to run when written notice that the order has been entered into the record by the clerk of court has been received.

Upchurch involved Susan Upchurch's ("Upchurch") appeal of an order issued by a family court judge in a divorce action. Upchurch, 367 S.C. at 21, 367 S.E.2d at 645. The family court judge signed the order on May 30, 2002. *Id.* at 22, 367 S.E.2d at 645. On May 31, 2002, the judge's administrative assistant mailed the signed order to the clerk of court with a letter directing the clerk of court to file the order and send copies of the filed order to the attorneys of record. Id., 367 S.E.2d at 645. The administrative assistant copied the attorneys on the letter to the clerk of court. Id., 367 S.E.2d at 645. On June 12, 2002, the clerk of court filed the order. Id., 367 S.E.2d at 645. On August 23, 2002, Upchurch received a copy of the filed order. Id., 367 S.E.2d at 645. On September 11, 2002, less than 30 days after receiving the filed order, Upchurch filed her notice of appeal. Id., 367 S.E.2d at 645.

The South Carolina Supreme Court held that Upchurch's appeal was timely under Rule 203(b)(1), SCACR. The court opined that "the May 31st letter from the judge's assistant was not notice of entry of judgment; the very language of the letter indicated an order had not yet been filed." Thus, the court concluded that notice of a to-be-entered order does not equate to written notice of entry of the order.

c. At best, the email from Judge Hayes' law clerk provided notice of the law clerk's intention to deliver an order to the clerk of court for filing.

Based on the South Carolina Supreme Court's interpretation of "written notice of the entry of the order" in Upchurch, Appellant's Rule 59(e) motion was timely filed and served. The April 3, 2015 email from Judge Hayes' law clerk attaching a copy of Judge Hayes' to-be-entered order was not "written notice of entry of the order." Like the letter from the judge's assistant in Upchurch, the email from Judge Hayes' clerk establishes that an order had not yet been filed. In the email, Judge Hayes' clerk states: "Later today, I will be taking the Order to the Clerk of Court's office to be filed." Based on the holding in Upchurch, the clerk's expressed intention to deliver an order to the clerk of court for filing does not equal filing.

Appellant did not receive a copy of the filed Order until April 9, 2015. Less than 10 days later, on April 16, 2015, Appellant filed and served her Motion to Reconsider. Accordingly, Appellant timely filed and served her Motion to Reconsider within 10 days of receipt of written notice of entry of the order.

2. Appellant timely filed her notice of appeal within 30 days of receipt of written notice of the order denying her Motion to Reconsider.

Rule 203(b)(1), SCACR requires a notice of appeal to "be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment." "When a timely . . . motion to alter or amend the judgment . . . has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion." Rule 203(b)(1), SCRCP.

Appellant timely filed and served her Motion to Reconsider on April 16, 2015. Judge Hayes' Order denying Appellant's Motion for Reconsideration was entered on April 30, 2015. Appellant received the filed Order denying the Motion for Reconsideration on

May 4, 2015. Less than 30 days later, on May 18, 2015, Appellant filed and served her Notice of Appeal. Therefore, Appellant timely filed and served her Notice of Appeal.

3. The cases cited by Respondents involve notice of filed orders; this case involves notice of a law clerk's intention to deliver an order to the clerk of court's office for filing.

The case of Wells Fargo Bank, N.A. v. Fallon Properties South Carolina, LLC, 413 S.C. 642, 776 S.E.2d 575 (Ct. App. 2015) cited by Respondents is not on point.[1] In Fallon Properties, the master-in-equity's administrative assistant emailed the parties a copy of the master's "signed and clocked . . . Order." Fallon Properties, 413 S.C. at 643, 776 S.E.2d at 576. Thus, there was no question in Fallon Properties that the parties had notice that the order was filed and entered into the record by the clerk of court. Like the appellant in Fallon Properties, the appellants in Ackerman v. 3-V Chemical, Inc., 349 S.C. 212, 562 S.E.2d 613 (2002) and Canal Ins. Co. v. Caldwell, 338 S.C. 1, 524 S.E.2d 416 (Ct. App. 1999) had notice that an order was actually filed and entered.

Unlike the appellants in the cases cited by Respondents, Appellant did not have written notice of entry of an order. Instead, Appellant had notice of Judge Hayes' law clerk's intention to deliver an order to the clerk of court for filing. As established in Upchurch, notice of a yet-to-be-filed order does not meet the plain, unambiguous requirement of written notice of ***entry*** of the order contained in Rule 59(e); therefore, Appellant's Motion to Reconsider and Notice of Appeal were timely.

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[1] Respondents represent that this Court in Fallon Properties "unequivocally held that an email from a Judge's chambers containing a copy of an order as an attachment 'constitutes written notice of entry of the order under Rule 203(b)(1).'" *See* Respondent's Brief. Respondent's summation of the holding in Fallon Properties omits the fact that the order attached to the email in that case was "signed and clocked." Fallon Properties, 413 S.C. at 643, 776 S.E.2d at 576. As set forth in Upchurch, this fact is an important difference that makes Fallon Properties distinguishable and inapplicable.

II. Respondent's brief asks this Court to ignore the undisputed facts within the record and the clear precedent requiring a finding that Respondents were the proximate cause of Appellants' damages as a matter of law.

It is apodictic that the drafting of incompatible and inconsistent management provisions of an operating agreement would proximately cause a dispute between members as to how the LLC was to be managed. It is further clear that the drafting of a deed which purportedly transferred property not owned by the grantors and not inclusive of the property the grantors wanted to transfer would lead to a property dispute over what was transferred. These clear breaches have predictable consequences showing proximate cause and satisfies the standard set forth in Tuten v. Joel, 410 S.C. 104, 763 S.E.2d 54 (Ct. App. 2014).

Respondent brief attempts to distinguish the case of Tuten v. Joel, 410 S.C. 104, 763 S.E.2d 54 (Ct.App. 2014). A closer examination of the Tuten opinion supports the instant appeal. In Tuten, the Trial Court granted a directed verdict on certain issues. In examining the case on appeal, this Court held that while "proximate cause is ordinarily a jury question, the court may decide proximate cause as a matter of law 'when the evidence is susceptible to only one inference.'" Tuten, at 61, quoting Pope v. Heritage Cmtys., Inc., 395 S.C. 404, 416, 717 S.E.2d 765, 771 (Ct.App.2011). "For an intervening act to break the causal link and insulate the tortfeasor from further liability, the intervening act must be **unforeseeable**." McKnight v. S.C. Dept. of Corrections, 684 S.E.2d 566, 385 S.Ct. 380 (Ct.App. 2009)(emphasis added), quoting Dixon v. Besco Eng'g, Inc., 320 S.C. 174, 180, 463 S.E.2d 636, 640 (Ct.App.1995). The Tuten court properly rejected attorney's arguments regarding a superseding and intervening event that interrupted the causal chain. Likewise, this Court should reject Respondents' arguments and find as a

matter of law that the causal chain originated in Respondents' malpractice and professional negligence not in Appellants' exercise of her legal rights.

It is undisputed that Respondents were tasked with drafting LLC operating agreements meant to protect the heirs from Tommy Cato and protect Tommy Cato from the heirs. **3 R. p. 980, lines 6-13; 3 R. p. 981, lines 16-25; 3 R. p. 1080, line 20 - p. 1081, line 9; 3 R. p. 1138, lines 1-8; 3 R. p. 1208, line 11 - p 1209, line 23.** It is undisputed the heirs wished to transfer into a single entity the property still held as tenants in common by the various devisees, including Appellant Burton Trust. **3 R. p. 980.** It is undisputed that Respondents created an operating agreement and articles of organization that were inconsistent and provided conflicting provisions regarding the authority of the manager. **3 R. p. 1137, lines 6-11; 3 R. p. 1143, lines 7-15; 3 R. p. 1185, line 25 - p. 1186 line 6; 3 R. p. 1305; 3 R. p. 1309; 3 R. p. 1331; 1 R. p. 23** Order, p.16. It is undisputed Respondents, using a General Warranty Deed, failed to deed into the LLC property owned by the heirs. **SR p. 2110, lines 18-25; SR p. 2115, line 19 - p. 2116, line 4; SR p. 2117, lines 5-19; SR p. 2118 lines 13-18.** It is also undisputed that Respondents used a General Warranty Deed to deed into the LLC certain property the heirs did not own. Id. It is undisputed that Marjorie Burton, as trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, emailed Cato in August 2007 contesting Cato's authority to bind the LLC in a sale and warning, quite presciently, of the potential of being sued by a potential purchaser if they misunderstood Cato's authority.[2] **3 R. p. 1094, line 18 - p. 1096, line 14; 3 R. p. 1405; 4 R. p. 1688.** It is undisputed that

[2] The email, quoted only in part by Respondents' brief, warns of the potential for litigation if a prospective purchaser misunderstands Cato's authority to bind the LLC and cautions Cato that all of the heirs must agree on a sale with unanimity.

Respondents received a copy of this email and placed it into their files. **3 R. p. 1149, line 19 - p. 1150, line 1; 3 R. p. 1155, lines 10-16; 3 R. p. 1170, lines 12-24; 3 R. p. 1171, lines 5-12; 4 R. p. 1688.** Respondent Pitts understood that Marjorie Burton's email questioned the manager's authority. **3 R. p. 1176, lines 22-25; 3 R. p. 1178, lines 15-20.**

Respondents failed to acknowledge or even address the fact that the "but for" cause of this dispute is their failure to create a consistent operating agreement and articles of organization. In fact, the Trial Court correctly found that not only do the operating documents conflict with each other, they are internally inconsistent. See Order p.16 **1 R. p. 23.** Without clear authority as to the rights and responsibilities of the members, a dispute was virtually assured and was clearly not "unforeseeable". The catalyst for this dispute was also guaranteed by Respondents' failure to deed into the LLC the property owned by the heirs and by deeding into the LLC property that was not owned by the heirs. But for these failures, there would have been no need for the quitclaim deed to be prepared and no need for a partition action to try to force the Appellants to fix Respondents' failures. Again, even with an alleged intervening act, said act had to be unforeseeable. McKnight, 684 S.E.2d at 569.

But for the Respondents' failures, a quit claim deed would not have been necessary. Not only is this axiomatic, the record shows that no other conclusions can be reached. The LLC's Manager, James "Tommy" Cato testified there would have been no need for a quitclaim deed if the deed into the LLC was correct from the start. **SR p. 2097, lines 4-22.** Professor Freeman's testimony also demonstrates that but for the defects in the deed into the LLC, there would have been no need for a quitclaim deed. Professor Freeman testified that the reason for the quitclaim deed was "because of a goof up in the

title or the failure to check title, the causal reliance on some hope or dream that all the documentation would, was, was correct from the start without doing a title check, and I say that with some question in my mind because of the, bill that shows some effort to check title either was done wrong or it wasn't done and should have been." **3 R. p. 1234, lines 3-11.** Likewise, Professor Virzi's testimony is that had the deed into the LLC been performed within the standard of care there would have been no need for a quitclaim deed. **SR p. 2131, lines 1-10.**

Joshua Vann, the attorney who prepared the closing for the transfer of the property out of the LLC to the Thomasson purchaser testified that the reason for the quitclaim deed was the defects he discovered in the deed into the LLC. **3 R. p. 1248, lines 19-23**. Respondents' expert also admitted that if there was no defect in the deed into the LLC there would have been no necessity for the quitclaim deed. **3 R. p. 1261, lines 10-17.** Even Respondent Pitts admitted that had the original deed been correct, there would have been no need for a quitclaim deed.[3] **3 R. p. 1191, lines 19-25; SR p. 2121 lines 1-5.**

The partition action is also evidence of the "but for" conclusion in this case. It is undisputed that Respondents filed the partition action when the Petitioner refused to sign the quitclaim deed. Had the deed into the LLC been prepared properly by Respondents, no partition action would have been necessary. In fact, the partition action would not have existed "but for" the Respondents' failures. Had the deed been prepared properly, Appellants would have been required to file an action against Cato if there was an issue

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[3] Respondent Pitts contended in his testimony that some "magic" would have been necessary in order for the deed to have been created accurately. **3 R. p. 1192, lines 1-5**. Professor Freeman's testimony made clear that no "magic" was necessary to perform a title search.**3 R. p. 1234, lines 12-21.**

with the transaction, such as a question regarding his authority to bind the LLC. Instead, the Respondents filed the partition action against Appellant to try to fix the mistakes made at the outset by Respondents.

Furthermore, the ambiguity created within the operating agreement was the 'but for' cause of the dispute. Had the operating agreement been clear, there would have been no question as to the authority of the general manager. Instead, the operating documents were internally conflicted and failed to properly set forth the authority of the manager to bind the LLC. In fact, the trial court found that Respondents breached the standard of care by preparing internally inconsistent operating documents for the LLC[4]. See Order, p. 16, **1 R. p. 23.** Importantly, the evidence in this case clearly demonstrates that Respondents received notice of the dispute regarding the manager's authority and failed to do anything. **3 R. p. 1149, line 19 - p. 1150, line 1; 3 R. p. 1155, lines 10-16; 3 R. p. 1170, lines 12-24; 3 R. p. 1171, lines 5-12; 3 R. p. 1179, lines 10-19; 4 R. p. 1688.** While Respondents wish to couch this in terms of comparative negligence, the reality is that Respondents again failed to act and but for their failures there would have been no litigation. Rather, Respondents wish to blame the victim of their negligence for her willingness to stand up for her rights. Under Respondents' theory of this case, no one in Appellant's position could ever contest the situation created by Respondents without risk of losing any legal recourse. Obviously had Appellant not stood up for her rights, Respondents would be arguing to this court that she waived her legal rights by not

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[4] TheTrail Court found that Respondents "owed [a] duty of care 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 within the Articles of Organization and Operating Agreement." Order, p. 16 **1 R. p. 23.**

contesting the partition action. Appellant was faced with the proverbial Hobson's choice under the Respondents' theory. Such a choice is not the law of this State and would be contrary to sound public policy.

III. Appellants demonstrated actual damages which were not addressed by the trial Court and Respondents waived their arguments regarding the reasonableness of the attorneys' fees evidence during trial.

Appellant amply demonstrated actual damages resulting from the Respondents' negligence. While the trial court's order does not address the calculation of damages, finding that such damages were proximately caused by the Trust's refusal so sign the quitclaim deed, the record is replete with testimony regarding the damages suffered by Appellants. Witnesses testified regarding billing incurred and paid by both the LLC and the Burton Trust during the litigation of the partition action.[5] **3 R. p. 1108, line 20 - p 1109, line 17; SR p. 2122, lines 12-25; 3 R. p. 1211, lines 1-25**. Witnesses also testified regarding the diminution of the value of the property. Id.

Insofar as Respondents contest the reasonableness of the fees in their arguments before this court, such arguments were not preserved for this appeal. During trial, counsel for Respondents argued against the introduction of the attorneys' fees evidence but said he was "not going to ask that the bills be authenticated or - I'm not objecting to whether or not the services were reasonable and necessary." **SR p. 2088, line 20 - p. 2089, line 2.** Nor did Respondent's counsel raise any issue regarding the allocation of legal services

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[5] Professor Freeman testified that the attorneys' fees for Jellenik totaled one hundred sixty-six thousand seven hundred twenty-four dollars and eighty-one cents ($166,724.81) over four years, McDow forty one thousand nine hundred sixty dollars and ninety-three cents ($41,960.86) and McCoy sixty-four thousand six hundred seventy-three dollars and ninety-three cents ($64,673.93). **3 R. p. 1211 lines 12-25**. This totals two hundred seventy-three thousand three hundred fifty-nine dollars and sixty cents ($273,359.60) in attorneys' fees for the parties in the partition action.

with any of the witnesses. For Respondents to raise the issue now before this Court is inappropriate. Finally, contrary to Respondents' arguments, the record provided testimony from witnesses that the fees incurred by the Trust were in fact paid. Dr. Burton, the current Trustee, testified the invoices were paid. **3 R. p. 1108, line 14 - p. 1109, line 17.**

Appellants, as admitted by Respondents' brief, also put forth evidence of the damages incurred in the diminution of the value of the property.[6] It is undisputed that witnesses testified regarding the value of the property and that all of them testified the property was worth more than the one million dollars ($1,000,000.00) agreed to by the LLC and the purchaser. In addition to the testimony described by Respondents, the current Trustee for the Burton Trust testified that the property was worth one million eight hundred sixty six thousand dollars ($1,866,000.00). **3 R. p. 1113 lines 2-14.** In fact, the evidence shows that the purchaser only paid the LLC nine hundred thousand dollars ($900,000.00), withholding one hundred thousand dollars ($100,00.00) for the roadbed issue and promising to pay an additional ten thousand dollars ($10,000.00) toward attorneys' fees for the partition action.

Respondents also argue that the fees incurred by Appellants in the partition action are not a part of the damages as they do not go to the defendant attorney's negligence. See Respondents' Initial Brief, p. 26. This argument is wholly without merit. The record unequivocally demonstrates that the partition action, filed against Appellant Trust by

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[6] Contrary to Respondents' brief, and as demonstrated by the evidence in this action, Appellants did not file the partition action. Rather, Respondents filed the partition action on behalf of the other beneficiaries against Appellants forcing the Trust to mount a defense or capitulate.

Respondents, was a direct result of the negligence of the Respondents.[7] Respondents created a defective title and defective LLC formation documents.[8] But for the Respondents' failures regarding the deed into the LLC and the formation documents there would have been no partition action. In fact, Respondents were solely responsible for the litigation as they filed the partition action against their own client.[9]

Finally, the Trial Court never conducted a quantitative analysis of the Appellants' damages. Instead, the Court only found that the Appellants' damages were not proximately caused by the Respondents' breach of the standard of care. Therefore, Respondents' arguments regarding the failure to demonstrate damages are without any evidentiary support and must be rejected by this Court.

IV. Respondents' arguments regarding the existence of an attorney-client relationship ignore clear South Carolina precedent which requires a finding of an attorney-client relationship between Appellants, including the Burton Trust, and Respondents.

The trial court erred as a matter of law in finding Respondents' actions and inactions did not rise to the level of an attorney-client relationship with the Plaintiff. Respondents' brief improperly cites to out-of-state case law while ignoring the holdings

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[7] Respondents make unsupported arguments the partition litigation was unnecessarily complex. However, there is no record testimony to this effect. Therefore such arguments are without an evidentiary basis in the record and must be rejected.

[8] The trial Court correctly found that Respondents created defective documents. See Order p. 16, **1 R. p. 23.**

[9] Respondent Pitts demonstrates a profound misunderstanding of the formation of the attorney client relationship, or a profound desire to have it both ways. In this action he claims he did not represent the Trust during the LLC formation and the Deed preparation and execution as he had no contact with it. On the other hand, Respondent Pitts filed a partition action naming as party plaintiffs the other members of the LLC who he testified he never had any contact or communications with. As discussed in more detail herein, as well as in Appellants' initial brief, Respondents should not be able to pick and choose when they have an attorney client relationship with the beneficiaries.

of South Carolina precedent that requires a finding of an attorney-client relationship.[10] South Carolina law clearly holds that the reasonable expectations of the putative client control in determining whether an attorney-client relationship has been formed.

In In the Matter of William Levern Pyatt, the court held with the Panel and Executive Committee that "[r]egardless of how the respondent regarded the relationship, he failed to exercise proper care and judgment in explaining to the [putative client] that he did not represent their legal interests." Pyatt, 280 S.C. at 303, 312 S.E.2d at 554. Thus, because the putative client believed he was a client of the attorney, he was. Likewise, in McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998), the South Carolina Court of Appeals found an attorney has an affirmative duty to notify a putative client attorney is not representing him if it is reasonable for the client to believe he is being represented by the attorney. The McNair court further clarified that an attorney-client relationship can be created by the reasonable belief of the putative client. See also, In Re Carter, 400 S.C. 170, 733 S.E.2d 897 (2012).

Respondents' Brief also completely fails to address Matter of Morgan, 288 S.C. 401, 343 S.E.2d 29 (1986). The Morgan Court found attorney's actions clearly formed a relationship with a minor daughter in the transaction even though the attorney had no contact with the minor daughter. Attorney's actions directly affected the daughter and monies she might be liable to pay if the transaction was consummated. Thus, the putative

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[10] In support of that argument, Respondents cite to a 2008 Order from the Court of Common Pleas and a Fourth Circuit Court of Appeals case. Additionally, Respondents cite Mallen, Legal Malpractice §8:3 (2014 ed.) for the proposition that "[T]he claimant's subjective belief does not establish an attorney-client relationship unless the lawyer reasonably induced the belief.") However, even in Respondents' citation, they admit that a claimant's subjective belief that a lawyer represents him *can* establish an attorney-client relationship *if* the lawyer reasonably induced that belief.

client, the minor daughter, could reasonably understand the attorney to be representing her interests. The attorney never took any action to notify the minor daughter that this was not so, and an attorney-client relationship was formed.

The record is clear in this case that Respondents provided legal services to the LLC and its members, including the Burton Trust. In so doing, Respondents implicitly created an attorney-client relationship with the members of the LLC, including the Appellant Trust. Furthermore, Respondents did nothing to disavow the attorney client relationship. Instead Respondents' actively used an agent to convey, explain, and execute the LLC and deed documents, received communications from Appellant Trust regarding the transaction and the authority of the manager to bind the LLC, and affirmatively instructed the LLC's manager to share Respondent Pitts' opinions with the other members of the LLC. Respondent Pitts also failed to disavow the manager's representations to the Appellant Trust that all of manager's actions on behalf of the LLC were reviewed and approved by Respondent Pitts. Thus, the Appellants clearly had a reasonable basis to believe and anticipate that they were represented by Respondents.

Appellant Trust's motion to disqualify Respondent Pitts in 2009 also stands by itself as further evidence of the Trust's subjective belief of an attorney-client relationship. Rule 11, SCRCP, provides that the signature of a party or attorney "constitutes a certificate by him that he has read the pleading, motion, or other paper, [and] that to the best of his knowledge, information and belief there is good ground to support it ...." Clearly, the filing of the motion to disqualify, read in the context of Rule 11, SCRCP, demonstrates a good faith subjective belief of an attorney-client relationship between Appellant Trust and Respondents.

V. The dissolution of the LLC does not affect the instant lawsuit.

The claims asserted on behalf of the T.E. Cato estate were not extinguished upon dissolutions of the LLC:

Appellants, in the interest of efficiency and judicial economy, pursued every means possible to properly assert their claims. As Respondents note, the LLC did not dissolve until June 25, 2013. The LLC existed at the time of the filing of the instant Complaint in 2010. Further, the LLC existed at the time the claims were assigned to it in 2013.

As set forth in the Initial Brief of Appellant, Appellant took all necessary steps to properly assert their claims in the 2010 Complaint, individually and on behalf of the LLC.

Respondents argue that "the other heirs (holding an 80% interest, combined) were forced to sue the Burton Trust to complete the sale of the property while the Burton Trust was the lone holdout and the only LLC member that lodged a complaint over the sale." The Appellant asserted these claims because the of the negligence of the Respondents in the creation of the LLC and in the further negotiations in this transaction. But for the Respondents' negligence, no action would have been necessary. As addressed in this Reply brief, if Respondents have their way, no complaint could be lodged, and the Appellant would have no right to recompense for the negligence and errors of the Respondents.

Thus, the dissolution of the LLC in 2013 was not relevant as to the assertion of claims on behalf of the LLC and its members, which were properly raised in the original Complaint, brought within the Statute of Limitations, and brought after a proper assignment of claims to the LLC, which was still in existence in 2013.

VI. The trial court abused its discretion in denying the motion to amend where the statute of limitation had been met at the time of the filing of the instant lawsuit.

The trial court erred in denying the Appellant's Motion to Amend the Complaint, and in finding that the claims asserted on behalf of the LLC were barred by the Statute of Limitations.

Even if the trial court were correct in finding that the statute of limitations began to run when the LLC received notice of the existence of a possible claim (e.g., a title problem), on October 22, 2007, the Complaint in this case was filed on May 27, 2010, well within the applicable statute of limitations. As set forth in the above section, Respondents were on notice of these claims for over four years. In filing its Complaint, Appellant took every action necessary to be sure to assert any and all claims necessary for proper adjudication of this dispute, pursuant to the South Carolina Rules of Civil Procedure.

Contrary to Respondents' assertion, *laches* should not bar Appellant's claims. Appellants did not wait too long to file their claims and place Respondents on notice. Rather, Appellant asserted its claims both individually and on behalf of the LLC within the statute of limitations pursuant to the discovery rule, S.C. Code Ann. §15-3-535 (Law. Co-op. 1976, as amended).

It is important to note that, procedurally, the motion to amend was filed as soon as legally possible, after the assignment of claims was made to Appellant as part of the settlement of the partition action, and while the LLC was still in existence in 2013. However, even without the additional factual allegations, the Appellants had already asserted claims on behalf of the LLC in the original pleadings. Respondents ignore

Appellant's argument in its Initial Brief of Appellant and the South Carolina Rules of Civil Procedure regarding relation back of amendments. Appellant had additional standing to assert the LLC's claims once they were assigned to Appellant in 2013. However, Appellant had already asserted these claims in the original Complaint. The claims did not change. The claims are substantially the same as set forth in the original Complaint, of which the Respondents were properly on notice. Rule 15(c), SCRCP, allows amendments to complaints, such as this, to relate back to the original pleading for purposes of the statute of limitations.

As set forth in Appellant's Initial Brief, the purpose of the proposed amendments was to better clarify and define the already existing claims, not add new ones. These amendments were directly in line with the interests of justice and as anticipated in the South Carolina Rules of Civil Procedure. The proposed amendments merely made the causes of action more specific to conform to the assignment. This is in direct contradiction to the arguments of Respondents. Respondents could not be prejudiced, regardless of the state of "written discovery" where the original pleadings alleged claims on behalf of the LLC. Respondents were already on notice of claims on behalf of the LLC. There was no significant change in the claims and causes of action, only the additional basis for standing of the Appellants to pursue the claims of the LLC against the Respondents. Therefore, there is no evidence in the record of prejudice necessary to support a denial of the Appellants' motion to amend.

Thus, the trial court erred in denying the proposed amendments, as well as in finding that the proposed amendments would have fallen outside the statute of limitations, and not been timely.

VII. Respondents arguments regarding the pre-existence of a title defect mislead the Court regarding the factual record.

Respondents argue that because the property was owned by the heirs for a number of years, any title defect that may exist already existed. This argument must be rejected as circular and self-serving. It is true that at the time of the creation of the LLC, a title defect existed in the form of the South Carolina Department of Transportation's deed of the roadbed to the dissolved Trust. However, Respondents failed to identify that defect and, instead, created two new defects firstly by deeding into the LLC property the heirs did not own and second, by not deeding in property they heirs did own. As such, not only did the Respondents fail to identify a single existing title defect, they created two new defects through their negligence.

VIII. The standard of care for a lawyer is breached when a lawyer drafts conflicting and inaccurate documents.

Respondent asserts as an alternative sustaining ground that Respondent did not breach the standard of care. See Respondent's Initial Brief at p. 42. Respectfully, the Trial Court was correct to disagree with Respondent and find that the standard of care had been breached when Respondent drafted an LLC operating agreement with inconsistent and conflicting provisions as to the management of the LLC. Furthermore, Respondent fell below the standard of care when Respondent drafted and presented for signature a general warranty deed which included land that the Grantors did not own and omitted land which Grantors sought to transfer with the deed.

Respondent was hired to draft an LLC operating agreement. The standard of care is for the lawyer to draft a consistent operating agreement which reflects the wishes of the members of the entity. Here, the operating agreement was required so that the

members of the LLC would know how the LLC would be operated (managed). Respondent drafted the operating agreement with inconsistent and conflicting management provisions. When questions regarding the management of the LLC arose, the operating agreement did not serve its purpose of setting forth how decisions were to be made. Clearly, Respondent fell below the standard of care.

Furthermore, Respondent was tasked with drafting a general warranty deed conveying certain land into the LLC. Rather than competently handle the task, Respondent prepared and presented for signature a General Warranty Deed purporting to transfer land which the Grantors did not own. The General Warranty Deed also omitted the description of land which the Grantors sought to transfer. Respectfully, if a lawyer is hired to prepare a general warranty deed, the lawyer must ensure the accuracy of what land is being transferred.

Contrary to Respondent's argument, it is not too much to ask lawyers in South Carolina to draft documents accurately and consistently. Not surprisingly, a lawyer in South Carolina falls below the standard of care when the lawyer drafts an operating agreement with conflicting management provisions and deeds that transfer land not owned by the grantor and omits land that the grantor seeks to transfer.

IX. Respondents arguments in support of release must be disregarded as they failed to plead the affirmative defense and therefore did not preserve the issue.

Rule 8(c), SCRCP, provides that "a party shall set forth affirmatively the defenses: accord and satisfaction, ... payment, ... release, ... and any other matter constituting an avoidance or affirmative defense." Where an affirmative defense is not pled in the Answer, it is waived and no longer available to the party asserting it. Adams v. B & D,

Inc., 377 S.E.2d 315, 297 S.C. 416 (S.C., 1989). South Carolina has extended to effect of Rule 8(c), SCRCP, to the gamut of civil claims, including Post Conviction Relief applications and domestic actions. Dearybury v. State, 625 S.E.2d 212 (S.C., 2006) ("State did not plead laches and accordingly is barred from asserting it now."), Hentges v. Hentges, (S.C. App., 2011) (application of Rule 8(c), SCRCP to family court action).

In the instant case, there is no evidence to demonstrate Defendants pled the affirmative defense of release within their Answer to the Complaint. As such, South Carolina clearly bars the assertion of the defense now.

X. The Assignment Does Not Violate Public Policy.

Respondent asserts as an alternative sustaining ground that legal malpractice claims cannot be assigned between the LLC and the Trust and cite to Skipper v. Ace Property & Casualty Insurance Co., 413 S.C. 33, 775 S.E.2d 777 (2015). See Initial Respondent's Brief at p. 47. Skipper stands for the proposition that assignments of legal malpractice claims between adversaries in litigation should be declared invalid where they rest on collusion, contain confessions of judgment where the amount confessed does not bear a relationship to the value of the case, and litigants take opposite positions as a result of the assignment. None of these concerns exist in the instant matter. After protracted litigation between members of an LLC regarding a partition action, a settlement agreement was reached where all claims were assigned to the Trust. The claims assigned to the Trust concern the improper, conflicting, and inconsistent LLC Operating Agreement; an issue different than the partition action itself. Furthermore, there is no confession of judgment or collusion to set up a lawyer for a lawsuit. It was Respondent who decided to draft an internally inconsistent document

Finally, the Trust has taken the same positions in each piece of litigation it has been involved in. Respectfully, the Trial Court was correct to find that the assignment of claims did not violate public policy.

XI. Respondents' arguments regarding the additional sustaining grounds of release were properly rejected by the Trial Court.

The Trial Court properly rejected Respondents' release arguments in the Court's April 3, 2015 Order finding that "a fair reading of the Settlement Agreement does not evince an intention by the ... parties to release non parties." See Order at 5, **1 R. p. 23.** This conclusion was appropriate in light of the state of the law and the plain language of the document. Further, the Respondents improperly attempt in their arguments to bootstrap into their appeal arguments deposition testimony and cite to it rather than the trial testimony.[11]

South Carolina interprets releases pursuant to contract law. Southern Glass & Plastics Co., v. Duke, 367 S.C. 421, 626 S.E.2d 19, 22 (Ct.App.2005). The entire release must be examined to determine the intent of the parties. Betty Land v. Green Tree Servicing, LLC, C/A No. 8:14-1156-TMC (D.S.C. 2014) citing Thomas-McCain, Inc., v. Siter, 232 S.E.2d 728, 729 (S.C. 1977). The Court will not pick a single phrase to determine the intention of the parties. "In construing the release, the court must seek to ascertain and give effect to the intention of the parties." Wilson Group, Inc., v. Quorum Health Rsrcs., Inc., 880 F.Supp. 416, 425 (D.S.C. 1995) citing Campbell v. Bi-Lo, Inc., 301 S.C. 448, 392 S.E.2d 477 (Ct.App. 1990). "Pursuant to the general rule, particular words and expressions in releases are given their ordinary meanings, unless the context

[11] Respondents repeatedly cite to the deposition of Dr. David Burton, rather than any testimony adduced at the trial.

indicates their use in a different sense." Wilson Group, *supra* at 425, citing Gardner v. City of Columbia Police Dept., 216 S.C. 219, 57 S.E.2d 308 (1950).

In the instant case, unlike in Bowers v. South Carolina Dept. of Transportation, 360 S.C. 149, 600 S.E.2d 543 (Ct.App. 2004), the release applies only to those released therein. In Bowers, the release was written so broadly to include any person for any thing. In fact, the Bowers release language specifically provided that the "undersigned releases and forever discharges [the tortfeasor] and all other persons, firms, or corporations liable or, who might be claimed to be liable ... from any and all claims ... causes of action or suits of any kind or nature whatsoever ... ." Bowers, at 152 (emphasis added). The Court noted that the language was so broad as to encompass any claims that could have been brought by anyone against anyone. That breadth of language is not found in the instant release document. Instead, the document refers to the parties to the release. It specifically confines the scope of the release to the claims in dispute in that action. Section number 9, parts A, B, C, and D, specifically and discretely identify the parties who are being released within the document. Those entities that are party to the release are specifically identified therein and there is no reference, as in Bowers, to "all other persons, firms, or corporations." See Release p.8, **4 R. p. 1887.** Additionally, the release sets forth in the preamble that the "the parties have now amicably resolved their differences and disputes ... the parties wish to memorialize that resolution ... to dismiss the claims asserted against each other .. and to waive and renounce any and all claims the parties have asserted against each other or could have asserted against each other ...." See Release p. 4 **4 R. p. 1877** (emphasis added). This limiting language continues through the document. In fact, the release goes on to identify the specific parties to the release

at page 5 by specifically listing James Thomas Cato, Helen Cato Jones, Douglas E. Jones, Albert M. Jones, Sara L. Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, the Burton Trust, Marjorie Burton, Sloan Marvin Burton, David Alan Burton, Cato, LLC, Thomasson, Broadus L. Thomasson, Sr., B. Lee Thomasson, Jr., B. Heath Thomasson, and Matthew J. Thomasson. See Release, p. 5 **4 R. p. 1887**. Again, there is none of the broad, all-encompassing language found in the Bowers case. Clearly, the intent of the parties in the settlement and resolution of the partition action was to only release those persons specifically listed and identified in the document. Had they wished to expand the language and coverage of the release to the breadth found in Bowers, they could have. However, that is not the case in this matter. As such, Defendants' arguments regarding the release are fatally flawed and must be disregarded by this Court.

Furthermore, it is clear that there was no intent to release the Respondents in this action, Carroll Pitts and Robinson, Bradshaw, Hinson. The release is not signed by those entities and does not reference them as being released therein. Further, the instant litigation is strong evidence that there was no intent to release the Respondents in the instant action.

As such, the Trial Court properly rejected Respondents' arguments as untimely pursuant to Rule 8(c), SCRCP and for failing to recognize the intent of the parties to the partition action to confine the release to those individuals a party to that action.

XII. The Trial Court properly rejected Respondents' arguments regarding the defense of ratification where the trial record failed to support the defense.

Respondents argue that the Appellant Trust "accepted and retained the benefits of Attorney Pitts' acts by negotiating the proceeds of the sale to Thomasson."[12] See Respondents' Initial Brief at 49. However, the Trial Court properly rejected this argument in the Order. See Order p.24-5 **1 R. p. 23**. In fact, the Trial Court's Order found 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 [Thomasson]." See Order at 25. **1 R. p. 23.**

"Ratification, as the term implies, is the adoption by one person of an act done or bargain made for him by another under such circumstances that he would not have been bound but for his subsequent assent." Brazell Bros. Contractors v. Hill, 245 S.C. 69, 138 S.E.2d 835 (S.C., 1964). "To ratify is to sanction or affirm, to give validity to something done for one by another, not to contract anew or upon different terms. Therefore, the adoption by the Brazells of the bargain made for them by the carrier can rise no higher as a bar to this action than the terms of that agreement." Brazell Bros. Contractors v. Hill, 245 S.C. 69, 138 S.E.2d 835 (S.C., 1964). "The critical question is whether the record is reasonably susceptible of an inference that the carrier and Hill intended that their agreement should acquit Hill of liability to the Brazells. If not, the subsequent ratification of the transaction by the Brazells, which raised no new promise, could not have that effect." Brazell Bros. Contractors v. Hill, 245 S.C. 69, 138 S.E.2d 835 (S.C., 1964).

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[12] Respondents' argument in this section are perhaps the greatest demonstration of their desire to pick and choose the relationship between them and Appellants. On one hand the Respondents argue in other sections that Respondents had not attorney client relationship with the Appellants and did not provide them any services. However, in this section, they argue that Respondent Trust accepted and retained the benefits of Respondent Pitts' acts.

As held by the Trial Court, the evidence fails to support a conclusion that the Trust's deposit of the sale check was in April 2008 was in any way an adoption of the acts of Respondents.[13] Instead, as noted by the Trial Court, the Trust was placed in the position of having to pay taxes on the proceeds regardless of their actions with the check. Further, the trial testimony of Dr. Burton, the current Trustee, demonstrates that those funds were not utilized by the Trust for any purpose other than to pay the associated taxes with the remainder held in an account. **3 R. p. 1103, lines 2-4.**

CONCLUSION

For the foregoing reasons, and those set forth in Appellants' Brief, this Court should reverse and remand this matter for a hearing on damages.

Respectfully submitted,

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March 14, 2016

[13] Respondents argue the negotiation of the check accepted and ratified "the underlying transaction and the work completed by Attorney Pitts." See Respondents' Initial Brief at p.50. This argument again demonstrates Respondents' desire to pick and choose when Pitts is providing legal services for Appellants' benefit further diminishing their attempts to argue in other sections that there was no attorney client relationship with the Trust.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

v.

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

Appellate Case No: 2015-001053

The Honorable John C. Hayes, III
York County
Circuit Court Case No: 2010-CP-46-02267

PROOF OF SERVICE

The undersigned hereby certifies that I have served Appellant's Final Brief and Appellant's Final Reply Brief on counsel for Respondents by depositing a copy of it in the United States Mail, postage prepaid, on March 14, 2016 addressed to their attorneys of record at Samuel W. Outten, Esq., Nelson, Mullins, Riley & Scarborough, Poinsett Plaza, Suite 900, 104 South Main Street, Greenville, South Carolina, 29601.

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March 14, 2016

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March 14, 2016

Via Hand Delivery
Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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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, Appellant v. Carroll M. Pitts, Jr., Esq. and Robinson Bradshaw & Hinson, P.A., Respondents; Appellate Case No: 2015-001053

Dear Ms. Kitchings:

Enclosed please find one unbound and seventeen bound copies of the Appellant's Final Brief and Final Reply Brief. Also enclosed is the original and one copy of the Proof of Service.

Please return three clocked copies of each brief and one clocked copy of the Proof of Service to my courier.

Sincerely,

Matthew B. Rosbrugh