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 BRIEF OF APPELLANT

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March 14, 2016

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STATEMENT OF THE CASE

This non-jury, legal malpractice, professional negligence and derivative action began on May 27, 2010 with the filing of a Summons and Complaint. **1 R. p. 57**. The Appellants alleged, among other things, that Respondents committed legal malpractice and professional negligence when Respondents failed to properly form Plaintiff T.E. Cato Estate, LLC (hereinafter referred to as "LLC"), and failed to properly transfer property into the LLC. The lawsuit sought to recover damages on behalf of the LLC and an LLC member, the Sloan Marvin Burton and

Marjorie Cato Burton, AB Living Trust (hereinafter referred to as "Trust") in excess of $570,000 including fees, costs, and the undervaluation of the property transferred into the LLC and sold by the LLC.

On July 20, 2010, Respondents answered the complaint denying all liability and the matter proceeded forward. **1 R. p. 134**. On September 9, 2013, Appellants moved to amend the Complaint to add additional Defendants and to clarify causes of action. **1 R. p. 278**. Respondents opposed the Motion to Amend. See **1 R. p. 336**. On October 24, 2013, the Court denied the Motion to Amend. See **1 R. p. 18**. A motion to reconsider was filed and denied. See **1 R. p. 353** and **1 R. p. 22**.

This matter proceeded to a non-jury trial on December 16-18, 2014 and January 26-27, 2015. On April 3, 2015, the Trial Court entered its order in favor of the Respondents which was received on April 9, 2015. The Trial Court held in part, that Respondents committed professional negligence but there was no proximate caused damage. See **1 R. p. 23**. A Motion to Reconsider was timely filed and denied on April 30, 2015. See **1 R. p. 359** and **1 R. p. 53**. The Order denying reconsideration was received on or about May 4, 2015. The Notice of Appeal was filed on May 18, 2015. See **1 R. p. 878**.

FACTUAL BACKGROUND

This matter arises as a result of the defective formation of a Limited Liability Company and real estate transaction drafted and created by the Defendants. T.E. Cato died in 1957 leaving to his heirs various parcels of property in York County.

Through the passage of time, this property was conveyed to various descendants. By 2007, the property was vested in varying percentages in seven (7) heirs. **3 R. p. 976, lines 10-12**; **3 R. p. 1196, lines 4-25; 3 R. p. 1197 lines 1-4; 4 R. p. 1691**. Plaintiff Marjorie Burton, as the daughter of T.E. Cato, held a twenty percent (20%) interest in the total property.[1]

Through the fifty plus years of ownership by the heirs, Marjorie Burton held the property in different names, including the Marjorie Cato Burton Revocable Living Trust. In 2004, the South Carolina Department of Transportation (DOT), initiated efforts to exchange a roadbed tract on the heirs property, referred to henceforth as the "Old Roadbed", for another roadbed tract, referred to henceforth as the "New Roadbed", on the same parcel of the heirs property. **3 R. p. 1008, lines 10-25; 3 R. p. 1009, lines 1-12; 3 R. p. 1012, lines 8-25**. At that time, Marjorie Burton's share of the property was held by the Marjorie Cato Burton Revocable Living Trust. In 2004, DOT received title to the New Roadbed tract from the heirs, including the Marjorie Cato Burton Revocable Living Trust. **3 R. p. 1294.** On October 19, 2006, Marjorie Burton dissolved her Marjorie Cato Burton Living Revocable Trust. **3 R. p. 1013, lines 18-21; 3 R. p.1269.** DOT waited until October 24, 2006 to deed to the heirs the Old Roadbed. **3 R. p. 1015, lines 6-17; 3 R. p.**

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[1] Plaintiff's identity in this matter is referred to as Marjorie Burton for the purpose of clarity. Mrs. Burton was the natural person who originally inherited the subject property. During the course of her lifetime she placed her interest in the subject property into a series of trust instruments culminating with the Sloan Marvin Burton and Marjorie Cato Burton A.B. Living Trust. **3 R. p. 1083, lines 22-25; 3 R. p. 1084, lines 1-6.** As a result of her infirmity and eventual death, the current trustee is her son, Dr. David Burton. **3 R. p. 1083, lines 22-25; 3 R. p. 1084, lines 1-6.**

1267; 3 R. p. 1269. In doing so, DOT deeded Marjorie Burton's ownership interest to her dissolved trust. **3 R. p. 1269.** Marjorie Burton subsequently formed the current plaintiff, the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust. **3 R. p. 1273.**

During the heirs' ownership of the property, there were several efforts by the heirs, to market and / or develop portions of the property. **3 R. p. 972, lines 13-17.** However, there was significant dissension among the heirs. **3 R. p. 972, lines 20-22.** In early 2007, James Thomas Cato, hereinafter referred to as "Cato," contacted Defendant Pitts, who was at that time employed with Defendant Robinson, Bradshaw, and Hinson (RBH), with the idea of marketing the different parcels for sale and / or development. **3 R. p. 978, lines 10-25.** Cato met with Defendant Pitts regarding the formation of an appropriate entity and for transfer of the devised property into the entity. **3 R. p. 979, lines 12-24; 3 R. p. 986, lines 7-11; 3 R. p. 1001, lines 18-20.** Cato instructed Pitts to protect Cato from the other family members and to protect the other family members from him. **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.** Pitts provided the LLC with a bill indicating "research probate records and titles" during the deeding of the property into the future LLC. **3 R. p. 1082, lines 20-22; 3 R. p. 1198, lines 2-7; 3 R. p. 1200, lines 15-25; 4 R. p. 1634.** However, Pitts testified he did not perform a title search.[2] **3 R. p. 1185, lines 10-11.** Pitts did not prepare an engagement

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[2] Cato also testified that no title search was performed during the deed into the then not formed LLC. **3 R. p. 1005, lines 1-4.**

letter or fee agreement. **3 R. p. 1204, line 25 - p. 1205, line 18; 3 R. p. 1206, lines 2-5; 3 R. p. 1207, lines 6-10.** Pitts also did not prepare any conflict disclosures or waivers. **3 R. p. 1206, lines 17-23.** Pitts did not contact any of the heirs by phone, mail, or otherwise. **3 R. p. 1060, lines 3-4; 3 R. p. 1207, lines 11-17.** Marjorie Burton never received any communications from anyone informing her that Defendant Pitts was only representing Cato. **3 R. p. 1116, lines 22-24.** Pitts never contacted Marjorie Burton or anyone associated with the Trust. **3 R. p. 1141, lines 20-23.**

Pursuant to Cato's directive, Pitts prepared a general warranty deed, operating agreement, and articles of organization for an LLC pursuant to the South Carolina Limited Liability Company statute at S.C. Code Ann., § 33-44-101, et. seq. **3 R. p. 980, line 14 - p. 981, line 3; 3 R. p. 1002, line 13 - p. 1003, line 4; 3 R. p. 1136, lines 13-20; 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.** Pitts understood the Articles of Organization were to set out the rules for how the LLC would operate and that the Deed would convey the properties into the LLC. **3 R. p. 1140, lines 3-6.** Pitts also understood that the documents were intended to govern which individual members would have what powers and duties within the LLC. **3 R. p. 1140, lines 3-6.**

Pitts gave Cato the documents he prepared on or about May 30, 2007 and instructed Cato to obtain signatures from the heirs on the operating agreement, articles, and deed. **3 R. p. 987, line 9 - p. 988, line 2, lines 11-13; 3 R. p. 1144, lines 12-23, 3 R. p. 1188,lines 17-19.** Pitts understood that Cato would be taking

them to the heirs and explaining the documents. **3 R. p. 1143, lines 3-10; 3 R. p. 1144, lines 20-23.** Cato met with Marjorie and her husband at their Raleigh residence and obtained their signatures.[3] **3 R. p. 990, lines 5-16.** Cato explained the documents to Marjorie Burton during a ten-hour meeting at her home in Raleigh on June 1, 2007. **3 R. p. 992, line 15 - p. 993, line 4.** Marjorie Burton believed that Cato was to be the spokesperson for the LLC. **3 R. p.1094, line 18 - p. 1096, line 14; 3 R. p. 1405.** Pitts did not have any contact with any of the heirs at any time prior to or during the formation of the LLC or the General Warranty Deed into the LLC. **3 R. p. 994, lines 5-9; 3 R. p. 1060, lines 3-4; 3 R. p. 1090, lines 17-20; 3 R. p. 1141, lines 18-23; 3 R. p. 1142, lines 9-25; 3 R. p. 1207, lines 11-17; 3 R. p. 1235, line 20 - p. 1236, line 1.**

The Deed and organizational documents prepared by Pitts were executed by the heirs between May 28, 2007 and June 16, 2007. **3 R. p. 1331.** Cato delivered to Pitts the executed deed and LLC documents. **3 R. p. 1142, lines 11-14.** Pitts did not file the LLC documents with the South Carolina Secretary of State until June 26, 2007. **3 R. p. 1305.** The certificate of existence for the LLC was not issued by the South Carolina Secretary of State until June 28, 2007, some 12 days after the final signature executing the deed into the LLC. **3 R. p. 1305.** The Deed was not recorded by Pitts until July 10, 2007. **3 R. p. 1331.** Pitts received the documents back from the recording offices around July 20, 2007. **3 R. p. 1143,**

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[3] At the time of this meeting, Marjorie Burton was quite elderly. She was a retired school teacher. **3 R. p. 1091, lines 4-5.** Due to Marjorie Burton's physical condition, she was unable to read. **3 R. p. 1087, line 22 - p. 1088, line 8; 3 R. p. 1089, lines 23-25.** Due to these physical infirmities, Dr. David Burton assisted Marjorie Burton in typing emails. **3 R. p. 1123, lines 10-18.**

lines 0-12. Pitts continued to be consulted by Cato from time to time "to make sure [he] was doing the right thing". **3 R. p. 1048 line 16 - p. 1049, line 9; 3 R. p. 1178, lines 21-25.** Cato kept Pitts informed by copies of emails. **3 R. p. 1049, lines 7-9; 4 R. p. 1419; 4 R. p. 1688.**

On August 1, 2007, Cato sent to the heirs an email requesting them to submit any bids for the property at or over one million dollars ($1,000,000.00) prior to noon on August 3, 2007. **3 R. p. 1092, lines 21-24; 3 r. p. 1093, lines 4-9; 3 R. p. 1404.** Marjorie Burton responded to that email on August 4, 2007, inquiring into certain issues and expressing her concern that Cato was not confused as to his role in this matter solely as spokesperson without authority to enter into a binding contract for sale. **3 R. p. 1094, line 18 - p. 1096, line 14; 3 R. p. 1405; 4 R. p. 1688.** Marjorie Burton further expressed her understanding that Cato was not empowered to sell the jointly held property without "all of the heirs coming to a unanimous decision as to what should or should not be done with the property and, obviously, doesn't rest solely with any one heir or individual."[4] **3 R. p. 1095, lines 11-17; 3 R. p. 1405; 4 R. p. 1688.**

Defendant Pitts received a copy of this email and printed it for his file on August 15, 2007 and placed it in the RBH file. **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.** Pitts understood that Marjorie Burton's email questioned the authority

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[4] The heirs had a long-standing understanding that no one heir could unilaterally decide any issue related to the property and that any decision regarding the property had to be a unanimous decision. **3 R. p. 1127, lines 1-22.**

of Cato. **3 R. p. 1179, lines 10-19.**[5] Pitts took no steps to contact Marjorie Burton regarding the authority of Cato as manager of the LLC. **3 R. p. 1179, lines 10-19.** Cato continued to interact with Defendant Pitts. **3 R. p. 991, lines 7-14; 3 R. p. 1073 lines 3-25; 3 R. p. 1074, lines 9-16; 3 R. p. 1075, lines 1-3; 3 R. p. 1076 line 18 - p. 1077, line 3, lines 15-25; 3 R. p. 1078, lines 1-9, 19-22; 3 R. p. 1079,lines 18-21; 5 R. p. 1985**

Pitts received an email from Cato on July 30, 2007 with a copy of the Thomasson letter of intent and reviewed it. **3 R. p. 1146, lines 9-12; 3 R. p. 1147, lines 23-24.** On August 3, 2007, Cato signed a letter of intent to sell the majority of the heirs' property to Thomasson Apartments LLC. **3 R. p. 1017, lines 8-12; 21-25; 3 R. p. 1018, lines 2-24; 3 R. p. 1238, lines 6-9, 3 R. p. 1341.** This letter of intent was a non-binding instrument to allow Thomasson to initiate and prepare financing for the purchase and development of the parcels. **3 R. p. 1018, line 25 - p 1019, line 6; 3 R. p. 1148, lines 10-20.**

On August 20, 2007, Cato responded by email to Marjorie Burton's August 4, 2007, email and assured her he does not do anything without the review and approval of the corporate lawyer. **3 R. p. 988, lines 20-24; 3 R. p. 1097, lines 10-15; 3 R. p. 1407; 4 R. p. 1419.** Cato's response included his assertion that "I really appreciate your concern for liability from exposure to developers but nothing

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[5] When asked whether the authority questions posed by Marjorie Burton related to the issues Pitts was dealing with the LLC and Cato, Pitts testified he "would normally assume that I would have discussed this information with Tommy Cato. I, I do not know that I did that." **3 R. p. 1177,lines 16-21.** Pitts further admitted that the contents of the email related to Cato's ability or authority to execute the Letter of Intent without the involvement of anyone else. **3 R. p. 1178, lines 15-20.**

I do is without consultation with the corporation attorney and the corporation CPA." **3 R. p. 989, lines 12-15; 3 R. p. 1407; 4 R. p. 1419.** Cato's email continues by stating

> [s]ince I am neither an attorney nor a CPA, their oversight and involvement, as I have 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 in ongoing consultations takes time and money but those consults represent insurance against risks.

3 R. p. 989, lines 16-22; 3 R. p. 1407. Cato went on to assert that "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 percentage of ownership. In the Corporation, no one has 'veto power' over the majority." **3 R. p. 1098, line 24 - p. 1099, line 5; 3 R. p. 1407; 4 R. p. 1419.** Cato was referring to Defendant Pitts as the corporation attorney within this email. **SR. p. 2087, lines 9-11.**

Pitts printed a copy of this email on August 23, 2007 and placed it into the RBH file. **3 R. p. 1155, lines 21-25; 3 R. p. 1156, lines 6-8; 3 R. p. 1172, lines 10-23; 4 R. p. 1419.** Pitts did not contact Marjorie Burton regarding Cato's assertions within this email. **3 R. p. 1181, lines 22-24.**

Joshua Vann, Esquire, attorney for Thomasson, identified a discrepancy between the deed and the letter of intent. **3 R. p. 1005, lines 17-23; 3 R. p. 1021, lines 8-12; 3 R. p. 1239, lines 6-15.** Vann's title search disclosed the property described in Pitts' deed into the LLC included the New Roadbed that belonged to DOT and did not include the Old Roadbed that belonged to the heirs. **3 R. p. 1005, lines 17-23; 3 R. p. 1006, lines 10-25; 3 R. p. 1007, lines 3-13; 3 R. p. 1239,**

lines 6-15. As a result, Vann prepared a quitclaim deed and a contract titled as "Amendment to Contract". **3 R. p. 1241, lines 4-15; 3 R. p. 1342.**

On or about October 22, 2007, prior to Cato's execution of the Amendment to Contract and prior to closing on the sale to Thomasson, a quitclaim deed was circulated to the heirs, including Marjorie Burton.[6] **3 R. p. 1023,lines 22-23; 3 R. p. 1410.** The letter requested that each of the heirs sign over any interest they might have in the Old Roadbed tract. **3 R. p. 1024, lines 13-20.** Marjorie Burton emailed Cato on November 7, 2007, expressing her concerns regarding the progression of events and the LLC. **3 R. p. 1411.** In particular, Marjorie Burton was concerned about the sales price for the property, inconsistencies in the representations made by Cato regarding valuation, the lack of an appraisal, and issues raised by Burton regarding capital gains taxes. **3 R. p. 1411.**

On November 24, 2007, Marjorie Burton emailed Cato attempting to get information on the status of the land and to determine whether or not the sales price was reasonable. **3 R. p. 1114, lines 9-16; 3 R. p. 1684**. The email also suggested that the one million dollar sales price accepted by Cato was not adequate. **3 R. p. 1115, lines 2-9.** On November 30, 2007, Marjorie Burton sent a proposed settlement of the issue to Cato and the other heirs for consideration setting forth her request to compromise the issues created through the failures of the deed and organizational documents. **4 R. p. 1775.** This email provided a

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6 The Vann quitclaim deed described all of the areas being conveyed to the Thomasson group, not just the Old Roadbed. **3 R. p. 1249, lines 10-24; 4 R. p. 1670.**

framework whereby Marjorie Burton would agree to sign off on the quitclaim deed for the roadbed issue.

On December 6, 2007, Cato executed the Amendment to Contract.[7] **3 R. p. 1239, lines 16-21; 3 R. p. 1342.** The Amendment to Contract called for a partition action to be filed against Marjorie Burton in order to clear the title to the Old Roadbed tract. **3 R. p. 1240, lines 16-23.** Pitts and Cato consulted regarding the "Amendment to Contract". **3 R. p. 1160, lines 1-12.** As a part of the Amendment to Contract, Thomasson agreed to pay the first ten thousand dollars ($10,000.00) in attorney's fees for a partition action against Marjorie Burton. **3 R. p. 1342.**

Despite Marjorie Burton's expressed concerns, Cato pressed forward with the Thomasson transaction. On December 12, 2007, Joshua Vann emailed Pitts regarding the closing documents and attached a copy of the closing documents for review by Pitts. **3 R. p. 1162, lines 12-20; 3 R. p. 1163, lines 1-7.** Vann communicated with Pitts in Pitts' capacity as attorney for the LLC. **3 R. p. 1238, lines 1-11; 3 R. p. 1160, lines 18-23; 3 R. p. 1161, lines 16-21; 3 R. p. 1246,lines 18-22.** In that email, Vann wrote Pitts to say:

> [t]here is a new ethics opinion making it clear that preparing a deed, a closing attorney is providing representation to the seller. The opinion involved residential closing, but I like to play it safe. I have prepared a deed for today's closing. In your capacity as counsel for T.E. Cato Estates, LLC, please review and approve.

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[7] There was no original binding contractual document to be amended. **3 R. p. 1027, lines 15-23; 3 R. p. 1028, lines 6-11.**

3 R. p. 1164, lines 4-25; 3 R. p. 1242, lines 12-21; 4 R. p. 1687. Attorney Vann's email also inquired of Pitts whether Cato had the authority to consummate the transaction for the LLC. **3 R. p. 1247; lines 17-22; 4 R. p. 1687.** Pitts did not communicate to Vann anything regarding the content of the Operating Agreement. **3 R. p. 1250, lines 7-15.**

Pitts and Vann discussed the closing documents and Vann received approval from Pitts. **3 R. p. 1238, lines 1-11; 3 R. p. 1243, lines 2-9; 3 R. p. 1244, lines 3-7, 12-15; 3 R. p. 1245, lines 3-6.** Pitts did not raise any question to Vann regarding Cato's authority to bind the LLC. **3 R. p. 1242, lines 15-24.** Pitts did not attend the closing. **3 R. p. 1245, lines 7-8.** Cato executed the closing documents on behalf of the LLC property on December 12, 2007, signing a general warranty deed to Thomasson. **3 R. p. 1029, lines 18-25; 3 R. p. 1031, lines 1-3; 3 R. p. 1032, lines 15-17; 3 R. p. 1033, lines 2-3; 3 R. p. 1238, lines 10-11; 3 R. p. 1242, lines 7-11; 3 R. p. 1331.** Marjorie Burton received a twenty percent (20%) share of seventy percent (70%) of the nine hundred thousand dollars ($900,000.00) received by the LLC from Thomasson.[8] **3 R. p. 1068, lines 5-13.** A further one hundred thousand dollars ($100,000.00) was held in reserve by Thomasson to be provided upon the completion of a partition action to be financed in part by

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[8] This check amounted to a total of one hundred twenty four thousand two hundred dollars ($124,000.00) before taxes. **3 R. p. 1069, lines 3-12; 4 R. p. 1777.** Marjorie Burton did not negotiate those funds until her tax liability came due. **3 R. p. 1102, lines 2-9.** At that time she deposited the funds in order to pay the tax liability. The net amount remained on deposit during the pendency of this action. **3 R. p. 1103, lines 2-4.**

Thomasson. **3 R. p. 1031, lines 1-11.** Thomasson also agreed to pay $10,000 in attorneys' fees for partition action. **3 R. p. 1342.**

On August 13, 2008, Pitts filed a partition action on behalf of the LLC and each of the other heirs against Marjorie Burton. **3 R. p. 1026, lines 13-19, 3 R. p. 1033, lines 18-25; 3 R. p. 1367.** Pitts never consulted with any of the heirs, other than Cato, regarding his pursuit of the partition action against Marjorie Burton. **3 R. p. 994, lines 5-9; 3 R. p. 1060, lines 3-4; 3 R. p. 1090, lines 17-20; 3 R. p. 1116, lines 22-24; 3 R. p. 1141, lines 18-23; 3 R. p. 1142, lines 9-25; 3 R. p. 1207, lines 11-17; 3 R. p. 1235, lines 20-25; 3 R. p. 1236, line 1.** The partition action was originally captioned as James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato and Cathy Cato Evans v. Marjorie Cato Burton, as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, bearing civil action number 2008-CV-46-3171. **3 R. p. 1367.** As a result of the filing of the partition action, Marjorie Burton answered and asserted counterclaims and third-party claims against the individuals and entities involved in the property transaction. **5 R. p. 1950, 5 R. p. 1960, 5 R. p. 1970.**

Pitts was asked to voluntarily withdraw from the case due to the conflict apparent in pursuing a claim against Marjorie Burton since she was his client in the underlying transaction. **5 R. p. 1913.** In April of 2009, a motion to disqualify Pitts was filed when Pitts refused to voluntarily withdraw as counsel adverse to Marjorie Burton in the partition action. **3 R. p. 1215, lines 11-14; 5 R. p. 1913.** The motion asserted in part that Pitts represented Marjorie Burton thereby prohibiting Pitts from being in a position adverse to the Trust. **3 R. p. 1216, lines 10-17; 3 R.**

p. 1218, lines 2-21; 5 R. p. 1913. That motion was heard before Judge Alford on June 1, 2009. **5 R. p. 1913, lines 18-20; 5 R. p. 1940.** At that hearing, the Court denied the motion "at [that] time" and instructed Pitts he should get out of the case. **3 R. p. 1219, lines 3-9, 14-16; 3 R. p. 1220, line 22 - p. 1221, line 11; 5 R. p. 1913.** Pitts eventually withdrew from the case and was substituted by Lucy McDow, Esquire and Brian McCoy, Esquire.

Plaintiffs filed the instant action against Defendants on May 27, 2010 asserting claims individually and on behalf of the LLC. **1 R. p. 57.** The Complaint included two causes of action for both legal malpractice and professional negligence. **1 R. p. 57.**

As a result of Pitts' eventual withdrawal from the partition case, Lucy McDow, Esquire was retained to represent the LLC and Brian McCoy, Esquire was retained to represent the heirs other than Marjorie Burton. **3 R. p. 1020, lines 5-6; 3 R. p. 1037, lines 8-15; 3 R. p. 1038, lines 6-9.** The partition action litigation continued until April 4, 2013, when the parties entered into a mediated settlement agreement.[9] **4 R. p. 1887; 2 R. p. 739.** During that time, the LLC incurred and paid legal fees and costs of forty-one thousand nine hundred sixty dollars and eighty-six cents ($41,960.86) from Lucy McDow, Esquire. **3 R. p. 1135, lines 1-4, 10-13; 3 R. p. 1211, lines 15-25.** The individual heirs' legal fees and costs of sixty-four thousand six hundred seventy-three dollars and ninety-three cents

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[9] During the underlying partition action, Judge Hayes found the sale to Thomasson was substantially all of the property held by the LLC, implicating the procedural requirements of S.C. Code Ann., § 33-44-440(c)(12) thereby requiring unanimous consent of all of the members. **3 R. p. 1264, line 11 - p. 1265, line 3.** The operating agreement is silent as to S.C. Code Ann., § 33-44-404(c)(12).

($64,673.93) were paid by the LLC. **3 R. p. 1042, lines -12; 3 R. p. 1043, line 21 - p. 1044, line 2; 3 R. p. 1211, lines 15-25; 4 R. p. 1421.** Marjorie Burton incurred legal fees and costs of one hundred sixty-six thousand seven hundred twenty-four dollars and eighty-one cents ($166,724.81). **3 R. p. 1108, line 20 - p. 1109, line 17; 3 R. p. 1211, lines 15-25; 4 R. p. 1421.**

As a result of the settlement agreement entered into by the heirs and LLC, Marjorie Burton received a payment of two hundred forty-nine thousand dollars ($249,000.00) and four residential lots. **3 R. p. 1069, lines 18-25.** Marjorie Burton also received an assignment of all of the assets of the LLC, including the right to pursue any claims of the LLC against the Defendants. **4 R. p. 1887.**

Dr. David Burton testified, as trustee of the Sloan Marvin Burton and Marjorie Cato Burton AB Living Trust, that the trust valued the property at one million eight hundred sixty-six thousand dollars ($1,866,000.00). **3 R. p. 1113, lines 6-14; 3 R. p. 1083, line 24 - p. 1084, line 2; 3 R. p. 1120, lines 6-14; 4 R. p. 1693.** During the course of the instant litigation, each of the parties retained separate expert witnesses to retrospectively evaluate the value of the property sold to Thomasson. Plaintiff's professional appraiser, George E. Knight, Jr., MAI, conducted a retrospective analysis of the property sold to Thomasson and determined its 2007 value to be one million three hundred sixteen thousand dollars ($1,316,000.00). **3 R. p. 1255, lines 17-20; 4 R. p. 1702.** Defendants' appraiser, Harrison Corbin Haskell, MAI, conducted a retrospective analysis of the value of the property sold to Thomasson and determined its 2007 value to be one million sixteen thousand dollars ($1,016,000.00). **3 R. p. 1260, lines 3-7.**

ARGUMENT:
THE TRIAL COURT ERRED WHEN IT HELD RESPONDENTS COMMITTED PROFESSIONAL NEGLIGENCE BUT THAT THERE WERE NO PROXIMATELY CAUSED DAMAGES[10]

After correctly holding the Defendants committed professional negligence in the formation of a company by incorrectly drafting documents establishing an LLC that was ambiguous and without clarity as to its management and operation, the Trial Court incorrectly held there were no proximately caused damages from the Defendants' professional negligence. Respectfully, the Trial Court ignored the obvious damages caused by the negligent drafting of an operating agreement and other LLC formation documents. This initial professional negligence acted much like a train wreck. Once the act that derailed the train occurred, all of the carnage that followed flowed directly from that original proximate cause act; so too here. All of the costs of the ensuing litigation regarding how the LLC would run, and who could and would make decisions, flowed directly from the preceding professionally negligent actions of the Defendants.

The Trial Court correctly found that Defendants committed professional negligence as to all members of the LLC through the establishment of the LLC and how it was to be managed. **1 R. p. 23** Order p. 15. The court correctly found the Defendants had a duty to the Plaintiff and the individual members of the LLC regarding the establishment of the LLC and how it was to be managed. **1 R. p. 23** Order p. 15. Further, the Trial Court correctly held the Defendants breached their duty to Plaintiff and that they are guilty of professional negligence as to the Plaintiff.

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[10] The Trial Court's finding is akin to a jury finding for the Plaintiff but with zero damages.

1 R. p. 23 Order p. 16. However, the Trial Court erred in finding no proximate causation for Plaintiffs' damages.

Proximate causation requires proof of both causation in fact and legal cause. Hurd v. Williamsburg County, 353 S.C. 596, 579 S.E.2d 136 (Ct. App. 2003) aff'd, 363 S.C. 421, 611 S.E.2d 488 (2005); see Oliver v. S.C. Dept. of Highways and Public Transportation, 309 S.C. 313, 422 S.E.2d 128 (1992).

Causation in fact is proven by establishing that the Plaintiff's injury would not have occurred but for the Defendants' negligence. Oliver, 309 S.C. at 316, 422 S.E.2d at 130. Legal cause is proven by establishing foreseeability. Oliver, 309 S.C. at 316, 422 S.E.2d at 131. Foreseeability is determined by looking at the natural and foreseeable consequences of the act complained of. Id; see also, Bramlette v. Charter-Medical-Columbia, 302 S.C. 68, 393 S.E.2d 914 (1990).

An injury or damage, therefore, is foreseeable if it is the natural and probable consequence of the breach of duty. See Bergstrom v. Palmetto Health Alliance, 352 S.C. 221, 573 S.E.2d 805 (Ct. App 2002). A negligent act or omission is a proximate cause of injury if, in a natural and continuous sequence of events, it produces the injury, and without it, the injury would not have occurred. See Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996) (emphasis added). Proximate cause is not the sole cause. Small v. Pioneer Mach., Inc., 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997). "Although 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 v. Joel, 410 S.C. 104, 763

S.E.2d 54, 61 (S.C. App., 2014), quoting Pope v. Heritage Cmtys., Inc., 395 S.C. 404, 416, 717 S.E.2d 765, 771 (Ct.App.2011).[11]

In the instant case, it was clearly foreseeable that a negligently drafted LLC agreement, which failed to properly set forth how the company would operate and make decisions, would lead to litigation about how the company was to operate and make decisions, especially when the LLC's purpose was protection for the members in the marketing and sale of the property forming the basis of this suit.

While the Court correctly concluded that the LLC formation documents created by Defendant were inconsistent with the intent of the formation of the LLC, it erred in finding that no action by Defendants proximately resulted in any damages to Plaintiffs. As correctly determined by Judge Hayes, "it appears the intention was that the LLC would be a member managed LLC with James Thomas Cato as General Manager." **1 R. p. 23** Order p. 16. Judge Hayes goes on to correctly conclude that "the LLC as ultimately formed left unclear as to how the LLC was to be managed." **1 R. p. 23** Order p. 16. Pitts failed in his charge of providing protection for Cato from the other family members and protection for the other family members from Cato through his negligent formation documents. **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, lines 11-25; 3 R. p. 1209, lines 1-23.**

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[11] The Tuten case is informative since the defendant lawyer in that case tried to shortcut the causal chain as the Defendants in this case have done by asserting a superseding or intervening cause. The Court of Appeals rejected that argument and found the root cause of the injury was the attorney's negligence.

failure is the true proximate cause of the dispute between the parties in the underlying partition action.

In fact, the evidence in the trial record demonstrates Marjorie Burton expressed a reasonable belief Cato could not enter into a binding contract for sale of the property without the express approval of the members[12] Marjorie Burton wrote Cato and specifically advised Cato he did not have the authority to unilaterally enter into any binding agreements and was only in a position to market the property to prospective purchasers. **4 R. p. 1688** ¶ #6. Marjorie Burton wrote in pertinent part,

> The letter allows you to act as a spokesperson for all the heirs .... and I just want to clarify that as general manager all of the heirs have granted you the ability only to negotiate and record any offers for the land on all of the heirs behalf; however, **any final decision** to sell or not to sell the areas ... or any of the property jointly held ... **still rests with all of the heirs coming to a unanimous decision** as to what should or should not be done with the property, and obviously doesn't rests(sic) solely with any one heir or individual. ... I wanted to make sure by accident you don't mistakenly proceed too far in the negotiating process without the proper authorization from the heirs. I for one have no desire nor do I cherish, any legal problems or lawsuits from any attorneys representing any developers thinking that somehow your speaking as the TE Cato LLC general manager somehow represents a legitimate offer on all of the heirs behalves as it relates to the property. **The last thing we all need, is a lawsuit from a developer's attorney that misunderstands your authority**.

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[12] The timing of the execution of documents in this case is important to a clear understanding of the depth of Defendants' failures. Prior to the execution of the binding "Amendment to Contract" on December 6, 2007, there was no legal obligation for the LLC to perform and sell the property to Thomasson.

4 R. p. 1688 ¶ 6. (emphasis added). The record demonstrates Pitts received that email and printed it for his file on August 15, 2007. **3 R. p. 1149 line 19 - p. 1150, line 1; 3 R. p. 1155, lines 10-16; 3 R. p. 1170, lines 5-12; 4 R. p. 1688**. On the other hand, Cato apparently believed, based upon his testimony and the exhibits, he had the unilateral authority to enter into a contract to sell the property without any input from the individual members as to pricing or other terms. **3 R. p. 995, line 15 - p. 996 line 10; 4 R. p. 1419.** In fact, Cato wrote "all the heirs have agreed that Tommy's turn has come to be in charge ..." **4 R. p. 1419** ¶ 6. This lack of clarity created a conflict between the Plaintiff and Cato that ultimately resulted in the underlying partition action.

On August 3, 2007, Cato unilaterally signed a letter of intent with the Thomasson group expressing a future conditional intent to sell the parcels for a sum of one million dollars ($1,000,000.00). **3 R. p. 1341.** This letter of intent was not a binding contract and contained no legal obligation on the part of the LLC to close on any portion of the property owned by the LLC. **3 R. p. 1018, line 25 - p. 1019, line 6; 3 R. p. 1147, lines 11-24; 3 R. p. 1148, lines 3-20.** As a result of the letter of intent, Joshua Vann, Esquire, conducted a title search of the property and discovered a flaw existed in the title as Defendants failed to convey the Old Roadbed the members owned into the LLC and purported to transfer into the LLC the New Roadbed the LLC members did not own. **3 R. p. 1005, lines 17-23; 3 R. p. 1006, lines 10-25; 3 R. p. 1007, lines 3-13; 3 R. p. 1021, lines 8-12; 3 R. p. 1239, lines 6-15.** Only after discovery of the flaw created by Defendants did Cato sign a legally binding contract on December 6, 2007 to sell the parcels to

Thomasson. **3 R. p. 1263, lines 3-10; 3 R. p. 1342.** It is important to note that until the execution of the "Amendment to Contract", the LLC was not obligated to sell the parcels to Thomasson. **3 R. p. 1148, lines 3-9.** The flaw in the LLC's deed was discovered several months prior to the execution of the "Amendment to Contract". **3 R. p. 1261, line 21 - p. 1262, line 8.** In fact, the Amendment to Contract specifically acknowledges the existence of the flaw in the LLC's deed. **3 R. p. 1342.** At any time prior to the execution of the Amendment to Contract, the LLC could have broken off negotiations with Thomasson. Instead, with full knowledge of the dispute among the heirs regarding the issue of authority to bind the LLC, and full knowledge of the flaw in the deed Pitts prepared, Pitts failed to act. **3 R. p. 1048, lines 6-25; 3 R. p. 1049, lines 1-9; 3 R. p. 1059, lines 1-6.** Pitts was the last clear chance to stop this proverbial train wreck and he again failed in his professional legal duties to his clients.

Because of the flaw in the LLC documents created by Defendants, Cato mistakenly believed he had the authority to enter into a binding contract and the Plaintiffs did not. This ambiguity in the formation documents formed the foundation and ultimately caused the fight between the Plaintiff and the other members of the LLC vis-a-vis the partition action.[13] This fight caused substantial damages to the LLC as well as Marjorie Burton through the expenditure of legal fees as well as a

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[13] Pitts represented the LLC and the other members of the LLC against the Trust in the partition action. Pitts billed the LLC for these services. **3 R. p. 1090, lines 17-20; 3 R. p. 1141, lines 18-23; 3 R. p. 1142, lines 9-25.** However, Pitts testified he never had any conversations with any of the other members of the LLC and never obtained any agreement to his representation of them in that action.

diminished valuation of the LLC property. **3 R. p. 1020, lines 5-6; 3 R. p. 1037, lines 8-15; 3 R. p. 1038, lines 6-9; 3 R. p. 1042, lines 9-12; 3 R. p. 1043, line 21 - p. 1044, line 2; 3 R. p. 1083, line 24 - p. 1084, line 2; 3 R. 1108, line 20 - p. 1109, line 17; 3 R. p. 1113, lines 6-14; 3 R. p. 1120, lines 6-14; 3 R. p. 1135, lines 1-4, 10-13; 3 R. p. 1211, lines 15-25; 4 R. p. 1421; 4 R. p. 1693; 4 R. p. 1702.** Pitts also stood to profit from this fight as he was billing the LLC for his legal services thereby incurring liability for Marjorie Burton and the LLC.[14] **3 R. p. 1198, lines 5-15, 23-25; 3 R. p. 1199; 3 R. p. 1200, lines 1-19; 3 R. p. 1201, lines 5-8; 3 R. p. 1202; 3 R. p. 1203, lines 1-11; 4 R. p. 1634.** Marjorie Burton was also required to retain legal counsel to defend against the claims of the partition action and other claims brought within that litigation. **3 R. p. 1108, line 20 - p. 1109, line 17; 3 R. p. 1211, lines 15-25; 4 R. p. 1421.** These legal costs would have been unnecessary had Pitts properly and competently created the LLC formation documents because Cato's authority would have been clearly defined for the members. As a result of Defendants' failures, Plaintiffs suffered damages in excess of Five Hundred Seventy Thousand Dollars ($570,000) through the expenditure of attorneys' fees and diminished value in the sale of the subject property.[15]

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[14] It is understood and acknowledged that Pitts never submitted a bill to the LLC for the partition action. However, the evidence demonstrates the LLC paid substantial legal fees to Lucy McDow, Esquire for her representation of the LLC and to Brian McCoy, Esquire, for his representation of the other members of the LLC. This division of representation following Pitts' withdrawal is another indication of Pitts' failures to understand the attorney-client relationship and conflicts.

[15] It is also interesting to note that despite Defendants' contention regarding the property valuation, Thomasson's willingness to pay ten thousand dollars

Pitts also held the keys to solving this problem during the course of debate among the members of the LLC. Pitts received at least two emails sent between the members indicating a significant dispute regarding the authority of the Manager to bind the LLC. **4 R. p. 1419, 4 R. p. 1688.** Marjorie Burton clearly asserted in emails to Cato, which Pitts received and placed into his file, her position that any binding agreement must be agreed upon by all members of the LLC. **4 R. p. 1419.** Such an understanding by Marjorie Burton was clearly reasonable in light of the internally conflicted and fatally flawed language created by Defendants. Cato responded to Marjorie Burton and advised that it was "Tommy's turn to be in charge" and that he could and would bind the LLC. **4 R. p. 1419.** Despite having direct actual knowledge of this dispute, Pitts did not contact Cato or Marjorie Burton to advise them regarding the issue of authority. In fact, Pitts remained silent and never had any contact with Marjorie Burton or any of the other heirs. **3 R. p. 1090, lines 17-20; 3 R. p. 1141, lines 18-23; 3 R. p. 1142, lines 9-25.** The record also demonstrates Joshua Vann, Esquire, specifically emailed Pitts regarding Cato's authority. Pitts patently failed to perform within the standard of care by drafting internally flawed documents that set the LLC's members up for a dispute regarding the sale of the real estate. Further, Pitts failed to act when he was put on notice of this dispute regarding the authority.

As a direct and proximate result of Defendants' failures, a dispute within the LLC was assured. When that dispute arose, Defendants turned a blind eye and

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($10,000.00) more than the agreed one million dollars ($1,000,000.00) sales price lends credence to the valuation questions repeatedly raised by Marjorie Burton.

failed to act. As a proximate result of Defendants' failures, the dispute matured into full-blown litigation causing Plaintiffs' damages in excess of five hundred seventy thousand dollars ($570,000.00).

Defendants' additional failures related to the deed documents also proximately caused the Plaintiffs' damages. Defendants were charged with creating a deed into the LLC for property the heirs jointly owned. **3 R. p. 979, lines 12-24; 3 R. p. 986, lines 7-11; 3 R. p. 1001, lines 18-20.** Instead, Defendants created a flawed and defective General Warranty Deed that left out property the heirs owned and included property they did not own. Defendants were charged with protecting Cato from the other heirs and the other heirs from Cato. **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, lines 11-25; 3 R. p. 1-23.** As a proximate result of the failure in the deed into the LLC, the foundation for future disputes was assured.

Defendants improperly attempt to shortcut the causal chain and blame the victim for her injury. However, the true genesis of the dispute in this case lies at the feet of the Defendants. **3 R. p. 1210, lines 10-15.** Had Defendants not breached their duties to Plaintiffs by improperly drafting the deed documents, there would have been no need for a quitclaim deed to be executed by Marjorie Burton. **3 R. p. 1210, lines 10-15; 3 R. p. 1248, lines 13-23; 3 R. p. 1261, lines 10-20.** In other words, had Defendants not been negligent in the preparation of the Deed into the LLC, there would have been no need for a quitclaim deed to address the roadbed issue. Pitts admitted during cross-examination that if the deed into the

LLC was initially correct, there would have been no need for a quitclaim deed. Pitts asserted in his testimony that drafting the deed properly at the start would have required "magic". **3 R. p. 1191, line 24 - p. 1192, line 5.** Professor Freeman correctly opined that no "magic" was necessary to conduct a title search. **3 R. p. 1234, lines 12-17.** Defendants' expert also admitted if the deed into the LLC had been done correctly on the front end there would have been no need for a quitclaim deed. **3 R. p. 1261, lines 10-19.** There may still have been litigation to the extent that Marjorie Burton could have decided to challenge the authority of Cato to enter into the contract and complete the sale, but Marjorie Burton would have made that choice. Instead, the choice was made for Marjorie Burton because the Defendants were negligent in the formation of the LLC, the drafting of the deed, and when Defendants filed the partition action against her. Marjorie Burton was forced into a position of responding to the asserted claims and asserting counterclaims as necessary to preserve its legal rights.[16] The litigation was entirely reactive to the actions and failures of the Defendants. Therefore, but for the negligence of the Defendants, there would have been no litigation and no damages to Marjorie Burton and the LLC.

The Court's Order also improperly characterizes the November 30, 2007 email as evidence of Marjorie Burton's recitation of her sole issues with the sale to Thomasson. Contrary to the Court's characterization, this single email is most

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[16] The Court's finding that Marjorie Burton is the proximate cause creates a circumstance where any person who is subject to misconduct by the negligent conduct of an attorney cannot defend themselves without risk of being blamed for their injury. This reasoning is much akin to blaming the victim of a crime for "looking rich", walking in the "wrong part of town", or being "too pretty".

clearly a settlement offer by Marjorie Burton to accept an arrangement to which she was not in agreement, and which she should have been able to address in the course of the LLC operations rather than through the partition action.[17] Even Plaintiff's expert witness admitted that the email could be characterized as a settlement offer. **3 R. P. 1266, lines 4-8.**

Had the LLC operating agreement been properly drafted, either Cato would have had the authority to act unilaterally in entering into the Amendment to Contract or, as set forth by the Court and believed by Marjorie Burton, the members would have been required to approve of any sale prior to entering into the binding Amendment to Contract. Because Defendants' creation of the LLC documents was so obtuse, inconsistent, and conflicted, it was inevitable a dispute would arise within the LLC with no recourse other than through the Courts. As such, the Defendants' created the perfect storm of conflict and then stood to profit from it when it hit shore by billing the LLC, of which Marjorie Burton was a member, for litigating the partition action against Marjorie Burton.

The Order also improperly asserts that eighty percent (80%) of the members of the LLC were in agreement regarding the sale of the parcels to Thomasson through the execution of the quitclaim deed. **3 R. p. 23** Order p. 13. It is pure speculation and conjecture for the Court to conclude this within the Order.

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[17] Nowhere in the November email cited by the Court does Marjorie Burton indicate it is a comprehensive catalog of all of the issues she has with the situation. Rather, it is one email in a long series of discourse that clearly constitutes an offer to compromise the wrongs she has been subjected to as a proximate result of Defendants' conduct.

While it is accepted the other members of the LLC executed the quitclaim deed, there are any number of reasons why this could have occurred including the inability to defend against the protracted litigation threatened, and then waged, by Defendants against Marjorie Burton.[18] In fact, as set forth within the record, Marjorie Burton expended considerable resources in defending against the partition action. **3 R. p. 1108, line 20 - p. 1109, line 17; 3 R. p. 1211, lines 15-25; 4 R. p. 1421.** Fortunately, for Marjorie Burton, she had the financial wherewithal to oppose the partition action and defend her rights under the law. It is just as possible, if not likely, that not every member of the LLC would have been in that position. Additionally, as discussed above, the willingness of another heir to resist the quitclaim deed would seemingly subject them to the same finding regarding proximate cause improperly placed upon the Plaintiffs in this case. Another possibility is that the other members were not interested in further engagement in the protracted ownership of the parcels and were resigned to their fate. Other than the testimony of Johnson and Cato, who represent only a thirty percent (30%) interest in the property, there is no evidence of the reasons the other members executed the quitclaim deed. **3 R. p. 1309; 3 R. p. 1691**. Therefore, there is no

[18] It is accepted that the caption of the partition action listed the LLC and its members, however, Defendant Pitts acted as the antagonist in filing this action against the Trust and persisting in litigating the issue even after being advised by Judge Alford to withdraw from the case. Further, Pitts testified he never had any contact with the members other than Cato. It is incomprehensible that Pitts acted as counsel for the other heirs in the partition action without any consent. This further demonstrates Pitts' complete lack of understanding of the formation of the attorney-client relationship.

evidentiary basis for the Court to find that eighty percent (80%) of members were in favor of the sale.

The Order also correctly notes that at the time of the creation of the LLC by Defendants, it was the intent of Marjorie Burton and the other heirs to sell their portion of the property. **1 R. p. 23** Order p. 2. However, the Court incorrectly concludes Marjorie Burton "improperly acted to thwart the intent of the LLC and its members". **1 R. p. 23** Order p. 13-14. Rather, Defendants' creation of internally inconsistent and flawed documents was the proximate cause of the conflict within the LLC resulting in the partition action. The evidence is that the heirs had a long history of unanimity in addressing the property. **3 R. p. 1127, lines 1-22.** Had Defendants competently created an operating agreement within the standard of care, the authority of the manager and the members would have been clearly conveyed and set forth within the formation documents. Marjorie Burton, and the other members, would have been able to determine at the outset the structure, organization, and authority of the arrangement. Marjorie Burton and the rest of the heirs, including Cato, would have had a clear understanding of the roles to be played and the authority of each. Instead, the documents prepared by Defendants failed to provide a consistent structure as required for the operations of the LLC, specifically including decision making authority in this case. As such, the dispute

between the Trust and the LLC would not have occurred but for the failures of the Defendants.[19]

The Court also concludes that nowhere in the November 30, 2007 email between Marjorie Burton and Cato is ambiguity cited as a reason the Trust would not sign the quitclaim deed. The Court uses this finding as support for its flawed conclusion the Defendants' failures were not the proximate cause of any damages. However, as discussed above, the Court's conclusion that the November 30, 2007 email was a conclusive catalog of issues is without evidentiary support. Rather, the evidence clearly supports the Plaintiffs' assertions of its claims against Defendants. The November 30, 2007 email cannot be read in a vacuum as done by the Court. The email is one of a multitude exchanged between the parties before, during, and after the dispute leading to the partition action. During this exchange, of which Pitts was aware, Plaintiffs clearly set forth issues regarding the valuation of the property, the authority of Cato to bind the LLC, and a host of other issues. **4 R. p. 1419, 4 R. p. 1688.** Cato, with Pitts' knowledge, went to great lengths to assure Marjorie Burton by email that everything he does is cleared through Pitts and that Pitts is monitoring his activities. **4 R. p. 1419.** For the Court to take a single email and determine it is dispositive of the proximate cause issue

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[19] Pitts testified he never had any conversation with any LLC member other than Cato. As such, the 'dispute' at the time of the filing of the partition action, if a dispute truly existed, was actually only between Cato, as manager, and Marjorie Burton. This fact requires one to question what authority Pitts had in acting to represent members other than Cato against Marjorie Burton if the members were not his clients. It also begs the question, assuming Pitts created a member-managed LLC, what authority did Pitts have to pursue the partition action without first specifically consulting with and receiving authorization from the other members.

is patently without evidentiary support and fails to consider the entirety of the trial record. It is a clear abuse of the Court's discretion and requires reversal.

Clearly, there was an attorney-client relationship between Pitts and LLC. **4 R. p. 1636**. As the court found, Pitts had a duty and breached that duty to Plaintiffs. **1 R. p. 23** Order pp. 15, 16. Just like the incident that derailed the train and caused all of its damage so too did Defendant's negligence proximately cause all of Plaintiff's damages in this case. For the court to find otherwise was error and should be reversed.

ARGUMENT:
THE TRIAL ERRED WHEN IT HELD CONTRA ESTABLISHED CASE LAW AND THE CLEAR FACTUAL RECORD THAT THERE WAS NO ATTORNEY – CLIENT RELATIONSHIP BETWEEN RESPONDENTS AND APPELLANT TRUST

The Trial Court erred in failing to find an Attorney-Client relationship existed between the Defendants and the Plaintiffs. An attorney-client relationship may arise in a variety of situations even without an engagement agreement and even if the attorney fails to recognize the existence of the relationship. In Re Carter, 400 S.C. 170, 733 S.E.2d 897 (2012). An attorney-client relationship is established in one of the following manners:

1. A Contract;
2. Express or implied acts of an agent;
3. Undertaking legal services on someone's behalf.

See Ethics Advisory Opinion 99-13 (1999), Ethics Advisory Opinion 00-17 (2000); Matter of Morgan, 288 S.C. 401, 343 S.E.2d 29 (1986).

The court in Matter of Morgan, 288 S.C. 401, 343 S.E.2d 29 (1986), a lawyer disciplinary matter, found an attorney-client relationship despite the respondent's stringent protests to the contrary. There, respondent was employed to effect the sale of a home for his clients, Dr. Tate and his four daughters.

Under the agreement, respondent would receive 8% of the sales price as his fee. Morgan, 288 S.C. at 402, 343 S.E.2d at 30. Throughout the transaction prior to signing a contract of sale for the home, respondent dealt solely with the father, Dr. Tate. Respondent did not have contact with Tate's daughters. The eventual contract provided for respondent to receive money from the sale. Id.

The court held that respondent clearly tried to represent three sets of interests: the sellers', the buyers', and his own. Id. While the court found it obvious that respondent had formed an attorney-client relationship with Dr. Tate, most importantly it also found that respondent had an attorney client relationship with the minor daughter with whom he had no contact during the transaction. The court held:

> Equally without merit is [r]espondent's denial of any representation of the minor daughter. Respondent was retained to effect a sale of the residence, one-fourth of which belonged to the minor. Had the sale to the Spaughs been consummated, the minor was responsible for her portion of [r]espondent's fee.

Morgan, 288 S.C. at 404, 343 S.E.2d at 31.

Thus, the South Carolina Supreme Court has found an attorney-client relationship existed despite the attorney not having any direct contact with the minor child and even though the minor child only *would have* paid respondent *if* the sale had been consummated. Clearly the court's reasoning recognizes the

daughters had a reasonable expectation respondent was their attorney and acting on their behalf despite not having any contact from him. (emphasis added). See also, In Re Pyatt, 280 S.C. 302, 312 S.E.2d 553 (1984) (recognizing that an attorney could and had formed a relationship with multiple sellers of a property based on the expectations of the sellers involved).

South Carolina Ethics Advisory Committee opinions also address the establishment of the attorney-client relationship. The relevant opinions focus on the underlying legal work performed and the expectations of the client. Ethics Advisory Opinion 99-13 cites Morgan, finding an attorney-client relationship can be formed "if an attorney performs work on behalf of an individual and fails to inform the client that no such relationship is intended." Ethics Advisory Opinion 99-13 (1999).

In 2000, the Ethics Advisory Committee provided additional clarification of this issue in opinion 00-17. Therein, the Committee sets forth:

> [w]hether an attorney-client relationship is created is a question of fact...the focus must be on the *subjective expectations of the would-be clients* such that their individual beliefs and reliance are safeguarded...

Ethics Advisory Opinion 00-17 (2000). (emphasis added).

The Committee makes further reference to the South Carolina Rules of Professional Conduct, Rule 1.7 (Comment 32), Rule 407, SCACR, noting an attorney can represent multiple parties in an organization or to a transaction.

An attorney-client relationship may arise in a variety of situations even without an engagement agreement and even if the attorney fails to recognize the existence of the relationship. In Re Carter, 400 S.C. 170, 733 S.E.2d 897 (2012). An express contract is not required to create an attorney-client relationship. Rather, the relationship may even be established through preliminary consultations, although the attorney is never formally retained and no fee is ever paid. See Bays v. Theron, 418 Mass. 685, 639 N.E.2d 720 (1994). The relationship continues until such time as the attorney provides notice to the client that they are no longer representing the client. Tuten v. Joel, 410 S.C. 104, 763 S.E.2d 54 (S.C. App., 2014) ("At a minimum, an attorney must communicate to his client his desire to withdraw from their attorney-client relationship in such a manner that the client understands her attorney will no longer represent her. If the attorney does not take such action, the attorney-client relationship continues.").

Thus, these cases and opinions demonstrate, as in the instant case, how easy it is to form the attorney-client relationship based upon the legal work undertaken for the client and the expectations of the client.

The record in the instant case clearly demonstrates an attorney-client relationship existed between both Plaintiffs and the Defendants. The Court improperly failed to consider the irrefutable evidence of an attorney-client relationship between Defendants and the LLC. **4 R. p. 1636**. The record clearly demonstrates Defendant Pitts acted as an attorney for the LLC and to its individual

members both during the initial document creation process and subsequently during the negotiations and transactions.

During discovery in this case, Defendants provided discovery responses that clearly identified the client as the LLC. **4 R. p. 1636; 3 R. p. 1187, lines 7-16**. Further, Pitts acted on behalf of the LLC and held himself out as representing the LLC. The record clearly demonstrates the buyer's attorney, Josh Vann, Esquire, emailed Pitts regarding the real estate closing. **3 R. p. 1162 - p 1165, lines 1-14; 4 R. p. 1687.** Vann's email requested Pitts review the closing documents for the sale of the LLC property to Thomasson. Id. Vann's email also refers to Pitts as the LLC's attorney. Id. Pitts and Vann discussed the closing documents and Pitts approved them on behalf of the LLC. Id. The record further demonstrates Pitts maintained contact with the LLC's manager, monitored communications, and provided consultations and advice to the manager. **3 R. p. 991, lines 7-14, 21-23; 3 R. p. 1073, lines 3-25; 3 R. p. 1074, lines 9-16; 3 R. p. 1075, lines 1-3; 3 R. p. 1076, line 18 - p. 1077, line 3, 3 R. p. 1077, line 15 - p. 1078, line 9, 3 R. p. 1078, lines 19-22; 3 R. p. 1079, lines 18-21; 3 R. p. 1416; 3 R. p. 1419; 3 R. p. 1688**.

It is undeniable that inherent in this attorney-client relationship with the LLC is also an attorney-client relationship with Marjorie Burton. The record shows Pitts utilized Cato as his agent to have the deed and LLC organizational documents

explained to and executed by the various members of the LLC.[20] **3 R. p. 1143, lines 3-10; 3 R. p. 1144, lines 20-23.** Following execution of the documents and formation of the LLC, Pitts continued to have an attorney-client relationship with the members, including Marjorie Burton. See In re Morgan, *supra*. Pitts knew of Cato's representations to the members that everything Cato did was reviewed and approved by Pitts. **4 R. p. 1419, 3 R. p. 1688.** Pitts did not disavow these representations at any time to any member of the LLC.[21] See Tuten v. Joel, *supra*.

The evidence in the record also demonstrates Marjorie Burton had a contemporaneous, and reasonable, belief Pitts represented her. Contrary to Defendants' assertions, Marjorie Burton's April 28, 2009 motion to disqualify Pitts

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[20] Pitts should not be able to avoid creation of an attorney-client relationship by sending out Cato as his agent to execute the Deed and formation documents then denying any such relationship existed because he was just preparing the documents as a mere scrivener. **3 R. p. 1208, lines 7-25; 3 R. p. 1209, lines 1-23.** This Court has repeatedly rejected this scheme to avoid responsibility by attorneys. See State v. Buyers Service Co., Inc., 292 S.C. 426, 434, 357 S.E.2d 15 (S.C., 1987)("We are convinced that real estate and mortgage loan closings should be conducted only under the supervision of attorneys, who have the ability to furnish their clients legal advice should the need arise and fall under the regulatory rules of this court. Again, protection of the public is of paramount concern."), Inglese v. Beal, 742 S.E.2d 687, 403 S.C. 290 (S.C. App., 2013) ("In South Carolina, all real estate closings must be supervised by an attorney"), and Matrix Financial Serv. Corp.. v. Frazer, 394 S.C. 134, 714 S.E.2d 532 (S.C., 2011) ("The unauthorized practice of law is inherently prejudicial to not only the parties involved in the instant transaction but also to the public at large ...."). In fact, in light of the record it is likely that Pitts participated in the unauthorized practice of law during the process of the deed into the LLC by sending Cato to explain the deed documents to the heirs. In re Lattimore, 361 S.C. 126, 604 S.E.2d 369 (S.C. 2004).

[21] Pitts never prepared an engagement letter, fee agreement, conflict disclosure, or conflict waiver for any of his clients in this case. **3 R. p. 1204, line 25 - p. 1205, line 18; 3 R. p. 1206, lines 2-5; 3 R. p. 1207, lines 6-10.**

in the underlying partition action demonstrates Marjorie Burton's belief Pitts was her attorney in the underlying formation and subsequent operation of the LLC. **5 R. p. 1913.** That motion was filed roughly twelve months prior to the instant civil action being filed against Defendants.[22] **4 R. p. 1913; 1 R. p. 57**. Had Marjorie Burton not believed Pitts was her attorney, she would not have moved to disqualify him based upon the conflict created by suing a former client pursuant to Rule 1.7. **3 R. p. 1216, line 10 - p. 1217, line 1; 3 R. p. 1217, lines 15-17; 3 R. p. 1218, lines 2-21; 5 R. p. 1913.** Regardless of how the motion was decided, even Pitts acknowledged Judge Alford recommended he withdraw from the matter. **3 R. p. 1211, lines 2-7; 3 R. p. 1219, lines 10-16, 3 R. p. 1220, line 9 - p. 1221, line 11; 3 R. p. 1236, lines 5-25; 3 R. p. 1237, lines 1-4.** The only logical conclusion regarding the record is that Judge Alford recognized the conflict and provided Pitts with the opportunity to voluntarily withdraw from the matter.[23] Judge Alford's denial of the motion "at this time" adds further credence to Pitts' testimony he was advised to withdraw from the case. **5 R. p. 1940**. The record clearly demonstrates an attorney-client relationship existed between Defendants and Marjorie Burton. Further, Pitts had an attorney-client relationship with the LLC. As such, the trial

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[22] Contrary to Judge Hayes's Order, and in keeping with the expert opinions provided by Professor John Freeman, the instant suit is also strong evidence of the subjective belief of Marjorie Burton that Pitts was her attorney for the purpose of the deed transfers, the LLC formation, and the LLC operations.

[23] In the instant case, Judge Hayes properly concluded that the Alford order regarding the motion to disqualify in the partition action was equivocal and did not substantively decide the issue.

court's finding of no attorney-client relationship and no proximate case was error and must be reversed.

ARGUMENT:
THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT HELD THAT THE LLC'S CLAIMS WERE BARRED BY A STATUTE OF LIMITATIONS DATE OF OCTOBER 27, 2010 WHEN THE LAWSUIT WAS FILED ON MAY 27, 2010

The Trial Court bent logic and failed to follow the law to come to its conclusion that a complaint filed before the statute of limitations expired was time barred. To reach this conclusion, the Trial Court: (1) failed to identify the filing date of the complaint in relation to the statute of limitations and (2) failed to review the allegations of the pending complaint and instead, improperly considered a denial of a motion to amend the complaint. See **1 R. p. 23** Order p. 9 -10.

Respectfully, the Trial Court was incorrect, as (1) the Complaint was filed prior to the statute of limitations running, (2) denial of the motion to amend does not vitiate those allegations in the complaint properly before the court which were inclusive of the LLC's claims, and (3) the pending complaint coupled with the assignment preserves the LLC's claims regardless of the LLC's dissolution.[24]

A. The Statute of Limitation on the LLC's claims had not run.[25]

As an initial matter, the Court found that the statute of limitations for the LLC's causes of action ran on or before October 21, 2010. **1 R. p. 23** Order p. 9

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[24] To the extent that the Trial Court held that the LLC had not suffered a proximately caused damage, see *infra* at 19-26.

[25] Respondents never pled the statute of limitations in their answer and the matter should have precluded from argument on this basis alone as it is an affirmative defense, See S. C.R.Civ. P. Rule 8 and Gillman v. City of Beaufort, 368 S.C. 24, 28, 627 S.E.2d 746, 748 (Ct. App. 2006)

("This exact date is unclear to the Court, but this issue surfaced at the latest by October 22, 2007 . . ."). The instant lawsuit was filed on May 27, 2010. **1 R. p. 57.** The statute of limitations was met as it was filed within three years of the date that the Court held the parties knew or should have known of the cause of action. See S.C. Code Ann. § 15-3-530 (5). Respectfully, the Trial Court was incorrect by its own calendaring as the complaint was filed before the Trial Court found the statute ran.[26]

B. The Pending Complaint has allegations sufficient to encompass the LLC's damages and therefore the motion to amend was not necessary to bring claims already in the Complaint.

The Trial Court held that the denial of a motion to amend the complaint precluded recovery for the LLC's damages. **1 R. p. 23** Order p. 6. Such is not the case as the pending complaint contained allegations inclusive of the LLC's damages. The pending complaint stated in relevant part:

> 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.
>
> * * *
>
> 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.
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> * * *

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[26] Though the Trial Court identified the date the statute of limitations began to run for the improper deed, the Trial Court did not address the date that the statute of limitations regarding the negligence in the formation of the LLC began.

> 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.

1 R. p. 57. The Trial Court failed to review the complaint in its entirety, as a whole, and liberally construed. See Doe ex rel. Legal Guardian v. Barnwell Sch. Dist. 45, 369 S.C. 659, 663, 633 S.E.2d 518, 520 (Ct. App. 2006) (In construing a complaint, however, the court must review the entire pleading."); Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 321, 701 S.E.2d 39, 44 (Ct. App. 2010) ("Pleadings in a case should be construed liberally so that substantial justice is done between the parties"). When taken as a whole, the pending complaint contained allegations sufficient to hold Defendant accountable for the LLC's damages. The Court's holding otherwise is clearly in error.[27]

ARGUMENT:
DISSOLUTION OF THE LLC IS NOT RELEVANT TO THE CAUSES OF ACTION BEFORE THE TRIAL COURT

The Trial Court erroneously held that the dissolution of the LLC precludes this litigation. See **1 R. p. 23** Order p. 10. Dissolution of the LLC is irrelevant for the recovery of damages caused to the LLC because the pending complaint (1) contained allegations for the recovery of the LLC's damages, (2) recovery through

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[27] The Trial Court even recognized that the allegations were sufficient to include the LLC's damages when it held: "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." See **1 R. p. 23** Order at p. 10. As the owner of the litigation asset, Appellant Trust had already filed its claim for negligence on May 27, 2010 and no statute of limitations issue could be asserted. Respectfully, the Trial Court ruled in error and without reasonable basis of fact unsupported by the record.

the individual cause of action, and (3) ultimately assignment of the claims as well as the derivative action. Appellant took all prudent steps and these steps are sufficient to claim the LLC's damages.

For example, paragraph 23 properly incorporated the individual causes of action brought by the Trust for the LLC's damages. See S.C.R. Civ. P. Rule 10(c) ("Statements in a pleading may be adopted by reference in a different part of the same pleading . . ."). When the allegations are read in their entirety inclusive of one another, the individual Plaintiff has asserted causes of action to recover for LLC's damages through the additional allegations contained in paragraphs 24-28. These damages were properly before the court through the derivative cause of action as well as through the assignment into the individual cause of action. The Court had no legal basis to bar these claims.

Rather, the Trial Court held through a convoluted argument that the dissolution of the LLC somehow acts to prevent the assigned claims to be pled in the pending complaint, a complaint that had been filed since 2010. Respondents were aware of the claims to recover the damages to the LLC for over four years. There is no legal justification for dismissing these claims.

Appellants undertook all necessary actions to ensure that their lawsuit against the Respondents could go forward including: (1) filing an individual and derivative lawsuit against Respondents within the statute of limitations that included the damages to the LLC, (2) obtaining an assignment of all rights that

LLC had to a derivative lawsuit[28] and (3) prosecuting LLC's damages against these Respondents.

ARGUMENT:
THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION TO AMEND THE COMPLAINT WHEN THE PROPOSED AMENDED COMPLAINT DID NOT RAISE ANY NEW ISSUES AGAINST THE RESPONDENTS.

It is well established that leave to amend pursuant to S.C.R. Civ. P. Rule 15(a), shall be liberally and freely given when justice so requires and does not prejudice any other party. See Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 607 S.E.2d 711 (Ct. App. 2005). Specifically, the prejudice courts look to under Rule 15 is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it. Id.; Tanner v. Florence County Treasurer, 336 S.C. 552, 521 S.E.2d 153 (1999); Duncan v. CRS Sirrine Engineers, Inc., 337 S.C. 537, 524 S.E.2d 115 (Ct. App. 1999). 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, 336 S.C. at 558–59, 521 S.E.2d at 156 (1999).

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[28] The Trial Court properly held that the issue certified in Skipper v. Ace Prop. & Cas. Ins. Co., 2014 WL 4700220 (D.S.C. Sept. 19, 2014) (decided July 15, 2015 and after the Trial Court Order) was a separate and distinct issue. See **1 R. p. 23** Order p. 7, In Skipper, the South Carolina Supreme Court held that "Accordingly, in South Carolina, the assignment of a legal malpractice claim between adversaries in litigation in which the alleged malpractice arose is prohibited." (emphasis added) Skipper v. ACE Prop. & Cas. Ins. Co., 413 S.C. 33, 775 S.E.2d 37, 39 (2015). As the Trial Court found, here, there is no assignment of a legal malpractice claim between adversaries in litigation in which the alleged malpractice arose: "In the instant action, Plaintiff's claim is not based on any legal malpractice on behalf of Defendants by virtue of the Partition litigation itself. 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." See **1 R. p. 23** Order p. 7.

To demonstrate how liberally courts favor amendments in the interest of justice, the court in Forrester v. Smith & Steele Builders, Inc., 295 S.C. 504, 507-08, 369 S.E.2d 156, 158 (Ct. App. 1988), elucidated that "although the drafters of our current rules of civil procedure modified Federal Rule 15(a) by adding the requirement that an amendment will not be allowed if it prejudices the other party, *this language should not be considered a new and additional restraint on the power of a court to allow an amendment.*" Forrester, 295 S.C. at 506, 369 S.E.2d at 158. (emphasis added). See also, Hughes v. Water World Water Slide, Inc., 314 S.C. 211, 442 S.E.2d 584 (1994) (holding that "Rule 8(f), SCRCP, requires that 'all pleadings shall be so construed to do substantial justice to all parties.' We agree with the committee note...that Rule 8(f), SCRCP, is applicable and that the rules should be liberally construed."). Unless there is a substantial reason to deny leave to amend, the discretion of the court is not broad enough to permit denial. Id. In the absence of a proper reason, such as bad faith, undue delay, or prejudice, a denial of leave to amend is an abuse of discretion. It is the responsibility of a party opposing an amendment to establish prejudice. Shelton v. Southern Ry. Co., 86 S.C. 98, 67 S.E. 899 (1910).

Respectfully, the Trial Court misunderstood the pending complaint and the impact amendment of it would have. The original complaint in the matter contained appropriate allegations through its derivative and individual causes of action to place Respondents on notice of the claims. The amendment merely clarified these causes of action in light of the assignment made by the LLC to the Trust.

First, the Amended Complaint did not seek to add Pitts and Morton & Gettys. Rather, it sought to add Joshua Vann, Esquire and Morton & Gettys, Joshua Vann being an attorney employed with the law firm Morton & Gettys.

This was necessary to meet the ends of justice because it was not until Mr. Cato's deposition that Plaintiff, Marjorie Burton, became aware that, in fact, it was Mr. Vann's involvement in the negotiation and sale of the subject property to Thomasson, and possibly the sole attorney who advised Cato regarding the quitclaim deeds, the Amendment to Contract, and the closing of the sale of the Areas. Ultimately, Marjorie Burton became aware that Vann, alone or in addition to attorney Pitts, failed to properly advise the LLC's general manager and its individual members as to the sale and requirements thereto, including Marjorie Burton. Thus, the crux of this proposed amendment was to better define the already existing claims based on the assignment agreement that assigned the LLC's claims to Plaintiff.

The proposed amendment squares directly with the interests of justice that the rules, specifically S.C.R. Civ. P. Rule 15, promote. Marjorie Burton did not learn of the roles of these additional parties until Cato's deposition in 2010. Moreover, the Plaintiff did not have standing to bring these claims outside of the derivative cause of action until the assignment from the LLC to the Plaintiff in 2010. Therefore, the interests of justice required allowing the proposed amendment to the Complaint and by doing so place any claims inside of the time limits provided by the Statute of Limitations.

Regarding prejudice, none of the Defendants, named or proposed, would have been prejudiced. Here, the current Defendants, Pitts and Robinson, Bradshaw & Hinson, as well as the proposed new defendants, Joshua Vann and Morton & Gettys, were all on notice of the claims against them. As set forth below, none of the claims and allegations substantively changed from the original Complaint to the proposed Amended Complaint.

As the same allegations and claims exist, all defendants were on notice of the claims against them. The original Complaint contains two causes of action:

1. Legal Malpractice as to Marjorie Burton, or, in the alternative, Professional Negligence; and
2. Legal Malpractice as to T.E. Cato Estate, LLC, or, in the alternative, Professional Negligence.

The proposed amendment simply makes the causes of action more specific based on the assignment. The proposed amended Complaint reiterates the necessary allegations of the same causes of action, making them specific to the Plaintiff, in the form of the members of T.E. Cato Estate, LLC or Marjorie Burton as Trustee. This is necessary only because of the assignment of claims made to Marjorie Burton at the settlement of the partition action. Only at the time the claims were assigned did the Plaintiff receive standing outside of the derivative action to assert the claims, and such an amendment was necessary to

fully and justly adjudicate this matter.[29] In the same vein, the proposed Amended Complaint sets forth the necessary allegations against Vann and Morton & Gettys, again based on the assignment of the claims. All of these allegations and causes of actions are substantively the same as the original Complaint. Thus, there were no substantial reason to deny the Motion to Amend, and the Trial Court abused its discretion in so doing.

Moreover, at the time of this hearing on the Motion to Amend, the parties were only in the discovery phase. They were not even at the trial phase. Thus, the current and proposed new defendants would have had ample time and opportunity to properly build a defense and defend the claims against them. .

Courts can abuse their discretion in deciding to deny a motion to amend, and here the Court did. Despite the fact that the analysis in the instant case is found properly under S.C.R. Civ. P. Rule 15(A), a comparison to S.C.R. Civ. P. Rule 15(b) is illustrative as to how the Trial Court abused its discretion here, and was therefore in error and should be reversed. S.C.R. Civ. P. Rule 15(b), looks to situations where a complaint must be amended based on evidence brought forth *at trial*. There, even when a case is at the trial stage, far beyond where this case was at the time of the hearing before Judge Hayes on the motion to amend, the court will go so far as to stop the proceedings and allow a continuance to allow the party time to meet the amendment as opposed to denying the motion to

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[29] The Appellant Trust had at least four ways to recover its claims against the Respondents: a derivative action, the original individual cause of action, an assignment, or an amended complaint. Respectfully, the Trial Court has allowed a wrong to remain uncorrected and committed reversible error when it failed to allow any of the four acceptable methods for recovery of the LLC's damages.

amend. Even recognizing some prejudice at that stage of the proceedings, cases under Rule 15(b) still favor granting a motion to amend. See Ball v. Canadian American Express, 314 S.C. 272, 442 S.E.2d 620 (Ct. App. 1994).

The Trial Court simply based its Order denying Plaintiffs' Motion to Amend on the fact that Defendants argue these claims could have been known in 2007 and thus would fall beyond the Statute of Limitations.

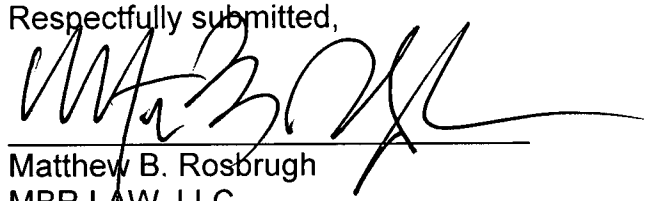
The Trial Court did not have a substantial reason for its denial of the Motion to Amend. The court should not have ruled on any defenses or Laches at this stage of the case. Instead, the amendment should have been permitted, according to the Rules of Civil Procedure. The parties, at the appropriate time, would have had the opportunities to assert these defenses. The rules permit, and frankly anticipate, that justice sometimes requires amendments. Thus exists an extensive body of case law liberally allowing amendments such as this one. The Trial Court simply had no substantial basis for denying Plaintiffs' motion. Based on the stage of the proceedings, the evidence, and spirit of Rule 15, SCRCP, the Trial Court clearly abused its discretion in denying the Plaintiffs' Motion to Amend, and should be reversed.

CONCLUSION

The record is clear that Respondents/Defendants owed and violated a duty to Appellants/Plaintiffs as professionals, and specifically as Appellants'/Plaintiffs' attorneys. Every damage complained of in this matter flowed directly and proximately from the negligence of the Respondents/Defendants in forming the LLC. Thus, proximately caused damages should have been found and awarded

on each of Appellants' claims. The Trial Court committed reversible error in not so finding. Based on the above discussed law and facts, Appellants respectfully request this Court to reverse the Trial Court as set forth herein.

Respectfully submitted,



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March 14, 2016

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
1220 Senate Street
Columbia, SC 29201

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