

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

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Opinion No. 5416 (S.C. Ct. App. filed June 15, 2016) S.C. SUPREME COURT

Allen Patterson, Steve Tilton, Richard Sendler,
Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis,
Michel Njeri, Allen Patterson Residential LLC, Tilton
Group, Sendler Construction Co., Inc., Privette Enterprises,
Ellis Construction Co., Inc., The Barry Davis Company, Inc.,
Great Southern Homes, and J. Carter, LLC, on behalf of
themselves and others similarly situated.....Petitioners,

v.

Herb Witter, Colin Campbell, Eddie Weaver,
Tom Markovich, Keith Smith, Jim Gregorie,
individually and as Trustees of the South Carolina
Home Builders Self Insurers Fund, and the South Carolina
Home Builders Self Insurers Fund.....Respondents.

APPENDIX – VOLUME II

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**Minutes of the Board of Trustees
South Carolina Home Builders Self-Insurers Fund
May 4, 2011**

Board members present were Herb Witter, Chairman, Colin Campbell, Vice Chairman, John Curl, Jim Gregorie, Keith Smith, Eddie Weaver, Tom Markovich and David Gully.

Staff Present was Jeff Ranew.

The meeting was called to order by Herb Witter.

Keith Smith moved that the minutes for the April meeting be approved. John Curl seconded the motion. The minutes were unanimously approved.

Ranew presented the departmental reports on behalf of the managers. He updated the group on the progress of the development of the mutual insurance company and reviewed the proposed timeline for completion of key tasks leading to the proposed start date of July 1, 2011.

A discussion was held regarding an OSHA initiative to strengthen fall protection measures, including specific written plans for jobsites where certain criteria cannot be met, i.e. guardrails and harnessing. Plans will be required only when the above criteria are not met.

The meeting was adjourned.

Jeff Ranew

From: Smith, W [WSmith@wcc.sc.gov]
Sent: Monday, May 23, 2011 3:46 PM
To: Jeff Ranew
Cc: Fickle, Brad
Subject: Fund Closure

Hello Jeff! This email is in follow-up to our meeting this past Friday, May 20, 2011, and our analysis of the supporting data you provided. In response to your request we have approved the release of \$5 million in non-pledged assets of the SC Home Builders Self-Insurers Fund to be used solely to capitalize the SC Builders Insurance Group, Inc., in conjunction with the closure of the self-insured fund. It is understood that the fund will cease accepting new members effective July 1, 2011 and will become no longer self-insured for workers' compensation in South Carolina effective January 1, 2012. The outstanding liabilities of the fund at the time of closure, January 1, 2012, will remain the responsibility of the self-insured fund and its membership under joint and several liability. The fund is required to provide a final audited financial statement following closure and will continue to provide the Commissions Form 11, Fund Quarterly Financial Report, until further notice. The fund will also be required to comply with Self-Insurance Tax and Second Injury Fund Assessment requirements following the funds closure. If I can be of further assistance please advise. WC Smith, Director, Self-Insurance, SCWCC



State of South Carolina

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Workers' Compensation Commission

August 4, 2011

Mr. Jeff Ranew
Administrator
South Carolina Home Builders SIF
1370 Browning Road, Suite 130
Columbia, SC 29210

Re: Distribution of member dividends

Dear Mr. Ranew:

The purpose of this letter is to address the matter of distribution of member dividends of self-insurance funds operating in South Carolina.

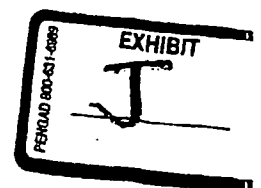
Pursuant to Chapter 67-1504 of the South Carolina Workers' Compensation Commission Regulations no self-insured fund may distribute member dividends without prior review and approval by the South Carolina Workers' Compensation Commission's Self-Insurance Division. A fund wishing to distribute member dividends will submit a current financial statement, a detailed plan including the proposed methodology for calculation of individual member distributions, and include an independent actuarially derived loss reserve analysis, including a provision for loss adjustment expense, IBNR, and applicable taxes and fees. The study must demonstrate that the distribution of dividends will not impair or diminish the financial integrity of the fund.

Please be advised that even if such plan is approved by the Commission's Self-Insurance Division, the members of the fund remain jointly and severally liable for all claims and related liabilities that may later arise which were not contemplated in the actuarial study. Should assessment of the members become necessary it will be the responsibility of the fund's board of trustees to submit a plan to cure the deficiency which will include an independent actuarially based study of liabilities, and a provision for additional funding through assessment sufficient to return the fund to an acceptable surplus. Failure to do so would result in the Commission's Self-Insurance Division imposing a mandatory assessment of the funds membership and the loss of the fund's self-insurance privileges.

Sincerely,

A handwritten signature in dark ink, appearing to read "W.C. Smith, III".

W.C. Smith, III, CPCU, ARM
Director, Self Insurance



SIF 146

ROA Supp000135
APP000502

[Handwritten signature]
1/25/12 *[Handwritten signature]*
1.23.2012

AGREEMENT AND DECLARATION OF TRUST
CREATING THE
SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND

THIS AGREEMENT, made and entered into this 27th day of September, 1995 by and between the Home Builders Association of South Carolina, Inc., a corporation not for profit, organized and existing under and by virtue of the laws of the State of South Carolina, hereinafter referred to as the "Settlor", and a Board of Trustees, hereinafter referred to as the "Trustees", has been designated for the purposes, among others, of directing the affairs of the Fund.

WITNESSETH:

WHEREAS, the Settlor and the Trustees intend to apply to the South Carolina Workers' Compensation Commission for the establishment of a group self insurers fund pursuant to South Carolina statutes for the benefit of the members of the Home Builders Association of South Carolina, Inc. and;

WHEREAS, the establishment of a group self insurers fund for the purpose of satisfying an employers' obligation under the South Carolina Workers' Compensation Act would be in the best interest of the members of the Home Builders Association of South Carolina, Inc. and;

WHEREAS, it is considered to be in the best interest of the members of the Home Builders Association of South Carolina, Inc. that an Agreement and Declaration of Trust fully setting forth the duties and responsibilities of the Trustees be entered into;



NOW, THEREFORE, for and in consideration of the mutual covenants and agreements herein contained, the SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND is hereby established as follows:

ARTICLE I

DEFINITIONS

Fund - The group self insurers fund or funds which are hereby created for the purposes set forth herein.

Indemnity Agreement - The Indemnity Agreement which shall be filed by the SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND pursuant to the Rules for Self Insurers as issued by the South Carolina Workers' Compensation Commission.

*6/11/12
270-2512*
Member - A company, firm, corporation, individual partnership or other legal entity involved in on-site ~~home~~ construction.

Rules for Self-Insurers - The Rules for Self Insurers under the South Carolina Workers' Compensation Act as amended from time to time and administered by the South Carolina Workers' Compensation Commission.

Service Agent - Any individual, co-partnership, corporation, firm or other legal entity engaged in the business of servicing approved workers' compensation self insurance programs which has made application to, and been approved by, the South Carolina Workers' Compensation Commission.

Trustees - The Trustees appointed to serve on the Board of Trustees of this Fund as provided herein.

ARTICLE II

CREATION OF THE TRUST

There is hereby established and created a Trust Fund which shall be known as the SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND and the Trustees thereof may hold property, enter into contracts and in all matters as hereinafter set forth act in behalf of the Trust Fund in that name. This Trust Fund shall be used for the purposes as hereinafter set forth.

ARTICLE III

PURPOSE

This Trust Agreement is made and executed for the purpose of meeting and fulfilling an employer's obligations and liabilities under the South Carolina Workers' Compensation Act; to form an overall self insurers fund pursuant to Laws of the State of South Carolina, which provides for workers' compensation coverage and benefits; to provide, as appropriate, allowable advance discounts on premium payments made by employers for workers' compensation coverage; and to minimize the cost of providing workers' compensation coverage by developing and refining specialized claim services and a loss prevention program within the South Carolina Home Building industry.

ARTICLE IV
DESIGNATION OF TRUSTEES

SECTION 1. NUMBER AND ELIGIBILITY OF TRUSTEES.

The operation and administration of the Trust Fund shall be the joint responsibility of a Board of Trustees consisting of a number of Trustees of not less five (5) nor more than nine (9). Trustees shall be a Chairman and Vice Chairman. Trustees shall be elected by the participating members by a mail ballot. The Trustees shall elect from one of their number one Trustee to serve as Chairman. ^{MEMBERS OF THE BUILDING INDUSTRY} Only ~~builders~~^{builders} domiciled in South Carolina whose businesses participate in the Trust, or their employees, may serve as Trustees

WLS
2-16-2014

SECTION 2. RESIGNATION OF TRUSTEES.

Any Trustee herein named, or any successor Trustee, may resign at any time, with or without cause, by giving not less than sixty (60) days written notice of the intention to so resign to the Board of Trustees. Prior to the effective date of such resignation the Board of Trustees may nominate a successor Trustee to complete the term of the resigned Trustee. No successor Trustee shall be liable or responsible for any acts or defaults of any predecessor Trustee, or for any losses or expenses resulting from or occasioned by anything done or neglected to be done in the administration of the Trust Fund prior to his becoming a Trustee or subsequent to his resignation as Trustee. A successor Trustee shall not be required to inquire into or take any notice of the prior administration of the Trust Fund. Any successor Trustee, immediately upon his acceptance in writing to the Trust, shall become vested with all the estates, rights, powers, discretion and duties of his predecessor Trustee with like effect as if originally named as Trustee herein.

No Trustee may be appointed who is, or continues to serve as a Trustee after becoming an owner, officer or employee of a service agent.

SECTION 3. TRUSTEES' TITLE

In case of death, resignation, refusal or inability to act by any one or more of the Trustees, the remaining Trustees shall have all of the powers, rights, estates and interest of this Trust and shall be charged with its duties, provided that in such cases no action may be taken unless it is concurred in by not less than a majority of the remaining Trustees, which shall be not less than two (2) in number.

SECTION 4. TRUSTEE OFFICERS.

The Trustees shall meet as promptly as possible after execution of this Trust Agreement and elect from among the Trustees a Chairman and a Secretary of the Board of Trustees. The term of such offices shall commence on the date of their election and continue to the end of the fiscal year. Thereafter, such officers shall be elected annually.

ARTICLE V

ADMINISTRATION OF FUND

SECTION 1. MEETINGS.

The Trustees shall meet at least quarterly, and more often if required, at the principal office of the Fund or at such other location as may be acceptable to a majority of the Trustees. The Chairman of the Trustees shall set the date, time and location of each meeting, and notice thereof shall be furnished to each Trustee by the Secretary or Administrator not less than ten (10) days prior to the date of such meeting. Such notice shall specify the date, time and location of such meeting and may specify the purpose

thereof and any action proposed to be taken thereat. Whenever any notice is required to be given to any Trustee hereunder, such notice shall be directed to the said Trustee by certified mail, return receipt requested, to the address of such Trustee as recorded in the office of the Fund.

Special meetings of the Trustees may be held at any time and place without notice. For the purposes of a duly called and noticed meeting of the Board of Trustees a quorum shall consist of four (4) members of the Board or Trustees, unless the Board of Trustees consists of less than four (4) Trustees in which case all Trustees shall be required to constitute a quorum. Meetings, including votes, may be conducted by telephone conference. The Secretary, acting Secretary, or his designee shall keep minutes of all meetings, proceedings and acts of the Board of Trustees, but such minutes need not be verbatim. Copies of all minutes of the meetings of the Board of Trustees shall be sent by the Secretary, acting Secretary or a designee to all Trustees.

SECTION 2. VOTING.

All actions by, and decisions of, the Board of Trustees shall be by the vote of a majority of the number of Trustees attending a duly called meeting of the Trustees at which a quorum is present; provided, however, that actions by, and decisions of, the Board of Trustees may be taken by a vote of a majority of the number of Trustees attending a special meeting.

SECTION 3. OFFICE OF THE FUND.

The Trustees shall establish and maintain an office of the Fund, the exact location of which is to be made known to the parties interested in or participating in the said Fund and

to the appropriate governmental agencies and departments of state. The books and records pertaining to the Fund and its administration shall be kept and maintained at the office of the Trust.

SECTION 4. EXECUTION OF DOCUMENTS.

A certificate signed by the chairman and secretary of the Fund shall be evidence of the action of the Board of Trustees and any such certificate or other instrument so signed shall conclusively be presumed to be authentic, and all facts and matters stated therein shall conclusively be presumed to be true.

SECTION 5. APPOINTMENT OF ADMINISTRATOR.

The Trustees shall designate a fiscal agent and/or an Administrator to administer the financial affairs of the Fund; provided, however, such fiscal agent or Administrator shall not be an owner, officer, or employee of a service agent.

Any fiscal agent and/or Administrator so appointed shall furnish a fidelity bond with the Trust as obligee, in an amount sufficient to protect the Fund against the misappropriation or misuse of any monies or securities held by or in the name of the Fund. The amount of the bond shall be determined by the Trustees and evidence of such bond shall be filed with the appropriate governmental agencies and departments.

SECTION 6. APPROVAL OF NEW MEMBERS.

The Trustees, after the inception date of the Fund, shall receive applications for membership from prospective new members to the Fund and shall approve such application for membership in accordance with the Rules for Self-Insurers, the terms of

the Indemnity Agreement and the rules and regulations established and promulgated by the Trustees for the admission of new members to the Fund. The Board of Trustees may delegate the ministerial authority for membership approval to the Administrator or such other person as they select; provided that such Administrator or person designated is not an owner, officer, or employee of a service agent. Membership in the Fund is also contingent on the regulations of the state of South Carolina and approval by the South Carolina Workers' Compensation Commission.

SECTION 7. ESTABLISHMENT OF FUNDS.

The Trustees shall be responsible for establishing such Trustee funds, loss funds, or other funds which may be required from time to time by South Carolina Statutes, or the Rules for Self-Insurers or the Rules of Conduct and Administration of this Fund as may be established by the Trustees from time to time.

SECTION 8. POSTING OF SECURITY.

The Trustees shall be responsible for and shall undertake the posting of such security deposit and/or security bonds as may be required to be posted with the South Carolina Workers' Compensation Commission pursuant to South Carolina Statutes, or the Rules for Self-Insurers or such other legislative enactments or administrative regulations which may be established from time to time.

SECTION 9. REPORTS BY TRUSTEES.

The Trustees shall be responsible for and shall cause to be filed such annual or other periodic audits, reports, and disclosures as may be required from time to time pursuant to

applicable federal or state statutes or governmental regulations.

SECTION 10. FISCAL MANAGENT AND AUTHORITY.

The Trustees shall have said authority and take all necessary precautions to safeguard the assets of the Fund including, but not limited, to the following:

a. The designation of a fiscal agent and/or Administrator to administer the financial affairs of the Fund, who shall furnish a fidelity bond with the Trustees as obligee, in an amount sufficient to protect the Fund against the misappropriation or misuse of any monies or securities. The amount of the bond shall be determined by the Trustees, and evidence of such bond shall be filed with the Commission, said bond being one of the conditions required for approval of the establishment and continued operation of a self insurers fund. Such fiscal agent or Administrator shall be an owner, officer, or employee of the service organization.

b. Retaining control of all monies collected or disbursed for the Fund. All loss funds or funds of any type shall remain in the custody of the Trustees or the authorized Administrator. Provided, however, that a revolving fund for payment of compensation benefits due and other related expenses may be established for the use of the authorized service company. The service company shall furnish a fidelity bond covering its employees, with the Trustees as obligee, in an amount sufficient to protect all monies placed in such revolving fund. Provided, however, that should the bond required of the fiscal agent and/or Administrator also cover the monies in the revolving fund, separate bond shall not be required.

c. Having the accounts and records of the Fund audited annually or at any other time as may be necessary to determine the financial stability of the Fund or the adequacy

of the monetary reserves, such audits to be made by Certified Public Accountants.

d. The Trustees shall make active efforts to collect delinquent accounts resulting from any unpaid premiums by members.

e. The Trustees or fiscal agent or Administrator shall not utilize any of the monies collected as premium for any purpose unrelated to workers' compensation insurance.

f. The Trustees shall be authorized to invest Trustees' funds, claims funds and unappropriated surplus in the following types of investments only:

1. Savings accounts or certificates of deposit in a duly chartered commercial bank located within the State of South Carolina and insured through the Federal Deposit Insurance Corporation.

2. Share accounts or savings certificates in a duly chartered savings and loan association located within the State of South Carolina and insured through the Federal Savings and Loan Insurance Corporation.

3. Direct obligations of the United States Treasury, such as notes, bonds or bills which are backed by the full faith and credit of the United States Government.

g. The safety of any investment of surplus monies or claims reserves shall be the responsibility of the Trustees.

h. The Trustees shall be prohibited from making any type of investment as authorized by these rules with the intent to trade, dispose or sell the security in any manner other than redeeming it at maturity. Therefore, it shall be the responsibility of the Trustee to purchase securities in such denominations and with dates of maturity to insure

that these securities shall be redeemable at the same time and in the same amounts as the Fund's current and long-term liabilities.

i. The Trustees shall report annually, as part of the financial statement of the Fund, a schedule showing the disposition of all investment income earned during the Fund year just ended.

j. The Board of Trustees shall have all authorities and powers granted to Trustees generally under the laws of South Carolina including the powers and authorities conferred under the Uniform Trustee's Powers Act which is incorporated herein by reference as permitted by statute 62-7-703 (b) as if fully set out herein.

SECTION 11. RULES AND REGULATIONS.

The Trustees may prescribe such rules and regulations as may, in their discretion, be proper and necessary for the sound and efficient administration of the Trust, provided the rules and regulations shall not be inconsistent with the provisions of this Declaration of Trust, the Indemnity Agreement, the Rules for Self Insurers, applicable federal and/or state statutes and applicable governmental regulations.

SECTION 12. TRUSTEES' LIABILITIES.

No Trustees or employee of the Trust shall be liable for any action taken pursuant to this Trust Agreement in good faith or for an omission, by any other Trustee or by any employee of Trustee.

The Trustees are hereby authorized and empowered to obtain at the expense of the Fund, liability insurance fully protecting the Trustees and the Fund from any loss or expense incurred, including reasonable attorney's fees, for all acts of the Trustees except

bad faith and gross negligence on the part of the Trustees. The Fund hereby agrees to save, hold harmless and indemnify the Trustees and employees of the Fund while acting in the capacity of Trustees or employees excepting bad faith and gross negligence.

SECTION 13. RELIANCE ON COUNSEL'S OPINION.

The Trustees may consult with legal counsel concerning any questions which may arise with reference to the duties and powers or with reference to any other matter pertaining to this Agreement or the Trust created hereby; and the opinion of such counsel shall be full and complete authorization and protection in respect to any action taken or suffered by the Trustees hereunder in good faith in accordance with the opinion of such counsel, and the Trustees shall not be liable therefor.

ARTICLE VI

MISCELLANEOUS

SECTION 1. AMENDMENTS.

This Agreement may be amended in writing at any time by the concurrence of a majority of the Trustees. However, this Agreement may not be amended so as to change its purpose as set forth in Article III above or to permit the diversion or application of any of the funds of the Trust for any purpose other than those specified herein. The Trustees, upon amending this Agreement, shall send a copy of any such amendment bearing the necessary signatures, to the Settlor. Amendments will not be effective until approved by the South Carolina Workers' Compensation Commission.

SECTION 2. TERMINATION OF TRUST.

This Trust may be terminated at any time by the Trustees and the concurrence of the South Carolina Workers' Compensation Commission.

This Trust shall terminate in any case upon the death of the last survivor of such persons who were living at the time of the creation of the Trust and who were participating in the Trust, unless, without the benefit of this provision, the Trust does not violate the rule against perpetuities; in which case, the Trust may continue in perpetuity unless otherwise terminated. This Agreement shall continue in full force and effect as may be amended and supplemented from time to time subject, however, to the above termination provision.

In the event of termination, the remaining funds available in the Trust, after providing for all outstanding obligations, shall be distributed, through a formula determined by the Trustees, to the participating members.

SECTION 3. SITUS OF THE TRUST.

This Trust Agreement is executed by the Parties hereto and accepted by the Trustees in the State of South Carolina, and all questions pertaining to its validity, construction and administration shall be determined in accordance with the laws of the State of South Carolina.

SECTION 4. CONSTRUCTION.

Whenever any words are used in this Agreement in the masculine gender, they shall be construed as though they were also used in the feminine or neuter gender in all situations where they would so apply, and whenever any words are used in this

Agreement in the singular form, they shall be construed as though they were also used in the plural form in all situations where they would so apply, and whenever any words were used in the Agreement in the plural form, they shall be construed as though they were also in the singular form in all situations where they would so apply.

IN WITNESS WHEREOF, this Agreement and Declaration of Trust has been executed the day and year first above written.

SETTLOR:

HOME BUILDERS ASSOCIATION OF SOUTH CAROLINA, INC

By: Warren Carpenter
President

ATTEST:

Patricia C. Shepard
My Commission
expires 5-2-2001

State of South Carolina

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Columbia, S.C. 29202-1715



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Workers' Compensation Commission

September 14, 2011

Jeff Ranew
Administrator
South Carolina Home Builders Self Insurers Fund
P.O. Box 7727
Columbia, SC 29202

Dear Mr. Ranew:

You have asked me to put in writing the position of the South Carolina Workers' Compensation Commission's Self-Insurance Division regarding the recent amendment of the Trust Agreement by the South Carolina Home Builders Self Insurers Fund. Please let this confirm the following:

1. The proposed amendments to the Trust Agreement were presented to me for consideration and approval on August 18, 2011.
2. Based upon our review of the Trust Agreement, the fund's trustees alone have the authority to make the amendments and revisions which were proposed and that the changes comply with and are not prohibited by Title 42 of the South Carolina Workers' Compensation Law or South Carolina Workers' Compensation Commission Regulation 67-1500.
3. We approved the same on August 18, 2011.

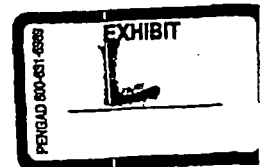
Please let me know if I can be of any further assistance regarding this matter.

Sincerely,

A handwritten signature in dark ink, appearing to read "W.C. Smith, III".

W. C. Smith, III, CPCU, ARM
Director, Self Insurance

SIF 161



ROA Supp000150
APP000517

State of South Carolina

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Workers' Compensation Commission

January 26, 2012

Jeff Ranew
Administrator
South Carolina Home Builders Self Insurers Fund
P.O. Box 7727
Columbia, SC 29202

Dear Mr. Ranew:

I am writing in regard to the proposed amendments of the By-Laws/Trust Agreement of the South Carolina Home Builders Self-Insurance Trust Fund that were presented to us for consideration January 23, 2012. Based on our review the proposed changes comply with and are not prohibited by Title 42 of the South Carolina Workers' Compensation Law or South Carolina Workers' Compensation Regulation 67-1500.

Please let me know if I can be of any further assistance regarding this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "W.C. Smith, III".

W. C. Smith, III, CPCU, ARM
Director, Self Insurance

SIF 162

ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellant Case No. 2014-000963

Allen Patterson, Steve Tilton, Richard Sendler,
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Home Builders Self Insurers Fund.....Respondents.

BRIEF OF APPELLANTS

James Edward Bradley, SC Bar # 66130
S. Jahue Moore, SC Bar # 4063
Margaret "Meg" Hazel, SC Bar # 100634
MOORE TAYLOR LAW FIRM, P.A.
P.O. Box 5709
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803-796-9160
Attorney for Appellants

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NOV 06 2014

SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. JUDGE COOPER IMPROPERLY RELIED ON THE PLEADING REQUIREMENTS OF RULE 23(b) REGARDING DERIVATIVE ACTIONS BROUGHT BY SHAREHOLDERS TO DISMISS THIS CASE BECAUSE THE TRUST FUND IS A TRUST WHICH IS NOT SUBJECT TO THE PLEADING REQUIREMENTS OF RULE 23(b).
- II. JUDGE COOPER IMPROPERLY RELIED ON THE PLEADING REQUIREMENTS OF RULE 23(b) TO DISMISS THE CASE BECAUSE THE TRUST FUND IS NOT AN UNINCORPORATED ASSOCIATION, THE BENEFICIARIES OF THE TRUST ARE NOT SHAREHOLDERS, AND THE ACTION IS NOT DERIVATIVE.
- III. EVEN IF THE COURT REQUIRES THE TRUST BENEFICIARIES TO COMPLY WITH RULE 23(b), THE BENEFICIARIES HAVE MET THE PLEADING REQUIREMENTS OF RULE 23(b), AND JUDGE COOPER DISMISSED THE COMPLAINT IN ERROR.

STATEMENT OF THE CASE

The Plaintiffs are beneficiaries of a trust. (R. p. 345). In February 2012, they sued the Defendants for breach of their duties as trustees. The matter was originally brought in February 2012 as case number 2012-CP-32-00757. (R. p. 23). By consent of the parties, the matter was moved to Richland County and assigned case number 2012-CP-40-04311. In that case, the Trustees moved to dismiss alleging that the action against them must be brought in Probate Court because they were the trustees of a trust. Judge Manning granted that motion. (R. p. 1). The Plaintiffs then sued in Probate Court on April 9, 2013, and removed the case to Circuit Court. (R. pp. 47, 56). The Defendants moved to dismiss, arguing that the entity was not a trust, but an unincorporated association subject to the additional pleading requirements of Rule 23. Judge Cooper denied their motion on November 8, 2013. (R. p. 4). The Defendants moved to reconsider. Judge Cooper reversed his earlier position and dismissed the complaint on February 11, 2014. (R. p. 13). Judge Cooper held that the Trust Fund is not a “trust in its

commonly recognized form.” As a result, he treated the trust as an unincorporated association and held the pleadings to the standards required for derivative actions under South Carolina Rule of Civil Procedure 23(b). Judge Cooper then determined that the trust beneficiaries did not comply with Rule 23(b) because they did not allege with particularity the efforts they made to satisfy the pre-suit demand request in Rule 23(b). As a result, he dismissed the Complaint. The Plaintiffs moved to reconsider, and Judge Cooper denied their motion. (R. p. 22). The Plaintiffs filed their Notice of Appeal May 1, 2014.

FACTS

In September 1995, the South Carolina Home Builders Association created a trust to administer worker’s compensation benefits for its members. That trust is titled the South Carolina Home Builders Self Insurers Fund (Trust Fund). (R. p. 345). The Trust Fund had several members of the South Carolina Home Builders Association on its board and worked in conjunction with the South Carolina Home Builders Association to sell worker’s compensation insurance policies and administer the policies. (R. p. 119).

The Trustees have made significant actions towards dissolving the trust and creating a new insurance company with the proceeds. The new insurance company would be a mutual insurance company of which the Trustees would all be board members. The insurance company would not have any particular benefit to the beneficiaries of the trust. The assets of the trust would be used to set up a company competing with the trust. The Trustees transferred approximately five million dollars out of the trust to do this. At some point, they transferred the money back into the trust. There is approximately \$20,000,000 remaining in the trust to fund its liabilities.

However, the Trustees intend to use these funds to set up a separate insurance company which will convey no benefit to the beneficiaries of the trust. (R. pp. 47, 119).

The Trustees have purchased a building with trust assets as well as an expensive software program for the purpose of creating another insurance company which will convey no benefit to the beneficiaries of the trust. The Trustees have used these assets to begin setting up a separate insurance company which will convey no benefit to the beneficiaries of the trust and have not reimbursed the trust for these costs including the use of facilities, the software programs, and the employees of the trust. If the trust continues along its present course, there will be insufficient assets to cover its risks which will expose the beneficiaries to additional risk. All beneficiaries of the trust are subject to personal liability for any shortfall in trust assets. (R. p. 119).

ARGUMENT

I. JUDGE COOPER IMPROPERLY RELIED ON THE PLEADING REQUIREMENTS OF RULE 23 TO DISMISS THIS CASE BECAUSE THE SELF INSURERS TRUST IS A TRUST WHICH IS NOT SUBJECT TO THE PLEADING REQUIREMENTS OF RULE 23(b).

A. THE TRUST FUND MEETS THE SOUTH CAROLINA REQUIREMENTS FOR A TRUST.

A trust is created by “written declaration signed by the owner of property that the owner holds identifiable property as trustee.” S.C. Code Ann. § 62-7-401(a)(2) (2013). For a trust to be created, there must be “a declaration of the trust, property to which the trust pertained, a Trustee, and named beneficiaries.” *Johnson v. Thornton*, 264 S.C. 252, 257, 214 S.E.2d 124, 127 (1975); *see also*, Restatement (Second) of Trusts § 2 (1959). A beneficiary is defined as a “person that has a present or future beneficial interest in a trust, vested or contingent.” S.C. Code Ann. § 62-7-103 (2)(A).

The Trust Fund is a trust. It meets all requirements of a trust in South Carolina. It was created by a written declaration. There is identifiable property, named trustees, and the beneficiaries are named or identified. (R. pp. 345-353).

The trial court erred when it held that the Trust Fund was not a trust. The court stated: “[t]he Agreement and Declaration of Trust in this case is replete with references to trustees and trustee duties and obligations. There is no reference to, or provisions for, ‘beneficiary(ies)’ in the document.” (R. p. 15). The court reasoned that because the word “beneficiary” was not used, beneficiaries were not created. However, the Trust used the word “member” to identify the beneficiaries, since all beneficiaries were also members of the South Carolina Home Builder's Association. The court was in error, since the use of the term “member” rather than “beneficiary” does not disqualify the Trust Fund as a trust.

“[N]o particular form of words is essential to the creation of an express trust, but unquestionably an intention so to do, on the part of the person to whom such creation is imputed, is essential.” *Richardson v. Inglesby*, 34 S.C. Eq. 59, 101 (S.C. Ct. App. 1866). Even the word “trust” does not have to be used in the document creating a trust as long as all requirements are met. *Hunter v. Hunter*, 58 S.C. 382, 36 S.E. 734, 736 (1900).

There is no particular formality required or necessary in the creation of a trust. Any agreement or contract in writing, made by a person having the power of disposal over property, whereby such person agrees or directs that a particular parcel of property, or a certain fund, shall be held or dealt with in a particular manner for the benefit of another, in a court of equity, raises a trust in favor of such other person.

Black v. Harman, 127 S.C. 359, 359, 120 S.E. 705, 710 (1923) (J. Hothran, dissenting) citing 1 Perry, Trusts (3d Ed.) § 82. There are no required words for the establishment of

a trust. As long as the agreement declares that property is held by one for the benefit of another, a trust is created. *Id.*

The content of the trust document indicates that the member beneficiaries were to benefit from the trust's operations. (R. pp. 345, 247). The Trust Agreement states that "the Settlor and the Trustees intend to . . . establish[] a group self insurers fund . . . *for the benefit of the members;*" and that this is "*in the best interest of the members.*" Though the word member is used instead of beneficiary, the agreement is a contract in writing, made by a person having the power of disposal over a certain fund, which shall be held or dealt with in a particular manner for the benefit of another. *Black*, 127 at 359, 120 S.E. at 710.

The trust document also states explicitly that it is a trust. "The Agreement and Declaration of Trust in this case is replete with references to trustees and trustee duties and obligations" (R. p. 15). The first page of the document declares that it is an "AGREEMENT AND DECLARATION OF TRUST CREATING THE SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND." (R. p. 345). Article II is titled "CREATION OF THE TRUST" and calls the fund a trust fund as follows:

There is hereby established and created a Trust Fund which shall be known as the SOUTH CAROLINA HOME BUILDERS SELF INSURERS FUND and the Trustees thereof may hold property, enter into contracts and in all matters as hereinafter set forth act in behalf of the Trust Fund in that name. This Trust Fund shall be used for the purposes as hereinafter set forth.

(R. p. 347). It continues by stating that:

WHEREAS, it is considered to be in the best interest of the members of the Home Builders Association of South Carolina, Inc. that an Agreement and Declaration of Trust fully setting forth the duties and responsibilities of the Trustees be entered into.

(R. p. 345). In addition, the agreement states: “[t]he Board of Trustees shall have all authorities and powers granted to Trustees generally under the laws of South Carolina including the powers and authorities conferred under the Uniform Trustee's Powers Act.” (R. p. 355). And, it cites Section 62-7-703(b) of the Probate Code to set forth the powers of the trustees. (R. p. 355).

The trial court reasoned that because “[e]ach member pays a predetermined rate” to the fund that the fund cannot be trust. (R. p. 15). This reasoning is in error. The settlor of a trust is defined as “a person, including a testator, who creates, or contributes property to, a trust.” S.C. Code Ann. § 62-7-103. Therefore, the member beneficiaries of the trust contribute to the trust fund. There is no South Carolina law prohibiting a settlor from being a beneficiary of a trust or prohibiting beneficiaries of a trust from contributing to it.

The Trust Fund meets all requirements of a trust, states that it is a trust, and refers to South Carolina Probate Code in defining trustee powers. It has a settlor, trustee, and beneficiaries. It is not incorporated. If it is not a trust as the trustees argue, what can it be?

If it is an unincorporated association, it could be a partnership. But there is no document indicating that any of the parties intended it to be a partnership. It is not a union, fraternal organization, sports team, or unincorporated church. The trust document makes no reference to it being an unincorporated association. It is not registered as a business trust. If the Trust Fund is not a trust, it does not identify as any entity currently recognized at law. It would have to be an entirely new species of business organization.

B. THE DEFENDANTS HAVE ALREADY ASSERTED THAT THE TRUST FUND IS A TRUST AND CANNOT NOW CONTEND THAT IT IS NOT.

The Plaintiffs are beneficiaries of the Trust Fund and sued the Defendants for breach of their duties as trustees. The matter was originally brought in February 2012 as case number 2012-CP-32-00757. In that case, the Trustees moved to dismiss on the basis that the Trustees must be sued in Probate Court because they served a trust. The Trustees stated: "this action should be dismissed for lack of subject matter jurisdiction as it involves the internal affairs of a trust." (R. p. 133). In support of this motion, the Trustees submitted the affidavit of Jeffrey Ranew. He continually refers to the South Carolina Home Builders Self Insurers Fund as a trust and the funds as a trust corpus. (R. p. 124).

Judge Manning granted the motion to dismiss, stating:

In particular, the Defendants have moved to dismiss on the basis of lack of subject matter jurisdiction. The Defendants argued that this lawsuit involved the internal affairs of the Trust such that it must be filed in the Probate Court under South Carolina Code Section 62-7-201.... It is clear from the documents submitted to the Court that this dispute concerns a trust.... With this in mind, the Court dismisses this lawsuit without prejudice such that it may be refiled in Probate Court to cure any alleged defects in subject matter jurisdiction.

(R. p. 1).

In their Second Motion to Dismiss, the Defendants took the position that the trust is not a trust, but an unincorporated association. (R. p. 142). The Trustees cannot now claim that the Trust Fund is not a trust when they previously maintained that it was a trust and received relief under that theory.

Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation. *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 252, 489 S.E.2d 472, 477 (1997) (citing *Colleton Regional Hosp. v. MRS Med. Rev. Sys.*, 866 F. Supp. 896 (D.S.C. 1994)). Judicial estoppel applies to inconsistent statements of fact. *Id.* “When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.” *Id.*

In *Hayne Federal Credit Union v. Bailey*, Mr. Bailey claimed ownership of a house through a resulting trust. Earlier, in his divorce, he disavowed any interest in the property and maintained that the property belonged to his son. The Supreme Court held Mr. Bailey was estopped from later claiming an interest in the property because in his divorce he attributed ownership to his son.

Likewise, the Trustees cannot now claim that the Trust Fund is not a trust. The Trustees obtained an order from the court dismissing the previous lawsuit based on their factual assertion that the South Carolina Home Builders Self Insurers Fund was a trust. Now, the Trustees take the position that it is not a trust, but an unincorporated association, which changes the pleading requirements of the lawsuit. The Trustees cannot assert these two different versions of the facts. They are bound by the assertion made in the previous lawsuit and the order which resulted. Thus, the Trust Fund is a trust, not an unincorporated association, and does not have to comply with Rule 23(b) regarding derivative actions.

II. RULE 23(b) DOES NOT APPLY TO THE TRUST FUND BECAUSE THE TRUST FUND IS NOT AN UNINCORPORATED ASSOCIATION, THE BENEFICIARIES OF THE TRUST ARE NOT SHAREHOLDERS, AND THE ACTION IS NOT DERIVATIVE.

A. THE TRUST FUND IS NOT AN UNINCORPORATED ASSOCIATION.

The trial court erred when it re-classified this lawsuit as a derivative suit by changing the Trust Fund into an unincorporated association. The Plaintiffs are the beneficiaries of the Trust Fund.¹ The trustee Defendants must operate the trust for the benefit of the Plaintiff beneficiaries, not for the benefit of a separate corporation or association.

Under South Carolina law, trusts are not unincorporated associations. For example, the South Carolina Real Property Valuation Reform Act defines a legal entity in the disjunctive as a “corporation, partnership, limited liability company, unincorporated association, or trust.” S.C. Code § 12-37-3160(c). Likewise, the Uniform Land Sales Practice Act lists trusts and unincorporated associations as separate types of business entities as follows:

(3) “*Person*” means an individual, corporation, government, or governmental subdivision or agency, business trust, estate, trust, partnership, unincorporated association, two or more of any of the foregoing having a joint or common interest, or any other legal or commercial entity.

S.C. Code Ann. § 27-29-10(3). The South Carolina Consumer Protection Code uses a similar definition. *See*, S.C. Code Ann § 37-25-10(2).

In addition, the South Carolina Code makes separate provisions for naming an unincorporated association in a lawsuit and for serving an unincorporated association.

¹ In addition, each beneficiary of the Trust Fund is jointly and severally liable for underfunded losses of the Self Insurers Fund. (R. p. 119). Under South Carolina law, a shareholder is not liable for corporate losses. S.C. Code Ann. § 33-6-220(b).

See, S.C. Code Ann. §§ 15-5-160 and 15-9-330. The Code also includes separate provisions for collection of judgments against unincorporated associations. *See*, S.C. Code Ann. § 15-35-170. The South Carolina Corporate Code defines both an unincorporated association and a trust as legal entities naming each one separately. *See*, S.C. Code Ann. § 33-1-400(11). So do the South Carolina Nonprofit Corporation Act and the South Carolina Unfair Trade Practices Act. *See*, S.C. Code Ann. §§ 33-31-140(15) and 39-5-10(a).

The Code also separately sets forth how to create a trust. *See*, S.C. Code Ann. § 62-7-401. It sets forth what venue is appropriate for suit against a trust. S.C. Code Ann. § 62-7-204. In fact, Article 7 of the South Carolina Probate Code contains the South Carolina Trust Code which contains detailed law regarding the creation and governance of trusts. *See*, S.C. Code Ann. §§ 62-7-101 to 62-7-1106.

As a result, the South Carolina Code treats unincorporated associations and trusts as distinct legal entities. And, Judge Cooper erred in redefining the Trust Fund as an unincorporated association and subjecting it to the requirements of Rule 23(b).

The trust document makes the beneficiary members of the Trust Fund jointly and severally liable for its debts, but this does not transform the Trust Fund into an unincorporated association. The Trust Fund calls itself a trust, calls its board members trustees, and meets the definition of a trust. Trusts are not treated as unincorporated associations in South Carolina. There is no South Carolina authority of any sort treating a trust as an unincorporated association. Therefore, the Trust Fund should be treated as a trust – not an unincorporated association. As a result, the Trust Fund is not entitled to the

derivative action protections of Rule 23(b) which apply only to corporations and unincorporated associations.

B. THE BENEFICIARY MEMBERS ARE NOT SHAREHOLDERS AND DO NOT HAVE THE RIGHTS OF SHAREHOLDERS.

Under Rule 23(b) a derivative action is “brought by one or more *shareholders or members to enforce a right of a corporation or of an unincorporated association....*” Nevertheless, Judge Cooper applied it to this action against a trust. Thus, to apply Rule 23(b), the beneficiaries of the trust would have to be shareholders of a corporation or members of an unincorporated association. A shareholder is a “person in whose name shares are registered in the records of a corporation or the beneficial owner of shares....” S.C. Code Ann. § 33-1-400. There are no registered shares in the Trust Fund.

In addition, shareholders have certain rights which the beneficiaries of the Trust Fund do not have. These rights give shareholders protection against abuses of directors. These rights include: the right to elect directors, S.C. Code Ann. § 33-8-103, notification of and opportunity to attend shareholder meetings, S.C. Code Ann. § 33-7-105, access to a list of shareholders entitled to vote, S.C. Code Ann. § 33-7-200, the right to distributions, S.C. Code Ann. § 33-6-400, the preemptive right to acquire unissued shares, S.C. Code Ann. § 33-6-300, the right to submit demands for meetings, S.C. Code Ann. § 33-7-102, the right to remove directors, S.C. Code Ann. § 33-8-108, and the right to dissent and obtain payment of shares, S.C. Code Ann. § 33-13-102.

The beneficiaries of the Homebuilder's Trust do not have the right to dissent. They do not have the right to shares. They do not have a right to meetings. They do not have the right to distributions, the right to acquire unissued shares, the right to submit demands. In derivative actions, the law presumes there are other rights which belong to

the shareholder bringing the action. The members of the trust are not shareholders, they do not have shareholder rights, and Rule 23(b) protections do not apply to the Trust Fund.

C. THIS ACTION IS NOT A DERIVATIVE ACTION.

1. Derivative Actions Do Not Apply To Trusts.

The plain meaning of Rule 23(b) does not apply it to trusts. “Where a statute uses a word having a well-recognized meaning in law, the presumption is that the Legislature intended to use the word in that sense.” *Coakley v. Tidewater Construction Corp.*, 194 S.C. 284, 9 S.E.2d 724 (1940).

The trial court erred in holding that Rule 23(b) applies to the Trust Fund. The Rule reads:

In a derivative action brought by one or more *shareholders or members to enforce a right of a corporation or of an unincorporated association*, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction....

Rule 23 (b)(1) (emphasis added).

The Rule specifically includes corporations and unincorporated associations. It does not mention trusts. If the legislature had intended for the rule to apply to trusts, it could have included trusts in the language of the rule. All case law involving derivative actions in South Carolina involves corporations and unincorporated associations, including partnerships. No South Carolina court has ever applied this rule to trusts.

The harm from mismanagement of the trust flows directly to the beneficiaries who are liable for any shortfalls in trust assets. The harm does not flow to a corporation. “[A] shareholder's suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder.” *Brown v. Stewart*, 348

S.C. 33, 49, 557 S.E.2d 676, 684 (S.C. Ct. App. 2001). Here, the injury is to each beneficiary who must, individually, make up for any shortfall in trust assets. The shortfall will not be made up by the trustees. Therefore, according to the plain language of the rule and the case law on derivative suits, Rule 23(b) does not apply to this action brought by the beneficiaries of the Trust Fund.

Every South Carolina case on trusts has been brought by beneficiaries without following the requirements set out in Rule 23(b). There are no South Carolina cases requiring the beneficiaries of a trust to follow Rule 23(b). South Carolina cases by beneficiaries against trustees do not require a derivative action or compliance with Rule 23(b): *E.g. Cartee v. Lesley*, 290 S.C. 333, 335, 350 S.E.2d 388, 389 (1986) (“Petitioners are the beneficiaries of a trust administered by [the trustees]. The beneficiaries brought suit against the trustees for negligence and breach of fiduciary duty alleging the estate had been mismanaged.”); *Epworth Orphanage v. Long*, 199 S.C. 385, 19 S.E.2d 481 (1942) (“The complaint alleges a cause of action in equity against the executors and trustees of a testamentary trust, all the beneficiaries of said trust being made parties.”); *Mayer v. M.S. Bailey & Son*, 347 S.C. 353, 359-60, 555 S.E.2d 406, 409 (Ct. App. 2001) (“we hold that as a minimum the [beneficiaries] had both standing and justiciable rights that a court of equity could protect.”); *Rembert v. Gressette*, 318 S.C. 519, 520, 458 S.E.2d 552, 553 (Ct. App. 1995) (“Three beneficiaries . . . opposed the planned distribution of the trust assets and counterclaimed against the trustees....”); *Ramage v. Ramage*, 283 S.C. 239, 243, 322 S.E.2d 22, 25 (Ct. App. 1984) (“[The beneficiaries] brought this action to have the quitclaim deed set aside and to enforce the terms of the trust.”). South Carolina courts allow trust beneficiaries to bring actions against trustees.

There is no South Carolina rule, statute or case which treats an action by trust beneficiaries as a derivative stockholder action or which require beneficiaries of a trust to comply with Rule 23(b).

2. This Lawsuit Alleges Direct Injury To The Beneficiaries.

The action brought by the Beneficiaries is not derivative, but a direct action. “[A] direct action is one where misconduct by the management of a corporation causes a particular loss to an individual shareholder.” *In re Greenwood Supply Co.*, 295 B.R. 787, 795 (Bankr. D.S.C. 2002). Courts have ruled that actions based upon allegations of breach of fiduciary duty and negligent mismanagement that resulted in a reduction of a shareholder's ownership in a corporation constitute direct actions. If there are allegations of a distinct injury to the shareholder, the action is not derivative. *Id.*

The Beneficiaries are not shareholders, and they have each suffered a particular loss. The trust was to be operated for the benefit of its members. Each member is a beneficiary of the trust. Therefore, mismanagement of the trust results in a direct loss to each beneficiary. Because they are beneficiaries and not shareholders, their only recourse is to bring a direct action. Since the Plaintiffs are beneficiaries of the trust, they have standing to bring this action.

The trial court erred when it held: “[t]he gravamen of the Plaintiffs' Complaint alleges that the fund has been injured, not that the members have been injured.” (R. p. 16). The Complaint says:

21. The Defendants have removed approximately five million dollars from the trust corpus for the purpose of establishing a separate member owned insurance company which will not provide any benefit to the Beneficiaries of the Trust.

22. The Trustees did not advise the beneficiaries that the funds could have been returned to them....

40. As a direct and proximate result of the Defendants' breach of their fiduciary duties and breach of the trust agreement, the Plaintiffs have been injured including, but not limited to, loss of funds, attorney fees, harassment and aggravation, loss of trust assets, higher payments into the Trust, and other damages all to their actual damage....

60. The beneficiaries' best interests would be served by a termination of the Trust and distribution of its assets to the beneficiaries.

(R. pp. 49, 51, 54). The Beneficiaries allege that the Trustees took monies from the Trust Fund, monies which were to be used for their benefit only, and used it for another purpose which injured them individually. The Complaint states the harm from the mismanagement of the trust flows directly to the beneficiaries, who are liable for any shortfalls in trust assets. The injury is to each beneficiary who must, individually, make up for any shortfall in trust assets.

3. Even If The Trust Fund Is Treated As An Unincorporated Association, The Beneficiaries' Claims Are Not Derivative But Individual Such That They Are Not Governed By Rule 23(b).

There are two exceptions to the general rule that a shareholder cannot sue for injuries to his corporation: (1) where there is a special duty between the wrongdoer and the shareholder, and (2) where the shareholder suffered an injury separate and distinct from that suffered by other shareholders. *Rice-Marko v. Wachovia Corp.*, 398 S.C. 301, 308, 728 S.E.2d 61, 65 (Ct. App. 2012). The Trustees have a special duty to the member beneficiaries.

The Trust document states that: "The Board of Trustees shall have all authorities and powers granted to Trustees generally under the laws of South Carolina including the

powers and authorities conferred under the Uniform Trustee's Powers Act" (R. p. 355). The South Carolina Trust Code reads: "the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this article," and that a "trustee shall administer the trust solely in the interests of the beneficiaries." S.C. Code Ann. §§ 62-7-801 and 62-7-802 (a).

Even when trustees act in good faith, any action they take must be in the interests of the beneficiaries. Because of this special duty, the beneficiaries meet the exception and can sue for injuries without bringing a derivative action.

III. EVEN IF THE COURT REQUIRES THE TRUST BENEFICIARIES TO COMPLY WITH RULE 23(b), THE BENEFICIARIES HAVE MET THE PLEADING REQUIREMENTS OF RULE 23(b) AND JUDGE COOPER DISMISSED THE COMPLAINT IN ERROR.

A. EVEN THOUGH THE TRUST BENEFICIARIES ARE NOT SUBJECT TO RULE 23(b), THEY HAVE COMPLIED WITH IT.

The beneficiaries have complied with the requirements of Rule 23(b). This rule requires a verification of the complaint. Each plaintiff has verified the complaint under oath. These verifications were served on the Defendants.

Rule 23(b) also requires that the Plaintiff set forth "the efforts, if any, made" to obtain the action desired. The complaint sets this out as follows:

8. To the extent required by South Carolina Rule of Civil Procedure 23, the Plaintiffs allege:

a. The Plaintiffs were beneficiaries of the trust at all times relevant including when the transactions complained of were made.

b. The Plaintiffs, their agents or others on their behalf have made efforts to obtain the action they desire in this matter including correspondence to counsel for the Defendants, meetings with counsel for the Defendants, correspondence to the Trust and a previous lawsuit to no avail.

(R. p. 48).

Plaintiffs' counsel also sent a letter to defense counsel setting forth the relief requested before bringing the suit. This letter was referenced in the Complaint (R. pp. 114-118) and states:

In particular, our clients believe the following actions are necessary and should be taken on behalf of the fund:

1. The \$5,000,000 which was taken out of the fund as excess funds to establish a competing mutual fund should be distributed immediately to the beneficiaries of the Trust as it is not needed for the operation of the South Carolina Home Builders Self Insurers Fund.
2. An accounting should be made of all remaining funds in custody of the South Carolina Home Builders Self Insurers Fund. All funds not necessary to insure liability should be distributed to members of the Trust.
3. Elections have not been held as required by the Trust documents. Elections should be held for all positions of Trustees.
4. The Trust should be dissolved as it appears in the Trustees' decision that a competing entity should be set up and that the Trust no longer serves its functions. As a result, the Trust should be dissolved with requisite amounts kept on hand to insure against future liabilities with the remaining assets distributed to members of the Trust.
5. All assets contemplated for use by the Mutual Fund and purchased with that intent should be sold with the proceeds to be distributed to beneficiaries of the Trust.

(R. p. 318). The Trustees acknowledged to the court that this letter was received and was authentic. (R. pp. 114-115).

Courts consider elements referenced in complaints if they are incorporated by reference. *Carolina First Corp. v. Whittle*, 343 S.C. 176, 190, 539 S.E.2d 402, 410 (Ct. App. 2000). Demand letters, even though not attached to a complaint but referenced in

the complaint satisfy the requirements of Rule 23. *Stoner v. Walsh*, 772 F. Supp. 790, 797 (S.D.N.Y. 1991). Along with exhibits attached to the complaint, see *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1989), courts also consider documents “referenced by the complaint and accepted by all parties as authentic.” *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002).

In its order, the trial court stated “[a]t a minimum, the demand must identify the alleged wrongdoers....” The Complaint reads:

19. The Defendants are trustees under the Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund.

It should “describe the factual basis of the alleged wrongful acts...”

20. The Defendants have voted to remove assets from the Trust in order to incorporate a new member owned insurance company which confers no benefits upon the beneficiaries of the Trust.

21. The Defendants have removed approximately five million dollars from the trust corpus for the purpose of establishing a separate member owned insurance company which will not provide any benefit to the Beneficiaries of the Trust.

“and the harm caused...”

40. As a direct and proximate result of the Defendants’ breach of their fiduciary duties and breach of the trust agreement, the Plaintiffs have been injured including, but not limited to, loss of funds, attorney fees, harassment and aggravation, loss of trust assets, higher payments into the Trust, and other damages all to their actual damage.

and “request [] remedial relief....”

41. The Plaintiffs are entitled to an Order of this Court ordering that the Trustees be removed for breach of their fiduciary duties and breach of trust, that new trustees be elected, that all trust assets be returned to the Trust, that all damages incurred and funds taken

out of the trust in breach of fiduciary duties and trust agreement be awarded, enjoining further violations of the fiduciary duties and trust agreement, and awarding the Plaintiffs and the class actual and punitive damages.

53. The Plaintiffs request an order of this Court ordering that the Defendants must comply with the Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund and their fiduciary duties.

54. In particular, the Plaintiffs are entitled to an order of this Court ordering that the Defendants may not take funds or assets from the trust for the purpose of setting up a member owned insurance company.

57. The Plaintiffs hereby demand an accounting pursuant to South Carolina trust law and common law for all expenditures made by the trust.

62. The Plaintiffs ask that a receiver be appointed and that the Trust be terminated with the assets distributed to the beneficiaries after costs and fees.

(R. pp. 13, 47). The wrongdoers are identified. The factual basis for the wrongful acts is established. The harm is identified, and the beneficiaries requested remedial relief. In addition, the Complaint is verified by beneficiaries. It alleges the action taken to obtain relief as well as the relief requested.

As a result, the Plaintiffs have complied with Rule 23(b) by stating in detail their request for relief, verifying their complaint, and stating that they undertook efforts to obtain that relief.

B. THE TRIAL COURT RELIED UPON *CAROLINA FIRST CORP. V. WHITTLE* TO GRANT THE TRUSTEES' MOTION. THIS DISMISSAL IMPROPERLY APPLIED RULE 23(b) AND SHOULD BE OVERTURNED.

The trial court relied on *Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000), to determine the beneficiaries did not comply with Rule 23(b). This decision is erroneous and should be overturned.

The trial court quoted extensively from *Whittle* to explain the requirements of Rule 23. *Whittle* states "that the sufficiency of the pleading in meeting the requirements of Rule 23 must be based solely upon the allegations contained within it." *Id.* at 188-89, 539 S.E.2d at 409, citing *McCormick v. England*, 328 S.C. 627, 633, 494 S.E.2d 431, 433 (Ct. App. 1997). This conclusion is in error. *McCormick* did not involve application of Rule 23: it concerned whether or not a physician's breach of confidentiality constituted a cause of action. *Id.* at 630, 494 S.C. at 432. The court's citation of *McCormick* does not mention Rule 23. *Id.* at 632-33, 494 S.E.2d at 433 (Ct. App. 1997).

The *Whittle* court also relied upon *Hawes v. City of Oakland*, 104 U.S. 450 (1881), to support its decision. This case examined whether a shareholder was required to bring a demand at all:

[I]t is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes.

Hawes, 104 U.S. at 460-61. The Court held that a demand must be made, and that the "efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts should be stated with particularity...." *Id.* at 461.

Rule 23(b)(1) was adopted from the federal rules of procedure. The Official Reporter Comments to S.C. Code Ann. § 33-7-400 state that courts should use federal precedent to construe procedural rules as follows: "Bringing an additional set of litigation rules into the South Carolina Business Corporation Act on top of Rule 23(b)(1) was deemed inadvisable, particularly since courts called on to interpret the new South Carolina rule have a large body of federal precedent from which to draw." Official Reporter Comments, S.C. Code Ann. § 33-7-400. Thus, the Corporation Act contemplates that South Carolina courts will rely upon federal precedent when construing Rule 23(b).

Federal courts do not encourage dismissal of suits based on Rule 23(b). "Rule 23(b) was not written in order to bar derivative suits." *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 371 (1966). Rather, the rule was written to prevent "strike suits," which are essentially worthless claims brought by persons trying to get a quick settlement. *Id.* The *Surowitz* court was very clear that Rule 23 should not prevent adjudication on the merits of a reasonable complaint:

We cannot construe Rule 23 or any other one of the Federal Rules as compelling courts to summarily dismiss, without any answer or argument at all, cases like this where grave charges of fraud are shown by the record to be based on reasonable beliefs growing out of careful investigation. The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. These rules were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits. Rule 23(b), like the other civil rules, was written to further, not defeat the ends of justice The dismissal of this case was error. It has now been practically three

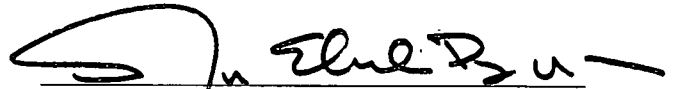
years since the complaint was filed and as yet none of the defendants have even been compelled to admit or deny the wrongdoings charged. They should be.

Surowitz, 383 U.S. at 373-74. Just as in *Surowitz*, it has been over two years since the beneficiaries filed their complaint. They followed the order of the court declaring the Trust Fund as a trust by filing this matter in probate court. Now, the Trustees have placed another procedural hurdle. The rules of procedure are intended to result in an honest and fair judicial system in which parties have disputes resolved on their merits rather than procedural technicalities.

CONCLUSION

This Court should reverse Judge Cooper's order dismissing the beneficiaries' lawsuit against the Trust Fund because the pleading requirements of Rule 23(b) do not apply to actions against trusts, a trust is not an unincorporated association, and the beneficiaries complied with Rule 23(b).

Respectfully submitted,



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November 6, 2014

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

RECEIVED

NOV 19 2014

Case No. 2013-CP-40-2655
Appellate Case No. 2014-000963

SC Court of Appeals

Allen Patterson, Steve Tilton, Richard Sendler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michael Nieri, Allen Patterson Residential LLC, Tilton Group, Sendler Construction Co., Inc., Privette Enterprises, Ellis Construction Co., Inc., The Barry Davis Company, Inc., Great Southern Homes, and J. Carter, LLC, on behalf of themselves and others similarly situated
..... Appellants,

v.

Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund, and the South Carolina Home Builders Self Insurers Fund..... Respondents.

FINAL BRIEF OF RESPONDENTS

THE STATE OF SOUTH CAROLINA
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G. Thomas Cooper, Jr., Circuit Court Judge

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FINAL BRIEF OF RESPONDENTS

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COUNTER-STATEMENT OF ISSUES ON APPEAL

- I. **DID THE CIRCUIT COURT CORRECTLY HOLD THAT THE ACTION ASSERTS DERIVATIVE CLAIMS AND IS SUBJECT TO THE REQUIREMENTS OF RULE 23(b)(1)?**
- II. **DID THE CIRCUIT COURT CORRECTLY HOLD THAT THE FUND IS AN UNINCORPORATED ASSOCIATION AND NOT A TRUST, AND THAT RULE 23(b)(1), THEREFORE, APPLIES?**
- III. **DID THE CIRCUIT COURT CORRECTLY FIND THAT APPELLANTS FAILED TO SATISFY THE PLEADING REQUIREMENTS OF RULE 23(b)(1) AND, THEREFORE, PROPERLY DISMISS THE COMPLAINT?**

STATEMENT OF THE CASE

This appeal is from a derivative action filed against the South Carolina Home Builders Self Insurers Fund ("Fund") and its Board of Trustees ("Board").

In a prior action filed on February 16, 2012 (2012-CP-40-4311), Appellants brought suit against Respondents asserting various derivative claims. Some Appellants are corporate home builders, and others are individuals who are members/owners of the corporate home builders. The Appellants purported to represent themselves and all other members of the Fund. The Appellants alleged, among other things, that the Board removed assets without any benefit to the members and misused assets of the Fund.

Following an amendment of Plaintiffs' Complaint in the prior action, Respondents moved to dismiss, based on Appellants' failure to meet the pleading requirements of Rule 23(b)(1), SCRCF, in their pursuit of derivative claims. Judge Manning dismissed the lawsuit by an Order *proposed by Appellants*. The Order was based upon an alternative legal argument made by Respondents, that *if* the Fund was subsequently determined to be a trust, the circuit court did not have subject matter jurisdiction because such a claim would need to be filed first in the Probate Court.

Following dismissal without prejudice, Appellants filed a second lawsuit in the Richland County Probate Court, making claims similar to the first lawsuit. Appellants subsequently

removed that action to the circuit court (the lawsuit currently on appeal) and Respondents filed a motion to dismiss. The motion was heard by the Honorable G. Thomas Cooper, and after oral argument, he issued an Order denying the motion. Respondents timely served a motion to reconsider that Order. After a hearing on the motion to reconsider was held, Judge Cooper granted the motion and issued an Order dismissing the lawsuit. His Order was based on his determination that this was a derivative lawsuit and that the mandatory requirements of Rule 23(b)(1) had not been met. Appellants then filed a motion to reconsider the Order of Dismissal. That motion was denied without a hearing and this appeal followed.

FACTUAL BACKGROUND

The Fund was created by a document entitled Agreement and Declaration of Trust dated September 27, 1995. [Agreement and Declaration of Trust, R. p. 345] Its purpose, as spelled out in the document, is to provide a fund to meet and fulfill the home builder/member's obligations and liabilities under the South Carolina Workers' Compensation Act. The Fund is not an insurance company and is not regulated by the South Carolina Department of Insurance. [Mar. 15, 2012 Aff. J. Ranew ¶2, R. p. 124-25] Instead, the Fund is regulated by the South Carolina Workers' Compensation Commission, and provides home builders who voluntarily become members of the Fund an alternative for meeting the requirements of the Workers' Compensation Act. [*Id.*, R. p. 124-25]

If a home builder wants to become a member of the Fund, the home builder must complete a South Carolina Workers' Compensation Commission Form 6A, entitled "Application for Membership in a Self-Insured Fund," and pay a \$25.00 non-refundable application fee to the Commission. [*Id.*, R. p. 124-25] The application makes clear that "[i]f the applicant is approved, it is agreed and acknowledged that the applicant, along with the other members of the Fund, will be jointly and severally liable for any liability of the Fund which is incurred during

the applicant's membership in the Fund." [*Id.*, R. p. 124-25]; accord S.C. CODE ANN. § 15-35-170 ("On judgment being obtained against an unincorporated association..., the individual property of any copartner or member thereof found in the State shall be liable to judgment and execution for satisfaction of any such judgment."). Participation by the home builder is entirely voluntary. Upon Commission approval, the home builder becomes a member of the Fund and receives a certificate confirming membership in the Fund. [*Id.*, R. p. 125] The Fund also provides the new member with a new member packet and invoices the new member the amount due for providing the member with workers compensation benefits/coverage. [*Id.*, R. p. 125] The issued certificate sets forth the responsibilities of the Fund and the member. [*Id.*, R. p. 125] The member is required to pay premiums for the coverage provided by the Fund. The Fund administers and processes workers' compensation claims made against its members. [Mar. 15, 2012 Aff. J. Ranew ¶2, R. p. 125] The Fund is managed by a Board that is elected by the members.

Appellants repeatedly and incorrectly refer to the Fund's members (home builders) as "beneficiaries." Not true. The Fund is comprised of members who pay a premium to the Fund. The Agreement and Declaration, which established the Fund, refers to all fund participants as "members," as does the Workers' Compensation Commission Form 6A application. Reference to the members as "beneficiaries" is not found in any document and is simply a made-up term used by Appellants.

In their Complaint, Appellants make myriad allegations, claiming that alleged misconduct by the Board has harmed the Fund, which incidentally, is the core claim for a derivative action.

The Appellants' Brief and Complaint states many incorrect purported factual statements concerning the Fund:

- Appellants allege that they are beneficiaries of an Agreement and Declaration of Trust created in the Fund. [Complaint, R. p. 47] *In fact, none are beneficiaries, and only some of the named Appellants remain as members of the Fund.* [Agreement, R. p. 345; July 9, 2013 Aff. J. Ranew ¶2-3, R. p. 130-31]
- Appellants allege that the Trustees removed approximately \$5,000,000 from the Fund in order to incorporate a new member-owned insurance company. [Complaint, R. p. 49] *In fact, the \$5,000,000 withdrawal for the purpose of establishing a member-owned mutual insurance company was done with the approval of the Workers' Compensation Commission using non-pledged assets. When the application for establishing the member-owned mutual insurance company was withdrawn, the \$5,000,000 was returned to the Fund.* [Mar. 15, 2012 Aff. J. Ranew ¶4-5, R. p. 125-27]
- Appellants allege that the Trustees did not advise the members that the funds could be returned to them and failed to advise them of the potential tax consequences. [Complaint, R. p. 49] *In fact, since the Fund's inception, the Board, in the exercise of its business judgment, when financially appropriate voted to declare a refund of member contributions due to excess reserve funds. In just the last 5 years, the members have received a return of member contributions totaling \$1,500,000. Of course, the ability of the Fund to make these past distributions was because of the fiscally sound and responsible management of the Board.* [Mar. 15, 2012 Aff. J. Ranew ¶6, R. p. 127-28]
- Appellants allege that a building was purchased that provides no benefit to them. [Complaint, R. p. 50] *In fact, the Fund, through a wholly-owned limited liability company, purchased a building with the approval of the Workers' Compensation Commission. The building generates revenue for the Fund and its members because a portion of the building is under lease to a third party.* [Mar. 15, 2012 Aff. J. Ranew ¶3, R. p. 125]
- Appellants allege that the Trustees will use trust funds for the purpose of creating a member-owned mutual insurance company that would not benefit the members of the Fund. [Complaint, R. p. 51] *In fact, the member-owned insurance company, if approved and created, would have a great benefit for the members: it would continue to offer workers' compensation coverage and at the same time eliminate the risk of joint and several liability that now exists with the present structure of the Fund. It would also provide more affordable rates for the members because the member-owned mutual insurance company would likely have a larger membership/risk pool.* [Mar. 15, 2012 Aff. J. Ranew ¶5, R. p. 127]
- Appellants argue that if the current course for the Fund continues, there will be insufficient assets to cover the risks of the Fund. *Appellants have not pleaded a single factual allegation to support this bald-faced statement.* [Complaint, R. p. 47] *In fact, the Fund has more than sufficient reserves, as shown by its required annual filings with the Workers' Compensation Commission.*

A running theme that permeates Appellants' misstatements are the allegations that the Fund has been harmed by the action/inaction of its Board. The allegations confirm that this is a derivative lawsuit. Accordingly, Appellants' failure to comply with Rule 23(b)(1), SCRCPP, compelled the proper dismissal of their case.

STANDARD OF REVIEW

Reviewing the circuit court's decision with respect to Respondents' Rule 12(b)(6) motion, this Court is bound to apply the same standard of review used by the circuit court. *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001). When faced with a Rule 12(b)(6) motion, the circuit court should accept as true all well-pled factual allegations contained in the complaint, and view them in the light most favorable to the non-moving party. *Slack v. James*, 356 S.C. 479, 482, 589 S.E.2d 772, 774 (Ct. App. 2003), *aff'd*, 364 S.C. 609, 614 S.E.2d 636 (2005). The circuit court should dismiss a complaint for failure to state facts sufficient to constitute a cause of action if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations contained in the complaint. *Slack*, 356 S.C. at 482, 589 S.E.2d at 773-74.

For purposes of considering Respondents' Rule 12(b)(6), SCRCPP motion, the circuit court could only consider the complaint and any documents attached to or referenced in it, all of which comprise a portion of the Complaint. *Carolina First Corp. v. Whittle*, 343 S.C. 176, 190 & n.7, 539 S.E.2d 402, 410 & n.7 (Ct. App. 2000). In applying Rule 12, federal courts have recognized that where "collateral documents are inherent to the allegations in the complaint and the parties have noticed that the court will consider the documents" it is appropriate for the court to consider the referenced documents in deciding a motion to dismiss (without converting the

motion to one for summary judgment).¹ See *Darcangelo v. Verizon Communications, Inc.*, 292 F.3d 181, 195 n.5 (4th Cir. 2002) (citing *New Beckley Mining Corp. v. Int'l Union, United Mine Workers of America*, 18 F.3d 1161, 1164 (4th Cir. 1994)); *Abadian v. Lee*, 117 F.Supp.2d 481, 485 (D.Md. 2000) (citing *Biospherics, Inc. v. Forbes, Inc.*, 989 F. Supp. 748, 749 (D.Md. 1997), *aff'd*, 151 F.3d 180 (4th Cir. 1998)). Further, the circuit court may also take judicial notice of other matters of record in the same action. *Masters v. Rodgers Dev. Group*, 283 S.C. 251, 255, 321 S.E.2d 194, 196 (Ct. App. 1984) (holding judicial notice is appropriate for items whose “accuracy is capable of verification by reference to readily available sources of indisputable reliability”).

“When ‘the dispute is not as to the underlying facts but as to the interpretation of the law, and development of the record will not aid the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss [pursuant to Rule 12(b)(6)].” *Bessinger v. BI-LO, Inc.*, 366 S.C. 426, 434, 622 S.E.2d 564, 568 (Ct. App. 2005) (quoting *Madison v. Am. Home Prods. Corp.*, 358 S.C. 449, 451, 595 S.E.2d 493, 494 (2004)).

Finally, and critical to this appeal, under Rule 23(b)(1), SCRCPP, a plaintiff *must* meet certain pleading requirements in order to maintain a derivative action.² “A derivative action that does not meet the pleading requirements of Rule 23(b)(1), SCRCPP, is properly dismissed pursuant to Rule 12(b)(6).” *Clearwater Trust v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006). This Rule seeks to prevent the unrestrained use of derivative actions. *Whittle*, 343 S.C. at 185, 539 S.E.2d at 407.

¹ Since [the South Carolina] Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, [South Carolina courts] look to the construction placed on the Federal Rules of Civil Procedure.” *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991).

² Rule 23(b)(1) requires that “the complaint *shall* also allege with particularity the efforts made by the plaintiff to obtain the action he desires from the director . . . and the reason for his failure to obtain the action or for not making the effort.” (emphasis added).

I. THE CIRCUIT COURT CORRECTLY HELD THAT THE ACTION INVOLVES DERIVATIVE CLAIMS AND IS SUBJECT TO THE REQUIREMENTS OF RULE 23(B)(1).

A. Rule 23(b)(1) and Its Purpose

Rule 23(b)(1) addresses derivative actions filed by the shareholders of a corporation or members of an unincorporated association.³ The Fund is an unincorporated association. A derivative action is brought when one or more members of an unincorporated association, perceiving that the association has received an injury that the management has failed to redress, seeks to institute a suit for the benefit of the association. Rule 23(b)(1) is a departure from the Rule 8 pleading standards in that it explicitly provides additional pleading requirements for a derivative action. In *Carolina First Corp. v. Whittle*, this Court acknowledged that the “protective principles underlying the pleading requirements of Rule 23(b)(1) have long been recognized as important gatekeepers in South Carolina corporate jurisprudence.” 343 S.C. 176, 185, 539 S.E.2d 402, 407 (Ct. App. 2000).

The drafters of the rules of civil procedure rightly determined, building from common law jurisprudence, that derivative lawsuits must meet the additional requirements of a pre-suit demand in order for members of an unincorporated association to proceed with a lawsuit relating to the internal decision making of the association. *Latimer v. Richmond & D.R. Co.*, 39 S.C. 44, 51-52, 17 S.E. 258, 260-61 (1893) (stating that “before the shareholder is permitted, in his own name, to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to

³ The requirements of Rule 23(b)(1) apply with equal force in lawsuits against both an unincorporated association and a corporation. Thus, if a prior decision uses the word “corporation” when identifying a named defendant, the holding of that decision applies to derivative suits against “unincorporated associations,” as well. Also, in a derivative action against a corporation, the action will be brought by “shareholders” on behalf of the corporation. In a derivative action against an unincorporated association, the action will be brought by the “members” on behalf of the unincorporated association.

obtain; within the corporation itself, the redress of his grievances, or action in conformity to his wishes”).

Rule 23(b)(1) provides that:

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort.

Rule 23(b)(1), SCRCPP (emphasis added).

In *Whittle*, this Court affirmed the circuit court’s dismissal of plaintiff’s complaint because it failed to meet the pleading requirements of Rule 23(b)(1). It held that “[d]emand is required in order to assure compliance with the most fundamental principle of corporate governance—directors are answerable to the shareholders and are charged with the duty and responsibility to manage all aspects of corporate affairs.” *Id.* at 188, 539 S.E.2d at 409. It is for that reason that a derivative action is referred to as a “remedy of last resort.” *Id.* at 187, 539 S.E.2d at 408.

The “protective principles” of Rule 23 have been adopted because a proper pre-suit demand alerts the Board so that it may exercise its reasonable business judgment as to whether any corrective action should be taken without litigation. *Id.* at 188, 539 S.E.2d at 409. Rule 23(b)(1) requires a plaintiff to allege *in the complaint* the details of his pre-suit demand with particularity. Again, “Rule 23 is a departure from the more liberal pleading requirements of Rule 8, SCRCPP, in that it requires particularized allegations.” *Id.* at 188, 539 S.E.2d at 409. By pleading with particularity the actions sought by the plaintiff, the efforts he has made to convince the Board to take those actions, and the resulting decision by the Board, the Court is able to

exercise its gatekeeping authority. Thus, if a demand is rejected by the Board, then the particularized allegations set forth *in the complaint* allow the Court to determine whether the Board's decision deserves deference and, thus, whether a derivative suit should proceed. *E.g., Grimes v. Donald*, 673 A.2d 1207, 1219 (Del. 1996) (noting that if a demand is rejected, "the board rejecting that demand is entitled to the presumption of the business judgment rule unless the stockholder can allege facts with particularity creating a reasonable doubt that the board is entitled to the benefit of the presumption") (overruled on unrelated grounds related to standard of review).

South Carolina's Rule 23(b)(1) mirrors Federal Rule of Civil Procedure 23.1. The federal rule, from which South Carolina's rule is derived, was designed to protect against the potential abuses stemming from derivative actions. *Whittle*, 343 S.C. at 185, 539 S.E.2d at 407. Rule 23.1 seeks to prevent unrestrained use of derivative actions by shareholders of a corporation or members of an unincorporated association which would undermine the basic principles of corporate governance that certain decisions should be made by management of the entity. *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 530 (1984) (noting the requirements for bringing a derivative action were designed to limit actions to situations in which there is an unjustified failure by the entity to act for itself). Furthermore, such actions impinge on the inherent role of management to conduct the affairs of the entity. *Renfro v. FDIC*, 773 F.2d 657, 658 (5th Cir. 1985). Mandatory compliance with Rule 23(b)(1) provides the circuit court, as gatekeeper, with a roadmap to follow in determining whether an unincorporated association's management has been given an opportunity to address the alleged wrong before forcing it into litigation.

Appellants misconstrue the purpose of Rule 23 when analogizing to federal jurisprudence at pages 21-22 of their Brief. The portion of Rule 23(b) addressed in *Surowitz v. Hilton Hotels Corp.* is the predecessor to current Rule 23.1(b), FRCP, which primarily deals with the

requirement that a plaintiff in a derivative lawsuit verify the complaint before filing the same.⁴ 383 U.S. 363, 372 (1966). It is this verification requirement, and *not* the pleading requirements at issue here, that was written to prevent “strike suits,” in which suits were filed without regard to their truth in order to coerce corporate managers to settle. *Id.* at 371 (noting that verification requirement was “originally adopted . . . to discourage ‘strike suits’ by people who might be interested in getting quick dollars by making charges without regard to their truth so as to coerce corporate managers to settle worthless claims in order to get rid of them”). To state that the entirety of Rule 23(b)(1) was created to prevent strike suits is grossly incorrect. Rule 23(b)(1) has clear and important gatekeeping functions that exist to allow management of a corporation or an association to use its business judgment when dealing with the operations and decision making of an organization. These pleading requirements are not mere “procedural technicalities”; they are designed to prevent minority members from taking an organization hostage.

The following are but a couple examples of why strict application of the pleading requirements of Rule 23(b)(1) are so important:

1. Assume the required pre-suit demand (which must be described with particularity in the complaint) asked a board to take action that would violate an SEC regulation or a decision of another regulatory agency (e.g., the Workers’ Compensation Commission). If the pre-suit demand is denied and a member(s) brings an action against the unincorporated association because his demand was not met, a trial judge can properly dismiss the complaint at the earliest stage of the litigation.
2. Assume the required pre-suit demand asked a board to take action in a manner inconsistent with its managerial discretion. If the pre-suit demand is denied and the member brings an action against the unincorporated association because his demand was not met, a trial judge can look to the pleadings to determine whether the board’s decision falls within the protections of the business judgment rule. If it does, then the trial judge can properly dismiss the complaint at the earliest stage of the litigation. If it does not fall within the protections of the business judgment rule, then the trial judge can make that legal determination and allow the litigation to proceed.

⁴ *Accord* Rule 23(b)(1) (stating that the “complaint shall be verified”).

B. The Claims Sought by Appellants Are Derivative

Appellants brought claims that are clearly of a derivative nature and thus subject to the mandatory requirements of Rule 23(b)(1). Appellants assert claims for the association as opposed to individualized wrongs allegedly suffered by particular members. Their own allegations in their complaint regarding claimed wrongs committed by the Board establish the derivative nature of this lawsuit. Paragraph 41 of the Complaint states:

41. The plaintiffs are entitled to an Order of this Court ordering that the Trustees be removed for breach of their fiduciary duties and breach of trust, that new trustees be elected, **that all trust assets be returned to the Trust, that all damages incurred and funds taken out of the trust in breach of fiduciary duties and trust agreement be awarded**, enjoining further violations of the fiduciary duties and trust agreement, and awarding the plaintiffs and the class actual and punitive damages. (emphasis added).

[Complaint, ¶41, R.p. 52] Appellants could not maintain an individual action because they did not allege, nor could they, that any individual member's loss was separate and distinct from that of the Fund itself. In fact, they allege the opposite. For example, at paragraph 13 of the Complaint, Plaintiffs allege that their injuries are typical of the claims of the other members. [Complaint, ¶13, R.p. 48] The Complaint identifies no personal, individualized damage to any Appellant, or an unnamed member for that matter.

A member of an association may maintain an individual action *only* if his loss is separate and distinct from that of the association. *Hite v. Thomas & Howard Co. of Florence, Inc.*, 305 S.C. 358, 361, 409 S.E.2d 340, 342 (1991), *overruled on other grounds by Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995); *Rice-Marko v. Wachovia Corp.*, 398 S.C. 301, 308, 728 S.E.2d 61, 65 (Ct. App. 2012). "A shareholder's suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder." *Hite*, 305 S.C. at 361, 409 S.E.2d at 342. Allegations of corporate malfeasance that result in identical harm to all shareholders constitute a "breach of fiduciary duty [claim that] gives rise to a classic

shareholders' derivative suit." *Clearwater Trust*, 367 S.C. at 351, 626 S.E.2d at 339; *Babb v. Rothrock*, 303 S.C. 462, 464, 401 S.E.2d 418, 419 (1991) ("It is firmly established by our decisions that individual shareholders may not sue corporate directors or officers directly for losses suffered by the corporation.").

The gravamen of Appellants' Complaint alleges that the Fund has been injured and that each member may be liable for a shortfall in the assets of the Fund. This is not an allegation setting forth a specific, individualized injury. Instead, such an allegation meets the definition of a lack of a distinct injury to any single member. These alleged injuries are to the collective whole, and are not specific, differentiated injuries to particular members. Appellants do not allege particularized losses that the individual members of the Fund suffered or might suffer; instead, it is a collective loss that has been (or could be) allegedly suffered equally by all members.

In an effort to evade the Rule 23(b)(1) requirements of a derivative lawsuit, Appellants argue for the right to bring direct claims under the so-called "special duty" exception. [Appellants' Brief, pp. 15-16] The Appellants did not raise this issue to the circuit court; they raised it for the first time in their opening brief to this Court. Accordingly, it is not preserved for appellate review. *Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp.*, 368 S.C. 342, 372, 628 S.E.2d 902, 919 (Ct. App. 2006) ("In order for an issue to be properly preserved for appeal, it must have been both raised to and ruled upon by the trial court.").

Issue preservation aside, Appellants' special duty argument fails as a matter of law. Appellants take the position that the general fiduciary duties the Board owes to all of the members of the Fund should be labeled as a *special duty*. That argument was rejected by the very decision Appellants cite.

In *Rice-Marko v. Wachovia Corp.*, 398 S.C 301, 728 S.E.2d 61 (Ct. App. 2012), former shareholders sought to bring direct claims against officers and directors of Wachovia for losses to their investment in Wachovia stock. The shareholders alleged they had a right to bring a direct claim for these losses based, in part, upon the special duty exception to the rule that “shareholders do not have standing to bring direct claims for wrongs that diminish the value of their shares in a corporation.” *Id.* at 307, 728 S.E.2d at 65. Affirming the circuit court’s dismissal of the shareholders’ complaint, the Court noted that “Appellants have failed to allege any facts from which it may be inferred that Respondents owed Appellants a duty that was personal to Appellants and distinct from the duty Respondents owed Wachovia and its shareholders.” *Id.* at 309, 728 S.E.2d at 65.

In support of their special duty argument, Appellants do not even cite to their Complaint. The omission is telling: Appellants’ Complaint does *not* identify any special duty between the Board and Appellants that is personal and distinct from the general fiduciary duties that the Board owes to all members. In fact, the Complaint repeatedly refers to the duties that the Board owed to the membership in terms of its general fiduciary duties. Accordingly, Appellants special duty argument fails as a matter of law.

It is clear from the pleadings that the Appellants are seeking damages on behalf of the Fund based on the alleged actions of the Board. Therefore, the claims are quintessentially derivative, making the entirety of the Complaint derivative in nature. The circuit court correctly held that the Complaint is derivative and that Rule 23(b)(1) applied.

II. THE CIRCUIT COURT CORRECTLY HELD THAT THE FUND IS AN UNINCORPORATED ASSOCIATION AND NOT A TRUST, AND THAT RULE 23(B)(1), THEREFORE, APPLIES

The circuit court held, as the Respondents maintained, that the Fund is an unincorporated association and not a trust. In making this determination, it is necessary to analyze the essence of each form of entity, rather than look to mere labels.

A. What is the Essence of a Trust?

A trust is an arrangement whereby property is transferred to another with the intent that it be administered by the trustee for the benefit of the transferor or a third party. *State v. Jackson*, 338 S.C. 565, 570, 527 S.E.2d 367, 370 (Ct. App. 2000). To prove the existence of a trust, the following elements must be shown: (1) a declaration creating the trust, (2) a trust *res*, and (3) designated beneficiaries. *Whetstone v. Whetstone*, 309 S.C. 227, 231, 420 S.E.2d 877, 879 (Ct. App. 1992) (holding that no trust existed because there was no initial trust *res*). “It is an axiomatic principle of law that a person or entity must hold title to property in order to declare that it is held in trust for the benefit of another or transfer legal title to one person for the benefit of another.” *All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of S. Carolina*, 385 S.C. 428, 449, 685 S.E.2d 163, 174 (2009).

In a private, non-charitable trust, the beneficiaries normally must be ascertainable. *Restatement (Third) of Trusts* § 44 (2003). Such beneficiaries are normally named, or can be derived from, the formational document of the trust. Furthermore, it is a fundamental element of a trust that its beneficiaries do not face liability for the actions of the trust. For example, a beneficiary is not liable as the constructive owner of the underlying trust property, is not liable in contract or tort, and is not liable as a stockholder (*i.e.*, for a capital call for stock that is held by the trust). See 3 *Law of Trusts*, Scott, Austin Wakeman, 4th Ed. §§ 265.2, 274, 274.1, 275, 276.

B. What is the Essence of an Unincorporated Association?

As opposed to a trust, an unincorporated association is a body of individuals organized for the pursuit of some common enterprise. *Graham v. Lloyds of London*, 296 S.C. 249, 255, 371 S.E.2d 801, 804 (Ct. App. 1988). An unincorporated association is not a legal entity separate from the individuals who compose it. *Id.* The liability of members of an unincorporated association is joint and several. *Elliott v. Greer Presbyterian Church*, 181 S.C. 84, 186 S.E. 651, 658 (1936); S.C. CODE ANN. § 15-35-170 ("On judgment being obtained against an unincorporated association..., the individual property of any copartner or member thereof found in the State shall be liable to judgment and execution for satisfaction of any such judgment."). *Accord Hall v. Walters*, 226 S.C. 430, 437, 85 S.E.2d 729, 732 (1955). Members freely and voluntarily choose to join an unincorporated association. A common example of such an association is a labor union. See *Int'l Association of Machinists v. Gonzales*, 356 U.S. 617 (1958). An unincorporated association is the predecessor to the many statutory business organizations common in today's world, such as corporations, limited partnerships, and limited liability companies.

C. The Fund Is Not a Trust But an Unincorporated Association

Analyzing this Fund in accordance with the respective elements of a trust on the one hand and an unincorporated association on the other hand allows for a ready identification of the Fund as an unincorporated association – not a trust.

The Fund is missing several essential characteristics of a trust:

- At inception, an identifiable trust *res* was not provided by a grantor. The Fund's property does not come from a third-party grantor or benefactor, but instead from contributions from the members themselves, through membership dues and workers' compensation premiums; membership is voluntary.
- The formational document did not contain ascertainable beneficiaries. The Agreement states generally that home builders can voluntarily become members

of the Fund, but no specific grouping is derived as normally exists with a trust (for example, a trust created for the benefit of all children of Mr. Smith).

- The Fund does not hold property transferred from one person for the benefit of another. There is no transfer of property, in the sense of a grantor providing property to the Fund and then relinquishing his rights to have some form of control over the property. Instead, money is voluntarily contributed to the fund by each member to provide a pool of money for workers' compensation coverage.
- The members of the Fund do not operate without any risk of liability for the actions of the Fund. If there is a shortfall in assets, every member faces joint and several liability for the Fund's losses.

The Fund is an unincorporated association:

- The Fund is comprised of a body of members joined together for a common purpose. The members have voluntarily come together with a common purpose to form a fund that provides lower costs for workers' compensation coverage for South Carolina home builders and their companies.
- Members voluntarily join the Fund. Each member makes a decision to join the Fund, and does so through an application process. Every application for membership must be approved by the Workers' Compensation Commission.
- Liability for the members of the Fund is joint and several.

While the Fund was created by a document called a declaration of trust, the circuit court correctly looked at substance over form and held that the declaration does not create a trust. *See Feeley v. NHAOCG, LLC*, 62 A.3d 649, 668 (Del. Ch. 2012) (noting, in a breach of fiduciary duty case, application of equitable maxim that "equity regards substance rather than form"). The circuit court correctly concluded that the Fund is an unincorporated association. The primary significance of this is that since the Fund is an unincorporated association the requirements of Rule 23(b)(1) *must* be met. "The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors" Rule 23(b)(1), SCRCP (emphasis added).

III. THE CIRCUIT COURT CORRECTLY FOUND THAT APPELLANTS FAILED TO SATISFY THE PLEADING REQUIREMENTS OF RULE 23(b)(1)

A. Appellants Failed to Satisfy the Pleading Requirements of Rule 23(b)(1)

As noted above, the subject Complaint challenged the decisions of the Fund's Board. Furthermore, the subject Complaint alleged equal harm to all members. Consequently, this is a derivative action that must meet the mandatory pleading requirements of Rule 23(b)(1), SCRC. "A derivative action that does not meet the pleading requirements of Rule 23(b)(1), SCRC, is properly dismissed pursuant to Rule 12(b)(6)." *Clearwater Trust*, 367 S.C. at 351, 626 S.E.2d at 339. The pleading requirements of Rule 23 require particularized, detailed, and heightened allegations, and are a departure from the liberal pleading requirements of Rule 8. *Whittle*, 343 S.C. at 188, 539 S.E.2d at 409. This Rule seeks to prevent the unrestrained use of derivative actions: *Id.* at 185, 539 S.E.2d at 407.

Whittle represents good law, is controlling and compels affirmance of the circuit court's order. Recognizing that *Whittle* compels affirmance, Appellants resort to the only course available to them – they ask this Court to overrule *Whittle*. This Court should summarily reject Appellants' argument. The *Whittle* Court correctly based its holding on South Carolina jurisprudence as well as federal case law concerning Rule 23. The "protective principles" of Rule 23 have been adopted because a proper pre-suit demand alerts the Board so that it may exercise its reasonable business judgment as to whether any corrective action should be taken without litigation. *Id.* at 188, 539 S.E.2d at 409. A plaintiff must allege *in his complaint* the details of his pre-suit demand with *particularity*. A Court is able to exercise its gatekeeping authority and decide whether to allow a case to move forward only when a plaintiff pleads with particularity in the complaint the actions sought by the plaintiff, the efforts he has made to convince the Board to take those actions, and the resulting decision by the Board. *E.g., Grimes*, 673 A.2d at 1219. Appellants have clearly failed to meet these Rule 23(b)(1) requirements.

Appellants claim that they have indeed met the requirements of Rule 23(b)(1) by the allegations set forth in paragraph 8 of their Complaint. They clearly have not. Paragraph 8 states in its entirety:

8.
 - a. The Plaintiffs were beneficiaries of the trust at all times relevant including when the transactions complained of were made.
 - b. The Plaintiffs, their agents or others on their behalf have made efforts to obtain the action they desire in this matter including correspondence to Counsel for the Defendants, meetings with counsel for the Defendants, correspondence to the Trust and a previous lawsuit to no avail.

[Complaint, ¶ 8; R. p. 48].

To make the determination of whether the pleading requirements of Rule 23(b)(1) have been met, a court may look *only* to the “four corners” of the complaint. *Whittle*, 343 S.C. at 190, 539 S.E.2d at 410. Appellants failed to satisfy the following requirements:

- Appellants failed to allege “with particularity” the pre-suit efforts they made to convince the board to meet their demands.
- At a minimum, the complaint must specifically identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm caused, and the requested remedial relief. *Whittle*, 343 S.C. at 189, 539 S.E.2d at 409.
- Plaintiffs only make a general allegation in paragraph 8 of the Complaint that they “made efforts to obtain the action they desire” by way of correspondence, meetings, and a previous lawsuit. South Carolina’s courts have deemed such general allegations totally insufficient. *Whittle*, 343 S.C. at 189, 539 S.E.2d at 402 (plaintiffs alleged they demanded “certain information” and “certain actions” in their derivative action; court deemed these allegations conclusory and insufficient).
- Plaintiffs also fail to allege any reasons for not making an appropriate pre-suit demand on the Trustees.

A simple review of the Complaint confirms the Appellants’ failure to comply with the requirements of Rule 23(b)(1). Comparing the facts alleged in the Complaint to the allegations set forth in the *Whittle* complaint establishes that the Complaint failed to meet the heightened pleading requirements of Rule 23(b)(1):

- In *Whittle*, the complaint alleged that plaintiffs demanded “certain information”; *Id.* at 189, 539 S.E.2d at 409. In the instant matter, Appellants Complaint states that they sent “correspondence to counsel for defendants.” [Complaint, ¶ 8; R. p. 48].
- In *Whittle*, the complaint alleged that plaintiffs demanded that “certain actions” be taken; *Id.* at 189, 539 S.E.2d at 409. In the instant matter, the Complaint alleged that Appellants had “meetings with counsel for defendants.” [Complaint, ¶ 8; R. p. 48].
- In *Whittle*, the complaint alleged that plaintiffs made a “supplemental demand”; *Id.* at 189, 539 S.E.2d at 409. In the instant matter, the Complaint alleges that Appellants “sent correspondence to the Trust.” [Complaint, ¶ 8; R. p. 48].

As in *Whittle*, this Complaint did “not allege what the [members] demanded and what the Board rejected.” *Id.* at 189, 539 S.E.2d at 409. Appellants alleged they sent “correspondence” without stating what was in the correspondence. Appellants allege they “had a meeting with counsel for defendants” without even hinting at what may have been said at the meetings. Appellants claim they sent “correspondence to the trust” without even summarizing what was in the correspondence. And finally, Appellants did not allege what the Board rejected—in fact, they could not include those particularized allegations because they did not even allow the Board to provide a substantive response. *See infra* n.5. As in *Whittle*, Appellants brought a derivative action that failed to comply with the requirements of Rule 23(b)(1) and, thus, Judge Cooper properly dismissed it. *Clearwater Trust*, 367 S.C. at 351, 626 S.E.2d at 339. The circuit court properly held that the Complaint failed to allege with particularity the efforts the Appellants made to satisfy the pre-suit demand requirements of Rule 23(b)(1).

During oral argument at the below motions hearing, Appellants asserted that they sent a demand letter to the Board setting forth specific demands.⁵ Contrary to the arguments posited by

⁵ After Respondents alerted Appellants to the Rule 23(b)(1) requirements by moving to dismiss their first complaint for failure to comply with the same, and while the parties were awaiting a ruling on that motion, Appellants sent a “demand letter” to Respondents. Respondents replied to that letter stating a substantive response would not be forthcoming until the circuit court ruled on their motion to dismiss. The circuit court entered an Order dismissing the first complaint on March 5, 2013; before Respondents were able to provide a substantive response, Appellants filed the second action (present appeal) on April 9, 2013. At the hearing on

Appellants, they did not articulate those demands in their Complaint, nor did they incorporate that letter into their Complaint, either by reference as an attachment or exhibit. The circuit court properly held that it could not review that letter in ruling on the motion to dismiss, pursuant to the pleading requirements of Rule 23(b). *Whittle*, 343 S.C. at 190, 539 S.E.2d at 410 (noting that court may only look to the “four corners of the pleading”).

The circuit court properly held that Appellants failed to meet the pleading requirements of Rule 23(b)(1), and did not commit any error in dismissing the Appellants’ Complaint.

B. Respondents Are Not Judicially Estopped from Maintaining that the Fund is an Unincorporated Association

Appellants argue that the Respondents were judicially estopped from maintaining that the Fund was an unincorporated association due to the order of dismissal in the first action. Put simply, this argument fails, and judicial estoppel does not apply.

Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation. *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). The purpose of the doctrine is to protect the integrity of the judicial process rather than to protect litigants from allegedly improper conduct by their adversaries. *Id.* Significantly, judicial estoppel generally applies only to inconsistent statements of fact, and the doctrine does not apply to conclusions of law or assertions of legal theories. *Id.*

In Respondents’ Motions to Dismiss in the first action, Respondents argued the very same Rule 23(b)(1) grounds that they argued in their Motions to Dismiss in the instant matter.

Respondents’ motion to reconsider their motion to dismiss, Respondents stipulated on the record that they would accept Appellants demand letter and provide a substantive response. The circuit court dismissed this action and in its order stated that Respondents had 60 days to respond to the demand letter. [Order, R. p. 20]. Respondents complied and provided a substantive response on April 16, 2014. [Response to Demand Letter, R. p. 320]. With the benefit of a stipulated demand letter and a substantive response, the Appellants were then equipped to allege with particularity in their new complaint all details of the demand process in a subsequent lawsuit. Appellants, however, opted to file a notice of appeal on April 30, 2014.

As in the second action, Appellants alleged in the first action that the Fund was a trust. Only as an alternative theory to Respondents' Rule 23(b)(1) grounds for dismissal, Respondents argued that *if*, as Appellants asserted, the Fund was subsequently determined to be a trust, then the Complaint still must be dismissed because the circuit court did not have subject matter jurisdiction. These arguments are not an inconsistent statement of fact; instead, they represent the normal practice of providing multiple legal theories to a court for grounds for dismissal of an action.⁶ That the circuit court in the first action used this alternative theory for dismissal, advanced by Appellants in their proposed order submitted to the circuit court, does not limit or estop the Respondents from asserting their primary arguments for dismissal upon the filing of a new action by Appellants. Appellants cannot use an alternative argument made by Respondents (and supported by Appellants through their proposed order to the circuit court) and bootstrap it to prevent Respondents from pursuing their primary justifications for dismissal.

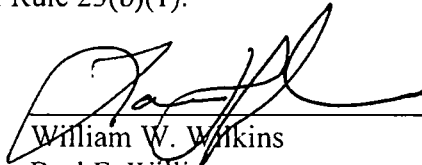
As a matter of law, Respondents' use of an alternative legal theory does not fall within the boundaries of judicial estoppel. Accordingly, they are not precluded from asserting that the Fund is an unincorporated association.

CONCLUSION

Appellants filed a complaint that alleged the Fund's Board acted in a manner that harmed all members of the Fund in the same manner. The Fund is an unincorporated association. Appellants' Complaint pleaded a classic derivative lawsuit. Appellants' Complaint, however, failed to meet the mandatory heightened pleading requirements of Rule 23(b)(1). Judge Cooper correctly identified the deficiencies in Appellants' Complaint and dismissed it. This Court

⁶ This is no different than Appellants' alternative positions in the circuit court and before this Court that they were not required to meet the pleading requirements of Rule 23(b)(1), but if they were, then they did so in paragraph 8 of their Complaint.

should affirm Judge Cooper's decision because it correctly followed this Court's decision in *Whittle* and the mandatory requirements of Rule 23(b)(1).



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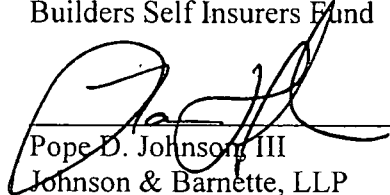
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November 19, 2014

ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

SC Court of Appeals

G. Thomas Cooper, Jr., Circuit Court Judge

Appellant Case No. 2014-000963

Allen Patterson, Steve Tilton, Richard Sendler,
Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis,
Michel Nieri, Allen Patterson Residential LLC, Tilton
Group, Sendler Construction Co., Inc., Privette Enterprises,
Ellis Construction Co., Inc., The Barry Davis Company, Inc.,
Great Southern Homes, and J. Carter, LLC, on behalf of
themselves and others similarly situated.....Appellants,

v.

Herb Witter, Colin Campbell, Eddie Weaver,
Tom Markovich, Keith Smith, Jim Gregorie,
individually and as Trustees of the South Carolina
Home Builders Self Insurers Fund, and the South Carolina
Home Builders Self Insurers Fund.....Respondents.

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ARGUMENT

I. THE ACTION IS NOT SUBJECT TO THE REQUIREMENTS OF RULE 23(B)(1) BECAUSE THE ACTION IS NOT A LAWSUIT AGAINST AN UNINCORPORATED ASSOCIATION.

Respondents mistakenly assert that because the beneficiaries have a common purpose, are voluntary members, and have joint and several liability, that the trust is an unincorporated association. (Respondent's Initial Brief, p.16).

Having a common purpose and voluntary membership is a hallmark of many trusts in South Carolina. This is usually associated with charitable trusts, but "[t]he great majority of the Code's provisions apply to both charitable and noncharitable trusts without distinction." Reporter's comments to S.C. Code Ann. § 62-7-103 (2014) (reporter's comments). Although the Home Builders Fund is a noncharitable trust, having a common purpose and voluntary membership is not disallowed by South Carolina law. To the contrary,

[i]n the absence of a statute to the contrary, a settlor may create a trust for any lawful purpose, and the trust may be created for the settlor's own benefit as well as the benefit of another. The material purposes of a trust are subject to the settlor's discretion, which is limited only to the extent its purposes are lawful, not contrary to public policy, and possible to achieve.

76 Am. Jur. 2d Trusts § 19 (internal citations omitted). These characteristics do not transform trusts into unincorporated associations.

In addition, there is no policy against beneficiaries having joint and several liability for shortfalls in a trust estate. "Except as limited by public policy, the extent of a beneficiary's interest is determined solely by the settlor's intent." S.C. Code Ann. § 62-7-103. The settlors for the Home Builder's Trust, the beneficiaries themselves, limited their own interest to provide for joint and several liability for shortfalls. This is part of

the trust agreement, allowed under South Carolina law, and does not transform the trust into an unincorporated association.

The trust was created in writing and specified that it was a trust throughout the document. The court stated: "The Agreement and Declaration of Trust in this case is replete with references to trustees and trustee duties and obligations." (R. p. 15). Even though the term "beneficiary" was not used, the document itself is entitled "Agreement and Declaration of Trust." (R. p. 345)

The Respondents assert that there was no trust *res* provided by a grantor. (Respondents' Initial brief, p.15). This statement contains two errors: First, the trust *res* was comprised of the contribution of members to the fund as well as any interest made from investments. The comments to S.C. Code Ann. § 62-7-401 explain that the *res* does not have to be large, nor does it have to be immediately available:

The property interest necessary to fund and create a trust need not be substantial. A revocable designation of the trustee as beneficiary of a life insurance policy or employee benefit plan has long been understood to be a property interest sufficient to create a trust. Furthermore, the property interest need not be transferred contemporaneously with the signing of the trust instrument.

Id. (internal citations omitted). Second, the Respondents incorrectly assert that there must be a grantor of property to form a trust *res*. However, there is no requirement in South Carolina law that a trust must be created by a third party grantor. The creator of a trust, the settlor, can also be the beneficiary of a trust. Restatement (Second) of Trusts § 156 (1959).

The designated beneficiaries were specified in the trust document as members of the Home Builders Association of South Carolina. The beneficiaries are capable of ascertainment or are ascertainable in the future. *See* S.C. Code Ann. § 62-7-402.

(“While some beneficiaries will be definitely ascertained as of the trust's creation, subsection (c) recognizes that others may be ascertained in the future as long as this occurs within the applicable perpetuities period”); Restatement (Second) of Trusts § 112 (1959) (“It is not necessary ... that the beneficiary should be known at the time of the creation of the trust”). “A beneficiary designation is sufficient for a private trust if the identity of the beneficiary can be ascertained objectively, solely from the standards stated in the instrument.” 76 Am. Jur. 2d Trusts § 53.

A trust cannot be treated as an unincorporated association because the laws of South Carolina prescribe very different duties and responsibilities for their governance. A trustee's primary duty is to the beneficiaries, while a director's primary duty is to the corporation in addition to the shareholders. Compare § 62-7-802 with *Clearwater Trust v. Bunting*, 367 S.C. 340, 349, 626 S.E.2d 334, 338 (2006).

If a trustee violates his duty, there are prescribed remedies for the court to follow. § 62-7-1001. This is not the case with a breach of duty by a director. See § 33-8-300. A beneficiary may ask the court to remove a trustee, but a director must be removed by vote of the shareholders. Compare § 62-7-706 with § 33-8-108. Corporations are required to hold annual meetings of shareholders and provide a list of voting groups. See § 33-7-701. However, there is no such requirement for trustees to have annual meetings of beneficiaries.

The court erred by holding that the Home Builder's Trust was an unincorporated association and that the members are shareholders. Shareholders have certain rights that the beneficiaries of the Trust Fund do not have. Beneficiaries of the trust do not have the right to notification of and opportunity to attend shareholder meetings, S.C. Code Ann. §

33-7-105, access to a list of shareholders entitled to vote, S.C. Code Ann. § 33-7-200, the right to distributions, S.C. Code Ann. § 33-6-400, the preemptive right to acquire unissued shares, S.C. Code Ann. § 33-6-300, the right to submit demands for meetings, S.C. Code Ann. § 33-7-102, the right to remove directors, S.C. Code Ann. § 33-8-108, and the right to dissent and obtain payment of shares, S.C. Code Ann. § 33-13-102. It is unfair to impose the label of unincorporated association to the trust since the trust beneficiaries do not have the protections of shareholders in a corporation. In essence, by holding that the trust is an unincorporated association, the court has changed the entire contract between the parties, and allowed the trustees to hold more power than was anticipated or allowed by South Carolina law.

II. THE ACTION IS NOT SUBJECT TO THE REQUIREMENTS OF RULE 23(B)(1) BECAUSE THE ACTION IS NOT DERIVATIVE.

“A derivative action is an action by a stockholder to obtain relief for an alleged wrong committed against the *corporation*.” 18 C.J.S. Corporations § 482 (emphasis added). However, a breach of trust gives rise to an action on the part of a beneficiary *for any loss to the trust estate*. 76 Am. Jur. 2d Trusts § 333 (internal citations omitted).

The beneficiaries of the Home Builder’s Trust claimed damage to both the trust corpus and to themselves as individuals. The court incorrectly held that since the beneficiaries are claiming damage to the trust corpus, the action is derivative in nature. This is not the law in South Carolina. It is necessary for a trust to have a corpus or *res* upon creation. If the trustee damages that trust estate, a beneficiary may bring a breach of trust action even though no distributions from the trust have been made. The trust code does not require that the beneficiaries bring a derivative action. § 62-7-1001, 1002. In other words, even though there has not yet been any distribution from a trust, the law

indicates that damages to a trust corpus are eventually borne by the beneficiaries, who have the right to bring an action for breach of trust.

The Home Builder's Trust Fund consists of a trust corpus held by trustees for the benefit of the beneficiaries. While the administration of that trust may be businesslike in nature, the trustees are not directors. The trust specifies that the beneficiaries do not have control over the funds, even though they were also the settlors who contributed the funds: "The Trustees shall have said authority [in] retaining control over all funds collected or dispersed." (R. pp. 353, 354). The individual beneficiaries have been damaged by the acts of the trustees. The Beneficiaries are not shareholders, and they have each suffered a particular loss. Therefore, mismanagement of the trust results in a direct loss to each beneficiary. Since the Plaintiffs are beneficiaries of the trust, they have standing to bring this action.

III. RESPONDENTS ARE JUDICIALLY ESTOPPED FROM CLAIMING THAT THE FUND IS ANYTHING OTHER THAN A TRUST.

Respondents claim that they never intended for the trust code to apply to the Home Builder's Trust, but that they were simply offering an alternative legal theory for the court. (Respondents' Initial Brief, p.21). The court, however, issued an order that states:

[The] Defendants moved to dismiss on the basis of lack of subject matter jurisdiction. The Defendants argued that this lawsuit involves the internal affairs of the Trust such that it must be filed in the Probate Court under South Carolina Code Section 62-7-201.... **It is clear from the documents submitted to the Court that this dispute concerns a trust....** With this in mind, the Court dismisses this lawsuit without prejudice such that it may be refiled in Probate Court to cure any alleged defects in subject matter jurisdiction.

(R. p. 2) (emphasis added). The court, therefore, has issued an order that declares the Home Builder's Trust to be a trust and not an unincorporated association. "When reviewing an action at law, on appeal of a case tried without a jury, the appellate court's jurisdiction is limited to correction of errors at law. The appellate court will not disturb the judge's findings of fact as long as they are reasonably supported by the evidence." *Epworth Children's Home v. Beasley*, 365 S.C. 157, 164, 616 S.E.2d 710, 714 (2005). Respondents did not appeal this ruling by the court. An unappealed ruling, right or wrong, is the law of the case. *Georgetown Cnty. League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 357, 713 S.E.2d 287, 291 (2011); *see also Warren v. Yarborough*, 2012-UP-401, 2012 WL 10860503 (S.C. Ct. App. July 11, 2012) ("the probate court order dated November 20, 2007, wherein the court found Appellant had breached his duty as Trustee was not appealed by Appellant. Thus, the findings of the probate court ... are the law of the case.")

The Trustees obtained an order from the court dismissing the previous lawsuit based on their factual assertion that the South Carolina Home Builders Self Insurers Fund was a trust. Now, the Trustees take the position that it is not a trust, but an unincorporated association, which changes the pleading requirements of the lawsuit. The Trustees cannot assert these two different versions of the facts. They are bound by the assertion made in the previous lawsuit and the order which resulted. Thus, the Trust Fund is a trust, not an unincorporated association, and does not have to comply with Rule 23(b) regarding derivative actions.

IV. EVEN IF RULE 23(B) APPLIES TO THE TRUST, THE PLEADING REQUIREMENTS HAVE BEEN MET.

In *Hormel v. Helvering*, 312 U.S. 552, 557, 61 S.Ct. 719, 721, 85 L.Ed. 1037 (1941), the Court stated: “*Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of rules of fundamental justice.*” (emphasis added). Respondents have asserted that Rule 23, and its construction in *Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000), should control in this case. However, the facts of *Whittle* are not on point with this case, and the pleading requirements have been met.

The Federal Rules of Civil Procedure “reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and [which instead] accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.” *Foman v. Davis*, 371 U.S. 178, 181-82 (1962) (citation and quotations omitted). See also *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966) (“The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion.”).

The first rule of civil procedure explains that the federal rules are to be “construed and administered to secure the just, speedy, and inexpensive determination of every action.” Fed. R. Civ. P. 1. “[T]hese rules were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court.” *Surowitz*, 383 U.S. at 373.

As lower courts have said, “it would ... be a harking back to the formalistic rigorism of an earlier and outmoded time ... to hold that the extremely simple procedure required by the rules is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with them defeats substantial rights.” *Alley v. Dodge Hotel*, 501 F.2d 880, 884 (D.C. Cir. 1974) (quoting *Crump v. Hill*, 104 F.2d 36, 38 (5th Cir. 1939)).

Respondents assert that the reference in the Complaint to Appellant’s pre-suit demand fails to satisfy the pleading requirements of Rule 23(b), and that the court could not consider the letter referenced in the complaint. (Respondents’ Initial Brief, p.20). However, the court may consider documents referenced in the plaintiff’s Complaint when testing the legal sufficiency of a pleading even if those documents are not attached.

Most circuit courts of appeal have concluded that “documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered.” *Branch v. Tunnell*, 14 F.3d 449, 453–54 (9th Cir. 1994) *overruled on other grounds by Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002); *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993) (recognizing narrow exception to conversion rule for documents the authenticity of which are not disputed by the parties, official public records, documents central to the plaintiffs’ claim and documents sufficiently referred to in the complaint); *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993) (“[A] court may consider an indisputably authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff’s claims are based on the document.”); *Venture Assoc. Corp. v. Zenith Data Systems Corp.*, 987 F.2d 429, 431 (7th Cir. 1993) (documents attached to a motion to dismiss are considered part of the pleadings if they are referred to

in the plaintiff's complaint and are central to his claim); *Cortec Indus. Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991) (finding conversion not required “[w]here plaintiff has actual notice of all of the information in the movant's papers and has relied upon these documents in framing the complaint”); *Teagardener v. Republic–Franklin Inc. Pension Plan*, 909 F.2d 947, 949 (6th Cir. 1990) (finding complaint's extensive quotation of unattached document permitted court to consider language and interpretation of document when defendant tendered it on motion to dismiss). South Carolina District Courts agree that documents such as these should be considered. *Cobin v. Hearst-Argyle Television, Inc.*, 561 F. Supp. 2d 546, 552 (D.S.C. 2008) (finding that the court could consider authentic documents referenced in a motion to dismiss).

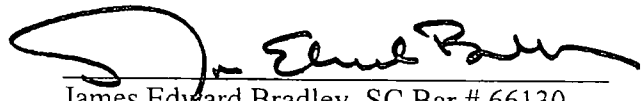
In the hearing before Judge Cooper on January 14, 2014, attorney for the Respondents stated that he would “accept this January 30th 2013, letter that the plaintiff styled [as] their demand letter [and] will accept it as being received.” (R. p. 115). The Respondents have accepted the letter as authentic. Therefore, the letter should have been considered as part of the pleadings.

Even if the letter was not considered, the complaint complied with Rule 23(b) by stating in detail their request for relief, verifying their complaint, and stating that they undertook efforts to obtain that relief. Therefore, the requirements of Rule 23(b) have been met.

CONCLUSION

This Court should reverse Judge Cooper's order dismissing the beneficiaries' lawsuit against the Trust Fund because the pleading requirements of Rule 23(b) do not apply to actions against trusts, a trust is not an unincorporated association, and the beneficiaries complied with Rule 23(b).

Respectfully submitted,



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November 6, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Allen Patterson, Steve Tilton, Richard Sendler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michael Nieri, Allen Patterson Residential LLC, Tilton Group, Sendler Construction Co., Inc., Privette Enterprises, Ellis Construction Co., Inc., The Barry Davis Company, Inc., Great Southern Homes, and J. Carter, LLC, on behalf of themselves and others similarly situated, Appellants,

v.

Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, Jim Gregorie, individually and as Trustees of the South Carolina Homes Builders Self Insurers Fund, and the South Carolina Home Builders Self Insurers Fund, Respondents.

Appellate Case No. 2014-000963

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 5416
Submitted December 1, 2015 – Filed June 15, 2016

AFFIRMED

James Edward Bradley and S. Jahue Moore, both of Moore Taylor Law Firm, P.A., of West Columbia, for Appellants.

William W. Wilkins and Burl F. Williams, of Nexsen Pruet, LLC, of Greenville, for Respondents; James Lynn Werner and Lawrence M. Hershon, of Parker Poe Adams & Bernstein LLP, of Columbia, for Respondent South Carolina Home Builders Self Insurers Fund and Respondents Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, and Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund; and Pope D. Johnson, III, of Johnson & Barnette, LLP, of Columbia, for Respondents Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, and Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund.

WILLIAMS, J: In this civil matter, Allen Patterson and several others¹ (collectively "Appellants") appeal the circuit court's grant of the South Carolina Home Builders Self Insurers Fund (the Fund) and its trustees' (collectively "Respondents") Rule 12(b)(6), SCRCP, motion to dismiss. Appellants argue the court erred in (1) finding the Fund was not a trust; (2) ruling the action involved derivative claims subject to the pleading requirements of Rule 23(b)(1), SCRCP; and (3) holding Appellants' complaint did not comply with such requirements. We affirm.

FACTS/PROCEDURAL HISTORY

Home Builders Association of South Carolina, Inc. (HBASC) is a nonprofit corporation organized under the laws of South Carolina. HBASC's membership is comprised of individual and corporate homebuilders throughout the state. On September 27, 1995, HBASC created the Fund in a document titled "Agreement and Declaration of Trust" (the Agreement). Pursuant to the Agreement with HBASC, as the "Settlor," the contemporaneously formed "Board of Trustees" (the Board) was to direct the affairs of the Fund. According to the Agreement, the

¹ The other named appellants in this matter are Steve Tilton, Richard Sendler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michael Nieri, Allen Patterson Residential LLC, Tilton Group, Sendler Construction Co., Inc., The Barry Davis Company, Inc., Great Southern Homes, and J. Carter, LLC.

Fund's purpose was to meet and fulfill HBASC members' obligations and liabilities under the South Carolina Workers' Compensation Act² (the Act).

The Fund is regulated and controlled by the South Carolina Workers' Compensation Commission (the Commission) and is not an insurance company. To become a member of the Fund and satisfy workers' compensation obligations under the Act, a homebuilder must first submit an application to the Commission. If the Commission approves the application, then the homebuilder receives a certificate confirming membership in the Fund. Five weeks following approval, the Fund begins to bill the new member for the premium relating to its business. Each Fund member pays a predetermined rate for protection from workers' compensation claims of its employees. Additionally, each member is jointly and severally liable for the obligations of the Fund.

Appellants are members of the Fund. On February 16, 2012, Appellants filed a complaint (First Complaint) against Respondents, bringing causes of action for, *inter alia*, breach of fiduciary duty, breach of trust, and breach of contract. Appellants alleged the Board breached its fiduciary duties by voting to remove approximately \$5 million from the Fund to establish a separate member-owned insurance company that Appellants argue would not provide any benefit to existing Fund members.³

After Appellants amended the First Complaint, Respondents moved to dismiss under Rule 12(b)(6), SCRCP, arguing Appellants failed to meet the pleading requirements for derivative suits under Rule 23(b)(1), SCRCP. Respondents alternatively asserted the suit involved the internal affairs of a trust and, thus, was under the exclusive jurisdiction of the probate court pursuant to section 62-7-201 of the South Carolina Code (Supp. 2015).

On March 4, 2013, the circuit court accepted Respondents' alternative argument and dismissed the action without prejudice, holding it lacked subject matter jurisdiction to hear the case. The court ruled Appellants must initially file the

² S.C. Code Ann. §§ 42-1-10 through -19-50 (2015 & Supp. 2015).

³ The \$5 million transfer to a new mutual insurance company was ratified by 96.5% of Fund members and approved by the Commission. Respondents returned the \$5 million to the Fund after failing to reach an agreement with HBASC on the formation of the company.

action in probate court, but could subsequently remove it to circuit court under section 62-1-302(d)(4) of the South Carolina Code (Supp. 2015).

Appellants filed another complaint (Second Complaint) on April 9, 2013, in probate court and moved to remove the case to circuit court. On April 22, 2013, the probate court granted Appellants' motion to remove. In the circuit court, Respondents again filed a motion to dismiss the Second Complaint, arguing the lawsuit was a shareholder derivative action and Appellants failed to comply with the pleading requirements of Rule 23(b)(1). On November 8, 2013, the circuit court denied Respondents' motion to dismiss, holding the Fund was a trust and, as such, was not subject to the pleading requirements of Rule 23(b)(1).

Respondents subsequently filed a Rule 59(e), SCRCP, motion to alter or amend judgment. The circuit court granted Respondents' motion on February 11, 2014, and dismissed Appellants' Second Complaint.⁴ In reaching its decision, the court found the Fund was not a trust, but instead resembled an unincorporated association. The court further explained the "gravamen of the [Appellants' c]omplaint alleges that the [F]und has been injured, not that the members have been injured." Thus, the court found the claims were typical of derivative claims subject to the pleading requirements of Rule 23(b)(1), requiring particularized allegations that Appellants first made a demand on the Board to obtain the relief they sought. The court found Appellants' complaint did not include sufficient allegations of such a demand and, therefore, did not comply with Rule 23(b)(1).

The circuit court, however, recognized Respondents had agreed to accept a January 20, 2013 letter from Appellants as a demand under Rule 23. After giving Respondents sixty days to respond to the letter, the court ruled Appellants "may pursue whatever legal action they determine is appropriate." On March 3, 2014, Appellants filed a motion to alter or amend the order of dismissal, which the circuit court denied. This appeal followed.

ISSUES ON APPEAL

⁴ Upon our review of the record on appeal, we cannot determine whether the Agreement was attached to the Second Complaint. Nevertheless, given that no party raised an issue on appeal regarding the circuit court's review of the Agreement under a Rule 12(b)(6) motion, we find it is the law of the case. See *Trans. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) ("An unappealed ruling is the law of the case and requires affirmance.").

- I. Did the circuit court err in finding the Fund was not a trust?
- II. Did the circuit court err in ruling the action involved derivative claims subject to Rule 23(b)(1), SCRCP?
- III. Did the circuit court err in holding Appellants' complaint did not comply with the pleading requirements of Rule 23(b)(1), SCRCP?

STANDARD OF REVIEW

The appellate court applies the same standard of review as the circuit court in reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). "A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case." *Fleteau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 415 (Ct. App. 2003). "The question is whether, in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 149, 714 S.E.2d 537, 539 (2011).

LAW/ANALYSIS

I. Unincorporated Association or Trust

A. Judicial Estoppel

As a preliminary matter, Appellants contend Respondents are judicially estopped from arguing the Fund is not a trust because Respondents previously took an inconsistent position in their first motion to dismiss Appellants' First Complaint. We disagree.

"Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004). "The purpose of the doctrine is to ensure the integrity of the judicial process, not to protect the parties from allegedly dishonest conduct by their adversary." *Id.* To prevail on a judicial estoppel claim, a party must prove the following:

(1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.

Id. at 215–16, 592 S.E.2d at 632. In South Carolina, the doctrine of judicial estoppel applies only to matters of fact, not conclusions of law. *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997).

In its motion to dismiss Appellant's First Complaint, Respondents argued Appellants failed to meet the pleading requirements for derivative suits under Rule 23(b)(1). Respondents alternatively asserted the suit involved the internal affairs of a trust and, thus, was under the exclusive jurisdiction of the probate court. The circuit court accepted Respondents' alternative argument when it dismissed the case for lack of subject matter jurisdiction. After Appellants filed their Second Complaint in probate court and removed the case to circuit court, Respondents filed another motion to dismiss, contending the Fund was not a trust.

Here, Respondents have not misrepresented facts or changed their version of events to gain an advantage in the instant litigation. *See Bailey*, 327 S.C. at 252, 489 S.E.2d at 477 ("When a party has formally asserted a certain version of the *facts* in litigation, he cannot later change those facts when the initial version no longer suits him." (emphasis added)). Rather, Respondents argued alternative legal theories concerning the essence of the Fund. *See id.* at 251, 489 S.E.2d at 477 (stating the doctrine of judicial estoppel "does not apply to conclusions of law or assertions of legal theories"). Therefore, we find the doctrine of judicial estoppel is inapplicable to this case.

B. Merits

As to the merits of this issue, Appellants argue the circuit court erred in finding the Fund was not a trust. We disagree.

"A trust is an 'arrangement whereby property is transferred with intention that it be administered by [a] trustee for another's benefit.'" *State v. Parris*, 363 S.C. 477, 482, 611 S.E.2d 501, 503 (2005) (quoting *State v. Jackson*, 338 S.C. 565, 570, 527 S.E.2d 367, 370 (Ct. App. 2000)). To prove the existence of a trust, one must show (1) a declaration creating the trust, (2) a trust *res*, and (3) designated beneficiaries. *Whetstone v. Whetstone*, 309 S.C. 227, 231, 420 S.E.2d 877, 879 (Ct. App. 1992).

"An unincorporated association is a body of individual persons organized without a charter for the prosecution of some common enterprise." *Graham v. Lloyd's of London*, 296 S.C. 249, 255, 371 S.E.2d 801, 804 (Ct. App. 1988). An unincorporated association is not a legal entity separate from its members. *Id.* Moreover, the liability of its members is joint and several. *Elliott v. Greer Presbyterian Church*, 181 S.C. 84, 96, 186 S.E. 651, 658 (1936); *see also* S.C. Code Ann. § 15-35-170 (2005) ("On judgment being obtained against an unincorporated association[,] . . . the individual property of any copartner or member thereof found in the State shall be liable to judgment and execution for satisfaction of any such judgment.").

We acknowledge that, at first glance, the Agreement contains language that could be indicative of the Fund being a trust. The Agreement refers to HBASC as the "Settlor." Further, the Agreement grants the Board all powers conferred by the South Carolina Uniform Trustee's Powers Act⁵ and authorizes it to invest assets of the Fund. *Cf.* S.C. Code Ann. § 62-7-933 (Supp. 2015) (providing the prudent investor rule for trustees). Additionally, the Agreement mentions the Fund's compliance with the rule against perpetuities and states the situs of the Fund is the State of South Carolina.

The Agreement, however, also contains provisions usually associated with business corporations. The Board, for example, is elected by the Fund's members. *Cf.* S.C. Code Ann. § 33-8-103(d) (2006) (providing for the election of board of directors by the shareholders). In addition, the Agreement provides notice requirements for regular and special meetings of the Board. *Cf.* S.C. Code Ann. § 33-8-220 (2006) (stating the notice requirements for meetings of the board of directors). Likewise, the Agreement requires that the Board establish an office to house the Fund's books and records. *Cf.* S.C. Code Ann. § 33-16-101 (2006)

⁵ The South Carolina Uniform Trustee's Powers Act was repealed by the South Carolina Uniform Trust Code in 2005. *See* Act No. 66, 2005 S.C. Acts 280–518 (codified as amended at S.C. Code Ann. §§ 62-7-101 through -1106 (Supp. 2015)).

(requiring corporations to maintain a principal office for corporate records). Under the Agreement, the Fund must indemnify the Board for negligence in all actions made in good faith. *Cf.* S.C. Code Ann. § 33-8-510 (2006) (granting authority to corporations to indemnify board of directors for actions made in good faith). Moreover, the Agreement authorizes the Board to obtain liability insurance at the expense of the Fund for all actions, except those made in bad faith or in gross negligence. *Cf.* S.C. Code Ann. § 33-8-570 (2006) (allowing corporations to purchase and maintain liability insurance for their board of directors).

Based upon our review of the Agreement and applicable law, we find the circuit court correctly held the Fund was not a trust. *See* 1 S. ALAN MEDLIN, ESTATE PLANNING IN SOUTH CAROLINA: THE LAW OF WILLS AND TRUSTS § 501.1 (2002) (stating "a settlor may fail to create a trust despite using the word trust"). While the Agreement—arguably a declaration—most likely satisfies the first element for creating a trust, Appellants cannot prove the remaining elements. *See Whetstone*, 309 S.C. at 231, 420 S.E.2d at 879. First, HBASC did not transfer any money or property to the Board to hold in trust for the Fund's members. *See* S.C. Code Ann. § 62-7-401 (Supp. 2015) (stating a trust may be created by a "transfer of property to another person as trustee"); *Whetstone*, 309 S.C. at 231, 420 S.E.2d at 879 (holding one must show a trust *res* to prove the existence of a trust); MEDLIN, *supra*, § 501.1 (noting "[a] settlor cannot create a trust in property not currently owned"). After the Fund was created, its members began to contribute membership dues and premiums into the Fund in exchange for protection for its workers' compensation obligations.

Second, the Agreement contains no provision for "beneficiaries." *See* S.C. Code Ann. § 62-7-402(a)(3) (Supp. 2015) (requiring a trust to have definite beneficiaries); § 62-7-402(c) ("A beneficiary is definite if the beneficiary can be ascertained now or in the future . . ."). Homebuilders must apply to become Fund members. Further, a third party—the Commission—must approve Fund members. Thus, even assuming the Agreement is a declaration of trust, potential Fund members are not ascertainable from the Agreement.

Moreover, we agree with the circuit court that the Fund resembles an unincorporated association. *See Graham*, 296 S.C. at 255, 371 S.E.2d at 804 (holding an unincorporated association is a "body of individual persons organized without a charter for the prosecution of some common enterprise"). The Fund is a common enterprise of homebuilders who have voluntarily joined together to form a fund to provide workers' compensation coverage for their businesses. Additionally, the Fund's members are joint and severally liable for any shortfall in

Fund assets. *See Elliott*, 181 S.C. at 96, 186 S.E. at 658 (stating the liability of an unincorporated association's members is joint and several).

Therefore, we find the circuit court properly concluded the Fund was an unincorporated association and not a trust.

II. Direct or Derivative Claims

Appellants next argue their claims are not derivative and, thus, do not need to comply with the pleading requirements of Rule 23(b)(1), SCRCP. We disagree.

At the outset, because Rule 23(b)(1) covers derivative suits for both corporations and unincorporated associations, we find that principles of South Carolina law concerning derivative suits for corporations apply in this case. *See* Rule 23(b)(1), SCRCP (outlining the requirements for "derivative action[s] brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association").

"In South Carolina, the authority to direct the business and affairs of a corporation is delegated to a board of directors, not the shareholders." *Carolina First Corp. v. Whittle*, 343 S.C. 176, 185, 539 S.E.2d 402, 407 (Ct. App. 2000). Individual shareholders may not directly sue corporate directors for losses suffered by the corporation. *Babb v. Rothrock*, 303 S.C. 462, 464, 401 S.E.2d 418, 419 (1991). "An action seeking to remedy a loss to the corporation is generally a derivative one." *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001) (quoting *Hite v. Thomas & Howard Co.*, 305 S.C. 358, 361, 409 S.E.2d 340, 342 (1991), *overruled on other grounds by Huntley v. Young*, 319 S.C. 559, 560, 462 S.E.2d 860, 861 (1995)).

"A derivative action is, in essence, a challenge to a board's managerial authority." *Whittle*, 343 S.C. at 408, 539 S.E.2d at 187. "[A] shareholder's suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder." *Brown*, 348 S.C. at 49, 557 S.E.2d at 684 (quoting *Hite*, 305 S.C. at 361, 409 S.E.2d at 342).

Nevertheless, the general rule that a shareholder cannot bring a direct suit for injuries to a corporation has two exceptions: (1) when the shareholder suffers an injury separate and distinct from that suffered by other shareholders, and (2) when the alleged wrongdoer owes a fiduciary relationship to the shareholder and full relief cannot be accomplished through recovery by the corporation. *Rice-Marko v.*

Wachovia Corp., 398 S.C. 301, 308, 728 S.E.2d 61, 65 (Ct. App. 2012) (quoting *Brown*, 348 S.C. at 49, 50, 557 S.E.2d at 684, 685).

In the instant case, Appellants allege the Board's decision to remove \$5 million from the Fund harmed the Fund's ability to adequately cover its risks. Thus, the action is premised on the alleged harm to the overall Fund, not to individual members. Accordingly, we find the circuit court correctly held Appellants' claims were derivative and subject to the pleading requirements of Rule 23(b)(1). *See* Rule 23(b)(1), SCRCP (noting the rule applies to members bringing a derivative action to enforce a right of an unincorporated association); *Brown*, 348 S.C. at 49, 557 S.E.2d at 684 (stating "a shareholder's suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder").

Appellants also argue their action falls under the fiduciary relationship exception to the general rule for derivative suits because the Board owed a special fiduciary duty to the Fund's members to protect the Fund's assets. *See Rice-Marko*, 398 S.C. at 308–09, 728 S.E.2d at 65–66. The circuit court did not rule on the special duty argument, and it is nowhere mentioned by Appellants in their complaints, the transcript of the motions hearing, or their Rule 59(e) motion to alter or amend judgment. Because Appellants raise this argument for the first time on appeal, we find the issue is not preserved for appellate review and decline to address it. *See Chastain v. Hiltabidle*, 381 S.C. 508, 514–15, 673 S.E.2d 826, 829 (Ct. App. 2009) ("[A]n appellate court cannot address an issue unless it was raised to and ruled upon by the [circuit] court.").

Therefore, we find the circuit court properly concluded Appellants' claims were derivative and, thus, subject to the requirements of Rule 23(b)(1).

III. Compliance with Rule 23(b)(1)

Finally, Appellants assert that, even if their claims are derivative, they properly complied with Rule 23(b)(1) by alleging a demand on the Board. We disagree.

In pursuing a derivative suit, shareholders must first make a demand on the board of directors to take the action they desire or allege that such demand would be futile. *Whittle*, 343 S.C. at 188, 539 S.E.2d at 409 (quoting *Allison ex rel. Gen. Motors Corp. v. Gen. Motors Corp.*, 604 F. Supp. 1106, 1112 (D. Del. 1985)). The purpose of the demand requirement is to ensure compliance with the most fundamental principle of corporate governance: directors are answerable to the

shareholders and responsible for managing all aspects of corporate affairs. *Id.* (quoting *Gen. Motors Corp.*, 604 F. Supp. at 1117). "A demand alerts the board so that it may take the corrective action, if any, which it deems necessary." *Id.*

Rule 23(b)(1) governs the manner in which a shareholder must bring a derivative action and provides as follows:

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. . . .

"The demand requirement of Rule 23 balances a shareholder's right to assert a derivative claim against a board's duty to decide whether to invest the resources of the corporation in pursuit of the shareholder's claim of a corporate wrong." *Whittle*, 343 S.C. at 187, 539 S.E.2d at 408 (quoting *Blasband v. Rales*, 971 F.2d 1034, 1048 (3d Cir. 1992)).

The heightened and particularized pleading requirements of Rule 23(b)(1) are intended to allow the court to perform a gatekeeping function to prevent the unrestrained use of derivative actions. *Id.* at 185, 539 S.E.2d at 408 (quoting 5 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE*, ¶ 23.1.02[4] (3d ed. 2000)). "A derivative action that does not meet the pleading requirements of Rule 23(b)(1), SCRCF, is properly dismissed pursuant to Rule 12(b)(6)." *Clearwater Tr. v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006).

This court has previously upheld the dismissal of a derivative suit when the shareholders' complaint failed to comply with Rule 23(b)(1). See *Whittle*, 343 S.C. at 184–91, 539 S.E.2d 406–10. In *Whittle*, a group of shareholders brought a

derivative suit against a bank's parent corporation, seeking rescission of bonuses paid to various bank officers in the form of stock in another company. 343 S.C. at 181, 539 S.E.2d at 405. The shareholders alleged the bonuses were devised as a method of self-dealing to the detriment of the bank and its parent corporation. *Id.* at 182, 539 S.E.2d at 406. The circuit court granted the bank and other defendants' motion to dismiss the action, finding the shareholders failed to allege particularized facts showing they complied with the demand requirements of Rule 23(b)(1) and the demand thereafter was wrongfully refused. *Id.* at 183, 539 S.E.2d at 406. In their complaint, the shareholders only alleged they demanded "certain information" and "certain actions" and made a "supplemental demand." *Id.* at 189, 539 S.E.2d at 409. Because the complaint did not contain allegations regarding what the shareholders demanded and what the bank's board of directors rejected, this court held the shareholders failed to comply with the demand requirements of Rule 23(b)(1) and affirmed the circuit court's dismissal of the action. *Id.*

In the instant case, Appellants assert they complied with Rule 23(b)(1), pointing to paragraph eight of their complaint:

8. To the extent required by South Carolina Rule of Civil Procedure 23, the [Appellants] allege:

- a. The [Appellants] were beneficiaries of the trust at all times relevant including when the transactions complained of were made.
- b. The [Appellants], their agents or others on their behalf have made efforts to obtain the action they desire in this matter including correspondence to Counsel for the [Respondents], meetings with counsel for the [Respondents], correspondence to the Trust and a previous lawsuit to no avail.

Contrary to Appellants' contention, we find they failed to allege sufficient particularized facts in their complaint to demonstrate they made a demand on the Board. We first note Appellants' allegations concerning their demand are vague and similar to those made in *Whittle*. 343 S.C. at 189, 539 S.E.2d at 406 (noting the shareholders only alleged in their complaint that they demanded "certain information" and "certain actions" and made a "supplemental demand"). In paragraph 41 of their complaint, Appellants requested that the circuit court (1) remove the entire Board for their breach of fiduciary duties, (2) provide for the

election of a new Board, (3) order that all assets be returned to the Fund, (3) order all damages incurred and money taken from the Fund be awarded, (4) enjoin future violations of fiduciary duties, and (5) award Appellants actual and punitive damages.

In paragraph eight of the complaint, however, Appellants provided no guidance on exactly what recourse they sought from the Board prior to this suit. Therefore, the circuit court could not discern whether Appellants simply requested the \$5 million be returned to the Fund or whether they, among other things, demanded that members of the Board resign or called for a new election. As a result, the circuit court was not in a position to determine whether the Board's refusal of the demand was wrongful and decide whether to allow the lawsuit to proceed. *See Whittle*, 343 S.C. at 189, 539 S.E.2d at 409 (holding shareholders did not comply with Rule 23(b)(1) because their complaint did not contain allegations regarding what they demanded and what the board of directors rejected).

Appellants nevertheless counter that their January 20, 2013 letter—a proper demand on the Board—was incorporated by reference in their Second Complaint.⁶ We find Appellants did not specifically incorporate the letter by reference in merely stating they sent "correspondence" to Respondents. Moreover, Appellants conceded the letter was not attached to the complaint, but rather was only included with their memorandum in opposition to Respondents' motion to dismiss. *See* Rule 10(c), SCRPC ("A copy of any plat, photograph, diagram, document, or other paper which is an exhibit to a pleading is a part thereof for all purposes if a copy is attached to such pleading."); *McCormick v. England*, 328 S.C. 627, 632–33, 494

⁶ After Respondents alerted Appellants to the Rule 23(b)(1) requirements by moving to dismiss the First Complaint for failure to comply with the rule, Appellants sent the January 20, 2013 demand letter. Respondents replied, stating they were withholding a substantive response until the circuit court ruled on their motion to dismiss. The circuit court dismissed the First Complaint for lack of subject matter jurisdiction on March 5, 2013. Respondents contend that, before they were able to provide a substantive reply, Appellants filed the Second Complaint in probate court on April 9, 2013, and removed the matter to circuit court. The circuit court then dismissed the Second Complaint and gave Respondents sixty days to respond to the demand letter, allowing Appellants to file another complaint that complied with Rule 23(b)(1). Appellants, however, instead chose to appeal the circuit court's dismissal.

S.E.2d 431, 433 (Ct. App. 1997) ("A ruling on a motion to dismiss a claim must be based solely on the allegations set forth on the face of the complaint.").

Therefore, we find the circuit court properly concluded that Appellants failed to comply with the requirements of Rule 23(b)(1).

CONCLUSION

Based on the foregoing, we hold the circuit court properly concluded the Fund was not a trust, Appellants' claims were derivative, and Appellants failed to comply with the pleading requirements of Rule 23(b)(1). Accordingly, the circuit court's grant of Respondents' motion to dismiss is

AFFIRMED.⁷

HUFF and THOMAS, JJ., concur.

⁷ We decide this case without oral argument pursuant to Rule 215, SCACR.

80064

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Richland County
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

RECEIVED

JUN 29 2016

SC Court of Appeals

Appellate Case No. 2014-000963

Allen Patterson, Steve Tilton, Richard Sendler,
Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis,
Michel Nieri, Allen Patterson Residential LLC, Tilton
Group, Sendler Construction Co., Inc., Privette Enterprises,
Ellis Construction Company, Inc., The Barry Davis Company, Inc.,
Great Southern Homes, and J. Carter, LLC, on behalf of
themselves and others similarly situated.....Appellants,

v.

Herb Witter, Colin Campbell, Eddie Weaver,
Tom Markovich, Keith Smith, Jim Gregorie,
individually and as Trustees of the South
Carolina Home Builders Self Insurers Fund, and
the South Carolina Home Builders Self Insurers Fund.....Respondents.

PETITION FOR REHEARING AND REHEARING *EN BANC*

Pursuant to Rules 219 and 221(a) of the South Carolina Appellate Court Rules,
Appellants hereby file this petition for rehearing and rehearing *en banc*. Appellants
respectfully submit that rehearing or issuance of a new opinion reversing the trial court's
decision is warranted. The grounds for this petition are that the Panel's opinion in this
matter overlooked or misapprehended several matters of fact and law. This matter is of

exceptional importance as it involves trust law, South Carolina Rule of Procedure 23(b) and pleading requirements.

In Opinion No. 5416 filed June 15, 2016, a Panel of this Court affirmed the trial court's order dismissing Appellants' action for relief against the South Carolina Home Builders Self Insurers Fund ("The Trust Fund") for transferring five million dollars from the fund assets to create a competing entity in violation of its duties to its beneficiaries. The Panel overlooked or misapprehended several matters of law and fact in rendering the opinion. First, the Panel improperly concluded that The Trust Fund is not a trust although it was created by a settlor as a trust, explicitly references trust law, was plead to be a trust by the fund itself and was ruled to be a trust at the Trust Fund's request. Second, the Panel improperly concluded the action is derivative even though the beneficiaries have separate claims as beneficiaries of a trust. Third, the Panel improperly concluded the Appellants did not comply with Rule 23(b) even though the complaint references correspondence seeking relief, the correspondence was admitted in the hearing and in the record on appeal, and the Appellants had previously sued seeking the same relief which was denied by The Trust Fund when it asserted it was a trust. As a result, this Court should grant rehearing or rehearing *en banc* in this matter.

ARGUMENT

I. The Panel Misapprehended the Facts Such That It Found The Trust Fund Had Not Represented Itself as a Trust.

The Panel found The Trust Fund could serially represent itself as a trust and represent itself as not a trust without violating judicial estoppel. It stated that The Trust Fund had not changed its version of events and that judicial estoppel did not apply because whether The Trust Fund is a trust is a pure question of law.

In fact, The Trust Fund continually represented itself as a trust, submitted sworn testimony that it was a trust and received relief on the basis that it was a trust until it decided later that it was not a trust.

The matter was originally brought in February 2012 as case number 2012-CP-32-00757. In that case, the Trustees moved to dismiss on the basis that the Trustees must be sued in Probate Court because they served a trust. The Trustees stated: "this action should be dismissed for lack of subject matter jurisdiction as it involves the internal affairs of a trust." (R. p. 133). In support of this motion, the Trustees submitted the affidavit of Jeffrey Ranew. He continually refers to the South Carolina Home Builders Self Insurers Fund as a trust and the funds as a trust corpus. (R. p. 124).

Judge Manning granted the motion to dismiss, stating:

In particular, the Defendants have moved to dismiss on the basis of lack of subject matter jurisdiction. The Defendants argued that this lawsuit involved the internal affairs of the Trust such that it must be filed in the Probate Court under South Carolina Code Section 62-7-201.... It is clear from the documents submitted to the Court that this dispute concerns a trust.... With this in mind, the Court dismisses this lawsuit without prejudice such that it may be refiled in Probate Court to cure any alleged defects in subject matter jurisdiction.

(R. p. 1).

The Trustees did not move to reconsider or appeal. They accepted the ruling as the law of the case.

In their Second Motion to Dismiss, the Trustees took the position that The Trust Fund is not a trust, but an unincorporated association. (R. p. 142). The Trustees cannot now claim that The Trust Fund is not a trust when they previously maintained that it was a trust and received relief under that theory.

Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation. *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 252, 489 S.E.2d 472, 477 (1997) (citing *Colleton Regional Hosp. v. MRS Med. Rev. Sys.*, 866 F. Supp. 896 (D.S.C. 1994)). Judicial estoppel applies to inconsistent statements of fact. *Id.* “When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.” *Id.*

In *Hayne Federal Credit Union v. Bailey*, Mr. Bailey claimed ownership of a house through a resulting trust. Earlier, in his divorce, he disavowed any interest in the property and maintained that the property belonged to his son. The Supreme Court held Mr. Bailey was estopped from later claiming an interest in the property because in his divorce he attributed ownership to his son.

Likewise, the Trustees cannot now claim that The Trust Fund is not a trust. The Trustees obtained an order from the court dismissing the previous lawsuit based on their factual assertion that the South Carolina Home Builders Self Insurers Fund was a trust. Now, the Trustees take the position that it is not a trust, but an unincorporated association, which changes the pleading requirements of the lawsuit. The Trustees cannot assert these two different versions of the facts. They are bound by the assertion made in the previous lawsuit and the order which resulted. Thus, The Trust Fund is a trust, not an unincorporated association, and the Appellants do not have to comply with Rule 23(b) regarding derivative actions.

II. The Panel Misapprehended the Facts and Law When It Recategorized The Trust Fund as an Unincorporated Association.

The Trust Fund calls itself a trust, calls its board members trustees, and meets the definition of a trust. Trusts are not treated as unincorporated associations in South Carolina.

The Panel misapprehended the law when it concluded The Trust Fund does not meet the definition of a trust. A trust requires a declaration, a *res*, and designated beneficiaries. See *Whetstone v. Whetstone*, 309 S.C. 227, 331, 420 S.E.2d 877, 879 (Ct. App. 1992). The Trust agreement calls itself a trust, calls its governing body trustees, purports to be governed by the South Carolina Uniform Trustee's Powers Act, authorizes investments of the fund, and states the situs of The Trust Fund as South Carolina.

To ascertain a settlor's intent, a court must first look to the language of the instrument. If the language is perfectly plain and capable of legal construction, the language determines the form and effect of the instrument. See, *Germann v. New York Life Ins.*, 286 S.C. 34, 37, 331 S.E.2d 385, 388 (Ct. App. 1985). The Trust Fund calls itself a trust, purports to be governed by trustees, and purports to follow trust law. The document conveys clear intent to create a trust. It never mentions a corporate form or an unincorporated association as found by the Panel.

The Panel misapprehended the law when it found The Trust Fund was not a trust because it did not have a *res* or property owned by the trust. The Panel found that the Home Builders Association of South Carolina "did not transfer any money or property to the Board to hold in trust for the Fund's members." There is no support in the record for this statement. Because this issue was not raised at the pleadings stage, there is no information relating to whether The Trust Fund received investment funding from the

settlor Home Builders Association of South Carolina. Thus, the Panel's conclusion is based on pure conjecture because there are no facts in the record to support it and it was not raised to the trial court. The Panel then found that because the trust was funded by its beneficiaries after the trust document was executed that it could not be a trust although the funds were held for the benefit of the beneficiaries. The Appellants know of no requirement that a trust be fully funded at inception or that prohibits beneficiaries from contributing to trust assets. The Panel cites no authority for this statement because there is none.

In fact, the reporter's comments to Code Section 62-7-401 indicate that an insubstantial property interest can fund a trust and that funding need not be done at the time a trust agreement is executed:

The property interest necessary to fund and create a trust need not be substantial. A revocable designation of the trustee as beneficiary of a life insurance policy or employee benefit plan has long been understood to be a property interest sufficient to create a trust. See Section 62-7-103(11) ("property" defined). Furthermore, the property interest need not be transferred contemporaneously with the signing of the trust instrument.

S.C. Code § 62-7-401 (reporter's comment).

Thus, the Panel incorrectly found that The Trust Fund was not a trust because it was not funded.

The Panel also misapprehended the law when it found The Trust Fund was an unincorporated association because it does not have ascertainable beneficiaries as required for a trust. A trust does not require that specific beneficiaries be ascertainable solely from the trust document itself as the Panel indicates in its opinion. In fact, a "beneficiary is definite if the beneficiary can be ascertained now or in the future...." S.C. Code Ann. § 62-

7-402(c). The Trust Fund refers to members as entitled to receive the benefit of The Trust Fund as follows:

Whereas, the Settlor and the Trustee intend to apply to the South Carolina Worker's Compensation Commission for the establishment of a group self insurance fund pursuant to South Carolina statute *for the benefit of the members of the Homebuilders Association of South Carolina, Inc.* (emphasis added).

(Trust Agreement, p.1, ROA p. 208). The Trust Fund even contemplates its own termination and indicates that the remaining funds "shall be distributed . . . to the participating members." (ROA p. 220). Finally, the Trustees themselves have recognized that the members are entitled to the benefits of the fund by distributing excess funds to the members in the past. (ROA pp. 127-128). Thus, The Trust Fund has beneficiaries even though the document refers to them as members and they are not specifically listed.

The United States Supreme Court has considered whether a trust should be treated as an unincorporated association for diversity jurisdiction purposes. *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 458-59 (1980).¹ In that case, the Respondents asserted that the "trust form masks an unincorporated association." *Id.* at 461. The Respondents also contended that because the trust's operations were characteristic of an association, including "centralized management, continuity of enterprise, and unlimited duration," that the trust was "in substance an association." *Id.* at 461-62.

The 5th Circuit Court of Appeals and the Supreme Court disagreed. The Supreme Court stated that while certain attributes of the trust were shared by associations, having business-like practices was not dispositive evidence that a trust was an unincorporated

¹ South Carolina courts rely on federal precedent in derivative actions: "Rule 23(b)(1) of the South Carolina Rules of Civil Procedure adopts the federal derivative suit provision, Fed. R. Civ. P. 23.1...." S.C. Code Ann. § 33-7-400.

association. *Id.* at 462. Even though shareholder beneficiaries had the power to elect and remove trustees, to terminate the trust, and to amend the Declaration or approve a majority disposition of the estate, this was insufficient to classify the trust as an unincorporated association. The Court concluded that despite these association-like characteristics, the trust was indeed a trust because the Trustees had real and substantial control over the property of the trust and the trustees' power was free from any control by the shareholder beneficiaries. *Id.* at 465 n. 14. "That the trust may depart from conventional forms in other respects has no bearing on this determination." *Id.* at 465. "We need not reject the argument that [the trust] shares some attributes of an association. In certain respects, a business trust also resembles a corporation. But this case involved neither an association nor a corporation. [The trust] is an express trust..." *Id.* at 462.

Like the trust in *Navarro*, the Home Builder's Trust may have some unconventional attributes. For example, the beneficiaries in the Home Builder's Trust are jointly and severally liable for underfunded losses. This is allowed under the South Carolina Trust Code. *See* S.C. Code Ann. § 62-7-105.² The Trustees assert that because the beneficiaries

² The following items cannot be overridden by the trust code:

- (1) the requirements for creating a trust;
- (2) the duty of a trustee to act in good faith and in accordance with the purposes of the trust;
- (3) the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful and possible to achieve;
- (4) the power of the court to modify or terminate a trust under Sections 62-7-410 through 62-7-416;
- (5) the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in Part 5;
- (6) the limitations on the ability of a settlor's agent under a power of attorney to revoke, amend, or make distributions from a revocable trust pursuant to Section 62-7-602(e);
- (7) the power of the court under Section 62-7-708(b) to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;
- (8) the effect of an exculpatory term under Section 62-7-1008;
- (9) the rights under Sections 62-7-1010 through 62-7-1013 of a person other than a trustee or beneficiary;
- (10) periods of limitation for commencing a judicial proceeding;
- (11) the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice; and
- (12) the subject matter jurisdiction of the court and venue for commencing a proceeding as provided in Sections 62-7-201 and 62-7-204.

are jointly and severally liable, this makes them an unincorporated association. This assertion is illogical. By this reasoning, joint tortfeasors would qualify as an unincorporated association. Although the beneficiaries of the Homebuilder's Trust share in liability for shortfalls in trust assets, this alone does not make the trust an unincorporated association.

A trust is a separate entity from an unincorporated association. A trust does not become another type of enterprise because it may share some characteristics of that enterprise. The Home Builder's Trust calls itself a trust, calls its board members trustees, and meets the definition of a trust.

III. The Panel Misapprehended the Law When It Found the Appellants' Claims Were Solely Derivative.

The harm from mismanagement of the trust flows directly to the beneficiaries who are liable for any shortfalls in trust assets. The harm does not flow to a corporation. "[A] shareholder's suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder." *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (S.C. Ct. App. 2001). Here, the injury is to each beneficiary who must, individually, make up for any shortfall in trust assets. The shortfall will not be made up by the trustees. Therefore, according to the plain language of the rule and the case law on derivative suits, Rule 23(b) does not apply to this action brought by the beneficiaries of The Trust Fund.

S.C. Code Ann. 62-7-105(a). Therefore, having joint and several liability on the part of the beneficiaries is allowed under the code.

The action brought by the Beneficiaries is not derivative, but a direct action. “[A] direct action is one where misconduct by the management of a corporation causes a particular loss to an individual shareholder.” *In re Greenwood Supply Co.*, 295 B.R. 787, 795 (Bankr. D.S.C. 2002). Courts have ruled that actions based upon allegations of breach of fiduciary duty and negligent mismanagement that resulted in a reduction of a shareholder's ownership in a corporation constitute direct actions. If there are allegations of a distinct injury to the shareholder, the action is not derivative. *Id.*

The Beneficiaries are not shareholders, and they have each suffered a particular loss. The trust was to be operated for the benefit of its members. Each member is a beneficiary of the trust. Therefore, mismanagement of the trust results in a direct loss to each beneficiary. Because they are beneficiaries and not shareholders, their only recourse is to bring a direct action. Since the Plaintiffs are beneficiaries of the trust, they have standing to bring this action.

The Panel misapprehended the facts when it found the Plaintiffs’ Complaint alleges that the fund has been injured, but not that the members have been injured. The Complaint says:

21. The Defendants have removed approximately five million dollars from the trust corpus for the purpose of establishing a separate member owned insurance company which will not provide any benefit to the Beneficiaries of the Trust.

22. The Trustees did not advise the beneficiaries that the funds could have been returned to them....

40. As a direct and proximate result of the Defendants’ breach of their fiduciary duties and breach of the trust agreement, the Plaintiffs have been injured including, but not limited to, loss of funds, attorney fees, harassment and aggravation, loss of trust assets, higher payments into the Trust, and other damages all to their actual damage....

60. The beneficiaries' best interests would be served by a termination of the Trust and distribution of its assets to the beneficiaries.

(ROA pp. 49, 51, 54). The Beneficiaries allege that the Trustees took monies from The Trust Fund, which were to be used for their benefit only and used it for another purpose which injured them individually. The Complaint states the harm from the mismanagement of the trust flows directly to the beneficiaries, who are liable for any shortfalls in trust assets. The injury is to each beneficiary who must individually make up for any shortfall in trust assets.

There are two exceptions to the general rule that a shareholder cannot sue for injuries to his corporation: (1) where there is a special duty between the wrongdoer and the shareholder, and (2) where the shareholder suffered an injury separate and distinct from that suffered by other shareholders. *Rice-Marko v. Wachovia Corp.*, 398 S.C. 301, 308, 728 S.E.2d 61, 65 (Ct. App. 2012). The Trustees have a special duty to the member beneficiaries.

The Trust Fund document states that: "The Board of Trustees shall have all authorities and powers granted to Trustees generally under the laws of South Carolina including the powers and authorities conferred under the Uniform Trustee's Powers Act" (R. p. 355). The South Carolina Trust Code reads: "the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this article," and that a "trustee shall administer the trust solely in the interests of the beneficiaries." S.C. Code Ann. §§ 62-7-801 and 62-7-802 (a).

Even when trustees act in good faith, any action they take must be in the interests of the beneficiaries. Because of this special duty, the beneficiaries meet the exception and can sue for injuries without bringing a derivative action.

IV. The Panel Misapprehended the Facts and Law When It Found the Appellants Did Not Comply With Rule 23(b)(1).

The beneficiaries have complied with the requirements of Rule 23(b). This rule requires a verification of the complaint. Each plaintiff has verified the complaint under oath. These verifications were served on the Defendants.

Rule 23(b) also requires that the Plaintiff set forth "the efforts, if any, made" to obtain the action desired. The Complaint sets this out as follows:

8. To the extent required by South Carolina Rule of Civil Procedure 23, the Plaintiffs allege:
 - a. The Plaintiffs were beneficiaries of the trust at all times relevant including when the transactions complained of were made.
 - b. The Plaintiffs, their agents or others on their behalf have made efforts to obtain the action they desire in this matter including correspondence to counsel for the Defendants, meetings with counsel for the Defendants, correspondence to the Trust and a previous lawsuit to no avail.

(R. p. 48).

Plaintiffs' counsel also sent a letter to defense counsel setting forth the relief requested. This letter was referenced as correspondence in the Complaint and states:

In particular, our clients believe the following actions are necessary and should be taken on behalf of the fund:

1. The \$5,000,000 which was taken out of the fund as excess funds to establish a competing mutual fund should be distributed immediately to the beneficiaries of the Trust as it is not needed

for the operation of the South Carolina Home Builders Self Insurers Fund.

2. An accounting should be made of all remaining funds in custody of the South Carolina Home Builders Self Insurers Fund. All funds not necessary to insure liability should be distributed to members of the Trust.
3. Elections have not been held as required by the Trust documents. Elections should be held for all positions of Trustees.
4. The Trust should be dissolved as it appears in the Trustees' decision that a competing entity should be set up and that the Trust no longer serves its functions. As a result, the Trust should be dissolved with requisite amounts kept on hand to insure against future liabilities with the remaining assets distributed to members of the Trust.
5. All assets contemplated for use by the Mutual Fund and purchased with that intent should be sold with the proceeds to be distributed to beneficiaries of the Trust.

The Trustees acknowledged to the court that this letter was received and was authentic.

Courts consider elements referenced in complaints if they are incorporated by reference. *Carolina First Corp. v. Whittle*, 343 S.C. 176, 190, 539 S.E.2d 402, 410 (Ct. App. 2000). Demand letters, even though not attached to a complaint but referenced in the complaint satisfy the requirements of Rule 23. *Stoner v. Walsh*, 772 F. Supp. 790, 797 (S.D.N.Y. 1991). Along with exhibits attached to the complaint, *see Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1989), courts also consider documents "referenced by the complaint and accepted by all parties as authentic." *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002).

In its order, the trial court stated “[a]t a minimum, the demand must identify the alleged wrongdoers....” The Complaint reads:

19. The Defendants are trustees under the Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund.

It should “describe the factual basis of the alleged wrongful acts...”

20. The Defendants have voted to remove assets from the Trust in order to incorporate a new member owned insurance company which confers no benefits upon the beneficiaries of the Trust.

21. The Defendants have removed approximately five million dollars from the trust corpus for the purpose of establishing a separate member owned insurance company which will not provide any benefit to the Beneficiaries of the Trust.

“and the harm caused...”

40. As a direct and proximate result of the Defendants’ breach of their fiduciary duties and breach of the trust agreement, the Plaintiffs have been injured including, but not limited to, loss of funds, attorney fees, harassment and aggravation, loss of trust assets, higher payments into the Trust, and other damages all to their actual damage.

and “request remedial relief...”

41. The Plaintiffs are entitled to an Order of this Court ordering that the Trustees be removed for breach of their fiduciary duties and breach of trust, that new trustees be elected, that all trust assets be returned to the Trust, that all damages incurred and funds taken out of the trust in breach of fiduciary duties and trust agreement be awarded, enjoining further violations of the fiduciary duties and trust agreement, and awarding the Plaintiffs and the class actual and punitive damages.

53. The Plaintiffs request an order of this Court ordering that the Defendants must comply with the Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund and their fiduciary duties.

54. In particular, the Plaintiffs are entitled to an order of this Court ordering that the Defendants may not take funds or assets from the trust for the purpose of setting up a member owned insurance company.

57. The Plaintiffs hereby demand an accounting pursuant to South Carolina trust law and common law for all expenditures made by the trust.

62. The Plaintiffs ask that a receiver be appointed and that the Trust be terminated with the assets distributed to the beneficiaries after costs and fees.

The wrongdoers are identified. The factual basis for the wrongful acts is established. The harm is identified, and the beneficiaries requested remedial relief. In addition, the Complaint is verified by the beneficiaries. It alleges the action taken to obtain relief as well as the relief requested.

As a result, the Appellants have complied with Rule 23(b) by stating in detail their request for relief, verifying their complaint, and stating that they undertook efforts to obtain that relief.

V. The Panel Improperly Followed Inconsistent Pleading Standards in Affirming the Motion to Dismiss.

The Panel found that although the Second Complaint references correspondence sent to the Defendants as a request for relief, and the January 20, 2013, letter requesting relief was received by the Defendants and in the record, the Second Complaint did not specifically incorporate the letter. The Panel concluded this because the pleadings say correspondence but not "Letter of January 20, 2013." The Panel goes on to state that the ruling on the motion cannot include the January 20, 2013, letter because it was not attached to the Complaint. It cites *McCormick v. England*, 328 S.C. 627, 632-33, 494 S.E.2d 431, 433 (Ct. App. 1997), for the proposition that the ruling can only be based on the facts

alleged in the complaint. However, earlier in the opinion, the Panel quotes from the affidavit submitted by the Defendants which alleges that the transfer of five million dollars in trust assets was done with the approval of 96.5 percent of Trust Fund members. (Op. No. 5416, n.3). Thus, the Panel supports its decision with the Defendants' affidavit, which the Appellants have not had an opportunity to challenge. But, it will not consider the January 20, 2013, demand letter which is in the record, was received by the Defendants and to which the Defendants had not replied at the time of the ruling.

VI. The Panel Relied On *Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000), To Determine the Beneficiaries Did Not Comply With Rule 23(b). This Decision Is Erroneous And Should Be Overturned.

The Panel quoted extensively from *Whittle* to explain the requirements of Rule 23. *Whittle* states "that the sufficiency of the pleading in meeting the requirements of Rule 23 must be based solely upon the allegations contained within it." *Id.* at 188-89, 539 S.E.2d at 409, citing *McCormick v. England*, 328 S.C. 627, 633, 494 S.E.2d 431, 433 (Ct. App. 1997). This conclusion is in error. *McCormick* did not involve application of Rule 23: it concerned whether or not a physician's breach of confidentiality constituted a cause of action. *Id.* at 630, 494 S.C. at 432. The court's citation of *McCormick* does not mention Rule 23. *Id.* at 632-33, 494 S.E.2d at 433 (Ct. App. 1997).

The *Whittle* court also relied upon *Hawes v. City of Oakland*, 104 U.S. 450 (1881), to support its decision. This case examined whether a shareholder was required to bring a demand at all:

[I]t is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes.

Hawes, 104 U.S. at 460-61. The Court held that a demand must be made, and that the “efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts should be stated with particularity....” *Id.* at 461.

Rule 23(b)(1) was adopted from the federal rules of procedure. The Official Reporter Comments to S.C. Code Ann. § 33-7-400 state that courts should use federal precedent to construe procedural rules as follows: “Bringing an additional set of litigation rules into the South Carolina Business Corporation Act on top of Rule 23(b)(1) was deemed inadvisable, particularly since courts called on to interpret the new South Carolina rule have a large body of federal precedent from which to draw.” Official Reporter Comments, S.C. Code Ann. § 33-7-400. Thus, the Corporation Act contemplates that South Carolina courts will rely upon federal precedent when construing Rule 23(b).

Federal courts do not encourage dismissal of suits based on Rule 23(b). “Rule 23(b) was not written in order to bar derivative suits.” *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 371 (1966). Rather, the rule was written to prevent “strike suits,” which are essentially worthless claims brought by persons trying to get a quick settlement. *Id.* The *Surowitz* court was very clear that Rule 23 should not prevent adjudication on the merits of a reasonable complaint:

We cannot construe Rule 23 or any other one of the Federal Rules as compelling courts to summarily dismiss, without any answer or argument at all, cases like this where grave charges of fraud are shown by the record to be based on reasonable beliefs growing out of careful investigation. The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. These rules were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits. Rule 23(b), like the other civil rules, was written to further, not defeat the ends of justice The dismissal of this case was error. It has now been practically three years since the complaint was filed and as yet none of the defendants have even been compelled to admit or deny the wrongdoings charged. They should be.

Surowitz, 383 U.S. at 373-74. Just as in *Surowitz*, it has been over two years since the beneficiaries filed their complaint. They followed the order of the court declaring The Trust Fund as a trust by filing this matter in probate court. Now, the Trustees have placed another procedural hurdle. The rules of procedure are intended to result in an honest and fair judicial system in which parties have disputes resolved on their merits rather than procedural technicalities.

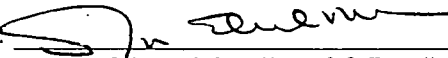
CONCLUSION

This Court should grant rehearing or rehearing *en banc* in this matter because:

1. The Panel Misapprehended the Facts Such That It Found The Trust Fund Had Not Represented Itself as a Trust.
2. The Panel Misapprehended the Facts and Law When It Recategorized The Trust Fund as an Unincorporated Association.
3. The Panel Misapprehended the Law When It Found the Appellants' Claims Were Solely Derivative.

4. The Panel Improperly Followed Inconsistent Pleading Standards in Affirming the Motion to Dismiss.
5. The Panel Relied on *Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000), to Determine the Beneficiaries Did Not Comply With Rule 23(b). This Decision Is Erroneous and Should Be Overturned.

Respectfully submitted,

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June 29, 2016

The South Carolina Court of Appeals

Allen Patterson, Steve Tilton, Richard Sendler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michael Nieri, Allen Patterson Residential LLC, Tilton Group, Sendler Construction Co., Inc., Privette Enterprises, Ellis Construction Co., Inc., The Barry Davis Company, Inc., Great Southern Homes, and J. Carter, LLC, on behalf of themselves and others similarly situated, Appellants,

v.

Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, Jim Gregorie, individually and as Trustees of the South Carolina Homes Builders Self Insurers Fund, and the South Carolina Home Builders Self Insurers Fund, Respondents.

Appellate Case No. 2014-000963

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Huff

J.

H. B. Weaver

J.

Paul C. Thomas

J.

FILED

10-27-16

Columbia, South Carolina

cc:

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Lawrence Michael Hershon, Esquire

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The Honorable G. Thomas Cooper, Jr.



The South Carolina Court of Appeals

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October 27, 2016

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Re: Allen Patterson v. Herb Witter
Appellate Case No. 2014-000963

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: The Honorable G. Thomas Cooper, Jr.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

RECEIVED

NOV 22 2016

S.C. SUPREME COURT

Opinion No. 5416 (S.C. Ct. App. filed June 15, 2016)

Allen Patterson, Steve Tilton, Richard Sendler,
Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis,
Michel Nieri, Allen Patterson Residential LLC, Tilton
Group, Sendler Construction Co., Inc., Privette Enterprises,
Ellis Construction Company, Inc., The Barry Davis Company, Inc.,
Great Southern Homes, and J. Carter, LLC, on behalf of
themselves and others similarly situated.....Petitioners,

v.

Herb Witter, Colin Campbell, Eddie Weaver,
Tom Markovich, Keith Smith, Jim Gregorie,
individually and as Trustees of the South
Carolina Home Builders Self Insurers Fund, and
the South Carolina Home Builders Self Insurers Fund.....Respondents.

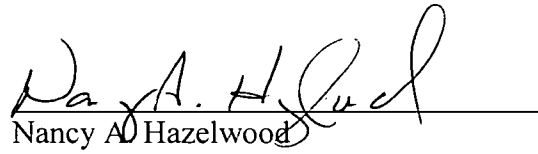
PROOF OF SERVICE

I certify that I have served the Appendix on the Respondents by depositing a copy
of it in the United States Mail, postage prepaid, on November 22, 2016, addressed to their
attorneys of record as follows:

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West Columbia, South Carolina

November 22, 2016