IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas

Marvin H. Dukes, III, Master-In-Equity

Case No. 2007-CP-07-2684

Watson William Eldrige IV and
Thomas Hadley Eldridge, as Trustees for the
Watson William Eldridge III Revocable Trust, ... Appellants,

v.

Frances Ulmer Eldridge, Individually and
Frances Ulmer Eldridge as Trustee for the
Frances Ulmer Eldridge Revocable Trust, ... Respondents.

RESPONDENTS' INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF THE ISSUES

1. Did the trial court correctly determine that Appellants' claims for equitable relief failed because Appellants had adequate remedies at law?

2. Did the trial court correctly determine that Appellants failed to prove the elements necessary to establish a constructive trust because Respondent did not participate in the fraudulent conduct or benefit from the improper transaction?

3. Did the trial court correctly determine that Appellants' claims were barred by laches because Appellants knew about Mr. Eldridge's breach of fiduciary duty and failed to take any action to remedy the breach?

STATEMENT OF CASE

This is an equitable action for a constructive trust or resulting trust. Watson William Eldridge, III (hereinafter "Mr. Eldridge") was married to the mother of their two sons, Watson William Eldridge, IV (hereinafter "Billy Eldridge" or Appellant) and Thomas Hadley Eldridge (hereinafter "Tom Eldridge" or Appellant). Mr. Eldridge created two trusts, the Watson William Eldridge, III Revocable Trust (hereinafter "Revocable Trust") and the Watson William Eldridge, III Irrevocable Qualified Personal Residence Trust (hereinafter "QPRT"). Appellants were specifically named beneficiaries of both trusts. Appellants were always successor trustees of the QPRT trust and became successor trustees of the Revocable trust in 1992 when their mother passed away. In 1999, Mr. Eldridge purchased a Florida condo and placed it in the QPRT.

In 2001, nine years after Appellants' mother died, Mr. Eldridge married Frances Ulmer Eldridge (hereinafter "Mrs. Eldridge"). Thereafter, Mr. Eldridge began exploring the option of terminating the QPRT trust because he felt it was "superfluous" based on changes to federal estate tax law. (Exh. 37). On October 8, 2001, Mr. Eldridge wrote his

attorney stating "[w]hen I buy a new residence I will not want to put it in the QPRT. Is there some way we can cancel, or nullify the effects of my irrevocable QPRT trust, or render it inoperable by reason of superseding Federal tax law?" Id.

On December 1, 2001, Mr. Eldridge's attorney instructed Mr. Eldridge that he had two options to get rid of the QPRT: "sell your residence" and establish a "qualified annuity" or "buy out" the QPRT by paying your sons "$78,686.00." (Exh. 10). Thereafter, Mr. Eldridge transferred over $140,000 to his sons (Appellants). (Exh. 33)

In March of 2002, Mr. Eldridge sold the Florida Condo (which was in the QPRT trust) and failed to title the successor residence he purchased (the Hilton Head home) in the name of the QPRT or establish an annuity trust. (Stipulations of Fact ##13-14, 21). He later re-titled the Hilton Head home in his name personally and Mrs. Eldridge's name as Joint Tenants with Right of Survivorship (JTWROS).

Appellants discovered Mr. Eldridge's breach of fiduciary duty but did not take any formal action to remedy the breach. Mr. Eldridge died on August 6, 2006. (Stip. #16). Ownership of the Hilton Head home transferred to Mrs. Eldridge as a JTWROS, and she subsequently transferred title to a pre-existing revocable trust of her own. (Stip. ##17-18).

Upon Mr. Eldridge's death, Appellants became the co-trustees of the Revocable Trust, and they were also appointed Personal Representatives of Mr. Eldridge's Estate. (Stip. ##3, 20). On September 28, 2007, Appellants commenced this action against Mrs. Eldridge alleging that they discovered Mr. Eldridge's breach while probating his estate. Specifically, Appellants' complaint alleged that during "the probate of [Mr. Eldridge's] estate, [Appellants] learned that no property was transferred from the QPRT to the

Revocable Trust upon [Mr. Eldridge's] death because the QPRT assets were wrongly transferred out of the QPRT prior to [Mr. Eldridge's] death . . . . [Mr. Eldridge] did not inform [Appellants] that he had purchased the Hilton Head property under the name of the Revocable Trust." (Exh. 46, ¶¶ 29 and 22). Mrs. Eldridge answered and raised defenses of, inter alia, laches. (Answer). The case was tried by the master in equity, and he ruled:

1. Appellants are not entitled to any equitable relief because they failed to timely make claims against Mr. Eldridge while he was alive or against Mr. Eldridge's estate after he died, and further, that the excuses Appellants offered for failing to act were without merit. (Order at p. 2-5).
2. Appellants failed to prove constructive trust because Mrs. Eldridge was an innocent party who played no part in Mr. Eldridge's breach of fiduciary duty and received no benefit from the inappropriate transaction. (Order at p. 5-10; "59(e)" Order at p. 2).
3. Appellants' claims were barred by laches. (Order at p. 5-10).

Appellants filed a motion to reconsider (Pls. "59(e)" Motion), which the trial court denied. ("59(e)" Order).

STANDARD OF REVIEW

In equity cases tried by a judge without a jury, the appellate court may make a de novo review of properly challenged findings of fact, as well as to rule upon properly challenged issues of law. This ability to make a de novo review of the facts does not, however, require the appellate court to disregard the findings below or ignore the fact that the trial judge, who saw and heard the witnesses, was in a better position than the reviewing court to evaluate the witnesses' credibility. Nor does it relieve an appellant of the burden of convincing this Court that the trial judge erred in his findings of fact. Because of the inherent advantage that exists when a trial court hears live testimony from the witness stand, the appellate court will generally accord great weight to a trial judge's findings.

SUMMARY OF ARGUMENT

This case involves a breach of fiduciary duty committed by Mr. Eldridge and Appellants' decision not to take any steps to hold Mr. Eldridge accountable for his breach. Rather than assert adequate and available claims against Mr. Eldridge, the admitted wrongdoer, Appellants did nothing. After Mr. Eldridge passed away, Appellants chose not to assert a claim against Mr. Eldridge's estate. Over five (5) and a half years after the breach of fiduciary duty occurred and over three (3) years after Appellants discovered the breach, Appellants filed this action requesting that the trial court undo Mr. Eldridge's breach of fiduciary duty by imposing a constructive trust or resulting trust.

Appellants maintained that the reason they did not assert a claim against Mr. Eldridge while he was alive was because they did not find out about the breach until they

were probating Mr. Eldridge's estate. This was simply not true. Appellants maintained that that the reason they did not make a claim against Mr. Eldridge's estate was because the estate was insolvent. This was incorrect as a matter of law. Appellants failed to assert any viable or sufficient reason for failing to act.

On September 28 2007, Appellants filed this lawsuit against Mrs. Eldridge, an 84 year old widow who they concede played no part in Mr. Eldridge's breach. Appellants asked the trial court to undo Mr. Eldridge's breach of fiduciary duty and impose a constructive trust or resulting trust against an innocent party. The trial court correctly rejected Appellants' claims for several independent reasons, all of which should be affirmed on appeal.

STATEMENT OF BACKGROUND FACTS

A. The Creation of the Eldridge Trusts

In 1973, Mr. Eldridge formed the Watson William Eldridge, III Revocable Trust (hereinafter "Revocable Trust"). (Joint Stipulations of Fact # 1; Exh. 2). On July 13, 1999, Mr. Eldridge formed the Watson William Eldridge, III Irrevocable Qualified Personal Residence Trust (QPRT) and transferred into the QPRT a condominium located in Jupiter, Florida (hereinafter the "Florida Condo"). (Stip. # 7). Pursuant to the terms of the QPRT, if Mr. Eldridge sold the Florida Condo he was required to either a) use the proceeds of any sale to acquire a successor residence or b) hold the proceeds of the same in an annuity trust. (Stip. # 10).

In 2001, Mr. Eldridge began exploring the option of terminating the QPRT trust because he felt that his "$3 mil. Estate" would be "exempt (up to $5 mil.) from Federal 'death taxes'" which would make the QPRT "superfluous." (Exh. 37). On October 8,

2001, Mr. Eldridge wrote his attorney stating "[w]hen I buy a new residence I will not want to put it in the QPRT. Is there some way we can cancel, or nullify the effects of my irrevocable QPRT Trust, or render it inoperable by reason of superseding Federal tax law?" Id.

On December 1, 2001, Mr. Eldridge's attorney instructed Mr. Eldridge that he had two options to get rid of the QPRT: "sell your residence" and establish a "qualified annuity" or "buy out" the QPRT by paying your sons "$78,686.00." (Exh. 10). Thereafter, Mr. Eldridge transferred over $140,000 to his sons (Appellants). (Exh. 33).

B. The Two Transactions at Issue and Mr. and Mrs. Eldridge's Relationship

1. The 2002 sale of the Florida Condo

On or about March 4, 2002, Mr. Eldridge sold the Florida condo and used the proceeds from that sale (and other monies)[1] to purchase a home at 13 Yellow Rail Lane, Hilton Head, South Carolina 29926 (hereinafter the "Hilton Head home"). (Stip. # 13; Exh. 38). Mr. Eldridge did not title the Hilton Head home in the name of the QPRT but in the name of his Revocable Trust. (Stip. # 14). Mr. Eldridge should have either titled the Hilton Head home in the name of the QPRT or established an annuity trust. (Id.). Mr. Eldridge breached his fiduciary duty to the QPRT and its beneficiaries when he failed to do so. (Stip. # 21). Mrs. Eldridge played no part in Mr. Eldridge's breach of fiduciary duty. (Tr. at p. 43 line 25; p. 44 line 1).

[1] Some of the money used to purchase the Hilton Head home was Mr. Eldridge's personal money. For example, he put down $10,000 in earnest money prior to the sale of the Florida Condo. (Exh. 38).

2. The 2003 Transaction

Over a year after the March 2002 transaction, in April 2003, Mr. Eldridge retitled the Hilton Head home in his individual name and Mrs. Eldridge's name as JTWROS. (Stip. # 15).

3. Mr. and Mrs. Eldridge's Relationship

The parties offered two different versions of events regarding the circumstances that led to the 2003 transfer. The trial court did not make any findings of fact with respect to what led to the transfer. The resolution of this issue is not relevant to the trial court's ruling.

Nevertheless, Appellants more or less maintain that Mrs. Eldridge married for money, initially rejected a pre-nuptial agreement, and ultimately used threats of divorce in 2003 to demand an ownership interest in the Hilton Head home. (App. Brief at pp. 13-14). While there are correspondence in the record that – if read without explanation – could be construed to support such assertions, Mrs. Eldridge vehemently denies that she ever rejected a pre-nuptial agreement or ever threatened to divorce Mr. Eldridge for any reason, much less over ownership of the Hilton Head home. (Tr. p. 92, lines 5-1; Tr. p. 95, lines 1-9).

Mrs. Eldridge explains that marital tension developed between her and Mr. Eldridge related to Billy Eldridge. Specifically, Mrs. Eldridge felt that Billy Eldridge exercised too much control over his father. For example, Billy Eldridge required Mr. Eldridge to submit annual "state of the estate" reports in which Billy would review and question expenses his father had made throughout the year. (Exh. 32); (Tr. at p. 21, lines 15-25). Second, Mrs. Eldridge felt that Billy Eldridge made intrusive and unannounced

visits to the Florida Condo and later the Hilton Head home. (Exh. 19) Mrs. Eldridge felt Billy treated his father's residence as a "bunk house" or "motel" where strangers could "bunk" anytime they wanted. (Id.). Mrs. Eldridge further believed that "monthly" visits by Billy Eldridge and friends were too much for an 84 year old couple to endure. (Id.). Rightfully or wrongly, Mrs. Eldridge came to feel like a visitor in the Hilton Head home, vulnerable to the whims of a step-child who appeared to be more concerned with his father's money than happiness. (Exh. 19 at August 25, 2002 letter). As such, she became less and less interested in spending time at the Hilton Head home and reluctant to transplant her life and possessions into such an environment. Id. Mr. Eldridge wrote that he "understood" Mrs. Eldridge's fear of continuous interference by Billy Eldridge, however, he felt that Mrs. Eldridge's fears were "unreasonable." (Exh. 19 at October 30, 2002 letter)

To assuage Mrs. Eldridge's fear, Mr. Eldridge agreed to transfer the Hilton Head home into their names jointly. This transfer gave Mrs. Eldridge the emotional security she needed and allowed her and Mr. Eldridge to live out the remainder of his life together without incident. Two years after the transfer, Mr. Eldridge wrote: "My relationship with [Mrs. Eldridge] has been so glorious for my happiness and longevity . . . I have put the Hilton Head house in our joint names . . . [w]hich means that if I die first, she gets the house, but if she dies first, I get it back! Don't make any bets either way [sic] – we're both 84!" (Exh. 19 at August 4, 2005 letter)

C. Appellants Discover Mr. Eldridge's Breach

Billy Eldridge met with Mr. Eldridge and his attorneys where they discussed the status of the QPRT and Mr. Eldridge's estate plan. (Exh. 47). In 2004, Billy Eldridge

requested that Mr. Eldridge's attorneys take steps to place the Hilton Head home back into the QPRT. (Tr. at pp. 52-53, and further Exh. 23) (showing that Mr. Eldridge's attorney had not spoken to Mr. Eldridge in between June 11, 2004 and September 11, 2004 but attaching a billing record indicating a conference occurring with Billy Eldridge regarding the Hilton Head home and the QPRT on August 31, 2004).

Tom Eldridge discovered that Mr. Eldridge had breached his fiduciary duty to the QPRT when he received a letter from Mr. Eldridge dated August 4, 2005. Tom admits that he confronted Mr. Eldridge but ultimately decided to "drop the whole issue" because he didn't "particularly care for conflict . . . and never said anything more about it." (Tr. at p. 64, lines 18-22).

D. Mr. Eldridge Passes Away

Mr. Eldridge died on August 6, 2006. In December 2006, Mr. Eldridge's estate was opened with the Beaufort County Probate Court. As of August 20, 2009, the value of Mr. Eldridge's non-probate assets was $761,245.92 with a value assigned to the Revocable Trust of $407,897. (Exh. 45). Over a year after Mr. Eldridge had passed away, this lawsuit was filed on September 28, 2007 naming Mrs. Eldridge (and her trust) as Defendants. (Exh. 46).

ARGUMENTS

I. The trial court correctly determined that Appellants' claims for equitable relief failed because Appellants had adequate remedies at law.

It is settled law that equitable relief is available "only where there is no adequate remedy at law." Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n, 298 S.C. 179, 185 (1989) citing 27 Am.Jur. 2 d, Equity, § 94 (1966); Strategic Resources Co. v. BCS Life Ins. Co., 367 S.C. 540 (2006) (courts reserve equitable powers for situations when

there is no adequate remedy at law); Thompson ex rel. Harvey v. Cisson Const. Co., 659 S.E.2d 171 (S.C. Ct. App. 2008) (the function of equity is to supplement the law, not to displace it). "While equitable relief is generally available where there is no adequate remedy at law, an adequate legal remedy may be provided by statute." Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). Indeed, a "court's equitable powers must yield in the face of an unambiguously worded statute." Id. Where there is an adequate remedy provided by a statute, there is "no reason for the lower courts to resort to equity principles." Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 644 S.E.2d 675 (2007).

A. Appellants knew about Mr. Eldridge's breach of fiduciary duty while Mr. Eldridge was alive.

Appellants argued during two and a half years of litigation – and up until the day of trial – that the reason they did not act to remedy Mr. Eldridge's breach of trust while Mr. Eldridge was alive was because they didn't discover the breach until after Mr. Eldridge's death. (Exh. 46, ¶¶ 29 and 22). ("During the probate of [Mr. Eldridge's] estate, [Appellants] learned that no property was transferred from the QPRT to the Revocable Trust upon [Mr. Eldridge's] death because the QPRT assets were wrongly transferred out of the QPRT prior to [Mr. Eldridge's] death."); ("[Mr. Eldridge] did not inform [Appellants] that he had purchased the Hilton Head property under the name of the Revocable Trust."). Tom Eldridge admitted at trial that these allegations were not true, and the trial court made a finding of fact that Billy Eldridge's lack of knowledge testimony was not credible.

Specifically, Tom Eldridge admitted during trial that he found out about Mr. Eldridge's breach of fiduciary duty when he received Mr. Eldridge's August 5, 2005

letter. (Tr. p. 71, lines 2-9). Tom further admitted that he confronted Mr. Eldridge about the breach. (Tr. at p. 64, lines 18-22). Finally, Tom admitted that he ultimately decided to "drop the whole issue" because he didn't "particularly care for conflict . . . and I just dropped the whole thing and never said anything more about it." Id.

Billy Eldridge testified at trial that he knew nothing about the inappropriate transactions and that he too discovered that the Hilton Head home was not in the QPRT during the probate of Mr. Eldridge's estate. The trial court did not find his testimony credible. While claiming he knew nothing about Mr. Eldridge's breach of fiduciary duty, Billy admitted that he met and conferred with Mr. Eldridge's attorneys regarding the Hilton Head home and the QPRT and further admitted that Mr. Eldridge's attorneys were going to draft documentation to place the Hilton Head home back in the QPRT.

Q: And there was going to be some paperwork drafted to put the house back into the QPRT trust, right?

A: Yes.

Q: Okay. And you knew about –

A: That was that letter that we looked at previously.

Q: Right. And you knew about that . . .

A: Yes.

Q: And you said, "That's why Larry [King] requested the documents on the sale of the house in Florida and the documents on the purchase of the house in Hilton Head"?

A: Correct.

(Tr. at p. 52, lines 19-25 and p. 53, lines 1-5).

Billing records and letters from Mr. Eldridge's attorney support the trial court's findings. Specifically, a September 11, 2004 correspondence from Mr. Eldridge's attorney to Mr. Eldridge notes that Mr. Eldridge and his attorney did not communicate with one another from June 11, 2004 to September 9, 2004. (Exh. 23). However, Mr. Eldridge's attorney's time sheets show a conference on August 31, 2004 between Mr. Eldridge's attorney and Billy Eldridge ("Bill") regarding "adding the Hilton Head to QPRT and file review." (Id. at p. 2).

Thus, the trial court correctly determined that both Appellants knew about the breach of fiduciary duty well before Mr. Eldridge passed away and well before this lawsuit was filed. The evidence shows that the delay was at least three (3) years and twenty-seven (27) days – from August 31, 2004 through September 27, 2007 – although Appellants likely knew well before then.

B. Appellants had adequate remedies available to them as beneficiaries and successor trustees to address Mr. Eldridge's breach of fiduciary duty while Mr. Eldridge was alive.

Forced to abandon their two and a half year old lack of knowledge argument, Tom Eldridge testified at trial – for the first time ever – that the new real reason he did not take action to remedy Mr. Eldridge's breach of fiduciary duty was because he was not a trustee of the Revocable Trust or QPRT trust. Appellants modified this argument on appeal – again for the first time – by arguing that they were merely "contingent beneficiaries" of both trusts. This argument is legally incorrect..

It is well accepted that a suit against a trustee of a private trust to enjoin or redress a breach of trust or otherwise to enforce the trust may be maintained "by a beneficiary or by a co-trustee, successor trustee, or other person acting on behalf of one or more

beneficiaries." RESTATEMENT (THIRD) TRUST § 94 (T.D. No. 5, 2009). Beneficiary, as it relates to trust beneficiaries, "includes a person who has **any** present or future interest, vested or contingent . . . ." S.C. Code § 62-1-201(2) (emphasis added). Appellants' argument that they could not act because their interests were contingent is simply at odds with South Carolina trust law.[2]

Appellants also had standing to act as successor trustees. Trustee includes "an original, additional, or successor trustee, whether or not appointed or confirmed by court." S.C. Code § 62-1-201(45). Here, it is undisputed that Appellants became "successor trustees" under the Revocable Trust as of March 24, 1993. (Stip. #2, Exh. 2, Fourth Amd. at p. 1). Appellants were always successor trustees of the QPRT trust. (Exh. 3 at p. 14).

The trial court correctly concluded that Appellants had standing to remedy Mr. Eldridge's breach of fiduciary duty as beneficiaries or successor trustees of both trusts.[3]

C. Appellants had adequate remedies available to them as beneficiaries and successor trustees against Mr. Eldridge's estate.

Even if Appellants did not have standing to sue Mr. Eldridge while he was alive, they could have filed a claim against Mr. Eldridge's estate after he passed away.

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[2] Moreover, Appellants were more than contingent remaindermen, they were vested remaindermen because their right to enjoy was certain as specifically named beneficiaries of the irrevocable QPRT trust. (Exh. #3); see also Holcombe-Burdette v. Bank of America, 371 S.C. 648, 640 S.E.2d 480 (S.C.App.,2006) ("It is not the uncertainty of enjoyment in the future, but the uncertainty of the right to that enjoyment which marks the difference between a vested and a contingent interest.") (citations omitted).

[3] Appellants try to dodge their successor trustee status under the Revocable Trust by asserting that their powers were limited to "purchasing certain United States Treasury Bonds." (Tr. at p. 79, lines 17-20). However, simply because the Revocable Trust provided the successor trustees with special powers they could have exercised before they became co-trustees, this does not take away the inherent ability of a successor trustee to enjoin or redress a breach of trust or otherwise to enforce the trust.

Appellants' excuse for not filing a claim against the estate was because they believed the estate was insolvent.

> Q: Okay. And I asked you in your deposition why you didn't file a lawsuit against [the estate]; do you remember that?
>
> A: Yes.
>
> Q: And do you remember that you testified, "The estate has no assets."
>
> A: Yes.
>
> . . . .
>
> Q: And was that true when you gave the testimony?
>
> A: Yes.
>
> Q: Okay. Now when -- when [opposing counsel had you go through each asset of the estate and tabulate its value on] the calculator, [] the purpose of that [was] to show the amount of the probate assets that were in the estate, [] therefore if a suit had been filed against your father's estate, there would not have been enough assets there to satisfy it?
>
> A: I would assume that was the reason.
>
> Q: Okay. Well, I mean, and that's why you testified in your deposition that you didn't file a claim against the estate because there weren't enough assets there and the little assets that were there had been used for expenses, right?
>
> A: Yes.
>
> . . . .
>
> Q: Do you remember testifying, I said, Question: "Are there any reasons why you feel that you should not file a claim against the estate of the [bad actor]? Answer: The estate has no assets."

A: Is that a question?

Q: Well the question is, do you remember giving that testimony?

A: Yes.

(Tr. at p. 44, lines 2-5 and p. 45, lines 1-21).

Appellants maintained that Mr. Eldridge's estate had no assets because the estate had limited probate assets. However, in determining the solvency of Mr. Eldridge's estate, Appellants failed to consider the value of the Revocable Trust. South Carolina Code § 62-7-505 provides that "the property of a trust that was revocable at the time of the settlor's death is subject to claims of the settlor's creditors . . . to the extent the settlor's probate estate is inadequate to satisfy those claims . . . ." See S.C. Code § 62-7-505 (underline added). Therefore, in order to determine whether or not the estate is solvent, Appellants should have considered the value of the Revocable Trust.

According to the most recent Inventory and Appraisement filed with the Beaufort County Probate Court, the value of Mr. Eldridge's Revocable Trust is $407,897.00. (Exh. 45 at p. 1). Appellants' argument that Mr. Eldridge's estate was insolvent is incorrect as a matter of law and the trial court correctly found the same.

D. Appellants waived any argument that the remedies available were not adequate because ownership in real property is a special right or because money damages are generally not an adequate remedy.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) citing Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997).

Appellants never argued that the remedies available to them were inadequate because ownership of real property is a special right or because money damages were inadequate. (Defendants' Post Trial Memorandum, at pp. 7, 8 and 9). Appellants raise these arguments for the first time on appeal. (Appellant's Brief at p. 9). Because these arguments were not raised at the trial court, Appellants cannot raise them now.

Even if these arguments were raised by Appellants, they were not ruled upon by the trial court. On June 4, 2010 Appellants submitted a nine (9) page Motion to Reconsider in which they set forth twenty-six (26) separate items they requested that the trial court rule upon. (Motion to Reconsider "59(e)" Motion). Appellants never argued that property ownership is a special right or that money damages would be inadequate in their Motion to Reconsider. (Id.) The trial court denied Appellants' Motion to Reconsider. (Order Denying Plaintiff's Motion to Reconsider "59(e)" Order) Because these arguments were not raised or ruled upon by the trial court, Appellants cannot raise them now.

E. Even if Appellants had raised the arguments that property ownership is a special right and money damages are inadequate arguments to the trial court, and the trial court had ruled on the arguments, the remedies available to Appellants were adequate.

Appellants argue that if they had sued Mr. Eldridge during his lifetime for breach of fiduciary duty "the only action available was to enforce the terms of the [trusts] (specific performance)" and that "the only change would have been to place ownership in the Hilton Head home back into the QPRT trust, which is not a remedy at law." (Appellants' Brief at p. 9). Appellants are simply mistaken.

First, Appellants could have sued Mr. Eldridge during his lifetime for breach of fiduciary duty and sought money damages, which would have been an action at law.

Corley v. Ott, 326 S.C. 89, 92 n. 1, 485 S.E.2d 97, 99 n. 1 (1997) ("This Court has held that an action alleging a breach of fiduciary duty is an action at law.") To remedy a breach of fiduciary duty, the court may compel the trustee to redress the breach by, inter alia, "paying money." S. C. Code Ann. § 62-7-1001(a)-(b). Second, suing to place ownership of the Hilton Head home back into the QPRT was not the "only" option available to Appellants. Pursuant to the terms of the QPRT, if Mr. Eldridge sold the Florida Condo he could either a) use the proceeds of any sale to acquire a successor residence or b) establish a separate annuity trust. (Stip. # 10). Appellants could have sued for money damages and/or forced Mr. Eldridge to establish an annuity trust, neither of which would have required the return of the Hilton Head home to the QPRT.[4]

F. Appellants' argument that filing a claim against Mr. Eldridge's estate would have been inadequate because Appellants would have been stealing from Peter to pay Paul is without merit.

Appellants assert that because they were beneficiaries of Mr. Eldridge's estate, a suit by the Revocable Trust against the estate would be "stealing from Peter to pay Paul." In other words, such a suit would not have the intended effect of maximizing their individual inheritance as beneficiaries and ensuring that Mrs. Eldridge received nothing. There are several problems with this argument. First, Appellants brought this action as trustees of the Revocable Trust. (Exh. 46). They did not bring this action in their individual capacities as individual beneficiaries of Mr. Eldridge's estate or individual beneficiaries of the Revocable Trust. Therefore, an action by the Revocable Trust against Mr. Eldridge's estate would have been adequate with respect to the Revocable Trust.

[4] Suing for any reason while Mr. Eldridge was alive would have provided Mr. and Mrs. Eldridge with an opportunity to address the breach and make other arrangements to accomplish his intent. See § III, A, B and C infra.

Second, whether or not such a claim would have been adequate from the perspective of an estate beneficiary (who was not a party to this lawsuit) is not equity's concern. The question is whether or not it would have been adequate to the Revocable Trust who brought suit.

The claim envisioned by the trial court was a claim by the Revocable Trust against Mr. Eldridge personally or his estate for breach of fiduciary duty. This may have lowered the value of the estate, and ultimately the amount of money that Tom and Billy Eldridge personally received. However, it would have been an appropriate and adequate remedy for the Revocable Trust which is the entity Appellants chose to sue on behalf of. Moreover, simply because Appellants' personal interests as beneficiaries of Mr. Eldridge's estate conflict with their fiduciary duties as trustees of the Revocable Trust, this is of no consequence to this Court or Mrs. Eldridge.

The Court should end its analysis here because the trial court correctly determined that 1) Appellants knew about Mr. Eldridge's breach of fiduciary duty and 2) Appellants had adequate and available remedies at law to address the breach. The Court is not required to analyze whether Appellants met their burden of proving constructive trust or resulting trust, or whether Respondents' defense of laches defeats those claims. Nevertheless, Respondents will show that the trial court correctly determined that Appellants did not meet their burden of proving constructive trust and that laches defeats their claims.

II. Appellants failed to prove the elements necessary to establish a constructive trust.

In order to prove a constructive trust, Appellants must show that "a party has obtained money which does not equitably belong to him and which he cannot in good

conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty." SSI Medi-cal Servs., 301 S.C. at 500, 392 S.E.2d at 793-94 (emphasis added); see also Lollis v. Lollis, 291 S.C. 525, 354 S.E.2d 559 (1987); Dye v. Gainey, 320 S.C. 65, 463 S.E.2d 97 (Ct.App.1995). "Generally, fraud is an essential element giving rise to a constructive trust, although it need not be actual fraud." Lollis v. Lollis, 291 S.C. 525, 354 S.E.2d 559 (1987); Whitmire v. Adams, 273 S.C. 453, 257 S.E.2d 160 (1979). In order to establish a constructive trust, the evidence in support of fraud must be "clear and convincing." SSI Medi-cal Servs., 301 S.C. at 500, 392 S.E.2d at 793-94.

With respect to the two transactions at issue in this case (the March 2002 transaction and the April 2003 transaction), Appellants concede that Mrs. Eldridge played no part in the 2002 transaction, played no part in the wrongdoing and received no benefit from the2002 transaction. (Tr. at p. 43, line 25 and p. 44, line 1) ("I'm not contending in this lawsuit that she had any part of it."). In addition, Appellants presented no evidence that Mr. Eldridge or Mrs. Eldridge breached any duty to anyone by completing the 2003 transaction. The breach of fiduciary occurred in 2002 which resulted in the house being titled in the name of the Revocable Trust. Therefore, the 2003 transaction did not result in Mrs. Eldridge acquiring the property through a "breach of trust or the violation of a fiduciary duty."

The South Carolina Court of Appeals addressed facts somewhat similar to this case in McNair v. Rainsford, 330 S.C. 332 (1998). There, the McNairs agreed to sell a house to the Rainsfords in exchange for $264,000 and various land option contracts.

After the sale, the house was titled solely in the name of Mrs. Rainsford and the options were signed only by Mr. Rainsford. Mr. Rainsford did not perform pursuant to the option contracts and the McNairs sued him for *inter alia* fraud. Mr. Rainsford declared bankruptcy, prompting the McNairs to request that a constructive trust over the proceeds of the house (Mrs. Rainsford had subsequently sold the house to third-parties the Farmers).

Prior to discussing the McNairs' claim for a constructive trust as to Ms. Rainsford, this Court noted that Mr. Rainsford filed for Chapter 11 Bankruptcy and that the bankruptcy plan was confirmed. Id. at 492. This is significant because this Court first determined that the bad actor was insolvent before it considered equitable claim for constructive trust.

Nevertheless, in refusing to find a constructive trust, the Court found as follows:

> According to the McNairs, because John Rainsford engaged in fraudulent acts concerning the land options, a constructive trust should be imposed on the proceeds Ann Rainsford received for the sale of the [house] to the Farmers. They maintain it would be inequitable for John Rainsford to use his wife as a pseudo-agent of his fraudulent activity and for her to retain the benefits from [the fraudulent activity].
>
> The McNairs do not allege Ann Rainsford committed any fraud or fraudulent acts. They have failed to present any evidence of the circumstances necessary to establish a constructive trust.
>
> . . . .
>
> Because [Mrs.] Rainsford received no benefit [from the alleged inappropriate transaction], there can be no constructive trust.

Id. at 357 (emphasis added).

While it is true that McNair v. Rainsford can be distinguished from this case because Mrs. Eldridge did not pay money for the Hilton Head home while Ann Rainsford did, this Court's ruling in McNair appears to have turned on whether or not Ms. Rainsford took part in the fraudulent conduct and benefited from the fraudulent conduct. Id. Here, the record is clear that Mrs. Eldridge did not commit any fraudulent act and it is equally clear that she received no benefit from the 2002 transaction. Just as in McNair, Appellants failed to present any evidence of circumstances necessary to establish a constructive trust.

Bank of Williston vs. Alderman, 106 S.C. 386, (1917) is also instructive. There, Alderman presented a check to Bank of Williston for payment. The check was made out in the amount of $15.00 and bore check number 52820. The teller mistook the check number for the draw amount and mistakenly paid Alderman $528.20 instead of $15.00. When the Bank of Williston pointed out the mistake to Alderman, he refused to return the overpaid funds. Instead, Alderman spent $238.20 of the money and deposited $290.00 into First National Bank.

Suit was filed against Alderman and First National Bank of Aiken. Bank of Williston vs. Alderman, 106 S.C. 386, (1917) ("$290 of the fund so received was deposited by the defendant Alderman in the defendant First National Bank of Aiken."). After suit was filed, Bank of Williston filed a motion to restrain Alderman from "disposing of so much of the fund as is now on deposit in the First National Bank of Aiken." Id. (emphasis added). In finding that a constructive trust was appropriate to follow the fund and subject it to Bank of Williston's claim, the Court found significant that Alderman was insolvent and there were no other remedies available to Bank of

Williston. Id. ("There are other allegations in the complaint, showing the necessity for the court, in the exercise of its chancery powers, to aid the plaintiff in following the fund, and subjecting it to the plaintiff's claim, on account of the **insolvency of Alderman** and the **inadequacy of the legal remedies**.") (emphasis added). In other words, it was necessary for the court to impose a constructive trust because Alderman was insolvent and because the Bank of Williston had no other legal remedies.[5]

Bank of Williston and McNair highlight the fallacy of Appellants arguments urging that a constructive trust be found against Mrs. Eldridge because she was not a good faith purchaser for value. While it is true that innocent third parties are generally required to be purchasers for value in order to be shielded from a constructive trust, litigants do not request a constructive trust unless the wrongdoer is insolvent and unable to respond in money damages. Respondent would respectfully submit that this is precisely why the Supreme Court first determined that Alderman (the bad actor) was insolvent and that Bank of Williston had no other legal remedies before it determined it was necessary to aid the Bank of Williston in following the fund and imposing a constructive trust. This logic is also supported by this Court's determination that Mr. Rainsford (the bad actor) was bankrupt before it discussed constructive trust.

Appellants also cite two family court cases and a corporate case for the proposition that courts have ordered application of a constructive trust against an innocent party who was not a good faith purchaser for value "without comment on the rule." However, just as in Alderman and Bank of Williston, the bad actor in those cases

[5] One party should not be made to bear a loss that rightfully belongs to another. SCJUR EQUITY § 12.1 citing Unison Ins. Co. v. Hertz Rental Corp., 436 SE 2d 182 (1993). Here, there is no question that the breach of fiduciary duty lies with Mr. Eldridge. Therefore, any loss from the same should be born by him or his estate.

was insolvent and unable to respond in money damages. Appellants have never cited a single case (from any jurisdiction) where a constructive trust was ordered against an innocent party (regardless of whether or not the innocent party was a purchaser for value) when the guilty party was solvent and able to answer for his misconduct.

Here, Appellants presented no evidence that Mr. Eldridge's estate was insolvent or that they had no legal remedies. The trial court correctly found that Mr. Eldridge and his estate were solvent. The trial court's refusal to find a constructive trust was consistent with the South Carolina law and fundamental fairness.

III. Appellants' claims were barred by laches because Appellants knew about Mr. Eldridge's breach of fiduciary duty and failed to take any action to remedy the breach, both of which resulted in prejudice.

Even if this Court were to find that Appellants had no available remedies at law and further determine that Appellants proved constructive trust, Respondents' defense of Laches defeats their claims.

Laches is an equitable doctrine defined as neglect for an unreasonable length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Hallums v. Hallums, 296 S.C. 195, 198 (1988). "In order to establish laches as a defense, a party must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the party asserting the defense of laches." Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 432 (2009), citing Strickland v. Strickland, 375 S.C. 76, 83 (2007). Under laches, if a party knows his rights and does not timely assert his rights, and by his delay, causes another party to "incur expenses or otherwise detrimentally change his position," then equity steps in and refuses to enforce those rights. See Mazloom v. Mazloom, 675 S.E.2d 746 (S.C. Ct. App.

2009); Sloan v. Department of Transp., 365 S.C. 299, 618 S.E.2d 876 (S.C. Ct. App. 2005); Emery v. Smith, 603 S.E.2d 598 (S.C. Ct. App. 2004).[6]

Laches is particularly applicable where the difficulty of doing entire justice arises through the death of one of the parties to the transaction in question, or of one of the witnesses to the transactions. See 30A C.J.S. Equity § 147 (2009); Charleston Library Soc. v. Citizens & Southern Nat. Bank, 201 S.C. 447, 23 S.E.2d 362 (S.C. 1942) ("The doctrine of laches applies [when] the lapse of time has been such . . . as to obscure the acts of the parties or the nature and character of the trust, as where there have been deaths of witnesses or loss of papers."); Kern v. Kern, 892 A.2d 1 (Pa. Super. 2005) ("It is well-settled law that the doctrine of laches is applicable peculiarly where the difficulty of doing justice arises through the death of the principal participants in the transactions complained of . . . ."); Bobin v. Tauber, 360 N.E.2d 368 (Ill. App. 1976) ("The rule of laches is particularly applicable where the difficulty of doing entire justice arises through the death of one of the parties to the transaction in question."). "Whether the plaintiff is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party." Bonney v. Granger, 292 S.C. 308, 356 S.E.2d 138 S.C.App.,1987 citing Privette v. Garrison, 235 S.C. 119, 110 S.E.2d 17 (1959).

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[6] While there is no expressed definition of what constitutes an unreasonable delay, where a beneficiary has a remedy at law concurrently with a remedy in equity, the statute of limitations applicable to the legal remedy applies also to the equitable remedy. See Nitkey v. S.T. McKnight Co., 87 F.2d 916, certiorari denied, 301 U.S. 697, rehearing denied 302 U.S. 773. Appellants had a cause of action at law against Mr. Eldridge for breach of fiduciary duty. The statute of limitations in South Carolina for such a claim is three years. Therefore, any equitable claim related to the breach would be subject to the same three year limitations period. Because the trial court made a finding of fact that Billy Eldridge met with and conferred with Mr. Eldridge's attorney regarding placing the Hilton Head home and the QPRT on August 31, 2004, the limitations period on any equitable claims related to the breach would have expired no later than August 31, 2007. Suit was not filed here until September 28, 2007.

In their Complaint, Appellants assert that they did not try to remedy Mr. Eldridge's breach of trust while Mr. Eldridge was alive because they didn't discover the breach until after Mr. Eldridge's death. (Exh. 46, ¶¶ 29 and 22) ("During the probate of [Mr. Eldridge's] estate, [Appellants] learned that no property was transferred from the QPRT to the Revocable Trust upon [Mr. Eldridge's] death because the QPRT assets were wrongly transferred out of the QPRT prior to [Mr. Eldridge] death."); ("[Mr. Eldridge] did not inform [Appellants] that he had purchased the Hilton Head property under the name of the Revocable Trust."). As shown in section I infra, Appellants knew about the breach of fiduciary duty for at least three (3) years and twenty-seven (27) days prior to filing this lawsuit.

Appellants also argue that their action was timely because, as contingent remaindermen of the trust, they did not have a justiciable interest, and thus no standing to initiate a suit against Mr. Eldridge until their interests became fully vested upon the death of Mr. Eldridge. This argument was expressly rejected by this Court. See Mayer v. M.S. Bailey & Son, 347 S.C. 353, 555 S.E.2d 406 (S.C.App. 2001).

The trial court found three separate types of prejudice from Appellants' delay: (1) failure to make alternative arrangements to Mr. Eldridge's estate plan; (2) lost opportunity to procure Mr. Eldridge's testimony; and (3) home costs after Mr. Eldridge's death. Each of these ruling independently supports the trial court's finding of laches.

A. Lost Opportunity to Change Estate Plan or Provide Second Home

The trial court found that Mr. Eldridge's intent was that Mrs. Eldridge have ownership of the Hilton Head home upon his death. (Order at p. 9) This is supported by that fact that Mr. Eldridge ultimately deeded the home to Ms. Eldridge and later wrote

Appellants informing them that his "relationship with [Mrs. Eldridge] has been so glorious for my happiness and longevity . . . I have put the Hilton Head house in our joint names . . . ." Therefore, the trial court determined that had Appellants timely exercised their rights and objected to the breach of fiduciary duty, Mr. Eldridge would have made alternative arrangements for Mrs. Eldridge. Appellants argue that there is no evidence to support the trial court's ruling but fail to cite any evidence to support a different one.

Appellants also argue that even if they had timely objected, and even if it was Mr. Eldridge's intent to make other arrangements for Mrs. Eldridge, it was "impossible" for Mr. Eldridge to "leave the Hilton Head Home to [Mrs. Eldridge] upon his death." (Appellant's Brief at p. 17). This is simply incorrect. Had Appellants timely objected, Mr. Eldridge could have conveyed the Hilton Head home back to his QPRT trust. Then, he could have made Mrs. Eldridge a beneficiary of his Revocable Trust (and the Hilton Head home). Upon his death in 2006, the Hilton Head home would have passed from the QPRT to the Revocable Trust, and then to Mrs. Eldridge as the new named beneficiary of the Revocable Trust. This is precisely why the trial court found that Mr. Eldridge's intent "could have been accomplished by modifications to his revocable trust." (Order at p. 9) Again, Mr. Eldridge could have lawfully accomplished the same result (leaving the Hilton Head home to Mrs. Eldridge) that Appellants now claim was accomplished unlawfully.

Nevertheless, even if Mr. Eldridge had not been able to leave Mrs. Eldridge "the Hilton Head home," the trial court found prejudice because Mr. Eldridge did not have the opportunity to make "other arrangements" for Mrs. Eldridge. (Order at 9). Mr. Eldridge

could have made any number of alternative arrangements to provide Mrs. Eldridge with the security she sought in growing old in her own home.

B. Lost Opportunity to Procure Mr. Eldridge's Testimony

Mr. Eldridge's attorney instructed Mr. Eldridge that he could remedy his breach of fiduciary duty by "buying back" Appellants "remainder interest" in the QPRT trust for "$78,686." (Exh. 10) ("The only other option is to 'buy out' the QPRT . . . . you will need to pay your sons $78,686.00 to 'buy back' from [Appellants] interest that they now own. Thereafter, Mr. Eldridge transferred over $140,000 to Appellants. (Stip. # 30).

Appellants argued that these transfers were gifts. Aside from the fact that Mr. Eldridge stated that his "gifting program" was terminated "the year before [Mrs. Eldridge] and I were married," (Exh. 19 at April 14, 2002 letter) what is important is that Mrs. Eldridge is now unable to procure testimony from Mr. Eldridge regarding the purpose of the transfers due to his death. This is a text book example of prejudice resulting from Appellants' decision to just "drop the issue." Charleston Library Soc. v. Citizens & Southern Nat. Bank, 201 S.C. 447, 23 S.E.2d 362 (S.C. 1942) ("The doctrine of laches applies [when] the lapse of time has been such . . . as to obscure the acts of the parties or the nature and character of the trust, as where there have been deaths of witnesses or loss of papers."); Kern v. Kern, 892 A.2d 1 (Pa. Super. 2005) ("It is well-settled law that the doctrine of laches is applicable peculiarly where the difficulty of doing justice arises through the death of the principal participants in the transactions complained of . . . ."); Bobin v. Tauber, 360 N.E.2d 368 (Ill. App. 1976) ("The rule of laches is particularly applicable where the difficulty of doing entire justice arises through the death of one of the parties to the transaction in question."). Id. ("Proof of prejudice

may be made in any one of several ways. For example, the death of material witnesses or of the original trustee obviously will be a great handicap, as will the loss of important documentary evidence.") (citing cases).[7]

Appellants also allege that Mr. Eldridge was threatened with divorce and coerced into conveying the Hilton Head home to Mrs. Eldridge. Mrs. Eldridge testified that never happened. (Tr. at 95, lines 1-9). Again, what is important is that Respondents are now unable to procure testimony from Mr. Eldridge on this point due to his death.[8]

C. Expenses Related to Hilton Head Home

Even though Appellants knew that Mr. Eldridge had improperly removed the Hilton Head home from the QPRT, neither Tom Eldridge nor Billy Eldridge ever informed Mrs. Eldridge about the breach. Instead, they "dropped the issue" and allowed Mrs. Eldridge to live in the home for years believing that she was the beneficial owner. During this time Mrs. Eldridge incurred expenses associated with the property. For example, on August 28, 2006 Mrs. Eldridge paid $2,227.74 in homeowner's insurance premiums, on November 11, 2006 she paid $3,216.29 in property taxes, and on February 20, 2007 she paid $921 in HOA dues. (Exh. 33) These expenses are text book examples of the type of expenses that cause prejudice under laches. See Bogert's Trusts and Trustees, The Law Of Trusts And Trustees § 949 (2009) ("Other facts which may tend to prove that the delay has been prejudicial are that the plaintiff has recognized the

[7] Appellants assert that Mr. Eldridge may not have been legally able to buy out Appellants' interest in the QPRT trust. Regardless of whether or not that is true from a tax law standpoint, showing that Mr. Eldridge transferred this money to cure the breach at issue would destroy Appellants' claims of equitable relief.

[8] Even if Mrs. Eldridge did threaten to divorce Mr. Eldridge if he did not transfer the Hilton Head home to her – which she did not – there would be nothing unlawful with her doing so. Mrs. Eldridge had no knowledge that such a transfer would be inappropriate and knew nothing about Mr. Eldridge's breach of fiduciary duty. Married couples find different ways to resolve disputes and it is not a Court's responsibility to judge the morality of how Mr. and Mrs. Eldridge may have successfully resolved theirs.

defendant as the beneficial owner of the property during the period of delay and thus caused him to be off guard and to fail to prepare for the defense of any trust claim, that the defendant has been bearing the burdens of ownership such as taxes and mortgage interest, or has been improving the property, and that the rights of third persons have become involved.")

Finally, Appellants argue that because the prejudice may be able to be remedied with an award of money damages, the prejudice somehow does not count as legal prejudice. There is simply no support for such an argument in prejudice jurisprudence.

CONCLUSION

Appellants filed this lawsuit alleging that they found out about Mr. Eldridge's breach of fiduciary duty during the probate of Mr. Eldridge's estate. That was simply not true. Appellants claimed not to have filed a claim against Mr. Eldridge's estate because the estate was insolvent. That was simply not true. The trial Court correctly determined that Appellants knew about the breach and had remedies available to address it. Appellants' delay in failing to take any action against Mr. Eldridge and failing to inform Mrs. Eldridge resulted in prejudice and laches. For these reasons and those set forth above, this Court should affirm the trial court's judgment in favor of Respondents.[9]

[9] If this court were to disagree with the trial court's and respondent's arguments, it should remand the case to the trial court for a determination of how much of the proceeds from the sale of the Florida condo were used to purchase the Hilton Head home and further order that Mrs. Eldridge be reimbursed for all expenses she incurred during Appellants' five (5) year and twenty-seven (27) day delay in bringing this lawsuit.

Respectfully submitted,

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February 17, 2011

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas

Marvin H. Dukes, III, Master-In-Equity

Case No. 2007-CP-07-2684

Watson William Eldrige IV and
Thomas Hadley Eldridge, as Trustees for the
Watson William Eldridge III Revocable Trust, ... Appellants,

v.

Frances Ulmer Eldridge, Individually and
Frances Ulmer Eldridge as Trustee for the
Frances Ulmer Eldridge Revocable Trust, , ... Respondents.

CERTIFICATE OF MAILING

The undersigned, J. Ashley Twombley attorneys for Respondents, does hereby certify that service of Respondents' Initial Brief in the above-captioned matter was made upon all counsel of record by placing copies in the Unites States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this 17th day of February 2011, addressed to the following:

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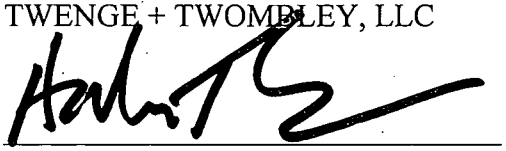
BY: 

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