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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

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

Appellate Case No. 2015-001053

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

v.

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

RECORD ON APPEAL VOLUME 2 OF 5

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INDEX

VOLUME 1

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT

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

Plaintiff,

vs.

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

Defendants.

Civil Action No. 2010-CP-46-2267

Trial Brief

The Plaintiff Cannot Assert This Assigned Claim

The Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust (the "Burton Trust") cannot assert this assigned legal malpractice claim against Carroll M. Pitts, Jr., ("Pitts") and Robinson Bradshaw & Hinson, P.A., (collectively, "RBH") because: (1) this Court ruled that the assertion of this assigned claim would prejudice RBH; (2) this assigned claim is time-barred; and (3) this legal malpractice claim cannot be assigned under South Carolina law.

FACTS

After more than four years of litigation, the parties to the Partition Action executed a Settlement Agreement on April 4, 2013. Under the terms of the Settlement Agreement, the Burton Trust released all claims "in any way related to the subject property" and executed a quitclaim deed to complete the sale to TAL in exchange for $249,000 and an Assignment Agreement that purports to assign to it the claims of the other members of the T.E. Cato Estate, LLC. (*See* Settlement Agreement, ¶¶ 3, 7; attached as **Exhibit A;** Assignment Agreement; attached as **Exhibit B.**)

On May 27, 2010, the Burton Trust filed this Complaint against RBH. On September 6, 2013, the Burton Trust moved to amend its complaint to, among other things, add a new cause of action pursuant to the Assignment Agreement. (*See* Mot. to Amend Compl., ¶¶ 24-30.)

On October 22, 2013, this Court denied the motion to amend and ruled that "[i]n regard to the 'Assignment Agreement' assigning relevant claims, the Court finds that allowing these claims would also prejudice Mr. Pitts and Morton & Gettys as the parties were not involved in the partition litigation." (Order Denying Mot. to Amend; attached as **Exhibit C.**) The Burton Trust moved for reconsideration on November 5, 2013, because it "believe[d] that the Court intended to refer only to Mr. Vann and Morton & Gettys, as Mr. Pitts was the attorney for the petitioners in the partition action." (Mot. for Reconsid. at 2, n. 1, attached as **Exhibit D.**) This Court denied the motion for reconsideration by order dated November 15, 2013. (Order Denying Mot. for Reconsid.; attached as **Exhibit E.**)

ARGUMENT

The Burton Trust cannot assert this assigned legal malpractice claim against RBH because: (1) this Court ruled that the assertion of this assigned claim would prejudice RBH; (2) this assigned claim is time-barred; and (3) this legal malpractice claim cannot be assigned under South Carolina law.

1. **This Court previously ruled that the assertion of assigned claims would prejudice Pitts.**

This Court expressly ruled that allowing claims based on the Assignment Agreement would be prejudicial to Mr. Pitts by his Order dated October 22, 2013. The Burton Trust's motion for reconsideration of this Order specifically asked the Court to reconsider whether or not prejudice would be created by the proposed claim against RBH. (**Ex. D,** at 3.) This Court's denial of the Burton Trust's motion for reconsideration, therefore, clarifies that the Court intended to preclude the Burton Trust from asserting this assigned claim against RBH.

Because this Court previously ruled that allowing the assigned claims would prejudice RBH, any claim made pursuant to the Assignment Agreement should be excluded at the trial of this case.

2. **The assigned claims are time-barred.**

South Carolina Code Ann. § 15–3–530 (Supp. 2003) provides a three year statute of limitations for legal malpractice lawsuits. Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct. *See Dean v. Ruscon Corp.,* 321 S.C. 360, 468 S.E.2d 645 (1996); S.C. Code Ann. § 15–3–535. *See also Berry v. McLeod,* 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997). The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed. *Id.* Under § 15–3–535, the statute of limitations is triggered not merely by knowledge of an injury but by knowledge of facts, diligently acquired, sufficient to put an injured person on notice of the existence of a cause of action against another. *True v. Monteith,* 327 S.C. 116, 120, 489 S.E.2d 615, 617 (1997); *Epstein v. Brown*, 363 S.C. 372, 376, 610 S.E.2d 816, 818 (2005).

Here, any legal malpractice claim against RBH that the Burton Trust received from the Assignment Agreement was time-barred as of the date of the assignment. The Burton Trust was on notice of a purported injury no later than the date on which it unsuccessfully sought to have Mr. Pitts disqualified for an alleged conflict of interest during the pendency of the Partition Action on April 27, 2009. (*See* Mot. to Disqual.) Therefore, the three-year statute of limitations began to run from that date (at the latest) and expired in April 2012. Subsequently, the Assignment Agreement was executed simultaneously with the Settlement Agreement dated April 4, 2013. Thus, the statute of limitations had already expired on any claim the Burton Trust received through the Assignment Agreement.

Therefore, the Burton Trust cannot assert this time-barred claim it purportedly received through the Assignment Agreement.

3. A legal malpractice claim cannot be assigned under South Carolina law.

The Burton Trust cannot assert this assigned legal malpractice claim because, under current South Carolina law, a legal malpractice claim cannot be assigned.

The general rule is that a claim for legal malpractice is not assignable. *See Zuniga v. Groce, Locke & Hebdon,* 878 S.W.2d 313, 315 (Ct. App. Tex. 1994) (citing cases and noting that "in most jurisdictions, one cannot assign a cause of action for legal malpractice"). Courts reason that a cause of action for legal malpractice is not assignable because it is "predicated on the uniquely personal nature of legal services and the contract out of which a highly personal and confidential attorney-client relationship arises, and public policy considerations based thereon." *Goodley v. Wank & Wank, Inc.*, 133 Cal. Rptr. 83, 87 (Cal. 1976).

Courts have justly feared that such an assignment could "relegate the legal malpractice action to the marketplace and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney." *Id.* Such factoring of malpractice claims could "encourage unjustified lawsuits against members of the legal profession, generate and increase in legal malpractice litigation, promote champerty and force attorneys to defend themselves against strangers." *Id.*

A South Carolina trial court recently determined that South Carolina would follow the majority against assignment of legal malpractice claims. In *Pavilion Dev. Corp. v. Nexsen Pruet, LLC*, C.A. No.: 2011-CP-10-05774, 2013 WL 5925732 (S.C.Ct.C.P. Oct. 9, 2013), The Honorable J.C. Nicholson, Jr., found that a party's assignment of a legal malpractice claim to an adversary in the litigation in which the alleged malpractice arose is void against public policy. *Pavilion*, 2013 WL 5925732 at *9. In reaching this conclusion, Judge Nicholson noted that the majority view of jurisdictions "is that legal malpractice claims are not assignable because they are void against public policy." *Id.* at *4 (identifying (the following states as having adopted the majority view: Arizona, California, Florida, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, Tennessee, Virginia, West Virginia, and North Carolina).

However, should this Court require further persuasion that allowing the Burton Trust to assert a legal malpractice claim by virtue of the Assignment Agreement would be improper, the Honorable J. Michelle Childs recently certified this very question to the South Carolina Supreme Court. *See Skipper v. Ace Prop. and Casualty Ins. Co.*, C.A. No.: 1:14-cv-00444-JMC, 2014 WL 4700220 (Order, Sept. 9, 2014). The South Carolina Supreme Court has not issued an opinion answering this question; therefore, *Pavilion* is the most recent expression of South Carolina law on the issue.

Based upon the majority rule against assignment, the public policy considerations for the unique nature of the legal services, and the current posture of South Carolina law on the issue, this Court should deny the Burton Trust's attempt to assert this assigned legal malpractice claim.

CONCLUSION

The Burton Trust cannot assert this assigned legal malpractice claim against RBH because: (1) this Court ruled that the assertion of this assigned claim would prejudice RBH; (2) this assigned claim is time-barred; and, (3) this legal malpractice claim cannot be assigned under South Carolina law.

[SIGNATURE PAGE ATTACHED]

Respectfully submitted,

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York, South Carolina

December 17, 2014

EXHIBIT A

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
IN THE SIXTEENTH JUDICIAL CIRCUIT

James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato and Cathy Cato Evans,

Petitioners,

vs.

David Alan Burton as Successor Trustee for Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, and in the Right and on behalf of T.E. Cato Estate, LLC; Marjorie Cato Burton Living Trust; and The SC Department of Transportation,

Respondents.

David Alan Burton as Successor Trustee for Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, and in the Right and on behalf of T.E. Cato Estate, LLC;

Third-Party Plaintiff,

vs.

Thomasson Apts., LLC,

Third-Party Defendant.

Thomasson Apts., LLC,

Fourth-Party Plaintiff,

vs.

T.E. Cato Estate, LLC, James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, and Cathy Cato Evans, and David Alan Burton,

Case No. 2008-CP-46-3171

Fourth-Party Defendants.)

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Mutual Release ("Settlement Agreement") dated April 4, 2013, is made and entered by, between, and among James Thomas Cato; Helen Cato Jones; Douglas E. Jones; Albert M. Jones; Sara L. Jones; Donn S. Johnson; Jane Cato West; Robert Lee Cato; Cathy Cato Evans; The Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, which is referenced in the above-captioned action as David Alan Burton as Successor Trustee for Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, but will be referred to hereinafter as "the Burton Trust"; Marjorie Burton; Sloan Marvin Burton; David Alan Burton, individually and as Successor Trustee of the Burton Trust; T.E. Cato Estate, LLC ("Cato, LLC"); Thomasson Apts., LLC ("Thomasson"); Broadus L. Thomasson, Sr.; B. Lee Thomasson, Jr.; B. Heath Thomasson; and Matthew J. Thomasson.

RECITALS:

WHEREAS, the property involved in this case was formerly owned by Thomas Edward Cato ("T.E. Cato"), who died on November 23, 1957 and ownership of this property later vested in the heirs of T.E. Cato and their successors, namely Marjorie Cato Burton through the Burton Trust, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, and James Thomas Cato ("T.E. Cato Heirs");

WHEREAS, on various dates ranging from May 30, 2007 to June 16, 2007, the T.E. Cato Heirs executed Articles of Organization of Cato, LLC;

WHEREAS, on the same day that each of the T.E. Cato Heirs executed the Articles of Organization of Cato, LLC, they each executed a deed in order to convey to Cato, LLC nine

tracts of land: Lots 42, 14, 13, 98, 175, and Areas A, B, C, and D, with such deed being recorded July 10, 2007 with the York County Clerk of Court in Book 9248 at Page 138, with the property being more particularly described therein ("Cato Deed");

WHEREAS, on August 3, 2007, James Thomas Cato, on behalf of Cato, LLC, executed a Letter of Intent regarding the sale of Areas A, B, C, and D to Thomasson for $1,000,000 ("Letter of Intent");

WHEREAS, it was later discovered that the legal description of Areas A, B, C, and D was not complete or correct because a certain piece of property described as the Roadbed Tract was not part of Area B;

WHEREAS, in December 2007, Cato, LLC and Thomasson entered into an Amendment to Contract, wherein all the members of Cato, LLC, except the Burton Trust, ratified the terms of the Letter of Intent and agreed to file an action for partition of the Roadbed Tract and to seek a private sale to Thomasson of the Roadbed Tract for $100,000.00 ("Amendment to Contract");

WHEREAS, on December 12, 2007, James Thomas Cato, on behalf of Cato, LLC, for consideration of $900,000.00 paid by Thomasson, executed a general warranty deed conveying to Thomasson Areas A, B, C and D, less the Roadbed Tract, which deed is dated December 12, 2007 and recorded December 17, 2007 with the York County Clerk of Court in Book 9673 at Page 150, with the property being more particularly described therein ("Thomasson Deed");

WHEREAS, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, and James Thomas Cato filed the above-captioned action against the Burton Trust for partition and the Burton Trust asserted various counterclaims and a Third-Party Complaint against Thomasson;

WHEREAS, Thomasson asserted counterclaims against the Burton Trust and a Fourth-Party Complaint against Cato, LLC, James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, and David Alan Burton (the above-captioned case including all counterclaims, the third-party complaint, and the fourth-party complaint all as amended shall be collectively referred to as "the Action");

WHEREAS, in the Action, the Burton Trust challenged the validity of the Cato Deed, the Thomasson Deed, challenged Cato, LLC's authority to enter into the various transactions referenced above, and challenged Thomasson's ownership of the subject property;

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

WHEREAS, Marjorie Burton, Sloan Marvin Burton, Broadus L. Thomasson, Sr., B. Lee Thomasson, Jr., B. Heath Thomasson, Matthew J. Thomasson, Douglas E. Jones, Albert M. Jones, and Sara L. Jones, are not parties to the Action but are parties to this Settlement Agreement to effectuate the agreement between the parties to resolve the Action in the manner set forth herein; and

NOW, THEREFORE, James Thomas Cato, Helen Cato Jones, Douglas E. Jones, Albert M. Jones, Sara L. Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, the Burton Trust, Marjorie Burton, Sloan Marvin Burton, David Alan Burton, Cato, LLC, Thomasson, Broadus L. Thomasson, Sr., B. Lee Thomasson, Jr., B. Heath Thomasson, and Matthew J. Thomasson (hereinafter sometimes collectively referred to as "the Parties") enter into this Settlement Agreement in exchange for the mutual promises, covenants, representations, and warranties contained herein, together with other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and further agree as follows:

1. INCORPORATION OF RECITALS. The above Recitals are incorporated herein and made a part of this Settlement Agreement.

2. COMPLETE RESOLUTION. It is the intent of this Settlement Agreement to resolve, fully and forever, any and all claims between the parties that were asserted or that could have been asserted in the Action pursuant to the terms contained herein, and to confirm that Thomasson henceforth owns the Roadbed Tract and Areas A, B, C, and D free and clear of any claim, right, title or interest of any of the other parties herein.

3. CONSIDERATION. For and in consideration of the total sum of Two Hundred Forty Nine Thousand and no/100 ($249,000.00) Dollars paid to the Burton Trust by or on behalf of Thomasson, Cato, LLC, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, and James Thomas Cato, and the Assignment set forth in paragraph 7 of this Settlement Agreement, and the mutual promises and covenants contained herein, the receipt and sufficiency of which are hereby acknowledged, the Parties agree to execute and deliver this Settlement Agreement and to be fully bound by its terms and to dismiss the claims asserted in the Action with prejudice.

4. CONSENT ORDER AND DISMISSAL OF ACTION. The parties to the Action through their counsel shall present to the presiding Judge of the York County Court of Common Pleas a Consent Order which dismisses all claims asserted in the Action with prejudice, finds and concludes the properties that are the subject of the Action-- Areas A, B, C, and D, and the Roadbed Tract-- are henceforth owned by Thomasson free and clear of any right, title, claim, or interest of the other parties to the Action, finds and concludes that the Cato Deed and the Thomasson Deed are henceforth valid, and approves and incorporates this Settlement Agreement. A copy of the Consent Order to be presented to the Court is attached hereto as **Exhibit A.**

5. QUITCLAIM DEED. James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, and the Burton Trust (in their individual capacities and as members of Cato, LLC), as well as Marjorie Burton, Sloan Marvin Burton, David Burton, Cato, LLC, Douglas E. Jones, Albert M. Jones, and Sara L. Jones shall execute a quitclaim deed, in a recordable form prepared by Thomasson conveying all of their right, title, and interest in Areas A, B, C, and D, and the Roadbed Tract to Thomasson with such quitclaim deed to also include in its legal description more recent surveys of these properties commissioned by Thomasson. A copy of this quitclaim deed is attached hereto as **Exhibit B**. As a condition of this Settlement Agreement, the quitclaim deed described herein shall be sent to and held in Trust by Thomasson's attorney, Demetri K. Koutrakos, and not deemed legally delivered unless the Consent Order is entered and filed with the York County Clerk of Court after which the quitclaim deed shall be deemed legally delivered and may be recorded, provided that, if the Consent Order is not entered and filed, then the quitclaim deed shall be null, void, and of no force or effect, it shall not be deemed legally delivered, and the signature pages for such

quitclaim deed shall immediately be returned to the attorneys of record for the respective signatories. The Parties agree and acknowledge that James Thomas Cato, as manager and authorized member of Cato, LLC, has the full and complete authority to execute the quitclaim deed on behalf of Cato, LLC and to also execute this Settlement Agreement and all associated documents on behalf of Cato, LLC.

6. SCDOT CONSENT ORDER. This Settlement Agreement is further conditioned upon the entry and filing of a consent order which orders that the quitclaim deed recorded November 4, 2006 with the York County Clerk of Court in Book 8577 at Page 187, wherein the South Carolina Department of Transportation ("SCDOT") quitclaimed its interest in the Roadbed Tract to Marjorie Cato Burton, Trustee of the Marjorie Cato Burton Revocable Trust, Helen C. Jones, Donn S. Johnson, Robert Lee Cato, James Thomas Cato, Martha Jane Cato West, and Cathy Cato Evans, be reformed by correcting the name of the grantees in that deed to David Alan Burton as Successor Trustee to Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, Helen C. Jones, Donn S. Johnson, Robert Lee Cato, James Thomas Cato, Martha Jane Cato West, and Cathy Cato Evans and dismisses the SCDOT as a party to the Action. A copy of this Consent Order is attached hereto as **Exhibit C.**

7. ASSIGNMENT OF CATO, LLC ASSETS. Cato, LLC shall convey certain rights, assets, and interests to the Burton Trust per the Assignment attached hereto and incorporated herein as **Exhibit D.**

8. OBLIGATIONS UNDER CONTRACTS. Upon the execution of this Settlement Agreement, all obligations of Thomasson and Cato, LLC, Helen Cato Jones, Donn S. Johnson, James Thomas Cato, Jane Cato West, Robert Lee Cato, and Cathy Cato Evans under the Letter

of Intent and the Amendment of Contract shall be deemed satisfied with no further payment from Thomasson due thereunder.

9. RELEASES.

A. The Burton Trust, Marjorie Burton, Sloan Marvin Burton, and David Burton, including, without limitation, their heirs, successors, assigns, trustees, co-trustees, settlors, employers, employees, predecessor trusts, successor trusts, affiliate trusts, and related entities hereby remise, release, and forever discharge Cato, LLC, James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, Douglas E. Jones, Albert M. Jones, and Sara L. Jones, including without limitation, their heirs, successors and assigns, in full of and from any and all claims, demands, liabilities, debts, rights, actions, costs, fees, expenses, compensation and causes of action, at law or in equity, either known or unknown at this time, apparent or not apparent, related in any manner whatsoever to the Letter of Intent, the Amendment to Contract, Areas A, B, C, and D, the Roadbed Tract, the Cato Deed, the Thomasson Deed, Lots 42, 14, 13, 98, 175, the creation, management, or operation of Cato, LLC, or the claims set forth in the Action, including any claims which were, or which could have been, set forth by The Burton Trust, Marjorie Burton, Sloan Marvin Burton, or David Burton against Cato, LLC, James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, Douglas E. Jones, Albert M. Jones, or Sara L. Jones in the Action.

B. Cato, LLC, James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, Douglas E. Jones, Albert M. Jones, and Sara L. Jones, including without limitation, their heirs, successors and assigns, hereby remise, release, and forever discharge the Burton Trust, Marjorie Burton, Sloan Marvin Burton, and David

Burton, including, without limitation, their heirs, successors, assigns, trustees, co-trustees, settlors, employers, employees, predecessor trusts, successor trusts, affiliate trusts, and related entities of and from any and all claims, demands, liabilities, debts, rights, actions, costs, fees, expenses, compensation and causes of action, at law or in equity, either known or unknown at this time, apparent or not apparent, related in any manner whatsoever to the Letter of Intent, the Amendment to Contract, Areas A, B, C, and D, the Roadbed Tract, the Cato Deed, the Thomasson Deed, Lots 42, 14, 13, 98, 175, the creation, management, or operation of Cato, LLC, or the claims set forth in the Action, including any claims which were, or which could have been, set forth by Cato, LLC, James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, Douglas E. Jones, Albert M. Jones, or Sara L. Jones against the Burton Trust, David Burton, Marjorie Burton, or Sloan Marvin Burton in the Action.

C. Thomasson, Broadus L. Thomasson, Sr., B. Lee Thomasson, Jr., B. Heath Thomasson, and Matthew J. Thomasson, including, without limitation, their heirs, successors, assigns, employers, employees, predecessor companies, successor companies, subsidiary companies, parent companies, affiliate companies, related companies, divisions, any and all past, present and future members and managers remise, release, and forever discharge James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, Cato, LLC, the Burton Trust, Marjorie Burton, Sloan Marvin Burton, David Burton, Douglas E. Jones, Albert M. Jones, and Sara L. Jones, including, without limitation, their heirs, successors, assigns, trustees, co-trustees, settlors, employers, employees, predecessor trusts, successor trusts, affiliate trusts, and related entities of and from any and all claims, demands, liabilities, debts, rights, actions, costs, fees, expenses, compensation and causes of action, at law or in equity,

either known or unknown at this time, apparent or not apparent, related in any manner whatsoever to the Letter of Intent, the Amendment to Contract, Areas A, B, C, and D, the Roadbed Tract, the Cato Deed, the Thomasson Deed, or the claims set forth in the Action, including any claims which were, or which could have been, set forth by Thomasson Broadus L. Thomasson, Sr., B. Lee Thomasson, Jr., B. Heath Thomasson, or Matthew J. Thomasson against James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, Cato, LLC, the Burton Trust, David Burton, Marjorie Burton, Sloan Marvin Burton, Douglas E. Jones, Albert M. Jones, or Sara L. Jones in the Action.

D. James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, Cato, LLC, the Burton Trust, Marjorie Burton, Sloan Marvin Burton, David Burton, Douglas E. Jones, Albert M. Jones, and Sara L. Jones, including, without limitation, their heirs, successors, assigns, trustees, co-trustees, settlors, employers, employees, predecessor trusts, successor trusts, affiliate trusts, and related entities remise, release, and forever discharge Thomasson, Broadus L. Thomasson, Sr., B. Lee Thomasson, Jr., B Heath Thomasson, and Matthew J. Thomasson including, without limitation, their heirs successors, assigns, employers, employees, predecessor companies, successor companies, subsidiary companies, parent companies, affiliate companies, related companies, divisions, related entities, successors in title, any and all past, present and future members and managers of and from any and all claims, demands, liabilities, claims of ownership and title, debts, rights, actions, costs, fees, expenses, compensation and causes of action, at law or in equity, either known or unknown at this time, apparent or not apparent, related in any manner whatsoever to the Letter of Intent, the Amendment to Contract, Areas A, B, C, and D, the Roadbed Tract, the Cato Deed, the Thomasson Deed, or the claims set forth in the Action, including any claims which were, or

which could have been, set forth by James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, Cato, LLC, the Burton Trust, David Burton, Marjorie Burton, Sloan Marvin Burton, Douglas E. Jones, Albert M. Jones, or Sara L. Jones against Thomasson, Broadus L. Thomasson, Sr., B. Lee Thomasson, Jr., B. Heath Thomasson, or Matthew J. Thomasson in the Action.

E. Cato, LLC remises, releases, and forever discharges James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, Cato, LLC, the Burton Trust, Marjorie Burton, Sloan Marvin Burton, David Burton, Douglas E. Jones, Albert M. Jones, and Sara L. Jones, including, without limitation, their heirs, successors, assigns, trustees, co-trustees, settlors, employers, employees, predecessor trusts, successor trusts, affiliate trusts, and related entities of and from any and all claims, demands, liabilities, debts, rights, actions, costs, fees, expenses, compensation and causes of action, at law or in equity, either known or unknown at this time, apparent or not apparent, related in any manner whatsoever to the Letter of Intent, the Amendment to Contract, Areas A, B, C, and D, the Roadbed Tract, the Cato Deed, the Thomasson Deed, or the claims set forth in the Action, including any claims which were, or which could have been, set forth by Cato, LLC in the Action.

10. ATTORNEYS' FEES. Each party shall bear its own costs, expenses and attorneys' fees in connection with this matter. To the extent a party to this Settlement Agreement files a legal action to enforce the terms of this Settlement Agreement, the prevailing party shall be entitled to an award of reasonable attorney's fees and costs.

11. NO ADMISSION OF LIABILITY. The Parties acknowledge and agree this settlement is a complete compromise of the matters involving disputed issues of law and fact.

The Parties understand and agree that this settlement is not to be construed as an admission of liability on the part of any party, all of whom expressly deny liability.

12. REPRESENTATION AND COMPREHENSION OF DOCUMENT. Except as to the promises, covenants, representations, and warranties contained herein and in the documents attached hereto, as applicable, no party is relying on any collateral, oral or written representations, or promise as an inducement to enter into this Settlement Agreement. All previous agreements between the parties regarding the subject matter hereof are merged herein. The terms of this Settlement Agreement are fully understood and voluntarily accepted by the Parties, and are not subject to modification or waiver except by means of a writing signed by the Parties. The Parties acknowledge and represent to each other that they have read this Settlement Agreement carefully, understand it, and have had the advice of counsel before signing same.

13. WARRANTY OF CAPACITY TO EXECUTE SETTLEMENT AGREEMENT. Each party represents and warrants that he, she, or it is properly identified and has the authority to enter into this Settlement Agreement and execute the associated documents. Each party represents and warrants that he, she, or it has not otherwise sold, assigned, transferred, conveyed or disposed of all or any portion of the claims, demands, liabilities, debts, rights, actions, costs, fees, expenses, compensation, causes of action, assets, and titles referred to in this Settlement Agreement and/or in the documents attached hereto, except as specifically stated herein or the documents incorporated by reference into this Settlement Agreement. Furthermore, the parties represent and warrant that no other person or entity related to him, her, or it has any interest in the property that is the subject of the Action or the claims asserted in the Action.

14. UNANIMOUS CONSENT OF THE MEMBERS OF CATO, LLC. By executing this Settlement Agreement, those parties to this Settlement Agreement who are members of Cato,

LLC represents, individually and as members of Cato LLC, that (s)he or it consents to Cato, LLC entering into this Settlement Agreement and executing this Settlement Agreement.

15. GOVERNING LAW. This Settlement Agreement shall be construed and interpreted in accordance with the laws of the State of South Carolina, without regard to conflicts of law principles.

16. SEVERABILITY. If any part or parts of this Settlement Agreement are held to be invalid or unenforceable, the Court shall nevertheless uphold and enforce the remaining provisions and construe the invalid portion(s), if any, as severable from the remaining terms of the Settlement Agreement.

17. ENTIRE DOCUMENT AND SUCCESSORS IN INTEREST. This Settlement Agreement, including all documents attached hereto or required herein, contains all agreements, conditions, promises, and covenants between the Parties regarding the matters addressed in it, and supersedes all prior or contemporaneous agreements, representations, or understandings with respect to the subject matter hereof. The Parties agree that the terms of this Settlement Agreement are contractual in nature and not a mere recital, and that these terms shall be binding on and inure to the benefit of the Parties' officers, employees, heirs, successors, and assigns.

18. CONSTRUCTION OF DOCUMENT. The Parties intend that the release provisions of this Settlement Agreement as set forth in paragraph 9 shall be construed as broadly and comprehensively as permitted by law.

19. EFFECTIVENESS. This Settlement Agreement is effective upon execution by all parties subject to the entry of the consent orders referenced herein. All requirements of this Settlement Agreement shall be completed on or before May 22, 2013 unless otherwise agreed to by the Parties.

20. COUNTERPARTS AND SIGNING. This Settlement Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which, together, shall constitute one and the same instrument. This Settlement Agreement may be executed by facsimile, which shall have binding effect. Copies of original execution pages of this Settlement Agreement shall have the same force and effect as the originals themselves.

IN WITNESS WHEREOF, the Parties set forth their hands and seals on the dates set forth below.

[SIGNATURES ON THE FOLLOWING PAGES]

T.E. Cato Estate, LLC, a South Carolina limited liability company [SEAL]

Witness

Witness 2

By: James Thomas Cato, Manager and Authorized Member of the Company

Witness 1

Witness 2

(SEAL)

James Thomas Cato

Robert C. Hoover

Witness 1

Witness 2

Donn S. Johnson (SEAL)

Donn S. Johnson

Expire date as of
June 4, 2022

Ifeshia Bessard
Witness 1 Signature

Jennifer Georgen
Witness 2/Notary Signature

Jane Cato West (SEAL)
Jane Cato West

Case No: 2008-CP-46-3171

Maxine Q. Smith
Witness 1

Amy A. Moore
Witness 2

Robert Lee Cato (SEAL)
Robert Lee Cato

Witness 1

Witness 2

Cathy Cato Evans (SEAL)
Cathy Cato Evans

Case# 2008-CP-46-3171

Court of Common Pleas

Mia Galjasevic
Witness 1

[signature]
Witness 2

[signature] (SEAL)
Albert M. Jones 5/1/13

Helen Cato Jones by Albert M Jones, her Attorney-In-Fact

Helen Cato Jones by Albert M. Jones, her Attorney-In-Fact

Tracie Cole

Witness 1

Jillian Goodman

Witness 2

Douglas E. Jones (SEAL)

Douglas E. Jones

Helen Cato Jones by Douglas E. Jones, her Attorney-In-Fact

Helen Cato Jones by Douglas E. Jones, her Attorney-In-Fact

Kayla [signature]

Witness 1

ADRIANA Snider

Witness 2

Sara L. Jones (SEAL)

Sara L. Jones

Helen Cato Jones by Sara L Jones her Attorney-In-Fact

Helen Cato Jones by Sara L. Jones, her Attorney-In-Fact

Marjorie Cato Burton by David Alan Burton AIF (SEAL)

Marjorie Cato Burton by David Alan Burton
as her Attorney-In-Fact

Witness 1

Witness 2

(SEAL)

Sloan Marvin Burton ~~by David Alan Burton~~
~~as his Attorney-In-Fact~~

Witness 1

Witness 2

(SEAL)

David Alan Burton, Individually

Witness 1

Witness 2

(SEAL)

David Alan Burton, as Successor Trustee
of the Sloan Marvin Burton and
Marjorie Cato Burton AB Living Trust

Witness 1

Witness 2

RECEIVED
APR 16 2013
Roger B. Jellenik, Esq.

Thomasson Apts., LLC [SEAL]

By: ______________
Authorized Member of the Company

____
Witness

____
Witness 2

Broadus L. Thomasson (SEAL)
Broadus L. Thomasson, Sr.

Cleo Thomasson
Witness 1

____
Witness 2

______________ (SEAL)
B. Lee Thomasson, Jr.

____
Witness 1

____
Witness 2

______________ (SEAL)
B. Heath Thomasson

____
Witness 1

____
Witness 2

______________ (SEAL)
Matthew J. Thomasson

____
Witness 1

____
Witness 2

Thomasson Apts., LLC [SEAL]

By: Member/Agent,
Authorized Member of the Company

Witness

Witness 2

(SEAL)
Broadus L. Thomasson, Sr.

Witness 1

Witness 2

(SEAL)
B. Lee Thomasson, Jr.

Witness 1

Witness 2

(SEAL)
B. Heath Thomasson

Witness 1

Witness 2

(SEAL)
Matthew J. Thomasson

Witness 1

Witness 2

Thomasson Apts., LLC [SEAL]

Witness

Witness 2

By: General Manager
Authorized Member of the Company

Witness 1

Witness 2

(SEAL)
Broadus L. Thomasson, Sr.

Witness 1

Witness 2

(SEAL)
B. Lee Thomasson, Jr.

Witness 1

Witness 2

(SEAL)
B. Heath Thomasson

Witness 1

Witness 2

(SEAL)
Matthew J. Thomasson

EXHIBIT B

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)
CIRCUIT

IN THE COURT OF COMMON PLEAS
FOR THE SIXTEENTH JUDICIAL

James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Lee Cato, and Cathy Cato Evans,
Petitioners,

v.

David Alan Burton as Successor Trustee for Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, and in the Right and on behalf of T.E. Cato Estate, LLC; Marjorie Cato Burton Living Trust; and The South Carolina Department of Transportation,
Respondents.

Case No. 2008-CP-46-3171

David Alan Burton as Successor Trustee for Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, and in the Right and on behalf of T.E. Cato Estate, LLC,
Third-Party Plaintiff,

v.

Thomasson Apts., LLC,
Third-Party Defendant.

ASSIGNMENT AGREEMENT

Thomasson Apts., LLC,
Fourth-Party Plaintiff,

v.

T.E. Cato Estate, LLC, James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, and Cathy Cato Evans,
Fourth-Party Defendants.

ASSIGNMENT AGREEMENT

THIS ASSIGNMENT AGREEMENT BY AND BETWEEN

A. The T.E. Cato Estate, L.L.C. ("CatoLLC"), a South Carolina limited liability company; James Thomas Cato, as General Manager of CatoLLC and as an individual; Helen Cato Jones, an individual; Donn S. Johnson, an individual; Jane Cato West, an individual; Robert Lee Cato, an individual; and Cathy Cato Evans, an individual (hereafter collectively referred to as "Assignors");

B. The Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust ("Assignee"), a North Carolina revocable trust; and

WHEREAS, the parties ("Parties") to this Assignment Agreement have been engaged in various proceedings under the captioned case number concerning, among other things, rights to certain pieces of real property in York County, South Carolina known respectively as the "Areas" and the "Roadbed Tract" more fully described in the Settlement Agreement to which this Assignment Agreement is attached and into which it is incorporated;

WHEREAS, the captioned litigation ("Litigation") has involved CatoLLC whose members are the Assignors and Assignee;

WHEREAS, the Parties now wish to settle the Litigation, and the Parties have agreed that the contents of this document are an integral part of their settlement;

NOW, THEREFORE, the Parties, in consideration of the mutual covenants set forth herein below, the sufficiency of which is hereby acknowledged, and intending to be legally bound hereby, do agree as follows:

1) The Assignors hereby assign to the Assignee the following assets of CatoLLC:
   a) The four lots — Lot Nos. 13, 14, 42, and 175 --- titled to CatoLLC;
   b) All the records of CatoLLC including but not limited to attorney fee bills and litigation expense records arising out of this Litigation;
   c) Excluding claims released pursuant to the Settlement Agreement to which this Assignment Agreement is attached, any and all causes of action that CatoLLC has or may have against third parties, including but not limited to causes of action against Carroll M. Pitts, Jr., Esq.; the law firm of Robinson Bradshaw and Hinson, LLC; Joshua B. Vann, Esq.; and the law firm of Morton & Gettys; and
   d) Any and all other assets of CatoLLC with the exception of its cash.
2) The members of CatoLLC represent that this list comprises all of the assets of CatoLLC to the best of their knowledge and belief.

3) Regarding bills from CatoLLC's attorney and the individual members' attorney, the Assignors agree to provide the Assignee copies of all said attorney fee bills and litigation expense records arising out of this Litigation within ten (10) days, provided that Assignors may redact from such bills references to legal strategy. Such redactions shall be accompanied by a certification by legal counsel, as applicable, that redactions pertain only to matters of legal strategy.
4) Within ten (10) days after filing of the Consent Order dismissing all claims with prejudice, CatoLLC counsel and counsel for the individual members shall provide un-redacted bills and expense records to Assignee, complete files of Assignors' counsel related to this Litigation, and up-to-date final attorney fee bills and litigation expense records arising out of this Litigation.
5) Real property being assigned pursuant to paragraph 1)a) above shall be conveyed by standard quitclaim deed from the CatoLLC to the Assignee within ten (10) days after filing of the Consent Order dismissing all claims with prejudice.
6) With the exception of outstanding attorney fees and expenses, CPA fees for preparation of CatoLLC's 2012 tax return, and fees owed to CatoLLC's manager, for his remaining work, Assignors represent that they know of no other liabilities or outstanding debts of CatoLLC. Assignee shall have no liability or responsibility for the known liabilities and debts listed above.
7) Upon filing of the Consent Order dismissing all claims with prejudice and compliance with the terms of this Assignment Agreement and the Settlement Agreement to which it is attached, CatoLLC shall be dissolved, and its manager is hereby authorized and directed to take all such steps necessary to accomplish such dissolution.
8) This Assignment Agreement is effective as of April 4, 2013.
9) The following additional provisions apply to this Assignment Agreement:
    a. *No Third Party Rights.* Nothing contained in this Assignment Agreement shall be construed or interpreted in any manner whatsoever as conferring any rights of any nature upon any person or entity not a party to this Assignment Agreement.
    b. *No Other Assignment.* Assignors warrant that none of them has previously assigned or transferred any assets, titles, claims, interests, or rights listed in this Assignment Agreement.
    c. *Applicable Law.* The validity, interpretation, and performance of this Assignment Agreement and of each and every provision herein, as well as all questions related to the sufficiency or other aspects of performance hereunder, shall be governed by the laws of the State of South Carolina except as to choice of law provisions, and no other.
    d. *Entire Contract.* This Assignment Agreement contains the entire agreement among the parties with respect to its subject matter, and there are no oral or written representations, understandings, or agreements that are not included herein. No waiver, alteration, amendment, or modification of any of the provisions hereof shall be binding on any party hereto unless approved in writing by such party.

Jab
JTP

e. *Counterparts.* To facilitate execution, this Assignment may be executed in as many counterparts as may be required; each of which shall be deemed an original, but all of which shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have executed this Assignment Agreement as of the day and year shown herein below.

David Alan Burton, Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust for the Trust itself and for the Trust as Member of T.E. Cato, L.L.C.

James Thomas Cato, individually and as General Manager and Member of T.E. Cato Estate, L.L.C.

Robert Lee Cato, individually and as Member of T.E. Cato, L.L.C.

Cathy Cato Evans, individually and as Member of T.E. Cato, L.L.C.

Donn S. Johnson, individually and as Member of T.E. Cato, L.L.C.

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Robert Lee Cato, individually and as Member of T.E. Cato, L.L.C.

Cathy Cato Evans, individually and as Member of T.E. Cato, L.L.C.

Donn S. Johnson, individually and as Member of T.E. Cato, L.L.C.

Helen Cato Jones, individually and as Member of T.E. Cato, L.L.C.

Jane Cato West, individually and as Member of T.E. Cato, L.L.C.

Case No: 2008-CP-3171

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James Thomas Cato
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Robert Lee Cato, individually and as Member of T.E. Cato, L.L.C.

Cathy Cato Evans
Cathy Cato Evans, individually and as Member of T.E. Cato, L.L.C.

Donn S. Johnson, individually and as Member of T.E. Cato, L.L.C.

Helen Cato Jones, individually and as Member of T.E. Cato, L.L.C.

Jane Cato West, individually and as Member of T.E. Cato, L.L.C.

Case # 2008-CP-46-3171
assignment agreement

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James Thomas Cato

James Thomas Cato, individually and as General Manager and Member of T.E. Cato Estate, L.L.C.

Robert Lee Cato, individually and as Member of T.E. Cato, L.L.C.

Cathy Cato Evans, individually and as Member of T.E. Cato, L.L.C.

Donn S. Johnson, individually and as Member of T.E. Cato, L.L.C.

Helen Cato Jones

Helen Cato Jones, individually and as Member of T.E. Cato, L.L.C.

by Sara L Jones her attorney-in-Fact

Jane Cato West, individually and as Member of T.E. Cato, L.L.C.

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Robert Lee Cato, individually and as Member of T.E. Cato, L.L.C.	Cathy Cato Evans, individually and as Member of T.E. Cato, L.L.C.
Donn S. Johnson, individually and as Member of T.E. Cato, L.L.C.	Helen Cato Jones Helen Cato Jones, individually and as Member of T.E. Cato, L.L.C. by Albert N Jones, her attorney-in-fact.
Jane Cato West, individually and as Member of T.E. Cato, L.L.C.	

JENNIFER C. TURNER
Notary Public
Commonwealth of Virginia
7137596
My Commission Expires May 31, 2015

State of: Virginia
County of: Chesterfield

e. *Counterparts.* To facilitate execution, this Assignment may be executed in as many counterparts as may be required; each of which shall be deemed an original, but all of which shall constitute one and the same instrument.

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David Alan Burton, Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust for the Trust itself and for the Trust as Member of T.E. Cato, L.L.C.	James Thomas Cato, individually and as General Manager and Member of T.E. Cato Estate, L.L.C.
Robert Lee Cato, individually and as Member of T.E. Cato, L.L.C.	Cathy Cato Evans, individually and as Member of T.E. Cato, L.L.C.
	Helen Cato Jones by Douglas E. Jones, her attorney-in-fact
Donn S. Johnson, individually and as Member of T.E. Cato, L.L.C.	Helen Cato Jones, individually and as Member of T.E. Cato, L.L.C.
Jane Cato West, individually and as Member of T.E. Cato, L.L.C.	

EXHIBIT C

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)
)
Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, by and through David A. Burton as Attorney-in-Fact, Individually and in the right and on Behalf of T.E. Cato Estate, LLC,)
)
Plaintiffs)
)
-V-)
)
Carroll M. Pitts, Jr., Esq. and Robinson Bradshaw & Hinson, P.A.,)
)
Defendants)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

2013 OCT 24 AM 11:22

Order

File Number: 2010-CP-46-2267

ORDER DENYING PLAINTIFF'S MOTION TO AMEND COMPLAINT

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

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

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

JCH

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

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

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

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

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

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

BY ORDER OF THE COURT

10/22, 2013 — John C. Hayes

York, S.C. — FOR York #2 COUNTY

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2010CP4602267

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

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

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

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

ORDER INFORMATION

Order Denying Plaintiff's Motion to Amend Complaint

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: ______

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

s/John C. Hayes, III	2049	102/22/2013
Circuit Court Judge	Judge Code	Date

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

For Clerk of Court Office Use Only

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

ATTORNEY(S) FOR THE PLAINTIFF(S)	ATTORNEY(S) FOR THE DEFENDANT(S)
Roger B. Jellenik 1111 Broad St., Box J Camden, SC 29020-3611 **George Hunter McMaster** PO Box 7337 Columbia, SC 29202	**Samuel W. Outten** PO Box 10208 Greenville, SC 29603-0208

David Hamilton

Court Reporter | **David Hamilton - Clerk of Court**

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

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

EXHIBIT D

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) FOR THE SIXTEENTH JUDICIAL CIRCUIT

David Alan Burton Individually and as Successor Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, Individually and and in the Right and on Behalf of T.E. Cato Estate LLC, Plaintiffs	Case No. 2010-CP-46-2267
v.	NOTICE OF MOTION AND MOTION
Carroll M. Pitts, Jr., Esq., Robinson Bradshaw & Hinson, P.A.; Joshua B. Vann, Esq., and Morton & Gettys, LLC, Defendants	

NOTICE OF MOTION AND MOTION TO RECONSIDER

TO: SAMUEL W. OUTTEN, ESQ, AND THE HONORABLE JOHN C. HAYES

#1 7/14

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, David Alan Burton individually and as Successor Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust individually and in the right and on behalf of T.E. Cato Estate, LLC (hereinafter referred to as "Plaintiff"), through the undersigned attorney will on the tenth day after service hereof at 10:00 AM, or as soon thereafter as counsel can be heard, move pursuant to Rule 59(e), SCRCP, before the Hon. John C. Hayes, Judge of the York County Court of Common Pleas, for reconsideration of his order ("Order") denying Plaintiff's Motion to Amend Complaint ("Motion to Amend").

Written notice of the Order was received by the undersigned on October 28, 2013, the Order having been executed on October 22, 2013, and filed on October 24, 2013.

The Order as presently written denies Plaintiff's Motion to Amend in its entirety.

Scope of Motion for Reconsideration.

This Motion seeks reconsideration of that part of the holdings set out in the Court's Order denying amendment of the Complaint for the purpose of clarifying and adding causes of action against the existing Defendants, Carroll M. Pitts, Jr., Esq. ("Pitts") and Robinson Bradshaw & Hinson, P.A. ("RBH") by reason of Rule 15(a) and the first paragraph of Rule 15(c), SCRCP.

Plaintiff does **not** seek reconsideration of that part of the Court's Order denying amendment of the Complaint for the purpose of adding Joshua B. Vann, Esq., and Morton & Gettys, LLC, as new parties defendant.

Grounds for Motion for Reconsideration.

According to the Order, the denial of Plaintiff's Motion to Amend is based upon the Court's conclusion that the Defendants would be prejudiced. Citing Tanner v. Florence County Treasurer, 336 S.C. 552, 521 S.E.2d 153 (1999), the Order states that "The prejudice Rule 15 envisions is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it." As to the amendments of the causes of action against the existing Defendants, the proposed amendment (i) clarifies the initial Complaint by pleading with greater particularity and (ii) adds, in a single cause of action (the Seventh Cause of Action) claims recently assigned to Plaintiff[1] but is based on the those same facts and documents as the original complaint filed April 30, 2009.

#34/99

It is respectfully submitted that, as to existing Defendants, there is no prejudice whatsoever inasmuch as Defendants have been on notice of the facts alleged by Plaintiff since this action was filed in May 2010.

[1] *N.B.*: In discussing assigned claims, the Court holds that "...allowing these claims would also prejudice Mr. Pitts and Morton & Gettys as the parties were not involved in the partition litigation". Plaintiff believes that the Court intended to refer only to Mr. Vann and Morton & Gettys as Mr. Pitts was the attorney for the petitioners in the partition action.

Therefore, based upon the foregoing, Plaintiff, David Alan Burton individually and as Successor Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust individually and in the right and on behalf of T.E. Cato Estate, LLC, respectfully requests that the Court grant this motion for reconsideration by amending that Order dated October 22, 2013, denying Plaintiff's Motion to Amend Complaint by granting that part of Plaintiff's Motion to Amend which deals solely with the Defendants Carroll M. Pitts, Jr., Esq., and Robinson Bradshaw & Hinson, P.A.

Respectfully Submitted,

GEORGE HUNTER McMASTER
TOMPKINS & McMASTER, LLP
POST OFFICE BOX 7337
COLUMBIA, SC 29201
PH: (803) 799 4499
FAX: (803) 252 2240
e-mail: ghm@tmmlaw.com

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

I, George H. McMaster, of Tompkins and McMaster, do hereby certify that I have this 5th day of November, 2013, served the following:

1. Motion to Reconsider

and by depositing a copy of the same in the U.S. Post Office addressed as follows:

Samuel W. Outten, Esq.
Womble Carlyle Sandridge & Rice, PLLC
550 South Main Street – Suite 400
Greenville SC 29601

The Hon. John C. Hayes, III
Moss Justice Center, 2nd Floor
1675-1H York Highway
York, SC 29745-7434

George H. McMaster

STATE OF SOUTH CAROLI.	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	
MARJORIE CATO BURTON ☒ Plaintiff	)	CASE NO. 2010-CP-46-2267
v.	)	MOTION AND ORDER INFORMATION FORM AND COVER SHEET
Carroll M. Pitts, Jr., Esq, Et Al. ☐ Defendant.	)	

Plaintiff's Attorney:	Defendant's Attorney:
George H. Mcmaster, Bar No. Address: PO Box 7337; Columbia, SC 29202 phone: 803-799-4499 fax: 803-252-2240 e-mail: ghm@tmmlaw.com other: bap@tmmlaw.com	, Bar No. Address: phone: fax: e-mail: other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: MOTION FOR RECONSIDERATION
Estimated Time Needed:30 MINUTES Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☐ Defendant ______ Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: ☑ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	______________________ JUDGE CODE: ________ Date: ________

CLERK'S VERIFICATION

Date Filed:

Collected by: ______________________

☐ MOTION FEE COLLECTED: ____________
☐ CONTESTED – AMOUNT DUE: ____________

SCCA/233 (11-03)

TOMPKINS AND MCMASTER, LLP
ATTORNEYS AND COUNSELORS AT LAW
1530 RICHLAND STREET (29201)
POST OFFICE BOX 7337
COLUMBIA, SOUTH CAROLINA 29202
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ESTABLISHED 1898

JOHN GREGG MCMASTER
GEORGE HUNTER MCMASTER **
FRANK BARNWELL MCMASTER

**ALSO ADMITTED IN TEXAS

FRANK G. TOMPKINS
1874-1956
FRANK G. TOMPKINS, JR.
1908-1973
ELIZABETH ELDRIDGE
1894-1975

November 5, 2013

The Hon. David Hamilton
York County Clerk of Court
Post Office Box 649
York, SC 29745

Re: Majorie Cato Burton as Trustee v. Carroll M. Pitts, Jr. and RBH
C/A No.: 2010-CP-46-2267

Dear Mr. Hamilton:

Enclosed are the original and one copy of the following documents in regard to the above-referenced matter:

1. Plaintiff's Motion to Reconsider and
2. Certificate of Mailing.

Please file the original Brief and return a clocked-in copy to me in the enclosed self addressed stamped envelope.

Thanking you in advance for your assistance.

Yours very truly,

George H. McMaster

Enclosures
cc: Samuel W. Outten, Esquire
Roger B. Jellenik, Esquire

EXHIBIT E

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

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

Plaintiffs

-V-

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

Defendants

2013 NOV 15 PM 9:57
C.C.P. & GS
YORK COUNTY, SC

Order

File Number: 2010-CP-46-2267

ORDER DENYING PLAINTIFF'S MOTION TO RECONSIDER

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

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

BY ORDER OF THE COURT

11/14, 2013

York, S.C.

John C Hay

FOR York COUNTY

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2010CP4602267

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

Submitted by:

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

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

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

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

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

ORDER INFORMATION

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

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Circuit Court Judge	Judge Code	Date
s/ John C. Hayes, III.	2049	11/15/2013

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

For Clerk of Court Office Use Only

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

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

ATTORNEY(S) FOR THE PLAINTIFF(S)

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

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

David Hamilton

David Hamilton - Clerk of Court

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

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

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

AUTHORITIES CITED

321 S.C. 360
Supreme Court of South Carolina.

Susan H. DEAN, Respondent,
v.
RUSCON CORPORATION, Petitioner.

No. 24394. | Heard Oct. 4, 1995. | Decided March 25, 1996. | Rehearing Denied April 18, 1996.

Building owner brought action against pile driving corporation, arising from structural damage to building allegedly caused by corporation's pile driving work at nearby construction site. The Circuit Court, Charleston County, William L. Howard, Sr., J., directed verdict for corporation, ruling that action was barred by six-year statute of limitations. On review, the Court of Appeals reversed, concluding that fact question existed as to whether owner was reasonably diligent in determining whether damage to building was attributable to corporation. After granting certiorari, the Supreme Court, Burnett, J., held that action accrued more than six years before owner brought it, when crack appeared in building at time of corporation's earlier pile driving activity, rather than later when enlargement of crack and bulging of bricks occurred in same location at time of corporation's later pile driving activity and, thus, action was barred by six-year statute of limitations.

Reversed.

****646 *361** Appeal From Charleston County; William L. Howard, Sr., Judge.

Attorneys and Law Firms

Claron A. Robertson, III and Michael S. Seekings, both of Robertson & Seekings, Charleston, for Petitioner.

A. Camden Lewis, William R. Calhoun, Jr. and Pete Kulmala, all of Lewis, Babcock & Hawkins, Columbia, for Respondent.

***362 ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

BURNETT, Justice:

We granted certiorari to review the Court of Appeals' opinion in *Dean v. Ruscon Corporation,* Op. No. 94-UP-188 (Ct.App. filed July 19, 1994). We reverse.

FACTS

In September 1984, Respondent Susan H. Dean (Dean) purchased a building located at 216 King Street in Charleston after a contractor had inspected it and determined it to be structurally sound. At the time of purchase, Dean did not notice any cracks in the masonry or facade of the building. During October and November of 1984, Petitioner Ruscon Corporation (Ruscon) performed pile driving activities at a nearby construction site for the Omni Hotel. Early in November 1984, Dean observed a fine crack approximately three feet in length at the front right corner of the building and concluded that the crack was attributable to Ruscon's pile driving.

Dean immediately hired a contractor and structural engineer to inspect the building. They recommended that she place a strain gauge on the crack and monitor it daily. Dean understood that unless there was a change in the gauge or crack, the damage could be corrected by placing right angle steel bracing on both corners of the building. Based upon her understanding that the crack posed no structural problems, she began renovations to the building in the amount of $194,553.09.

During the summer of 1985, Ruscon resumed pile driving activities adjacent to the block where Dean's building was located. In August 1985, Dean noticed that the original crack had expanded and the facade of the building was bulging and buckling at the ****647** location of the original crack. Another crack also appeared on the opposite side of the building. Dean closed her business which was located in the building after being informed that the building was no longer structurally sound.

In April 1991, Dean filed this lawsuit. At trial, Dean's expert opined that the damage to Dean's building was "most ***363** reasonably caused by the pile driving activity" which Ruscon performed in 1984, rather than the pile driving performed in 1985. Moreover, Dean testified that from her observations she believed the damage to her building resulted from the 1984 pile driving activities.

The circuit court directed a verdict in favor of Ruscon concluding that Dean discovered potential damage to her building in 1984 and associated it with Ruscon's pile driving activities. Therefore, as a matter of law Dean's lawsuit accrued in November 1984. Because she filed her lawsuit in April 1991, the circuit court determined that Dean was barred by the six year statute of limitations. The Court of Appeals reversed.

ISSUE

Does a jury question exist as to whether Dean's case is barred by the statute of limitations?

DISCUSSION

The Court of Appeals concluded that a question of fact existed as to whether Dean was reasonably diligent in determining whether the damage to her building was attributable to Ruscon thereby triggering the running of the statute of limitations in 1984. Accordingly, it reversed the circuit court's direction of verdict. We disagree.

[1] [2] [3] A cause of action for trespass upon or damage to real property which arises or accrues prior to April 5, 1988, must be commenced within six years. S.C.Code Ann. § 15-3-530(3) (1976). The discovery rule is applicable to actions brought under § 15-3-530(3). *See Santee Portland Cement Co. v. Daniel Int'l Corp.,* 299 S.C. 269, 384 S.E.2d 693 (1989) (citing *Campus Sweater and Sportswear Co. v. M.B. Kahn Constr. Co.,* 515 F.Supp. 64 (D.S.C.1979), *aff'd,* 644 F.2d 877 (4th Cir.1981)). According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. *Johnston v. Bowen,* 313 S.C. 61, 437 S.E.2d 45 (1993). We have interpreted the "exercise of reasonable diligence" to mean that the injured party must act with some promptness where the facts and circumstances of ***364** an injury place a reasonable person of common knowledge and experience on *notice* that a claim against another party might exist. *Snell v. Columbia Gun Exchange, Inc.,* 276 S.C. 301, 278 S.E.2d 333 (1981). Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial. *Dillon County School Dist. No. Two v. Lewis Sheet Metal Works, Inc.,* 286 S.C. 207, 332 S.E.2d 555 (Ct.App.1985), *cert. granted,* 287 S.C. 234, 337 S.E.2d 697 (1985), *cert. dismissed,* 288 S.C. 468, 343 S.E.2d 613 (1986).

[4] Dean contends that the crack which appeared in 1984 and the bulging of the bricks in 1985 present two distinct harms and, therefore, our holdings in *Benton v. Roger C. Peace Hosp.* [1] and *Santee Portland Cement, supra,* are controlling. In *Benton,* a Downes Syndrome patient fell from his wheelchair and suffered facial lacerations which were readily apparent and discoverable. Later, a second more insidious injury arose from neurological damage which could have been caused by the fall or something else. Because the nature of the neurological injury was not discoverable by the appearance of facial lacerations, we held these injuries to be two separate, distinct, and severable harms. Thus, we held that the statute of limitations began to run at different times for each injury.

In this case, the evidence establishes that in 1984 Dean's consultants advised her that the damage resulting from pile driving could be corrected by steel braces if the crack did ****648** not change. The experts also advised her to monitor the crack, and if it did in fact expand, corrective measures would need to be reevaluated to ensure the building's continued structural integrity. Dean admitted that she personally believed the damage to her building resulted from the pile driving activities of 1984, and that when she first noticed the crack, she thought the structure of the building was compromised. Moreover, Dean acknowledged that the initial crack appeared in the right front corner of the building and that the subsequent enlargement of the crack and bulging of bricks appeared in the same location. We find this case distinguishable from *Benton* in that the resulting harm to Dean's building in 1985-enlarged crack and bulging bricks-by being in the same location ***365** and of the same nature as the original harm, evolved from Ruscon's 1984 pile driving activities. Therefore, because the subsequent harm was not separate and distinguishable, it was discoverable in 1984.

Dean's reliance upon *Santee* is also misplaced. In *Santee,* minor cracks, which are common in cement structures, appeared in cement storage silos. The cracks were repaired. After an inspection, the repairs were considered to be permanent, and the consultants found the silos to be in good condition. It was not until later that the cracks in the silos were determined to be caused by the defective placement of steel reinforcement rods. Because the rods were inside concrete walls, the defects were undetectable. In this case, however, the potential damage to Dean's building was not latent, but was apparent in November 1984. Indeed, there is no question that Dean initially discovered the damage in 1984 and associated it with Ruscon's pile driving activities.

Next, Dean relies upon *Graniteville Co., Inc. v. IH Services, Inc.* [2] to support her contention that by retaining experts in November 1984 to evaluate the damage, she exercised reasonable diligence in discovering whether a cause of action arose from Ruscon's wrongful conduct. In *Graniteville,* the injured party employed an expert eight days after noticing damage to determine its cause. The Court of Appeals held that when an injury requires an expert to determine its cause and an expert is retained, there is evidence that the injured party exercised reasonable diligence and the statute of limitations should be tolled. Accordingly, the statute was tolled for eight days-which was the date the injured party discovered that a cause of action existed.

Here, the evidence establishes that Dean acted promptly by retaining consultants in November 1984 to inspect the damage. As a result, Dean was warned that the crack might expand. In fact, Dean conceded that she believed the damage to her building resulted from the pile driving activities of 1984. Because Dean had *notice* in November 1984 that she may have a cause of action against Ruscon, there is no need to toll the statute of limitations beyond that date. Dean's subsequent failure to act with reasonable diligence in pursuing such claim ***366** is no reason to toll the statute of limitations until such time as further damage evolved. Moreover, the fact that Dean may not have comprehended in 1984 that the original crack would expand causing the building to ultimately buckle is immaterial. *Dillon County School Dist. No. Two v. Lewis Sheet Metal Works, Inc., supra.*

[5] When the trial court rules on a directed verdict motion, it must view the evidence as well as all favorable inferences in the light most favorable to the non-moving party, and if more than one reasonable inference can be drawn from the testimony, the case should be submitted to the jury. *Santee Portland Cement Co. v. Daniel Int'l Corp., supra.* Here, however, there was no question of fact for the jury to decide because the only reasonable conclusion supported by the evidence is that Dean's lawsuit accrued in November 1984, and by filing her lawsuit in April 1991, she was barred by the six year statute of limitations. Accordingly, the circuit court correctly directed a verdict for Ruscon and the judgment of the Court of Appeals is

REVERSED.

****649** FINNEY, C.J., and MOORE and WALLER, JJ., concur.

TOAL, A.J., not participating.

Parallel Citations

468 S.E.2d 645

Footnotes

1 313 S.C. 520, 443 S.E.2d 537 (1994).

2 316 S.C. 146, 447 S.E.2d 226 (Ct.App.1994).

End of Document

005163

328 S.C. 435
Court of Appeals of South Carolina.

Eldon M. BERRY, Freddie D. Johnson, Betty Temple, William Coppage, II, Patsy V. Coppage, Sammie King, A.L. Kirkland, Charles H. Cash, C.A. Armstrong, Jr., Norman Strader, Bryon Turner, Henry Rowland, Lillian S. Hammack, Durand G. Coates, J.D. Southerland, W.E. Crawford, and B. Jack Walker Appellants,
v.
Daniel R. McLEOD, Jr., The McNair Law Firm, John W. Harte, and George Cantelou, Respondents.

No. 2718. | Heard June 5, 1997. | Decided Sept. 22, 1997. | Rehearing Denied Nov. 24, 1997. | Certiorari Denied Apr. 9, 1998.

Town residents brought action for legal malpractice and civil conspiracy against attorneys who had acted as bond and corporate counsel for town in connection with issuance of bond for sewer project. The Circuit Court, Aiken County, Henry F. Floyd, J., granted summary judgment to defendants, and residents appealed. The Court of Appeals held that: (1) residents had failed to contest legality of issuance of bond within 20 days and thus could not thereafter attack its legality; (2) limitations period on legal malpractice claim began when bond documents were filed with clerk of court; (3) residents lacked standing to bring action; and (4) court did not abuse its discretion in denying leave to file third amended complaint.

Affirmed.

Attorneys and Law Firms

****797** ***440** Francis T. Draine, Columbia, for appellants.

Robert B. Wallace and Paul E. Tinkler, both of Wallace and Tinkler, Charleston; Wilburn Brewer, Jr. and Ralph W. Barbier, both of Nexsen, Pruet, Jacobs & Pollard, and Frederick A. Gertz, of Gertz & Moore, Columbia, for respondents.

Opinion

PER CURIAM.

The appellants are residents of the Town of New Ellenton, South Carolina (Residents). They brought this action for legal malpractice and civil conspiracy against the town's former corporate counsel, John W. Harte (Harte); bond counsel, Daniel R. McLeod and The McNair Law Firm (bond counsel) (collectively referred to as "Attorneys"); and a developer, George Cantelou (Cantelou). Cantelou was dismissed from the suit in a ruling which Residents do not now contest. Residents allege Attorneys committed legal malpractice in their handling of a New Ellenton revenue bond issued to fund construction of a sewer system, conspiring with Cantelou to benefit his private development. Attorneys filed motions to dismiss under Rule 12(b)(6) and moved in the alternative for summary judgment on the grounds that the court lacked subject matter jurisdiction, the complaint failed to state facts sufficient to constitute a cause of action, and the statutes of limitation had expired. The trial judge granted the motions, concluding the amended complaint failed to allege facts sufficient to state a claim for individual recovery; the plaintiffs lacked standing; and their claims were barred by both the general and the bond statutes of limitation. We affirm.

I. FACTS

This action arises following the issuance of a revenue bond in the amount of $5,002,500 to finance the construction and installation of a sewer system in New Ellenton, South Carolina. The bond was issued in accordance with an ordinance adopted by the town council and was signed by the mayor on June 25, 1990. The bond was then filed with the clerk of court in Aiken County on June 28, 1990 as required by S.C.Code Ann. § 11–15–10 (1986). No action was brought to contest the ***441** bond within twenty days of this filing, and Residents concede the bond was incontestable when this suit was brought.

Residents allege Attorneys misrepresented a large septic system as an existing sewer system, which allowed the town to pass the bond ordinance without holding a referendum. Residents also allege Attorneys misrepresented the true financial ramifications of the bond, misleading town council and Residents about its economic viability and by assuring them connection to the system would be optional. They did this, according to Residents, by conspiring with Cantelou and the mayor, so Cantelou could publicly fund a sewer system to benefit his private development.

Residents claim damage in the form of excessive, mandatory tap-in and user fees and depreciation to their property resulting from the bond indebtedness and obligations. They also claim damage from the loss of their right to vote on the issue. Additionally, they argue standing to bring this suit on behalf of the town, which they allege has been damaged by the bond obligations.

The trial court concluded the claims should be dismissed because they were barred by the expiration of the statutes of limitation and Residents had no standing to bring them. We agree.

II. *SCOPE OF REVIEW*

[1] A Rule 12(b)(6) motion to dismiss for failure to state a cause of action must be resolved by the trial judge based solely on the allegations established in the complaint. *See Woodell v. Marion Sch. Dist. One,* 307 S.C. 297, 414 S.E.2d 794 (Ct.App.1992). The motion cannot be granted if the facts set forth in the complaint and the inferences reasonably drawn therefrom would entitle the plaintiff to any relief on any theory of the case. *Brown v. Leverette,* 291 S.C. 364, 353 S.E.2d 697 (1987).

****798** **[2]** The trial court decided the motion based not only upon the pleadings, but also after considering the bond ordinance. By doing so, the court converted the motion to dismiss into a summary judgment motion pursuant to Rule 56, SCRCP. *See* ***442** *McDonnell v. Consol. Sch. Dist. of Aiken,* 315 S.C. 487, 445 S.E.2d 638 (1994). There is no appeal from this ruling, and thus, it becomes the law of the case. *Resolution Trust Corp. v. Eagle Lake and Golf Condominiums,* 310 S.C. 473, 427 S.E.2d 646 (1993).

Summary judgment is proper when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. "Summary judgment should be granted when plain, palpable, and undisputable facts exist on which reasonable minds cannot differ." *Byerly v. Connor,* 307 S.C. 441, 445, 415 S.E.2d 796, 799 (1992). In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party. *Koester v. Carolina Rental Ctr.,* 313 S.C. 490, 443 S.E.2d 392 (1994).

III. *DISCUSSION*

A. *Twenty day statute of limitations*

Residents contend the trial court erred in finding the twenty day statute of limitations under S.C.Code Ann. § 11–15–30 applicable. S.C.Code Ann. § 11–15–10 (1986) provides:

> In case any county, township, school district, city, town or other municipality is authorized to issue bonds in pursuance of law, the persons and officers charged therewith shall make a full record of the proceedings connected with such bond issue, and a copy of the record of such proceedings shall be filed and indexed in the office of the clerk of court of the county in a special book to be furnished therefor.

Id.

S.C.Code Ann. § 11–15–30 (1986) provides:

> No action shall be commenced on account of the issuance of any such bonds after the expiration of twenty days from the date of the filing and indexing of such records as prescribed by §§ 11–15–10 and 11–15–20, and such bonds so issued, when in the hands of a bona fide purchaser for value, shall be incontestable, but the period within which such ***443** actions may be commenced shall not begin to run until such records have been filed as herein prescribed.

Id.

[3] **[4]** The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Horn v. Davis Electrical Constructors, Inc.,* 307 S.C. 559, 416 S.E.2d 634 (1992). The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand a statute's operation. *First Baptist Church of Mauldin v. City of Mauldin,* 308 S.C. 226, 417 S.E.2d 592 (1992). Therefore, if an action is "commenced on account of the issuance" of a bond within the meaning of

S.C.Code Ann. § 11–15–30, the action must be commenced within twenty days of the date that the documents related to the bond were filed pursuant to S.C.Code Ann. § 11–15–10.

[5] The issuance of the bond was documented by the town and filed in the clerk of court's office in Aiken County on June 28, 1990. The bond records were then properly indexed in miscellaneous civil book 7, file number 12, 101. The requirements of public notification established in S.C.Code Ann. § 11–15–10 were met. The proper filing and indexing of the record of bond documents on June 28, 1990 started the twenty day contestability period under Section 11–15–30, which ended without any contest on July 18, 1990.

This suit was not filed until July 7, 1995 and is undeniably outside of the twenty day contestability period. Therefore, to the extent these causes of action are "commenced on account of the issuance of a bond," this suit is barred. Residents do not contest, in fact they acknowledge, the incontestability of the bonds. They argue they and/or the town have suffered damage because of the bond obligations and the economic burden placed on them now that it is incontestable.

****799** In *Morgan v. Feagin,* 230 S.C. 315, 95 S.E.2d 621 (1956), our supreme court addressed the statute of limitations which required actions to contest the validity of a county school bond to be brought within thirty days. The supreme court stated:

> Similar short statutes of limitation, applicable to actions which question the proceedings upon the issuance of municipal and other bonds have been of force in this State for ***444** many years, apparently without challenge heretofore. Code of 1952, Sec. 1–645, twenty days [1]; Sec. 21–976, thirty days; and Sec. 47–842, thirty days. The practical necessity of them is obvious. Purchasers of bonds could hardly be found if the bonds were subject in their hands to attack for alleged illegality in the proceedings upon the issuance of them. Furthermore, it is within common knowledge that sales of bonds are frequently timed to take advantage of a favorable market, which might well be hindered by long delay.

Id. at 317, 95 S.E.2d at 622.

Under the wording of S.C.Code Ann. § 11–15–30 and *Morgan,* the time to contest the legality of the proceedings for the issuance of the bond expired after twenty days. We conclude, as did the trial court, Residents are now barred from attacking the legality of the bond proceedings, which includes attacking the underlying factual basis for the bond or the procedure employed for its passage. This ruling is consistent with the policy considerations surrounding short statutes of limitation involving bonds, as set forth in *Morgan.*

We do not address Residents' argument that the allegations of fraud or collusion toll the short contestability period because they failed to present this argument to the trial judge. *See Morgan v. Feagin,* 230 S.C. at 318, 95 S.E.2d at 623. Therefore, it is not preserved for our review. *See Hendrix v. Eastern Distribution, Inc.,* 320 S.C. 218, 464 S.E.2d 112 (1995).

B. ***Three year statute of limitations***

To the extent Residents' claim for damages may be considered separate from an action "on account of the issuance of" the bond and therefore not controlled by the twenty day statute of limitations, the action is still barred by the three year statute of limitations applicable to actions of this type.

[6] South Carolina Code Ann. § 15–3–530 (Supp.1996) provides a three year statute of limitations for legal malpractice actions. Section 15–3–535 provides actions arising or accruing on or after to April 5, 1988 which are initiated under § 15–3–530(5), must be commenced within three years after the ***445** person knew or by the exercise of reasonable diligence should have known that he had a cause of action. S.C.Code Ann § 15–3–535 (Supp.1996). In *Mitchell v. Holler,* 311 S.C. 406, 429 S.E.2d 793 (1993), our supreme court stated:

> The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice

> that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full blown theory of recovery developed.

Id. at 409, 429 S.E.2d at 795 (quoting *Snell v. Columbia Gun Exch., Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981)).

[7] [8] [9] The test of whether a person should have known the operative facts is objective, rather than subjective. *See Burgess v. American Cancer Soc.*, 300 S.C. 182, 386 S.E.2d 798 (Ct.App.1989). "Specifically, the discovery rule focuses upon whether the complaining party acquired knowledge of any existing facts 'sufficient to put said party on inquiry, which, if developed, will disclose the alleged fraud.' " *Id.* at 186, 386 S.E.2d at 800 (quoting *Walter J. Klein Co. v. Kneece*, 239 S.C. 478, 484, 123 S.E.2d 870, 874 (1962)). An individual on inquiry or constructive notice is held to be on notice of the contents of documents filed in conformity with applicable statutory law, which an inquiry would have revealed. *See Fuller–Ahrens v. South Carolina Dept. of Highways and Pub. Transp.*, 311 S.C. 177, 427 S.E.2d 920 (Ct.App.1993). ****800** The statute of limitations begins to run at the time the individual has inquiry or constructive notice. *Id.*

[10] The trial judge determined the statute of limitations began to run, at the latest, when the bond documents were publicly filed with the clerk of court in Aiken county on June 28, 1990. He concluded Residents had inquiry or constructive notice at the time of public disclosure by the filing of the true terms of the bond and any possible cause of action began to run at that time. Accordingly, he concluded the three year statute of limitations expired before Residents filed suit in July 1995. We agree.

***446** Residents claim their damages flow essentially from two things: the manner or procedure followed for passage of the bond by which they lost their right to vote in a referendum and monetary harm caused by the economic burden. Both the manner of approving the bond and the financial requirements, including the tap-in and user fees, are set forth in the bond documents filed with the clerk. There is no allegation that passage of the bond ordinance occurred other than in the normal course of a public meeting by the town council. Thus, even if these allegations can be construed as not arising "on account of the issuance of" the bond, the statute of limitations began to run on June 28, 1990.

Residents have attempted on appeal to argue on behalf of the town that the statute as to Harte could not have run where, as here, there was continuous representation by the attorney and the client (town) was persuaded to follow the fiduciary's advice. They assert that in this circumstance the statute of limitations is tolled until the attorney ceases to represent the client. Assuming, *arguendo,* Residents had standing to assert this argument, they did not present it to the trial judge. Therefore, it is not preserved for our review. *See Hendrix v. Eastern Distribution, Inc.*, 320 S.C. at 219, 464 S.E.2d at 113.

C. *Standing to sue*

[11] The trial court next determined Residents lacked standing to maintain this action in a derivative capacity on behalf of the town or as representatives of a class of New Ellenton citizens. The trial judge was uncertain from the amended complaint and supplemental filing whether the plaintiffs were attempting to bring this suit on behalf of New Ellenton or as a representative of a class of New Ellenton citizens, but concluded Residents cannot maintain this lawsuit in either capacity.[2] We agree with this ruling and also ***447** conclude it necessary to address both asserted capacities for bringing the suit.

[12] [13] The authority to decide when a claim should or should not be brought by a governmental entity is vested with the entity. *See Ex parte Hart,* 190 S.C. 473, 2 S.E.2d 52 (1939); *see also Johnston v. City of Myrtle Beach,* 285 S.C. 453, 330 S.E.2d 321 (Ct.App.1985). Moreover, this power cannot normally be controlled or exercised by a taxpayer to bring an action on behalf of a town, unless it is clear the governmental entity has unjustifiably refused to assert the claim. *Ex parte Hart,* 190 S.C. at 477, 2 S.E.2d at 53; *Owens v. Magill,* 308 S.C. at 560, 419 S.E.2d at 789 (finding the Museum Commission did not abuse its discretion in deciding not to pursue a claim meant the plaintiffs lacked standing to bring a derivative or class action suit). "A court will not attempt to control the discretionary powers conferred upon a [governmental entity] and will not interfere, by means of a taxpayer suit, to restrain the authorities of a [governmental entity] from the exercise of their discretionary power with regard to the control or disposition of property of the [governmental entity] in the absence of illegality, fraud, or clear abuse of authority." *Id.* at 560, 419 S.E.2d at 789 (quoting *Babb v. Green,* 222 S.C. 534, 543, 73 S.E.2d 699, 703 (1952)).

****801** **[14]** **[15]** Generally, a private citizen cannot test the validity of executive or legislative action unless he or she has sustained or will sustain prejudice not common to the public from such action. *Florence Morning News v. Building Comm'n.* 265 S.C. 389, 218 S.E.2d 881 (1975). The discretionary power is vested in the governmental entity of determining when a suit shall be brought, but that means legal discretion. *Ex parte Hart,* 190 S.C. at 479, 2 S.E.2d at 54. "Where it clearly appears that power is abused, the governing body places itself outside the protection of the rule stated, and may be compelled to act, or in some instances further remedies may be resorted to." *Id.* at 479, 2 S.E.2d at 54. The court in *Hart* also states:

> If a county or other corporation has a *plain* cause of action for an injury done to it, that should be enforced for the ***448** protection of its members, and its governing body refuses to perform its *plain* duty in the premises, our system of jurisprudence is by no means so weak that justice can thereby be defeated. On the contrary, any member of the corporation, by reason of his indirect interest therein, suing in behalf of himself and all similarly situated, may set judicial proceedings in motion, making the corporation a defendant, as trustee for all of its members, and thereby enforce the rights of the corporation.

Id. at 479, 2 S.E.2d at 54 (emphasis added) (quoting *Land, Log & Lumber Co. v. McIntyre,* 100 Wis. 245, 75 N.W. 964 (1898)).

[16] The authority to bring suit on behalf of the town is vested with the town council of New Ellenton. The trial court concluded the pleadings failed to allege any factual basis for the assertion that the present council and mayor abused their discretion in deciding not to initiate this litigation. We agree. Although the amended complaint asserts that the mayor and council were asked by Residents to bring this suit and they refused, there is no factual assertion of an underlying claim which is plain and clearly merited prosecution by the town.

In *Ex parte Hart,* the governmental entity refused to attack an order rendered in a case to which it was not a party, requiring it to pay attorney fees. *Ex parte Hart,* 190 S.C. at 473, 2 S.E.2d at 52. The court found this to be unreasonable inaction on a claim which had plainly appearing merit. Unlike the claim in *Ex parte Hart,* the claim alleged by Residents on behalf of the town is not clearly set forth and is far from plain. First, the bond documents contain the obligations. Thus, the town council could not claim it was misled by them. Second, neither the loss of the right to vote in a referendum nor the underlying economic obligations of the revenue bond implicates a proprietary interest or statutory right of the town, as opposed to the individual citizens. *See Glaze v. Grooms,* 324 S.C. 249, 478 S.E.2d 841 (1996) (finding a municipality must allege an infringement of its proprietary interests or statutory rights to establish standing). Third, the misrepresentations which are alleged as the basis for both causes of action involved the then mayor, acting in his capacity as an official for the town.

[17] ***449** The trial court also found the amended complaint failed to state a claim for damages on behalf of the town. The plaintiffs alleged declining property values and mandatory tap and user fees as damages. The trial court determined these are damages incurred by the individuals and not the town. The plaintiffs alleged they had been denied their right to vote in a referendum on the bond, but this is also a right personal to the individuals, not of the town. The plaintiffs contend the town is wrongfully obligated to repay the bond, but the bond ordinance states the "obligation for the payment of money incurred by the Town shall not create a pecuniary liability of the Town or a charge upon its general credit or taxing power...." The ordinance also states the bond is a sewer system revenue bond to be paid "solely from the Revenues" created by the sewer system, which are required to be set apart and pledged toward the repayment of the bond. Thus, we agree with the trial court's conclusion.[3]

****802** **[18]** Likewise, the claims fail as claims of individual injury or as a class action claim because there is no claim of injury or damage not common to the public. *Florence Morning News v. Building Comm'n,* 265 S.C. at 398, 218 S.E.2d at 885.

D. *Leave to amend complaint*

Finally, Residents argue the trial court erred in dismissing the complaint without leave to amend. They assert the trial judge abused his discretion especially because it was a motion to dismiss under Rule 12(b)(6), SCRCP. However, we note the respondents filed a Rule 12(b)(6) motion or in the alternative a summary judgment motion, and the trial judge dismissed the complaint based upon his review of matters outside of the pleadings. Therefore, the motion to dismiss was converted into a summary judgment motion.

[19] [20] [21] [22] Under Rule 15(a) and (b), SCRCP, the court has the power to amend pleadings beyond the time allowed for an ***450** amendment when to do so does not prejudice another party. Courts have wide latitude in amending pleadings. *Porter Bros., Inc. v. Specialty Welding, Co.* 286 S.C. 39, 331 S.E.2d 783 (Ct.App.1985). While this power should not be used indiscriminately or to prejudice or surprise another party, the decision to allow an amendment is within the sound discretion of the trial court and will rarely be disturbed on appeal. *Id.* The trial judge's finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred. *Anders v. Nash,* 256 S.C. 102, 180 S.E.2d 878 (1971); *Mylin v. Allen–White Pontiac, Inc.,* 281 S.C. 174, 314 S.E.2d 354 (Ct.App.1984). We find the trial judge did not abuse his discretion in refusing to allow the Residents leave to amend their complaint a third time. [4]

For the foregoing reasons, the decision of the trial court is

AFFIRMED.

HEARN, STILWELL, and HOWARD, JJ., concur.

Parallel Citations

492 S.E.2d 794

Footnotes

1 This statute is the predecessor to S.C.Code Ann. § 11–15–30 (1986).

2 We agree with the trial court's analysis concerning the derivative suit, but we do not agree with the trial judge's reasoning as to the class action aspect of the case. The trial court found Residents failed to plead the necessary facts for a class action. However, the initial analysis concerns standing, and an individual or group must have standing to proceed in either a derivative or class action suit. *See Owens v. Magill,* 308 S.C. 556, 419 S.E.2d 786 (1992). We find Residents did not have standing to bring a derivative or class action suit, and therefore will not address the merits of the class action suit.

3 Although Residents argued on appeal that the suit seeks to recover attorney fees the town incurred in litigation with the bond custodian and Cantelou, there is no allegation to support this claim in the amended complaint. Residents also failed to present this argument the trial court. Therefore, we decline to address it. *See Hendrix v. Eastern Distribution, Inc.*. 320 S.C. at 219, 464 S.E.2d at 113.

4 The court considered the motion in relation to an amended complaint, but allowed Residents to file a memorandum explaining their legal position on damages and standing, which the court stated it would consider as a part of the complaint. Thus, the court did allow amendment before rendering a decision, and any subsequent amendment would have been a fourth version.

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327 S.C. 116
Supreme Court of South Carolina.

Betty B. TRUE, Petitioner,
v.
Edmund H. MONTEITH and Monteith and Monteith, Respondents. Attorneys at Law,

No. 24653. | Heard April 15, 1997. | Decided July 28, 1997.

Former client brought legal malpractice action against attorney who had represented client in connection with commercial lease agreement, alleging that attorney had engaged in dual representation of second party to lease which attorney failed to disclose. The Circuit Court, Richland County, Joseph M. Strickland, Special Judge, granted summary judgment to attorney, and plaintiff appealed. The Court of Appeals affirmed, and plaintiff petitioned for writ of certiorari. After granting writ, the Supreme Court, Burnett, J., held that: (1) fact issue as to when client learned of dual representation precluded summary judgment based on statute of limitations, and (2) fact issues existed as to whether notice to client's brother-in-law was provided and, if so, whether brother-in-law was agent of client.

Reversed.

Attorneys and Law Firms

****616 *117** James R. True, Aspen, for petitioner.

James W. Alford and Andrew E. Haselden, both of Barnes, Alford, Stork & Johnson, Columbia, for respondents.

Opinion

***118** BURNETT, Justice:

This Court granted a writ of certiorari to review the Court of Appeals' opinion in *True v. Monteith,* Op. No. 95-UP-269 (S.C. Ct.App. filed October 19, 1995) which affirmed the trial court's order granting summary judgment in favor of respondents based on the statute of limitations. We reverse.

FACTS

In 1973, respondent Edmund H. Monteith (Monteith) represented petitioner and her brothers-in-law (the Trues) in executing a long-term commercial lease agreement with Joe Edens whereby the Trues leased property they owned to Edens. At the time of execution, petitioner read the lease and questioned the absence of a cost-of-living clause for future lease payments. Monteith indicated to petitioner that Edens would not agree to a cost-of-living clause.

Without disclosure to petitioner, Monteith also represented Edens in the lease transaction and had a business relationship with Edens. However, Monteith claims he told Durant True (Durant), petitioner's brother-in-law, of his dual representation. According to Monteith, Durant was the family spokesperson.

In May 1990, while petitioner was investigating the possibility of renegotiating the lease, petitioner discovered the business and attorney/client relationship between Monteith and Edens. Petitioner brought this legal malpractice action in February 1993, alleging Monteith's conflict of interest in the lease transaction was not disclosed to her and she was damaged by the lack of a cost-of-living clause in the lease agreement. The trial judge granted Monteith's motion for summary judgment on the ground this action was barred by the statute of limitations. The trial judge found the lack of a cost-of-living clause in the lease was petitioner's injury and, because she was aware of this injury at the time she executed the lease, she had notice of a potential claim in 1973. The Court of Appeals affirmed finding Monteith had disclosed his conflict of interest to Durant in 1973, and as petitioner's agent, notice to Durant served as notice to petitioner. *Id.* ***119**

ISSUE

> Did the Court of Appeals err in affirming the trial court's grant of summary judgment in favor of respondents on the ground petitioner's cause of action is barred by the statute of limitations?

DISCUSSION

Petitioner contends the trial court and Court of Appeals erred in finding she had notice that a potential claim existed in 1973 because she was aware the lease did not contain a cost-of-living clause. We agree.

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Citizens and Southern National Bank of South Carolina v. Lanford,* 313 S.C. 540, 443 S.E.2d 549 (1994). In ruling on motions for summary judgment, the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party. *Johnston v. Bowen,* 313 S.C. 61, 437 S.E.2d 45 (1993).

[1] [2] [3] In a negligence action, the statute of limitations accrues at the time of the negligence or when the facts and circumstances would put a person of common knowledge on *notice* that there might be a claim against another party. *Kreutner v. David,* 320 S.C. 283, 465 S.E.2d 88 (1995) (emphasis added); S.C.Code Ann. §§ 15-3-530(5) & -535 (Supp.1996). Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct. *See Dean v. Ruscon Corp.,* 321 S.C. 360, 468 S.E.2d 645 (1996); S.C.Code Ann. § 15-3-535 (Supp.1996). The "exercise of reasonable diligence" means the injured party must act with some promptness where the facts and circumstances of an injury place a ****617** reasonable person of common knowledge and experience on notice that a claim against another party might exist. *Dean, supra.*

[4] [5] If we accept as true petitioner's allegations that Monteith did not disclose to her the conflict of interest and she was unaware of the dual representation, the fact that petitioner ***120** knew of her injury (no cost-of-living clause) in 1973 would not necessarily provide notice to her that she may have a cause of action for legal malpractice. Contrary to respondents' contention, knowledge of injury alone does not, *a fortiori,* give rise to a suspicion of any impropriety by her attorney. Under § 15-3-535, the statute of limitations is triggered not merely by knowledge of an injury but by knowledge of facts, diligently acquired, sufficient to put an injured person on notice of the existence of a cause of action against another.

Although petitioner knew of the lack of the cost-of-living clause in the lease, this knowledge alone is insufficient to put petitioner on notice to investigate the possible malfeasance of her attorney. A client should not be expected to investigate an attorney's loyalty every time the attorney provides the client with counsel the client dislikes. Instead, absent other facts, the client should be able to rely on the attorney's advice and should be able to follow this advice without fear the attorney is not acting in the client's best interest.

[6] Petitioner further contends the Court of Appeals erred in finding Monteith disclosed his representation of Edens to Durant, petitioner's brother-in-law, and because Durant was petitioner's agent, notice to Durant served as notice to petitioner. We agree.

Durant died in 1989, before petitioner alleges she discovered Monteith's dual representation. Petitioner denies being advised by anyone of the dual representation. According to petitioner, she believed Durant would have told the others involved in the transaction about Monteith's representation of Edens if Durant had known. Further, petitioner testified Charlie True, another brother-in-law, informed her prior to his death that he did not know that Monteith had represented Edens in the lease transaction. Petitioner's deposition reveals petitioner did not consider Durant to be her agent. Instead, according to petitioner's testimony, all the family members participated in the decision to lease the property. She claims Durant had "no power."

The Court of Appeals ignored petitioner's testimony and found Monteith's testimony on the agency and disclosure issues to be persuasive. However, because both the agency and the disclosure issues hinge on the credibility of Monteith ***121** and petitioner, summary judgment was inappropriate. *See Hiers by Hiers v. Mullens,* 310 S.C. 63, 425 S.E.2d 57 (Ct.App.1992) (matters of credibility should not be determined at the summary judgment stage).

REVERSED.

FINNEY, C.J., and TOAL, MOORE and WALLER, JJ., concur.

Parallel Citations

489 S.E.2d 615, 67 A.L.R.5th 775

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363 S.C. 372
Supreme Court of South Carolina.

Franklin M. EPSTEIN, M.D. and Southern Neurological Institute, Appellants,
v.
David A. BROWN, Esquire, Respondent.

No. 25953. | Heard Jan. 4, 2005. | Decided March 21, 2005.

Synopsis
Background: After adverse verdicts against surgeon in wrongful death and survival action were affirmed, 342 S.C. 279, 536 S.E.2d 408, surgeon brought legal malpractice action against attorney who represented him in underlying suit. The Circuit Court, Aiken County, James C. Williams, Jr., J., granted attorney's motion for summary judgment, and surgeon appealed.

Holdings: The Supreme Court, Waller, J., held that:

[1] three-year limitations period governing legal malpractice action was not tolled by attorney's continuous representation of surgeon during appeal, and

[2] three-year limitations period governing legal malpractice claim began to run on date adverse verdict was entered against surgeon.

Affirmed.

Toal, C.J., filed dissenting opinion.

Pleicones, J., filed dissenting opinion.

Attorneys and Law Firms

****817 *374** Hugh M. Claytor, and Heather Goetz Ruth, of Womble, Carlyle, Sandridge and Rice, of Greenville, for Appellants.

M. Dawes Cook, Jr., and P. Gunnar Nistad, of Barnwell, Whaley, Patterson and Helms, of Charleston, for Respondents.

Opinion

Justice WALLER:

We certified this case from the Court of Appeals pursuant to Rule 204(b), SCACR. The issue on appeal involves the date on which the statute of limitations (SOL) for a legal malpractice claim begins to run.

FACTS

Dr. Franklin Epstein (Appellant) performed spinal fusion surgery on Marshall O. Welch in February, 1996. Welch died three days later of complications.[1] Welch's estate brought wrongful death and survival actions against Dr. Epstein alleging medical malpractice. Respondent, David Brown, a licensed South Carolina attorney, represented Epstein. On February 18, 1998, a jury returned a verdict of $3,000,000 in the wrongful death action, and $28,535.88 in the survival ***375** action. The following day, the jury assessed $3,000,000 punitive damages against Dr. Epstein.

Brown filed a notice of appeal on behalf of Dr. Epstein. Although Brown remained counsel of record during the appeal, Dr. Epstein was represented on appeal by Stephen Groves, John Hamilton Smith, and Steven Brown. The Court of Appeals affirmed the verdicts on July 31, 2000. *Welch v. Epstein,* 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000). This Court denied certiorari in January 2001.

Dr. Epstein filed this legal malpractice claim against Brown on January 9, 2002, alleging breach of fiduciary duty, negligence, and breach of contract. Brown moved for summary judgment on the ground that Dr. Epstein had failed to commence the action within the applicable three-year statute of limitations (SOL). The trial court ruled the SOL began to run, at the latest, on February 18, 1998, the date of the jury's verdict, such that this action was untimely. Accordingly, Brown was granted summary judgment.

STANDARD OF REVIEW

[1] [2] In reviewing the grant of a summary judgment motion, this Court applies the same standard as the trial court under Rule 56(c), SCRCP: "summary judgment is proper when 'there is no genuine issue as to any material fact and ...

the moving party is entitled to judgment as a matter of law.' " *Dawkins v. Fields,* 354 S.C. 58, 69, 580 S.E.2d 433, 438–439 (2003), *citing Baughman v. American Tel. and Tel. Co.,* 306 S.C. 101, 410 S.E.2d 537, 545 (1991). In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party. *Id.* at 115, 410 S.E.2d at 545.

****818 ISSUE**

Did the trial court err in ruling Dr. Epstein knew, or should have known, he had a possible claim against Brown by the date of the jury's adverse verdict, such that the SOL began to run on that date?

***376 DISCUSSION**

[3] **[4]** **[5]** South Carolina Code Ann. § 15–3–530 (Supp.2003) provides a three year statute of limitations for legal malpractice lawsuits. Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct. *See Dean v. Ruscon Corp.,* 321 S.C. 360, 468 S.E.2d 645 (1996); S.C.Code Ann. § 15–3–535. *See also Berry v. McLeod,* 328 S.C. 435, 492 S.E.2d 794 (Ct.App.1997). The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party **might** exist. **The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed.** *Id.* (emphasis supplied). Under § 15–3–535, the statute of limitations is triggered not merely by knowledge of an injury but by knowledge of facts, diligently acquired, sufficient to put an injured person on notice of the existence of a cause of action against another. *True v. Monteith,* 327 S.C. 116, 120, 489 S.E.2d 615, 617 (1997).

In his complaint, Dr. Epstein alleged Brown was negligent in numerous particulars, including: failing to conduct an adequate investigation, failing to advise Epstein to settle, failing to keep Epstein adequately informed during the pendency of the case, representing multiple defendants with conflicts of interest, forgetting to call expert witnesses, and adopting a defense which was contrary to Dr. Epstein's medical opinion. Counsel for Dr. Epstein conceded that many of these allegations were within Dr. Epstein's knowledge at the time of the jury's verdict. The court found the majority of the damages alleged by Dr. Epstein stemmed from the adverse jury verdict, and the damages to his reputation resulting from the publicity were all damages suffered at the time of the verdict. The court concluded that, although these damages might be mitigated by a successful appeal, they could never be wholly eliminated by a reversal of the jury's verdict. Accordingly, the trial court ruled Dr. Epstein either knew, or should have ***377** known, of a possible claim against Brown by the date of the adverse verdict, such that the SOL began to run on that date.

[6] Dr. Epstein contends that because Brown remained counsel of record during the pendency of the appeal, [2] the SOL did not begin to run until this Court denied certiorari, in January 2001. Dr. Epstein urges us to adopt the "continuous representation" rule to toll the SOL during the period an attorney continues to represent a client on the same matter which forms the basis of a legal malpractice action. We decline to adopt the continuous representation rule in the context of a legal malpractice claim and adhere, instead, to the discovery rule set forth by the Legislature.

Under the continuous representation rule, the SOL is tolled during the period an attorney continues to represent the client on the same matter out of which the alleged malpractice arose. *See* George L. Blum, *Attorney Malpractice—Tolling or Other Exceptions to Running of Statute of Limitations,* 87 A.L.R. 5th 473, § 4 (2001). In those jurisdictions where it is adopted, the rule requires: 1) ongoing representation by the lawyer; 2) on the same subject matter; and 3) continuous representation. *See generally,* Mallen and Smith, *Legal Malpractice,* § 22.13, p. 431 (5th Ed. 2000).

This Court has not specifically addressed the continuous representation rule. However, in *Holy Loch Distributors v. Hitchcock,* 332 S.C. 247, 503 S.E.2d 787 (Ct.App.1998), *rev'd on other grounds,* 340 S.C. 20, 531 S.E.2d 282 (2000), the Court of Appeals specifically declined to adopt the continuous representation rule, based in large part on this ****819** Court's refusal to adopt the "continuous treatment" rule in the context of medical malpractice cases. *See Preer v. Mims,* 323 S.C. 516, 519, 476 S.E.2d 472, 473 (1996).

In *Harrison v. Bevilacqua,* 354 S.C. 129, 580 S.E.2d 109 (2003), this Court declined to adopt the continuous treatment rule. In *Harrison,* the plaintiff was a schizophrenic who had been involuntarily committed in 1982. He remained there until 1995, and ultimately brought suit against the defendant, the state hospital, alleging he had been confined too long and ***378** had been improperly medicated. He argued his causes of action should be deemed to have accrued on the date of his discharge in 1995. We defined the continuous treatment rule as follows:

> The so-called continuous treatment rule as generally formulated is that if the treatment by the doctor is a continuing course and the patient's illness, injury or condition is of such a nature as to impose on the doctor a duty of continuing treatment and care, the statute does not commence running until treatment by the doctor for the particular disease or condition involved has terminated —unless during treatment the patient learns or should learn of negligence, in which case the statute runs from the time of discovery, actual or constructive.

354 S.C. at 135, 580 S.E.2d at 112, *quoting* David W. Louisell & Harold Williams, Medical Malpractice, § 13.02[3] (1996).

In *Harrison,* we recognized the policy behind adoption of the continuous treatment rule being that, without such a rule, a plaintiff would be required to bring suit against his or her physician before treatment is even terminated. 354 S.C. at 136, 580 S.E.2d at 113. Alternative reasons justifying the rule are "a patient's right to place trust and confidence in his physician," the difficulty of determining the precise timing of an act of malpractice during continuous treatment, and "basic tort principles of fairness and deterrence." *Id.* at 136–137, 580 S.E.2d at 113. Notwithstanding the very legitimate policy rationales in favor of adoption of a continuous treatment rule, we declined to adopt it, finding the Legislature has set absolute time restrictions for the bringing of medical malpractice actions in the statutes of repose both for medical malpractice and for persons operating under disability. *See* S.C.Code Ann. §§ 15–3–545 and 15–3–40. *Id.*

We find the justifications favoring adoption of the continuous treatment rule are similar to those justifying the continuous representation rule, to wit: to avoid disruption of the attorney-client relationship; to allow an attorney to continue efforts to remedy a bad result, even if some damages have occurred and the client is aware of the attorney's errors. *See generally,* Mallen and Smith, *Legal Malpractice,* § 22.13 (5th Ed. 2000). *See also United States National Bank of Oregon* ***379** *v. Davies,* 274 Or. 663, 548 P.2d 966, 970 (1976) (it seems anomalous to force a plaintiff to contend in the underlying litigation on appeal that he is entitled to a favorable decision, while in a simultaneous legal malpractice action he is forced to contend his attorney's negligence was why he received an unfavorable judgment at the trial level).

Notwithstanding such justifications, numerous jurisdictions refuse to judicially adopt the continuous representation rule. *See Beesley v. Van Doren,* 873 P.2d 1280 (Alaska 1994) (statute of limitations in attorney malpractice cases is not tolled pending final resolution of litigation underlying malpractice claim); *Laird v. Blacker,* 2 Cal.4th 606, 7 Cal.Rptr.2d 550, 828 P.2d 691 (1992) (limitations period commences and is not tolled by filing an appeal absent continuous representation by the trial attorney);[3] *Law Offices of Jerris Leonard, P.C. v. Mideast Sys. Ltd.,* 111 F.R.D. 359, 363 (D.D.C.1986) (under discovery rule, legal malpractice claim was deemed to have occurred when summary judgment entered against it or at latest when answer was due in suit for legal fees); *Zupan v. Berman,* 142 Ill.App.3d 396, 96 Ill.Dec. 889, 491 N.E.2d 1349, 1351–52 (1986) (statute of limitations for legal malpractice began to run when adverse judgment was ****820** entered, not when appellate court modified judgment); *Chambers v. Dillow,* 713 S.W.2d 896, 898–99 (Tenn.1986) (injury for legal malpractice held to have accrued when lawsuit was initially dismissed).

Generally, those jurisdictions which adopt the continuous representation rule also adopt the continuous treatment in the context of medical malpractice. *See generally* Mallen and Smith at § 22.13, p. 430 (noting rule's medical malpractice origins); *Rosenfield v. Rogin,* 69 Conn.App. 151, 795 A.2d 572 (2002); *Seebacher v. Fitzergerald et al.,* 181 Mich.App. 642, 449 N.W.2d 673 (1989); *Skidmore v. Rottman,* 5 Ohio St.3d 210, 450 N.E.2d 684 (1983) (holding that cause of action for legal malpractice accrues and the statute of limitations commences to run when the client discovers, or, in the exercise of reasonable care and diligence should have discovered, the resulting injury; court noted that policy considerations underlying ***380** discovery rule in medical malpractice cases are no less compelling in legal malpractice cases).

In accord with these authorities, and in light of the Legislature's declaration that an action "must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known he had a cause of action," [4] we decline to adopt the continuous representation rule.

[7] Dr. Epstein asserts that, even if we do not adopt the continuous representation rule, the statute of limitations should not be deemed to have begun to run until the date on which this Court denied certiorari (January 11, 2001), because it was not until that date upon which he suffered "legal damages." We disagree.

Although there is a split of authority as to whether a plaintiff has suffered legally cognizable damages prior to the conclusion of an appeal, those jurisdictions which decline to adopt the continuous representation rule tend to hold that a plaintiff may institute a malpractice action prior to the conclusion of an appeal. *See Laird v. Blacker* 2 Cal.4th 606, 7 Cal.Rptr.2d 550, 828 P.2d 691, 696 (1992)(disagreeing with plaintiff's contention that a successful appeal negates the client's ability to file a malpractice action. The court noted that the client sustains an injury as soon as he or she is forced to incur costs pursuing an appeal and that, "although appellate review may correct judicial error, and thus reduce the client's damages, an appeal does not necessarily exonerate the attorney, nor does it extinguish the client's action against him for negligence in the conduct of trial."); *Beesley v. VanDoren,* 873 P.2d 1280, 1282(Alaska 1994)(rejecting claim that injury or damaging effect on the unsuccessful party is not ascertainable until the appellate process is completed); [5] ***381** *Michael v. Beasley,* 583 So.2d 245 (Ala.1991), *reversal on other ground recognized by, Borden v. Clement,* 261 B.R. 275 (Bkrtcy. N.D.Ala.2001) (on the date of adverse jury verdict, plaintiffs became obligated to expend additional monies for the appellate process including the continuing service of an attorney, the cost of the transcript, the cost of the appeal, and the inconvenience of the appeal. In finding that the plaintiffs' injury accrued on the date of the jury's verdict, the court held that a plaintiff was not required to exhaust all appellate remedies before filing a claim for legal malpractice); *St. Paul Fire & Marine Insurance* ****821** *Co. v. Speerstra,* 63 Or.App. 533, 666 P.2d 255, 258 (1983) (plaintiff was held to have suffered harm when trial court's judgment was entered, because plaintiff was then required to either pay the judgment or the costs of appeal); *Hunt v. Bittman,* 482 F.Supp. 1017 (D.D.C.1980), aff'd, 652 F.2d 196 (D.C.Cir.), *cert. denied,* 454 U.S. 860, 102 S.Ct. 315, 70 L.Ed.2d 158 (1981), (SOL began to run from date of Watergate conspirator's conviction, the date on which he suffered actual injury). *See generally,* Ronald Mallen, *Limitations and the Need for Damages in Legal Malpractice Actions,* 60 Def. Couns. J. 234, 245–246 (April 1993) (noting that a client who has suffered an adverse result because of a lawyer's negligence has both knowledge of the negligence and present damage).

Epstein also asserts that requiring him to pursue an appeal while simultaneously filing a malpractice suit against his attorney puts him in the awkward position of arguing inconsistent positions in two different courts. The same may also be raised in the context of continuous medical treatment. In any event, there are measures which may be taken to avoid such ***382** inconsistent positions. *See Morrison v. Goff,* 91 P.3d 1050, 1056 (Co.2004); *Gebhardt v. O'Rourke,* 444 Mich. 535, 510 N.W.2d 900 (1994) (holding that a plaintiff who files a malpractice claim against an attorney at the same time an appeal is pending may seek a stay of the malpractice action in the trial court); [6] Mallen, *supra,* 60 Def. Couns. J. at 248 (suggesting that during the pendency of an appeal, "most lawyers are willing to stipulate to toll a statute of limitations on the hope that the existence or extent of an injury will be minimized or terminated" by the appeal). [7]

[8] This Court has recognized that, under the discovery rule, the statute of limitations begins to run when a reasonable person of common knowledge and experience would be on notice that a claim against another party might exist. The fact that the injured party may not comprehend the full extent of the damage is immaterial. *Dean v. Ruscon Corp.,* 321 S.C. 360, 363–364, 468 S.E.2d 645, 647 (1996). *See also Wiggins v. Edwards,* 314 S.C. 126, 442 S.E.2d 169 (1994) (reasonable diligence means simply that injured party must act with some promptness where facts and circumstances of injury would put person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist; statute of limitations begins to run from this point and not when advice of counsel is sought or full-blown theory of recovery is developed); *Snell v. Columbia Gun Exchange, Inc.,* 276 S.C. 301, 278 S.E.2d 333 (1981) (same).

Under the facts of this case, we find Dr. Epstein clearly knew, or should have known he might have had some claim against Brown at the conclusion of his trial. The damages he claims are largely those to his reputation, and the claims he raises in his complaint are primarily related to trial and pre-trial errors. Counsel for Dr. Epstein conceded at oral argument on the summary judgment motion that "some of the allegations down there, your Honor, were within the man's ***383** knowledge when the verdict came in." Further, in a letter from Dr. Epstein to his appellate attorney, Steven Groves, Dr. Epstein indicated both that he would not deal with Mr. Brown, and that "I believe that my representation was so egregiously lacking." It is patent Dr. Epstein knew, or should have known, of a possible claim against Brown long before this Court denied certiorari in January 2001. Accordingly, we find the trial court properly granted summary judgment on this issue.[8] The judgment below is

AFFIRMED.[9]

****822** MOORE AND BURNETT, JJ., concur, TOAL, C.J., and PLEICONES, J., dissenting in separate opinions.

Chief Justice TOAL dissenting:
I respectfully dissent. I would adopt a bright-line rule that the statute of limitations does not begin to run in a legal malpractice action until an appellate court disposes of the action by sending a remittitur to the trial court.

I agree that under the discovery rule, the statute of limitations is tolled until the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for the wrongful conduct. S.C.Code Ann. § 15-3-535 (Supp.2003); *See also Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996) (explaining the discovery rule). In *Dean,* this Court explained the nature of "reasonable diligence":

> [w]e have interpreted the exercise of reasonable diligence to mean that the injured party must act with some promptness where the facts and circumstances of *an injury* place a ***384** reasonable person of common knowledge and experience on notice that a claim against another party might exist.

Id. (emphasis added).

I disagree with the majority's decision holding that the appellants should have known of the existence of a cause of action arising from respondent's alleged malpractice at the conclusion of the trial. In my opinion, there was no evidence that appellants were injured as a result of respondent's alleged malpractice until the court of appeals disposed of the case by sending a remittitur to the trial court. Therefore, I would establish a bright-line rule that the statute of limitations does not begin to run in a legal malpractice action until a remittitur has been sent to the trial court. As a result, in my opinion, the statute of limitations does not bar Appellants' claim.

Justice PLEICONES dissenting:
I respectfully dissent. I concur in the majority's rejection of the continuous-representation rule and in its retention of the discovery rule. In my opinion, however, Brown should be estopped from asserting the statute of limitations as a defense. I would therefore reverse and remand to the circuit court for trial.

"Under South Carolina law, a defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute ha[s] been induced by the defendant's conduct." *Kleckley v. N.W. Nat. Cas. Co.*, 338 S.C. 131, 136, 526 S.E.2d 218, 220 (2000) (internal quotation omitted). "Such inducement may consist of conduct that suggests a lawsuit is not necessary." *Kleckley*, 338 S.C. at 136–37, 526 S.E.2d at 220.

Brown affirmatively represented to Epstein that the adverse verdict had resulted from errors of law committed by the trial judge which had in turn affected the jury's fact-finding role. Brown also remained nominally as counsel to Epstein throughout the appeal from the verdict. I would hold that the circuit court erred by holding that Brown's representations coupled with his presence on the appellate team did not reasonably induce Epstein's forbearance. That Brown did not actually participate in the appellate representation, other ***385** than filing the appeal and being counsel of record, makes this conclusion all the more compelling, as his watchful presence bolstered his affirmative representations. I would therefore hold that Brown is estopped from asserting the statute of limitations as a defense.

Parallel Citations

610 S.E.2d 816, 14 A.L.R.6th 741

Footnotes

1 Welch was a 37 year old nurse who worked for Epstein's neurological group, Southern Neurological Institute, in the care of surgical patients. The facts surrounding his surgery and post-surgical care are fully set forth in the Court of Appeals' opinion. *Welch v. Epstein,* 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000).

2 Although Brown remained counsel of record, the appeal was handled by a different firm.

3 Notably, the California statute specifically has a provision for tolling in the event the attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred. West's Ann. Cal.Code Civ. P. § 340.6(2).

4 See S.C.Code Ann. § 15–3–535 (Supp.2003).

5 The *Van Doren* court noted that the "overwhelming majority of courts" hold the statute of limitations applicable to a claim for legal malpractice is not tolled pending resolution of the underlying litigation. 873 P.2d at 1282, *citing Rhoades v. Sims,* 286 Ark. 349, 692 S.W.2d 750, 752 (1985); *Laird v. Blacker,* 2 Cal.4th 606, 7 Cal.Rptr.2d 550, 828 P.2d 691, 696 *cert. denied,* 506 U.S. 1021, 113 S.Ct. 658, 121 L.Ed.2d 584, (1992); *Jankowski v. Taylor, Bishop & Lee,* 246 Ga. 804, 273 S.E.2d 16, 18 (1980); *Belden v. Emmerman,* 203 Ill.App.3d 265, 148 Ill.Dec. 583, 560 N.E.2d 1180, 1183 (1990); *Basinger v. Sullivan,* 540 N.E.2d 91, 94 (Ind.App.1989); *Dearborn Animal Clinic P.A. v. Wilson,* 248 Kan. 257, 806 P.2d 997, 1006 (1991); *Braud v. New England Ins. Co.,* 576 So.2d 466, 469–70 (La.1991); *Hayden v. Green,* 431 431 Mich. 878, 429 N.W.2d 604 (1988); *Sabes & Richman, Inc. v. Muenzer,* 431 N.W.2d 916, 918–19 (Minn.App.1988); *Dixon v. Shafton,* 649 S.W.2d 435, 438 (Mo.1983); *Suzuki v. Holthaus,* 221 Neb. 72, 375 N.W.2d 126, 128 (1985); *Zimmie v. Calfee, Halter & Griswold,* 43 Ohio St.3d 54, 538 N.E.2d 398, 402 (1989); *Chambers v. Dillow,* 713 S.W.2d 896, 898 (Tenn.1986); *Richardson v. Denend,* 59 Wash.App. 92, 795 P.2d 1192, 1195 n. 7 (1990); *Hennekens v. Hoerl,* 160 Wis.2d 144, 465 N.W.2d 812, 818–19 (1991).

6 *Gebhardt* and *Goff* both involved malpractice claims brought by criminal defendants who brought malpractice claims while pursuing an appeal of their convictions.

7 Here, the only discussions concerning a tolling agreement came after the Court of Appeals' opinion in this matter.

8 We do not hold that, in all instances, the date of a jury's adverse verdict is the date on which the SOL begins to run. To the contrary, we hold only that, under the facts of this case, Dr. Epstein knew of a potential claim against Brown by this date, at the latest.

9 The remaining issue is affirmed pursuant to Rule 220(b)(1), SCACR, and the following authority: *Vines v. Self Mem'l Hosp.,* 314 S.C. 305, 309, 443 S.E.2d 909, 911 (1994) (summary judgment is proper where there is no evidence of conduct warranting estoppel).

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878 S.W.2d 313
Court of Appeals of Texas,
San Antonio.

Manual ZUNIGA, Jr.; Mary Zuniga; Betty Jo Zuniga; Thomas Zuniga; Manuel Zuniga, III; and Minor Child Rick Zuniga, Appellants,
v.
GROCE, LOCKE & HEBDON, A Professional Corporation; and Ron A. Sprague, Appellees.

No. 04–93–00614–CV. | May 31, 1994. | Rehearing Denied June 16, 1994.

Plaintiffs in products liability action settled with defendant in return for assignment of defendant's malpractice cause of action against its attorney. The 225th District Court, Bexar County, Andy Mireles, J., dismissed plaintiffs' action against attorney, and appeal was taken. The Court of Appeals, Peeples, J., held that assignment of legal malpractice action arising from litigation was invalid.

Affirmed.

Attorneys and Law Firms

***314** Larry J. Doherty, Michael H. Norman, Doherty, Norman & Wagner, Houston, for appellants.

Cathy J. Sheehan, Nancy L. Farrer, Lewin Plunkett, Sylvan S. Lang, Jr., Plunkett, Gibson & Allen, Inc., San Antonio, for appellees.

Before BUTTS, PEEPLES and LÓPEZ, JJ.

OPINION

PEEPLES, Justice.

The issue in this case is whether a client may assign his cause of action for legal malpractice arising out of litigation. For the reasons stated below, we hold that he may not.

The Zunigas brought a personal injury suit against Bauer Manufacturing Company and other defendants. Attorney Ron Sprague of Groce, Locke & Hebdon [1] defended Bauer in that suit. Ultimately the Zunigas obtained a judgment against Bauer, whose insurer had become insolvent. Bauer assigned to the Zunigas its rights to sue the law firm for malpractice, and the Zunigas agreed not to collect the judgment from Bauer. The trial court rendered summary judgment for Sprague on the sole ground that a legal malpractice cause of action is not assignable; [2] whether Sprague was indeed negligent is a contested issue not before us.

We need not state the facts of the underlying personal injury litigation in great detail. Mr. Zuniga fell from a ladder and was seriously injured. Sprague defended Bauer against the Zuniga family's personal injury claim, which asserted that Bauer had defectively manufactured and labeled the ladder. Bauer's insurer became insolvent, and Bauer feared a large judgment would put it into bankruptcy. At a pre-trial hearing on the motions in limine, the Zunigas contended that certain of Sprague's responses to discovery negligently admitted part of the liability case against Bauer. The Zunigas settled with a different defendant for $7.5 million, and the case against Bauer was not tried. Later the Zunigas' lawyers [3] offered to settle with Bauer if Bauer would assign its malpractice cause of action against Sprague and the law firm.

Bauer ultimately agreed to a $25 million judgment and assigned its malpractice action to the Zunigas. The Zunigas did not give Bauer a covenant not to execute as part of the settlement. Instead, the Zunigas and their lawyers agreed that Bauer could transfer all its assets (except the malpractice cause of action) to a new corporation, and the Zunigas waived their rights to the new entity's assets and released all claims against all the individuals connected with Bauer. The parties also agreed that the asset transfer was not a fraudulent transfer under the Uniform Fraudulent Transfer Act. The Zunigas then brought this suit against Sprague.

The only Texas case that has spoken directly on the issue of assignability contains this statement: "A part or all of a claim for legal malpractice can be assigned, just as any other negligence claim." *Stonewall Surplus Lines Ins. Co. v. Drabek*, 835 S.W.2d 708, 711 (Tex.App.—Corpus Christi 1992, writ denied). The Zunigas urge us to accept and apply this statement as settled Texas law.

We decline to simply accept the *Drabek* court's statement as a binding declaration of the law of Texas on this issue for four reasons: it is dictum, it is unsupported by reasoning or authority, it is overbroad and incorrect as a matter of substantive law, and the ***315** supreme court has said the issue is open and unsettled in Texas.

[1] The statement is dictum. The *Drabek* court did not *hold* that a malpractice claim is generally assignable, or assignable to the original tort plaintiff. The issue in *Drabek* was whether an excess carrier could sue the primary carrier's attorneys. We need not accept dictum as binding authority. Moreover, the court cited no authority for its sweeping statement, nor did it support the statement with reasoning of any kind.

[2] The statement in *Drabek* is also demonstrably incorrect: it is not true that *any* negligence claim is assignable, although most are. For example, "it is contrary to public policy to permit a joint tortfeasor the right to purchase a cause of action from a plaintiff to whose injury the tortfeasor contributed." *International Proteins Corp. v. Ralston–Purina Co.,* 744 S.W.2d 932, 934 (Tex.1988). Likewise, Mary Carter agreements, in which the plaintiff assigns to a settling defendant an interest in the plaintiff's recovery from a co-defendant, are against public policy in Texas. *Elbaor v. Smith,* 845 S.W.2d 240 (Tex.1992).

In addition, the supreme court recently declined to decide whether a legal malpractice action is assignable. On the same day the supreme court denied review in *Drabek,* it expressly left open the question whether a legal malpractice cause of action is assignable. *See American Centennial Ins. Co. v. Canal Ins. Co.,* 843 S.W.2d 480, 484 n. 6 (Tex.1992); *id.* at 486 (Hecht, J., concurring).

For all these reasons, we address the issue of assignability presented in this appeal as an open question.

[3] [4] Ordinarily, a nonclient cannot sue a lawyer for malpractice because there is no privity of contract. *American Centennial,* 843 S.W.2d at 484. There is an exception to this rule when an excess insurance carrier is forced to pay a judgment because the primary carrier and its attorneys negligently allowed the insured to suffer a judgment in excess of the primary coverage. *Id.* Our question is whether a client, who is in privity with the lawyer, may assign his cause of action to someone who lacks privity and thereby enable the assignee to bring the malpractice lawsuit. As another court has said: "The question in this case is not whether clients should be able to make claims against lawyers for malpractice. The question is whether to allow clients to sell off their claims for pursuit by others." *Picadilly, Inc. v. Raikos,* 582 N.E.2d 338, 345 (Ind.1991). This case has nothing to do with the client's right to pursue his own case against the lawyer.

In most jurisdictions one cannot assign a cause of action for legal malpractice. *See Schroeder v. Hudgins,* 142 Ariz. 395, 690 P.2d 114, 118–19 (Ct.App.1984); *Goodley v. Wank & Wank, Inc.,* 62 Cal.App.3d 389, 133 Cal.Rptr. 83 (1976); *Roberts v. Holland & Hart,* 857 P.2d 492, 495–96 (Colo.Ct.App.1993), *cert. denied; Washington v. Fireman's Fund Ins. Co.,* 459 So.2d 1148 (Fla.Dist.Ct.App.1984); *Brocato v. Prairie State Farmers Ins. Ass'n,* 166 Ill.App.3d 986, 117 Ill.Dec. 849, 850–851, 520 N.E.2d 1200, 1201–1202 (1988), *appeal denied,* 121 Ill.2d 567, 122 Ill.Dec. 434, 526 N.E.2d 827; *Picadilly, Inc. v. Raikos,* 582 N.E.2d 338, 339–45 (Ind.1991); *Bank IV Wichita, Nat'l Ass'n v. Arn, Mullins, Unruh, Kuhn & Wisson,* 250 Kan. 490, 827 P.2d 758, 764–65 (1992); *Coffey v. Jefferson County Bd. of Educ.,* 756 S.W.2d 155, 157 (Ky.Ct.App.1988); *Joos v. Drillock,* 127 Mich.App. 99, 338 N.W.2d 736, 738–39 (1983); *Wagener v. McDonald,* 509 N.W.2d 188, 189–92 (Minn.Ct.App.1993); *Chaffee v. Smith,* 98 Nev. 222, 645 P.2d 966 (1982); Francis M. Dougherty, Annotation, *Assignability of Claim for Legal Malpractice,* 40 A.L.R.4th 684 (1985).

A few jurisdictions allow such assignments. *See Thurston v. Continental Cas. Co.,* 567 A.2d 922, 923 (Me.1989); *Collins v. Fitzwater,* 277 Or. 401, 560 P.2d 1074, 1077–78 (1977), overruled on other grounds, *Lancaster v. Royal Ins. Co.,* 302 Or. 62, 726 P.2d 371 (1986); *Hedlund Mfg. Co. v. Weiser, Stapler & Spivak,* 517 Pa. 522, 539 A.2d 357, 359 (1988). Though a New York statute prohibits assignment of personal injury claims, the New York decisions allow assignment on the ground that legal malpractice actions do not fall within the statute because they are not suits for personal injuries. *See* ***316** *Oppel v. Empire Mut. Ins. Co.,* 517 F.Supp. 1305 (S.D.N.Y.1981).

For several reasons we are persuaded that Texas legal malpractice actions arising out of litigation should not be assignable.

Most of the authorities disallowing assignment have reasoned that to allow assignability would make possible the commercial marketing of legal malpractice causes of action by strangers, which would demean the legal profession.[4] This is a legitimate concern. We do not relish the thought of entrepreneurs purchasing the legal rights of clients against their attorneys as an ordinary business transaction in pursuit of profit. We do not know the extent to which this fear would be realized if we were to permit assignment, or whether it has been realized in the few states that have already permitted assignment. In the fountainhead case on this subject, a person with no apparent connection to the original representation purchased the legal malpractice action as a thing of value. *See Goodley v. Wank & Wank, Inc.*, 62 Cal.App.3d 389, 133 Cal.Rptr. 83 (1976) (assignee bought divorce litigant's rights against lawyer for allegedly negligent representation regarding property division).

Most legal malpractice assignments seem to be driven by forces other than the ordinary commercial market. In most of the reported cases, the motive for assignment was the plaintiff's inability to collect a judgment from an insolvent, uninsured (or underinsured) defendant. In several instances, the malpractice plaintiff was the original plaintiff who, unable to collect against the original defendant, obtained the malpractice action in hopes of satisfying the underlying judgment. *See, e.g., Brocato v. Prairie State Farmers Ins. Ass'n*, 166 Ill.App.3d 986, 117 Ill.Dec. 849, 850–851, 520 N.E.2d 1200, 1201–1202 (Ill.App.Ct.1988), *appeal denied*, 121 Ill.2d 567, 122 Ill.Dec. 434, 526 N.E.2d 827; *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338, 339–45 (Ind.1991); *Thurston v. Continental Cas. Co.*, 567 A.2d 922 (Me.1989) (products liability plaintiff was assigned rights to sue defendant's lawyer for malpractice and its insurer for negligent failure to settle); *Collins v. Fitzwater*, 277 Or. 401, 560 P.2d 1074 (1977).

In at least one reported case, the assignment does not fit neatly into either the commercial-marketing or the insolvent-defendant category. In *Hedlund Manufacturing Co. v. Weiser, Stapler & Spivak*, 517 Pa. 522, 539 A.2d 357, 359 (1988), there was neither a commercial sale nor an insolvent defendant. An attorney mishandled a patent application, and when the client sold the patent rights it also sold the malpractice action to the assignee.

There are also cases in which the plaintiff seeks to obtain the right to bring the malpractice action by using post-judgment collection devices. In *Chaffee v. Smith*, 98 Nev. 222, 645 P.2d 966 (1982), the plaintiff obtained a default judgment and then levied execution on defendant's assets, which included ***317** the malpractice action against the defense attorney. The court disallowed this attempt by a judgment creditor to obtain the right to bring the malpractice suit. Similarly in *Charles v. Tamez*, 878 S.W.2d 201 (Tex.App.—Corpus Christi, 1994, n.w.h.), the court denied a plaintiff the right to require turnover of a legal malpractice action that the client had not asserted and whose validity the client denied. [5] Other courts have held that the legal malpractice action is subject to involuntary transfer in a post-judgment collection proceeding. *See Ikuno v. Yip*, 912 F.2d 306, 313–14 (9th Cir.1990); *Bergen v. F/V St. Patrick*, 686 F.Supp. 786 (D.Alaska 1988).

In the present case, the Zuniga–Bauer assignment is a transparent device to replace a judgment-proof, uninsured defendant with a solvent defendant. [6] To allow such assignments would serve two principal goals: enabling the defendant-client to extricate himself from liability, and funding the original plaintiff's judgment. But to allow assignments would exact high costs: the plaintiff would be able to drive a wedge between the defense attorney and his client by creating a conflict of interest; in time, it would become increasingly risky to represent the underinsured, judgment-proof defendant; and the malpractice case would cause a reversal of the positions taken by each set of lawyers and clients, which would embarrass and demean the legal profession.

We appreciate the goals furthered by assignment, but conclude that they do not justify the detrimental impact that assignment would have on the legal system.

Concerning the client's desire to be free from liability, we question how far the law should stretch to protect the client who chose to go uninsured. Here, of course, Bauer's insurer became insolvent; but our decision must apply to cases generally. And whatever damages the judgment-proof defendant has sustained, he may seek compensation for them in an ordinary malpractice suit.

We well understand the other goal of allowing assignment of the malpractice action—the plaintiff's desire to find a defendant who is both culpable and able to respond in damages. But we think the corresponding harm to the legal system is too great, for three reasons.

A plaintiff who is injured by an uninsured, insolvent defendant has every incentive to look elsewhere for a source of funding. Should the law allow the plaintiff and the defendant to make a deal and focus on the defense lawyer? If assignments are permitted, the plaintiff will have the legal right to bargain for the defendant's right to sue his lawyer. When the defendant cannot make payment, why not offer to waive collection from him in return for assignment of his right to sue his lawyer? Defense attorneys would have to conduct their defense with the knowledge that the plaintiff might make exactly this kind of offer. Defense counsel would realize that zealous advocacy might prompt opposing counsel to retaliate with the newest weapon in his arsenal: the offer to settle in return for the client's malpractice action. The plaintiff's attorney would be bound to explore assignment if there were no other way to compensate his client.

Upon receiving the plaintiff's offer to settle with the defendant in return for his malpractice action, defense lawyer would be pitted against client. The attorney's interest would be to reject the offer and avoid being the named defendant in a new lawsuit; the client's interest might be to accept the offer and thereby avoid the danger of judgment. Prudent defense counsel would recommend that the defendant-client consult other counsel about the offer.

Ultimately, to allow assignment would make lawyers reluctant—and perhaps unwilling—to represent defendants with inadequate insurance and assets. Such representation, after all, might make the lawyer the ***318** most attractive target in the lawsuit. Lawyers would soon realize that representing the low-asset defendant could bring an assigned malpractice suit after the plaintiff and defendant have made their peace. The pressure for assignment would be minimal when the defendant had adequate insurance or assets. But underinsured, undercapitalized clients might discover that lawyers are less willing to represent them. By agreeing to represent an insolvent defendant, a lawyer could be putting his own assets and insurance within reach of a plaintiff who otherwise would have an uncollectible judgment.

In each assigned malpractice case, there would be a demeaning reversal of roles. The two litigants would have to take positions diametrically opposed to their positions during the underlying litigation because the legal malpractice case requires a "suit within a suit." To prove proximate cause, the client must show that his lawsuit or defense would have been successful "but for" the attorney's negligence. *See Millhouse v. Wiesenthal,* 775 S.W.2d 626, 627 (Tex.1989); David J. Beck, *Legal Malpractice in Texas,* 43A BAYLOR L.REV. 1, 60–62 (1991). In the malpractice suit, the Zunigas would argue that Bauer suffered judgment not on the strength of the Zunigas' claim but because of attorney negligence.

In the underlying tort case, the Zunigas' position was: we have a valid tort case involving a defective Bauer ladder, and we will win the case on the merits even if Bauer's lawyer represents it capably. But to prove proximate cause in the legal malpractice case, the Zunigas would have to take the contrary position: we would have lost our tort case and Bauer would have prevailed if its lawyers had capably defended our suit. Bauer (our assignor) would have won the defective-ladder case if only its lawyers had used due care and competence.

For the law to countenance this abrupt and shameless shift of positions would give prominence (and substance) to the image that lawyers will take any position, depending upon where the money lies, and that litigation is a mere game and not a search for truth. *See Picadilly, Inc. v. Raikos,* 582 N.E.2d 338, 344–45 (Ind.1991). It is one thing for lawyers in our adversary system to represent clients with whom they personally disagree; it is something quite different for lawyers (and clients) to switch positions concerning the same incident simply because an assignment and the law of proximate cause have given them a financial interest in switching.

On balance, we conclude that the costs to the legal system of assignment outweigh its benefits. We hold that an assignment of a legal malpractice action arising from litigation is invalid. The judgment of dismissal is therefore affirmed.

Footnotes

1 For simplicity we will refer to Sprague and Groce, Locke & Hebdon collectively as "Sprague."

2 The judgment also rests on the related grounds that the Zunigas do not have standing to bring this suit and that they lack privity with the client. We need not reach these issues.

3 Doug and Guy Allison of Allison & Huerta in Corpus Christi represented the Zunigas in the underlying case. The Zunigas have different counsel in this malpractice case.

4 The California court summarized the arguments in support of its holding that legal malpractice actions should not be assignable:

> It is the unique quality of legal services, the personal nature of the attorney's duty to the client and the confidentiality of the attorney-client relationship that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment. The assignment of such claims could relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who have never had any prior connection with the assignor or his rights. The commercial aspect of assignability of choses in action arising out of legal malpractice is rife

> with probabilities that could only debase the legal profession. The almost certain end result of merchandizing such causes of action is the lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members of the legal profession, generate an increase in legal malpractice litigation, promote champerty and force attorneys to defend themselves against strangers. The endless complications and litigious intricacies arising out of such commercial activities would place an undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.

Goodley v. Wank & Wank, Inc., 62 Cal.App.3d 389, 397, 133 Cal.Rptr. 83, 87 (1976). The courts in *Brocato, Picadilly, Joos,* and *Wagener* quoted with approval this passage from *Goodley.*

5 The reasons for our holding, which concerns voluntary assignments, would prevent the judgment creditor from obtaining the malpractice action by execution or turnover from a defendant who was willing to assert it as a valid claim.

6 Two courts have noted the possibility that assignments can promote collusion. *See Coffey v. Jefferson County Bd. of Educ.,* 756 S.W.2d 155, 157 (Ky.Ct.App.1988); *Wagener v. McDonald,* 509 N.W.2d 188, 191 (Minn.Ct.App.1993).

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62 Cal.App.3d 389
Court of Appeal, Second District, Division 1, California.

Harry I. GOODLEY, Plaintiff and Appellant,
v.
WANK AND WANK, INC., a corporation, et al., Defendants and Respondents.

Civ. 48001. | Sept. 28, 1976.

The assignee of a claim for damages for legal malpractice brought an action on the claim against a law firm. The Superior Court, Los Angeles County, August J. Goebel, J., entered judgment for defendants, and plaintiff appealed. The Court of Appeal, Lillie, J., held that the claim in suit was not assignable.

Affirmed.

Attorneys and Law Firms

***391** ****83** Harry I. Goodley, in pro per.

Roper & Folino and Craig N. Beardsley, Los Angeles, for defendants and respondents.

Opinion

LILLIE, Associate Justice.

The First Amended Complaint for Negligence alleges 'That plaintiff is the owner of the claim (legal malpractice) against defendants herein by virtue of a written assignment by Eleanor Rae Katz, dated August 7, 1972'; that defendants are attorneys at law and represented Eleanor Katz in a dissolution of marriage proceeding during the course of which they were negligent in advising her that they did not have to keep in their possession certain original insurance policies of which she was beneficiary and returned them to her, and in failing to secure a court order to restrain her husband from changing the status of said policies; that subsequently and during the pendency of the dissolution proceeding, her husband found the policies and, without her knowledge, cancelled the same and shortly thereafter died; that defendants' erroneous advice that she was protected in her property rights, was ***392** the proximate cause of her loss of the proceeds from the policies; and that as a result of defendants' negligence she has been damaged in the sum of $147,000. Subsequent to the filing of their answer and extensive discovery proceedings, defendants filed motion for summary judgment. Judgment was entered for defendants and against plaintiff on the order granting the motion. Plaintiff appeals therefrom.

The motion for summary judgment was made under section 437c, Code of Civil Procedure. It was supported by declaration of defendants' counsel which generally asserted that plaintiff's cause of action is based on a written assignment of a tort claim for negligent performance of personal legal services rendered to Eleanor Katz by defendants. In his opposing declaration plaintiff asserted the right to sue under the written assignment and relied heavily upon the facts of the underlying malpractice claim. The sole issue was whether by virtue ****84** of the assignment plaintiff has standing to bring this action for legal malpractice. [1]

On the state of the record it is clear that no factual issues were tendered by the declarations. The contention merely was that plaintiff has no standing to sue. Accordingly, we are not concerned with the sufficiency of the affidavits but with the sufficiency of the first amended complaint to state a cause of action in this plaintiff, the real issue being that the cause of action for tortious conduct by defendants, even if properly alleged and proved, cannot be asserted by him. 'That question may appropriately be determined on a motion for summary judgment. (Goldstein v. Hoffman, 213 Cal.App.2d 803, 811, 29 Cal.Rptr. 334; Wilson v. Wilson, 54 Cal.2d 264, 269, 5 Cal.Rptr. 317, 352 P.2d 725.) We are persuaded, moreover, that the motion herein presented and submitted to the court, notwithstanding its nomenclature, was nothing more than a motion for judgment on the pleadings. (See Maxon v. Security Ins. Co., 214 Cal.App.2d 603, 610, 29 Cal.Rptr. 586.) Accordingly, the motion has the purpose and effect of a general demurrer. (Colberg, Inc. v. State of California ex rel. Dept. of Pub. Wks., 67 Cal.2d 408, 411—414, 62 Cal.Rptr. 401, 432 P.2d 3.) When a motion is made for a judgment on the pleadings, 'the only question, as on a general demurrer, is one of law, and that question is simply whether the complaint states a ***393** cause of action. (Citations.)' (Maxon v. Security Ins. Co., supra, 214 Cal.App.2d at p. 610, 29 Cal.Rptr. (586) at p. 589.)' (Franklin v. Municipal Court, 26 Cal.App.3d 884, 900, 103 Cal.Rptr. 354, 364. [2]) Thus we accept as true all allegations of the first amended complaint. (Franklin v. Municipal Court, 26 Cal.App.3d 884, 900, 103 Cal.Rptr. 354.)

If plaintiff has the right to maintain the within action said right can be based only on a written assignment. The crux of the issue is whether a cause of action for legal malpractice is assignable. [3]

In 1872 our Legislature effected a change in the common law rule of nonassignability of choses in action by enacting sections 953 [4] and 954 [5], Civil Code. Thus a thing in action arising out of either the violation of a right of property or an obligation or contract may be transferred (Morris v. Standard Oil Co., 200 Cal. 210, 214, 252 P. 605; Stapp v. Madera Canal & Irr. Co., 34 Cal.App. 41, 46, 166 P. 823). The construction and application of the broad rule of assignability have developed a complex pattern of case law underlying which is the basic public policy that "(a)ssignability of things in action is now the rule; nonassignability, the exception" (Rued v. Cooper, 109 Cal. 682, 693, 34 P. 98, 101; Webb v. Pillsbury, 23 Cal.2d 324, 327, 144 P.2d 1; Jackson v. Deauville Holding Co., 219 Cal. 498, 500, 27 P.2d 643; Wikstrom v. Yolo Fliers Club, 206 Cal. 461, 464, 274 P. 959; Everts v. Will S. Fawcett Co., 24 Cal.App.2d 213, 215, 74 P.2d 815). "(A)nd this exception is confined to ****85** wrongs done to the person, the reputation, of the feelings of the injured party, and to contracts of a purely personal nature, like promises of marriage." (Rued v. Cooper, 109 Cal. 682, 693, 34 P. 98, 101.) Thus, causes of action for personal injuries arising out of a tort are not assignable [6] nor are those founded upon wrongs of a purely ***394** personal nature such as to the reputation or the feelings of the one injured. [7] Assignable are choses in action arising out of an obligation or breach of contract [8] as are those arising out of the violation of a right of property (s 954, Civ.Code) or a wrong involving injury to personal or real property. [9]

'Legal malpractice consists of the failure of an attorney 'to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.' (Lucas v. Hamm (1961) 56 Cal.2d 583, 591, 15 Cal.Rptr. 821, 825, 364 P.2d 685, 689.) When such failure proximately causes damage, it gives rise to an action in tort. Since in the usual case, the attorney undertakes to perform his duties pursuant to a contract with the client, the attorney's failure to exercise the requisite skill and care is also a breach of an express or implied term of that contract. . . . ( ) Malpractice in the legal field usually causes damage to intangible property interests . . ..' (***395** Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal.3d 176, 181, 98 Cal.Rptr. 837, 838, 491 P.2d 421, 422.) The elements of a cause of action for legal malpractice are set up in Budd v. Nixen, 6 Cal.3d 195 at page 200, 98 Cal.Rptr. 849, at page 852, 491 P.2d 433, at page 436: '(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence (citations).' Plaintiff's pleading sounds in tort. He has alleged negligence in the performance of legal services rendered to his assignor by defendants in their failure to secure a restraining order to prevent a third party from interfering with the status of certain insurance policies. He does not ****86** herein seek to recover the proceeds of the policies, indeed the amount thereof is not alleged, nor plead direct injury to personal or real property or sue for breach of contract. Although the relationship between plaintiff's assignor and defendants arose out of a contract for legal services, the underlying cause herein is clearly one for malpractice the gravamen of which is the negligent breach by defendants of a duty to plaintiff's assignor. The prayer is for money damages.

Appellant argues that the claim is 'for property damages arising out of the negligent performance of attorneys-at-law representing the assignor and it being a nonpersonal tort is freely assignable'. Respondents' position is that the duty owed to plaintiff's assignor and allegedly breached by them is a personal one thus the tort is of a 'purely personal nature,' and is none the less so because the damage alleged to have been suffered by plaintiff's assignor as a direct consequence of their alleged negligence is pleaded in terms of money.

Our view that a chose in action for legal malpractice is not assignable is predicated on the uniquely personal nature of legal services and the contract out of which a highly personal and confidential attorney-client relationship arises, and public policy considerations based thereon.

'The relation between attorney and client is a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity . . .' (Cox v. Delmas, 99 Cal. 104, 123, 33 P. 836, 839; Neel v. Magana, Olney, Levy, Cathcart and Gelfand, 6 Cal.3d 176, 189, 98 Cal.Rptr. 837, 491 P.2d 421). Thus, not only does the attorney owe the duty to use skill, prudence and diligence in the performance of the tasks he undertakes for his client (***396** Smith v. Lewis, 13 Cal.3d 349, 356, 118 Cal.Rptr. 621, 530 P.2d 589) but owes undivided loyalty to the interests professionally entrusted to him. Because of the inherent character of the attorney-client relationship, it has been jealously guarded and restricted to only the parties involved. For example, so personal and highly confidential is the relationship and so personal are the services performed by the attorney that his authority, in the absence of exceptional justifying circumstances, is not delegable to other counsel without the client's permission; thus, he cannot substitute another attorney in his place by assigning a contract with the client while services are still being rendered thereunder. (See Taylor v. Black Diamond Coal M. Co., 86 Cal. 589, 590, 25 P. 51.) Another example is the early denial in California of liability of an attorney in tort or contract to an intended beneficiary injured by a negligently drawn will (Buckley v. Gray, 110 Cal. 339, 42 P. 900).[10] Not until Biakanja v. Irving, 49 Cal.2d 647, 320 P.2d 16 and Lucas v. Hamm, 56 Cal.2d 583, 15 Cal.Rptr. 821, 364 P.2d 685, was the scope of the liability of an attorney enlarged by recognition of a cause of action in tort for negligence or for breach of contract in those intended beneficiaries; the Supreme Court reasoned that such extension of liability 'does not place an undue burden on the profession, particularly when we take into consideration that a contrary conclusion would cause the innocent beneficiary to bear the loss.' (P. 589, 15 Cal.Rptr. p. 824, 364 P.2d p. 688.)

By retaining defendant-attorneys to represent her in connection with her status and personal and property rights arising out of dissolution of her marriage, there was created the professional relationship of attorney-client between defendants and plaintiff's assignor which defined the scope of reciprocal rights and duties of the parties. The attorneys' duty to their client arising out of their professional employment was a personal one running solely to her (**87 Norton v. Hines, 49 Cal.App.3d 917, 920, 123 Cal.Rptr. 237). An attorney has but one intended beneficiary, his client (see DeLuca v. Whatley, 42 Cal.App.3d 574, 576, 117 Cal.Rptr. 63 (duty to defend client accused of crime)), and no one other than plaintiff's assignor was intended to be benefitted by defendants' performance[11] (*397 Donald v. Garry, 19 Cal.App.3d 769, 771, 97 Cal.Rptr. 191). However, the personal nature of the duty owed to the client does not perforce convert the breach thereof to a 'tort of a purely personal nature' on a par with those wrongs done to the person of the injured party or his reputation or feelings which fall within the exception to the general rule of assignability; but neither does the damage alleged to be a direct consequence of defendants' negligent breach of duty convert it to a claim 'for property damages' arising out of a 'non-personal tort' that is freely assignable.

It is the unique quality of legal services, the personal nature of the attorney's duty to the client and the confidentiality of the attorney-client relationship that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment. The assignment of such claims could relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who have never had any prior connection with the assignor or his rights. The commercial aspect of assignability of choses in action arising out of legal malpractice is rife with probabilities that could only debase the legal profession. The almost certain end result of merchandizing such causes of action is the lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members of the legal profession, generate an increase in legal malpractice litigation, promote champerty and force attorneys to defend themselves against strangers. The endless complications and litigious intricacies arising out of such commercial activities would place an undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.

Public policy encourages those who believe they have claims to solve their problems in a court of law and secure a judicial adjustment of their differences. The California Supreme Court has emphatically rejected the concept of self help (i.e., Daluiso v. Boone, 71 Cal.2d 484, 492, 78 Cal.Rptr. 707, 455 P.2d 811 (policy against self help in land disputes)). However, the ever present threat of assignment and the possibility that ultimately the attorney may be confronted with the necessity of defending himself against the assignee of an irresponsible client who, because of dissatisfaction with legal services rendered and out of *398 resentment and/or for monetary gain, has discounted a purported claim for malpractice by assigning the same, would most surely result in a selective process for carefully choosing clients thereby rendering a disservice to the public and the profession.

That assignability of the legal malpractice chose in action would be contrary to sound public policy is supported by many considerations based upon the nature of the services rendered by the legal profession. An analogous situation is found in the court's early refusal to recognize a naked right of action for fraud and deceit as a marketable commodity, holding that assignment of a bare right to complain of fraud[12] **88 is contrary to public policy (Whitney v. Kelly, 94 Cal. 146, 148, 29 P. 624). In Sanborn v. Doe, 92 Cal. 152, 28 P.

105, the court quoted from Dickinson v. Seaver, 44 Mich. 624, 7 N.W. 182: "The present complainant, according to his own proofs, has merely purchased claims for the purpose of this litigation, or of some litigation. He was never defrauded. It would be against every rule of equity to allow a party to buy up stale claims, and then seek to establish fraud committed against his assignors. A right to complain of fraud is not assignable . . .." (92 Cal. p. 154, 28 P. p. 106.)

The judgment is affirmed.

WOOD, P.J., and THOMPSON, J., concur.

Parallel Citations

62 Cal.App.3d 389

Footnotes

1 The minute order reads in part: 'A review of all papers filed herein establishes there are no triable issues of material fact existing as to these parties, and Moving party is entitled to judgment as a matter of law. The action is without merit in that the cause of action is predicated on a tort (i.e., malpractice) and plaintiff is the assignee of the person who allegedly was the victim of malpractice, and causes of action for tort cannot be assigned. (Pacific Gas & Electric v. Nakano, 12 Cal.2d 711, 713 (,87 P.2d 700).)'

2 We adhere to the foregoing even though demurrer to the first amended complaint was overruled.

3 The court in Fazio v. Hayhurst, 247 Cal.App.2d 200, at page 202, 55 Cal.Rptr. 370 at page 371 (overruled on other grounds in Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal.3d 176, 190, 98 Cal.Rptr. 837, 491 P.2d 421) stated: 'It is established in this state that a cause (of action) for damages arising out of an attorney's malpractice survives his death (citation) . . ..' (See also 65 A.L.R.2d 211, 216.) No authority that such cause of action may be assigned by the client has been called to our attention.

4 'A thing in action is a right to recover money or other personal property by a judicial proceeding.'

5 'A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. . . .'

6 (Fifield Manor v. Finston, 54 Cal.2d 632, 639, 642, 7 Cal.Rptr. 377, 354 P.2d 1073; Washington v. Washington, 47 Cal.2d 249, 254, 302 P.2d 569; Pacific Gas & Elec. Co. v. Nakamo, 12 Cal.2d 711, 713, 87 P.2d 700; Jackson v. Deauville Holding Co., 219 Cal. 498, 500, 27 P.2d 643; Morris v. Standard Oil Co., 200 Cal. 210, 252 P. 605; McCafferty v. Golbank, 249 Cal.App.2d 569, 574, 57 Cal.Rptr. 695; Franklin v. Franklin, 67 Cal.App.2d 717, 726, 155 P.2d 637; Auslen v. Thompson, 38 Cal.App.2d 204, 214, 101 P.2d 136; Cassetta v. Del Frate, 116 Cal.App. 255, 257.)

7 (Reichert v. General Ins. Co., 68 Cal.2d 822, 834, 69 Cal.Rptr. 321, 442 P.2d 377; Webb v. Pillsbury, 23 Cal.2d 324, 327, 144 P.2d 1; Jackson v. Deauville Holding Co., 219 Cal. 498, 500, 27 P.2d 643; Wikstrom v. Yolo Fliers Club, 206 Cal. 461, 463, 274 P. 959; Rued v. Cooper, 109 Cal. 682, 693, 34 P. 98; Los Angeles Fire & Police Protection League v. Rodgers, 7 Cal.App.3d 419, 425, 86 Cal.Rptr. 623; Franklin v. Franklin, 67 Cal.App.2d 717, 726, 155 P.2d 637; Everts v. Will S. Fawcett Co., 24 Cal.App.2d 213, 215, 74 P.2d 815.)

8 (Sec. 954, Civ.Code; Reichert v. General Ins. Co., 68 Cal.2d 822, 834, 69 Cal.Rptr. 321, 442 P.2d 377; Trubowitch v. Riverbank Canning Co., 30 Cal.2d 335, 339, 182 P.2d 182.)

9 (Webb v. Pillsbury, 23 Cal.2d 324, 327, 144 P.2d 1 (statutory right of administrator of insolvent estate to set aside fraudulent conveyance for benefit of creditors); Jackson v. Deauville Holding Co., 219 Cal. 498, 500, 27 P.2d 643 (property (money) obtained by fraudulent representation); Morris v. Standard Oil Co., 200 Cal. 210, 214, 252 P. 605 (property injury to employer); Lehmann v. Schmidt, 87 Cal. 15, 22, 25 P. 161 (conversion of personal property); Moore v. Massini, 32 Cal. 590, 594 (trespass); Smith v. Stuthman, 79 Cal.App.2d 708, 709, 181 P.2d 123 (slander of title); Michal v. Adair, 66 Cal.App.2d 382, 388, 152 P.2d 490 (creditors cause of action to set aside fraudulent conveyance); Miller v. Bank of America, 52 Cal.App.2d 512, 515, 126 P.2d 444 (conversion); Auslen v. Thompson, 38 Cal.App.2d 204, 214, 101 P.2d 136 (fraudulent sale of corporate stock); Staley v. McClurken, 35 Cal.App.2d 622, 625, 96 P.2d 805 (conversion of personal property); Stapp v. Madera Canal & Irr. Co., 34 Cal.App. 41, 46, 166 P. 823 (damages to realty).)

10 Said the court in Buckley v. Gray, 110 Cal. 339 at pages 342—343, 42 P. 900 at page 900: '. . . the rule is universal that for an injury arising from mere negligence, however gross, there must exist between the party inflicting the injury and the one injured some privity, by contract or otherwise, by reason of which the former owes some legal duty to the latter.'

11 This is not a case of an attorney's liability to an intended beneficiary as in Heyer v. Flaig, 70 Cal.2d 223, 74 Cal.Rptr. 225, 449 P.2d 161 and Lucas v. Hamm, 56 Cal.2d 583, 15 Cal.Rptr. 821, 364 P.2d 685.

12 Where the form of assignment to plaintiff is sufficient to cover the property rights and claims of his assignors in and to the moneys or property so obtained by fraud and deceit, it constitutes a transfer of more than a mere naked right of action for fraud and deceit, since it includes also the right to recover the moneys or property so obtained. (Jackson v. Deauville Holding Co., 219 Cal. 498, 502—503, 27 P.2d 643.)

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2013 WL 5925732 (S.C.Com.Pl.) (Trial Order)
Court of Common Pleas of South Carolina.
Ninth Judicial Circuit
Charleston County

PAVILION DEVELOPMENT CORP. & Larry Mcnair, Plaintiffs,

v.

NEXSEN PRUET, LLC, Defendant,

v.

DC & SONS, LLC, Counterclaim Defendant.

No. 2011CP1005774.
October 9, 2013.

Order

J.C. Nicholson, Jr., Judge.

***1** This matter is before the Court on Defendant Nexsen Pruet LLC's motion for summary judgment. Nexsen Pruet seeks an order granting summary judgment in its favor as to all causes of action in the complaint and counterclaim on the ground that this case is proceeding pursuant to an assignment of a legal malpractice claim that is void as against public policy.

The motion was heard on March 13, 2013. Elizabeth Van Doren Gray and Tina Cundari of Sowell Gray Stepp & Laffitte, LLC, appeared on behalf of Nexsen Pruet. Andrew K. Epting, Jr., and George Kefalos appeared on behalf of Pavilion Development Corporation and Larry McNair (Plaintiffs) and on behalf of Counterclaim Defendant DC & Sons, LLC (DC & Sons). After considering the arguments presented by counsel and the written memoranda filed, the Court grants Nexsen Pruet's motion for summary judgment. The Court finds that this case, although brought in the name of Plaintiffs, is proceeding pursuant to an assignment of a legal malpractice claim from Plaintiffs to DC & Sons. The Court concludes the assignment in this case is void as against public policy because it is an assignment between adversaries in litigation. Judgment is entered in favor of Nexsen Pruet.

BACKGROUND

This is a legal malpractice case. Pavilion Development Corporation and Larry McNair have sued Nexsen Pruet, LLC for legal malpractice that allegedly arose in litigation between Plaintiffs and DC & Sons. The litigation between Plaintiffs and DC & Sons began in 2007, when Plaintiffs sued DC & Sons for specific performance of a contract to purchase a piece of property at Shem Creek. [Compl. ¶ 13.] At the same time that they filed the complaint, Plaintiffs filed a notice of lis pendens. *Id.* Plaintiffs subsequently amended the complaint, dropping the cause of action for specific performance and pursuing claims for breach of contract and an equitable lien only. [Compl. ¶ 22.] Plaintiffs maintained the lis pendens, however, which DC & Sons alleged constituted an abuse of process. [Compl. ¶¶ 15, 23, 25.]

Plaintiffs were represented by Nexsen Pruet from the beginning of the case until April 2009, when Nexsen Pruet was permitted to withdraw as counsel by order of the court. [Wallace Aff., Jan. 14, 2013, ¶¶ 3, 6, 7.] The court permitted Nexsen Pruet to withdraw as counsel because Nexsen Pruet's lawyers had become witnesses to the facts of the case due to the allegations of abuse of process. [Id. ¶¶ 6, 7.] Attorney Dan David was substituted as counsel for Plaintiffs. [Wallace Aff., Oct. 19, 2011, ¶¶ 7, 8.] DC & Sons was represented throughout the case by Andrew K. Epting, Jr., and George Kefalos, who represent DC & Sons in this action as well. [Wallace Aff., Jan. 14, 2013, ¶ 4.]

On January 18, 2011, nearly twenty-one months after Nexsen Pruet withdrew as counsel, Plaintiffs and DC & Sons settled the case. [Exs. A and B, Nexsen Pruet's Mem. in Supp. of Summ. J.] The settlement was reached during a court recess on what was to be the first day of J trial. [Ex. B, Nexsen Pruet's Mem. in Supp. of Summ. J., Jan. 18, 2011, Hr'g Tr. p. 14.] The recess was taken after DC & Sons argued its motion for summary judgment. *Id.* at pp. 13, 14. The trial judge stated that he intended to enter judgment in favor of DC & Sons. *Id.* The parties asked for time to see if they could reach an agreement. *Id.*

The Settlement

*2 The terms of the settlement reached between Plaintiffs and DC & Sons are as follows. First, Pavilion Development Corporation (Pavilion) confessed judgment in favor of DC & Sons for $4,580,015.93. [Ex. A, Nexsen Pruet's Mot. for Summ. J.] In exchange, Plaintiffs received a release of personal liability of Larry McNair and Lowell Frazier, the principals of Pavilion, and a waiver of trial against Pavilion on punitive damages. *Id.* Second, the parties entered into an agreement in which Plaintiffs assigned to DC & Sons all proceeds from a case to be brought against Nexsen Pruet for legal malpractice and breach of fiduciary duty, as well as the right to elect to own the claims themselves. *Id.* Plaintiffs also gave DC & Sons the right to control the litigation, including trial, appeal, settlement, and the waiver of the attorney-client and work-product privilege with Nexsen Pruet. *Id.*

The pertinent terms of the agreement are as follows:

· "Pavilion and McNair assign to DC & Sons all proceeds from a suit or suits to be filed by Pavilion and McNair against its counsel Nexsen Pruet and all other responsible parties."

· "At DC & Sons election Pavilion and McNair assign all claims to include [breach] of contract, breach of fid[uciary] duty, professional negligence, etc."

· "Further, Pavilion and McNair place full control of the said litigation in the hands of DC & Sons, to include the handling of the litigation, trial, appeal, settlement, and the waiver of the attorney-client and work-product privilege with the Nexsen Pruet firm."

· "Further, Pavilion and McNair agree to cooperate in the prosecution of this action and to pursue the litigation as if they retained the right to all proceeds."

· "The cost of the litigation will be borne by DC & Sons alone."

· "Pavilion and McNair acknowledge [that the] suit will be brought in their names."

· "Pavilion and McNair direct that the earnest money [$50,000] plus interest shall be turned over to DC & Sons and their counsel."

· "DC & Sons agree that in the event of a settlement or judgment that the first $250,000 will be split equally between DC & Sons and Pavilion and McNair so as to defray their defense cost and compensation for loss of business and emotional distress. All further funds shall be for the benefit of DC & Sons."

Id.

After reaching an agreement, the parties went back on the record. [Ex. B, Nexsen Pruet's Mem. in Supp. of Summ. J., Hr'g Tr., Jan. 18, 2011, p. 14.] Counsel for DC & Sons announced to the court that the case had been settled. *Id.* Counsel for DC & Sons summarized the terms of the settlement by stating that "the effective deal is Mr. McNair is relieved from liability," and that Pavilion confessed judgment in the amount of $4,580,015.93, which according to counsel for DC & Sons, represented the actual damages to DC & Sons. *Id.* When the court asked how the amount was determined, counsel for DC & Sons provided an explanation "from memory," without submitting any evidence or testimony. *Id.* at pp. 15-16. Although counsel for DC & Sons told the court that claims and proceeds had been assigned to DC & Sons, he did not say which claims or which proceeds, and did not tell the court that the assignment was an assignment to DC & Sons of all proceeds from a legal malpractice case to be brought against Nexsen Pruet, and that it gave DC & Sons full control over the litigation, including the right to elect to own the very claims themselves. *Id.* at p. 14.

When the trial judge asked counsel for DC & Sons how the assignment should be reflected in the Form 4 order, counsel for DC & Sons stated that the assignment was handwritten and did not need to be reflected in the Form 4 Order. *Id.* at p. 17. The court then suggested that the Form 4 Order state merely that the case has been settled and the amount of damages was put on the record. *Id.* at pp. 17-18. Counsel for DC & Sons agreed. *Id.* at p. 18.

The Present Case

*3 As contemplated in the agreement between Plaintiffs and DC & Sons, Nexsen Pruet has now been sued for legal malpractice and breach of fiduciary duty. [Compl.] The case was filed on August 16, 2011, and has been brought in the names of Pavilion Development Corporation and Larry McNair. *Id.* The assignment was not attached to or otherwise referenced in the complaint. *Id.* Plaintiffs are now represented by Andrew K. Epting, Jr., and George J. Kefalos, the very same lawyers who represented DC & Sons in the litigation between Plaintiffs and DC & Sons, and who represent DC & Sons in this action. *Id.*

Nexsen Pruet answered the complaint and asserted a counterclaim for declaratory judgment against Plaintiffs and a new party, DC & Sons, which was added to the case by Nexsen Pruet as a counterclaim defendant. [Ans. & Countercl.] Among other things, the counterclaim seeks an order declaring the assignment void as against public policy. Plaintiffs and DC & Sons moved to dismiss the counterclaim. [Mots, to Dismiss, Nov. 2, 2011, and Nov. 21, 2011.] Following a hearing, the court denied the motions to dismiss, allowing the counterclaim against Plaintiffs and DC & Sons to proceed. [Order, Apr. 26, 2012.]

On January 14, 2013, Nexsen Pruet filed a motion for summary judgment arguing, among other things, that judgment should be entered in favor of Nexsen Pruet as to all causes of action in the complaint and counterclaim on the basis that this case is proceeding pursuant to an assignment of a legal malpractice claim that is void as against public policy.

STANDARD

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a factfinder." *Singleton v. Sherer*, 377 S.C. 185, 197-98, 659 S.E.2d 196, 203 (Ct. App. 2008). Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

"In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010). "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings." *Singleton, 311* S.C. at 197-98, 659 S.E.2d at 203. "The nonmoving party must come forward with specific facts showing there is a genuine issue for trial." *Id.* at 198, 659 S.E.2d at 203.

An assignment is a contract, and the question of whether it is void as against public policy is a question of law. ("The interpretation of a contract is an action at law."). *See also Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163, 167 (Conn. 2005) ("The question of whether an assignment is barred as a matter of public policy is an issue of law."); *Comet Energy Servs., LLC* *v. Powder River Oil & Gas Ventures, LLC*, 185 P.3d 1259, 1261 (Wyo. 2008) ("Assignments are contracts and are construed according to the rules of contract interpretation.").

LAW / ANALYSIS

Nexsen Pruet contends that summary judgment should be granted in its favor as to all causes of action in the complaint and counterclaim because this case is proceeding pursuant to an assignment of a legal malpractice claim that is void as against public policy. Nexsen Pruet further contends that the circumstances under which this case arose are tainted with collusion, and the taint cannot be cured by simply striking the assignment and allowing the case to proceed as filed. The Court agrees.

I. Assignment of Legal Malpractice Claims

A. Law

***4** South Carolina appellate courts have not addressed the question of whether a legal malpractice claim is assignable. Courts in other jurisdictions have.

1. The majority view

The majority view is that legal malpractice claims are not assignable because they are void as against public policy. The following states have adopted the majority view: **Arizona,** *Botma v. Huser*, 39 P.3d 538 (Ariz. Ct. App. 2002); **California,** *Goodley v. Wank & Wank, Inc.*, 133 Cal. Rptr. 83 (Cal. Ct. App. 1976); **Colorado,** *Roberts v. Holland & Hart*, 857 P.2d 492 (Colo. Ct. App. 1993); **Florida,** *Law Office of David J. Stern v. Sec. Nat'l Servicing Corp.*, 969 So.2d 962 (Fla. 2007); **Illinois,** *Wilson v. Cornet Ins. Co.*, 689 N.E.2d 1157 (Ill. 1997), *but see Learning Curve Intern., Inc. v. Seyfarth Shaw LLP*, 911 N.E.2d 1073 (Ill. App. 2009) (allowing an assignment as part of a transfer of assets in a merger); **Indiana,** *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338 (Ind. 1991) and *State Farm Fire Mut. Auto Ins. Co. v. Estep*, 873 N.E.2d 1021 (Ind. 2007); **Kansas,** *Bank IV Wichita, Nat'l Ass'n v. Am. Mullins, Unruh, Kuhn & Wilson*, 827 P.2d 758 (Kan. 1992); **Kentucky,** *Davis v. Scott*, 320 S.W.3d 87 (Ky. 2010) and *Coffey v. Jefferson County Bd. of Educ*, 756 S.W.2d 155 (Ky. Ct. App. 1988); **Michigan,** *Joos v. Drillock*, 338 N.W.2d 736 (Mich. Ct. App. 1983); **Minnesota,** *Wagener v. McDonald*, 509 N.W.2d 188 (Minn. Ct. App. 1993); **Missouri,** *Freeman v. Basso*, 128 S.W.3d 138 (Mo. Ct. App. 2004); **Nebraska,** *Earth Science Laboratories, Inc. v. Adkins and Wondra, P.C.*, 523 N.W.2d 254 (Neb. 1994); **Nevada,** *Chaffee v. Smith*, 645 P.2d 966 (Nev. 1982); **New Jersey,** *Alcman Servs. Corp. v. Samuel H. Bullock, P.C.*, 925 F. Supp. 252 (D.N.J. 1996) *aff'd, 12A* F.3d 185 (3d Cir.1997); **Tennessee,** *Can Do, Inc. Pension & Profit Sharing Plan v. Manier, Herod, Hollabaugh & Smith*, 922 S.W.2d 865 (Tenn. 1996); **Virginia,** *MNC Credit Corp. v. Sickels*, 497 S.E.2d 331 (Va. 1998); **West Virginia,** *Delaware CWC Liquidation Corp. v. Martin*, 584 S.E.2d 473 (W. Va. 2003). *See also* 6 Am. Jur. 2d *Assignments* § 57 (2012) ("Most jurisdictions have held that legal malpractice claims are nonassignable."). **North Carolina** recently adopted the majority view. *Revolutionary Concepts, Inc. v. Clements Walker PLLC*, __ S.E.2d ___, 2013 WL 1876777 (N.C. Ct. App. May 7, 2013).

Several public policy reasons have been recognized for prohibiting such assignments. "Most courts view the unique personal nature of the relationship between an attorney and his client to be the most compelling public policy reason for prohibiting the assignment of legal malpractice claims." *Delaware CWC Liquidation Corp. v. Martin*, 584 S.E.2d 473 (W. Va. 2003). Assignments of legal malpractice claims are incompatible with the duty of loyalty and duty of confidentiality owed by attorneys to their clients, and "the unique and personal nature of the relationship between an attorney and a client and the need to preserve the sanctity of that relationship" counsel against permitting such assignments. *Gurski v. Rosenblum & Filan*, LLC, 885 A.2d 163 (Conn. 2005). Assignments of legal malpractice claims "relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who have never had any prior connection with the assignor or his rights." *Goodley v. Wank& Wank, Inc.*, 133 Cal. Rptr. 83, 87 (Cal. Ct. App. 1976).

*5 Additional reasons cited for prohibiting the assignment of legal malpractice claims are that they "place an undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client." *Id.* Allowing legal malpractice claims to be assigned "would encourage the commercialization of such claims and in turn spawn increased and unwarranted malpractice actions." *Gurski*, 885 A.2d at 170. Finally, allowing such assignments "would make attorneys hesitant to represent insolvent, underinsured or judgment proof defendants for fear that the malpractice claims would be used as tender." *Id.*

2. The minority view

A minority of jurisdictions have declined to adopt a *per se* bar against the assignment of legal malpractice claims but have instead taken a case-by-case approach in evaluating whether a particular assignment is void. These include **Connecticut,** *Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163 (Conn. 2005); **District of Columbia,** *Richter v. Analex Corp.*, 940 F. Supp. 353 (D.D.C. 1996); **Georgia,** *Villanueva v. First Am. Title Ins. Co.*, 740 S.E.2d 108, 111 (Ga. 2013)1 **Maine,** *Thurston v. Cont'l Cas. Co.*, 567 A.2d 922 (Me. 1989); **Massachusetts,** *New Hampshire Ins. Co., Inc. v. McCann*, 707 N.E.2d 332 (Mass. 1999); **New York,** *Vitale v. City of New York*, 183 A.D.2d 502, (N.Y. App. Div. 1992); **Oregon,** *Gregory v. Lovlien*, 26 P.3d 180 (Or. Ct. App. 2001); **Pennsylvania,** *Hedlund Mfg. Co. v. Weiser, Stapler & Spivak*, 539 A.2d 357 (Pa. 1988); **Rhode Island,** *Cerberus Partners, L.P. v. Gadsby & Hannah*, 728 A.2d 1057 (R.I. 1999); Texas, *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313 (Tex. App. 1994); and **Washington,** *Kommavongsa v. Haskell*, 67 P.3d 1068, 1078 (Wash. 2003). *See also St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani*, 293 P.3d 661 (Idaho 2013) (holding that "while legal malpractice claims are generally not assignable, where the legal malpractice claim is transferred to an assignee in a commercial transaction, along with other business assets and liability, such a claim is assignable.").

3. Assignments between adversaries in litigation.

Although there is division among courts as to whether to adopt an absolute bar against the assignment of legal malpractice claims or to take a case-by-case approach, courts uniformly hold that assignments between adversaries in litigation in which the alleged legal malpractice arose are void as against public policy. *See, e.g., Kim v. O'Sullivan*, 137 P.3d 61 (Ct. App. Wash. 2006) ("A client may not assign a claim of attorney malpractice to his adversary in the litigation out of which the alleged malpractice arose."); *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313 (Tex. Ct. App. 1994) ("It is one thing for lawyers in our adversary system to represent clients with whom they personally disagree; it is something quite different for lawyers (and clients) to switch positions concerning the same incident simply because an assignment and the law of proximate cause given them a financial interest in switching."); *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338 (Ind. 1991) (citing the "disreputable public role reversal that would result during the trial" if assignments between adversaries were permitted), *abrogated on other grounds by Liggett v. Young*, 877 N.E.2d 178 (Ind. 2007); *Coffey v. Jefferson Cnty. Bd. of Educ*, 756 S.W.2d 155 (Ky. Ct. App. 1988) (holding an assignment to an adversary void as against public policy and the entire transaction involving a confession of judgment "so collusive that same should be held to be against public policy"). This is true even in states that have adopted the minority, case-by-case approach. *See Kommavongsa v. Haskell*, 67 P.3d 1068, 1078 (Wash. 2003) ("In sum, we can see no advantage flowing to the legal system or the public that it serves from permitting assignments of malpractice claims to adversaries in the same litigation that gave rise to the alleged malpractice.").

*6 There are several reasons for prohibiting assignments between adversaries in litigation in which the alleged legal malpractice arose. To begin, the "counterintuitive claim and reversal of roles, requiring the assignee to bring a claim for legal malpractice when she was the very party who benefited from that malpractice in the underlying litigation, would engender a perversion that would erode public confidence in the legal system." *Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163, 174 (Conn. 2005). Additionally, assignments between adversaries provide an "opportunity and incentive for collusion in stipulating to damages in exchange for a covenant not to execute judgment in the underlying litigation." *Kommavongsa*, 67 P.3d at 1078.

"[S]uch a stipulated judgment cannot properly serve as an indication of the actual damages, if any there were, as a result of the legal malpractice." *Id.* (citing *Coffey*, 756 S.W.2d at 156-57).

As one court has explained:

A party should not be permitted to transmute a claim against a penniless adversary into a claim against the adversary's wealthier lawyer based on the lawyer's supposed negligence towards the adversary. A legal malpractice action is not a commodity to be sold to a bidder who has never even had a relationship with the lawyer. The decision to bring a legal malpractice action "is one peculiarly vested in the client." ... There is, in addition, a high risk that the plaintiff and defendant in the underlying litigation will collude to the detriment of the defendant's lawyer.

If assignments were permitted, we suspect that they would become an important bargaining chip in the negotiation of settlements.

Alcman Servs. Corp. v. Bullock, P.C., 925 F. Supp. 252, 258 (D.N.J. 1996) (internal citations omitted).

Further, "[a] defendant who can assign his or her legal malpractice claim in exchange for a covenant not to enforce a judgment in the underlying litigation would have little incentive to seriously litigate the amount of damages allegedly arising from his or her negligence." *Kommavongsa*, 67 P.3d at 1078. Additionally, "to permit such assignments would make lawyers hesitant to accept the defense of defendants who are judgment-proof or nearly so, and who are uninsured or underinsured." *Id.* Moreover, because legal malpractice cases present a "trial within a trial," an assignment to an adversary "arising from the same litigation that gave rise to the malpractice claim would lead to abrupt and shameless shift of positions that would give prominence (and substance) to the perception that lawyers will take any position, depending upon where the money lies, and that litigation is a mere game and not a search for truth, thereby demeaning the legal profession." *Id.*

Finally, courts have expressly denounced the scenario where a party confesses judgment in favor of his adversary and then assigns to his adversary the right to sue the party's lawyer for legal malpractice. *See Wagener v. McDonald*, 509 N.W.2d 188 (Minn. Ct. App. 1993) (describing the assignment and confession scenario as a "contrived and elaborate scheme" that has been denounced by other courts); *Coffey v. Jefferson Cnty. Bd. of Educ*, 756 S.W.2d 155 (Ky. Ct. App. 1988) (referring to a settlement involving an assignment of a legal malpractice claim to an adversary and a confession of judgment as a "contrived and elaborate scheme" that is "so collusive that same should be held to be against public policy").

B. Analysis

The present case involves a confession of judgment and an assignment of a legal malpractice claim between adversaries in litigation in which the alleged legal malpractice arose. To settle the litigation with DC & Sons, Pavilion confessed judgment in the amount $4,580,015.93 in exchange for a release of personal liability as to Pavilion's principals, Larry McNair and Lowell Frazier. Pavilion did so without challenging the amount or requiring DC & Sons to present evidence to support it. Plaintiffs then assigned to DC & Sons all proceeds from a case to be brought against Nexsen Pruet for legal malpractice and breach of fiduciary duty, and assigned the right to elect to own the claims themselves. Plaintiffs gave DC & Sons complete control over the malpractice case, including the trial, appeal, and settlement, and the power to waive the attorney-client privilege and work-product protection. Plaintiffs agreed to cooperate in the prosecution of the malpractice case and to pursue the litigation as if they retained the right to the proceeds. Plaintiffs acknowledged that the suit would be brought in their names but that the cost of the litigation would be borne by DC & Sons alone.

***7** This scenario has been expressly denounced by other courts, and the Court denounces it here. Plaintiffs and DC & Sons have converted the legal malpractice action into a commodity to be exploited and transferred to an economic bidder (DC & Sons) that Nexsen Pruet has never represented or owed any legal duties to. By placing full control of the litigation against Nexsen Pruet in the hands of DC & Sons and their counsel, including the right to waive the attorney-client privilege between Plaintiffs and Nexsen Pruet, Plaintiffs have brought embarrassment to the attorney-client relationship and have imperiled the sanctity of the highly confidential and fiduciary nature of the relationship. The assignment spawned this litigation, which appears to have been brought for the purpose of collecting a judgment confessed rather than remedying a wrong. Accordingly, the Court concludes that the assignment is void as against public policy.

In their opposition to Nexsen Pruet's motion for summary judgment, Plaintiffs do not defend the validity of the assignment or argue that it is not void as against public policy. Instead, Plaintiffs argue that they have not assigned the claims to DC & Sons, but rather have assigned only a portion of the proceeds, and argue that they remain the real parties in interest. This is contrary to the plain language of the assignment.

According to the plain language of the assignment, the proceeds have been assigned to DC & Sons. The assignment states: "Pavilion and McNair assign to DC & Sons *all proceeds* from a suit or suits to be filed by Pavilion and McNair against its counsel Nexsen Pruet and all other responsible parties." [Ex. A, Nexsen Pruet's Mot for Summ. J.] The assignment also states: "[Pavilion and McNair] agree to cooperate in the prosecution of this action and to pursue the litigation *as if they retained the right to all proceeds." Id.* There is nothing unclear or ambiguous about the language in the assignment. Additionally, the assignment states: "At DC & Sons election, Pavilion and McNair assign all claims to include [breach] of contract, breach of fid[uciary] duty, professional negligence, etc." *Id.* This "right to elect" reinforces the fact that DC & Sons is in control and has the right at any time and without any notice to own the very claims themselves. DC & Sons simply has to say when.

The fact that DC & Sons agreed to give half of the first $250,000 received in its pursuit of this action to Plaintiffs does not change the fact that DC & Sons owns the right to the proceeds. DC & Sons has simply agreed to allocate the proceeds in a way that gives Plaintiffs some nominal interest in the case, in an attempt to avoid the conclusion that an assignment of a legal malpractice claim has occurred. At most, Plaintiffs stand to receive $125,000 - $50,000 of which represents the money they have already directed to be paid to DC & Sons in settlement of the prior case - when there is allegedly $4,580,015.93 at stake. Plaintiffs' interest represents 2.7% of the total damages alleged. When the $50,000 in earnest money is taken into account, Plaintiffs' interest diminishes to 1.637%. This is far less than the interest held by assignors in other cases, and yet the courts in those cases have held that an illegal assignment had occurred. *See Davis v. Scott*, 320 S.W.3d 87 (Ky. 2010) (holding that an illegal assignment had occurred even though the assignor retained a 20% interest in the proceeds); *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627 (Tex. App. 2000) (holding that an assignment had occurred even though the assignor retained a 10% interest in any net recovery). Accordingly, the Court concludes that DC & Sons is the party that has the real, actual, material, and substantial interest in this case.

Moreover, the control that DC & Sons has over this case overcomes Plaintiffs' argument that only a portion of the proceeds has been assigned. Similar arguments have been made in other courts and rejected. For example, in one case the plaintiffs, conceding that Arizona law would not permit the assignment of the claim itself and in an effort to circumvent the prohibition, argued that only the proceeds of the action had been assigned, and not the cause of action itself. *Botma v. Huser*, 39 P.3d 538 (Ariz. Ct. App. 2002). In rejecting this argument, the court stated:

> ***8** Whatever the form, whatever the label, whatever the theory, the result is the same. The policies create an interest in any recovery against a third party for bodily injury. Such an arrangement, if made or contracted for prior to settlement or judgment, is the legal equivalent of an assignment and therefore unenforceable.

Id. at 542.

Similarly, in another case, the plaintiff argued that only the proceeds had been assigned and that an assignment of the malpractice claim itself had not occurred. *Davis v. Scott*, 320 S.W.3d 87 (Ky. 2010). But after examining the substance of the agreement, the court disagreed. In holding that the legal malpractice claim had been assigned, the court stated:

This level of control over a lawsuit is consistent with an assignment of the entire cause of action, not merely the proceeds of the litigation. The terms of this settlement agreement essentially placed the control of the malpractice suit in [the assignee's] hands and rendered [the assignor's] interest merely nominal. Though [the parties to the agreement] assert otherwise, what has occurred is an assignment not merely of the proceeds of the claim against [the lawyer], but of the entire claim itself.

Id. at 91 (internal citations omitted).

Applying this same principle of looking to the substance of the agreement, courts in other jurisdictions have reached similar conclusions. *See Kim v. O'Sullivan*, 137 P.3d 61 (Wash. App. 2006) (holding that an assignment of a legal malpractice claim had occurred because the assignee and his attorney were in complete control of the malpractice suit and only they would benefit from a settlement or judgment); *Gurski v. Rosenblum &Filan, LLC*, 885 A.2d 163 (Conn. 2005) (stating "we agree with those courts that have identified the 'meaningless distinction' between an assignment of a cause of action and an assignment of recovery from such an action, which distinction is made merely to circumvent the public policy barring assignments"); *Weiss v. Leatherberry*, 863 So.2d 368 (Fla. Dist. Ct. App. 2003) (recognizing that the rule prohibiting the assignment of legal malpractice claims "has been applied even in the absence of a formal assignment of the claim"); *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627 (Tex. App. 2000) (holding that an assignment had occurred despite the fact that the assignor retained a ten percent interest in any net recovery because the assignor gave his former adversary "absolute control over the litigation, including the unfettered right to settle the malpractice suit on such terms as [the adversary] determines").

Finally, Plaintiffs have all but admitted that an illegal assignment has occurred. On March 21, 2013, eight days after the hearing before this Court on Nexsen Pruet's motion for summary judgment, Plaintiffs and DC & Sons arranged a hearing before The Honorable Roger Young for the purpose of presenting an amended settlement agreement. [Tr. dated Mar. 21, 2013.] In the proposed amended settlement agreement, titled "Amended Agreement re: Assignment," Plaintiffs state: "the parties to the settlement wish to remove from the settlement the right of control by DC & Sons and to remove the right of assignment of proceeds or claims ...." [Ex. D, Pls.' Sur-Reply to Def. Nexsen Pruet's Mem. in Supp. of Summ. J.] By stating that the parties wish to remove the right of assignment of proceeds or claims, Plaintiffs appear to have conceded that the claims and proceeds have been assigned. Further, counsel's conduct of attempting to have another judge approve an amended settlement agreement after the hearing on the motion for summary judgment is a concession that the settlement agreement in its current form is illegal.

*9 Plaintiffs also contend that summary judgment is not appropriate because they have not had a full and fair opportunity to complete discovery. But there are no facts to be discovered that will impact the analysis of whether the assignment is void as against public policy. The assignment is a contract, and the question of whether it is void as against public policy is a question of law. *Alexander's Land Co., LLC v. M & M & K Corp.*, 390 S.C. 582, 592, 703 S.E.2d 207, 212 (2010) ("The interpretation of a contract is an action at law."). *See also Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163, 167 (Conn. 2005) ("The question of whether an assignment is barred as a matter of public policy is an issue of law."); *Comet Energy Servs., LLC v. Powder River Oil & Gas Ventures, LLC*, 185 P.3d 1259, 1261 (Wyo. 2008) ("Assignments are contracts and are construed according to the rules of contract interpretation.").

No facts or testimony can change the Court's conclusion that the agreement between Plaintiffs and DC & Sons is an assignment of a legal malpractice claim that is void as against public policy. The assignment says what it says. There is no genuine issue of material fact regarding the terms of the assignment or the circumstances under which it was entered. Plaintiffs have not presented any evidence to dispute the existence of the assignment or the circumstances under which it was entered.

Accordingly, the Court finds that Plaintiffs have assigned the legal malpractice claim against Nexsen Pruet to their adversary in the litigation in which the alleged legal malpractice arose. The Court concludes as a matter of law that the assignment is void as against public policy. The Court reaches this conclusion without deciding whether South Carolina courts should adopt the majority or minority rule. That is for the appellate courts to decide. Instead, the Court is guided by decisions in other jurisdictions - some of which have adopted the majority view, and some of which have adopted the minority view - that hold that assignments between adversaries in litigation in which the alleged legal malpractice arose are void as against public policy. The

Court is further persuaded by those courts that have expressly denounced scenarios like the one in the present case, involving a confession of judgment and an assignment.

The Court concludes that the assignment in this case is void as against public policy. Nexsen Pruet's motion for summary judgment is granted.

II. The Remedy

Plaintiffs argue that even if the assignment is void as against public policy, the proper remedy is to strike the assignment and to allow the case to proceed as pled and filed. Nexsen Pruet argues that the case is tainted with collusion and the taint cannot be cured by simply striking the assignment and allowing the case to proceed in its current form.

The Court finds that this case cannot simply proceed as filed because it was never filed by Plaintiffs in the first instance. Plaintiffs ceded all rights and control of the case to DC & Sons, including the right to determine whether to file the case in the first instance. The entire case has been controlled by DC & Sons and their counsel, who also represent Plaintiffs. Further, the facts and circumstances under which the assignment was entered created the opportunity for collusion, as did the conduct by counsel for Plaintiffs and DC & Sons following the hearing on the motion for summary judgment. Accordingly, the Court concludes that the appropriate remedy is to dismiss the case with prejudice.

A. Law

1. Dismissal with prejudice / Judgment in favor of law firm

Most courts that have addressed the question of whether an assignment of a legal malpractice claim is void as against public policy do not discuss the remedy. The courts either dismiss the case outright or enter summary judgment in favor of the law firm. *See, e.g., Gurski v. Rosenblum & Filan, LLC*, 885 A.2d 163, 167 (Conn. 2005) (dismissing the case outright and entering judgment in favor of the law firm); *Can Do, Inc. Pension & Profit Sharing Plan v. Manier, Herod, Hollabaugh & Smith*, 922 S.W.2d 865 (Tenn. 1996) (affirming dismissal of case brought pursuant to the illegal assignment); *Zuniga v. Groce, Locke &Hebdon*, 878 S.W.2d 313 (Tex. App. 1994); *Picadilly, Inc.* v. *Raikos*, 582 N.E.2d 338 (Ind. 1991) (affirming summary judgment in favor of the attorney or the law firm without addressing whether the client has the right to re-file the case), *abrogated on other grounds by Liggett v. Young*, 877 N.E.2d 178 (Ind. 2007); *Coffey v. Jefferson County Bd. of Educ*, 756 S.W.2d 155 (Ky. Ct. App. 1988) (same).

2. Dismissal without prejudice

***10** At least three courts that have addressed the remedy question have concluded that the case should be dismissed without prejudice. This is because cases born out of an illegal assignment are "tainted in some respect," and to allow them to proceed as filed would be "to wink at the rule against assignment of legal malpractice claims." *Davis v. Scott*, 320 S.W.3d 87, 92 (Ky. 2010) (quoting *Botma v. Huser*, 39 P.3d 538, 543 (Ariz. 2002)). In *Davis*, the court held that the proper remedy was dismissal without prejudice and stated that although the client did not forfeit the malpractice claim, "the current suit, born of the improper assignment, cannot be permitted to continue." 320 S.W.2d at 92. Accordingly, if the client decided to reassert his claim against the attorney, the client could do so "only upon showing that the attempted assignment is no longer in place and that he is the real party in interest." *Id.* In *Botma*, the court ruled that the case could not continue in the client's name because the client retained no interest in the lawsuit. 39 P.3d at 543. Any benefit that the client received in simply continuing the case would be used to pay the $12 million judgment confessed in favor of the client's adversary. *Id.*

Similarly, another court held that a case brought pursuant to illegal assignment should be dismissed without prejudice and that if the client wanted to re-file a malpractice claim against the law firm, the new case could not be controlled in any way by the party to whom the claims were initially assigned and the client could not be represented by attorneys associated with that party. *Edens Technologies, LLC v. Kile Goekjian Reed & McManus, PLLC*, 675 F. Supp. 2d 75, 86 (D.D.C. 2009). The court recognized that a dismissal without prejudice "does not eliminate the risk of collusion in future cases completely, but it does provide the client with more of an incentive to 'seriously litigate the amount of damages' in the underlying suit because now the client bears the risk of not recovering in the legal malpractice action." *Id.* "Furthermore, it eliminates the public and disreputable role reversals that have concerned many courts." *Id.*

B. Analysis

The Court finds that the circumstances under which the present case arose and has proceeded require the Court to dismiss the case with prejudice. The present case was filed by Plaintiffs in name only and without notice to the Court or to Nexsen Pruet that Plaintiffs assigned the proceeds and the claims to their adversary in the litigation in which the alleged legal malpractice arose. [Compl.] Although brought in Plaintiffs' name, the Court finds that the case has belonged to DC & Sons since its inception. As the owner of the claims and proceeds, and as the party with full control over the case, the Court finds that DC & Sons is responsible for every decision made in this case on behalf of Plaintiffs, including the choice of counsel, the filing and service of the complaint, the serving of discovery, and the filing of motions opposing all motions filed by Nexsen Pruet in the case, including the motion to disqualify counsel [1] and the present motion for summary judgment. The Court concludes that the case cannot proceed as pleaded because it was not brought by the client, Pavilion and McNair, in the first instance.

Moreover, the circumstances under which the assignment arose and the conduct of counsel for Plaintiffs and DC & Sons, indicate that the opportunity for collusion was present. The circumstances are as follows:

1. The settlement of the case between Plaintiffs and DC & Sons was reached during a court recess on what was to be the first day of trial after Plaintiffs learned that the trial court intended to grant DC & Sons's motion for summary judgment. [Ex. B, Nexsen Pruet's Mem. in Supp. of Summ. J., Hr'g Tr., Jan. 18, 2011.]

*11 2. During the court recess, Pavilion confessed judgment in favor of DC & Sons for $4.5 million without challenging the amount of damages or requiring DC & Sons to present evidence to support the amount confessed. [Exs. A and B, Nexsen Pruet's Mem. in Supp. of Summ. J.] In exchange, Plaintiffs obtained a full release of personal liability as to its principals, Larry McNair and Lowell Frazier. *Id.* At the same time, Plaintiffs assigned all proceeds in a case to be brought against Nexsen Pruet for legal malpractice and breach of fiduciary duty to DC & Sons and gave DC & Sons full control over the litigation, including the right to elect to own the claims themselves. *Id.* The assignment was drafted by counsel for DC & Sons. [Tr. 6:14-23, Mar. 13, 2013.]

3. Counsel for DC & Sons did not put all terms of the assignment on the record. [Ex. B, Nexsen Pruet's Mem. in Supp. of Summ. J., Hr'g Tr., Jan. 18, 2011.] Counsel did not tell Judge Young that the settlement included the assignment of a legal malpractice claim to be brought against Nexsen Pruet or that the legal malpractice case was to be controlled and funded by DC & Sons but brought in the names of Pavilion and McNair. *Id.*

4. Plaintiffs filed the present case against Nexsen Pruet without revealing the existence of the assignment. [Compl.] The existence of the assignment came to the Court's attention through the filing of the counterclaim by Nexsen Pruet. [Answer & Countercl.]

5. Counsel for Plaintiffs represented DC & Sons in the litigation between Plaintiffs and DC & Sons and also represent DC & Sons in the present case. [Wallace Aff., Jan. 14, 2013, ¶ 4.] This means that the lawyers who represented the adverse party in the case in which the alleged legal malpractice arose have now switched sides and represent the plaintiffs who were once adverse to their client. At the same time, the lawyers continue to represent DC & Sons, in whose favor the judgment was confessed.

6. Eight days after the hearing on Nexsen Pruet's motion for summary judgment regarding whether the assignment is void as against public policy, Plaintiffs and DC & Sons obtained a hearing before Judge Young without notice to Nexsen Pruet (or its

counsel) asking Judge Young to approve a proposed amended settlement agreement striking the assignment but keeping the confession of judgment in place. [Hr'g Tr., Mar. 21, 2013.]

7. After the hearing, Judge Young issued a Form 4 order and entered it in the present case, Case No. 2011-CP-10-05774. [Order, Mar. 21, 2013.] The order states: "The proposed Amended Settlement Agreement has been DISMISSED." *Id.* Thereafter, Nexsen Pruet filed the transcript from the hearing before Judge Young. [Not. of Filing Tr. of H'rg.]

8. According to the transcript, the attorneys present were Andrew K. Epting, Jr., George J. Kefalos, who represented DC & Sons in the litigation between Plaintiffs and DC & Sons and who represent both Plaintiffs and DC & Sons in the present case, and Dan David, who represented Plaintiffs in the prior litigation. [Hr'g Tr., Mar. 21, 2013.] The only attorneys who spoke on the record were Epting and Kefalos. *Id.* Dan David was silent. *Id*: Mr. Epting asked Judge Young to approve an amended agreement regarding the assignment of the legal malpractice claim to "put the control in the [malpractice suit] in McNair and Pavilion and to void the assignment." [Hr'g Tr. 4:6-8.] Mr. Kefalos stated:

I didn't want to have Judge Nicholson issue an order about the validity of this one way or another because then it would create some precedent in South Carolina about this thing, and my feeling was the best thing to do is just take it off the table and void the assignment so he doesn't have to decide and we'll give up - return the right to control back to Pavilion and we can move forward.

***12** [Hr'g Tr. 5:20 - 6:6.] Judge Young declined to approve the amended agreement, stating: "I'm a little concerned that you're asking the Court to do something to help you out in the position in another case and there is another party out there that has an interest in what we do here in that it affects their case." [Hr'g Tr. 6:8-12.] Further, Judge Young repeatedly stated that he was "uncomfortable" with what he was being asking to do and that his "inner alarms" were going off. [Hr'g Tr. 6:15-16, 21; 7:1, 13-14, 20-21; 8:14.]

9. In response to Requests for Admission served by Nexsen Pruet, Plaintiffs admit that Pavilion has not paid anything to satisfy the $4.5 million judgment. [Ex. C, Nexsen Pruet's Mem. in Supp. of Mot. for Summ. J.] Moreover, it does not appear that Pavilion is at risk of having to pay the judgment, given that its counsel has asked the Court to keep the confession of judgment in place. [Hr'g Tr. 34:3-7, Mar. 13, 2013.] In addition, counsel submitted a proposed amended agreement to Judge Young stating that Pavilion agrees that DC & Sons retains the judgment and all rights as judgment creditor. [Ex. D, Pls' Sur-Reply to Def. Nexsen Pruet's Mem. in Supp. of Summ. J.].

These circumstances lend further support to the Court's conclusion that the proper remedy is dismissal with prejudice. Plaintiffs have used the court system to litigate a claim they do not own, without revealing this important fact to the Court or to the defendant. By assigning the proceeds, control, and the right to own all claims to DC & Sons, Plaintiffs completely and voluntarily relinquished their right to sue Nexsen Pruet for legal malpractice and breach of fiduciary duty. Further, after the hearing on the motion for summary judgment, Plaintiffs and DC & Sons went to another judge to try to have the assignment voided while the motion was still pending.

Additionally, the confession of judgment for an unsupported, multi-million dollar amount, coupled with the assignment of the legal malpractice claims, strongly suggest that collusion has occurred. The fact that counsel for Plaintiffs and DC & Sons seek to have the confession of judgment remain in place further supports the conclusion that Plaintiffs do not have any intention of paying the judgment and DC & Sons does not have any intention of executing on it, and therefore the confession was never intended to have any purpose, other than to be used in a case against Nexsen Pruet as purported evidence of damages. At the very least, the Court finds that the opportunity for collusion was present.

Given these facts and circumstances, the Court concludes that this case is not a genuine legal malpractice case. It is an action to collect a judgment confessed. The Court concludes that the only proper remedy under the circumstances is dismissal with prejudice. By dismissing the case with prejudice, the Court is not ruling on the merits of the legal malpractice or breach of fiduciary duty claims, especially given that the claims have been brought by an entity that has never been a client of Nexsen Pruet.

Because this case was brought by Plaintiffs in name only and under circumstances that suggest collusion, or the opportunity for collusion, the Court declines to simply strike the assignment and allow the case to proceed as pled. The conduct of Plaintiffs and DC & Sons with respect to the courts and with respect to Nexsen Pruet cannot be undone with the stroke of a pen. The case is dismissed with prejudice.

CONCLUSION

Nexsen Pruet's Motion for Summary Judgment is granted on the basis that this case is proceeding pursuant to an assignment of a legal malpractice claim that is void as against public policy. Accordingly, judgment is entered in favor of Nexsen Pruet as to all causes of action in the complaint and counterclaim, and this case is dismissed with prejudice.

***13** IT IS SO ORDERED.

<<signature>>

The Honorable J.C. Nicholson, Jr.

Circuit Court Judge

Charleston, South Carolina

10 / 8, 2013

Footnotes

1 Nexsen Pruet filed a motion to disqualify Andrew Epting and George Kefalos as counsel for Plaintiffs on the basis that they are witnesses to the facts of the case in which the alleged legal malpractice arose because they represented Plaintiffs' adversary, DC & Sons, in the underlying litigation. Plaintiffs opposed the motion, and following a hearing, the court ruled that the motion be held in abeyance pending discovery and any necessary evidentiary hearing. [Order, Apr. 26, 2012.]

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2014 WL 4700220
Only the Westlaw citation is currently available.
United States District Court,
D. South Carolina,
Aiken Division.

George SKIPPER, Veronica Skipper,
Michael Perry Bowers, Specialty Logging,
LLC, and Harold Moors, Plaintiffs,
v.
ACE PROPERTY AND CASUALTY
INSURANCE COMPANY, Brantley C.
Rowlen, and Erin Lawson Coia, Defendants.

Civil Action No. 1:14–cv–00444–
JMC. | Signed Sept. 19, 2014.

Attorneys and Law Firms

Mark B. Tinsley, Gooding and Gooding, Allendale, SC, Randolph Murdaugh, IV, Peters Murdaugh Parker Eltzroth and Detrick, Hampton, SC, for Plaintiffs.

Ronald K. Wray, II, Gallivan White and Boyd, Greenville, SC, Robert Rivera, Jr., Robert S. Safi, Susman Godfrey LLP, Houston, TX, for Defendants.

ORDER

J. MICHELLE CHILDS, District Judge.

***1** Plaintiffs George Skipper, Veronica Skipper, Michael Perry Bowers ("Bowers"), Specialty Logging, LLC ("SLL"), and Harold Moors ("Moors") (collectively "Plaintiffs") filed this action seeking damages from Defendants ACE Property and Casualty Insurance Company ("ACE"), Brantley C. Rowlen ("Rowlen"), and Erin Lawson Coia ("Coia") (collectively "Defendants") for their alleged mishandling of a lawsuit arising out of an automobile/log truck collision that resulted in a civil action captioned *George Skipper v. Specialty Logging, LLC,* Civil Action Number 2012–CP–03–172 (hereinafter the "Underlying Lawsuit"). (ECF No. 1–1.) Specifically, Plaintiffs assert state law claims against ACE for bad faith/breach of the covenant of good faith and fair dealing, negligence, breach of contract, restitution/unjust enrichment/ quantum meruit; claims against Rowlen and Coia for legal professional negligence, breach of fiduciary duty, breach of the implied warranty of workmanlike service, interference with contractual relationship; and claims against Defendants collectively for barratry and equitable indemnity. (*Id.* at 18–34.)

This matter is before the court pursuant to a motion by Rowlen and Coia to dismiss the claims asserted against them by George Skipper and Veronica Skipper (together the "Skipper Plaintiffs") for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6) (the "Rule 12(b)(6) motion"). (ECF No. 5.) In addition, ACE moves the court to dismiss the action against it also pursuant to Fed.R.Civ.P. 12(b)(6). (ECF No. 12.) Plaintiffs filed memorandums in opposition to both pending Rule 12(b)(6) motions. (ECF Nos. 15, 20.) Plaintiffs further move the court to remand the matter to state court on the ground that removal was improper because diversity jurisdiction does not exist. (ECF No. 19.)

In addressing the merits of these pending motions, the court must consider a determinative issue of whether a legal malpractice claim is assignable. This issue has not been addressed by controlling precedent of the South Carolina appellate courts. As a result, the court must certify this issue to the South Carolina Supreme Court.

I. RELEVANT BACKGROUND AND FACTUAL FINDINGS [1]

Skipper Plaintiffs are husband and wife and citizens of the State of Georgia. (ECF No. 1–1 at 8 ¶ 1, n. 1.) On September 22, 2010, George Skipper was involved in a vehicle accident (the "Accident") with a logging truck owned by SLL [2] and driven by Moors. (*Id.* at 10 ¶ 13, 11 ¶ 16.) ACE [3] insured SLL's logging truck under a commercial auto insurance policy with limits of $1,000,000.00 per occurrence (the "Policy"). (*Id.* at 11 ¶¶ 16–17.) Plaintiffs allege that the Accident caused serious and permanent bodily injuries to George Skipper. (*Id.* at ¶ 15.)

On May 15, 2012, George Skipper's attorney wrote to ACE, outlined the extent of George Skipper's injuries, and demanded the Policy's coverage limits of $1,000,000.00 to settle George Skipper's claims within thirty (30) days. (*Id.* at 12 ¶ 21.) ACE retained the law firm of Lewis Brisbois Bisgaard & Smith LLP [4] to represent SLL's and Harold Moors' interests and defend them against George Skipper's claims. (*Id.* at ¶ 22.) ACE also hired a physician to evaluate George Skipper's claims. (*Id.* at 13 ¶ 24.) The physician concluded that George Skipper's alleged back injuries preexisted the Accident and were not aggravated by the Accident. (*Id.*) On that basis, ACE offered $50,000.00 to settle the matter. (*Id.*)

*2 On August 17, 2012, George Skipper commenced the Underlying Lawsuit in the Allendale County (South Carolina) Court of Common Pleas against SLL and Moors alleging that they were negligent, careless, reckless, grossly negligent, willful and wanton in causing the wreck that injured George Skipper. (*Id.* at 13 ¶ 25.) By letter dated February 14, 2013, George Skipper's attorney made a settlement demand for $2,500,000.00 in the form of an offer of judgment, which offer would expire twenty (20) days later. (*Id.* at 14 ¶ 28.) Defendants did not accept George Skipper's offer of judgment. (*Id.* at ¶ 29.) ACE then offered to settle George Skipper's claim for $981,211.11, the amount of coverage that remained after paying his property damage claim. (*Id.*)

On May 28, 2013, George Skipper's attorney offered to settle the matter on a "high-low" basis with the "high" being $7,000,000.00 and the "low" being the coverage available under the Policy. [5] (*Id.* at 15 ¶ 31.) ACE rejected the "high-low" settlement proposal on June 11, 2013, but again offered to settle the claims for the remaining policy limits. (*Id.* at ¶ 32.)

On January 14, 2014, Skipper Plaintiffs and SLL, Bowers, and Moors (together the "SLL Plaintiffs") entered into a Settlement Agreement, Agreement to Stay Execution of Judgment, and Springing Covenant not to Execute (the "Settlement Agreement"). (*Id.* at 17 ¶ 36 (referencing ECF No. 1–1 at 40–47).) Pursuant to the Settlement Agreement, SLL Plaintiffs agreed to, and did, execute a confession of judgment (the "Confession of Judgment") in which they admitted liability for the injuries and losses sustained by Skipper Plaintiffs and agreed that the value of those injuries and losses was $4,500,000.00. [6] (ECF No. 1–1 at 43 § 3.1.) SLL Plaintiffs further agreed in the Settlement Agreement to assign to Skipper Plaintiffs an interest in any claims against ACE, Rowlen, and Coia (the "Assignment"). (*Id.* at 44 § 5.1, 45 § 5.2 (Skipper Plaintiffs and SLL Plaintiffs "will institute a civil action against Ace and its assigned counsel ..." and SLL Plaintiffs agree to "assign a portion of the recovery from those claims to [Skipper] Plaintiffs, and hereby give [Skipper] Plaintiffs a lien against the proceeds from the claims ....").) Pursuant to the Assignment, Skipper Plaintiffs could receive anywhere from 85 to 95 percent of the proceeds from a settlement of the claims-even if the settlement was for less than the amount of the Confession of Judgment. (*Id.* at 45 §§ 5.3–5.3.5.) Skipper Plaintiffs and SLL Plaintiffs agreed that if the Settlement Agreement was found invalid, then Skipper Plaintiffs' underlying lawsuits would be "reinstated so as to return the parties the status quo prior to the execution of the Settlement Agreement and the entry of the Confession of Judgment." (*Id.* at 43 § 3.2.) They also agreed that "if any part of this Agreement is declared to be in any way illegal, void or unenforceable, then the entire Agreement is void." (*Id.; see also id.* at 44 § 4.4.)

*3 On January 15, 2014, Plaintiffs commenced the instant action in the Allendale County (South Carolina) Court of Common Pleas alleging the aforementioned causes of action against Defendants. (ECF No. 1–1.) On February 20, 2014, ACE removed the case to the United States District Court for the District of South Carolina pursuant to 28 U.S.C. § 1332. (ECF No. 1.) In the notice of removal, ACE asserted that removal was proper because the court possessed diversity jurisdiction over the matter since (1) Skipper Plaintiffs have no valid claims to assert because the Settlement Agreement and Assignment are invalid; (2) Skipper Plaintiffs' claims against ACE, Rowlen, and Coia were fraudulently joined; and (3) the assignment of claims against ACE, Rowlen, and Coia was collusive and designed to defeat diversity jurisdiction. (ECF No. 1 at 3 ¶ 8.) ACE further asserted that the amount in dispute exceeds the requisite sum of $75,000.00. (*Id.* at ¶ 7.)

On February 21, 2014, Rowlen and Coia filed their Rule 12(b)(6) motion and ACE filed its Rule 12(b)(6) motion on February 27, 2014. (ECF Nos. 5, 12.) On March 17, 2014, Plaintiffs filed their motion to remand. (ECF No. 19.)

II. LEGAL STANDARD

Federal courts in diversity cases apply the law of the forum state. *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). In situations in which "there is no case law from the forum state which is directly on point, the district court attempts to do as the state court would do if confronted with the same fact pattern." *Roe v. Doe,* 28 F.3d 404, 407 (4th Cir.1994) (internal citations omitted). The Fourth Circuit has noted that "[o]nly if the available state law is clearly insufficient should the court certify the issue to the state court." *Id.* (citing *Smith v. FCX, Inc.,* 744 F.2d 1378, 1379 (4th Cir.1984)).

South Carolina Appellate Court Rule 244 provides that the South Carolina Supreme Court "in its discretion may answer questions of law certified to it by any federal court of the United States ... when requested by the certifying court if there are involved in any proceeding before that court questions of law of this state which may be determinative of the cause then pending in the certifying court when it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court." Rule 244(a), SCACR. The certification order must set forth: (1) "the questions of law to be answered"; (2) "all findings of fact relevant to the questions certified"; and (3) "a statement showing fully the nature of the controversy in which the questions arose." Rule 244(b), SCACR.

III. NATURE OF THE CONTROVERSY

A. ***The Parties' Arguments***

Skipper Plaintiffs, Rowlen, and Coia are all citizens of the State of Georgia. As a result, Plaintiffs argue that the court should remand the matter to the Allendale County (South Carolina) Court of Common Pleas because there is a lack of complete diversity of citizenship among the parties. [7] (ECF No. 19–1 at 12.) Defendants oppose remand asserting that the motion should be denied because Skipper Plaintiffs are not real parties in interest and have been collusively or fraudulently joined to this action by virtue of a void assignment of alleged legal malpractice and related tort claims by SLL Plaintiffs against their former counsel, Rowlen and Coia; and there is complete diversity between the real parties in interest. (ECF No. 27 at 1.)

*4 In support of their position, Plaintiffs assert that Skipper Plaintiffs are real parties in interest because legal malpractice claims are assignable under South Carolina law. (*Id.* at 39–53 (citing, *e.g., Fowler v. Hunter,* 388 S.C. 355, 697 S.E.2d 531 (S.C.2010) (affirming *Fowler v. Hunter,* 380 S.C. 121, 668 S.E.2d 803 (S.C.Ct.App.2008))).) In *Fowler,* the South Carolina Supreme Court affirmed a holding by the South Carolina Court of Appeals that a professional negligence claim against an insurance agency could be assigned pursuant to a settlement agreement so long as the risk of collusion was minimized. *Fowler,* 697 S.E.2d at 535. However, if the court was not persuaded by *Fowler* and the other case law cited by Plaintiffs, they requested that the court certify this issue to the South Carolina Supreme Court before issuing a decision. (*Id.* at 57, 697 S.E.2d 531.)

Defendants contend that the claims against Rowlen and Coia are for legal malpractice and arise from their attorney/client relationship with SLL Plaintiffs and the assignment of such claims is void as against public policy. (*See* ECF No. 5–1.) In support of this argument, Rowlen and Coia specifically point out that although South Carolina appellate courts have not addressed whether a legal malpractice claim is assignable, the court should be persuaded that assignment of legal malpractice claims is void as against public policy pursuant to the opinion issued by Judge J.C. Nicholson, Jr. in *Pavilion Dev. Corp. v. Nexsen Pruet, LLC,* No.2011—CP10–05774, 2013 WL 5925732 (S.C.Ct.C.P. Oct. 9, 2013). [8] (ECF No. 5–1 at 7–10.) In *Pavilion,* Judge Nicholson found that a party's assignment of a legal malpractice claim to an adversary in the litigation in which the alleged malpractice arose is void as against public policy. *Pavilion,* 2013 WL 5925732 at *9. In reaching this conclusion, Judge Nicholson noted that the majority view of jurisdictions "is that legal malpractice claims are not assignable because they are void as against public policy." *Id.* at *4 (identifying the following states as having adopted the majority view: Arizona, California, Florida, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, Tennessee, Virginia, West Virginia, and North Carolina). Based on the foregoing, Rowlen and Coia assert that because the Assignment is void, Skipper Plaintiffs have no basis for any other cause of action against them and, therefore, the complaint against them should be dismissed.

B. ***The Court's Review***

After reviewing the authority cited by the parties, the court is persuaded that certification is appropriate in this case. There is only one case that addresses the issue of whether a legal malpractice claim can be assigned and that opinion originated from the South Carolina Circuit Court without review by an appellate level court. Based on the lack of controlling precedent, the court finds that the available state law on the assignability of a legal malpractice claim is clearly insufficient. Therefore, because the assignability of a legal malpractice claim is a determinative issue, the court proceeds with certifying a question to the South Carolina Supreme Court.

III. CERTIFIED QUESTION

*5 The court certifies the following question:

Can a legal malpractice claim be assigned between adversaries in litigation in which the alleged legal malpractice arose?

IV. CONCLUSION

Based on the foregoing, the court **CERTIFIES** the foregoing question to the South Carolina Supreme Court. The clerk shall forward a copy of this Order to the South Carolina Supreme Court under this court's official seal. In the interest of judicial economy and its docket considerations, the court **DENIES** without prejudice the motions to dismiss of ACE Property and Casualty Insurance Company, Brantley C. Rowlen, and Erin Lawson Coia with leave to re-file after adjudication of the certified question. (ECF Nos. 5, 12.)

IT IS SO ORDERED.

Footnotes

1 In light of the procedural posture of this case, the facts set forth herein are essentially the allegations in the complaint.

2 SLL is a limited liability company organized and existing under the laws of the State of South Carolina. (ECF No. 1–1 at 8 ¶ 2.) SLL is owned and operated by Bowers, a citizen of South Carolina. (*Id.* at ¶ 3.) Moors is also a citizen of South Carolina. (*Id.* at 9 ¶ 4.)

3 ACE is an insurance company organized and existing under the laws of the Commonwealth of Pennsylvania with its principal place of business in Philadelphia, Pennsylvania. (ECF No. 1 at 4 ¶ 11.)

4 Rowlen and Coia are attorneys in the Atlanta Office of Lewis Brisbois and are citizens of the State of Georgia. (ECF No. 1 at 2 ¶ 3, 4 ¶ 12.)

5 Pursuant to the "high-low" offer, "only the issue of Defendants' conduct in handling the claim would be litigated." (ECF No. 1–1 at 15 ¶ 31.) "If the trier of fact found in favor of the Defendants, the Skippers would accept and ACE would pay its remaining coverage of $981,211.21; if the trier of fact found against the Defendants, ACE would pay Skipper $7,000,000." (*Id.*)

6 The Confession of Judgment was not filed. Skipper Plaintiffs agreed to delay filing the Confession of Judgment and stay its execution "until all claims that may be brought by or on behalf of [Skipper Plaintiffs] and [SLL Plaintiffs] ... are resolved by settlement or verdict or otherwise resolved or abandoned." (ECF No. 1–1 at 44 § 4.2.) Accordingly, the Confession of Judgment is being held in "trust" by Skipper Plaintiffs' attorney so long as SLL Plaintiffs cooperate in the present lawsuit as required by the Settlement Agreement. (*See id.* at 43 § 3.1, 46 § 5.5.)

7 ACE removed this case based on diversity jurisdiction. For this removal to have been proper, the court must agree with ACE on one of the following assertions: (1) Skipper Plaintiffs do not have any claims against either ACE or Rowlen and Coia; (2) Skipper Plaintiffs do not have any claims against Rowlen and Coia and Skipper Plaintiffs claims against ACE should be severed from the claims of SLL Plaintiffs against Rowlen and Coia; or (3) even if Skipper Plaintiffs and SLL Plaintiffs have valid claims against both ACE and Rowlen and Coia, the claims against ACE should be severed from the claims against Rowlen and Coia. If the court does not agree with any of these assertions, the matter must be remanded to state court.

8 *Pavilion* was attached as an exhibit to ACE's notice of removal. (*See* ECF No. 1–2 at 11–22.)

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STATE OF SOUTH CAROLINA COUNTY OF YORK	)))	IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT
Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust by and through David A. Burton as Attorney-in-Fact, Individually and in the right and on behalf of T.E. Cato Estate, LLC, Plaintiff, vs. Carroll M. Pitts, Jr., Esq. and Robinson Bradshaw & Hinson, P.A., . Defendants.	)	Civil Action No. 2010-CP-46-2267 **Trial Brief** **The Plaintiff Cannot Prove it was Damaged by any Act or Omission of RBH**

The Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust (the "Burton Trust") cannot prove it was damaged by any alleged act or omission of Carroll M. Pitts, Jr., ("Pitts") or Robinson Bradshaw & Hinson, P.A., (collectively "RBH") because: (1) The Burton Trust cannot prove it received less than fair market value for its share of the property; and, (2) attorneys' fees are not recoverable under the facts of this case.

FACTUAL BACKGROUND

This legal malpractice lawsuit arises out of a commercial real estate transaction which closed in December 2007 in York County. In early 2007, James Thomas "Tommy" Cato ("Cato") engaged Mr. Pitts to form an LLC (the "LLC") and to draft a deed that would convey certain property owned by the heirs to the T.E. Cato Estate into that LLC so that the property could be marketed and sold.

After the LLC was formed, each of the heirs executed the deed into the LLC. As planned, Mr. Cato marketed the property to several developers and subsequently entered into a contract to sell the property for $1 million to the developer who made the highest offer, Thomasson Apartments, LLC, ("TAL").

The closing was scheduled for December 2007. Before the closing, a question arose regarding the title to a strip of land (the "Roadbed Tract") that was situated within the property to be sold. To resolve that question, the closing attorney, Joshua Vann, Esq., of Morton & Gettys, LLC, prepared a quitclaim deed to be signed by each member of the LLC, including the Burton Trust. Although every other member of the LLC signed the quitclaim deed, the Burton Trust refused to sign.

The closing went forward on December 12, 2007. Mr. Vann prepared an amendment to the contract of sale that allocated $100,000 of the $1 million price to the Roadbed Tract. TAL paid the LLC $900,000 for the property conveyed, and the remaining $100,000 was to be paid upon the resolution of the Roadbed Tract issue. The Burton Trust received $124,200 for its 20% interest in the property conveyed.

Thereafter, a Partition Action was filed by Mr. Pitts on behalf of the LLC members who sought to compel the Burton Trust to transfer its share of the Roadbed Tract in order to complete the transaction with TAL. The Partition Action settled after many years of litigation. Under the terms of the Settlement Agreement, the Burton Trust executed a quitclaim deed to complete the sale to TAL in exchange for a payment of $249,000. No other party received a settlement payment.

It is undisputed that the Burton Trust received a total of $373,200 for its 20% share of the property sold in the underlying transaction ($124,200 from the December 2007 closing, and $249,000 in the settlement of the Partition Action).

ARGUMENT

The Burton Trust cannot prove it was damaged by any alleged act or omission of RBH because: (1) the Burton Trust cannot prove it received less than fair market value for its share of the property; and, (2) attorneys' fees are not recoverable under the facts of this case.

1. The Burton Trust cannot prove it received less than fair market value for it share of the property.

"Damage to property is measured by the difference between what such property is worth and what it should have been worth but for the attorney's negligence." Mallen & Smith, *Legal Malpractice* § 21.4 (2014 ed.).

In legal malpractice cases involving land transactions, South Carolina courts measure damages using the difference in the value received and fair market value. Our Supreme Court affirmed that damages were properly measured by "the difference between the value of the actual property received and the value of the property which would have been received" when a client was injured by his real estate attorney's negligence in *Jennings v. Lake*, 267 S.C. 677, 680, 230 S.E.2d 903, 905 (1976). Similarly, the Supreme Court held that the plaintiff could not prove damages in connection with a commercial land transaction because he profited from the sale of the land in question in *Brandt v. Gooding*, 368 S.C. 618, 627, 630 S.E.2d 259, 263 (2006). Stated differently, when the plaintiff profits from the underlying land transaction, there are no damages.

There is no evidence in the record that the Burton Trust received less than fair market value for its share of the property. When asked whether the Burton Trust benefitted economically from the Partition Action, Dr. Burton testified that "[i]t got its fair share. Let's put it that way." (Burton Dep. 88:7-8; May 12, 2014.) Further, he testified that the Burton Trust "received [the] money . . . for the sale of the land that [he] felt [the Burton Trust] was entitled to." (*Id.* 89:4-6.)

The fact is that the evidence in the record proves that the Burton Trust received more than fair market value. During the pendency of the Partition Action, Dr. Burton agreed that the only way for the Burton Trust to prove whether or not it was damaged was by obtaining an appraisal:

> Q. Without that appraisal, is it accurate to say you have no idea what that property is worth?
>
> A. Yes, ma'am.
>
> Q. And until you know what that property is worth, you have no idea that [the Burton Trust] has been damage[d] or not.
>
> A. Correct.

(Burton Dep. 176:10-177:1; May 10, 2010.) The independent appraisal requested by RBH valued the property at $1,016,000 – within 1.6% of the $1 million price offered by TAL. (*See* Appraisal of H. Corbin Haskell, MAI.) Additionally, the appraiser hired by the Burton Trust valued the property at $1,311,000. (*See* Amended Appraisal of George E. Knight, Jr., MAI.) Furthermore, TAL's $1 million offer equates to a market appraisal because that was the highest offer Mr. Cato received after marketing the property to several developers. (Cato Dep. 179:14-21; Nov. 19, 2010.) According to each of these appraisals, the Burton Trust received more than fair market value for its share of the property because the $373,200 it received exceeds 20% of the total value of each appraisal by more than $100,000. When presented with this evidence at trial, Dr. Burton agreed that the Burton Trust had been overpaid according to his own expert's appraisal.

Because the Burton Trust cannot prove that it received less than fair market value for its share of the property, it cannot prove that it was damaged by any alleged act or omission of RBH.

2. Attorneys' fees are not recoverable under the facts of this case.

The Burton Trust cannot recover attorneys' fees in this case because (a) the fees it seeks to recover were not incurred to correct any alleged act or omission of RBH, and (b) because the Burton Trust failed to produce sufficient evidence to prove its claim.

a. The attorneys' fees were not incurred to correct any alleged act or omission of RBH.

The recovery of attorneys' fees in a legal malpractice case is limited to legal expenses "reasonably incurred outside the malpractice action itself as a result of a lawyer's misconduct." Restatement (Third) of Law Governing Lawyers § 53, cmt. f (2000). *See also Gefre v. Davis Wright Tremaine, LLP*, 306 P.3d 1264, 1281 (Alaska 2013) ("[A] legal malpractice plaintiff may recover as actual damages the attorney fees incurred as a result of the defendant's malpractice, so long as the plaintiff can demonstrate she would not have incurred the fees in the absence of the defendant's negligence.").

For example, "if a lawyer's negligent title search causes a client to buy land with an unclear title and as a result to incur legal expenses defending the title against a challenger, the client may recover those expenses from the negligent lawyer." Restatement (Third) of Law Governing Lawyers § 53, cmt. f. In this case, however, the buyer of the land did not challenge the title, and the legal expenses incurred by the Burton Trust were not incurred to defend the title. On the contrary, the Burton Trust was the challenger and the legal expenses it incurred were caused by its refusal to sign the quitclaim deed.

Dr. Burton testified that the Burton Trust's refusal to sign the quitclaim deed caused the Partition Action:

> Q: Well, that's why they [the LLC members] brought the partition action, wasn't it, because the Burton Trust refused to sign the Quit Claim Deed, right?
>
> A: Yep.

(Burton Dep. 93:2-6; May 12, 2014.) Further, Dr. Burton admitted that if the Burton Trust had executed the quitclaim deed in 2007, there would have been no Partition Action:

> Q: Had the Burton Trust executed the Quit Claim Deed sent to it by Tommy Cato in November or December of 2007, there would have been no partition action, correct?
> MR. MCMASTER: Objection as to form.
>
> Q: Is that correct?
>
> A: I assume.
> MR. MCMASTER: Move to strike.
>
> A: I'm not an attorney, but I assume, yes, sir.
>
> Q: You believe that to be the case; is that correct?
>
> A: Yes, sir. I guess so.

(*Id.* 92:7-21.) Dr. Burton's testimony proves that the Partition Action was caused by the Burton Trust's refusal to sign the quitclaim deed and, therefore, the attorneys' fees associated with the Action resulted from the actions of the Burton Trust.

Additionally, an email sent by Dr. Burton[1] two weeks before the closing with TAL proves that the Burton Trust's refusal to sign the quitclaim deed had nothing to do with any act or omission of RBH. In that email, Dr. Burton stated that the Burton Trust "[would] agree to sign over the last quitclaim [deed]" if the LLC would agree to: (1) offset Marjorie Cato Burton's share of the capital gains tax, (2) reimburse Marjorie Cato Burton for time she spent managing the property, and (3) execute a document to assure there were no "side deals" between the other members and TAL[2]. (Email from the Burton Trust to James Thomas Cato RE: Requirements for signing of Cato SCDOT quitclaim deed, ¶¶ 1-3 (November 30, 2007); attached as **Exhibit A.**) Dr. Burton closed by clarifying "[a]gain, I am willing to sign the last piece of Area B quitclaim deed in order for all the other heirs to finish this deal, but the above issues will have to be ironed-out first before that signing occurs." (*Id.* at 2.)

The Burton Trust's email made no reference to any act or omission of Mr. Pitts, identified no issue with the authority of Mr. Cato or the LLC, and did not question the effectiveness of the deed into the LLC. Instead, the email demonstrates that the Burton Trust attempted to leverage its refusal to sign the quitclaim deed in an effort to obtain more than its 20% share of the proceeds from the sale to TAL.

Furthermore, the attorneys' fees the Burton Trust seeks to recover were incurred as a direct and proximate result of the Burton Trust's actions. The Burton Trust

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[1] Dr. Burton testified at trial that he drafted this email to Mr. Cato and signed his mother's name to it.

[2] The email also stated that the Burton Trust was "willing to purchase both Areas A and C for the same amount of money that all the hairs are selling their potion . . . to [TAL]." (Email, ¶ 4.) This offer, however, came almost four months after the LLC executed the Letter of Intent to sell the property to TAL on August 3, 2007, and, therefore, the LLC could not have accepted this offer without breaching its contractual obligation to TAL.

responded to the filing of the Partition Action by asserting six third-party claims against Mr. Cato and TAL. (*See* Third-Party Compl. filed Apr. 30, 2009 (C.A. No. 2008-CP-46-3171).) By asserting these claims, the Burton Trust caused the Partition Action to grow into a complex lawsuit that was litigated for more than four years. Therefore, the lion's share of Mr. Jellenik's fees that the Burton Trust seeks to recover resulted not from the defense of the Partition Action, but from the Burton Trust's prosecution of unnecessary third-party claims.

Additionally, Ms. McDow was hired by the LLC to defend it against the fourth-party claim brought by TAL – a claim that never would have been made but for the Burton Trust filing a Third-Party Complaint against TAL. (*See* Ans. to Third-Party Compl., ¶¶ 59, 67, 70.) Therefore, Ms. McDow's fees were proximately caused by the Burton Trust's actions. Finally, Mr. McCoy represented the Petitioners during the Partition Action after Mr. Pitts' voluntary withdrawal. Therefore, Mr. McCoy's fees were also a direct result of the actions of the Burton Trust because the Partition Action was only filed because the Burton Trust refused to sign the quitclaim deed, as memorialized in the Amendment to Contract. (*See* Amendment to Contract, ¶ 3.0.)

Because the attorneys' fees incurred during the Partition Action were the result of the Burton Trust's refusal to sign the quitclaim deed, and its decision to prosecute six third-party claims against Mr. Cato and TAL, the attorneys' fees incurred in that action are not recoverable against RBH.

b. The Burton Trust failed to produce sufficient evidence to prove its claim.

"The party seeking an award of [attorneys'] fees should submit evidence supporting the hours worked and rates claimed." *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 1939 (1983). *See also Funai Elec. Co. v. Daewoo Electronics Corp.*, 2009 WL 1110825, at *1 (N.D. Cal. Apr. 24, 2009) (finding that a plaintiff "must provide [the defendants] with redacted time sheets so that [the defendants] have a meaningful opportunity to challenge the reasonableness of the fees requested"). "Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation." *Carlyle v. Tuomey Hosp.*, 305 S.C. 187, 193, 407 S.E.2d 630, 633 (1991).

The billing records produced by the Burton Trust at trial[3] are insufficient evidence to support its claim for attorneys' fees. Specifically, Mr. Jellenik's time entries do not indicate whether his time was spent defending the Partition Action, prosecuting third-party claims, or prosecuting this action against RBH. The Court is left only to speculate as to the nature and reasonableness of these entries and, therefore, the records fail to provide a sufficient basis upon which RBH could be found to be responsible for causing the Burton Trust to incur the fees. Moreover, the Burton Trust failed to produce any evidence, such as a cancelled check or bank statement, to prove that it paid Mr. Jellenik's bills. Therefore, it cannot prove whether or not the bills were actually paid.

In sum, the Burton Trust cannot recover attorneys' fees in this case because (a) the fees it seeks to recover were not incurred to correct any alleged act or omission of

[3] As argued by RBH at the time these documents were introduced, the billing records should be excluded from evidence because they were not timely produced during discovery despite multiple discovery requests expressly seeking any evidence of damages.

RBH, and (b) because the Burton Trust failed to produce sufficient evidence to support a claim for attorneys' fees.

CONCLUSION

The Burton Trust cannot prove it was damaged by any alleged act or omission of Mr. Pitts or RBH because: (1) the Burton Trust cannot prove it received less than fair market value for its share of the property; and, (2) attorneys' fees are not recoverable under the facts of this case.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By:________________________

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

York, South Carolina

January 26, 2015

EXHIBIT A

18

EXHIBIT 101 WM

Subj: Fw: Requirements for signing of Cato SCDOT quitclaim deed.
Date: 11/30/07 7:16:24 P.M. Eastern Standard Time
From: SloanMBurton@hotmail.com
To: CharInsOff@aol.com

Friday Night

FELONY ACCUSATIONS
BURTON LETTER
IMPLYING FELONIOUS ACTIONS.
REQUEST FOR PAY OFF.

Tommy,

First let me say that the tone of your last letter/email was much improved. Next let me address the fact that Marvin and I have never been completely opposed to selling the et al property due to the history of our many attempts to either develop it, or sell it in years past.

However, I am opposed to selling it without first addressing the needs of those individuals that are in the most need. I will agree to sign over the last quitclaim deed from the South Carolina State Department of Transportation if we address the following issues:

1. Capital Gains Tax: As you are well aware, Helen and I represent the first generation offspring of my father T.E. Cato. Upon my father's death in November of 1957, the land was transferred to the first generation heirs. From a tax point of view, this date would represent the starting date for the evaluation of capital gains tax by the IRS for both Helen and I as to our original cost basis for the value of the et al property. You, Bob, Don, Cathy and Jane represent the second generation heirs, and all of you have benefited from a stepped-up cost basis as to the original cost of the land for evaluation by the IRS for capital gains tax purposes. I have no problem signing the quitclaim deed if some sort of legal agreement can be reached that equals out the amount of tax all of us pay so that Helen and I are not penalized just because we haven't yet passed away. Unfortunately for everyone, there is no incentive for me to sell land that penalizes Helen and me due to our age.

2. Remuneration: Another sticking issue is the issue of remuneration for your hard work in dealing with the sell of this land. As you are aware, you mentioned in several of your emails that you would like to be (NO suggested by owners) reimbursed or paid for handling all of the taxes needed for the et al property as well as the work that you have done in bringing this offer from Mr. Thomasson to the table. My problem is that in the past, I have handled for years, and years, and years the taxes to be paid for the et al property along with my son Bud (disinherited) attempting several years ago to handle the development of Cato Estates, to include but not be limited to developing architectural drawings, contacting, and recruiting various retail companies to become commercial tenants if the land was developed, negotiating with the State of South Carolina, for improvements to the land as well as the new roadbed that was developed by SCDOT to go through areas A and B. We have invested a lot of time and money without ever being reimbursed by anyone for our efforts. I have even gone so far as to pay other heirs taxes for them to avoid any foreclosures by York County and never charged one penny for my time, expense, or trouble. My sticking point is that I feel that if you Tommy are to be reimbursed for your time, then certainly the time that both Bud and I have put in over the many years should receive the same treatment given the fact that I have carried this burden for a much longer period of time. I hope you would agree that this is a fair and equitable treatment for similar services that my immediate family has provided over the many years.

3. The third sticking point is that I also want to make sure that there are no other agreements or deals that any of us have on the side with Mr. Thomasson. A "hypothetical" explanation of this would include the example that perhaps I were to convince everyone to sell their portion of the et al property only to have someone in the family later discover that I had engaged in a side agreement with the purchasing developer to have part ownership of any projects that he developed later on, on that land. I would not have been truthful with my in-laws, and it would look very damaging to me that I had circumvented the real reason for the sell of the land to the other Cato estate heirs. ? I am not accusing anyone of any misdeeds, all I am saying is that a legal document will have to be signed by all heirs including me stating that they have no current or future business relationship with the developer for any of the et al property that was sold to such developer.

RBH 000043

BWB 3100568

[illegible] AND [illegible]UST!

4. Marvin and I are willing to purchase both Areas A and C for the same amount of money that all the heirs are selling their portion of Areas A and C to Mr. Thomasson. By the operating agreement that was signed by all, any heir has first refusal right to purchase other heirs properties should they be willing to sell. Just for the record, Marvin and I have never been offered the chance to buy Areas A and C because those areas of the et al property were thrown into the offer by you to Mr. Thomasson for the added price of $100,000 dollars. Marvin and I would be willing to pay the same amount minus of course my 20% interest (100,000 minus 20,000) which would equal a price of $80,000 dollars for both Areas A and C. Also for the record, the original offer by Mr. Thomasson was for Areas B and D for the price of $900,000 dollars. If this would be pleasing to all of the other Cato heirs, then Mr. Thomasson could purchase Areas B and D for the original $900,000 dollars and Marvin and I would purchase Areas A and C from the other Cato heirs for $80,000 (again the total $100,000 minus my 20% share). Obviously, Mr. Thomasson should have no problem with this offer since his real interest lies in areas B and D due to the fact that Area D already enhances his other property adjacent to it. The heirs shouldn't mind because it's cash that they want, and I am abiding by the rules set forth in the operating agreement that heirs will have first option to purchase other heirs property should any other heir be willing to sell. Moreover, you and all of the heirs will finally at last not have to pay any more taxes!

7

expired 8/3/07

The fact that you for some reason feel that this SCDOT quitclaim deed signing needs to be signed immediately isn't necessary. Mr. Thomasson has 180 days (6 months) to reinvest his money in order to acquire his like-kind-exchange status, so he still has plenty of time. Likewise, there is plenty of time yet still available for us to "nail-down" the above 4 issues and still provide Mr. Thomasson his tax-free status. Again, I am willing to sign the last piece of Area B quitclaim deed in order for all the other heirs to finish this deal, but the above issues will have to be ironed-out first before that signing occurs.

Regards,

Your Aunt,
Marjorie C. Burton

3 Legal Malpractice § 21:4 (2014 ed.)

Legal Malpractice
Database updated February 2014
Ronald E. Mallen [a0], and Jeffrey M. Smith [a1], with Allison D. Rhodes [a2]
Part IV. Damages
Chapter 21. Damages

§ 21:4. Direct damages—General rules

If the claim is liquidated, the resolution of damages usually is not complicated. Most legal malpractice claims, however, are not liquidated. This fact differentiates legal malpractice litigation from ordinary tort litigation. Liquidating the malpractice claim, that is, determining the existence and extent of damage, may be a complex and difficult task.

The basic proposition is that an attorney is liable for all damages proximately caused by the wrongful act or omission. [1] Deciding the issue of proximate causation usually resolves the issue of which damages are recoverable. The determination of proximate causation requires analysis of which of the injuries sustained, if any, foreseeably would have been expected to flow from the wrongful conduct. [2] In other words, the measure of damages is the difference between what the plaintiff's pecuniary position is and what it should have been had the attorney not erred. [3] The measure of damages necessarily depends on the nature of the attorney's undertaking for the client. [4] The injury is measured at the time of the attorney's error. [5] The claimant, usually a plaintiff, for those damages proximately caused under the legal theory asserts the analysis. [6]

The application of these rules depends on the nature of the injury. If the injury is to a cause of action, the loss may be total or partial. Injuries can occur when lawsuits are unsuccessfully or inadequately defended. The liability of the attorney engaged in litigation is discussed more extensively in other sections. [7] Generally, the measure of injury to a cause of action is the value of the claim lost. [8] In other words, the damages for a plaintiff or claimant are what the client would have recovered, less what was recovered [9] plus legally recoverable expenses incurred because of the negligence. [10] What "would have been" recovered requires consideration of the amount that should have resulted and how much was collectable. [11] When the injury is an adverse judgment, the judgment sets the measure of direct damages. [12] Usually that is true even if the plaintiff has not paid the judgment. [13] If the injury is claimed to be an excessive judgment, the damages are the difference between the judgment and what should have been the amount had the attorney properly defended.

Of course, not all damage claims concern an injury occurring in litigation. The injury may be to property or to property rights. Damage to property is measured by the difference between what such property is worth and what it should have been worth but for the attorney's negligence. [14] Property damage also can be measured by the cost of restoration or repair. The ultimate measure is whichever of the two sums is less. Where a property right consists of injury to a claim, the measure of damages is the value of the right, remedy or interest lost or impaired. [15] The damages may include lost profits, but the rule is that there should be sufficient proof to assure that the issue is not left to speculation. [16]

For a brief time, the law in Illinois was that economic damages were not recoverable in a legal malpractice action. [17] In *Collins v. Reynard*, an Illinois attorney, hired to handle the sale of the client's business, negligently failed to provide for a primary security interest in the business and assets. The buyer pledged the assets to a bank that obtained a security interest superior to the client. Consequently, after the buyer defaulted, the bank took possession of the assets, thereby preventing the client from selling the business to a willing buyer. The client sought the balance due under the installment agreement as direct damages.

The court explained that economic losses are damages that occur without personal injury or damage to other property. Concluding that legal malpractice causes injury to intangible property interests, the court applied its earlier tort decision in *Moorman Manufacturing Co. v. National Tank Company*. [18] There the court previously held that a products-liability plaintiff could not recover solely for economic loss except for (1) fraud [19] or (2) where the defendant is in the business of providing information for the guidance of others and makes a negligent misrepresentation.

The dissent pointed out that the tort theory has been the premise of most legal malpractice actions. [20] The dissent observed that an attorney almost never guarantees or promises a particular result, and that the majority's ruling would result in extensive negotiating of the terms of attorneys' engagement agreements. Upon rehearing, the majority acknowledged that tradition and logic compelled an exception to the *Moorman* doctrine for lawyers, returning attorneys' liability to the status quo before the court's decisions. [21]

a0 Of The California Bar.

a1 Of The Georgia Bar.

a2 Of California and Oregon Bars.

1 *E.g.,* Bloomer v. Gibson, 180 Vt. 397, 2006 VT 104, 912 A.2d 424 (2006) (quoting text); Two Thirty Nine Joint Venture v. Joe, 60 S.W.3d 896 (Tex. App. Dallas 2001), judgment rev'd on other grounds, 145 S.W.3d 150 (Tex. 2004); Hyden v. Law Firm of McCormick, Forbes, Caraway & Tabor, 115 N.M. 159, 848 P.2d 1086 (Ct. App. 1993); Dessel v. Dessel, 431 N.W.2d 359 (Iowa 1988); Olson v. Fraase, 421 N.W.2d 820 (N.D. 1988) (citing text); Taylor Oil Co. v. Weisensee, 334 N.W.2d 27 (S.D. 1983); Pickens, Barnes & Abernathy v. Heasley, 328 N.W.2d 524 (Iowa 1983); Lieberman v. Employers Ins. of Wausau, 171 N.J. Super. 39, 407 A.2d 1256 (App. Div. 1979), judgment aff'd and modified, 84 N.J. 325, 419 A.2d 417 (1980); Smith v. Lewis, 13 Cal. 3d 349, 118 Cal. Rptr. 621, 530 P.2d 589, 78 A.L.R.3d 231 (1975) (disapproved of on other grounds by, In re Marriage of Brown, 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561, 94 A.L.R.3d 164 (1976)); Pete v. Henderson, 124 Cal. App. 2d 487, 269 P.2d 78, 45 A.L.R.2d 58 (1st Dist. 1954).

2 *E.g.,* Hendricks v. Davis, 196 Ga. App. 286, 395 S.E.2d 632 (1990) (overruled on other grounds by, Hardaway Co. v. Amwest Sur. Ins. Co., 263 Ga. 698, 436 S.E.2d 642 (1993)); Patterson & Wallace v. Frazer, 79 S.W. 1077 (Tex. Civ. App. 1904).

3 *E.g.,*
Cal.—Lally v. Kuster, 177 Cal. 783, 171 P. 961 (1918).
Mo.—Steward v. Goetz, 945 S.W.2d 520 (Mo. Ct. App. E.D. 1997) (citing text).
Neb.—Stansbery v. Schroeder, 226 Neb. 492, 412 N.W.2d 447 (1987) (citing text).
N.J.—Carbis Sales, Inc. v. Eisenberg, 397 N.J. Super. 64, 935 A.2d 1236 (App. Div. 2007); Kohn v. Schiappa, 281 N.J. Super. 235, 656 A.2d 1322 (Law Div. 1995); 2175 Lemoine Ave. Corp. v. Finco, Inc., 272 N.J. Super. 478, 640 A.2d 346 (App. Div. 1994).
N.M.—Hyden v. Law Firm of McCormick, Forbes, Caraway & Tabor, 115 N.M. 159, 848 P.2d 1086 (Ct. App. 1993).
N.Y.—Flynn v. Judge, 149 A.D. 278, 133 N.Y.S. 794 (2d Dep't 1912).
N.C.—Greene v. Carpenter, Wilson, Cannon and Blair, P.A., 119 N.C. App. 415, 458 S.E.2d 507 (1995); Smith v. Childs, 112 N.C. App. 672, 437 S.E.2d 500 (1993) quoting text.
Va.—Lyle, Siegel, Croshaw & Beale, P.C. v. Tidewater Capital Corp., 249 Va. 426, 457 S.E.2d 28 (1995) (between value of what client bargained for and value of what was received).
Vt.—Bloomer v. Gibson, 180 Vt. 397, 2006 VT 104, 912 A.2d 424 (2006) (citing text).

4 Smith v. Childs, 112 N.C. App. 672, 437 S.E.2d 500 (1993) (citing text); Hoppe v. Ranzini, 158 N.J. Super. 158, 385 A.2d 913 (App. Div. 1978).

5 Smith v. Childs, 112 N.C. App. 672, 437 S.E.2d 500 (1993) (citing text); McClain v. Faraone, 369 A.2d 1090 (Del. Super. Ct. 1977) (value of real property).

6 Smith v. Childs, 112 N.C. App. 672, 437 S.E.2d 500 (1993).

7 *See* Chapter 32, *infra,* The Litigation Attorney.

8 *E.g.,* Piscitelli v. Friedenberg, 87 Cal. App. 4th 953, 105 Cal. Rptr. 2d 88 (4th Dist. 2001); Lockhart v. Cade, 728 A.2d 65 (D.C. 1999);. Campagnola v. Mulholland, Minion & Roe, 76 N.Y.2d 38, 556 N.Y.S.2d 239, 555 N.E.2d 611 (1990) (citing text).

9. *E.g.,* Whiteaker v. State, 382 N.W.2d 112 (Iowa 1986) (citing text); Ware v. Durham, 246 Ga. 84, 268 S.E.2d 668 (1980) (rule recognized); Freeman v. Rubin, 318 So. 2d 540 (Fla. Dist. Ct. App. 3d Dist. 1975); McLellan v. Fuller, 226 Mass. 374, 115 N.E. 481 (1917).

10 Coats v. Bussard, 94 Mich. App. 558, 288 N.W.2d 651 (1980), judgment rev'd, 409 Mich. 858, 294 N.W.2d 692 (1980) (remanded for trial). *See also,* § 21:10 *infra,* Consequential damages—Expenses of mitigation.

11 *E.g.,* Two Thirty Nine Joint Venture v. Joe, 60 S.W.3d 896 (Tex. App. Dallas 2001), judgment rev'd on other grounds, 145 S.W.3d 150 (Tex. 2004); Sitton v. Clements, 257 F. Supp. 63 (E.D. Tenn. 1966), judgment aff'd, 385 F.2d 869 (6th Cir. 1967); Lally v. Kuster, 177 Cal. 783, 171 P. 961 (1918); Cox v. Sullivan, 7 Ga. 144, 50, 1849 WL 1649 (1849). *See also,* § 32:17, *infra,* The plaintiff's attorney—The cause of action.

12 Wolfe v. Walsh, 2008-Ohio-185, 2008 WL 185504 (Ohio Ct. App. 2d Dist. Montgomery County 2008); Gruse v. Belline, 138 Ill. App. 3d 689, 93 Ill. Dec. 297, 486 N.E.2d 398 (2d Dist. 1985); Better Homes, Inc. v. Rodgers, 195 F. Supp. 93 (N.D. W. Va. 1961).

13 *See* § 33:12, *infra,* The defense attorney—The cause of action.

14 *E.g.,* DePinto v. Rosenthal & Curry, 237 A.D.2d 482, 655 N.Y.S.2d 102 (2d Dep't 1997) (quoting text); Gleason v. Title Guarantee Co., 300 F.2d 813 (5th Cir. 1962).

15 Smith v. Lewis, 13 Cal. 3d 349, 118 Cal. Rptr. 621, 530 P.2d 589, 78 A.L.R.3d 231 (1975) (disapproved of on other grounds by, In re Marriage of Brown, 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561, 94 A.L.R.3d 164 (1976)).

16 *See* § 21:13, *infra,* Consequential damages—Economic loss.

17 135 Ill.2d 554, 159 Ill. Dec. 102, 575 N.E.2d 909 (1990).

18 Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 61 Ill. Dec. 746, 435 N.E.2d 443, 33 U.C.C. Rep. Serv. 510 (1982).

19 *Collins* was interpreted not to apply to a claim of fraud. Scholes v. Stone, McGuire and Benjamin, 786 F. Supp. 1385, Fed. Sec. L. Rep. (CCH) P 97367 (N.D. Ill. 1992) (securities fraud).

20 Citing text.

21 Radtke v. Murphy, 312 Ill. App. 3d 657, 245 Ill. Dec. 633, 728 N.E.2d 715 (1st Dist. 2000); Collins v. Reynard, 154 Ill. 2d 48, 180 Ill. Dec. 672, 607 N.E.2d 1185 (1992).

3 Legal Malpractice § 21:4 (2014 ed.)

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The application of these rules depends on the nature of the injury. If the injury is to a cause of action, the loss may be total or partial. Injuries can occur when lawsuits are unsuccessfully or inadequately defended. The liability of the attorney engaged in litigation is discussed more extensively in other sections.[7] Generally, the measure of injury to a cause of action is the value of the claim lost.[8] In other words, the damages for a plaintiff or claimant are what the client would have recovered, less what was recovered[9] plus legally recoverable expenses incurred because of the negligence.[10] What "would have been" recovered requires consideration of the amount that should have resulted and how much was collectable.[11] When the injury is an adverse judgment, the judgment sets the measure of direct damages.[12] Usually that is true even if the plaintiff has not paid the judgment.[13] If the injury is claimed to be an excessive judgment, the damages are the difference between the judgment and what should have been the amount had the attorney properly defended.

Of course, not all damage claims concern an injury occurring in litigation. The injury may be to property or to property rights. Damage to property is measured by the difference between what such property is worth and what it should have been worth but for the attorney's negligence.[14] Property damage also can be measured by the cost of restoration or repair. The ultimate measure is whichever of the two sums is less. Where a property right consists of injury to a claim, the measure of damages is the value of the right, remedy or interest lost or impaired.[15] The damages may include lost profits, but the rule is that there should be sufficient proof to assure that the issue is not left to speculation.[16]

For a brief time, the law in Illinois was that economic damages were not recoverable in a legal malpractice action.[17] In *Collins v. Reynard*, an Illinois attorney, hired to handle the sale of the client's business, negligently failed to provide for a primary security interest in the business and assets. The buyer pledged the assets to a bank that obtained a security interest superior to the client. Consequently, after the buyer defaulted, the bank took possession of the assets, thereby preventing the client from selling the business to a willing buyer. The client sought the balance due under the installment agreement as direct damages.

The court explained that economic losses are damages that occur without personal injury or damage to other property. Concluding that legal malpractice causes injury to intangible property interests, the court applied its earlier tort decision in *Moorman Manufacturing Co. v. National Tank Company*.[18] There the court previously held that a products-liability plaintiff could not recover solely for economic loss except for (1) fraud [19] or (2) where the defendant is in the business of providing information for the guidance of others and makes a negligent misrepresentation.

The dissent pointed out that the tort theory has been the premise of most legal malpractice actions. [20] The dissent observed that an attorney almost never guarantees or promises a particular result, and that the majority's ruling would result in extensive negotiating of the terms of attorneys' engagement agreements. Upon rehearing, the majority acknowledged that tradition and logic compelled an exception to the *Moorman* doctrine for lawyers, returning attorneys' liability to the status quo before the court's decisions. [21]

a0 Of The California Bar.

a1 Of The Georgia Bar.

a2 Of California and Oregon Bars.

1 *E.g.,* Bloomer v. Gibson, 180 Vt. 397, 2006 VT 104, 912 A.2d 424 (2006) (quoting text); Two Thirty Nine Joint Venture v. Joe, 60 S.W.3d 896 (Tex. App. Dallas 2001), judgment rev'd on other grounds, 145 S.W.3d 150 (Tex. 2004); Hyden v. Law Firm of McCormick, Forbes, Caraway & Tabor, 115 N.M. 159, 848 P.2d 1086 (Ct. App. 1993); Dessel v. Dessel, 431 N.W.2d 359 (Iowa 1988); Olson v. Fraase, 421 N.W.2d 820 (N.D. 1988) (citing text); Taylor Oil Co. v. Weisensee, 334 N.W.2d 27 (S.D. 1983); Pickens, Barnes & Abernathy v. Heasley, 328 N.W.2d 524 (Iowa 1983); Lieberman v. Employers Ins. of Wausau, 171 N.J. Super. 39, 407 A.2d 1256 (App. Div. 1979), judgment aff'd and modified, 84 N.J. 325, 419 A.2d 417 (1980); Smith v. Lewis, 13 Cal. 3d 349, 118 Cal. Rptr. 621, 530 P.2d 589, 78 A.L.R.3d 231 (1975) (disapproved of on other grounds by, In re Marriage of Brown, 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561, 94 A.L.R.3d 164 (1976)); Pete v. Henderson, 124 Cal. App. 2d 487, 269 P.2d 78, 45 A.L.R.2d 58 (1st Dist. 1954).

2 *E.g.,* Hendricks v. Davis, 196 Ga. App. 286, 395 S.E.2d 632 (1990) (overruled on other grounds by, Hardaway Co. v. Amwest Sur. Ins. Co., 263 Ga. 698, 436 S.E.2d 642 (1993)); Patterson & Wallace v. Frazer, 79 S.W. 1077 (Tex. Civ. App. 1904).

3 *E.g.,*
Cal.—Lally v. Kuster, 177 Cal. 783, 171 P. 961 (1918).
Mo.—Steward v. Goetz, 945 S.W.2d 520 (Mo. Ct. App. E.D. 1997) (citing text).
Neb.—Stansbery v. Schroeder, 226 Neb. 492, 412 N.W.2d 447 (1987) (citing text).
N.J.—Carbis Sales, Inc. v. Eisenberg, 397 N.J. Super. 64, 935 A.2d 1236 (App. Div. 2007); Kohn v. Schiappa, 281 N.J. Super. 235, 656 A.2d 1322 (Law Div. 1995); 2175 Lemoine Ave. Corp. v. Finco, Inc., 272 N.J. Super. 478, 640 A.2d 346 (App. Div. 1994).
N.M.—Hyden v. Law Firm of McCormick, Forbes, Caraway & Tabor, 115 N.M. 159, 848 P.2d 1086 (Ct. App. 1993).
N.Y.—Flynn v. Judge, 149 A.D. 278, 133 N.Y.S. 794 (2d Dep't 1912).
N.C.—Greene v. Carpenter, Wilson, Cannon and Blair, P.A., 119 N.C. App. 415, 458 S.E.2d 507 (1995); Smith v. Childs, 112 N.C. App. 672, 437 S.E.2d 500 (1993) quoting text.
Va.—Lyle, Siegel, Croshaw & Beale, P.C. v. Tidewater Capital Corp., 249 Va. 426, 457 S.E.2d 28 (1995) (between value of what client bargained for and value of what was received).
Vt.—Bloomer v. Gibson, 180 Vt. 397, 2006 VT 104, 912 A.2d 424 (2006) (citing text).

4 Smith v. Childs, 112 N.C. App. 672, 437 S.E.2d 500 (1993) (citing text); Hoppe v. Ranzini, 158 N.J. Super. 158, 385 A.2d 913 (App. Div. 1978).

5 Smith v. Childs, 112 N.C. App. 672, 437 S.E.2d 500 (1993) (citing text); McClain v. Faraone, 369 A.2d 1090 (Del. Super. Ct. 1977) (value of real property).

6 Smith v. Childs, 112 N.C. App. 672, 437 S.E.2d 500 (1993).

7 *See* Chapter 32, *infra,* The Litigation Attorney.

8 *E.g.,* Piscitelli v. Friedenberg, 87 Cal. App. 4th 953, 105 Cal. Rptr. 2d 88 (4th Dist. 2001); Lockhart v. Cade, 728 A.2d 65 (D.C. 1999);. Campagnola v. Mulholland, Minion & Roe, 76 N.Y.2d 38, 556 N.Y.S.2d 239, 555 N.E.2d 611 (1990) (citing text).

9 *E.g.,* Whiteaker v. State, 382 N.W.2d 112 (Iowa 1986) (citing text); Ware v. Durham, 246 Ga. 84, 268 S.E.2d 668 (1980) (rule recognized); Freeman v. Rubin, 318 So. 2d 540 (Fla. Dist. Ct. App. 3d Dist. 1975); McLellan v. Fuller, 226 Mass. 374, 115 N.E. 481 (1917).

10 Coats v. Bussard, 94 Mich. App. 558, 288 N.W.2d 651 (1980), judgment rev'd, 409 Mich. 858, 294 N.W.2d 692 (1980) (remanded for trial). *See also,* § 21:10 *infra,* Consequential damages—Expenses of mitigation.

11 *E.g.,* Two Thirty Nine Joint Venture v. Joe, 60 S.W.3d 896 (Tex. App. Dallas 2001), judgment rev'd on other grounds, 145 S.W.3d 150 (Tex. 2004); Sitton v. Clements, 257 F. Supp. 63 (E.D. Tenn. 1966), judgment aff'd, 385 F.2d 869 (6th Cir. 1967); Lally v. Kuster, 177 Cal. 783, 171 P. 961 (1918); Cox v. Sullivan, 7 Ga. 144, 50, 1849 WL 1649 (1849). *See also,* § 32:17, *infra,* The plaintiff's attorney—The cause of action.

12 Wolfe v. Walsh, 2008-Ohio-185, 2008 WL 185504 (Ohio Ct. App. 2d Dist. Montgomery County 2008); Gruse v. Belline, 138 Ill. App. 3d 689, 93 Ill. Dec. 297, 486 N.E.2d 398 (2d Dist. 1985); Better Homes, Inc. v. Rodgers, 195 F. Supp. 93 (N.D. W. Va. 1961).

13 *See* § 33:12, *infra,* The defense attorney—The cause of action.

14 *E.g.,* DePinto v. Rosenthal & Curry, 237 A.D.2d 482, 655 N.Y.S.2d 102 (2d Dep't 1997) (quoting text); Gleason v. Title Guarantee Co., 300 F.2d 813 (5th Cir. 1962).

15 Smith v. Lewis, 13 Cal. 3d 349, 118 Cal. Rptr. 621, 530 P.2d 589, 78 A.L.R.3d 231 (1975) (disapproved of on other grounds by, In re Marriage of Brown, 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561, 94 A.L.R.3d 164 (1976)).

16 *See* § 21:13, *infra,* Consequential damages—Economic loss.

17 135 Ill.2d 554, 159 Ill. Dec. 102, 575 N.E.2d 909 (1990).

18 Moorman Mfg. Co. v. National Tank Co., 91 Ill. 2d 69, 61 Ill. Dec. 746, 435 N.E.2d 443, 33 U.C.C. Rep. Serv. 510 (1982).

19 *Collins* was interpreted not to apply to a claim of fraud. Scholes v. Stone, McGuire and Benjamin, 786 F. Supp. 1385, Fed. Sec. L. Rep. (CCH) P 97367 (N.D. Ill. 1992) (securities fraud).

20 Citing text.

21 Radtke v. Murphy, 312 Ill. App. 3d 657, 245 Ill. Dec. 633, 728 N.E.2d 715 (1st Dist. 2000); Collins v. Reynard, 154 Ill. 2d 48, 180 Ill. Dec. 672, 607 N.E.2d 1185 (1992).

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AUTHORITIES CITED

267 S.C. 677
Supreme Court of South Carolina.

Russell L. JENNINGS and
Anita M. Jennings, Appellants,
v.
Walter T. LAKE, Respondent.

No. 20329. | Dec. 20, 1976.

Client brought suit against his attorney to recover damages resulting from the attorney's negligence in the examination of a title and preparation of a deed to a lot of land. The Circuit Court, Newberry County, Francis B. Nicholson, J., rendered judgment for the client in the amount of the purchase price of the lot and client appealed. The Supreme Court held that where the attorney negligently prepared a deed describing the property as running to a lakeshore, while, in fact, a strip of fringe land separated the property from the lakeshore, the client was entitled to recover from the attorney the price of the strip of fringe land, plus the cost of a survey for the transfer of the fringe land.

Reversed and remanded.

West Headnotes (2)

[1] **Attorney and Client**
Acts and Omissions of Attorney in General
Attorney who negligently certifies title to be good is liable to his client for damages sustained as proximate result of such negligence.

4 Cases that cite this headnote

[2] **Attorney and Client**
Damages and Costs
Where attorney negligently prepared deed describing property as running to lakeshore, while, in fact, strip of fringe land separated property from lakeshore, client was entitled to recover from attorney the price of the strip of fringe land, plus cost of survey for transfer of fringe land.

3 Cases that cite this headnote

Attorneys and Law Firms

****903 *678** James L. Edwards, Clinton, and Lee Moise & Myers, Sumter, for appellants.

****904** E. Maxcy Stone, Newberry, for respondent.

Opinion

PER CURIAM:

This is an action by a client (appellants) against his attorney (respondent) to recover damages resulting from respondent's negligence in the examination of the title and preparation of the deed to a lot of land. The facts are not in dispute.

***679** It appears that appellants desired and intended to purchase a certain lot of land fronting on the waters of Lake Murray, in Newberry County. Respondent, an attorney, was employed by appellants to examine the title to the property and determine if the title was marketable and whether there were any encumbrances thereon. Thereafter, respondent certified the title as marketable and free of encumbrances and furnished a deed to appellants in which the property was described as 'on the waters of Lake Murray' and 'running to the waters of the said Lake Murray.' Relying upon respondent's certificate of title and the deed description of the land, appellants purchased the lot for the sum of $1500.00. After the purchase, appellants went upon the lot and made improvements.

Subsequently, appellants discovered that the lot purchased and improved by them did not run to the waters of Lake Murray, as called for by the description in their deed but, on the contrary, was separated from the water by a lot approximately 70 200 ('fringe land') owned by the South Carolina Electric and Gas Company.

The trial judge, before whom the issues were tried without a jury, concluded that respondent was negligent in rendering the certificate of title and entered judgment against him in the amount of $1500.00. There is no appeal from the finding by the trial judge that respondent was negligent in the title examination. See 59 A.L.R.3d 1176 for annotation on 'Liability of Attorney for Negligence in Connection with Investigation or Certification of Title to Real Estate.' The appeal is solely from the amount of the award of damages. Appellants contend that it was inadequate and that the trial judge applied the wrong measure of damages. The right to recover in some amount is not in issue in this appeal.

The sole question is the measure of the damages recoverable from an attorney for his negligence in certifying a title to real estate, where part of the land certified and subsequently improved by the purchaser, was not owned by the seller.

***680** The lower court held that the measure of damages in this case would be the purchase price paid by appellants, which was the sum of $1500.00. This conclusion was based upon the following reasoning: 'Plaintiffs (appellants) paid a consideration of only $1500.00 on March 17, 1973, for the lot purchased. Assuming, under the most favorable possible position to plaintiffs, that the deprivation of beneficial use and ownership of the 'fringe land' causes to plaintiffs the complete loss of value of what they purchased, then that loss monetarily is their expenditure of $1,500.00.'

The record shows that the 'fringe land' can be purchased for the sum of $3,000.00, plus costs of appraisal, survey, and paper work. This would give to appellants the full area certified by respondent as included in their deed, that is to the waters of Lake Murray. Appellants contend that they are entitled to recover as damages the amount necessary to acquire the 'fringe land.' No question is raised as to the reasonableness of the price asked for the additional area. Neither has any issue been presented as to the feasibility of removing the improvements made upon the land or, if feasible, any effect it might have on the question of damages.

[1] As a general rule, an attorney, who negligently certifies a title to be good, is liable to his client for the damages sustained as a proximate result of such negligence, 7 C.J.S. Attorney and Client s 157f.

[2] An exact rule for determining the amount of such damages is difficult to formulate and must to some extent depend upon the facts of each case. Under the ****905** facts of this case, however, we think appellants were entitled to recover the difference between the value of the actual property received and the value of the property which would have been received if it had contained the quantity or acreage certified by the attorney.

While the trial testimony is not included as a part of the record, the statement in appellants' brief is unchallenged ***681** that, after receiving the deed and title certificate, improvements were placed on the land purchased. The award of only $1500.00, the amount paid by appellants for the land, would not, therefore, represent the total damage to them because of its failure to take into consideration the question of improvements.

The actual value of the land at the time of conveyance was $1500.00; and the market value without the deficiency in quantity or acreage was $4,500.00, plus the costs of survey, etc. for the transfer of the 'fringe land'. The difference between the two values is $3,000.00, plus the cost of survey, etc. This difference would give the proper total damages sustained, for which respondent would be liable.

The judgment is accordingly reversed and the cause remanded for entry of judgment in appellants' favor against respondent for the foregoing amount.

Parallel Citations

230 S.E.2d 903

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368 S.C. 618
Supreme Court of South Carolina.

Donald M. BRANDT, Individually and as the Personal Representative of the Estate of Janice N. Brandt, Deceased, Appellant,
v.
Elizabeth K. GOODING and Gooding & Gooding, P.A., Respondents.

No. 26135. | Heard Jan. 20, 2005. | Decided April 10, 2006. | Rehearing Denied June 7, 2006.

Synopsis
Background: Former client brought legal malpractice action against attorney and law firm that represented him in land transaction. The Circuit Court, Allendale County, Paul M. Burch, J., granted defendants summary judgment and held client in civil and criminal contempt for introducing fraudulent document. Client appealed.

Holdings: Upon certifying issues for review from the Court of Appeals, the Supreme Court, Toal, C.J., held that:

[1] circuit court was authorized to grant summary judgment and find client in contempt;

[2] client suffered no injury from alleged malpractice;

[3] dismissal of complaint as a sanction for civil contempt was warranted;

[4] introduction of fraudulent document in deposition warranted citation for direct contempt;

[5] court did not abuse discretion in issuing restraining order; and

[6] defendants were entitled to costs and attorney fees.

Affirmed.

West Headnotes (24)

[1] **Judges**
Judicial powers and functions in general
Subsequent circuit court judge was authorized to grant summary judgment in legal malpractice action to law firm and attorney and find former client in contempt after previous judge held a hearing to determine the authenticity of document presented by client; the first judge dismissed contempt proceedings without prejudice since the proceedings were premature until after the document's authenticity was determined, and thus, the first judge left the issue of contempt to be addressed later in subsequent motion before second judge.

Cases that cite this headnote

[2] **Judgment**
Hearing and determination
When determining whether to grant summary judgment, a court must examine both the facts and the law; because a court must conduct the examination of law and facts, such an examination constitutes a trial.

2 Cases that cite this headnote

[3] **Judgment**
Construction and operation
A summary judgment motion, when granted, constitutes the final determination of all the issues that exist between the parties.

1 Cases that cite this headnote

[4] **Judges**
Judicial powers and functions in general
A circuit court judge cannot deny the use of an amended complaint in light of an order of another circuit judge that permitted use of the amended complaint.

Cases that cite this headnote

[5] **Judgment**
Absence of issue of fact
Summary judgment is appropriate when it is clear that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.

Cases that cite this headnote

[6] **Judgment**
Presumptions and burden of proof
In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the party that is not moving for summary judgment.

Cases that cite this headnote

[7] **Judgment**
Presumptions and burden of proof
The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact.

Cases that cite this headnote

[8] **Attorney and Client**
Elements of malpractice or negligence action in general
In a legal malpractice action, a plaintiff must prove that the defendant was negligent, the defendant's negligence proximately caused the plaintiff's injuries, and damages resulted.

Cases that cite this headnote

[9] **Attorney and Client**
Acts and omissions of attorney in general
Former client did not suffer any injury from attorney's alleged malpractice in land transaction, as was required for a legal malpractice claim, where client profited from the sale of outparcels from the land purchased in the transaction involved in the malpractice action.

Cases that cite this headnote

[10] **Contempt**
Nature and grounds of power
Courts have the power to punish for both civil and criminal contempt.

Cases that cite this headnote

[11] **Contempt**
Review
On appeal, a decision regarding contempt should be reversed only if it is without evidentiary support or the trial judge has abused his discretion.

6 Cases that cite this headnote

[12] **Contempt**
Nature and grounds in general
Circuit court did not abuse its discretion in dismissing former client's legal malpractice complaint as a sanction for client's civil contempt, where client had submitted a fraudulent document to the court. Rules Civ.Proc., Rule 41.

Cases that cite this headnote

[13] **Contempt**
Nature and grounds of power
Courts have the inherent power to punish for offenses that are calculated to obstruct, degrade, and undermine the administration of justice.

1 Cases that cite this headnote

[14] **Contempt**
Nature and Elements of Contempt
"Direct contempt" involves contemptuous conduct in the presence of the court.

3 Cases that cite this headnote

[15] **Contempt**
Nature and Elements of Contempt

A person may be found guilty of direct contempt if the conduct interferes with judicial proceedings, exhibits disrespect for the court, or hampers the parties or witnesses.

2 Cases that cite this headnote

[16] **Contempt**

Contempts in presence of court

Direct contempt that occurs in the court's presence may be immediately adjudged and sanctioned summarily.

2 Cases that cite this headnote

[17] **Contempt**

Nature and Elements of Contempt

The presence of the court for purposes of direct contempt extends beyond the mere physical presence of the judge or the courtroom to encompass all elements of the system.

Cases that cite this headnote

[18] **Attorney and Client**

Miscellaneous particular acts or omissions

Because there is no presiding authority, it is even more incumbent upon attorneys to conduct themselves in a professional and civil manner during a deposition.

Cases that cite this headnote

[19] **Contempt**

Suppression or falsification of evidence

Former client's introduction of a fraudulent document into expert's deposition in legal malpractice action constituted an introduction of the document into the presence of the court, warranting a citation for direct contempt.

1 Cases that cite this headnote

[20] **Injunction**

Discretionary nature of remedy

The decision of whether to issue a restraining order is within the trial judge's discretion.

Cases that cite this headnote

[21] **Protection of Endangered Persons**

Harassment, stalking, and surveillance

Circuit court did not abuse its discretion in issuing restraining order against former client, who brought legal malpractice action, to prevent client from harassing attorney and other parties involved in action, where client testified that he would spend ten years and a million dollars to get justice against parties and used threatening conduct towards the parties, such as telling one dismissed party that he "wasn't out of the woods yet."

Cases that cite this headnote

[22] **Appeal and Error**

Costs and Allowances

Appeal and Error

Attorney fees

An award of attorneys' fees and costs is a discretionary matter not to be overturned absent abuse by the trial court.

1 Cases that cite this headnote

[23] **Contempt**

Costs and fees

An award of attorney fees and costs for civil contempt is appropriate when a party has caused unnecessary litigious activity as a result of the contemptuous behavior.

Cases that cite this headnote

[24] **Contempt**

Costs and fees

Circuit court did not abuse its discretion in awarding attorney and law firm costs and attorney fees in legal malpractice action brought by former client as an award for client's civil contempt, where client's introduction of a fraudulent document unnecessarily prolonged the case.

Cases that cite this headnote

Attorneys and Law Firms

**261 Jack B. Swerling, of Columbia; and Richard A. Harpootlian, of Columbia, for Appellant.

Amanda G. Steinmeyer and Daniel A. Speights, both of Speights & Runyan, of Hampton; and Joel W. Collins, Jr., and Joseph S. McCue, both of Collins & Lacy, of Columbia, for Respondents.

Opinion

Chief Justice TOAL:

*622 This is a legal malpractice action. The trial court granted summary judgment, found the plaintiff to be in contempt, and dismissed the complaint as a sanction. In addition, the trial court sentenced the plaintiff to six months imprisonment, issued a restraining order, and awarded court costs and attorneys' fees to the defendant. The plaintiff appealed. We hold that the trial court properly granted summary judgment, and properly issued criminal and civil contempt sanctions. Additionally, the court correctly awarded costs. Therefore, we affirm.

FACTUAL/PROCEDURAL BACKGROUND

This legal malpractice action arose out of a land transaction in Allendale County. Donald M. Brandt (Brandt) sued Elizabeth K. Gooding, the law firm of Gooding & Gooding (Gooding), the lender, Edisto Farm Credit Service (Edisto Farm), and Ronald L. Summers (Summers), Senior Vice President of Edisto Farm, for breach of fiduciary duty, negligence, and civil conspiracy stemming from Gooding's representation of Brandt in the land transaction. [1]

1. Brandt also sued the Lombard Corporation (Lombard) in Aiken County. Lombard was a partner in the land transaction with Brandt. The parties settled.

In 1999, the court dismissed the claims against Summers and Edisto Farm. The court found that those parties were sham parties named in the complaint by Brandt to establish venue in Orangeburg County. As a result, venue was transferred to Allendale County.

During discovery, Brandt produced a document (Edisto Farm Letter), which appeared to have been sent by Summers of Edisto Farm to Brandt on September 18, 1995. Brandt also provided the letter to his malpractice expert, Professor John Freeman. The letter was introduced in Professor Freeman's deposition and used by him to opine that Gooding had *623 committed malpractice. Brandt first caused the document to enter the case on April 3, 2001 when he provided a supplemental response to a request to produce. In addition, Brandt introduced the deposition into evidence in the case as an attachment to his Memorandum in Support of Motion for Reconsideration on January 18, 2002.

The document, if authentic, would have imputed knowledge to Gooding of a conflict of interest related to the representation of Brandt in the land transaction. But Gooding claimed that the document was fraudulent, and as a result, requested a hearing to determine whether the document was authentic. In addition, Gooding asked the court to issue a citation of contempt if the document proved to be a forgery. However, the circuit court judge delayed a contempt hearing until it could be determined if the document was authentic.

In subsequent motions before a second circuit court judge (trial court), Gooding moved for summary judgment, dismissal of the cause of action, and contempt. At the hearing on the second motions, Gooding presented the testimony of Marvin Dawson (Dawson), an expert in document examination and authenticity. Dawson opined that the letter was fraudulent.

Dawson testified that the Edisto Farm Letter was printed on a type of paper that was not developed until 2000, almost five years after the letter allegedly was sent. In addition, Dawson found that the letter did not contain the appropriate watermark. In a report, Dawson cited numerous inconsistencies and characteristics indicating that the document was a forgery.

Although Brandt was not represented by counsel, Brandt cross-examined Dawson as to the authenticity of the document. Brandt testified that he could not find anyone to represent him. He did, however, bring a potential expert witness to court, but decided not to put the witness on the stand.

262 The trial court found Brandt introduced a fraudulent document into a court proceeding. As a result, the trial court dismissed the complaint with prejudice as a sanction. In addition, the trial court granted summary judgment. The trial court also held Brandt in criminal contempt for perpetrating a fraud upon the court and sentenced him to six- ***624 months imprisonment. Finally, the trial court awarded court and attorneys' fees to Gooding. Subsequent to the trial court's finding that the Summers letter was fraudulent, Professor Freeman withdrew his opinion, stating:

> The Court's meticulously detailed Order finds that the Brandt letter was "fabricated, forged and fraudulent," and the [sic] Mr. Brandt committed a fraud on the Court in bringing the evidence forward ... it appears to me that my services were used in an attempt to perpetrate a fraud on the Court.
>
> ....
>
> ... I have no choice but to withdraw and disaffirm my opinion testimony offered in the Gooding case.

Brandt filed a motion for reconsideration. The trial court suspended the sentence pending review. Upon review, the trial court sustained its earlier ruling and Brandt was taken into custody. Another motion for reconsideration was filed and denied. Brandt appealed.

This Court certified the following issues for review from the court of appeals pursuant to Rule 204(b), SCACR:

I. Did the trial court have the authority to hold a contempt proceeding even though the first judge ruled that a contempt hearing should be delayed?

II. Did the trial court err in granting summary judgment?

III. Did the trial court err in dismissing the complaint as a sanction for civil contempt of court?

IV. Did the trial court err in holding Brandt in *direct* criminal contempt?

V. Did the trial court err in issuing a restraining order?

VI. Did the trial court err in awarding attorneys' fees and costs?

LAW/ANALYSIS

I. Authority of the Trial Court

[1] Brandt argues that the trial court did not have subject matter jurisdiction to grant summary judgment or cite him for ***625** contempt of court.[2] We disagree.

2 The circuit court has subject matter jurisdiction in this matter. *See Johnston v. S.C. Dept. of Labor Licensing and Regulation,* 365 S.C. 293, 617 S.E.2d 363 (2005) (outlining the history of this Court's restrictive view of subject mater jurisdiction); *Dove v. Gold Kist,* 314 S.C. 235, 442 S.E.2d 598 (1994) (stating that subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong); S.C. Const. Art. V, § 11 (stating that the circuit court is the general trial court and has original jurisdiction in civil and criminal matters). As a result, we address the issue with regard to whether the circuit court had the authority to rule on the issue of summary judgment and contempt.

[2] **[3]** When determining whether to grant summary judgment, a court must examine both the facts and the law. *Royster Co. v. Eastern Distribution, Inc.,* 301 S.C. 18, 20, 389 S.E.2d 863, 864 (1990). Because a court must conduct the examination of law and facts, such an examination constitutes a trial. *Id.* As a result, a summary judgment motion, when granted, constitutes the final determination of all the issues that exist between the parties. *Id. See also Baird v. Charleston,* 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999) (holding that summary judgment is an adjudication on the merits).

[4] In support of his argument that the trial court did not have the authority to rule on contempt, Brandt relies on authority that prohibits one circuit court judge from reversing the standing order of another circuit court judge. For example, in *Cook v. Taylor,* this Court held that a circuit court judge does not have the authority to reverse another circuit court judge's determination of the proper mode of trial. 272 S.C. 536, 538, 252 S.E.2d 923, 924 (1979). Moreover, a circuit court judge cannot deny the use of an amended complaint in light of an order of ****263** another circuit judge that permitted use of the amended complaint. *Enoree Baptist Church v. Fletcher,* 287 S.C. 602, 603, 340 S.E.2d 546, 547 (1986).

In the present case, the first judge issued an order on Gooding's motion for a rule to show cause as to whether the Edisto Farm Letter was authentic. If the letter was proven to be a forgery, Gooding wanted to go forward with contempt proceedings against Brandt. The first judge dismissed the petition without prejudice because a contempt proceeding was premature until after the document's authenticity was determined. ***626** In addition, the first judge established a procedure to examine the document and examples of similar documents from Edisto Farm. In essence, the first judge took the logical steps to leave the issue of contempt to be addressed after such a determination had been made. Gooding then brought subsequent motions before the trial court with testimony from an expert that the document was a forgery. In the second battery of motions, Gooding moved for summary judgment, for citation of contempt, and for dismissal of the complaint. After a hearing, the trial court granted summary judgment, dismissed the complaint, and held Brandt in contempt of court.

Because the first judge delayed a contempt hearing, the trial court did not reverse a standing order of the first judge. Instead, the trial court acted in accordance with the steps outlined by the first judge and ruled on the issue of contempt after the document's authenticity could be determined. Accordingly, we hold that the trial court had the authority to grant summary judgment.

II. Summary Judgment

Brandt contends that the trial court erred in granting summary judgment in favor of Gooding. We disagree.

[5] [6] [7] Summary judgment is appropriate when it is clear that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Summer v. Carpenter,* 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997). In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Id.* The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. *Baughman v. Am. Tel. and Tel. Co.,* 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991).

[8] In a legal malpractice action, a plaintiff must prove that (1) the defendant was negligent, (2) the defendant's negligence proximately caused the plaintiff's injuries, and (3) damages resulted. *Summer,* 328 S.C. at 42, 492 S.E.2d at 58.

[9] In the present case, the trial court granted summary judgment on the ground that Gooding did not proximately ***627** cause Brandt any injury. In addition, the trial court found that because the case against Lombard in the Aiken County matter settled, Gooding was released from any liability. Further, the trial court found Brandt could not show damages. To the contrary, Brandt *profited* from the sale of outparcels from the land purchased in the transaction involved in this legal malpractice action.

Because Brandt did not suffer any injury, we hold that the trial court did not err in granting summary judgment.

III. Civil Contempt

Brandt contends that the trial court erred ordering civil contempt and dismissing the complaint as a sanction for the contempt. We disagree.

[10] [11] Courts have the power to punish for both civil and criminal contempt. *In re Brown,* 333 S.C. 414, 420, 511 S.E.2d 351, 355 (1998). On appeal, a decision regarding contempt should be reversed only if it is without evidentiary support or the trial judge has abused his discretion. *Stone v. Reddix–Smalls,* 295 S.C. 514, 516, 369 S.E.2d 840, 840–41 (1988) (citing *Means v. Means,* 277 S.C. 428, 431, 288 S.E.2d 811, 812–813 (1982)).

A defendant may move to dismiss the plaintiff's complaint on the ground that the plaintiff has no right to relief based on the facts and the law. Rule 41, SCRCP; *Shepard v. S.C. Dept. of Corrections,* 299 S.C. 370, 372, 385 S.E.2d 35, 36 (Ct.App.1989). Furthermore, ****264** a complaint may be dismissed with prejudice for failure to comply with these rules or any other order of the court. Rule 41(b), SCRCP.

[12] In the present case, the trial court found Brandt to be in contempt of court for introducing a fraudulent document. In response, the trial court dismissed the complaint as a sanction for perpetrating a fraud upon the court.

We hold that the trial court did not abuse its discretion in dismissing the complaint as a sanction for civil contempt. Dismissal of the complaint is a proper sanction against a complainant who submits fraudulent documents to the court. Therefore, we affirm the trial court's decision.

*628 IV. Criminal Contempt

Brandt contends the trial court erred in holding him in direct criminal contempt. We disagree.

[13] It is within the trial court's discretion to punish by fine or imprisonment all contempts of authority before the court. S.C.Code Ann. § 14–5–320 (1976). In addition, courts have the inherent power to punish for offenses that are calculated to obstruct, degrade, and undermine the administration of justice. *State ex rel. McLeod v. Hite,* 272 S.C. 303, 305, 251 S.E.2d 746, 747 (1979).

[14] [15] [16] Direct contempt involves contemptuous conduct in the presence of the court. *State v. Kennerly,* 337 S.C. 617, 620, 524 S.E.2d 837, 838 (1999). A person may be found guilty of direct contempt if the conduct interferes with judicial proceedings, exhibits disrespect for the court, or hampers the parties or witnesses. *State v. Havelka,* 285 S.C. 388, 389, 330 S.E.2d 288 (1985). Direct contempt that occurs in the court's presence may be immediately adjudged and sanctioned summarily. *Int'l Union, United Mine Workers of Am. v. Bagwell,* 512 U.S. 821, 827, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994).

[17] "South Carolina courts have always taken a liberal and expansive view of the 'presence' and 'court' requirements." *Kennerly,* 337 S.C. at 620, 524 S.E.2d at 838. The "presence of the court" extends beyond the mere physical presence of the judge or the courtroom to encompass all elements of the system. *Id.*

[18] This Court has recognized that depositions are judicial proceedings and are within the "presence of the court." *Matter of Golden,* 329 S.C. 335, 496 S.E.2d 619 (1998). In *Golden,* the Court held that "although a deposition is not conducted in a courtroom in the presence of a judge, it is nonetheless a judicial setting." Because there is no presiding authority, it is even more incumbent upon attorneys to conduct themselves in a professional and civil manner during a deposition. *Id.* at 343, 496 S.E.2d at 623.

[19] In the present case, the record shows that Brandt presented a fraudulent document to the court. The document was introduced at the deposition of Professor John Freeman. ***629** In addition, the deposition was introduced into evidence in the case as an attachment to his Memorandum in Support of Motion for Reconsideration. Further, the record shows that Brandt was the sole cause of the introduction of the document into this case when he provided a supplemental response to the request to produce one day before Professor Freeman's deposition. We hold that the introduction of the document into the deposition constituted an introduction of the document into the presence of the court, warranting a citation for direct contempt.

Therefore, we hold that the trial court did not err in citing Brandt for direct criminal contempt.

V. Restraining Order

Brandt argues that the trial court abused its discretion by issuing a restraining order. We disagree.

[20] The decision of whether to issue a restraining order is within the trial judge's discretion. *State v. Hill,* 266 S.C. 49, 52, 221 S.E.2d 398, 399 (1976).

[21] In the present case, the record indicates that the judge did not abuse his discretion when he issued a restraining order. Brandt testified that he would spend ten ****265** years and a million dollars to get justice against Summers and Edisto Farm Credit. Further, Brandt used threatening conduct toward parties involved in the litigation. For example, Brandt told Ronald Summers, after he was dismissed from the lawsuit, that he "wasn't out of the woods yet."

The issuance of a restraining order was arguably necessary to prevent Brandt from harassing Gooding and other parties involved in the litigation. Therefore, we hold that the trial court did not abuse its discretion.

VI. Fees and Costs

Brandt contends that the trial court erred in awarding attorneys' fees and costs. We disagree.

[22] [23] An award of attorneys' fees and costs is a discretionary matter not to be overturned absent abuse by the trial court. *Donahue v. Donahue,* 299 S.C. 353, 365, 384 S.E.2d 741, 748 (1989). An award for civil contempt is appropriate ***630** when a party has caused unnecessary litigious activity as a result of the contemptuous behavior. *Curlee v. Howle,* 277 S.C. 377, 386, 287 S.E.2d 915, 920 (1982).

00587

[24] In the present case, Brandt presented a fraudulent document. The introduction of this document unnecessarily prolonged this case. Therefore, the award of fees and costs is an appropriate award because of the unnecessary litigation directly related to the introduction of the letter. Accordingly, we affirm the award.

CONCLUSION

In sum, we hold that summary judgment was proper. Additionally, the citations for civil and criminal contempt were proper. Finally, the trial court did not abuse its discretion in issuing a restraining order and awarding attorneys' fees and costs. Accordingly, the ruling of the trial court is affirmed.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

Parallel Citations

630 S.E.2d 259

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Restatement (Third) of Law Governing Law § 53 (2000)

Restatement of the Law - The Law Governing Lawyers

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Restatement (Third) of The Law Governing Lawyers

Chapter 4. Lawyer Civil Liability

Topic 1. Liability for Professional Negligence and Breach of Fiduciary Duty

§ 53 Causation and Damages

A lawyer is liable under § 48 or § 49 only if the lawyer's breach of a duty of care or breach of fiduciary duty was a legal cause of injury, as determined under generally applicable principles of causation and damages.

Comment:

a. Scope and cross-references. Legal-malpractice actions (for negligence under § 48 and for fiduciary breach under § 49) are subject to generally applicable principles of causation and damages. Those are set forth in Restatement Second, Torts §§ 430-461 and 901-932. The term "legal cause" is defined in Restatement Second, Torts § 9 and is equivalent to "proximate cause."

As with the rest of this Chapter, this Section does not consider remedies other than damages, such as attorney-fee forfeiture (see § 37), fee reduction (see §§ 34 & 39), litigation sanctions (§ 110), and professional discipline (see § 5). For restitutionary, injunctive, and declaratory relief, see §§ 6 and 55(2).

The Comment on this Section sets forth certain general principles generally applicable to negligence (see § 48) and fiduciary-breach (see § 49) litigation. The Section presupposes that the defendant lawyer in a malpractice case owes a duty of care to the plaintiff (see §§ 50 & 51), has been found not to have provided such care (see § 52), and has no defense (see § 54). Likewise, in a breach-of-fiduciary-duty case the Section presupposes that the defendant lawyer has committed a breach of fiduciary duties owed to the plaintiff client (§ 49) and has no defense. On the application of this Section to breach-of-fiduciary-duty cases, see § 49, Comment *e*.

b. Action by a civil litigant: loss of a judgment. In a lawyer-negligence or fiduciary-breach action brought by one who was the plaintiff in a former and unsuccessful civil action, the plaintiff usually seeks to recover as damages the damages that would have been recovered in the previous action or the additional amount that would have been recovered but for the defendant's misconduct. To do so, the plaintiff must prove by a preponderance of the evidence that, but for the defendant lawyer's misconduct, the plaintiff would have obtained a more favorable judgment in the previous action. The plaintiff must thus prevail in a "trial within a trial." All the issues that would have been litigated in the previous action are litigated between the plaintiff and the plaintiff's former lawyer, with the latter taking the place and bearing the burdens that properly would have fallen on the defendant in the original action. Similarly, the plaintiff bears the burden the plaintiff would have borne in the original trial; in considering whether the plaintiff has carried that burden, however, the trier of fact may consider whether the defendant lawyer's misconduct has made it more difficult for the plaintiff to prove what would have been the result in the original trial. (On a lawyer's right to disclose client confidences when reasonably necessary in defending against a claim, see

§§ 64 and 80.) Similar principles apply when a former civil defendant contends that, but for the misconduct of the defendant's former lawyer, the defendant would have secured a better result at trial.

What would have been the result of a previous trial presenting issues of fact normally is an issue for the factfinder in the negligence or fiduciary-breach action. What would have been the result of an appeal in the previous action is, however, an issue of law to be decided by the judge in the negligence or fiduciary-breach action. The judges or jurors who heard or would have heard the original trial or appeal may not be called as witnesses to testify as to how they would have ruled. That would constitute an inappropriate burden on the judiciary and jurors and an unwise personalization of the issue of how a reasonable judge or jury would have ruled.

A plaintiff may show that the defendant's negligence or fiduciary breach caused injury other than the loss of a judgment. For example, a plaintiff may contend that, in a previous action, the plaintiff would have obtained a settlement but for the malpractice of the lawyer who then represented the plaintiff. A plaintiff might contend that the defendant in the previous action made a settlement offer, that the plaintiff's then lawyer negligently failed to inform plaintiff of the offer (see § 20(3)), and that, if informed, plaintiff would have accepted the offer. If the plaintiff can prove this, the plaintiff can recover the difference between what the claimant would have received under the settlement offer and the amount, if any, the claimant in fact received through later settlement or judgment. Similarly, in appropriate circumstances, a plaintiff who can establish that the negligence or fiduciary breach of the plaintiff's former lawyer deprived the plaintiff of a substantial chance of prevailing and that, due to that misconduct, the results of a previous trial cannot be reconstructed, may recover for the loss of that chance in jurisdictions recognizing such a theory of recovery in professional-malpractice cases generally.

The plaintiff in a previous civil action may recover without proving the results of a trial if the party claims damages other than loss of a judgment. For example, a lawyer who negligently discloses a client's trade secret during litigation might be liable for harm to the client's business caused by the disclosure.

Even when a plaintiff would have recovered through trial or settlement in a previous civil action, recovery in the negligence or fiduciary-breach action of what would have been the judgment or settlement in the previous action is precluded in some circumstances. Thus, the lawyer's misconduct will not be the legal cause of loss to the extent that the defendant lawyer can show that the judgment or settlement would have been uncollectible, for example because the previous defendant was insolvent and uninsured. The defendant lawyer bears the burden of coming forward with evidence that this was so. Placement of this burden on the defending lawyer is appropriate because most civil judgments are collectible and because the defendant lawyer was the one who undertook to seek the judgment that the lawyer now calls worthless. The burden of persuading the jury as to collectibility remains upon the plaintiff.

c. Action by a civil litigant: attorney fees that would have been due. When it is shown that a plaintiff would have prevailed in the former civil action but for the lawyer's legal fault, it might be thought that—applying strict causation principles—the damages to be recovered in the legal-malpractice action should be reduced by the fee due the lawyer in the former matter. That is, the plaintiff has lost the net amount recovered after paying that attorney fee. Yet if the net amount were all the plaintiff could recover in the malpractice action, the defendant lawyer would in effect be credited with a fee that the lawyer never earned, and the plaintiff would have to pay two lawyers (the defendant lawyer and the plaintiff's lawyer in the malpractice action) to recover one judgment.

Denial of a fee deduction hence may be an appropriate sanction for the defendant lawyer's misconduct: to the extent that the lawyer defendant did not earn a fee due to the lawyer's misconduct, no such fee may be deducted in calculating the recovery in the malpractice action. The same principles apply to a legal-malpractice plaintiff who was a defendant in a previous civil action. The appropriateness and extent of disallowing deduction of the fee are determined under the standards of § 37 governing fee forfeiture. In some circumstances, those standards allow the lawyer to be credited with fees for services that benefited the client. See § 37, Comment *e*.

Illustration:
Illustration:

1. Plaintiff retains Lawyer to bring a contract action seeking to recover $40,000, at a fee of $150 per hour. After working 10 hours, Lawyer withdraws without cause just before the trial. As a result, Plaintiff's case is dismissed with prejudice. When Plaintiff then sues Lawyer for malpractice and shows that Plaintiff would have prevailed in the contract action but for Lawyer's withdrawal, Plaintiff is entitled to recover $40,000. Lawyer is not entitled to deduct either attorney fees for hours devoted to the case before the withdrawal or hours that would have been devoted to the trial, for both were forfeited by Lawyer's improper and harmful withdrawal (see §§ 37 & 40, Comment *e*).

d. Action by a criminal defendant. A convicted criminal defendant suing for malpractice must prove both that the lawyer failed to act properly and that, but for that failure, the result would have been different, for example because a double-jeopardy defense would have prevented conviction. Although most jurisdictions addressing the issue have stricter rules, under this Section it is not necessary to prove that the convicted defendant was in fact innocent. As required by most jurisdictions addressing the issue, a convicted defendant seeking damages for malpractice causing a conviction must have had that conviction set aside when process for that relief on the grounds asserted in the malpractice action is available.

A judgment in a postconviction proceeding is binding in the malpractice action to the extent provided by the law of judgments. That law prevents a convicted defendant from relitigating an issue decided in a postconviction proceeding after a full and fair opportunity to litigate, even though the lawyer sued was not a party to that proceeding and is hence not bound by any decision favorable to the defendant. See Restatement Second, Judgments §§ 27-29. Some jurisdictions hold public defenders immune from malpractice suits.

e. Nonlitigated matters. Generally applicable principles of causation and damages apply in malpractice actions arising out of a nonlitigated matter. When a lawyer is subject to liability to a nonclient under § 51(2) for negligence in preparing an opinion letter on which the nonclient reasonably relied, recovery is ordinarily governed by the causation and damages rules applicable to negligent misrepresentation actions, unless the lawyer has undertaken greater responsibility to the nonclient (see Restatement Second, Torts § 552B).

f. Attorney fees as damages. Like other civil litigants, the winning party in a malpractice action ordinarily cannot recover its attorney fees and other expenses in the malpractice action itself, except to the limited extent that the jurisdiction allows the recovery of court costs. The rule barring fee recovery has exceptions, which may be applicable in a malpractice action in appropriate circumstances. For example, many jurisdictions allow recovery of attorney fees against a plaintiff or defendant that litigates in bad faith (see also § 110, Comment *g* (litigation sanctions)).

The rule barring recovery of fees does not prevent a successful legal-malpractice plaintiff from recovering as damages additional legal expenses reasonably incurred outside the malpractice action itself as a result of a lawyer's misconduct. For example, if a lawyer's negligent title search causes a client to buy land with an unclear title and as a result to incur legal expenses defending the title against a challenger, the client may recover those expenses from the negligent lawyer.

g. Damages for emotional distress. General principles applicable to the recovery of damages for emotional distress apply to legal-malpractice actions. In general, such damages are inappropriate in types of cases in which emotional distress is unforeseeable. Thus, emotional-distress damages are ordinarily not recoverable when a lawyer's misconduct causes the client to lose profits from a commercial transaction, but are ordinarily recoverable when misconduct causes a client's imprisonment. The law in some jurisdictions permits recovery for emotional-distress damages only when the defendant lawyer's conduct was clearly culpable (see also § 56, Comment *g*).

h. Punitive damages. Whether punitive damages are recoverable in a legal-malpractice action depends on the jurisdiction's generally applicable law. Punitive damages are generally permitted only on a showing of intentional or reckless misconduct by a defendant.

A few decisions allow a plaintiff to recover from a lawyer punitive damages that would have been recovered from the defendant in an underlying action but for the lawyer's misconduct. However, such recovery is not required by the punitive and deterrent purposes of punitive damages. Collecting punitive damages from the lawyer will neither punish nor deter the original tortfeasor and calls for a speculative reconstruction of a hypothetical jury's reaction.

i. Joint and several liability; contribution; claims against successor counsel. The principles of joint and several or several liability generally applicable to negligence actions apply to professional-negligence and fiduciary-breach actions (see Chapter 4, Introductory Note). If, for example, a seller and the seller's lawyer both participate in negligent misrepresentations to a buyer, and if the lawyer owes a duty of care to the buyer under § 51(2), general principles of law make the seller and lawyer jointly and severally liable for resulting damages. See also § 56, Comment *d* (liability for advising and assisting clients); Restatement Second, Torts §§ 875-886B. Generally applicable law also governs whether one tortfeasor who has been held liable can obtain contribution or indemnity from another. On a client's obligation to indemnify a lawyer for liabilities to which the client has exposed the lawyer without the lawyer's fault, see § 17(2). On vicarious liability of law firms and their partners for certain torts of firm lawyers, see § 58.

When the damage caused by the negligence or fiduciary breach of a lawyer is increased by the negligence or fiduciary breach of successor counsel retained by the client, the first lawyer is liable to the client for the whole damage if the conditions set forth in Restatement Second, Torts § 447 are satisfied. The successor lawyer is also directly liable to the client for damage caused by that lawyer's negligence or fiduciary breach. The first lawyer, however, may not seek contribution or indemnity from the successor lawyer in the same action in which the successor lawyer represents the client, for that would allow the first lawyer to create or exacerbate a conflict of interest for the second lawyer and force withdrawal of the second lawyer from the action. The first lawyer may, however, dispute liability in the negligence or fiduciary breach action for the portion of the damages caused by the second lawyer on the ground that the conditions of Restatement Second, Torts § 447 are not satisfied. The client may then choose whether to accept the possibility of such a reduction in damages or to assert a second claim against successor counsel, with the resultant necessity of retaining a third lawyer to proceed against the first two. Regardless of whether the client asserts a second claim, such three-sided disputes may raise problems involving client confidences (see § 52, Comment *h*), conflicts of interest (see § 125), lawyer duties of disclosure (see § 20, Comment *c*), and lawyer witnesses (see § 108) that require lawyers and judges to act carefully to protect the rights of clients and lawyers.

Reporter's Note

*Comment b. Action by a civil litigant: loss of a judgment.*On the "trial within a trial," see, e.g., Winskunas v. Birnbaum, 23 F.3d 1264 (7th Cir.1994) (summary-judgment context); Honeywell, Inc. v. American Standards Testing Bureau, Inc., 851 F.2d 652 (3d Cir.), cert. denied, 488 U.S. 1010, 109 S.Ct. 795, 102 L.Ed.2d 787 (1989) (discussing use of expert testimony to establish what result should have been); Glencore, Ltd. v. Ince, 972 P.2d 376 (Utah 1998) (issue is how case should have been decided, not what would in fact have happened); Vahila v. Hall, 674 N.E.2d 1164 (Ohio 1997) (seemingly rejecting traditional requirement); Lewandowski v. Continental Cas. Co., 276 N.W.2d 284 (Wis.1979); 3 R. Mallen & J. Smith, Legal Malpractice § 29.13 (4th ed.1996); C. Wolfram, Modern Legal Ethics 218-22 (1986); Annot., 90 A.L.R.4th 1033 (1991). On the submission to the jury of the question whether the plaintiff would have prevailed and the prohibition of testimony by the judge who would have heard the original case, see, e.g., Justice v. Carter, 972 F.2d 951 (8th Cir.1992); Phillips v. Clancy, 733 P.2d 300 (Ariz.Ct.App.1986); Pickett, Houlon & Berman v. Haislip, 533 A.2d 287 (Md.Ct.Spec.App.1987); Chocktoot v. Smith, 571 P.2d 1255 (Or.1977) (jury decides issues of fact, even those that would have been tried by judge in defective first suit, but not issues of law); Brust v. Newton, 852 P.2d 1092 (Wash.Ct.App.1993); Helmbrecht v. St. Paul Ins. Co., 362 N.W.2d 118 (Wis.1985). There is a similar requirement that a client whose lawyer has negligently failed to appeal must show that the client would have prevailed on appeal in order to recover from the lawyer the sum which plaintiff would have received had the appeal prevailed; whether the client would have prevailed on appeal is decided by the court as a matter of law. See, e.g., Oteiza v. Braxton, 547 So.2d 948 (Fla.Dist.Ct.App.1989); Charles Reinhart Co. v. Winiemko, 513 N.W.2d 773 (Mich.1994); Goldstein v. Kaestner, 413 S.E.2d 347 (Va.1992); Daugert v. Pappas, 704 P.2d 600 (Wash.1985).

On recovery for "loss of a chance," see Singleton v. Stegall, 580 So.2d 1242 (Miss.1991) (declining to dismiss on pleadings); Kitchen v. Royal Air Force Assoc., [1958] 1 W.L.R. 563 (C.A.) (Eng.); J. Hamelin & A. Damien, Les Regles de la Profession d'Avocat 548-49 (7th ed.1992) (France); Comment, Loss of Chance in Legal Malpractice, 61 Wash. L. Rev. 1479 (1986). Contra, Daugert v. Pappas, 704 P.2d 600 (Wash.1985); Sheppard v. Krol, 578 N.E.2d 212 (Ill.App.Ct.1991). For such recovery in suits against physicians and hospitals for medical malpractice, see, e.g., Perez v. Las Vegas Medical Center, 805 P.2d 589 (Nev.1991); Scafidi v. Seiler, 574 A.2d 398 (N.J.1990) (citing authorities).

On recovery for failure to settle, see Moores v. Greenberg, 834 F.2d 1105 (1st Cir.1987) (lawyer did not transmit settlement offer to client); Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin, 828 P.2d 745 (Alaska 1992); McConwell v. FMG, Inc., 861 P.2d 830 (Kan.Ct.App.1993) (failure to inform clients or negotiate actively, but no proximate cause when client did not show that an acceptable offer was or would have been made); 3 R. Mallen & J. Smith, supra § 29.38. Compare Schlomer v. Perina, 485 N.W.2d 399 (Wis.1992) (rejecting as speculative claim of harm resulting from negligent delay in settling). On recovery for negligently inadequate settlement, see Grayson v. Wofsey, Rosen, Kweskin & Kuriansky, 646 A.2d 195 (Conn.1994); Fishman v. Brooks, 487 N.E.2d 1377 (Mass.1986); Cook v. Connolly, 366 N.W.2d 287 (Minn.1985); Malfabon v. Garcia, 898 P.2d 107 (Nev.1995); Ziegelheim v. Apollo, 607 A.2d 1298 (N.J.1992); Helmbrecht v. St. Paul Ins. Co., 362 N.W.2d 118 (Wis.1985); 3 R. Mallen & J. Smith, Legal Malpractice, supra; Annot., 87 A.L.R.3d 168 (1978); cf. Weiss v. Manfredi, 639 N.E.2d 1122 (N.Y.1994). Contra, Muhammad v. Strassburger, McKenna, Messer, Shilobod, & Gutnick, 587 A.2d 1346 (Pa.), cert. denied, 502 U.S. 867, 112 S.Ct. 196, 116 L.Ed.2d 156 (1991) (no liability for negligent settlement in absence of fraud by lawyer), limited in McMahon v. Shea, 688 A.2d 1179 (Pa.1997) (liability for negligent advice on terminibility of support payments under settlement); see McKay v. Owens, 937 P.2d 1222 (Id.1997) (client estopped from suing lawyer on grounds she explicitly contradicted before settlement court). On damages other than the loss of the case, see Spering v. Sullivan, 361 F.Supp. 282 (D.Del.1973) (costs of attempt to reinstate original claim); Salley v. Childs, 541 A.2d 1297 (Me.1988) (emotional distress of defendant who lost suit; but see Comment *h*); McInnis v. Hyatt Legal Clinics, 461 N.E.2d 1295 (Ohio 1984) (loss of business caused by lawyer's use of service by publication in violation of client instructions); Annot., 90 A.L.R.4th 1033 (1991).

On the burden of proving uncollectibility of the judgment in the original suit, compare Smith v. Haden, 868 F.Supp. 1 (D.D.C.1994) (defendant lawyer has burden of proving judgment in underlying case uncollectible); Power Constructors, Inc. v. Taylor & Hintze, 960 P.2d 20 (Alaska 1998) (same); Jourdain v. Dineen, 527 A.2d 1304 (Me.1987) (same); Teodorescu v. Bushnell, Gage, Reizen & Byington, 506 N.W.2d 275 (Mich.Ct.App.1993) (same); Hoppe v. Ranzini, 385 A.2d 913 (N.J.Super.Ct.App.Div.1978) (same); Kituskie v. Corbman, 714 A.2d 1027 (Pa.1998) (same), with, e.g., Klump v. Duffus, 71 F.3d 1368 (7th Cir.1995), cert. denied, 518 U.S. 1004, 116 S.Ct. 2523, 135 L.Ed.2d 1047 (1996) (plaintiff's burden); Jernigan v. Giard, 500 N.E.2d 806 (Mass.1986) (same, unless lawyer's negligence made proof of collectibility more difficult); Eno v. Watkins, 429 N.W.2d 371 (Neb.1988) (same); 3 R. Mallen & J. Smith, supra § 29.13 (same), with Wagner v. Tucker, 517 F.Supp. 1248 (S.D.N.Y.1981) (lawyer has burden of producing evidence of uncollectibility, after which plaintiff has burden of persuading trier of collectibility); Fernandes v. Barrs, 641 So.2d 1371 (Fla.Dist.Ct.App.1994) (lawyer has burden when lawyer's negligence makes it impossible for plaintiff to prove collectibility).

*Comment c. Action by a civil litigant: attorney fees that would have been due.*The approaches taken by courts have varied considerably. Compare, e.g., Kane, Kane & Kritzer, Inc. v. Altagen, 165 Cal.Rptr. 534 (Cal.Ct.App.1980) (no deduction of fees); McCafferty v. Musat, 817 P.2d 1039 (Colo.Ct.App.1990) (same); Winter v. Brown, 365 A.2d 381 (D.C.1976) (same); Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn.1980) (same); Campagnola v. Mulholland, Minion & Roe, 555 N.E.2d 611 (N.Y.1990) (same), with, e.g., Moores v. Greenberg, 834 F.2d 1105 (1st Cir.1987) (allowing deduction, but noting that lawyer had done work to earn fee); Sitton v. Clements, 257 F.Supp. 63 (E.D.Tenn.1966), aff'd, 385 F.2d 869 (6th Cir.1967) (allowing deduction), overruled by Foster v. Duggin, 695 S.W.2d 526 (Tenn.1985); Childs v. Comstock, 74 N.Y.S.

643 (N.Y.App.Div.1902) (same), overruled by Campagnola v. Mulholland, Minion & Roe, supra; 2 R. Mallen & J. Smith, Legal Malpractice § 19.18 (4th ed.1996) (approving this approach), with Jenkins v. St. Paul Fire & Mar. Ins. Co., 393 So.2d 851 (La.Ct.App.1981), aff'd in other respects, 422 So.2d 1109 (La.1982) (plaintiff may recover excess of attorney fees in malpractice suit over those that would have been due in previous suit); Saffer v. Willoughby, 670 A.2d 527 (N.J.1996) (court may deduct fee in exceptional case; plaintiff recovers legal costs of malpractice action itself); Foster v. Duggin, supra (lawyer may receive credit for expenses benefiting client); cf. FDIC v. O'Melveny & Meyers, 969 F.2d 744 (9th Cir.1992), rev'd on other grounds, 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994) (successful malpractice plaintiff may obtain restitution of attorney fees already paid).

*Comment d. Action by a criminal defendant.*Compare, e.g., Glenn v. Aiken, 569 N.E.2d 783 (Mass.1991) (defendant must show innocence); State ex rel. O'Blennis v. Adolf, 691 S.W.2d 498 (Mo.Ct.App.1985) (same); Wiley v. San Diego County, 966 P.2d 983 (Cal.1998) (same); Moore v. Owens, 698 N.E.2d 707 (Ill.App.Ct.1998) (same); Carmel v. Lunney, 511 N.E.2d 1126 (N.Y.1987) (defendant must allege colorable claim of innocence); Morgano v. Smith, 879 P.2d 735 (Nev.1994) (same); Harris v. Bowe, 505 N.W.2d 159 (Wis.Ct.App.1993) (defendant must prove innocence, which guilty plea precludes), with, e.g., Williams v. Callaghan, 938 F.Supp. 46 (D.D.C.1996) (defendant must show result would have been different but for malpractice); Hines v. Davidson, 489 So.2d 572 (Ala.1986) (defendant must show he would have been acquitted but for malpractice); Fischer v. Longest, 637 A.2d 517 (Md.Ct.Spec.App.1994) (defendant may recover for collateral harm such as failure to release on bail); Cooper v. Simon, 719 S.W.2d 463 (Mo.Ct.App.1986), cert. denied, 482 U.S. 918, 107 S.Ct. 3194, 96 L.Ed.2d 681 (1987) (defendant must show result would have been different); cf. Levine v. Kling, 123 F.3d 580 (7th Cir.1997) (innocence must be shown when defendant claims he would have been acquitted but for malpractice, but not when defendant challenges failure to press defense such as double jeopardy); Shaw v. State, 861 P.2d 566 (Alaska 1993) (lawyer may raise client's guilt as defense).

Most jurisdictions allow a criminal defendant to sue for legal malpractice only after having the underlying criminal conviction set aside, on appeal or by collateral attack. That position is reflected in the Comment, but two of the Reporters disagree, believing that ordinary principles of causation should apply. Cases consistent with the Comment are: Shaw v. State, supra; Kramer v. Dirksen, supra; Carmel v. Lunneyu, supra; Steele v. Kehoe, 747 So.2d 931 (Fla.1999); Stevens v. Bispham, 851 P.2d 556 (Or.1993); Bailey v. Tucker, 621 A.2d 108 (Pa.1993) (also requiring that lawyer acted recklessly); Peeler v. Hughes & Luce, 909 S.W.2d 494 (Tex.1995); Adkins v. Dixon, supra; see Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994) (Civil Rights Act suit against police and prosecutors for unconstitutional state conviction subject to habeas corpus requirement of exhaustion of state remedies). Contra, Williams v. Callaghan, supra; Silvers v. Brodeur, 682 N.E.2d 811 (Ind.Ct.App.1997); Gebhardt v. O'Rourke, 510 N.W.2d 900 (Mich.1994); Duncan v. Campbell, 936 P.2d 863 (N.M.Ct.App.1997) (dictum); Krahn v. Kinney, 538 N.E.2d 1058 (Ohio 1989); cf. Glenn v. Aiken, 569 N.E.2d 783 (Mass.1991) (conviction need not have been set aside for inadequate assistance of counsel).

Collateral relief is not required when it is unavailable, for example because the malpractice plaintiff does not challenge the conviction. Fischer v. Longest, 637 A.2d 517 (Md.Spec.Ct.App.1994) (where claim is limited to damages from malpractice that caused pretrial detention, no need to have later conviction set aside) (dictum); see Bowman v. Doherty, 686 P.2d 112 (Kan.1984) (lawyer's negligence caused plaintiff's arrest for nonappearance in court); Geddie v. St. Paul Fire & Marine Ins. Co., 354 So.2d 718 (La.Ct.App.1978) (plaintiff received 4-year sentence for crime with 2-year maximum and sued after serving sentence). There is sparse and contradictory authority on whether, when collateral relief is a prerequisite to recovery, the statute of limitations starts running only after relief is obtained. Compare Stevens v. Bispham, 851 P.2d 556 (1993) (yes) with Seevers v. Potter, 537 N.W.2d 505 (Neb.1995) (no).

On the issue-preclusion effect of a judgment in a postconviction proceeding on a later malpractice suit, see, e.g., McCord v. Bailey, 636 F.2d 606 (D.C.Cir.1980), cert. denied, 451 U.S. 983, 101 S.Ct. 2314, 68 L.Ed.2d 839 (1981); Schlumm v. O'Hagan, 433 N.W.2d 839 (Mich.Ct.App.1988); Belford v. McHale Cook & Welch, 648 N.E.2d 1241 (Ind.Ct.App.1995); Adkins v. Dixon, supra.

See generally 3 R. Mallen & J. Smith, Legal Malpractice § 25.3 (4th ed.1996); Koniak, Through the Looking Glass of Ethics and the Wrong with Rights We Find There, 9 Geo. J. Leg. Ethics 1 (1995); Kaus & Mallen, The Misguiding Hand of Counsel-Reflections on "Criminal Malpractice," 21 U.C.L.A. L. Rev. 1191 (1974); Annot., 4 A.L.R.5th 273 (1992). On whether public defenders are immune from malpractice liability, compare, e.g., Dziubak v. Mott, 503 N.W.2d 771 (Minn.1993) (yes), with, e.g., Donigan v. Finn, 290 N.W.2d 80 (Mich.Ct.App.1980) (no).

*Comment e. Nonlitigated matters.*See, e.g., Doe v. Hughes, Thorsness, Gantz, Powell & Brundin, 833 P.2d 11 (Alaska 1992) (lawyer who failed to comply with statute arguably applicable to adoption liable for costs of defending adoption against challenge); Linck v. Barokas & Martin, 667 P.2d 171 (Alaska 1983) (lawyer's failure to advise client to disclaim interest in estate rendered lawyer liable for resulting gift taxes); Kushner v. McLarty, 300 S.E.2d 531 (Ga.Ct.App.1983) (lawyer liable for misdrafting contract even though client read it before signing, when meaning was unclear to nonlawyer and lawyer did not explain it); Wartzman v. Hightower Productions Ltd., 456 A.2d 82 (Md.Ct.Spec.App.1983) (when lawyer's malpractice prevented client corporation from selling stock, corporation recovered reliance damages); Tilly v. Doe, 746 P.2d 323 (Wash.Ct.App.1987) (when seller's lawyer failed to perfect security interest in sold business and buyers defaulted, seller could recover from lawyer by proving collectibility and value the security interest would have had); Hazel & Thomas, P.C. v. Yavari, 465 S.E.2d 812 (Va.1996) (no liability for failing to propose contractual clause without showing that other party would have accepted it); Keister v. Talbott, 391 S.E.2d 895 (W.Va.1990) (when lawyer's title search for buyer of land failed to reveal that mineral rights had already been conveyed, buyer recovered from lawyer difference between price paid and market value of land without mineral rights); Estate of Campbell v. Chaney, 485 N.W.2d 421 (Wis.Ct.App.1992) (when client settled challenge to prenuptial agreement negligently drafted by lawyer without proper disclosures to prospective spouse, client can recover without proving that challenge would have succeeded).

*Comment f. Attorney fees as damages.*On the applicability to malpractice suits of the "American Rule" barring recovery of attorney fees expended in the malpractice action itself, see, e.g., Dalo v. Kivitz, 596 A.2d 35 (D.C.1991); Whitney v. Buttrick, 376 N.W.2d 274 (Minn.Ct.App.1985); Olson v. Fraase, 421 N.W.2d 820 (N.D.1988); Kelly v. Foster, 813 P.2d 598 (Wash.Ct.App.1991). But see Jenkins v. St. Paul Fire & Marine Ins. Co., 393 So.2d 851 (La.Ct.App.1981), aff'd, 422 So.2d 1109 (La.1982); Saffer v. Willoughby, 670 A.2d 527 (N.J.1996). On the recovery of attorney fees and other litigation expenses as damages when a lawyer's malpractice causes the client to incur such expenses in matters other than litigating the malpractice claim, see, e.g., De Pantosa Saenz v. Rigau & Rigau, P.A., 549 So.2d 682 (Fla.Dist.Ct.App.1989) (lawyer sold client's land at unauthorized low price; client recovers expenses of rescission suit); Ramp v. St. Paul Fire & Marine Ins. Co., 269 So.2d 239 (La.1972) (expenses of setting aside estate settlement improperly advised by lawyer); First Nat'l Bank of Clovis v. Diane, Inc., 698 P.2d 5 (N.M.Ct.App.1985) (lawyer liable for expenses of defending suit to which client was exposed by lawyer's improper advice); Krahn v. Kinney, 538 N.E.2d 1058 (Ohio 1989) (expenses of setting aside default order entered because lawyer did not appear); 2 R. Mallen & J. Smith, Legal Malpractice § 19.6 (4th ed.1996); cf. Glamann v. St. Paul Fire & Mar. Ins. Co., 424 N.W.2d 924 (Wis.1988) (client entitled to fees, including fees on appeal, incurred in legal-malpractice action proving, as case-within-case, lost entitlement to employment-discrimination recovery). See generally Leubsdorf, Recovering Attorney Fees as Damages, 38 Rutgers L. Rev. 439 (1986); D. Dobbs, Handbook on the Law of Remedies 195-97 (1973).

*Comment g. Damages for emotional distress.*For differing rules about when such damages are recoverable, see, e.g., Wehringer v. Powers & Hall, P.C., 874 F.Supp. 425 (D.Mass.), aff'd, 65 F.3d 160 (1st Cir.1995) (not recoverable when malpractice involves only property rights, in suit for damages for tape recording client's voice); Timms v. Rosenblum, 713 F.Supp. 948 (E.D.Va.1989), aff'd, 900 F.2d 256 (4th Cir.1990) (only when client suffers physical injury or lawyer engaged in intentional and outrageous conduct; not here, where lawyer's negligence and misrepresentations deprived client of custody of children for 2 years); Boros v. Baxley, 621 So.2d 240 (Ala.1993), cert. denied, 510 U.S. 997, 114 S.Ct. 563, 126 L.Ed.2d 463 (1993) (recoverable only for affirmative wrongdoing, not neglect); Pleasant v. Celli, 22 Cal.Rptr.2d 663 (Cal.Ct.App.1993) (not when emotional distress was not foreseeable result of failure to bring timely medical-malpractice action, and lawyer did not act recklessly); Merenda v. Superior Court, 4 Cal.Rptr.2d 87 (Cal.Ct.App.1992) (not when lawyer's negligence causes only injury to economic interest, here the right to recover for sexual battery); Tara Motors v. Superior Court, 276 Cal.Rptr. 603 (Cal.Ct.App.), appeal dism'd, 812 P.2d 563 (Cal.1991) (recoverable when lawyer's negligence causes substantial economic loss); Cummings

v. Pinder, 574 A.2d 843 (Del.1990) (recoverable for outrageous and intentional conduct; lawyer stopped payment on settlement check, unilaterally increased fee, failed to give proper advice); Person v. Behnke, 611 N.E.2d 1350 (Ill.App.Ct.1993) (lawyer whose egregious malpractice deprived client of custody of children liable for loss of society but not mental anguish); Salley v. Childs, 541 A.2d 1297 (Me.1988) (recoverable when pecuniary loss also shown, here temporary suspension of horse-training license); Gore v. Rains & Block, 473 N.W.2d 813 (Mich.Ct.App.1991) (generally recoverable, here when lawyer failed to pursue medical-malpractice claim); Gautam v. DeLuca, 521 A.2d 1343 (N.J.Super.Ct.App.Div.1987) (only in extraordinary circumstances, not for failure to pursue medical-malpractice claim); Hilt v. Bernstein, 707 P.2d 88 (Or.Ct.App.1985) (not for negligence injuring economic interest, here rights in marital property); 2 R. Mallen & J. Smith, Legal Malpractice § 19.11 (4th ed.1996); cf. Person v. Behnke, 611 N.E.2d 1350 (Ill.App.Ct.), cert. denied, 622 N.E.2d 1226 (Ill.1993) (where malpractice led to loss of parental custody, lawyer liable for damages for loss of children's society).

A number of cases have allowed emotional-distress damages for malpractice causing the client's imprisonment, probably because distress is likely and financial damages difficult to prove. E.g., Wagenmann v. Adams, 829 F.2d 196 (1st Cir.1987); Bowman v. Doherty, 686 P.2d 112 (Kan.1984); Singleton v. Stegall, 580 So.2d 1242 (Miss.1991). In other instances, recovery seems to reflect the egregious misconduct of the lawyer as well as the client's harm. E.g., Cummings v. Pinder, 574 A.2d 843 (Del.1990) (lawyer raised fee without notice, stopped check, etc.; punitive damages also allowed); Perez v. Kirk & Carrigan, 822 S.W.2d 261 (Tex.Ct.App.1991) (lawyer disclosed confidential information to district attorney).

*Comment h. Punitive damages.*For different formulations of the standard, see, e.g., Cummings v. Pinder, 574 A.2d 843 (Del.1990) (outrageous and intentional conduct); Dessel v. Dessel, 431 N.W.2d 359 (Iowa 1988) (actual or legal malice); Arana v. Koerner, 735 S.W.2d 729 (Mo.Ct.App.1987) (reckless indifference); Rodriguez v. Horton, 622 P.2d 261 (N.M.Ct.App.1980) (wanton disregard of client's rights); Patrick v. Ronald Williams, P.A., 402 S.E.2d 452 (N.C.Ct.App.1991) (gross negligence); Olson v. Fraase, 421 N.W.2d 820 (N.D.1988) (oppression, fraud, or malice); 2 R. Mallen & J. Smith, Legal Malpractice § 19.16 (4th ed.1996); Annot., 13 A.L.R.4th 95 (1982); see Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) (possible constitutional limits to punitive-damage awards); Bernier v. Burris, 497 N.E.2d 763 (Ill.1986) (upholding constitutionality of legislation eliminating punitive damages for legal and medical malpractice); Bjorgen v. Kinsey, 466 N.W.2d 553 (N.D.1991) (when statute provided for treble damages against lawyer guilty of deceit or collusion, punitive damages not also recoverable). For recovery of punitive damages that a client would have obtained in an underlying action but for a lawyer's malpractice, see Ingram v. Hall, Roach, Johnston, Fisher & Bollman, 1996 WL 54206 (N.D.Ill.1996); Elliott v. Videan, 791 P.2d 639 (Ariz.Ct.App.1989); Merenda v. Superior Court, 4 Cal.Rptr.2d 87 (Cal.Ct.App.1992); Haberer v. Rice, 511 N.W.2d 279 (S.D.1994); Patterson & Wallace v. Frazer, 79 S.W. 1077 (Tex.Civ.App.1904); 2 R. Mallen & J. Smith, supra, at § 19.7. Contra, Cappetta v. Lippman, 913 F.Supp. 302 (S.D.N.Y.1996).

*Comment i. Joint and several liability; contribution; claims against successor counsel.*On the application of general principles of joint and several liability in legal-malpractice actions, see, e.g., Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin, 828 P.2d 745 (Alaska 1992) (joint and several liability of lawyer and insurer in malpractice action arising out of earlier action against insured client); Faier v. Ambrose & Cushing, P.C., 609 N.E.2d 315 (Ill.1993) (settling lawyer entitled to contribution and indemnity from nonsettling codefendant); Arana v. Koerner, 735 S.W.2d 729 (Mo.Ct.App.1987) (similar; settlement with insurer did not release lawyer); Olson v. Fraase, 421 N.W.2d 820 (N.D.1988) (2 lawyers who joined in improper advice jointly and severally liable); Considine Co. v. Shadle, Hunt & Hagar, 232 Cal.Rptr. 250 (Cal.Ct.App.1986) (division of liability between lawyer and client who participated in negligent misrepresentations to third person); Brown v. La Chance, 477 N.W.2d 296 (Wis.Ct.App.1991) (contribution between 2 lawyers who represented client in same matter); Annot., 20 A.L.R.4th 338 (1983) (lawyer may not obtain contribution from defendant sued in underlying action); § 58, Reporter's Note; cf. Faison v. Nationwide Mortgage Corp., 839 F.2d 680 (D.C.Cir.1987), cert. denied, 488 U.S. 823, 109 S.Ct. 70, 102 L.Ed.2d 46 (1988) (joint and several liability of lawyer and other participants in fraudulent scheme); Baker, Watts & Co. v. Miles & Stockbridge, 876 F.2d 1101 (4th Cir.1989) (§ 12(2) of Securities Act of 1933 does not create right of contribution or indemnity, but does not preempt any such right under state law).

On whether a legal-malpractice plaintiff may recover from the originally negligent lawyer an increase in damages caused by negligent successor counsel, see Restatement Second, Torts § 447 (negligence of a second person not a supervening cause if: actor should have realized a second person might so act; a reasonable observer would not regard it as highly extraordinary for a second person so to act; or intervening act was a normal consequence of the situation created by actor's conduct). On whether a lawyer may seek, through impleader, indemnity or contribution from successor counsel, compare, e.g., Austin v. Superior Court, 85 Cal.Rptr.2d 644 (Cal.Ct.App.1999) (no); Waldman v. Levine, 544 A.2d 683 (D.C.1988) (no); Roberts v. Heilgeist, 465 N.E.2d 658 (Ill.App.Ct.1984) (no); Melrose Floor Co. v. Lechner, 435 N.W.2d 90 (Minn.Ct.App.1989) (no); Hughes v. Housley, 599 P.2d 1250 (Utah 1979) (no); 1 R. Mallen & J. Smith, Legal Malpractice § 7.15 (4th ed.1996) (supporting this result), with, e.g., Brown-Seydel v. Mehta, 666 N.E.2d 800 (Ill.App.Ct. 1996) (yes); Maddocks v. Ricker, 531 N.E.2d 583 (Mass.1988) (yes; upholding disqualification of successor counsel, but noting potential for abuse); Hansen v. Brognano, 524 N.Y.S.2d 862 (N.Y.App.Div.1988) (yes; without discussing conflict problem); Costin v. Wick, 1996 WL 27974 (Ohio Ct.App.1996) (yes); cf. Schauer v. Joyce, 429 N.E.2d 83 (N.Y.1981) (first lawyer may obtain contribution from second lawyer in malpractice suit in which client is represented by third lawyer).

Case Citations - by Jurisdiction

D.Nev.

D.Nev.2003. Subsec. (i) cit. and quot. in sup. Attorney sued former clients for unpaid attorney fees allegedly owed under contingent-fee agreement. After clients counterclaimed, alleging malpractice and breach of fiduciary duty, plaintiff filed third-party claim against client's current attorneys, seeking indemnity or contribution for any damage resulting from current attorneys' malpractice. Granting current attorneys' motion to dismiss, this court held that plaintiff could not file third-party complaint for contribution or indemnity against current attorneys in malpractice action where current attorneys had no duty to mitigate plaintiff's malpractice liability, did not breach specific duty of professional practice, and did not exacerbate damages allegedly caused by plaintiff's malpractice. Mirch v. Frank, 295 F.Supp.2d 1180, 1185.

Ariz.

Ariz.2004. Com. (d) quot. in sup., quot. in ftn. Client convicted in criminal matter sued his attorney; trial court dismissed based on statute of limitations. Appellate court reversed, and attorney petitioned for review. Vacating and remanding, this court held, in a matter of first impression, that cause of action for legal malpractice in criminal case did not accrue, and statute of limitations did not begin to run, until criminal conviction was set aside in post-conviction proceedings. Glaze v. Larsen, 207 Ariz. 26, 83 P.3d 26, 31, 32.

Ark.

Ark.2003. Rptr's Note cit. in disc. Insurance companies brought legal-malpractice action against attorney, alleging that defendant failed to perfect an appeal in a negligence lawsuit against an insured. The trial court granted defendant's motion for summary judgment. Reversing, this court held, inter alia, that, although the trial court was correct to dispose of this matter through the vehicle of summary judgment, it erred in concluding that the court of appeals would have affirmed the judgment against insured, and that defendant's failure to perfect the appeal was not the proximate cause of plaintiffs' damages. The court remanded for a determination of what, if any, damages plaintiffs incurred as a result of defendant's malpractice. Southern Farm Bureau Casualty Ins. Co. v. Daggett, 354 Ark. 112, 118 S.W.3d 525, 529.

Cal.

Cal.2003. Com. (h) quot. in sup. In mass tort suit, class counsel stipulated to certification of a mandatory, non-opt-out class with respect to punitive damages. To settle suit, class counsel agreed to dismiss punitive-damages class claims with prejudice. Despite objections from some class members, trial court dismissed punitive damages claims and approved settlement. Two objectors sued law firm and its attorneys for punitive damages they allegedly would have recovered but for counsel's negligence, alleging legal malpractice. Trial court entered judgment for defendants, and appellate court affirmed. This court affirmed, holding that plaintiffs in a legal-malpractice suit could not recover as compensatory damages the punitive damages they allegedly lost due to their attorneys' negligence in underlying suit, since lost punitive damages were too speculative. Ferguson v. Lieff, Cabraser, Heimann & Bernstein, 30 Cal.4th 1037, 135 Cal.Rptr.2d 46, 54, 69 P.3d 965, 972.

Cal.App.

Cal.App.2008. Com. (g) cit. in sup. Former prisoner whose felony convictions were vacated after police officers admitted to testifying falsely against him sued county and deputy public defender that represented him for legal malpractice. After a jury awarded substantial damages, the trial court granted defendants a new trial, finding that the jury's failure to apportion any fault to officers was against the weight of the evidence. This court affirmed, holding, inter alia, that a legal-malpractice action seeking primarily noneconomic damages for emotional distress and physical pain was an "action for personal injury" requiring the apportionment of fault under California law. The court noted that, in a criminal case, the primary interest at stake in the defendant's legal representation was the defendant's liberty, and an emotional injury resulting from the incarceration of an innocent defendant was plainly foreseeable. Ovando v. County of Los Angeles, 159 Cal.App.4th 42, 73, 71 Cal.Rptr.3d 415, 440.

Cal.App.1997. Com. (b) cit. in disc. (citing § 75, T.D. No. 7, 1994, which is now § 53). A subcontractor, whose federal civil rights action was voluntarily dismissed after the federal district court ordered the imposition of sanctions against it for document fabrication, brought a malpractice suit against the accounting firm it had hired to provide litigation support. On remand, the trial court entered judgment on a jury verdict awarding the subcontractor damages. Reversing in part and affirming in part, this court held, inter alia, that the trial court erred in ruling that the subcontractor was not required to establish that, absent the accounting firm's negligence, the subcontractor would have prevailed in the underlying case. Mattco Forge, Inc. v. Arthur Young & Co., 52 Cal.App.4th 820, 60 Cal.Rptr.2d 780, 788.

Ill.

Ill.2006. Com. (h) quot. in sup. Former client brought malpractice action against law firm for negligently prosecuting client's action against a bank. The trial court entered judgment on a jury verdict against defendant, awarding plaintiff both compensatory and punitive damages that it would have received from bank. The appellate court, inter alia, affirmed the award of lost punitive damages. Reversing that portion of the decision, this court held, as a matter of first impression, that lost punitive damages were not recoverable in a subsequent action for legal malpractice. The court reasoned that holding defendant liable for the intentional or willful and wanton misconduct of a third-party would not advance, and was not consonant with, the purpose of punitive damages—to punish the offender and to deter it and others from committing similar acts of wrongdoing in the future. Tri-G, Inc. v. Burke, Bosselman & Weaver, 222 Ill.2d 218, 305 Ill.Dec. 584, 856 N.E.2d 389, 416.

Ill.App.

Ill.App.2013. Com. (b) quot. in sup. Client brought a legal-malpractice action against law firm that had represented him in an underlying action concerning the terms of a stock-purchase agreement, alleging, among other things, that firm had been negligent in failing to argue that the agreement was ambiguous. The trial court dismissed, finding, as a matter of law, that firm's actions constituted nonactionable errors of judgment, and not professional negligence. Reversing and remanding, this court held that it could not be said, as a matter of law, that client could prove no set of facts from which a jury could find that firm's negligence in failing to raise the additional available arguments was the proximate cause of client's damages. The court noted that the test for establishing causation in a legal-malpractice action was not what the specific judge in the underlying action would have done had a different argument been made; rather, the test was objective and the question was what a reasonable judge would have done. Nelson v. Quarles and Brady, LLP, 2013 IL App (1st) 123122, 997 N.E.2d 872, 895.

Ill.App.2007. Com. (b) quot. in sup. Guardian of minor's estate brought a legal-malpractice action against lawyer and law firm that unsuccessfully represented estate in underlying medical-malpractice action to recover damages for injuries minor suffered at birth, alleging that defendants failed to inform guardian of a $1 million settlement offer in the medical-malpractice case. The trial court entered judgment on a jury verdict awarding plaintiff $1 million. Affirming, this court held, as a matter of first impression, that the issue of whether the trial court in the underlying medical-malpractice case would have approved the settlement was not a question of fact for the jury but a question of law to be decided by the trial court in the legal-malpractice action; in the absence of such a ruling by that court, this court concluded, as a matter of law, that the trial court in the medical-malpractice action would have approved the settlement. First Nat. Bank of LaGrange v. Lowrey, 375 Ill.App.3d 181, 313 Ill.Dec. 464, 872 N.E.2d 447, 469.

Iowa,

Iowa, 2013. Cit. in sup., com. (c) quot. in sup. Former client brought a legal-malpractice action against attorney, alleging that attorney had negligently represented her in her personal-injury suit against state and a volunteer driver for a state agency. The district court entered judgment on a jury verdict for client, and denied attorney's posttrial motion to offset the verdict by the amount of the contingent fee he would have taken had the underlying tort action been successful or, alternatively, the reasonable value of his legal services. Affirming the district court's ruling denying attorney's posttrial motion, this court held, as a matter of first impression, that the damages awarded by the jury to client in her legal-malpractice suit could not be reduced by attorney's contingent fee, because attorney never earned the fee, and client had to pay new counsel who prosecuted the malpractice action. The court reasoned that, to allow attorney a setoff for his contingent fee would leave client less than whole once she paid the fees of the counsel who won her recovery, and thus a fee setoff conflicted with Iowa cases providing that a plaintiff was to be made whole. Hook v. Trevino, 839 N.W.2d 434, 437, 446.

Iowa, 2013. Com. (g) cit. and quot. in ftn. to diss. op. Ecuadorian clients sued attorney for legal malpractice after their I-601 applications for permission to enter the United States were denied and they were barred from readmission to the country for 10 years. The trial court granted attorney's motion for a directed verdict on clients' claims for emotional-distress damages. The court of appeals reversed that portion of the decision and remanded. Affirming, this court held that clients' claim for emotional-distress damages was viable, because an attorney-client relationship in the immigration context was the type of relationship in which negligent conduct was especially likely to cause severe emotional distress. The dissent argued that there were sound policy reasons against opening the door wider to claims for negligently caused pure emotional harm, even when it was foreseeable, including avoiding fictitious or trivial claims, the difficulty of establishing or disproving the nature and extent of the alleged mental injury, and limiting liability. Miranda v. Said, 836 N.W.2d 8, 39.

Ky.

Ky.2012. Com. (b) quot. in sup. and cit. in ftn. Client brought a legal-malpractice action against attorney, alleging that attorney failed to file, before the applicable statute of limitations expired, a negligence suit on her behalf against pilot who crashed his airplane into her home. The trial court entered judgment on a jury verdict for plaintiff. The court of appeals affirmed in part. Reversing and remanding, this court held that the trial court committed prejudicial error by improperly instructing the jury as to the suit-within-a-suit method for litigating legal-malpractice claims under Kentucky law. While the trial court properly instructed the jury on the standard for legal malpractice to be applied to attorney, it failed to instruct the jury at all on the underlying negligence case against pilot; thus, lacking a jury determination as to whether pilot was negligent, client failed to establish that attorney's malpractice proximately caused her loss. Osborne v. Keeney, 399 S.W.3d 1, 10.

Me.

Me.2009. Com. (g) cit. in sup. Clients brought legal-malpractice action against attorney in connection with his representation of them in a land dispute against their neighbor. The trial court entered judgment on a jury verdict for husband plaintiff on his claim for emotional distress arising from the malpractice. Vacating that portion of the decision, this court held, inter alia, that plaintiffs were not entitled to emotional-distress damages because plaintiffs suffered only an economic loss as a result of attorney's negligence, and attorney did not act egregiously. The general rule was that emotional-distress damages were not recoverable in legal-malpractice cases when the only injury was economic, except where the tort was intentional, because of the unforeseeability of emotional-distress damages flowing from an economic loss. Garland v. Roy, 2009 ME 86, 976 A.2d 940, 948.

Md.

Md.2010. Cit. in sup., com. (b) cit. and quot. in sup. Client sued law firm, alleging that it committed legal malpractice when it missed the deadline to request a fifth extension of time to file her request to elect her statutory share of her late husband's estate. After the trial court granted summary judgment for client, the court of special appeals reversed and remanded for entry of judgment in favor of law firm. While reversing and remanding for a trial on the merits, this court agreed with law firm that the trial-within-a-trial doctrine applied, under which the factfinder was to determine what would have occurred absent law firm's malpractice, because law firm disputed causation. The court concluded that, although the underlying case had already been litigated and client's opponent had in fact challenged the untimely request for a fifth extension, firm was not precluded from arguing that, had it timely filed for the fifth extension, opponent would have in any event successfully challenged an allegedly invalid original extension granted to client when proceeding pro se. Suder v. Whiteford, Taylor & Preston, LLP, 413 Md. 230, 992 A.2d 413, 419-422.

Ohio App.

Ohio App.2012. Com. (b) quot. in case quot. in sup. Corporate client brought a legal-malpractice suit against law firm that represented it in an administrative-expense claim against a debtor in an underlying bankruptcy proceeding, alleging that discovery sanctions levied against it by the bankruptcy court because of defendant's failure to respond to debtor's discovery requests proximately caused it to lose its claim against debtor's estate. On remand, the trial court granted summary judgment for defendant. While reversing and remanding on other grounds, this court held that plaintiff was collaterally estopped from asserting that defendant's negligence in the bankruptcy proceeding had proximately caused the loss of its administrative-expense claim. The court reasoned that the bankruptcy court, in denying plaintiff's claim, had found that plaintiff failed to meet its burden of proving that the administrative expense it claimed was an actual, necessary cost and expense of preserving the estate, and thus plaintiff had obtained a full and fair adjudication of its administrative-expense claim for collateral-estoppel purposes despite the discovery sanctions. C & K Indus. Serv. v. McIntyre, Kahn & Kruse Co., L.P.A., 2012-Ohio-5177, 984 N.E.2d 45, 50.

Tex.

Tex.1999. Com. (g) cit. in disc. (citing § 75, T.D. No. 8, 1997, which is now § 53). Husband and wife sued former attorneys for legal malpractice arising out of representation in a business dispute. The trial court directed a verdict for defendants on wife's claims. The court of appeals reversed in part. Reversing in part and rendering judgment that wife take nothing, this court held, in part, that wife could not recover mental-anguish damages as part of her legal-malpractice claim because those damages arose as a consequence of her economic loss. Douglas v. Delp, 987 S.W.2d 879, 885.

Vt.

Vt.2013. Com. (b) quot. in sup., com. (g) quot. in disc. Elderly former client brought a legal-malpractice suit against attorney who represented him in an underlying specific-performance action brought against him by buyers of his home after client refused to go through with the sale, alleging that attorney failed to timely plead meritorious defenses of fraud and misrepresentation, and failed to advise him to accept a pre-suit settlement to rescind the contract of sale for a $15,000 payment to buyers, ultimately resulting in a settlement in which client paid buyers $103,000 to keep his house. The trial court entered judgment on a jury verdict awarding client economic and emotional-distress damages. Affirming in part and reversing in part, this court held that, while emotional-distress damages were not available to client in this legal-malpractice case, because the threatened loss of his home was not of such a personal and emotional nature that it would support an exception to the general rule disallowing recovery of emotional-distress damages in the absence of physical impact, client was entitled to economic damages, because he presented prima facie evidence that the ultimate settlement, though out of sync with the actual market value of the house, was reasonable. The court concluded that the jury could reasonably have determined that a settlement agreement negotiated at arm's length over a period of time between client's new lawyer and opposing counsel, approved by client's guardians, and reviewed and approved by the probate court was reasonable. Vincent v. DeVries, 2013 VT 34, 72 A.3d 886, 895, 898.

Wash.

Wash.2010. Adopted in case quot. in sup., com. (c) quot. in sup. and cit. in ftn. Clients sued former attorney for legal malpractice and breach of fiduciary duty, seeking interest on a settlement payment they would have received approximately 10 years earlier had he not mishandled their case. After attorney admitted liability, the trial court awarded interest calculated on a figure representing the settlement less attorney's contingency fee. The court of appeals reversed, ruling that the interest should have been calculated on the total amount of the settlement, not the amount clients would have recovered after paying a contingency fee. Affirming, this court held that a legal malpractice plaintiff's damages could appropriately include forfeiture of the attorney's hypothetical contingency fee, reasoning that such a plaintiff should not be burdened with the obligation to pay twice for the same services. In addition, the court noted the rationale that a negligent lawyer should not be "credited" with a fee that he never earned. Shoemake ex rel. Guardian v. Ferrer, 168 Wash.2d 193, 225 P.3d 990, 993, 994.

Wash.App.

Wash.App.2008. Quot. in ftn., com. (c) cit. and quot. in sup. Former clients brought a legal-malpractice action against attorney who had represented them in a personal-injury case. After defendant admitted liability, the trial court awarded plaintiffs damages, reduced by the 40% contingent fee defendant would have recovered had he not been negligent. Reversing, this court held, as a matter of first impression, that a negligent attorney was not entitled to have the damages awarded to a successful malpractice plaintiff reduced by the amount stated in the negligent attorney's contingent-fee contract. The court reasoned that such an outcome would not put an injured plaintiff in the position she would have occupied in the absence of negligence, since, in almost all cases, she would be required to pay a second attorney to prosecute the malpractice action. Shoemake v. Ferrer, 143 Wash.App. 819, 182 P.3d 992, 996-997.

Wyo.

Wyo.2002. Cit. in sup., com. (g) cit. in sup. Divorced wife sued her attorney for malpractice, alleging that he did no meaningful work for her, gave bad advice that complicated her legal problems, pursued hopeless claims, and made false promises of success. Plaintiff sought damages for the emotional upheaval attending her eviction from ex-husband's home and loss of child custody. Answering certified questions from the trial court, this court determined that damages for emotional suffering were not available in a legal malpractice case that alleged mere negligence. Long-Russell v. Hampe, 2002 WY 16, 39 P.3d 1015, 1020.

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306 P.3d 1264
Supreme Court of Alaska.

Nicholas A. GEFRE and Charles T. Beck, individually and as a derivative action on behalf of Petro Alaska, Inc., an Alaskan corporation, Appellants,

v.

DAVIS WRIGHT TREMAINE, LLP; Jon S. Dawson; Richard A. Klobucher; Burr Pease & Kurtz; and John C. Siemers, Appellees.
Burr Pease & Kurtz And John C. Siemers, Cross–Appellants,

v.

Nicholas A. Gefre and Charles T. Beck, individually and as a derivative action on behalf of Petro Alaska, Inc., an Alaskan corporation, Cross–Appellees.

Nos. S–13675, S–13745. | Aug. 2, 2013.

Synopsis

Background: Shareholders of closely-held corporation brought derivative action against a shareholder-director and the corporation's former attorneys for fiduciary fraud, fraudulent conveyance, legal malpractice, and civil conspiracy. After evidentiary hearing, the Superior Court, First Judicial District, Ketchikan, Trevor Stephens, J., dismissed action. Shareholders appealed.

Holdings: The Supreme Court, Winfree, J., held that:

[1] ten-year statute of limitations applicable to certain actions relating to real property did not apply to claims for civil conspiracy and fraudulent conveyance;

[2] three-year statute of limitations for contract claims, rather than two-year statute of limitations for torts, applied to shareholders' spoliation of evidence claim against law firms;

[3] shareholders' legal malpractice claim against law firm, based on firm's alleged failure to warn shareholders that their potential claims against shareholder-director were set to expire, accrued from date of expiration of time for filing action against shareholder-director; and

[4] a legal malpractice plaintiff may recover as actual damages the attorney fees incurred as a result of the defendant's malpractice, so long as the plaintiff can demonstrate she would not have incurred the fees in the absence of the defendant's negligence.

Affirmed in part, reversed in part, and remanded.

West Headnotes (21)

[1] Corporations and Business Organizations
Time to sue; limitations and laches

Ten-year statute of limitations applicable to certain actions relating to real property did not apply to shareholders' derivative action claims against shareholder-director for civil conspiracy and fraudulent conveyance, even though claims arose out of purchase of real property by shareholder-director; claims involved only improprieties regarding the shareholder-director's acquisition and retention of property rather than an ownership interest itself. AS 09.10.230.

Cases that cite this headnote

[2] Torts
Time to sue and limitations

Three-year statute of limitations for contract claims, rather than two-year statute of limitations for torts, applied to shareholders' spoliation of evidence claim against law firms in derivative action regarding firms' alleged destruction of record concerning prior representation of corporation and shareholder-director, where claim arose in connection with the assertion of a breach of fiduciary duty in a legal malpractice claim. AS 09.10.053, 09.10.070.

Cases that cite this headnote

[3] Limitation of Actions
Negligence in performance of professional services

Shareholders' legal malpractice claim against law firm, based on firm's alleged failure to warn shareholders that their potential claims against shareholder-director were set to expire, accrued from date of expiration of time for filing action against shareholder-director. AS 09.10.053.

Cases that cite this headnote

[4] **Limitation of Actions**
⇐ In general; what constitutes discovery
The discovery rule operates only to lengthen, never to shorten, the limitations period.

Cases that cite this headnote

[5] **Limitation of Actions**
⇐ In general; what constitutes discovery
Although a cause of action generally accrues when the plaintiff incurs an injury, accrual can be delayed under a statutory or common-law discovery rule.

Cases that cite this headnote

[6] **Limitation of Actions**
⇐ In general; what constitutes discovery
The common-law discovery rule tolls the running of an applicable statute of limitations where an element of a cause of action is not immediately apparent.

1 Cases that cite this headnote

[7] **Limitation of Actions**
⇐ In general; what constitutes discovery
Under the discovery rule, the statute of limitations does not begin to run until the claimant discovers, or reasonably should have discovered, the existence of all elements essential to the cause of action.

Cases that cite this headnote

[8] **Limitation of Actions**
⇐ In general; what constitutes discovery
In determining when the limitations period begins to run under the discovery rule, court looks to the date when a reasonable person has enough information to alert that person that he or she has a potential cause of action or should begin an inquiry to protect his or her rights.

Cases that cite this headnote

[9] **Limitation of Actions**
⇐ In general; what constitutes discovery
The discovery rule may provide different possible dates on which a statute of limitations can begin to run; first is the inquiry-notice date, the date when the plaintiff has information which is sufficient to alert a reasonable person to begin an inquiry to protect his rights, while second is the actual-notice date, the date when the plaintiff reasonably should have discovered the existence of all essential elements of the cause of action.

1 Cases that cite this headnote

[10] **Limitation of Actions**
⇐ Want of diligence by one entitled to sue
If an inquiry, as would generally start running of limitations period, has not been made, a court, in applying the discovery rule to determine date on which limitations began to run, asks in the abstract whether a reasonable inquiry would have produced knowledge of the cause of action; this focuses on an ideal inquiry with the realization that time for a reasonable investigation is included in the length of the statute of limitations.

1 Cases that cite this headnote

[11] **Limitation of Actions**
⇐ Want of diligence by one entitled to sue
If an unproductive inquiry has been made, the court's analysis of when, under the discovery rule, limitations began to run, changes, and court asks whether the plaintiff's inquiry was reasonable.

Cases that cite this headnote

[12] **Limitation of Actions**
In general; what constitutes discovery
Limitation of Actions
Want of diligence by one entitled to sue

If a plaintiff's inquiry was not reasonable, then, under the discovery rule, the cause of action accrues at the inquiry-notice date unless a reasonable inquiry would not have been productive within the statutory period, but if a reasonable inquiry was made, the limitations period is tolled until the plaintiff either: (1) received actual knowledge of the facts giving rise to the cause of action, or (2) received new information which would prompt a reasonable person to inquire further.

1 Cases that cite this headnote

[13] **Limitation of Actions**
Attorneys

Under discovery rule, shareholders knew or should have known that legal action needed to be taken to protect corporation's rights no later than date when shareholder-director unequivocally reneged on his position that he held certain real property in trust for corporation, and therefore shareholders' legal malpractice claim against law firm, based on firm's alleged failure to advise shareholders of need for legal action, accrued from such date; at that point, shareholders knew that property's acquisition was important corporate opportunity, that the property was in shareholder-director's name, that shareholder-director had not voluntarily transferred title to property, and that shareholder-director had withdrawn his statement that he was holding property in trust for corporation.

Cases that cite this headnote

[14] **Limitation of Actions**
Estoppel to rely on limitation

For a defendant to be equitably estopped from pleading a statute of limitations defense, a plaintiff must show: (1) fraudulent conduct, which may take the form of either an affirmative misrepresentation or a failure to disclose facts where there is a duty to do so; (2) justifiable reliance; and (3) damage.

Cases that cite this headnote

[15] **Constitutional Law**
Limitation of actions
Limitation of Actions
Estoppel to rely on limitation

Trial court's application of statutory "reasonable inquiry" standard for evaluation of shareholders' investigatory diligence, in analysis of whether shareholder-director was equitably estopped from asserting limitations defense to shareholders' derivative action, did not violate equal protection clause, despite argument that court's application of statute displaced the "utterly unreasonable" standard regarding accrual of relevant statute of limitations; statutory "reasonable inquiry" standard did not hold shareholders to different standard. U.S.C.A. Const.Amend. 14; AS 09.10.053, 10.06.450(b).

Cases that cite this headnote

[16] **Judgment**
Bar of statute of limitations

When a factual dispute precludes entry of summary judgment on a statute-of-limitations defense, the dispute must ordinarily be resolved by the superior court at a preliminary evidentiary hearing in advance of trial.

Cases that cite this headnote

[17] **Jury**
Taking case or question from jury

Trial court's determination of reasonableness of shareholders' reliance on shareholder-director's representations concerning ownership of particular real property, as well as whether it should have been apparent to shareholders by certain date that shareholder-director was not going to voluntarily transfer title to property to corporation, as shareholders had intended to happen, in evidentiary hearing did not violate shareholders' right to jury trial, in determining whether limitations period barred shareholders' derivative action against shareholder-director; court had before it evidence establishing that shareholders had knowledge that property's acquisition was an important corporate opportunity, that shareholder-director purchased the property in his name, and that shareholder-director repeatedly failed to transfer title to corporation, and trial court did not address merits of any underlying claims. Const. Art. 1, § 16.

Cases that cite this headnote

[18] **Privileged Communications and Confidentiality**

Waiver of privilege

The attorney-client privilege is waived if: (1)assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.

Cases that cite this headnote

[19] **Privileged Communications and Confidentiality**

Waiver of privilege

Shareholders impliedly waived their attorney-client privilege with their own attorney by asserting discovery rule and equitable estoppel, in statute of limitations dispute in shareholders' legal malpractice and fiduciary fraud action against law firm which had represented corporation and corporate president, in case in which shareholder asserted that firm's conduct prevented shareholders from timely obtaining requisite knowledge for filing derivative action against corporate president; shareholders could not be permitted to thrust their lack of knowledge into the litigation while simultaneously retaining the attorney-client privilege to frustrate proof of knowledge that negated the very foundation necessary to their positions.

Cases that cite this headnote

[20] **Costs**

American rule; necessity of contractual or statutory authorization or grounds in equity

The general rule is that attorney's fees for work in the case under review are not recoverable as damages.

Cases that cite this headnote

[21] **Attorney and Client**

Damages and costs

A legal malpractice plaintiff may recover as actual damages the attorney fees incurred as a result of the defendant's malpractice, so long as the plaintiff can demonstrate she would not have incurred the fees in the absence of the defendant's negligence.

Cases that cite this headnote

Attorneys and Law Firms

***1266** Daniel W. Hickey and Anne M. Preston, Gruenstein & Hickey, Anchorage, and James J. Ragen and Gail M. Ragen, Ragen & Ragen, Seattle, Washington, for Appellants and Cross–Appellees.

Patrick B. Gilmore, Atkinson, Conway & Gagnon, Anchorage, for Appellees Davis Wright Tremaine, LLP, Jon S. Dawson, and Richard A. Klobucher.

Clay A. Young and Kendra E. Bowman, Delaney Wiles, Inc., Anchorage, for Appellees ***1267** and Cross–Appellants Burr Pease & Kurtz and John C. Siemers.

Before: CARPENETI, Chief Justice, FABE, WINFREE, and STOWERS, Justices.

WINFREE, Justice.

I. INTRODUCTION

Shareholders of a closely held corporation brought a derivative suit against a shareholder-director and the corporation's former attorneys for fiduciary fraud, fraudulent conveyance, legal malpractice, and civil conspiracy. After an evidentiary hearing, the superior court ruled all the claims were time-barred. We affirm the superior court's dismissal of most claims, but reverse its dismissal of two claims and remand those claims for further proceedings.

II. FACTS AND PROCEEDINGS

A. Facts

1. Gefre, Beck, and Steffen form Island Fuel (Petro Alaska).

Nicholas Gefre, Charles Beck, and Edward Steffen, who were friends and co-workers, formed Island Fuel, Inc. (Petro Alaska) in 1985. Steffen took 52% of the corporation's stock; Gefre and Beck took 24% each. Each became a member of the Board of Directors. The Board appointed Steffen President, Gefre Vice–President, and Beck Secretary and Treasurer. None had prior corporate experience, and despite his title as Secretary, Beck did not maintain the corporate books or minutes. Steffen acted as the company manager and Gefre and Beck worked in the company's day-to-day operations.

Petro Alaska was successful and there was agreement to expand operations. In January 1988 Steffen and his wife leased a Ketchikan property (the Property) from Stephen and Cheryl Day. [1] Steffen executed the lease in his name, although the lease referenced him as an individual doing business as Petro Alaska; the lease also indicated that Petro Alaska would make improvements on the Property. The Board met in December 1988 and ratified the lease and authorized Steffen to pursue, on Petro Alaska's behalf, a lease with an option to purchase the Property.

1 Both Steffen's and his wife's names were on the Property lease and later on the Property's title when it was purchased. Both were also named as defendants in this suit. But for ease of reference we use "Steffen" to refer both to Steffen individually when discussing his actions and to the Steffens collectively when discussing the Property ownership.

2. Steffen retains Davis Wright Tremaine.

In December 1988 Steffen contacted the law firm Davis Wright Tremaine (DWT) to represent Petro Alaska. The initial engagement letter from DWT partner Richard Klobucher stated DWT would provide Petro Alaska general corporate representation and "eventually [represent] all of the shareholders in personal estate and estate tax planning matters." The corporate representation specifically included a review of current corporate affairs. DWT then prepared the December 1988 Board meeting minutes, which reflected that the Property was a corporate opportunity Steffen was pursuing on Petro Alaska's behalf. DWT soon began estate planning for Steffen, but had no direct contact with Gefre or Beck.

DWT partner Judith Nevins helped Steffen pursue a lease of the Property with an option to purchase. Nevins understood DWT represented Petro Alaska, and advised Steffen that the lease should be in Petro Alaska's name. Steffen initially agreed, but later told Nevins that the Days wanted the lease made in Steffen's name. Believing it was an accommodation to the Days, Nevins drafted a letter to the Days' attorney stating Steffen, rather than Petro Alaska, would be the lessee. Nevins did not communicate this change to Gefre or Beck because she believed Steffen would do so.

Nevins finalized the lease in January 1990. The lease granted Steffen an option to purchase the Property, with a rebate on the purchase price equivalent to rent paid. It did not memorialize Nevins's understanding that Steffen held the Property for Petro Alaska's benefit; instead, it provided that the Property could be subleased by Steffen to Petro Alaska only if Steffen maintained at ***1268** least 52% ownership of Petro Alaska. DWT billed Petro Alaska for its lease-related legal fees.

Steffen informed Gefre and Petro Alaska's bookkeeper that he had negotiated a five-year lease for the company with a purchase option. He did not disclose that the lease was in his name. The Board did not formally adopt or ratify the lease at Petro Alaska's December 1991 Board meeting, which was its last official meeting prior to this litigation. Petro Alaska paid the lease rent, and its financial statements for 1990 through 1992 indicated that Petro Alaska leased and had an option to purchase the Property.

3. Steffen exercises the purchase option.

Steffen exercised the purchase option in December 1993 and took title to the Property. He received credit against the purchase price for Petro Alaska's lease payments. Petro Alaska's 1993 financial statement stated: "Effective January 1, 1994, the company's majority stockholder acquired the property on which its Ketchikan, Alaska operations are located. Effective January 1, 1994 the company leased this property from the majority stockholder." Petro Alaska's financial statements from 1994 to 2006 included the lease payments to Steffen. Petro Alaska's bookkeeper was aware that Steffen had purchased the Property and was leasing it to Petro Alaska. Gefre and Beck were not told.

DWT prepared consent minutes in lieu of Board meetings for 1992 through 1994. The 1993 consent indicated Petro Alaska had purchased the Property for $750,000. The 1994 consent contained a provision on the first page approving the lease between Steffen and Petro Alaska. Gefre and Beck signed the second page, but later denied seeing or approving the provision ratifying the lease between Steffen and Petro Alaska.

Gefre discovered by early 1995 that Steffen owned the Property. He confronted Steffen, who claimed he purchased it for Petro Alaska because the Days did not want to sell to a corporation. Steffen assured Gefre that he held the Property for Petro Alaska and would transfer title. Steffen repeatedly promised Gefre that he would transfer the title, but did not.

4. Gefre retains attorney Clay Keene.

Gefre retained Ketchikan attorney Clay Keene in 1997 to help secure title to the Property for Petro Alaska. Keene advised Gefre that he had fiduciary duties as a Board member and could be personally liable to Petro Alaska for not fulfilling those duties. Specifically, Keene informed Gefre that his fiduciary duties included ensuring Petro Alaska received title to the Property.

In November 1997 Keene ghostwrote a letter to Steffen for Gefre and Beck. In this letter Gefre and Beck acknowledged Petro Alaska had not maintained required corporate formalities, including Board meetings, and stated a desire to begin doing so. They also acknowledged Steffen held title to the Property as an accommodation to Petro Alaska, and asked Steffen to transfer the Property to Petro Alaska by the end of 1997. They requested that Gefre, Beck, and Steffen meet with Petro Alaska's outside accountant, Peter Hogan, to discuss tax consequences of transferring the Property to Petro Alaska.

Gefre, Beck, and Steffen met with Hogan in November 1997. They agreed Steffen would transfer title to Petro Alaska and the shareholders as individuals. Steffen stated he would work with Hogan to transfer the title, and Hogan memorialized the meeting. Neither Gefre nor Beck contacted Hogan to verify whether title had been transferred. Nothing changed with respect to how Petro Alaska's directors conducted corporate affairs. In 1998 Steffen contacted DWT about establishing a limited liability company into which he could transfer his real estate holdings, including the Property. Petro Alaska was billed for at least some of this work.

5. Beck requests a buyout, and Steffen destroys records.

Beck's health deteriorated in the late 1990s and he left Alaska for medical treatment. He asked for a buyout of his Petro Alaska shares in 2000, but this did not occur. Petro Alaska continued to pay Beck's wages and health insurance for a time, but these payments eventually were discontinued.

***1269** In 2000 Beck contacted Connie Williams, Petro Alaska's bookkeeper from 1986 to 1997, regarding possible corporate wrongdoing by Steffen. She provided Beck a list of suspected improprieties, including appropriating corporate money to acquire personal property, funding personal real estate ventures with corporate funds, and personally purchasing the Property with Petro Alaska making the loan payments coded as "rent." Beck believed Williams, but did not show the list to Gefre or Hogan. Near the same time, a Petro Alaska employee informed Beck that Steffen was destroying corporate records.

In the early 2000s Gefre became aware that Steffen had directed Petro Alaska staff not to send Gefre financial statements. Gefre nonetheless knew he had a right to review corporate records. Both Beck and Gefre repeatedly requested corporate records from Steffen, but he ignored or put off their requests. Beck concluded before June 2002 that Steffen would not transfer the Property's title to Petro Alaska.

6. Beck retains attorney Clay Keene and considers suit.

Beck retained Keene in May 2002 regarding Steffen's self-dealing and the Property. He told Keene about Williams's information on Steffen's self-dealing. He also gave Keene copies of corporate records he had received from Gefre. In June 2002 Keene ghostwrote a letter for Beck to send to Steffen. In this letter Beck requested copies of 30 categories of corporate records, including Property-related records, and requested that all corporate documents be preserved. Beck also informed Steffen that his failing health required him to liquidate his Petro Alaska shares and offered to sell them for $500,000. A copy of the letter was sent to Gefre.

In July 2002 Beck received a reply from Petro Alaska, including documents enabling Beck to resign as a director and officer. In a response ghostwritten by Keene, Beck declined to resign until his concerns about the company were resolved. He also requested copies of all corporate minutes and bylaws.

Keene ghostwrote another letter for Beck in late July 2002. This letter to Steffen reiterated Beck's demands for corporate records, including records related to the Property, stated his intent to remain a director, and expressed his concern with Steffen's record-request obstruction. Beck copied Gefre and a Petro Alaska employee, asking the employee to send him copies of certain records.

Steffen referred Beck's letters to attorney Jonathan Michaels at DWT. Michaels did not know former DWT partner Nevins, who had left DWT before he joined the law firm, and had had no prior contact with Petro Alaska. Michaels drafted a response to Beck's second letter for Steffen, which Steffen modified. Steffen's response included certain corporate records and stated that: (1) he purchased the Property and leased it to Petro Alaska; (2) the other requested records could be reviewed at Petro Alaska's offices; (3) neither Petro Alaska nor its shareholders were able to purchase Beck's shares; and (4) Petro Alaska requested Beck's resignation because he had not actively participated in managing Petro Alaska.

In August 2002 Beck contacted Keene to express concerns about incomplete corporate minutes. He also stated his fear that Steffen might attempt to bankrupt Petro Alaska and leave. Keene ghostwrote another letter for Beck to send to Steffen, reiterating Beck's demands for corporate records, stating Steffen's purchase of the Property was a misappropriation of Petro Alaska's corporate opportunity, and stating Beck could not be removed as a director or officer. Gefre was sent a copy.

At this time Beck began considering legal action against Steffen. He again contacted former bookkeeper Williams and asked for information on Steffen's self-dealing. She responded with information about several instances of Steffen's self-dealing and offered further assistance. Beck never followed up with Williams.

Beck consulted further with Keene, who advised him that although he could be removed as a director, Beck retained access to the Board's records as a shareholder. In August Beck had Keene ghostwrite more letters to Steffen, containing demands and statements similar to Beck's previous letters. Keene advised Beck that a suit against Steffen ***1270** was possible, but suggested that contacting the Alaska Department of Labor (DOL) to file a complaint might yield the same results as litigation. He also noted that if Beck personally pursued an action against Steffen, Steffen could avail himself of Petro Alaska's assets to defend himself at the company's expense. In September 2002 Beck contacted DOL about investigating Steffen. He emphasized that Steffen had "essentially stol[en]" the Property from Petro Alaska, but DOL declined to investigate.

DWT referred Beck's August 2002 inquiries to the law firm Burr Pease & Kurtz (BPK). In October John Siemers of BPK ghostwrote a letter for Steffen to send to Beck stating that Steffen owned the Property, Petro Alaska owned the improvements on the Property, and the purchase was reflected in Petro Alaska's records. The letter also stated that Petro Alaska would consider replacing Beck at its next Board meeting.

In November 2002 Keene ghostwrote two more letters for Beck to send to Steffen, asserting Steffen had breached his fiduciary duties to Petro Alaska by engaging in self-dealing. Siemers ghostwrote Steffen's response to these two letters, describing Beck's allegations as "reckless" and lacking a basis in fact. The letter also advised Beck to retain an attorney if Beck believed he had "a claim against the company." The letter stated Petro Alaska was "prepared to defend itself in a court of law, if necessary." BPK did no further legal work for Petro Alaska after 2002. It closed its file on Petro Alaska in 2004 and destroyed its Petro Alaska records in August 2005.

In November 2002 Steffen formed Steffen Properties, LLC (the LLC) with DWT's help. He then transferred the Property to the LLC.

Because he was indicted on an unrelated criminal matter and because Keene would not accept the case on a contingent fee basis, Beck did not bring suit in 2002 or 2003. Afraid of "rock[ing] the boat," Gefre did not join Beck's efforts, review corporate records, take efforts to hold the required Board meetings, or further investigate the self-dealing assertions made by Williams. In December 2002 Gefre and Steffen accepted Beck's resignation as a Petro Alaska officer and removed him as a director.

Petro Alaska retained copies of its pre–2000 records until 2006. An employee destroyed these records in 2006 because she had heard nothing further from Beck regarding corporate records. Beck and Gefre did not further pursue their concerns until Beck contacted a new attorney in May 2006. That attorney briefly reviewed Beck's files and concluded Beck required litigation counsel; Beck and Gefre then retained a new law firm. Through counsel, Gefre and Beck made a corporate records inspection demand to Steffen in February 2007 requesting all documents related to the Property. DWT provided copies of all Property-related records.

B. Proceedings

In August 2007 Gefre and Beck, individually and derivatively on behalf of Petro Alaska (collectively the Shareholders), filed suit against Steffen, the LLC, DWT, and DWT partner Jon Dawson. The complaint alleged: (1) fiduciary fraud by DWT and Steffen; (2) misappropriation of corporate opportunities by Steffen; (3) participation by DWT in Steffen's tortious conduct; (4) legal malpractice by DWT; and (5) fraudulent conveyance of the Property by DWT and Steffen. The Shareholders requested imposition of a constructive trust on the Property, an accounting by Steffen, and punitive damages. The Shareholders also requested that DWT and Steffen be estopped from asserting a statute-of-limitations defense.

The Shareholders did not sue BPK because they were unaware of its 2002 involvement on behalf of Petro Alaska. BPK initially represented Steffen in the suit. The Shareholders' counsel then came upon a 2002 BPK billing in Petro Alaska's general ledger, and in January 2008 BPK disclosed the nature of its 2002 assistance with Steffen's responses to Beck's letters. In February 2008 the Shareholders amended their complaint to add Klobucher, Siemers, and BPK as defendants. The Shareholders also added an intentional spoliation of evidence claim against Steffen and BPK for destruction of records. ***1271** Steffen settled with the Shareholders in May 2008 and transferred the Property to Petro Alaska.

Both DWT and BPK moved for summary judgment based on statutes-of-limitations defenses. The superior court denied DWT's and BPK's motions, but scheduled an evidentiary hearing on the statutes-of-limitations issues. The Shareholders objected to the evidentiary hearing. In July 2009 the superior court held the evidentiary hearing, and in October 2009 the court dismissed the Shareholders' claims as time-barred and entered final judgment.

The Shareholders appeal the dismissal of all the claims against the attorneys as time-barred. BPK cross-appeals the superior court's refusal to recognize an offer of judgment in awarding fees and costs.

III. STANDARD OF REVIEW

The date on which a claim accrues is a factual question, which we review for clear error. [2] However, we review de novo the legal standard used to determine accrual dates, [3] and we review de novo questions regarding the applicable statute of limitations, the interpretation of that statute, and whether that statute bars a claim. [4]

2 *Sengupta v. Wickwire,* 124 P.3d 748, 752 (Alaska 2005) (citing *Alderman v. Iditarod Props., Inc.,* 104 P.3d 136, 140 (Alaska 2004)).

3 *See City of Fairbanks v. Amoco Chem. Co.,* 952 P.2d 1173, 1178–80 (Alaska 1998) (reviewing de novo applicable accrual standards).

4 *Weimer v. Cont'l Car & Truck, LLC,* 237 P.3d 610, 613 (Alaska 2010) (citing *Smallwood v. Cent. Peninsula Gen. Hosp.,* 151 P.3d 319, 322–23 (Alaska 2006)).

We apply our independent judgment to questions of constitutional law, [5] including questions regarding the extent of the right to a trial by jury and the right to equal protection. [6] We "adopt the rule of law that is most persuasive in light of precedent, reason, and policy." [7]

5 *Fraternal Order of Eagles v. City & Borough of Juneau,* 254 P.3d 348, 352 (Alaska 2011) (citing *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska, Inc.,* 28 P.3d 904, 908 (Alaska 2001)).

6 *See, e.g., Pomeroy v. Rizzo ex rel. C.R.,* 182 P.3d 1125, 1128 (Alaska 2008) (reviewing by independent judgment constitutional right to trial by jury); *Pub. Emps.' Ret. Sys. v. Gallant,* 153 P.3d 346, 349 (Alaska 2007) ("The equal protection challenge presents a question of law to which this court applies its independent judgment." (citing *Alaska Civil Liberties Union v. State,* 122 P.3d 781, 785 (Alaska 2005))).

7 *Fraternal Order of Eagles,* 254 P.3d at 352 (quoting *Alaskans for Efficient Gov't., Inc. v. State,* 153 P.3d 296, 298 (Alaska 2007)).

IV. DISCUSSION

A. Statutes–Of–Limitations Rulings

1. Overview

The Shareholders raise several arguments regarding the superior court's statutes-of-limitations rulings. To analyze these arguments, we must address the statutes of limitations applicable to the Shareholders' claims, the proper rule for determining when the claims accrued, and whether the claims' accrual should be delayed. We then address whether equitable estoppel forecloses the statutes-of-limitations defenses.

2. Applicable statutes of limitations

The Shareholders claim the superior court erred by: (1) refusing to apply AS 09.10.230's ten-year statute of limitations to the conspiracy and fraudulent conveyance claims; and (2) applying the two-year tort statute of limitations to the fiduciary fraud and intentional spoliation claims.

a. Alaska Statute 09.10.230 does not apply to the conspiracy and fraudulent conveyance claims.

[1] Alaska Statute 09.10.230 provides that actions to determine a person's "right or claim to or interest in real property" must be brought within ten years. [8] The superior *1272 court ruled AS 09.10.230 applied to the Shareholders' misappropriation of corporate opportunities claim, which directly related to Petro Alaska's interest in the Property, but not to the Shareholders' other claims indirectly related to the Property.

8 AS 09.10.230 incorporates the ten-year limitations period provided in AS 09.10.030. *See* AS 09.10.230 (providing action for determination of right or claim to or interest in real property must be "commenced within the limitations provided for actions for the recovery of the possession of real property"); AS 09.10.030 (providing action for recovery of possession of real property must be commenced within ten years).

The Shareholders argue that a civil conspiracy claim for depriving an owner of real property is subject to AS 09.10.230's ten-year limitations period. The Shareholders state the superior court correctly applied AS 09.10.230 to claims against Steffen for his wrongful acquisition and retention of title to the Property. But the Shareholders then contend that because the "nature of the unlawful conduct underlying the conspiracy determines the applicable statute," the conspiracy claims against DWT related to Steffen's acquisition of the Property must also be subject to AS 09.10.230. The Shareholders also argue that a direct fraudulent conveyance claim against DWT (under AS 34.40.010 [9]) specifically requires application of AS 09.10.230.

9 AS 34.40.010 provides in relevant part that "a conveyance or assignment ... of an estate or interest in land ... or of rents or profits issuing from them ... made with the intent to hinder, delay, or defraud creditors ... is void."

We agree with the superior court's conclusion that the ten-year statute of limitations under AS 09.10.230 does not apply to the Shareholders' civil conspiracy and fraudulent conveyance claims. Because "[AS] 09.10.230 contemplates a dispute over an interest in real property," [10] we have previously applied it where the nature of the ownership interest was the central issue. [11] We have not applied AS 09.10.230 where the "issue [was] not the ownership interest itself but [rather] improprieties in the bargaining that resulted in the conveyance of that interest." [12] To invoke AS 09.10.230's limitations period, it is not enough for a claim to be merely attendant to an underlying conveyance of a property interest—it must directly involve "the determination of a right or claim to or interest in real property." [13] The ten-year statute of limitations under AS 09.10.230 applied to the Shareholders' misappropriation claim against Steffen because the misappropriated opportunity was the lease and ownership of the Property and the relief sought was recovery of the Property. Because the conspiracy claims against DWT and BPK involve only improprieties regarding Steffen's acquisition and retention of the Property, and not the ownership interest itself, AS 09.10.230 is not applicable to these claims. [14]

10 *Bauman v. Day*, 892 P.2d 817, 825 (Alaska 1995).

11 *Carter v. Hoblit*, 755 P.2d 1084, 1085–86 (Alaska 1988) (applying AS 09.10.230 to equitable request for one-third interest in property that three individuals had intended to purchase and hold title to jointly, where group member conducting the transaction took deed in his name alone

and fraudulently concealed his action). *See also Bauman,* 892 P.2d at 825 (discussing *Carter*).

12 *Bauman,* 892 P.2d at 825.

13 AS 09.10.230.

14 *See Bauman,* 892 P.2d at 825 (finding AS 09.10.230 inapplicable because "[t]he dispute over title and possession arose from the foreclosure sale, while the contract and fraud claims arose from the original sale of the property").

We similarly conclude that AS 09.10.230 is not applicable to the fraudulent conveyance claim against DWT. Alaska Statute 34.40.010 does not create a special mechanism to recover land, but rather creates a method by which a creditor may reach assets in a third-party's hands by voiding an improper transfer. [15] The direct fraudulent conveyance claim concerns DWT's conduct relating to Steffen's retention of the Property, not Petro Alaska's interest in the Property. Accordingly AS 09.10.230 is inapplicable to the direct fraudulent conveyance claim.

15 *See* AS 34.40.010; *see also Gabaig v. Gabaig,* 717 P.2d 835, 838 (Alaska 1986) (stating under AS 34.40.010, "[a] conveyance intended to hinder, delay or defraud creditors or other persons in their lawful suits is void").

b. Alaska Statute 09.10.053 applies to all claims against DWT and BPK.

Contract claims are subject to a three-year statute of limitations under AS 09.10.053. [16] ***1273** We have held previously that actions for a breach of a fiduciary duty arising out of a professional services relationship generally are governed by AS 09.10.053. [17] In contrast, tort claims generally must be brought within two years under AS 09.10.070. [18]

16 AS 09.10.053 provides that "[u]nless the action is commenced within three years, a person may not bring an action upon a contract or liability, express or implied."

17 *See Lee Houston & Assocs., Ltd. v. Racine,* 806 P.2d 848, 854 (Alaska 1991) (construing former AS 09.10.050, now codified at AS 09.10.053).

18 AS 09.10.070 is a residual statute of limitations in that it governs all claims "for personal injury ... not arising on contract and not specifically provided otherwise." AS 09.10.070(a)(2). *See Austin v. Fulton Ins. Co.,* 444 P.2d 536, 538 (Alaska 1968) (stating "it is clear that the two-year statute of limitations respecting torts is applicable" to negligence claims); *Silverton v. Marler,* 389 P.2d 3, 5 (Alaska 1964) ("A tort action must be commenced within two years...." (citing AS 09.10.070)).

The Shareholders argue AS 09.10.053 should apply to the fiduciary fraud claims against DWT and BPK. But the superior court did apply AS 09.10.053 to these claims. The court initially stated that "[m]ost of [the Shareholders'] causes of action against DWT [and BPK] are subject to" AS 09.10.053, and then listed only the spoliation and fraudulent conveyance claims as subject to AS 09.10.070.

[2] The Shareholders also argue the court incorrectly applied the two-year statute of limitations under AS 09.10.070 to the claims for spoliation by BPK and fraudulent conveyance by DWT. The Shareholders contend the court should have applied AS 09.10.053's three-year statute of limitations to these claims.

Although intentional spoliation of evidence is a tort claim, [19] the spoliation claim in this case arises in connection with the assertion of BPK's breach of fiduciary duty in a legal malpractice claim. Similarly the fraudulent conveyance claim in this case arises in connection with the assertion of DWT's breach of fiduciary duty in a legal malpractice claim. Because we give preference to the longer limitations statute when two may reasonably apply, [20] AS 09.10.053 provides the appropriate limitations period for these claims. It was error to apply AS 09.10.070 to the Shareholders' spoliation and fraudulent conveyance claims.

19 *See Allstate Ins. Co. v. Dooley,* 243 P.3d 197, 200–01 (Alaska 2010).

20 *City of Fairbanks v. Amoco Chem. Co.,* 952 P.2d 1173, 1181 (Alaska 1998) ("If two limitations statutes may reasonably apply, preference is given to the longer limitations period.").

3. Accrual and timely filing of two claims

The Shareholders argue the superior court made errors in its accrual findings and conclusions. The general rule is that "accrual of a cause of action is established at the time of the injury." [21] Under this rule, we determine whether a claim was timely filed by computing the time period between when the cause of action accrued and when the plaintiff filed a claim.

If this time period does not exceed the applicable statute of limitations, then the claim is timely filed.[22]

21 *Cameron v. State,* 822 P.2d 1362, 1365 (Alaska 1991). *See also John's Heating Serv. v. Lamb,* 46 P.3d 1024, 1031 n. 14 (Alaska 2002) ("The date on which the statute of limitations begins to run is usually the 'date on which the plaintiff incurs injury.' " (quoting *Russell v. Municipality of Anchorage,* 743 P.2d 372, 375 (Alaska 1987))).

22 The Shareholders argue the superior court erred by applying the accrual rule, and not an "express trust" method of accrual, which delays accrual until a trustee clearly repudiates an express trust. *See Arneman v. Arneman,* 43 Wash.2d 787, 264 P.2d 256, 262 (1953) ("[T]he statute of limitations begins to run on a resulting trust, not when such trust comes into being, but when the trustee repudiates the trust and notice of such repudiation is brought home to the beneficiary."). The Shareholders contend that under this method the limitations period on the breach of fiduciary duty claims could not have begun to run before Steffen's unequivocal 2002 disavowal of holding the Property in trust for Petro Alaska. But the Shareholders never claimed that Steffen held the Property in express trust; the Shareholders claimed Steffen held the Property in constructive trust. *Cf. D.A.W. v. State,* 699 P.2d 340, 342 (Alaska 1985) ("A party may not raise for the first time on appeal an alleged error to which he failed to object to in the [superior] court." (quoting *Chugach Elec. Assoc. v. Lewis,* 453 P.2d 345, 349 (Alaska 1969))). And even if we were to consider the express trust argument for the first time on appeal, it is unavailing—because the claims are subject to a three-year statute of limitations they would have expired in 2005, two years before suit was brought in 2007. We therefore decline to consider adopting an express-trust accrual rule.

*1274 a. Spoliation claim

The record destruction underlying the spoliation claim against BPK occurred in August 2005. As discussed above, we agree with the Shareholders that this claim is subject to AS 09.10.053's three-year statute of limitations.[23] Because the Shareholders added this claim in February 2008, before the three-year period expired, this claim was timely filed. We therefore reverse the dismissal of this claim on statute-of-limitations grounds.

23 *See* Part IV.A.2.b, above.

b. Legal malpractice claims

[3] The Shareholders challenge the court's dismissal of the legal malpractice claims against DWT and BPK. The superior court ruled that the claims against Steffen for an interest in the Property accrued by mid–1996, indicating the limitations period under AS 09.10.230 expired in mid–2006. The Shareholders argued at the evidentiary hearing that DWT and BPK committed legal malpractice by not warning Petro Alaska that potential causes of action against Steffen were set to be statutorily barred. Because the court found the statute of limitations on the AS 09.10.230 claims against Steffen expired in 2006, the Shareholders argue Petro Alaska suffered a new harm at this point and that the claims for legal malpractice based thereon could not have expired until 2009. In contrast, BPK argues that under the discovery rule the applicable statute of limitations began running once Gefre and Beck became aware of all the elements of the legal malpractice claims.

[4] The expiration of claims against Steffen is a legal harm distinct from Steffen's misappropriation of the corporate opportunity. Because a claim generally does not accrue until the plaintiff suffers the harm giving rise to it, the legal malpractice claims against DWT and BPK for failing to warn Petro Alaska of the expiration of the limitations period did not accrue until 2006. Contrary to BPK's argument and for the reasons we discuss below, the discovery rule operates only to lengthen—and never to shorten—the limitations period.[24] Given the three-year limitations period under AS 09.10.053, the legal malpractice claims based on the alleged failure to advise Petro Alaska of the expiration of the limitations period against Steffen were timely filed in 2007 and 2008.[25] It therefore was error to dismiss these limited legal malpractice claims.

24 *Jarvill v. Porky's Equip., Inc.,* 189 P.3d 335, 339 (Alaska 2008).

25 Because we conclude these limited legal malpractice claims against DWT and BPK are not time-barred, we do not need to address the Shareholders' argument that a continuous representation rule should have been applied to toll these claims.

4. Discovery rule and remaining claims

a. Doctrinal framework

[5] Although a cause of action generally accrues when the plaintiff incurs an injury, accrual can be delayed under a statutory or common-law discovery rule. For example, in AS 09.10.230 the legislature adopted a statutory discovery rule for fraudulent conveyance actions, delaying accrual of the ten-year statute of limitations until the fraud is discovered. The Shareholders assert, based on the argument that the conspiracy and fraudulent conveyance claims against DWT and BPK arise under AS 09.10.230, that accrual of these claims should be statutorily delayed. But because we conclude the claims are not subject to AS 09.10.230, [26] the superior court correctly ruled this statutory discovery rule is not applicable.

26 *See* Part IV.A.2.a, above.

[6] [7] [8] The common-law discovery rule tolls the running of an applicable statute of limitations "[w]here an element of a cause of action is not immediately apparent." [27] It "developed as a means to mitigate the harshness that can result from the [accrual] rule's preclusion of claims where the injury provided insufficient notice of the cause of action to the plaintiff." [28] As we have explained:

27 *John's Heating Serv. v. Lamb,* 46 P.3d 1024, 1031 (Alaska 2002) (citing *Pedersen v. Zielski,* 822 P.2d 903, 906–07 (Alaska 1991)).

28 *Cameron v. State,* 822 P.2d 1362, 1365 (Alaska 1991) (citing *Hanebuth v. Bell Helicopter Int'l,* 694 P.2d 143, 146 (Alaska 1984)); *see also id.* at 1365 n. 5 ("[R]ather than characterize the discovery rule as a mitigating, pseudo-equitable doctrine, it is more appropriate to view it as specifying the meaning of 'accrual' under the statute.").

> ***1275** [T]he statute of limitations does not begin to run until the claimant discovers, or reasonably should have discovered, the existence of all elements essential to the cause of action. Thus we have said the relevant inquiry is the date when the claimant reasonably should have known of the facts supporting her cause of action. We look to the date when a reasonable person has enough information to alert that person that he or she has a potential cause of action or should begin an inquiry to protect his or her rights. [29]

29 *Mine Safety Appliances Co. v. Stiles,* 756 P.2d 288, 291 (Alaska 1988) (internal editing marks and citations omitted).

[9] Accordingly the discovery rule may provide different possible dates on which a statute of limitations can begin to run. [30] First is the inquiry-notice date, "the date when the plaintiff has information which is sufficient to alert a reasonable person to begin an inquiry to protect his rights." [31] Second is the actual-notice date, "the date when [the] plaintiff reasonably should have discovered the existence of all essential elements of the cause of action." [32]

30 *John's Heating,* 46 P.3d at 1031 (citing *Waage v. Cutter Biological Div. of Miles Labs., Inc.,* 926 P.2d 1145, 1148 (Alaska 1996)).

31 *Id.* (citing *Cameron,* 822 P.2d at 1366).

32 *Id.* (citing *Cameron,* 822 P.2d at 1366).

We have held the inquiry-notice date, rather than the actual-notice date, is generally the date from which the statutory period begins to run. [33] But we have noted this general rule may produce unjust results because inquiry "may be a time-consuming process," which "may not produce knowledge of the elements of a cause of action within the statutory period, or it may produce knowledge of the elements of a cause of action only relatively late in the statutory period." [34]

33 *Waage,* 926 P.2d at 1148; *Cameron,* 822 P.2d at 1366.

34 *Cameron,* 822 P.2d at 1366 ("Either way it is possible that a litigant may be deprived of his right to bring a lawsuit before he has had a reasonable opportunity to do so.").

[10] If an inquiry has not been made, we ask in the abstract whether a reasonable inquiry would have produced knowledge of the cause of action. [35] This focuses on an ideal inquiry with the realization that time for a reasonable investigation is included in the length of the statute of limitations. [36]

35 *Pedersen v. Zielski,* 822 P.2d 903, 908 (Alaska 1991).

36 *See Palmer v. Borg–Warner Corp. (Palmer I),* 818 P.2d 632, 636 (Alaska 1990) ("Indeed, the length of a limitations period reflects legislative awareness that time

is needed to investigate a course of action before filing suit.").

[11] [12] We recognize some inquiries will be productive and some will not be.[37] If an unproductive inquiry has been made, the analysis changes and we ask whether the plaintiff's inquiry was reasonable.[38] If the inquiry was not reasonable, then the cause of action accrues at the inquiry-notice date "unless a reasonable inquiry would not have been productive within the statutory period."[39] But if a reasonable inquiry was made, the limitations period is tolled until the plaintiff either: (1) "received actual knowledge of" the facts giving rise to the cause of action; or (2) "received new information which would prompt a reasonable person to inquire further."[40]

37 *Pedersen,* 822 P.2d at 908.

38 *Id.*

39 *Id.*

40 *Cameron v. State,* 822 P.2d 1362, 1367 (Alaska 1991) (quoting *Pedersen,* 822 P.2d at 908).

b. Application of common-law discovery rule

The superior court assumed the Shareholders' initial inquiry in 1995, which disclosed Steffen held title to the Property, was reasonable. Because Gefre and Beck individually only periodically asked Steffen about the status of the title transfer, the court ***1276** found "the reasonableness [of their inquiry] dissipated over time." Due to Steffen's repeated promises and failures to transfer title, the court found it should have been apparent to the Shareholders by mid–1996 that Steffen was not going to voluntarily transfer title.

As to claims against DWT, the superior court found that upon learning Steffen held title to the Property, a reasonable inquiry into "when, how, and why" he held title "would have led directly to DWT and DWT's involvement." The court concluded the Shareholders should have discovered the existence of causes of action against DWT by mid–1996.

As to claims against BPK, the superior court found that based on Gefre and Beck's ongoing obligation to conduct a reasonable inquiry concerning Steffen and DWT, a reasonable investigation would have resulted in discovery of BPK's role in 2002. The court found several Petro Alaska employees knew of BPK's involvement in 2002 and a "simple computer search of Petro Alaska's General Ledger would have resulted in the discovery of BPK and its detailed billing for the 2002 work."

The Shareholders argue the superior court erred in finding they did not engage in a reasonable inquiry. The Shareholders assert they engaged in a reasonable but unsuccessful inquiry, and the causes of action should have accrued on the actual-notice date.

When either or both Gefre and Beck were on inquiry notice is a question of fact that "depends upon all of the surrounding circumstances"[41] and is reviewed for clear error.[42] Both Gefre and Beck knew the Property's acquisition was an important corporate opportunity, and they knew by 1995 that the Property was in Steffen's name. They also knew that Steffen had lied and therefore were aware of their injury. Upon being placed on inquiry notice in 1995, Gefre and Beck were charged with "an affirmative duty to investigate *all* potential causes of action before the statute of limitations expire[d],"[43] not merely those directly related to Steffen's acquisition of the Property.[44] Their inquiry also must have been prompt and diligent.[45] The superior court found that Gefre and Beck's initial inquiry requesting that Steffen transfer the Property's title to Petro Alaska was reasonable, but that a reasonable and diligent inquiry would have required further action when it became clear in 1996 that Steffen would not voluntarily transfer title. The superior court also found that a reasonable and diligent inquiry would have disclosed to Gefre and Beck the existence of a cause of action against DWT and BPK. The Shareholders argue that their inquiry was reasonable but unsuccessful and that, in any event, Steffen's oft-repeated assurances that he held the Property in trust for the corporation equitably estopped Steffen, and the corporation's attorneys, from relying on the statute of limitations.

41 *Preblich v. Zorea,* 996 P.2d 730, 736 (Alaska 2000) (quoting *Breck v. Moore,* 910 P.2d 599, 604 (Alaska 1996)).

42 *Sengupta v. Wickwire,* 124 P.3d 748, 752 (Alaska 2005).

43 *Palmer v. Borg–Warner Corp. (Palmer I),* 818 P.2d 632, 634 (Alaska 1990) (emphasis in original) (citing *Mine Safety Appliances Co. v. Stiles,* 756 P.2d 288, 292 (Alaska 1988)).

44 Gefre and Beck were directors with corporate fiduciary duties to act "with the care, including reasonable inquiry, that an ordinarily prudent person in a like position would

use under similar circumstances." AS 10.06.450(b). This included a duty to know Petro Alaska's business dealings and activities.

45 *See id.* at 634–35 n. 4 ("[W]e do not insist that a claimant actually know the precise cause of action at the time of the injury, rather we conclude that a claimant must begin an inquiry as to the cause of injury promptly and diligently once it is apparent that an injury has occurred due to the possible negligence of another.").

[13] We do not need to resolve this conflict because even if the superior court erred in concluding the accrual date for some of the Shareholders' claims was in mid–1996, the accrual date could not possibly have been later than the end of 2002, when Steffen unequivocally reneged on his position that he held the Property in trust for the corporation. But the Shareholders did not bring their lawsuit until 2007. Their inquiry was therefore unreasonable after 2002. The Shareholders did not satisfy the three-year ***1277** statute of limitations for their legal-malpractice-based claims.

The Shareholders nonetheless argue that the accrual of the causes of action should have been delayed because of their relative lack of sophistication. A party's relative sophistication is considered in a court's accrual findings,[46] but the party does not have to understand the legal explanation for or significance of an injury before having knowledge sufficient for a cause of action to accrue.[47] By 2002 Gefre and Beck knew the Property's acquisition represented an important corporate opportunity, the Property was in Steffen's name, Steffen had not voluntarily transferred title, and he had withdrawn his statement that he was holding the property in trust for the corporation. Because Gefre and Beck knew or should have known that legal action needed to be taken to protect Petro Alaska's rights, their lack of sophistication does not excuse their unreasonable inquiry after 2002.[48]

46 *Sengupta,* 124 P.3d at 753 (quoting *Preblich v. Zorea,* 996 P.2d 730, 736 (Alaska 2000)).

47 *See Mine Safety,* 756 P.2d at 291 ("A plaintiff does not have to understand the technical or scientific explanation for a defect before having knowledge sufficient to start the statute of limitations running." (citing *Sharrow v. Archer,* 658 P.2d 1331, 1334–35 (Alaska 1983))).

48 *Id.* ("We look to the date when a reasonable person has enough information to alert that person that he or she has a potential cause of action or should begin an inquiry to protect his or her rights." (citing *Sharrow,* 658 P.2d at 1334)).

5. Equitable estoppel

[14] A defendant may in some situations be equitably estopped from pleading a statute-of-limitations defense.[49] Equitable estoppel requires the plaintiff to show: "(1) fraudulent conduct, which may take the form of either an affirmative misrepresentation or a failure to disclose facts where there is a duty to do so; (2) justifiable reliance; and (3) damage."[50] It cannot be invoked "unless [the person has] exercised due diligence in attempting to uncover the concealed facts."[51] In other words, "a party should be charged with knowledge of the fraudulent misrepresentation or concealment only when it would be *utterly unreasonable* for the party not to be aware of the deception."[52]

49 *See Williams v. Williams,* 129 P.3d 428, 432 (Alaska 2006).

50 *Id.* (citing *Waage v. Cutter Biological Div. of Miles Labs., Inc.,* 926 P.2d 1145, 1149 n. 7 (Alaska 1996)).

51 *Id.* (quoting *Waage,* 926 P.2d at 1151).

52 *Waage,* 926 P.2d at 1149 (emphasis added) (quoting *Palmer v. Borg–Warner Corp. (Palmer II),* 838 P.2d 1243, 1251 (Alaska 1992)).

The superior court found that DWT's and BPK's identities were known by Petro Alaska's employees and revealed within its general ledger. The court also found Gefre and Beck both were aware that Petro Alaska had retained attorneys for some matters. In addressing the Shareholders' equitable estoppel arguments, the superior court noted Gefre and Beck had an affirmative duty by 1995 to investigate all claims related to the Property. The court stated that a reasonable investigation would have focused on how Steffen acquired the Property and who represented Petro Alaska during that time "to find out what they knew about how this very important corporate opportunity had not been realized by [Petro Alaska]." The superior court stated that "[s]uch a reasonable initial investigation would have led directly to DWT." The court also looked at what Gefre and Beck as "ordinarily prudent person[s] in similar circumstances" should have done and discovered "in view of their own fiduciary duties and obligations under AS 10.06.450."[53] The superior court concluded that it would have been utterly unreasonable for Gefre and Beck not to be aware of DWT's and BPK's alleged deception and concealment by 1996 and 2002, respectively.

53 AS 10.06.450(b) provides that "[a] director shall perform [his] duties ... in good faith, in a manner the director reasonably believes to be in the best interests of the corporation, and with the care, including reasonable inquiry, that an ordinarily prudent person in a like position would use under similar circumstances."

The Shareholders argue the superior court's finding that their actions were utterly unreasonable is clearly erroneous, and request that we apply equitable estoppel to ***1278** extend the limitations period of AS 09.10.053. The Shareholders argue DWT and BPK effectively concealed their involvement in the Property issues, despite an ongoing fiduciary duty to disclose. The Shareholders also claim the superior court's application of AS 10.06.450(b) violates the Alaska Constitution. [54] Specifically the Shareholders argue the superior court's implicit ruling that AS 10.06.450(b) displaced the "utterly unreasonable" standard regarding accrual of the relevant statute of limitations is an equal protection violation.

54 The Shareholders expressly limit the constitutional challenge to the superior court's application of AS 10.06.450(b). The Shareholders do not argue AS 10.06.450 is facially unconstitutional.

Again we do not need to resolve whether the Shareholders' investigation during the 1996–2002 period was sufficient. Once Steffen renounced his earlier position that he held the Property in trust for the corporation, he was not equitably estopped from asserting the statute-of-limitations defense. [55] Because at least starting in late 2002 the Shareholders failed to "exercise [ ] due diligence in attempting to uncover the concealed facts" regarding the Property and because it would not be utterly unreasonable for them to be aware of DWT's and BPK's identity and involvement thereafter, the Shareholders cannot invoke equitable estoppel now. [56]

55 *Gudenau & Co. v. Sweeney Ins., Inc.,* 736 P.2d 763, 769 (Alaska 1987) ("Plaintiff must also show that it resorted to legal action within a reasonable period after the circumstances ceased to justify delay.").

56 *Williams,* 129 P.3d at 432 (quoting *Waage,* 926 P.2d at 1151).

[15] We reject the Shareholders' equal protection violation argument. Alaska Statute 10.06.450(b) required Gefre and Beck to perform their duties as directors "with the care, including reasonable inquiry, that an ordinarily prudent person in a like position would use under similar circumstances." Gefre and Beck's status as directors and AS 10.06.450(b)'s "reasonable inquiry" standard assist in evaluating Gefre and Beck's investigatory diligence. It does not hold them to a different standard—it merely holds them to a reasonable standard based "upon all of the surrounding circumstances." [57] Accordingly the superior court did not commit an equal protection violation.

57 *Preblich v. Zorea,* 996 P.2d 730, 736 (Alaska 2000) (quoting *Breck v. Moore,* 910 P.2d 599, 604 (Alaska 1996)).

B. Validity Of The Statutes–Of–Limitations Evidentiary Hearing

The Shareholders argue that use of evidentiary hearings to resolve factual questions underlying statutes-of-limitations issues is a violation of the constitutional right to a jury trial. BPK cites several of our prior decisions as evidence that we "recognize[ ] the superior court's ability to act as fact-finder to resolve statute of limitations issues at an evidentiary hearing." DWT adds that the Shareholders have failed to establish "compelling reasons" for entirely abandoning pretrial evidentiary hearings. [58]

58 See *McCrary v. Ivanof Bay Vill.,* 265 P.3d 337, 340–41 (Alaska 2011):

> Our precedent is not lightly set aside. We have repeatedly held that a party raising a claim controlled by an existing decision bears a heavy threshold burden of showing compelling reasons for reconsidering the prior ruling. We will overrule a prior decision only when clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent.

(quoting *Guerrero ex rel. Guerrero v. Alaska Hous. Fin. Corp.,* 123 P.3d 966, 982 n. 104 (Alaska 2005)) (footnote and internal quotation marks omitted).

1. Evidentiary hearings generally

[16] "The purpose of statutes of limitations is to eliminate the injustice which may result from the litigation of stale claims." [59] To facilitate this purpose we have recognized the propriety of evidentiary hearings to resolve factual issues regarding statutes of limitations.[60] The Shareholders are correct that *1279 article I, section 16 of the Alaska Constitution provides that "[i]n civil cases where the amount in controversy exceeds [$250], the right of trial by a jury of twelve is preserved to the same extent as it existed at common law." But "the task of interpreting and applying a statute of limitations traditionally falls within the province of the courts."[61] We again approve the use of evidentiary hearings to determine when a cause of action accrued.[62] Specifically we affirm that when "a factual dispute precludes entry of summary judgment [on a statute-of-limitations defense] the dispute must ordinarily be resolved by the [superior] court at a preliminary evidentiary hearing in advance of trial."[63]

59 *Pedersen v. Zielski,* 822 P.2d 903, 907 (Alaska 1991) (citing *Johnson v. City of Fairbanks,* 583 P.2d 181, 187 (Alaska 1978)).

60 *Id.* at 907 n. 4 ("Holding an evidentiary hearing well in advance of trial to resolve fact questions goes part way toward meeting the early resolution goals of statutes of limitations. We recommend such a hearing in this case.").

61 *Cikan v. ARCO Alaska, Inc.,* 125 P.3d 335, 339 (Alaska 2005); *see also Ellicott v. Nichols,* 7 Gill 85, 96 (Md.1848) (stating "it is the province of the court authoritatively to interpret" the facts and determine whether they "take the plaintiff's claim out of the bar of the statute of limitations"); *Sundell v. Town of New London,* 119 N.H. 839, 409 A.2d 1315, 1320 (1979) ("The rule in this State is that a statute of limitations is a matter of procedure, the interpretation and application of which is traditionally within the province of the court...." (citation, quotation marks, and internal editing omitted)); *Lopez v. Swyer,* 62 N.J. 267, 300 A.2d 563, 567 (1973) ("[T]he question as to the application of the statute of limitations is ordinarily a legal matter and as such is traditionally within the province of the court.").

62 *See, e.g., Egner v. Talbot's, Inc.,* 214 P.3d 272, 278 (Alaska 2009); *Domke v. Alyeska Pipeline Serv. Co.,* 137 P.3d 295, 303 n. 19 (Alaska 2006).

63 *Cikan,* 125 P.3d at 339 (citing *John's Heating Serv. v. Lamb,* 46 P.3d 1024, 1033 n. 28 (Alaska 2002)).

We acknowledge that in certain circumstances the superior court may improperly reach the merits of an underlying claim within the evidentiary hearing. For example, in *Williams v. Williams* the superior court held an evidentiary hearing and found it necessary to reach the underlying question of fraud to resolve a statutory tolling question.[64] Although the court also reached alternative conclusions supporting its result, we recognized that "addressing the substantive merits of a case in ... a preliminary evidentiary hearing can create considerable tension with the ... right to a jury trial."[65] But to the extent the superior court does not address the substantive merits of a case, the use of evidentiary hearings to decide statutes-of-limitations issues is constitutional.

64 129 P.3d 428, 431 (Alaska 2006).

65 *Id.* at 431.

2. Evidentiary hearing in this case

[17] The Shareholders argue that the superior court made several improper findings as a result of the evidentiary hearing. Specifically the Shareholders challenge the court's determination that: (1) the reasonableness of their reliance on Steffen's representations "dissipated over time"; and (2) "it should have been apparent to [them] by mid 1996 that [Steffen] was not going to voluntarily transfer title." The Shareholders argue for an "inviolate right to jury trial on these issues."

We conclude the superior court properly decided these issues. The court had before it evidence establishing that the Shareholders had knowledge the Property's acquisition was an important corporate opportunity, Steffen purchased the Property in his name, and Steffen repeatedly failed to transfer title to Petro Alaska. The court acted well within its authority to make factual findings as to when the Shareholders had inquiry notice of the potential causes of action arising out of Steffen's misappropriation. In making these findings, the court did not address the merits of any underlying claims within the evidentiary hearing—the court merely addressed when the Shareholders had notice of these potential claims and not whether there was any merit to these claims.

C. Attorney–Client Privilege Issues

1. Gefre, Beck, and Keene

The Shareholders argue the superior court erred in ruling they waived their attorney-client privilege with Keene by asserting the discovery rule and equitable estoppel in the statutes-of-limitations disputes. The Shareholders argue the court applied the incorrect standard for finding a waiver of the attorney-client privilege. The Shareholders suggest ***1280** the court should have adopted the waiver test established in *Rhone–Poulenc Rorer Inc. v. Home Indemnity Co.,* [66] instead of the test established in *Hearn v. Rhay.* [67]

66 32 F.3d 851, 863 (3d Cir.1994).

67 68 F.R.D. 574, 581(E.D.Wash.1975).

Under the *Rhone* test, the attorney-client privilege is waived only if the litigant directly puts the attorney's advice at issue in the litigation. [68] In other words, the privilege is waived once a party seeks to avoid or limit liability by showing reliance on counsel's advice. This test rejects relevance as the standard for waiver because it undermines the exchange of confidential and candid communications between attorney and client. [69] In contrast, under the *Hearn* test the attorney-client privilege is waived if:

68 *Rhone–Poulenc Rorer,* 32 F.3d at 863.

69 *Id.* at 864.

> (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense. [70]

70 *Hearn,* 68 F.R.D. at 581.

The superior court adopted the *Hearn* test based on our focus on fairness, finding an implied waiver of the attorney-client privilege. [71] The court then concluded that the Shareholders had "impliedly waived the attorney client privilege with respect to their communications with [Keene] that relate or pertain to DWT." Accordingly the court stated DWT could pursue discovery from Gefre, Beck, and Keene concerning what they knew about Steffen and DWT.

71 *See Lewis v. State,* 565 P.2d 846, 850 n. 4 (Alaska 1977) (finding fairness dictated attorney-client privilege was waived when client filed motion that put into "issue what advice he did or did not receive from [his attorney]").

[18] We have previously noted a client may impliedly waive the attorney-client privilege by putting discussions with counsel at issue. [72] We stated the "purpose of the rule implying waiver in [such a] situation is essentially fairness to the opposing party." [73] In addition, "we emphasize[d] that it is not the mere filing of [a] motion, but the actual placing in issue of confidences covered by the privilege, that waives the attorney-client privilege." [74] Because we continue to believe fairness to the opposing party should be included in the implied waiver analysis, we adopt the *Hearn* test. [75]

72 *Id.*

73 *Id.*

74 *Id.*

75 *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 80 (1998) reporter's note cmt. b ("The preferred approach is to require that the client either permit a fair presentation of the issues raised by the client or protect the right to keep privileged communications secret by not raising at all an issue whose fair exposition requires examining the communications.").

[19] Applying the *Hearn* test, we conclude the superior court did not err in finding the Shareholders placed their communications with Keene at issue by raising the discovery rule and estoppel in response to DWT's statutes-of-limitations defenses. The communications are material to the defenses because the Shareholders claimed they had no knowledge, either direct or constructive, of DWT's identity or role with regard to Steffen's conduct. The Shareholders cannot be permitted to thrust their lack of knowledge into the litigation while simultaneously retaining the attorney-client privilege to frustrate proof of knowledge that negates the very foundation necessary to their positions. The superior court correctly found fairness dictated that DWT be permitted to discover from Gefre, Beck, and Keene what they knew about Steffen and DWT. [76]

76 *See League v. Vanice,* 221 Neb. 34, 374 N.W.2d 849, 855–56 (1985) (finding implied waiver when plaintiff justified noncompliance with statute of limitations by alleging that delay was caused solely by defendant's concealment of facts).

2. Petro Alaska and DWT

The Shareholders also challenge the superior court's denial of a motion to waive ***1281** DWT's attorney-client privilege while DWT simultaneously represented Petro Alaska and Steffen individually. Specifically the Shareholders request all communications between DWT and any inside or outside counsel relating to matters involved in this litigation.

DWT voluntarily produced all pre-litigation documents created internally, thereby rendering Petro Alaska's claim moot as to internal communications. The Shareholders' claim regarding communications between DWT and outside counsel is waived for a failure to adequately brief it—a single conclusory sentence requesting DWT's communications with outside counsel without citation of any authority providing for such a remedy is not adequate to put the issue before this court.[77]

77 *A.H. v. W.P.*, 896 P.2d 240, 243–44 (Alaska 1995) (finding issue waived for inadequate briefing because "superficial briefing and the lack of citations to any authority constitutes abandonment of the point on appeal"); *Adamson v. Univ. of Alaska*, 819 P.2d 886, 889 n. 3 (Alaska 1991) ("[W]here a point is given only a cursory statement in the argument portion of a brief, the point will not considered on appeal.").

D. Attorney's Fees As Special Damages

The Shareholders argue the superior court incorrectly ruled that a plaintiff cannot recover attorney's fees incurred in bringing suit as special damages in that suit. Specifically the Shareholders argue DWT and BPK committed legal malpractice and fiduciary fraud, causing Gefre and Beck to incur attorney's fees in this litigation.

[20] The general rule is "that attorney's fees for work in the case under review are not recoverable as damages."[78] A prevailing party's attorney's fees are generally recoverable only as an attorney's fee award under Alaska Civil Rule 82. However it is also generally recognized that "when the defendant has breached a specific duty to protect the plaintiff from litigation expenses, the defendant is necessarily liable for those expenses, including attorney fees."[79] "When recovery of a fee award is permitted ... the fee award is *damages,* not *costs.*"[80] For example, "where the negligence of a malpracticing lawyer requires the client to protect her interests by litigating with others; the lawyer is liable for the litigation expenses as consequential damages."[81]

78 *Sisters of Providence in Wash. v. A.A. Pain Clinic, Inc.*, 81 P.3d 989, 1008 (Alaska 2003), *cited in ASRC Energy Servs. Power & Commc'ns, LLC v. Golden Valley Elec. Ass'n, Inc.*, 267 P.3d 1151, 1165 (Alaska 2011); *see also* RESTATEMENT(SECOND) OF TORTS § 914(1) (1979) ("The damages in a tort action do not ordinarily include compensation for attorney fees or other expenses of the litigation.").

79 1 DAN B. DOBBS, LAW OF REMEDIES: DAMAGES–EQUITY–RESTITUTION § 3.10(3), at 401 (2d ed. 1993) (This "reflect[s] a willingness to award attorney fees to the plaintiff when the defendant should have protected the plaintiff from litigation or litigation costs."); *see also* RESTATEMENT (SECOND) OF TORTS S S § 914(2) ("One who through the tort of another has been required to act in the protection of his interests by bringing ... an action against a third person is entitled to recover reasonable compensation for ... attorney fees ... thereby suffered or incurred in the earlier action.").

80 DOBBS at 402 (emphasis in original).

81 *Id.* at 407–08; *see also Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer,* 8 N.Y.3d 438, 835 N.Y.S.2d 534, 867 N.E.2d 385, 388 (2007) ("A plaintiff's damages [in a legal malpractice case] may include 'litigation expenses incurred in an attempt to avoid, minimize, or reduce the damage caused by the attorney's wrongful conduct.' " (quoting *DePinto v. Rosenthal & Curry,* 237 A.D.2d 482, 655 N.Y.S.2d 102, 102 (1997))).

[21] As applicable here, we agree "that a legal malpractice plaintiff may recover as actual damages the attorney fees incurred as a result of the defendant's malpractice, so long as the plaintiff can demonstrate she would not have incurred the fees in the absence of the defendant's negligence."[82] Therefore if the Shareholders are successful on the spoliation and legal malpractice claims on remand, then the fact-finder must determine what, if any, of their attorney's fees incurred against Steffen would not have been incurred in the absence of DWT's and BPK's specific wrongdoing, and, thus, are recoverable as damages. But the Shareholders may not recover as special damages attorney's fees incurred in asserting claims against DWT and BPK.

82 *Nettleton v. Stogsdill,* 387 Ill.App.3d 743, 326 Ill.Dec. 601, 899 N.E.2d 1252, 1261 (2008).

***1282 E. Other Issues**

The Shareholders argue the superior court erred in denying a motion prohibiting DWT from arguing comparative fault as to the fiduciary fraud claim. The Shareholders also argue the court erred in granting DWT's motion for an order that DWT and BPK should not be jointly and severally liable for the conspiracy and aiding and abetting causes of action. Because the underlying claims are time-barred, we decline to address these issues.

The Shareholders also contend the superior court incorrectly dismissed the claim that DWT must disgorge fees because of alleged ethical violations. The court dismissed the claim because it found the Shareholders had adequate and complete legal remedies available. Because the Shareholders provide merely a single conclusory sentence without further discussion or citation of any authority, we find the issue waived for a failure to adequately brief.[83]

On cross-appeal, BPK argues the superior court erred in refusing to recognize its October 2008 offer of judgment under Alaska Civil Rule 68. Because we are remanding the spoliation claim against BPK to the superior court and BPK's judgment against the Shareholders must be vacated, we decline to address the Rule 68 issue.

V. CONCLUSION

For the reasons stated above, we VACATE DWT's and BPK's judgments and REMAND for further proceedings consistent with the opinion.

CHRISTEN, Justice, not participating.

83 *See* note 77, above.

103 S.Ct. 1933
Supreme Court of the United States

C. Duane HENSLEY et al., Petitioners
v.
Thomas ECKERHART et al.

No. 81–1244. | Argued Nov. 3, 1982. | Decided May 16, 1983.

Plaintiffs brought action on behalf of all persons involuntarily confined at forensic unit of state hospital, challenging the constitutionality of treatment and conditions at the hospital. The United States District Court found constitutional violations, and awarded plaintiffs attorney fees, and appeal was taken. The Court of Appeals, 664 F.2d 294, affirmed, and certiorari was granted. The Supreme Court, Justice Powell, held that District Court failed to properly consider the relationship between the extent of success and the amount of attorney fee award, and cause would be remanded to permit District Court to determine the proper amount of fee award in light of Supreme Court's determination that the extent of a plaintiff's success is a crucial factor in determining the proper amount of award of attorney fees.

Vacated and remanded.

Chief Justice Burger filed a concurring opinion.

Justice Brennan filed an opinion concurring in part and dissenting in part, in which Justices Marshall, Blackmun and Stevens joined.

West Headnotes (12)

[1] **Civil Rights**
Results of litigation; prevailing parties

The purpose of the Civil Rights Attorney's Fees Awards Act is to ensure effective access to the judicial process for persons with civil rights grievances, and accordingly, a prevailing plaintiff should ordinarily recover an attorney fee unless special circumstances would render such an award unjust. 42 U.S.C.A. § 1988.

927 Cases that cite this headnote

[2] ***Civil Rights***
Awards to defendants; frivolous, vexatious, or meritless claims

Under the Civil Rights Attorney's Fees Awards Act, a prevailing defendant may recover attorney fees only when the suit is vexatious, frivolous, or brought to harass or embarrass defendant. 42 U.S.C.A. § 1988.

290 Cases that cite this headnote

[3] **Civil Rights**
Amount and computation

The amount of fee to be awarded under the Civil Rights Attorney's Fees Awards Act must be determined on the facts of each case. 42 U.S.C.A. § 1988.

85 Cases that cite this headnote

[4] **Civil Rights**
Time expended; hourly rates

The most useful starting point for determining the amount of a reasonable fee under the Civil Rights Attorney's Fees Awards Act is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate; party seeking an award of fees should submit evidence supporting the hours worked and rates claimed, and when the documentation of hours is inadequate, district court may reduce the award accordingly. 42 U.S.C.A. § 1988.

9254 Cases that cite this headnote

[5] **Civil Rights**
Results of litigation; prevailing parties

Under the Civil Rights Attorney's Fees Awards Act, the factor of "results obtained" is particularly crucial when plaintiff is deemed "prevailing" even though he succeeded on only some of his claims for relief; in that situation, two questions must be addressed: whether plaintiff failed to prevail on claims that were unrelated to the claims on which he succeeded, and whether plaintiff achieved a level of success that made the hours reasonably expended a satisfactory basis for making a fee award. 42 U.S.C.A. § 1988.

4903 Cases that cite this headnote

[6] **Civil Rights**

Services or activities for which fees may be awarded

In civil rights suit in which plaintiff presents distinctly different claims for relief that are based on different facts and legal theories, counsel's work on one claim will be unrelated to his work on another claim, and work on the unsuccessful claim cannot be deemed to have been expended in pursuit of the ultimate result achieved, for purposes of Civil Rights Attorney's Fees Awards Act. 42 U.S.C.A. § 1988.

607 Cases that cite this headnote

[7] **Civil Rights**

Amount and computation

When civil rights plaintiff obtains excellent results, his attorney should recover a fully compensatory fee, and normally that will encompass all hours reasonably expended on the litigation, and in some cases of exceptional success, an enhanced award may be justified; in those circumstances, the fee award should not be reduced simply because plaintiff failed to prevail on every contention raised in the lawsuit. 42 U.S.C.A. § 1988.

4155 Cases that cite this headnote

[8] **Civil Rights**

Amount and computation

If civil rights plaintiff achieves only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount under the Civil Rights Attorney's Fees Awards Act. 42 U.S.C.A. § 1988.

5162 Cases that cite this headnote

[9] **Civil Rights**

Time expended; hourly rates

Under the Civil Rights Attorney's Fees Awards Act, the fee applicant bears burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rate; applicant should exercise billing judgment with respect to hours worked, and should maintain billing time records in a manner that will enable reviewing court to identify distinct claims. 42 U.S.C.A. § 1988.

2979 Cases that cite this headnote

[10] **Civil Rights**

Taxation

Under the Civil Rights Attorney's Fees Awards Act, it is important for district court to provide concise but clear explanation of its reasons for the fee award, and when an adjustment is requested on the basis of either the exceptional or limited nature of the relief obtained by plaintiff, district court should make clear that it has considered the relationship between the amount of the fee awarded and the results obtained. 42 U.S.C.A. § 1988.

616 Cases that cite this headnote

[11] **Civil Rights**

Services or activities for which fees may be awarded

Federal Courts

Particular cases

In civil rights suit challenging the conditions of confinement in forensic unit of state hospital, in which district court found constitutional violations in five of the six general areas of treatment, district court failed to properly consider the relationship between the extent of success and the amount of attorney fee award, and cause would be remanded to permit district court to determine the proper amount of the fee award in light of Supreme Court's determination that the extent of a plaintiff's success is a crucial factor in determining the proper amount of award of attorney fees. 42 U.S.C.A. § 1988.

653 Cases that cite this headnote

[12] **Civil Rights**
Amount and computation
The extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney fees under the Civil Rights Attorney's Fees Awards Act. 42 U.S.C.A. § 1988.

338 Cases that cite this headnote

424 **1935 *Syllabus *

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Respondents, on behalf of all persons involuntarily confined in the forensic unit of a Missouri state hospital, brought suit in Federal District Court against petitioner hospital officials, challenging the constitutionality of treatment and conditions at the hospital. The District Court, after a trial, found constitutional violations in five of the six general areas of treatment. Subsequently, respondents filed a request for attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, which provides that in federal civil rights actions "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." After determining that respondents were prevailing parties under § 1988 even though they had not succeeded on every claim, the District Court refused to eliminate from the attorney's fees award the hours spent by respondents' attorneys on the unsuccessful claims, finding that the significant extent of the relief clearly justified the award of a reasonable attorney's fee. The Court of Appeals affirmed.

Held: The District Court did not properly consider the relationship between the extent of success and the amount of the attorney's fee award. The extent of a plaintiff's success is a crucial factor in determining the proper amount of an attorney's fee award under § 1988. Where the plaintiff failed to prevail on a claim unrelated to the successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the court should award only that amount of fees that is reasonable in relation to the results obtained. Pp. 1937–1942.

664 F.2d 294 (8th Cir., 1981), vacated and remanded.

Attorneys and Law Firms

***425** *Michael L. Boicourt,* Assistant Attorney General of Missouri, argued the cause for petitioners. With him on the brief was *John Ashcroft,* Attorney General.

Stanley J. Eichner argued the cause and filed a brief for respondents.*

* *Robert E. Williams, Douglas S. McDowell,* and *Lorence L. Kessler* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.

Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston, Steven L. Winter, Norman J. Chachkin, and *E. Richard Larson* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., et al. as *amici curiae* urging affirmance.

Briefs of *amici curiae* were filed for the State of Pennsylvania et al. by *LeRoy S. Zimmerman,* Attorney General of Pennsylvania, and *Andrew S. Gordon* and *Allen C. Warshaw,* Deputy Attorneys General, *Charles A. Graddick,* Attorney General of Alabama, *Wilson L. Condon,* Attorney General of Alaska, *Robert K. Corbin,* Attorney General of Arizona, and *Anthony B. Ching,* Solicitor General, *John Steven Clark,* Attorney General of Arkansas, *George Deukmejian,* Attorney General of California, *J.D. MacFarlane,* Attorney General of Colorado, *Richard S. Gebelein,* Attorney General of Delaware, *Jim Smith,* Attorney General of Florida, *Michael J. Bowers,* Attorney General of Georgia, *Tany S. Hong,* Attorney General of Hawaii, *David H. Leroy,* Attorney General of Idaho, *Tyrone C. Fahner,* Attorney General of Illinois, *Linley E. Pearson,* Attorney General of Indiana, *Thomas J. Miller,* Attorney General of Iowa, *Robert T. Stephan,* Attorney General of Kansas, *Steven L. Beshear,* Attorney General of Kentucky, *James E. Tierney,* Attorney General of Maine, *Stephen H. Sachs,* Attorney General of Maryland, *Francis X. Bellotti,* Attorney General of Massachusetts, *Frank J. Kelley,* Attorney General of Michigan, *Warren R. Spannaus,* Attorney General of Minnesota, *William A. Allain,* Attorney General of Mississippi, *Paul L. Douglas,* Attorney General of Nebraska, *Richard H. Bryan,* Attorney General of Nevada, *Gregory H. Smith,* Attorney General of New Hampshire, *Irwin I. Kimmelman,* Attorney General of New Jersey, *Jeff Bingaman,* Attorney General of New Mexico, *Rufus L. Edmisten,* Attorney General of North Carolina, *Robert O. Wefald,* Attorney General of North Dakota, *William J. Brown,* Attorney General of Ohio, *Jan Eric Cartwright,* Attorney General of Oklahoma, *Hector Reichard,* Attorney General of Puerto Rico, *Daniel R. McLeod,* Attorney General of South Carolina, *Mark D. Meierhenry,* Attorney General of South Dakota, *William M. Leech, Jr.,* Attorney General of Tennessee, *Mark White,* Attorney General of Texas, *David L. Wilkinson,* Attorney General of Utah, *John J. Easton,* Attorney General of Vermont, *Gerald L. Baliles,* Attorney General of Virginia, *Kenneth O. Eikenberry,* Attorney General of Washington, *Chauncey H. Browning,* Attorney General of West Virginia, *Bronson C. La Follette,* Attorney General of Wisconsin, and *Steven F. Freudenthal,* Attorney General of Wyoming; and for the American Bar Association by *David R. Brink* and *M.D. Taracido.*

Opinion

***426** Justice POWELL delivered the opinion of the Court.

Title 42 U.S.C. § 1988 provides that in federal civil rights actions "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The issue in this case is whether a partially ****1936** prevailing plaintiff may recover an attorney's fee for legal services on unsuccessful claims.

I

A

Respondents brought this lawsuit on behalf of all persons involuntarily confined at the Forensic Unit of the Fulton State Hospital in Fulton, Missouri. The Forensic Unit consists of two residential buildings for housing patients who are dangerous to themselves or others. Maximum-security patients are housed in the Marion O. Biggs Building for the Criminally Insane. The rest of the patients reside in the less restrictive Rehabilitation Unit.

In 1972 respondents filed a three-count complaint in the District Court for the Western District of Missouri against petitioners, who are officials at the Forensic Unit and members of the Missouri Mental Health Commission. Count I challenged the constitutionality of treatment and conditions at the Forensic Unit. Count II challenged the placement of patients in the Biggs Building without procedural due process. Count III sought compensation for patients who performed institution-maintaining labor.

Count II was resolved by a consent decree in December 1973. Count III largely was mooted in August 1974 when ***427** petitioners began compensating patients for labor pursuant to the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* In April 1975 respondents voluntarily dismissed the lawsuit and filed a new two-count complaint. Count I again related to the constitutionality of treatment and conditions at the Forensic Unit. Count II sought damages, based on the Thirteenth Amendment, for the value of past patient labor. In July 1976 respondents voluntarily dismissed this back-pay count. Finally, in August 1977 respondents filed an amended one-count complaint specifying the conditions that allegedly violated their constitutional right to treatment.

In August 1979, following a three-week trial, the District Court held that an involuntarily committed patient has a constitutional right to minimally adequate treatment. 475 F.Supp. 908, 915 (WD Mo.1979). The court then found constitutional violations in five of six general areas: physical environment; individual treatment plans; least restrictive environment; visitation, telephone, and mail privileges; and seclusion and restraint. [1] With respect to staffing, the sixth general area, ***428** the District Court found that the Forensic Unit's staffing levels, which had increased during the litigation, were minimally adequate. 475 F.Supp., at 919–920. Petitioners did not appeal the District Court's decision on the merits.

1 Under "physical environment" the court found that certain physical aspects of the Biggs Building were not minimally adequate. 475 F.Supp., at 916–919.

Under "individual treatment plans" the court found that the existing plans were adequate, but that the long delay in preparation of initial plans after patients were admitted and the lack of regular review of the plans operated to deny patients minimally adequate plans. *Id.,* at 921–922.

Under "least restrictive environment" the court found unconstitutional the delay in transfer of patients from the Biggs Building to the Rehabilitation Unit following a determination that they no longer needed maximum-security confinement. *Id.,* at 922–923.

Under "visitation, telephone and mail" the court found that the visitation and telephone policies at the Biggs Building were so restrictive that they constituted punishment and therefore violated patients' due-process rights. *Id.,* at 923–925.

Under "seclusion and restraint" the court rejected respondents' claim that patients were given excessive medication as a form of behavior control. The court then found that petitioners' practices regarding seclusion and physical restraint were not minimally adequate. *Id.,* at 925–928.

B

In February 1980 respondents filed a request for attorney's fees for the period from January 1975 through the end of the litigation. Their four attorneys claimed 2,985 hours worked and sought payment at rates varying from $40 to $65 per hour. This amounted to approximately $150,000. ****1937** Respondents also requested that the fee be enhanced by thirty to fifty percent, for a total award of somewhere between $195,000 and $225,000. Petitioners opposed the request on numerous grounds, including inclusion of hours spent in pursuit of unsuccessful claims.

The District Court first determined that respondents were prevailing parties under 42 U.S.C. § 1988 even though they had not succeeded on every claim. It then refused to eliminate from the award hours spent on unsuccessful claims:

> "[Petitioners'] suggested method of calculating fees is based strictly on a mathematical approach comparing the total number of issues in the case with those actually prevailed upon. Under this method no consideration is given for the relative importance of various issues, the interrelation of the issues, the difficulty in identifying issues, or the extent to which a party may prevail on various issues." No. 75–CV–87–C, at 7 (WD Mo., Jan. 23, 1981), Record 220.

Finding that respondents "have obtained relief of significant import," Record 231, the District Court awarded a fee of $133,332.25. This award differed from the fee request in two respects. First, the court reduced the number of hours claimed by one attorney by thirty percent to account for his inexperience ***429** and failure to keep contemporaneous records. Second, the court declined to adopt an enhancement factor to increase the award.

The Court of Appeals for the Eighth Circuit affirmed on the basis of the District Court's memorandum opinion and order. 664 F.2d 294 (1981). We granted certiorari, 455 U.S. 988, 102 S.Ct. 1610, 71 L.Ed.2d 847 (1982), and now vacate and remand for further proceedings.

II

[1] **[2]** In *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), this Court reaffirmed the "American Rule" that each party in a lawsuit ordinarily shall bear its own attorney's fees unless there is express statutory authorization to the contrary. In response Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, authorizing the district courts to award a reasonable attorney's fee to prevailing parties in civil rights litigation. The purpose of § 1988 is to ensure "effective access to the judicial process" for persons with civil rights grievances. H.R.Rep. No. 94–1558, p. 1 (1976). Accordingly, a prevailing plaintiff " 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' " S.Rep. No. 94–1011, p. 4 (1976), U.S.Code Cong. & Admin.News 1976, p. 5912 (quoting *Newman v. Piggie Park Enterprises,* 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968)). [2]

2 A prevailing defendant may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant. See H.R.Rep. No. 94–1558, p. 7 (1976); *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978) ("[A] district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.").

[3] The amount of the fee, of course, must be determined on the facts of each case. On this issue the House Report simply refers to twelve factors set forth in *Johnson v. Georgia Highway* ***430** *Express, Inc.,* 488 F.2d 714 (CA5 1974). [3] The Senate Report cites to *Johnson* as well and also ****1938** refers to three district court decisions that "correctly applied" the twelve factors.[4] One of the factors in *Johnson,* "the amount involved and the results obtained," indicates that the level of a plaintiff's success is relevant to the amount of fees to be awarded. The importance of this relationship is confirmed in varying degrees by the other cases cited approvingly in the Senate Report.

3 The twelve factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F.2d, at 717–719. These factors derive directly from the American Bar Association Code of Professional Responsibility, Disciplinary Rule 2–106.

4 "It is intended that the amount of fees awarded ... be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases[,] and not be reduced because the rights involved may be nonpecuniary in nature. The appropriate standards, see *Johnson v. Georgia Highway Express,* 488 F.2d 714 (5th Cir.1974), are correctly applied in such cases as *Stanford Daily v. Zurcher,* 64 F.R.D. 680 (ND Cal.1974); *Davis v. County of Los Angeles,* 8 E.P.D. ¶ 9444 (CD Cal.1974); and *Swann v. Charlotte-Mecklenburg Board of Education,* 66 F.R.D. 483 (WDNC 1975). These cases have resulted in fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys. In computing the fee, counsel for a prevailing party should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.' *Davis, supra; Stanford Daily, supra* at 684." S.Rep. No. 94–1011, p. 6 (1976), U.S.Code Cong. & Admin.News 1976, pp. 5908, 5913.

In *Stanford Daily v. Zurcher,* 64 F.R.D. 680 (ND Cal.1974), aff'd, 550 F.2d 464 (CA9 1977), rev'd on other grounds, 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978), the plaintiffs obtained a declaratory judgment, then moved for a preliminary injunction. After the defendants promised not to violate the judgment, ***431** the motion was denied. The District Court awarded attorney's fees for time spent pursuing this motion because the plaintiffs "substantially advanced their clients' interests" by obtaining "a significant concession from defendants as a result of their motion." 64 F.R.D., at 684.

In *Davis v. County of Los Angeles,* 8 E.P.D. ¶ 9444 (CD Cal.1974), the plaintiffs won an important judgment requiring the Los Angeles County Fire Department to undertake an affirmative action program for hiring minorities. In awarding attorney's fees the District Court stated:

> "It also is not legally relevant that plaintiffs' counsel expended a certain limited amount of time pursuing certain issues of fact and law that ultimately did not become litigated issues in the case or upon which plaintiffs ultimately did not prevail. Since plaintiffs prevailed on the merits and achieved excellent results for the represented class, plaintiffs' counsel are entitled to an award of fees for all time reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter." 8 E.P.D. ¶ 9444, at 5049.

Similarly, the District Court in *Swann v. Charlotte-Mecklenburg Board of Education,* 66 F.R.D. 483, 484 (WDNC 1975), based its fee award in part on a finding that "[t]he results obtained were excellent and constituted the total accomplishment of the aims of the suit," despite the plaintiffs' losses on "certain minor contentions."

In each of these three cases the plaintiffs obtained essentially complete relief. The legislative history, therefore, does not provide a definitive answer as to the proper standard for setting a fee award where the plaintiff has achieved only limited success. Consistent with the legislative history, courts of appeals generally have recognized the relevance of the results obtained to the amount of a fee award. They ***432** have adopted varying standards, however, for applying this principle in cases where the plaintiff did not succeed on all claims asserted.[5]

5 Some courts of appeals have stated flatly that plaintiffs should not recover fees for any work on unsuccessful claims. See, *e.g., Bartholomew v. Watson,* 665 F.2d 910, 914 (CA9 1982); *Muscare v. Quinn,* 614 F.2d 577, 579–581 (CA7 1980); *Hughes v. Repko,* 578 F.2d 483, 486–487 (CA3 1978). Others have suggested that prevailing plaintiffs generally should receive a fee based on hours spent on all nonfrivolous claims. See, *e.g., Sherkow v. Wisconsin,* 630 F.2d 498, 504–505 (CA7 1980); *Northcross v. Board of Educ. of Memphis City*

Schools, 611 F.2d 624, 636 (CA6 1979), cert. denied, 447 U.S. 911, 100 S.Ct. 2999, 64 L.Ed.2d 862 (1980); *Brown v. Bathke,* 588 F.2d 634, 636–637 (CA8 1978). Still other courts of appeals have held that recovery of a fee for hours spent on unsuccessful claims depends upon the relationship of those hours expended to the success achieved. See, *e.g., Copeland v. Marshall,* 205 U.S.App.D.C. 390, 401–402, n. 18, 641 F.2d 880, 891–892, n. 18 (1980) (en banc); *Jones v. Diamond,* 636 F.2d 1364, 1382 (CA5 1981) (en banc), cert. dism'd, 453 U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1981); *Gurule v. Wilson,* 635 F.2d 782, 794 (CA10 1980) (opinion on rehearing); *Lamphere v. Brown Univ.,* 610 F.2d 46, 47 (CA1 1979).

****1939** In this case petitioners contend that "an award of attorney's fees must be proportioned to be consistent with the extent to which a plaintiff has prevailed, and only time reasonably expended in support of successful claims should be compensated." Brief for Petitioners at 24. Respondents agree that a plaintiff's success is relevant, but propose a less stringent standard focusing on "whether the time spent prosecuting [an unsuccessful] claim in any way contributed to the results achieved." Brief for Respondents at 46. Both parties acknowledge the discretion of the district court in this area. We take this opportunity to clarify the proper relationship of the results obtained to an award of attorney's fees. [6]

6 The parties disagree as to the results obtained in this case. Petitioners believe that respondents "prevailed only to an extremely limited degree." Brief for Petitioners at 22. Respondents contend that they "prevailed on practically every claim advanced." Brief for Respondents at 23. As discussed in Part IV, *infra,* we leave this dispute for the District Court on remand.

*433 III

A

A plaintiff must be a "prevailing party" to recover an attorney's fee under § 1988. [7] The standard for making this threshold determination has been framed in various ways. A typical formulation is that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Nadeau v. Helgemoe,* 581 F.2d 275, 278–279 (CA1 1978). [8] This is a generous formulation that brings the plaintiff only across the statutory threshold. It remains for the district court to determine what fee is "reasonable."

7 As we noted in *Hanrahan v. Hampton,* 446 U.S. 754, 758 n. 4, 100 S.Ct. 1987, 1989 n. 4, 64 L.Ed.2d 670 (1980) (*per curiam*), "[t]he provision for counsel fees in § 1988 was patterned upon the attorney's fees provisions contained in Title II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a–3(b) and 2000e–5(k), and § 402 of the Voting Rights Act Amendments of 1975, 42 U.S.C. § 1973*l*(e)." The legislative history of § 1988 indicates that Congress intended that "the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act." S.Rep. No. 94–1011, p. 4 (1976), U.S.Code Cong. & Admin.News 1976, p. 5912. The standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a "prevailing party."

8 See also *Busche v. Burkee,* 649 F.2d 509, 521 (CA7 1981), cert. denied, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1982); *Sethy v. Alameda County Water Dist.,* 602 F.2d 894, 897–898 (CA9 1979) (*per curiam*). Cf. *Taylor v. Sterrett,* 640 F.2d 663, 669 (CA5 1981) ("[T]he proper focus is whether the plaintiff has been successful on the central issue as exhibited by the fact that he has acquired the primary relief sought").

[4] The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly.

***434** The district court also should exclude from this initial fee calculation hours that were not "reasonably expended." S.Rep. No. 94–1011, p. 6 (1976). Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise ****1940** unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority." *Copeland v. Marshall,* 205

U.S.App.D.C. 390, 401, 641 F.2d 880, 891 (1980) (en banc) (emphasis in original).

B

[5] The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the "results obtained."[9] This factor is particularly crucial where a plaintiff is deemed "prevailing" even though he succeeded on only some of his claims for relief. In this situation two questions must be addressed. First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

9 The district court also may consider other factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–719 (CA5 1974), though it should note that many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate. See *Copeland v. Marshall*, 205 U.S.App.D.C. 390, 400, 641 F.2d 880, 890 (1980) (en banc).

[6] In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, even where the ***435** claims are brought against the same defendants—often an institution and its officers, as in this case—counsel's work on one claim will be unrelated to his work on another claim. Accordingly, work on an unsuccessful claim cannot be deemed to have been "expended in pursuit of the ultimate result achieved." *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444, at 5049 (CD Cal.1974). The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim.[10]

10 If the unsuccessful claim is frivolous, the defendant may recover attorney's fees incurred in responding to it. See n. 2, *supra*.

It may well be that cases involving such unrelated claims are unlikely to arise with great frequency. Many civil rights cases will present only a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.

[7] Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. See *Davis v. County of Los Angeles*, 8 E.P.D. ¶ 9444, at 5049 (CD Cal.1974). Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.[11]

11 We agree with the District Court's rejection of "a mathematical approach comparing the total number of issues in the case with those actually prevailed upon." Record 220. Such a ratio provides little aid in determining what is a reasonable fee in light of all the relevant factors. Nor is it necessarily significant that a prevailing plaintiff did not receive all the relief requested. For example, a plaintiff who failed to recover damages but obtained injunctive relief, or vice versa, may recover a fee award based on all hours reasonably expended if the relief obtained justified that expenditure of attorney time.

****1941** [8] ***436** If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.

Application of this principle is particularly important in complex civil rights litigation involving numerous challenges to institutional practices or conditions. This type of litigation is lengthy and demands many hours of lawyers' services.

Although the plaintiff often may succeed in identifying some unlawful practices or conditions, the range of possible success is vast. That the plaintiff is a "prevailing party" therefore may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved. In this case, for example, the District Court's award of fees based on 2,557 hours worked may have been reasonable in light of the substantial relief obtained. But had respondents prevailed on only one of their six general claims, for example the claim that petitioners' visitation, mail, and telephone policies were overly restrictive, see n. 1, *supra,* a fee award based on the claimed hours clearly would have been excessive.

There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce ***437** the award to account for the limited success. The court necessarily has discretion in making this equitable judgment. This discretion, however, must be exercised in light of the considerations we have identified.

C

[9] A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee. Where settlement is not possible, the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. The applicant should exercise "billing judgment" with respect to hours worked, see *supra,* at 1939–1940, and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims. [12]

12 We recognize that there is no certain method of determining when claims are "related" or "unrelated." Plaintiff's counsel, of course, is not required to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures. See *Nadeau v. Helgemoe,* 581 F.2d 275, 279 (CA1 1978) ("As for the future, we would not view with sympathy any claim that a district court abused its discretion in awarding unreasonably low attorney's fees in a suit in which plaintiffs were only partially successful if counsel's records do not provide a proper basis for determining how much time was spent on particular claims.").

[10] We reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters. It remains important, however, for the district court to provide a concise but clear explanation of its reasons for the fee award. When an adjustment is requested on the basis of either the exceptional or limited nature of the relief obtained by the plaintiff, the district court should make clear that it has considered the relationship between the amount of the fee awarded and the results obtained.

*438 **1942 IV

[11] In this case the District Court began by finding that "[t]he relief [respondents] obtained at trial was substantial and certainly entitles them to be considered prevailing ...., without the need of examining those issues disposed of prior to trial in order to determine which went in [respondents'] favor." Record 219. It then declined to divide the hours worked between winning and losing claims, stating that this fails to consider "the relative importance of various issues, the interrelation of the issues, the difficulty in identifying issues, or the extent to which a party prevails on various issues." Record 220. Finally, the court assessed the "amount involved/results obtained" and declared: "Not only should [respondents] be considered prevailing parties, they are parties who have obtained relief of significant import. [Respondents'] relief affects not only them, but also numerous other institutionalized patients similarly situated. The extent of this relief clearly justifies the award of a reasonable attorney's fee." Record 231.

These findings represent a commendable effort to explain the fee award. Given the interrelated nature of the facts and legal theories in this case, the District Court did not err in refusing to apportion the fee award mechanically on the basis of respondents' success or failure on particular issues. [13] And given the findings with respect to the level of respondents' success, the District Court's award may be consistent with our holding today.

13 In addition, the District Court properly considered the reasonableness of the hours expended, and reduced the hours of one attorney by thirty percent to account for his inexperience and failure to keep contemporaneous time records.

We are unable to affirm the decisions below, however, because the District Court's opinion did not properly consider the relationship between the extent of success and the amount of the fee award. [14] The court's finding that "the [significant] ***439** extent of the relief clearly justifies the award of a reasonable attorney's fee" does not answer the question of what is "reasonable" in light of that level of success. [15] ****1943** We ***440** emphasize that the inquiry does not end with a finding that the plaintiff obtained significant relief. A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole.

14 The District Court expressly relied on *Brown v. Bathke,* 588 F.2d 634 (CA8 1978), a case we believe understates the significance of the results obtained. In that case a fired school teacher had sought reinstatement, lost wages, $25,000 in damages, and expungement of derogatory material from her employment record. She obtained lost wages and the requested expungement, but not reinstatement or damages. The District Court awarded attorney's fees for the hours that it estimated the plaintiff's attorney had spent on the particular legal issue on which relief had been granted. The Eighth Circuit reversed. It stated that the results obtained may be considered, but that this factor should not "be given such weight that it reduces the fee awarded to a prevailing party below the 'reasonable attorney's fee' authorized by the Act." 588 F.2d, at 637. The court determined that the unsuccessful issues that had been raised by the plaintiff were not frivolous, and then remanded the case to the District Court. *Id.,* at 638.

Our holding today differs at least in emphasis from that of the Eighth Circuit in *Brown.* We hold that the extent of a plaintiff's success is a crucial factor that the district courts should consider carefully in determining the amount of fees to be awarded. In *Brown* the plaintiff had lost on the major issue of reinstatement. The District Court found that she had " 'obtained only a minor part of the relief she sought.' " *Id.,* at 636. In remanding the Eighth Circuit implied that the District Court should not withhold fees for work on unsuccessful claims unless those claims were frivolous. Today we hold otherwise. It certainly was well within the *Brown* District Court's discretion to make a limited fee award in light of the "minor" relief obtained.

15 The dissent errs in suggesting that the District Court's opinion would have been acceptable if merely a single word had been changed. See *post,* at 1949. We note, for example, that the District Court did not determine whether petitioners' unilateral increase in staff levels was a result of the litigation. Petitioners asserted that 70%–80% of the attorney time in the case was spent on the question of staffing levels at the Forensic Unit. Memorandum in Opposition to Plaintiffs' Request for an Award of Attorneys' Fees, Expenses and Costs 30. If this is true, and if respondents' lawsuit was not a catalyst for the staffing increases, then respondents' failure to prevail on their challenge to the staffing levels would be material in determining whether an award based on over 2500 hours expended was justifiable in light of respondents' actual success. The District Court's failure to consider this issue would not have been obviated by a mere conclusory statement that this fee was reasonable in light of the success obtained.

V

[12] We hold that the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 U.S.C. § 1988. Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained. On remand the District Court should determine the proper amount of the attorney's fee award in light of these standards.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Chief Justice BURGER, concurring.

I read the Court's opinion as requiring that when a lawyer seeks to have his adversary pay the fees of the prevailing party, the lawyer must provide detailed records of the time and services for which fees are sought. It would be inconceivable that the prevailing party should not be required to establish at least as much to support a claim under 42 U.S.C. § 1988 as a lawyer would be required to show if his own client challenged the fees. A District Judge may not, in my view, authorize the payment of attorney's fees unless the ***441** attorney involved has established by clear and convincing evidence the time and effort claimed and shown that the time expended was necessary to achieve the results obtained.

A claim for legal services presented by the prevailing party to the losing party pursuant to § 1988 presents quite a different situation from a bill that a lawyer presents to his own client. In the latter case, the attorney and client have presumably built up a relationship of mutual trust and respect; the client has confidence that his lawyer has exercised the appropriate "billing judgment," *ante,* at 1940, and unless challenged by the client, the billing does not need the kind of extensive documentation necessary for a payment under § 1988. That statute requires the losing party in a civil rights action to bear the cost of his adversary's attorney and there is, of course, no relationship of trust and confidence between the adverse parties. As a result, the party who seeks payment must keep records in sufficient detail that a neutral judge can make a fair evaluation of the time expended, the nature and need for the service, and the reasonable fees to be allowed.

Justice BRENNAN, with whom Justice MARSHALL, Justice BLACKMUN, and Justice STEVENS join, concurring in part and dissenting in part.

The Court today holds that "the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 U.S.C. § 1988." *Ante,* at 1943. I agree with the Court's carefully worded statement because it is fully consistent with the purpose of § 1988 as well as the interpretation of that statute reached by the courts of appeals. I also agree that plaintiffs may receive attorney's fees for cases in which " 'they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit,' " *id.,* at 1939, citing ****1944** *Nadeau v. Helgemoe,* 581 F.2d 275, 278–279 (CA1 1978), and that plaintiffs may receive fees for all hours reasonably spent litigating ***442** a case even if they do not prevail on every claim or legal theory, see *ante,* at 1940.

Regretfully, however, I do not join the Court's opinion. In restating general principles of the law of attorney's fees, the Court omits a number of elements crucial to the calculation of attorney's fees under § 1988. A court that did not take account of those additional elements in evaluating a claim for attorney's fees would entirely fail to perform the task Congress has entrusted to it, a task that Congress—I think rightly—has deemed crucial to the vindication of individuals' rights in a society where access to justice so often requires the services of a lawyer.

Furthermore, whether one considers all the relevant factors or merely the relationship of fees to results obtained, the District Court in this case awarded a fee that was well within the court's zone of discretion under § 1988, and it explained the amount of the fee meticulously. The Court admits as much. See *ante,* at 1942. Vacating a fee award such as this and remanding for further explanation can serve only as an invitation to losing defendants to engage in what must be one of the least socially productive types of litigation imaginable: appeals from awards of attorney's fees, after the merits of a case have been concluded, when the appeals are not likely to affect the amount of the final fee. Such appeals, which greatly increase the costs to plaintiffs of vindicating their rights, frustrate the purposes of § 1988. Where, as here, a district court has awarded a fee that comes within the range of possible fees that the facts, history, and results of the case permit, the appellate court has a duty to affirm the award promptly.

I

In *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240, 269, 95 S.Ct. 1612, 1627, 44 L.Ed.2d 141 (1975), this Court held that it was beyond the competence of judges to "pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others." Congress, however, has full authority to make such decisions, and it responded to the challenge ***443** of *Alyeska* by doing the "picking and choosing" itself. Its legislative solution legitimates the federal common law of attorneys fees that had developed in the years before *Alyeska* [1] by specifying when and to whom fees are to be available. [2] Section 1988 manifests ****1945** a finely balanced congressional ***444** purpose to provide plaintiffs asserting specified federal rights with "fees which are adequate to attract competent counsel, but which do not produce windfalls to attorneys." S.Rep. No. 94–1011, 94th Cong., 2d Sess. 6 (1976) (hereinafter Senate Report); cf. H.R.Rep. No. 94–1558, 94th Cong., 2d Sess. 9 (1976) (hereinafter House Report), U.S.Code Cong. & Admin.News 1976, p. 5913. [3] The Court today emphasizes those aspects of judicial discretion necessary to prevent "windfalls," but lower courts must not forget the need to ensure that civil rights plaintiffs with bona fide claims are able to find lawyers to represent them.

1 See cases cited at 421 U.S., at 284–285, 95 S.Ct., at 1634–1635 (MARSHALL, J., dissenting). See also S.Rep. No. 94–1011, 94th Cong., 2d Sess. 6, U.S.Code Cong. & Admin.News 1976, p. 5913 ("This bill creates no startling new remedy—it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys' fees which had been going on for years prior to the Court's ... decision.").

2 Because of this selectivity, statutory attorney's fee remedies such as those created by § 1988 and its analogues bear little resemblance to either common-law attorney's fee rule: the "American Rule," under which the parties bear their own attorney's fees no matter what the outcome of a case, or the "English Rule," under which the losing party, whether plaintiff or defendant, pays the winner's fees. They are far more like new causes of action tied to specific rights than like background procedural rules governing any and all litigation. This fundamental distinction has often been ignored. See *ante,* at 1937; *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S., at 247, 95 S.Ct., at 1616.

For certain rights selected by Congress, § 1988 facilitates litigation by plaintiffs and encourages them to reject half-measure compromises, see *New York Gaslight Club v. Carey,* 447 U.S. 54, 63, 100 S.Ct. 2024, 2030, 64 L.Ed.2d 723 (1980); *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968) (per curiam), while at the same time it gives defendants strong incentives to avoid arguable civil rights violations in the first place and to make concessions in hope of an early settlement, see *Copeland v. Marshall,* 205 U.S.App.D.C. 390, 407, 641 F.2d 880, 897 (1980) (en banc); *Dennis v. Chang,* 611 F.2d 1302, 1307 (CA9 1980). Civil rights plaintiffs with meritorious claims "appear before the court cloaked in a mantle of public interest." H.R.Rep. 94–1558, 94th Cong., 2d Sess. 6 (1976) (citing *United States Steel Corp. v. United States,* 519 F.2d 359, 364 (CA3 1975)). Congress has granted them a statutory right to attorney's fees in addition to any rights they have under fees rule of general applicability. *Newman v. Piggie Park Enterprises, supra,* 390 U.S. at 402, n. 4, 88 S.Ct., at 966 n. 4; see *Christianburg Garment Co. v. EEOC,* 434 U.S. 412, 416–417, 98 S.Ct. 694, 697–698, 54 L.Ed.2d 648 (1978). Both of the traditional rules reflect the assumption that plaintiff and defendant approach litigation on a more-or-less equal basis. They leave the parties to private, essentially symmetrical calculations as to whether litigation—including the attorney's fees it entails—represents a better investment than compromise and settlement or simply acceding to the opposing party's demands. Of course, the parties approach those calculations with different risk preferences and financial positions, and the principal difference between the two rules is that the English Rule, by enhancing the cost of losing after litigation, gives the party with superior ability to undertake risk more of a tactical advantage than does the American Rule. But—in theory, at least—neither common-law rule systematically favors plaintiffs over defendants, or vice versa.

3 The portion of § 1988 at issue in this case states:

"In any action or proceeding to enforce a provision of sections 1981, 1982, 1982, 1985, and 1986 of [Title 42], title IX of Public Law 92–318 ... or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641.

Section 1988 was drafted based on Congress's experience with over 50 fee-shifting provisions in other statutes, dating back to Reconstruction-era civil rights statutes, see Senate Report 3–4; *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240, 260, n. 33, 95 S.Ct. 1612, 1623, n. 33, 44 L.Ed.2d 141 (1975).

In enacting § 1988, Congress rejected the traditional assumption that private choices whether to litigate, compromise, or forgo a potential claim will yield a socially desirable level of enforcement as far as the enumerated civil rights statutes are concerned. [4]

4 For most private-law claims, the public interest lies primarily in providing a neutral, easily available forum for resolving the dispute, and a plaintiff's choice to compromise a claim or to forgo it altogether, based on his private calculation that what he stands to gain does not justify the cost of pursuing his claim, is of little public concern. But, in enacting § 1988, Congress determined that the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff. Simply put, Congress decided that it would be better to have more vigorous enforcement of civil rights laws than would result if plaintiffs were left to finance their own cases.

***445** "All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

"In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must recover what it costs them to vindicate these rights in court." Senate Report 2; see House Report 1–3, U.S.Code Cong. & Admin.News 1976, p. 5910.[5]

5 Congress had other reasons as well to believe that civil rights plaintiffs would often be unable to pay for the desirable level of law enforcement themselves. Civil rights remedies often benefit a large number of persons, many of them not involved in the litigation, making it difficult both to evaluate what a particular lawsuit is really worth to those who stand to gain from it and to spread the costs of obtaining relief among them. Cf. *Hall v. Cole,* 412 U.S. 1, 5–7, 93 S.Ct. 1943, 1946–1947, 36 L.Ed.2d 702 (1973); *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 396, 90 S.Ct. 616, 627–628, 24 L.Ed.2d 593 (1970) (finding nonstatutory awards under traditional "common fund" exception to the American Rule appropriate for this reason). This problem is compounded by the facts that monetary damages are often not an important part of the recovery sought under the statutes enumerated in § 1988, cf. *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S., at 402, 88 S.Ct., at 966, and that doctrines of official immunity often limit the availability of damages against governmental defendants, see House Report 9, and n. 17.

Congress ****1946** could, of course, have provided public funds or government attorneys for litigating private civil rights claims, but it chose to "limi[t] the growth of the enforcement bureaucracy," Senate Report 4, U.S.Code Cong. & Admin.News 1976, p. 5911, by continuing ***446** to rely on the private bar[6] and by making defendants bear the full burden of paying for enforcement of their civil rights obligations.[7]

6 This case reflects the fact that Congress has provided public funding to some limited extent through a number of programs such as the Legal Services Corporation: respondents' attorneys are associated with Legal Services of Eastern Missouri, Inc. They may not, however, use the money they receive from the Federal Government for cases in which fees are available. See 42 U.S.C. § 2996f(b)(1). For purposes of § 1988, such attorneys should be paid as if they were in private practice, in order both to avoid windfalls to defendants and to free public resources for other types of law enforcement. See *New York Gaslight Club, Inc. v. Carey,* 447 U.S., at 70, n. 9; *Copeland v. Marshall,* 205 U.S.App.D.C., at 409–410, 641 F.2d, at 899–900; *Rodriguez v. Taylor,* 569 F.2d 1231, 1248 (CA3 1977).

7 Congress's imposition of liability for attorney's fees under § 1988 also represents a decision to abrogate the sovereign immunity of the States in order to accomplish the purposes of the Fourteenth Amendment. See Senate Report 5; *Fitzpatrick v. Bitzer,* 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976); *Maher v. Gagne,* 448 U.S. 122, 128–129, 100 S.Ct. 2570, 2574–2575, 65 L.Ed.2d 653 (1980).

Yet Congress also took steps to ensure that § 1988 did not become a "relief fund for lawyers." 122 Cong.Rec. 33,314 (remarks of Sen. Kennedy). First, it limited fee awards to "prevailing" plaintiffs, rather than allowing fees for anyone who litigated a bona fide claim in good faith, see House Report 6–8, and it expressly reaffirmed the common-law doctrine that attorney's fees could be awarded *against* plaintiffs who litigated frivolous or vexatious claims, see *id.,* at 1938–1939; *Christianburg Garment Co. v. EEOC,* 434 U.S. 412, 416–417, 98 S.Ct. 694, 697–698, 54 L.Ed.2d 648 (1978). It also left district courts with discretion to set the precise award in individual cases and to deny fees entirely in "special circumstances" when an award would be "unjust," even if the plaintiff prevailed, see Senate Report 4; House Report 6; *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968) (per curiam).

"[A] key feature of the bill is its mandate that fees are to be allowed in the discretion of the court. Congress has passed many statutes *requiring* that fees be awarded to a prevailing party. Again, the Committee ***447** adopted a more moderate approach here by leaving the matter to the discretion of the judge, guided of course by the case law interpreting similar attorney's fee provisions." House Report 8 (footnote omitted).

At a number of points, the legislative history of § 1988 reveals Congress's basic goal that attorneys should view civil rights cases as essentially equivalent to other types of work they could do, even though the monetary recoveries in civil rights cases (and hence the funds out of which their clients would pay legal fees) would seldom be equivalent to recoveries in most private-law litigation. Thus, the Senate Report specifies that fee awards under § 1988 should be equivalent to fees "in other types of equally complex Federal litigation, such as antitrust cases, and not be reduced because the rights involved may be nonpecuniary in nature." Senate Report 6, U.S.Code Cong. & Admin.News 1976, p. 5913. Furthermore, "counsel for prevailing parties should be paid, as is traditional with attorneys compensated by fee-paying clients, for all time reasonably expended on a matter." *Ibid.*

As nearly as possible, market standards should prevail, for that is the best way of ****1947** ensuring that competent counsel will be available to all persons with bona fide civil rights claims. This means that judges awarding fees must make certain that attorneys are paid the full value that their efforts would receive on the open market in non-civil-rights cases, see generally *Copeland v. Marshall,* 205 U.S.App.D.C. 390, 400–410, 641 F.2d 880, 890–900 (1980) (en banc), both by awarding them market-rate fees, *id.,* at 899, and by awarding fees only for time *reasonably* expended, *id.,* at 881. If attorneys representing civil rights plaintiffs do not expect to receive full compensation for their efforts when they are successful, or if they feel they can "lard" winning cases with additional work solely to augment their fees, the balance struck by § 1988 goes awry.

The Court accepts these principles today. As in litigation for fee-paying clients, a certain amount of "billing judgment" ***448** is appropriate, taking into account the fact that Congress did not intend fees in civil rights cases, unlike most private-law litigation, to depend on obtaining relief with substantial monetary value. Where plaintiffs prevail on some claims and lose on others, the Court is correct in holding that the extent of their success is an important factor for calculating fee awards. Any system for awarding attorney's fees that did not take account of the relationship between results and fees would fail to accomplish Congress's goal of checking insubstantial litigation.

At the same time, however, courts should recognize that reasonable counsel in a civil rights case, as in much litigation, must often advance a number of related legal claims in order to give plaintiffs the best possible chance of obtaining significant relief. As the Court admits, "Such a lawsuit cannot be viewed as a series of discrete claims." *Ante,* at 1940. And even where two claims apparently share no "common core of facts" or related legal concepts, see *ibid,* the actual work performed by lawyers to develop the facts of both claims may be closely intertwined. For instance, in taking a deposition of a state official, plaintiffs' counsel may find it necessary to cover a range of territory that includes both the successful and the unsuccessful claims. It is sometimes virtually impossible to determine how much time was devoted to one category or the other, and the incremental time required to pursue both claims rather than just one is likely to be small.

Furthermore, on many occasions awarding counsel fees that reflect the full market value of their time will require paying more than their customary hourly rates. Most attorneys paid an hourly rate expect to be paid promptly and without regard to success or failure. Customary rates reflect those expectations. Attorneys who take cases on contingency, thus deferring payment of their fees until the case has ended and taking upon themselves the risk that they will receive no payment at all, generally receive far more in winning cases than they would if they charged an hourly rate. The difference, however, reflects the time-value of money and the ***449** risk of nonrecovery usually borne by clients in cases where lawyers are paid an hourly rate. Courts applying § 1988 must also take account of the time-value of money and the fact that attorneys can never be 100% certain they will win even the best case.

Therefore, district courts should not end their fee inquiries when they have multiplied a customary hourly rate times the reasonable number of hours expended, and then checked the product against the results obtained. They should also consider both delays in payment and the pre-litigation likelihood that the claims which did in fact prevail would prevail. [8] *Copeland v.* ****1948** *Marshall,* 205 U.S.App.D.C., at 402–403, 641 F.2d, at 892–893; *Northcross v. Board of Education,* 611 F.2d 624, 638 (CA6 1979); *Lindy Bros. Builders v. American Radiator & Standard Sanitation Corp.,* 540 F.2d 102, 117 (CA3 1976). These factors are potentially relevant in every case. Even if the results obtained do not justify awarding fees for all the hours spent on a particular case, no fee is reasonable unless it would be adequate to induce other attorneys to represent similarly situated clients seeking relief comparable to that obtained in the case at hand.

8 Thus, the Court's opinion should not be read to imply that "exceptional success" provides the only basis for awarding a fee higher than the reasonable rate times the reasonable number of hours. See *ante,* at 1940. To the contrary, the Court expressly approves consideration of the full range of *Johnson v. Georgia Highway Express*

factors. See *infra,* at 1940. If the rate used in calculating the fee does not already include some factor for risk or the time value of money, it ought to be enhanced by some percentage figure. By the same token, attorneys need not obtain "excellent" results to merit a fully compensatory fee, see *ante,* at 1940; merely prevailing to some significant extent entitles them for full compensation for the work reasonably required to obtain relief. See *infra,* at 1941, and n. 9.

II

Setting to one side theoretical issues about how district courts should approach attorney's fees questions under ***450** § 1988, I fear the Court makes a serious error in vacating the judgment in this case and remanding for further proceedings. There is simply no reason for another round of litigation between these parties, and the lower courts are in no need of guidance from us.

A

The Court admits that the District Court made a "commendable effort" to explain the fee award and that the award "may be consistent" with today's opinion. *Ante,* at 1942. It professes to be "unable to affirm" solely because the District Court's finding that "[t]he extent of this relief clearly justifies the award of a reasonable attorney's fee," App. to Pet. for Cert. A–16, is not accompanied by a further finding as to "what is 'reasonable' in light of that level of success." *Ante,* at 1942–1943.

Even if the District Court had been silent on the reasonableness of the amount of its fee award, it would be difficult to imagine why this Court would presume, as it apparently does, that a federal judge had awarded an *unreasonable* fee without explaining how such a result was compelled. In any event, the District Court stated expressly that:

> "The Court concludes that, in this case, the entire award made to plaintiffs constitutes a reasonable attorney's fee. No portion of it can be characterized as a penalty or damage award against the state of Missouri." App. to Pet. for Cert. A–11.

The District Court also addressed each of the factors mentioned in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (CA5 1974), discussed by the Court *ante,* at 1937, under the general rubric "Reasonableness of the Fee." App. to Pet. for Cert. A–11–A–18. It explained why it was not enhancing respondents' fee to account for the uncertainty factor, *id.,* at A–15–A–16, and it discounted one attorney's hours by 30% to yield "a reasonable claim of time," ***451** *id.,* at A–13. The District Court had this to say under the subheading "Amount Involved/Results Obtained":

> "The significance of this case cannot be measured in terms of dollars and cents. It involves the constitutional and civil rights of the plaintiff class and resulted in a number of changes regarding their conditions and treatment at the state hospital. Not only should plaintiffs be considered prevailing parties, they are parties who have obtained relief of significant import. Plaintiffs' relief affects not only them, but also numerous other institutionalized patients similarly situated. The extent of this relief clearly justifies the award of a reasonable fee." *Id.,* at A–16.

It is clear from the context that the District Court regarded the fee it was awarding as reasonable compensation for the results obtained. Simply changing the word "a" to "this," in the last sentence quoted, would provide the additional finding the Court demands.

**1949 B

No more significant legal error requires today's judgment. The Court notes that the District Court relied on *Brown v. Bathke,* 588 F.2d 634 (CA8 1978), an opinion the "emphasis" of which the Court regards as misplaced. See *ante,* at 1942, n. 14. What the Court finds suspicious in *Brown* is the implication that a district court must award attorney's fees for all work "reasonably calculated to advance a client's interest," *i.e.,* all nonfrivolous claims, whenever the client satisfies the "prevailing party" test. See 588 F.2d, at 637–638. The District Court did not, however, refer to the language criticized by the Court. Rather, it cited a footnote in *Brown* for the proposition that "mechanical division of claimed hours ... ignores the interrelated nature of many prevailing and non-prevailing claims." App. to Pet. for Cert. A–7, citing 588 F.2d, at 637, n. 5. The remainder of the *Brown* footnote ***452** makes clear that the court was concerned with related legal theories, only one of which ultimately becomes the basis for relief. To that extent, *Brown* is perfectly consistent with today's opinion. See *ante,* at 1940–1941, and n. 11. The Court of Appeals for the Eighth Circuit, in its brief, unpublished memorandum affirming the District Court, did not cite *Brown* at all. App. to Pet. for Cert. A–1–A–2.

Perhaps if the questionable language in *Brown* were being misapplied in other cases from the Eighth Circuit, or if courts in some other circuit were misinterpreting § 1988 in light of precedents with similar implications, today's result would have some instructive value. But such is not the case. The Court of Appeals for the Eighth Circuit has never applied *Brown* in the manner the Court fears. Rather, its published opinions following *Brown* have made clear that, although it is an abuse of discretion to deny fees entirely to any plaintiff who has crossed the "prevailing party" threshold, district courts should consider the degree of plaintiffs' success in setting a fee award. See, *e.g., Williams v. Trans World Airlines, Inc.*, 660 F.2d 1267, 1274 (CA8 1981); *United Handicapped Federation v. Andre*, 622 F.2d 342 (CA8 1980) (rejecting claim for over $200,000 in fees and setting $10,000 limit on award because of limited success in case); *Oldham v. Ehrlich*, 617 F.2d 163, 168, n. 9 (CA8 1980); *Cleverly v. Western Electric Co.*, 594 F.2d 638, 642 (CA8 1979).

The law in other circuits is substantially identical. Federal courts of appeals have adopted a two-stage analysis, whereby plaintiffs who obtain any significant relief are considered "prevailing parties," and district courts are directed to take into consideration the overall degree of a plaintiff's success, and the extent to which work on claims on which no relief was obtained contributed to that success, in setting the exact amount of the award due. The mere fact that plaintiffs do not prevail on every claim does not preclude an award of fees for all work reasonably performed, [9] but it is rarely an ***453** abuse of discretion to refuse to ****1950** award fees for work done on non-prevailing claims that are not closely related to the relief obtained. See, *e.g., Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 163–165 (CA7 1981); *Jones v. Diamond*, 636 F.2d 1364, 1382 (CA5 1981) (en banc); *Lamphere v. Brown University*, 610 F.2d 46, 47 (CA1 1979); *Equal Employment Opportunity v. Safeway Stores*, 597 F.2d 251 (CA10 1979); cf. *Copeland v. Marshall*, 205 U.S.App.D.C., at 401–402, 641 F.2d, at 891–892, and n. 18. Many of the same courts, however, have also stressed Congress's clearly expressed intent that the apparent *monetary* value of the relief obtained should not be the measure of success in a civil rights case, and they have recognized that in many cases various claims are essentially part and parcel of a single attempt to establish and vindicate the plaintiffs' rights. See, *e.g., Copeland v. Marshall, supra; Gurule v. Wilson*, 635 F.2d 782, 794 (CA10 1981) (as modified en banc); *Nadeau v. Helgemoe*, 581 F.2d 275 (CA1 1978).

9 Both the Senate and House reports make clear Congress's conclusion that success on every claim is not necessary. See *ante*, at 1937–1938, and n. 4. In addition, in its discussion of awards before final judgment, the Senate Report states:

> "In appropriate circumstances, counsel fees under [§ 1988] may be awarded pendente lite. See *Bradley v. School Board of the City of Richmond*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974). Such awards are especially appropriate where a party has prevailed on an important matter in the course of litigation, *even when he ultimately does not prevail on all issues.*" Senate Report 5 (emphasis added).

See also *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392, 90 S.Ct. 616, 625–626, 24 L.Ed.2d 593 (1970) (allowing fees pendente lite in suit which "has not yet produced, and may never produce, a monetary recovery," an issue still to be tried).

The House Report notes that "courts have awarded counsel fees to a plaintiff who successfully concludes a class action suit even though that individual was not granted any relief." House Report 8 (citing *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (CA8 1970), and *Reed v. Arlington Hotel Co.*, 476 F.2d 721 (CA8 1973)). Note that in *Reed* the Court of Appeals awarded "reasonable attorney's fees, including services for this appeal," although the appellant obtained no significant relief at all on a major issue, either before the trial court or on appeal. See 476 F.2d, at 726.

Evaluation of the interrelatedness of several claims within a single lawsuit, and of the legal work done on those claims, is ***454** most appropriately a task for the district court that heard and decided the case, subject to appellate review for abuse of discretion. As the Court implicitly recognizes, the case before us manifests no clear abuse of discretion. Although plaintiffs obtained only part of the specific injunctive relief they requested, the District Court's opinion on the merits both confirmed the existence of the constitutional right to minimally adequate treatment they claimed, App. 173–179, and established strict standards for staffing, treatment plans, and environment, against which the future conduct of defendants and other state mental health authorities will be measured, *id.*, at 188–195. To a large extent, the District Court's opinion fixed plaintiffs' entitlement to improvements instituted by defendants during the course of litigation. See *id.*, at 192–193 (treatment plans), 190–191 (staff); compare Deposition of H. Bratkowski 12–13, 39, with App. 106–114, 120–121 (increase in staff during litigation). It is thus entirely understandable that the District Court considered respondents to have prevailed to an extent justifying fees for all hours reasonably spent, subject to one substantial reduction of over 300 hours for wasteful litigation practices, see *ante,* at 14, n. 13.

C

To remain faithful to the legislative objectives of § 1988, appellate courts, including this Court, should hesitate to prolong litigation over attorney's fees after the merits of a case have been concluded. Congress enacted § 1988 solely to make certain that attorneys representing plaintiffs whose rights had been violated could expect to be paid, not to spawn litigation, however interesting, over which claims are "related" or what constitutes optimal documentation for a fees request. Paragraph-by-paragraph scrutiny of the explanations for specific exercises of the district courts' broad discretion under § 1988 serves no productive purpose, vindicates no ***455** one's civil rights, and exacerbates the myriad problems of crowded appellate dockets.[10]

10 Cf. Note, Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act, 80 Colum.L.Rev. 346, 352 (1980).

If a district court has articulated a fair explanation for its fee award in a given case, the court of appeals should not reverse or remand the judgment unless the award is so low as to provide clearly inadequate compensation to the attorneys on the case or so high as to constitute an unmistakable windfall. See, *e.g., Gurule v. Wilson,* 635 F.2d 782, 792 (CA10 1981); *Furtado v. Bishop,* 635 F.2d 915, 923, n. 16 (CA1 1980). Any award that falls between those rough poles substantially accomplishes Congress's objectives.[11] More exacting review, for which ****1951** there is no clear mandate in the statute or its legislative history, frustrates rather than advances the policies of § 1988.

11 Congress having delegated responsibility for setting a "reasonable" attorney's fee to the court that tried the case, reviewing courts, as a matter of good judicial policy, should not disturb the trial court's solution to the problem of balancing the many factors involved unless the end product falls outside of a rough "zone of reasonableness," or unless the explanation articulated is patently inadequate. Cf. *Permian Basin Area Rate Cases,* 390 U.S. 747, 767, 88 S.Ct. 1344, 1360, 20 L.Ed.2d 312 (1968).

In systemic terms, attorney's fee appeals take up lawyers' and judges' time that could more profitably be devoted to other cases, including the substantive civil rights claims that § 1988 was meant to facilitate. Regular appellate scrutiny of issues like those in this case also generates a steady stream of opinions, each requiring yet another to harmonize it with the one before or the one after. Ultimately, § 1988's straightforward command is replaced by a vast body of artificial, judge-made doctrine, with its own arcane procedures, which like a Frankenstein's monster meanders its well-intentioned way through the legal landscape leaving waste and confusion (not to mention circuit-splits) in its wake. Within the confines of ***456** individual cases, from prevailing plaintiffs' point of view, appellate litigation of attorney's fee issues increases the delay, uncertainty, and expense of bringing a civil rights case, even after the plaintiffs have won all the relief they deserve. Defendants—who generally have deeper pockets than plaintiffs or their lawyers, and whose own lawyers may well be salaried and thus have lower opportunity costs than plaintiffs' counsel—have much to gain simply by dragging out litigation. The longer litigation proceeds, with no prospect of improved results, the more pressure plaintiffs and their attorneys may feel to compromise their claims or simply to give up.

This case itself provides a perfect example. Petitioners, who have little prospect of substantially reducing the amount of fees they will ultimately have to pay, have managed to delay paying respondents what they owe for over two years, after all other litigation between them had ended, with further delay to come. Respondents' attorneys can hardly be certain that they will ever be compensated for their efforts here in defending a judgment that five Justices find deficient only in minor respects. Apart from the result in this case, the prospect of protracted appellate litigation regarding attorney's fee awards to prevailing parties is likely to discourage litigation by victims of other civil rights violations in Missouri and elsewhere. The more obstacles that are placed in the path of parties who have won significant relief and then seek reasonable attorney's fees, the less likely lawyers will be to undertake the risk of representing civil rights plaintiffs seeking equivalent relief in other cases. It may well become difficult for civil rights plaintiffs with less-than-certain prospects for success to obtain attorneys.

That would be an anomalous result for judicial construction of a statute enacted "to attract competent counsel in cases involving civil and constitutional rights," House Report 9; cf. *Copeland v. Marshall,* 205 U.S.App.D.C., at 400, 641 F.2d, at 890 (fee awards intended to provide "an incentive to competent lawyers to undertake Title VII work).

***457 D**

Few, if any, differences about the basic framework of attorney's fees law under § 1988 divide the Court today. Apart from matters of nuance and tone, largely tangential to the case at hand, I object to only two aspects of today's judgment. First, I see no reason for us to have devoted our scarce time to hearing this case, and I fear that the sudden appearance of a new Supreme Court precedent in this area will unjustifiably provoke new litigation and prolong old litigation over attorney's fees. More fundamentally, the principles that the Court and I share should have led us, once we had granted a writ of *certiorari,* to affirm the judgment below. To that extent, I dissent.

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United States District Court,
N.D. California.

FUNAI ELECTRIC COMPANY, LTD., Plaintiff,
v.
DAEWOO ELECTRONICS CORP., et al., Defendants.

No. C-04-01830 JCS. | April 24, 2009.

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ORDER GRANTING IN PART AND DENYING IN PART WITHOUT PREJUDICE PLAINTIFF FUNAI ELECTRIC COMPANY, LTD.'S APPLICATION FOR ATTORNEYS' FEES AND EXPENSES, AND CALCULATION OF PREJUDGMENT INTEREST [Docket No. 803] AND AMENDING COURT'S APRIL 20, 2009 ORDER TO INCREASE AMOUNT OF BONDS REQUIRED TO STAY EXECUTION OF THE JUDGMENT AGAINST DEC AND DEAM

JOSEPH C. SPERO, United States Magistrate Judge.

I. INTRODUCTION

*1 On January 5, 2009, the Court held that Funai was entitled under 35 U.S.C. § 285 to attorneys' fees and expenses incurred in connection with the three patents on which it prevailed on its infringement claims at trial. In the same order, the Court held that Funai was entitled under 35 U.S.C. § 284 to costs and prejudgment interest on the damage award from the date of first infringement. The amounts were to be determined according to proof. The Court noted, however, that it would not resolve the parties' disputes relating to costs until the parties had complied with the procedures set forth in the Local Rules relating to determination of costs. Funai filed a Bill of Costs with the Clerk's Office, pursuant to Local Rule 54-1, on February 4, 2009. The Clerk's Office has not yet taxed Funai's costs.

On February 13, 2009, Funai filed an Application for Attorneys' Fees and Expenses, and Calculation of Prejudgment Interest ("the Motion"), in which it requested the following amounts: 1) $3,473,853.63 in attorneys' fees; 2) $449,066.46 in expenses; and 3) $1,161,789.00 in prejudgment interest on the judgment, with DEC liable for the entire amount and DEAM liable for $321,921.00 in prejudgment interest. Defendants did not object to Funai's calculation of prejudgment interest and therefore, the Motion is GRANTED as to Funai's request for prejudgment interest. In particular, Funai is entitled to $1,161,789.00 in prejudgment interest, with DEC liable for the entire amount and DEAM liable for $321,921.00 of that amount. For the reasons stated below, the Motion is DENIED without prejudice as to attorneys' fees and costs.

II. ATTORNEYS' FEES

Funai requests over $3 million in attorneys' fees and expenses. It has supported its request with copies of invoices showing the fees and expenses that were billed to Funai, a time line of the case listing important motions and rulings, and a study by the American Intellectual Property Law Association ("AIPLA") Economic Survey reporting the costs of patent infringement litigation by location and amount of risk. Funai has not provided Defendants or the Court with any time sheets in support of its request, however, asserting that it would reveal its litigation strategy on appeal if it were to do so. While time sheet entries may be entitled to protection as work product or under the attorney-client privilege, blanket assertions of privilege are "extremely disfavored." *See Clark v. American Commerce National Bank,* 974 F.2d 127, 129 (9th Cir.1992) (holding that billing statements that contained only case name, amount of the fee and the general nature of the work performed were not privileged). Funai has cited no authority suggesting that it may withhold *all* of its billing statements from Defendants. Rather, Funai must provide Defendants with redacted time sheets so that Defendants have a meaningful opportunity to challenge the reasonableness of the fees requested by Funai. Accordingly, Funai's request for attorneys' fees is DENIED without prejudice to resubmitting its request, supported by redacted time sheets. Funai is cautioned that it may redact *only* the information that is subject to attorney-client privilege or constitutes absolute work product under Rule 26 of the Federal Rules of Civil Procedure. Redaction of information that does not fall within these narrow privileges may result in exclusion of fees for the requested time.

III. EXPENSES

***2** In its January 5, 2009 Order, the Court awarded Funai its "expenses" under 35 U.S.C. § 285 and its "costs" under 35 U.S.C. § 284. To avoid potential inconsistency between the Clerk's taxation of costs and the Court's award of expenses, the Court declines to address Funai's request for expenses until after the Clerk's Office has taxed costs and Funai has complied with the requirements set forth in the Local Rules for challenging the determination of the Clerk's Office. Therefore, the Court DENIES Funai's request for expenses without prejudice to renewing it after the Clerk's Office has ruled on the Bill of Costs.

IV. CONCLUSION

The Motion is GRANTED in part and DENIED in part as follows: 1) Funai is entitled to $1,161,789.00 in prejudgment interest, with DEC liable for the full amount and DEAM liable for $321,921.00 of that amount; 2) Funai's request for attorneys' fees and expenses is denied without prejudice to renewing its request as discussed above. Prior to submitting any future request, the parties shall be required to meet and confer, in good faith, to address any disputes relating to attorneys' fees and costs. Failure to comply with this requirement may result in exclusion of requested amounts or, as to Defendants, waiver of specific objections. The Court also amends its order of April 20, 2009 to increase the amounts of the bonds required in order to stay execution of the judgment to the following amounts: 1) $10,473,108.75 (DEC); and 2) $3,275,638.75 (DEAM).

IT IS SO ORDERED.

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305 S.C. 187
Supreme Court of South Carolina.

Joan CARLYLE, as Administratrix of the Estate of Mark Carlyle, Deceased, Respondent,

v.

The TUOMEY HOSPITAL, Petitioner.

No. 23437. | Heard March 19, 1991. | Decided July 22, 1991. | Rehearing Denied Aug. 15, 1991.

Hospital appealed from judgment of the Circuit Court, Sumter County, Frank P. McGowan, Jr., J., entered in favor of administratrix in wrongful death and survivorship action. The Court of Appeals affirmed. On certiorari, the Supreme Court held that: (1) there was no violation of pretrial discovery order, but (2) there was inadequate foundation for hospital bill.

Affirmed in part and reversed and remanded in part.

West Headnotes (4)

[1] **Pretrial Procedure**
Sufficiency of disclosure; supplementation of responses

There was no violation of scheduling order which required that parties declare the names of expected witnesses within 30 days and complete discovery within 90 days, despite claim that expert witness, whose identity had been timely revealed, had not been provided by counsel with necessary materials to reach a conclusion within 90 days, and thus could not have been effectively deposed.

Cases that cite this headnote

[2] **Appeal and Error**
Prejudice to Rights of Party as Ground of Review

Proof that error caused appellant prejudice is a prerequisite to reversal based on error where trial court's discretion is involved.

2 Cases that cite this headnote

[3] **Appeal and Error**
Rulings on admissibility of evidence in general

Trial
Admission of evidence in general

Admission of evidence is matter left to the discretion of the trial judge and, absent clear abuse, will not be disturbed on appeal.

14 Cases that cite this headnote

[4] **Evidence**
Items of property and value thereof; invoices

Evidence
Damages

There was insufficient foundation for admission of hospital bill which contained both charges for which recovery was sought and charges for which it was not sought, and testimony of physician that 60% to 70% of the care was allocated to treatment for which recovery was sought was insufficient to allow the jury to determine the charges and to apportion damages.

Cases that cite this headnote

Attorneys and Law Firms

****630 *188** Charles E. Carpenter, Jr., and Deborah L. Harrison, both of Richardson, Plowden, Grier & Howser, Columbia, and M.M. Weinberg, Jr., of Weinberg, Brown & McDougall, Sumter, for petitioner.

J. Edward Bell, III, of Bell & Bagley, Sumter, for respondent.

Opinion

PER CURIAM:

Respondent Joan Carlyle, administratrix of the estate of Mark Carlyle, deceased, instituted this action under the wrongful death and survivorship statutes. The jury awarded respondent $100,000 for each cause of action. The Court of Appeals affirmed, Memo.Op. No. 90–MO–067 (Ct.App. Filed April 16, 1990). Petitioner Tuomey Hospital moved for Stay of Remittitur and Rehearing, and the Motion was denied on ***189** June 20, 1990. The case is before this Court on a writ of certiorari from the Court of Appeals. We affirm in part, reverse in part and remand.

Respondent filed suit seeking recovery for damages caused by petitioner's alleged negligence which resulted in the death of respondent's decedent. Subsequently, the ****631** case was removed from the active trial roster pursuant to SCRCP 40(c)(3). The case was later restored by order of the circuit court over petitioner's objection. Petitioner appealed and moved for a remand.

This Court dismissed the appeal upon remanding the case in a scheduling order, the pertinent portion of which provided as follows:

.....

2. Within thirty days after the case is restored to the roster, each party shall declare the names of expected lay and expert witnesses.

3. Within ninety days thereafter, each party shall complete discovery of the witnesses named.

.....

The case was restored to the active roster on July 17, 1987, and in due course proceeded to trial.

The trial record reflects that Mark Carlyle was admitted to Tuomey Hospital on September 20, 1983, for treatment of extensive decubitus, commonly called bedsores. The decubitus was a complication of spastic quadriparesis, an incurable, progressive paralytic disease which gradually paralyzes the body from the feet up. At the time of his admission, Mark was paralyzed from the waist down and incontinent. On September 24, 1983, during the 3:00 P.M. to 11:00 P.M. nursing shift, an external device, known as a condom catheter, had been affixed to Mark's penis. On September 25, 1983, a nursing supervisor noticed that Mark's penis exhibited discoloration and blistering with swelling. The strap used to secure the catheter had been wrapped around Mark's penis twice. The strap of a correctly placed condom catheter wraps around the penis once.

On September 27, 1983, Dr. Jerry Jackson, a urologist, examined Mark and recommended that he be transferred to ***190** Norfolk General Hospital for reconstructive penile surgery. Dr. Jackson testified that half of Mark's penis was black and ischemic and that an indentation circled its base at the origin of discoloration. Dr. Jackson's opinion was that the injury was a recent one. He was not aware of the events which had transpired during the thirty-six hour period preceding his examination.

On October 6, 1983, Mark was transferred to Norfolk. Dr. David A. Gilbert, the plastic surgeon who performed the surgery, testified that Mark's penis was ulcerated and necrotic. Reconstruction consisted of debridement, or removal of dead subcutaneous tissue in two separate procedures; a cadaver graft over the penis shaft in a third procedure; and a skin graft from Mark's thigh to the penis in a fourth procedure.

It was Dr. Gilbert's opinion that the condition resulted from the catheter being secured too tightly or being left on too long without being changed. He testified that Mark's penis would have become necrotic after six to ten hours if the catheter had been secured too tightly. Dr. Gilbert testified that Mark's penis was disfigured, probably irreparably damaged, and that confusion, anxiety, distress and fear of losing his penis had a traumatic psychological effect on Mark.

According to Dr. Gilbert, 60 to 70 percent of Mark's care at Norfolk was devoted to the condition involving his penis, and the remaining 30 to 40 percent was related to treatment of the pre-existing decubitus. He testified further that part of the reconstructive treatment could have been performed on an outpatient basis if decubitus had not required hospitalization.

Norfolk returned Mark to Tuomey on December 10, 1983, and he was discharged in January, 1984. He was cared for at home by a home health care employee, his mother and sister. Mark was hospitalized for a brief period in February, 1984, readmitted in April, 1984, and died on September 11, 1984. The hospital discharge summary lists the cause of death as septicemia with urinary tract infections, multiple decubiti, and pneumonia as contributing factors.

Dr. Phillip Brandt, Mark's internist, testified that pneumonia was the immediate cause of death. Quadriparesis had advanced to Mark's chest area, and he was ****632** unable to clear his lungs by coughing. Mark's parents refused to allow a tracheotomy. According to Dr. Brandt, Mark would eventually ***191** have succumbed to quadriparesis, but a tracheotomy would have prolonged his life. He testified further that infections at any site in the body could contribute to deterioration and ultimately to the cause of death. Dr. Brandt gave his opinion that any infection of the urinary tract caused by the suprapubic tube in place during penile reconstruction did not contribute to Mark's pneumonia.

Dr. Joseph E. Davis, respondent's expert witness, responded to a hypothetical question based upon records and excerpts from depositions supplied by the respondent. Dr. Davis testified, based upon reasonable medical certainty (1) that the injury to Mark's penis was caused by the condom catheter being incorrectly placed; (2) that the damage to the penis would have occurred after the catheter had been in place between ten and twenty-four hours; (3) that a suprapubic tube could cause septicemia and lead to pneumonia because infection caused by the tube could weaken the body and allow other infections to occur in the respiratory tract and lungs; and (4) that the suprapubic tube and septicemia were significant contributing factors to Mark's death. Dr. Davis also testified that when there are multiple infections, each of which could cause septicemia, it cannot be said with reasonable medical certainty that any one of the sources was the actual cause of septicemia.

On appeal, petitioner alleges the trial court abused its discretion in allowing Dr. Davis to testify, in violation of paragraph 3 of the Supreme Court's Scheduling Order (the Order). Petitioner contends Dr. Davis provided the only evidence connecting Mark's death with petitioner's negligence and that it was prejudiced thereby. Paragraph 3 of the Order provides that within ninety days, each party shall complete discovery of the witnesses named. The ninety days expired on November 17, 1987. Petitioner maintains that respondent's counsel did not personally contact Dr. Davis until December, 1987, or January, 1988, and did not provide any information to Dr. Davis until early 1988. Consequently, petitioner argues, Dr. Davis was not "available for deposition" and discovery could not have been completed prior to November 17, 1987.

Respondent contends the name of Dr. Joseph E. Davis was included with the names of witnesses furnished within the thirty-day period provided in paragraph 2 of the Order. Respondent ***192** argues further that Dr. Davis' name was initially provided pursuant to the Circuit Court Order of April 28, 1987, requiring the name of expert witnesses to be disclosed prior to May 15, 1987.

Under South Carolina law, the admission of expert and other evidence "is a matter addressed to the sound discretion of the trial judge and absent clear abuse of discretion amounting to an error of law, the lower court's ruling will not be disturbed on appeal." *Hofer v. St. Clair,* 298 S.C. 503, 381 S.E.2d 736, 742 (1989); *see also Tribble v. Hentz,* 285 S.C. 616, 330 S.E.2d 560, 562 (1985) (where a party fails to timely disclose identity of expert witness, the question of whether the witness' testimony may be received is left largely to the discretion of the trial judge).

The Order of this Court is unambiguous and purports to do nothing more than provide scheduling for a case complicated by numerous potential witnesses residing in multiple jurisdictions. The Order only contemplates that each party will have its witnesses available to respond to discovery requests submitted by the opposing party.

[1] It is undisputed that respondent disclosed to petitioner prior to August 17, 1987, the name of Dr. Joseph E. Davis as one of respondent's expert witnesses; thus, petitioner cannot claim surprise. The record reflects that petitioner did not attempt to depose Dr. Davis prior to November 17, 1987. Moreover, petitioner did not serve the respondent with a notice of deposition for Dr. Davis and, in fact, expressly informed the respondent that it would not depose Dr. Davis.

[2] Additionally, petitioner has not shown that it was prejudiced by the admission ****633** of Dr. Davis' testimony. Although Dr. Davis related the Tuomey injury to factors contributing to the decedent's death, he also testified that where there are multiple infections, it cannot be said with reasonable medical certainty that any one of the sources actually caused septicemia. Proof that an error caused the appellant prejudice is a prerequisite to reversal based on error where the trial court's discretion is involved. *Dunn v. Dunn,* 298 S.C. 499, 381 S.E.2d 734 (1989).

When considered in conjunction with the entire record and the totality of the circumstances, we conclude that the trial court did not abuse its discretion in admitting Dr. Davis' testimony. ***193** The decision of the Court of Appeals is affirmed.

Next, petitioner asserts the trial court erred in admitting into evidence a Norfolk General Hospital bill containing charges for the penile reconstruction and treatment of decubitus without establishing any foundation for the portion related to the penile reconstruction. We agree.

[3] The admission of evidence is a matter left to the discretion of the trial judge and, absent clear abuse, will not be disturbed on appeal. *Hofer v. St. Clair, supra.* Nevertheless, evidence presented must be sufficient to enable the factfinder to make a determination with reasonable certainty or accuracy. "Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation." *Gray v. Southern Facilities, Inc.*, 256 S.C. 558, 183 S.E.2d 438 (1971).

> Medical bills not clearly identified by medical testimony, or otherwise, as being connected with the tortious act which resulted in injuries under litigation are generally held inadmissible, especially where there is evidence that plaintiff was treated for a condition unrelated to the injuries sustained in the accident.

22 Am.Jur.2d *Damages* § 933 (1988).

[4] The aggregate Norfolk bill for penile reconstruction and treatment of the pre-existing decubitus showed no apportionment of the cost for either. The entire twenty-two page bill containing 1,309 entries and charges totaling $42,985.33 was admitted into evidence without a proper foundation upon which the jury could arrive at a determination with reasonable accuracy. Dr. Gilbert's testimony that 60 to 70 percent of Mark's care was allocated to treatment involving reconstructive surgery is insufficient to allow a jury to determine charges and apportion damages for the penile injury.

We conclude that the lack of a proper foundation for admission of the Norfolk bill and the absence of adequate identification of charges related to penile reconstruction allowed the jury to arrive at a verdict through surmise, conjecture, or speculation. Accordingly, the judgment and verdict in the survival action are reversed and remanded to the circuit court.

For the foregoing reasons, we affirm the judgment and verdict in the action for wrongful death; the cause of action for ***194** pain and suffering is reversed and remanded to the circuit court.

Parallel Citations

407 S.E.2d 630

End of Document

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT

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

Plaintiff,

vs.

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

Defendants.

Civil Action No. 2010-CP-46-2267

Trial Brief

Plaintiff Cannot Assert a Claim on behalf of the T.E. Cato Estate, LLC

The Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust (the "Burton Trust") cannot assert a claim on behalf of the T.E. Cato Estate, LLC (the "LLC") because: (1) the Burton Trust does not fairly and adequately represent the interests of the LLC's members; (2) the LLC has dissolved and, therefore, the relief sought is individual to the Burton Trust; and (3) the claim is moot because the Settlement Agreement and Release in the Partition Action (the "Settlement Agreement") resolved all claims the LLC could make regarding the Deed into the LLC (the "Deed") and sale of the subject property to Thomasson Apartments, LLC ("TAL").

FACTS

The Complaint filed by the Burton Trust in this case asserts a purported "derivative" cause of action on behalf of the LLC, in addition to the direct claim it asserts on its own behalf. (See Compl. ¶¶ 23-28.) Specifically, the Burton Trust alleges that Mr. Pitt's breached the standard of care owed to the LLC by: (1) executing the Deed prior to the formation of the LLC, and (2) failing to assure that the LLC members understood applicable statutory requirements for selling substantially all of the LLC's assets. (*See* Compl. ¶¶ 25-26.) The Burton Trust alleges it is entitled to bring a derivative claim on behalf of the LLC because any effort to cause the LLC to commence a legal malpractice action against Mr. Pitts was unlikely to succeed. (Compl. ¶¶ 15-16.) After this lawsuit was filed, the LLC dissolved upon the filing of the Articles of Termination on June 25, 2013. (Articles of Termination, attached as **Exhibit A.**) The LLC no longer exists as a separate legal entity.

ARGUMENT

Under the facts of this case, the Burton Trust cannot assert a derivative action because: (1) the Burton Trust cannot fairly and adequately represent the interests of the LLC's members; (2) the LLC has dissolved and, therefore, the relief sought is individual to the Burton Trust; and (3) the claim is moot.

1. The Burton Trust cannot fairly and adequately represent the interests of the LLC's members.

Under the South Carolina Rules of Civil Procedure, a "derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association." Rule 23(b)(1), SCRCP; *see also Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 437, 673 S.E.2d 448, 458 (2009) (disallowing a derivative claim for failure of LLC member to comply with requirements of S.C. R. Civ. P. 23(b)).

With regard to suits by members of a corporate entity, The Honorable J. Michelle Childs found that "generally an action is either derivative or direct." *Covan v. Blue Cross* *and Blue Shield of South Carolina*, Order, Jan. 8, 2010 (C.A. No.: 2008-CP-40-549, attached as **Exhibit B**) (citing *Schuster v. Gardner*, 127 Cal. App. 4th 305, 312)) ("shareholders may bring two types of actions, a direct action filed by the shareholder ... or a derivative action ... the two actions are mutually exclusive: i.e., the right of action and recovery belongs either to the shareholders (direct action) or to the corporation (derivative action).). Only in rare situations have courts held claims to be both derivative and direct in character. *Id.*

The Burton Trust cannot bring a derivative claim because its interests do not fairly and adequately represent the interests of the members of the LLC. This is proven by the fact that LLC members Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, and James Thomas Cato (collectively 80% of the LLC's members) had to sue the Burton Trust in order to complete the sale to TAL by filing the Partition Action. The Partition Action was based on the fact that the Burton Trust was the lone member of the LLC unwilling to sign a quitclaim deed to complete the sale of the LLC's property to TAL. No other member complained about the validity of the Deed, or the sale of the LLC's property to TAL. Additionally, the Burton Trust was the only member who sued the General Manager of the LLC, Mr. Cato, for an alleged breach of fiduciary duty.

Further, the Burton Trust was the only member of the LLC to receive any monetary recovery in the Partition Action. The remaining members received only the Burton Trust's agreement to the sale of the LLC's property to TAL—which had been the intent of the LLC's members since formation (*See* Settlement Agreement, attached as **Exhibit C**.)

Finally, and perhaps most tellingly, no other member joined the Burton Trust in making this claim against Mr. Pitts on behalf of the LLC. The Burton Trust's attempt to bring a derivative action on behalf of the LLC runs afoul of the "protective principles underlying the pleading requirements of Rule 23(b)(1) [which] have long been recognized as important gatekeepers in South Carolina corporate jurisprudence." *Carolina First Corp. v. Whittle*, 343 S.C. 176, 185, 539 S.E.2d 402, 407 (Ct. App. 2000). As the *Whittle* court went on to say:

> to allow a single stockholder, or one or more of them, to force a corporation or its managing agents into a litigation, which the majority of the body or its officers may think unwise or unnecessary, would place it in the power of a single stockholder who may be dissatisfied with the management of the business of the corporation to involve the corporation in expensive litigation, which might be destructive to the interests of such corporation and would permit a single discontented stockholder to force the majority, who have the right to control, to adopt his views of policy, or incur the expense and hazards of a lawsuit.

Id (internal citations omitted). The Burton's Trust's so called "derivative" claims are merely the direct claims of a single discontented member seeking to force its unsupported views of Mr. Pitt's representation of the LLC onto the majority. The Burton Trust cannot single-handedly force the LLC into this litigation.

Therefore, because the record proves that the Burton Trust's interests do not fairly and adequately represent those of the other members, it cannot maintain a derivative action on behalf of the LLC under S.C. R. Civ. P. 23(b)(1).

2. The LLC has dissolved and, therefore, the relief sought is individual to the Burton Trust.

Apart from the reason set forth above, the Burton Trust cannot assert this claim on behalf of the LLC because the LLC has dissolved and, therefore, the gravamen of this claim concerns the individual interests of the Burton Trust and does not seek to enforce a right of the LLC.

"A derivative action is a suit brought by a stockholder to enforce a corporate right. A suit brought by a stockholder is a derivative action if the gravamen of the complaint is injury to the corporation and not injury to the individual interests of the stockholder." *Ward v. Griffin*, 295 S.C. 219, 2201, 367 S.E.2d 703, 704 (Ct. App. 1988) (internal citation omitted).

As a threshold issue, this "derivative" claim cannot be maintained on behalf of the LLC because the LLC dissolved on June 25, 2013, and, therefore, no longer has a corporate right to be enforced. (*See* **Ex. A.**) Further, the corporate entity should be the recipient of any award from a derivative action. Because the LLC has dissolved, it no longer exists to receive the benefit of any award obtained on its behalf and, therefore, it would be futile to allow a derivative action to be asserted in its right. The non-existence of the LLC illustrates that the gravamen of the Burton Trust's "derivative" claim focuses on an individual injury to the Burton Trust, not an injury to the LLC. Therefore, the "derivative" claim asserted by the Burton Trust is actually a direct claim based on the substance of the relief sought.

The Burton Trust cannot assert this "derivative" claim because the dissolved LLC does not exist to receive any benefit from the claim and, therefore, the gravamen of the claim is based solely on the alleged injury to the Burton Trust.

3. The LLC's claim is moot.

The Burton Trust's "derivative" claim brought on behalf of the LLC is moot because the Settlement Agreement released any and all claims related to the Deed, the creation of the LLC, and the sale of the subject property to TAL.

The Burton Trust's "derivative" claim is based primarily on the timing of the execution of the Deed. This issue was resolved by the Settlement Agreement to which the LLC was a party.[1] In relevant part, the Settlement Agreement states as follows:

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

---

[1] Even prior to the execution of the Settlement Agreement the issue of the timing of the Deed was resolved by this Court. The Burton Trust raised the validity of the Deed's timing when it tried to set aside the Deed in the Partition Action. The Burton Trust filed a motion for partial summary judgment to set aside the Deed as void because it was signed prior to filing of the Articles of Organization for the LLC. In it's March 21, 2011 Order, this Court denied the Burton Trust's motion for summary judgment, finding that:

> Here, the Cato Deed was signed by each of T.E. Cato Heirs at the same exact time that each of T.E. Cato Heirs signed the Articles of Organization of Cato, LLC. At the time the Cato Deed was signed by the T.E. Cato Heirs, all the T.E. Cato Heirs were informed, understood, and agreed that the property was going to be conveyed to Cato, LLC, an entity of which all T.E. Cato Heirs would be members. James T. Cato Dep. at 304.

(Order, Apr. 4, 2011 [C.A.No.:2010-CP-46-00897], attached as **Exhibit D**.) As our Supreme Court affirmed in *Irby v. Richardson*, 278 S.C. 484, 298 S.E.2d 452 (1982), a legal malpractice plaintiff is precluded from relitigating issues that were litigated during the underlying transaction. The Burton Trust's motion for partial summary judgment placed the issue of whether the Deed was void due to timing squarely before this Court. By denying the Burton Trust's motion, this Court ruled that the Deed was not void due to timing.

(Settlement Agreement, p. 4 (emphasis added); **Ex. C.**) The Settlement Agreement releases all claims related to the Deed and creation or operation of the LLC. Therefore, by executing the Settlement Agreement, the LLC released the claim the Burton Trust seeks here to assert on its behalf. As such, the "derivative" claim based on the timing of the Deed is moot.

The second factual allegation upon which the Burton Trust's claim is premised is that Mr. Pitts allegedly failed to assure that the LLC members understood applicable statutory requirements for selling substantially all of the LLC's assets. This claim was also released and is moot because the Settlement Agreement extinguished all claims the LLC could bring related to the sale of the subject property to TAL.[2]

Therefore, the Burton Trust's "derivative" claim is moot because the Settlement Agreement released any and all claims related to the Deed, the creation of the LLC, and the sale of the subject property to TAL.

CONCLUSION

The Burton Trust cannot maintain a derivative action on behalf of the LLC because (1) the Burton Trust cannot fairly and adequately represent the interests of the LLC's members; (2) the LLC has dissolved and, therefore, the relief sought is individual to the Burton Trust; and (3) the claim is moot.

---

[2] Further, this claim is factually flawed because the LLC did not sell "substantially all" of its assets to TAL. The Deed conveyed nine (9) separate parcels of property into the LLC, specifically those known as Areas A, B, C, and D (collectively "Property sold to TAL"), and Lot 42, Lot 14, Lot 13, Lot 98, and Lot 175 (collectively the "Numbered Lots"). The Numbered Lots were not sold to TAL; therefore, it is incorrect to characterize the sale as disposing of "substantially all" of the LLC's assets because the Numbered Lots remained the LLC's property. In fact, one of the Numbered Lots was later sold in 2008 (see James T. Cato Dep. p. 330:3-18, Nov. 19-22, 2010, attached as **Exhibit E**) and the other four lots were conveyed to the Burton Trust as part of the settlement of the Partition Action (see **Ex. C.**) Therefore, the sale to TAL did not dispose of substantially all of the LLC's assets.

Respectfully submitted,

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York, South Carolina

December 16, 2014

~#4818-4262-4288~

EXHIBIT A

STATE OF SOUTH CAROLINA
SECRETARY OF STATE

ARTICLES OF TERMINATION
Limited Liability Company – Domestic
Filing Fee - $10.00

TYPE OR PRINT CLEARLY IN BLACK INK

The following limited liability company having dissolved and completed its winding up, terminates its existence by filing these articles of termination in accordance with S.C. Code of Laws §33-44-805:

1. The name of the limited liability company is T. E. CATO ESTATE, LLC
2. The date the articles of organization were filed is JUNE 26, 2007
3. The date of the dissolution of this limited liability company was APRIL 4, 2013
4. Has the company wound up its business and terminated its legal existence? YES
5. Unless otherwise specified, these articles are effective when endorsed for filing by the Secretary of State. Specify the time and date of any delayed effective date ____________

James Thomas Cato
Signature (Please see the Filing Checklist below)

JAMES THOMAS CATO
Print or Type Name

Capacity/Position of Person Signing (You must check one box.)

Date 6-11-13

☑ Manager ☑ Member ☐ Organizer
☐ Fiduciary ☐ Attorney-in-Fact

Filing Checklist

- Articles of Termination (filed in duplicate)
- $10.00 made payable to the Secretary of State's Office
- Self-Addressed, Stamped Return Envelope
- Make sure the proper individual has signed the form (Please see S.C. Code of Laws §33-44-205(a))
  Limited Liability Company forms filed with the Secretary of State must be signed in the name of the company by a:
  (1) manager of a manager-managed company
  (2) member of a member-managed company
  (3) person organizing the company, if the company has not been formed or
  (4) fiduciary, if the company is in the hands of a receiver, trustee or other court-appointed fiduciary
- Return all documents to: South Carolina Secretary of State's Office
  Attn: Corporate Filings
  1205 Pendleton Street, Suite 525
  Columbia, SC 29201

130627-0008 FILED: 06/25/2013
T. E. CATO ESTATE, LLC
Filing Fee: $10.00 ORIG
Mark Hammond South Carolina Secretary of State

CERTIFIED TO BE A TRUE AND CORRECT COPY AS TAKEN FROM AND COMPARED WITH THE ORIGINAL ON FILE IN THIS OFFICE

NOV 25 2014

Mark Hammond

SECRETARY OF STATE OF SOUTH CAROLINA

STATE OF SOUTH CAROLINA
SECRETARY OF STATE

ARTICLES OF CORRECTION
LIMITED LIABILITY COMPANY

TYPE OR PRINT CLEARLY IN BLACK INK

The limited liability company in accordance with Section 33-44-207 of the 1976 South Carolina Code, as amended corrects a record filed by the Secretary of State, which record contains a false or erroneous statement or was defectively signed.

1. The name of the Limited Liability Company T. E. CATO ESTATE, LLC

2. Describe the record to be corrected, including its filing date, or attach a copy of the record to be corrected to these articles of correction:

   Articles of Termination, filed 6/25/13

3. Specify the incorrect statement and the reason it is incorrect or the manner in which the signing was defective:

   Incorrect: 3. The date of the dissolution of this limited liablity company was April 4, 2013

   Reason incorrect: The date was erroneous.

4. Correct the incorrect statement or defective signing: 3. The date of dissolution of this limited liability company was May 17, 2013.

Date October 4, 2013

James Thomas Cato
Signature

James Thomas Cato, Mgr./Managing member
Name Capacity

FILING INSTRUCTIONS

1. If management of the limited liability company is vested in managers, a manager shall execute these articles of correction. If management of the limited liability company is reserved to the members, a member shall execute these articles of correction. Specify whether a member or managers is executing these amended articles of organization.

2. File two copies of this form, the original and either a duplicate original or a conformed copy.

3. This form must be accompanied by the filing fee of $2.00 payable to the Secretary of State.

Return to: Secretary of State
1205 Pendleton Street, Suite 525
Columbia, SC 29201

131022-0110 FILED: 10/11/2013
T. E. CATO ESTATE, LLC
Filing Fee: $2.00 ORIG
Mark Hammond South Carolina Secretary of State

Exhibit B

2010-01-08-02

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	Civil Action No.: 2008-CP-40-5294
Carolyn D. Covan and Debra K. Harris, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	**ORDER**
Blue Cross and Blue Shield of South Carolina, Joseph F. Sullivan, Billy L. Amick, Robert V. Royall, E. Erwin Maddrey II, Merl F. Code, Charles F. Bolden, Jr., M. Edward Sellers, Helen E. Clawson, Minor M. Shaw, John M. Trask, Jr., and Harry R. Easterling,	)	
Defendants.	)	

This matter came before the Court on September 21, 2009 pursuant to Defendants' Motion to Dismiss Plaintiffs' Verified First Amended Class Action Complaint. Present at the hearing were J. Preston Strom, Jr., Esquire, Mario A. Pacella, Esquire, and John P. Freeman, Esquire, representing Plaintiffs; and W. Howard Boyd, Jr., Esquire, Luanne Lambert Runge, Esquire, and Michael A. Pope, Esquire, representing Defendants, Blue Cross and Blue Shield of South Carolina ("Blue Cross") and Blue Cross' Board of Directors ("Board").

FACTUAL AND PROCEDURAL BACKGROUND

On July 23, 2008, Plaintiffs filed a Class Action Complaint alleging causes of action for breach of fiduciary duty and to compel the declaration of dividends. Defendants moved to dismiss Plaintiffs' Complaint on the following grounds: (1) Plaintiffs failed to state facts sufficient to state a cause of action for breach of fiduciary duty under South Carolina's statutory law and failed to allege any exception to South Carolina's common law business judgment rule; (2) Plaintiffs have no right to a dividend; (3) Plaintiffs' claims are barred, in part, by lack of standing and the statute of limitations; and (4) the allegations in the Complaint alleging a derivative action failed to comply with Rule 23, SCRCP. By Order dated March 26, 2009, the Court granted Defendants' Motion to Dismiss as to both causes of action and granted Plaintiffs' request for leave to amend the Complaint ("Order").

On April 24, 2009, Plaintiffs filed a Verified First Amended Class Action Complaint ("Amended Complaint") alleging direct causes of action for breach of fiduciary duty and oppressive and unfairly prejudicial conduct, and derivative causes of action for breach of fiduciary duty and to compel the declaration of dividends. Plaintiffs, current policyholders of Blue Cross, allege that Defendants breached their fiduciary duties to Blue Cross and its policyholders and have acted in an illegal, fraudulent, oppressive and unfairly prejudicial manner by continuing to increase premiums and Blue Cross' capital surplus without declaring dividends. Plaintiffs seek an order compelling the declaration of dividends from Blue Cross' excess surplus, an accounting and the imposition of a constructive trust over the excess surplus, and other equitable remedies as the Court may determine, pursuant to S.C. Code Ann. § 33-14-310 (1976).

Defendants now move to dismiss Plaintiffs' Amended Complaint on the grounds that: (1) Plaintiffs' sole purported cause of action is a derivative cause of action for breach of fiduciary duty for Defendants' failure to declare dividends, and Plaintiffs have failed to allege that demand would be futile as required by Rule 23(b)(1), SCRCP; (2) Plaintiffs are not entitled to seek relief under the involuntary judicial dissolution provisions of South Carolina Code Ann. §§ 33-14-300 (1976), *et seq.*; and (3) Plaintiffs have failed to state facts sufficient to constitute a cause of action for breach of fiduciary duty or for judicial dissolution.

STANDARD OF REVIEW

A defendant may move to dismiss a complaint based on a plaintiff's failure to state facts sufficient to constitute a cause of action. Rule 12(b)(6), SCRCP; Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). A court's decision to grant a Rule 12(b)(6) motion to dismiss must be based solely upon the allegations set forth in the complaint. Spence, 368 S.C. at 116, 628 S.E.2d at 874; Clearwater Trust v. Bunting, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006). If material outside the pleading is considered by the court, the motion becomes one for summary judgment. McDonnell v. The Consolidated School Dist. of Aiken, 315 S.C. 487, 489, 445 S.E.2d 639, 639 n.2 (1994); Gilbert v. Miller, 356 S.C. 25, 586 S.E.2d 861 (Ct. App. 2003).

In reviewing a motion to dismiss, the court must accept as true the well-pleaded facts in the complaint. See Gressette v. S.C. Elec. & Gas Co., 370 S.C. 377, 379, 635 S.E.2d 538, 538 (2006). However, the court will not admit inferences drawn by the plaintiff from such facts, nor will it admit conclusions of law. See Fireman's Ins. Co. of Newark, New Jersey v. Cincinnati Ins. Co., 302 S.C. 234, 235, 394 S.E.2d 855, 856 (Ct. App. 1990). Essentially, the plaintiff must describe each element of the cause of action in terms of the facts of the case. This requires the plaintiff "to plead the ultimate facts which will be proved at trial, not evidence which will be used to prove those facts." Clark v. Clark, 293 S.C. 415, 416, 361 S.E.2d 328, 328 (1987). "Ultimate facts fall somewhere between the verbosity of 'evidentiary facts' and the sparsity of 'legal conclusions.'" Watts v. Metro Security Agency, 346 S.C. 235, 240, 550 S.E.2d 869, 871 (Ct. App. 2001). Legal conclusions "describe a legal status, condition, or legal offense." Stroud v. Riddle, 260 S.C. 99, 103, 194 S.E.2d 235, 237 (1973). Where the facts alleged give rise to competing inferences, dismissal under Rule 12(b)(6) is inappropriate; thus, "further development of the facts is [often] necessary before [a] case can be decided." Jensen v. Conrad, 297 S.C. 323, 334, 377 S.E.2d 102, 108 (Ct. App. 1988).

Since "a judgment on the pleadings is considered to be a drastic measure," a motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom entitle a plaintiff to any relief under any theory of the case. Id.; Overcash v. S.C. Elec. & Gas Co., 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005); Slack v. James, 356 S.C. 479, 589 S.E.2d 772 (Ct. App. 2003). Furthermore, the court should not dismiss a complaint merely because the court doubts the plaintiff will prevail in the action. Spence, 328 S.C. at 116-17, 628 S.E.2d at 874.

LEGAL DISCUSSION

I. Cause of Action for Breach of Fiduciary Duty for Failure to Declare Dividends

Plaintiffs allege both direct and derivative causes of action in their Amended Complaint. Plaintiffs allege direct causes of action for breach of fiduciary duty and oppressive and unfairly prejudicial conduct, and derivative causes of action for breach of fiduciary duty and to compel the declaration and payment of dividends. Although Plaintiffs have separated their allegations into multiple claims or theories in their Amended Complaint, Plaintiffs only allege a cause of action for breach of fiduciary duty for Defendants' failure to declare dividends. While a complaint may state two causes of action in form, there is one cause of action in fact where a plaintiff alleges a single wrong and seeks a single recovery. Glenn v. E.I. DuPont de Nemours & Co., 250 S.C. 323, 323, 157 S.E.2d 630, 630 (1967); Floyd v. C.I.T. Corp., 191 S.C. 518, 518, 5 S.E.2d 299, 301 (1939) ("A single cause of action cannot be split either as to relief demanded or grounds on which recovery is sought.").

The gravamen of Plaintiffs' Amended Complaint is Defendants' failure to declare dividends. The Amended Complaint alleges:

> Plaintiffs do not contend that their premiums should be lower, but rather contend that *the failure to pay dividends*, while the company performs well in a particular year, while raising the premiums the following year, constitutes oppressive conduct by the Defendants and represents a bad faith breach of Defendants' fiduciary duties owed to Plaintiffs and its members. Given the financial condition of the company, the Board's *failure to consider and to declare dividends constitutes a breach of fiduciary duty. The failure to declare a dividend* against the backdrop of increasing premiums and the exponential growth of Blue Cross' capital surplus is without business justification and constitutes bad faith.

(Am. Compl. ¶ 5) (emphasis added). The Amended Complaint further alleges:

> The Plaintiffs, individually and on behalf of the class, allege that the Defendants arbitrarily and capriciously breached their fiduciary duty in *failing to declare dividends* from [the] excess surplus and instead raised premiums in bad faith to grow the excess surplus.
>
> The Plaintiffs, individually and on behalf of the class members, aver that *they are entitled to a judicial declaration of dividends* from excess surplus, costs, and attorneys' fees.

(Am. Compl. ¶¶ 78 and 79) (emphasis added). To support their direct and derivative causes of action, Plaintiffs allege the same wrongful conduct: (1) Defendants failed to consider whether to pay dividends (Am. Compl. ¶¶ 83-84, 91, 96-97, 130); and (2) Defendants failed to declare dividends while continuing to increase premiums and grow Defendant Blue Cross' surplus (Am. Compl. ¶¶ 83-84, 91, 96-97, 130). Plaintiffs do not assert any other conduct by Defendants to support their causes of action.

In addition to the declaration of dividends, at the hearing Plaintiffs indicated to the Court that they also seek equitable remedies such as the replacement of the Board, creation of a new dividend policy, the refund of premiums to members who have paid escalating premiums without receiving the payment of dividends, or the reinstatement of former policyholders who were spiraled out of coverage because Defendants did not declare a dividend despite increasing premiums. However, the requested equitable remedies are also based on Defendants' failure to declare dividends. In Baron v. Allied Artists Pictures Corp., 337 A.2d 653 (Del. Ch. 1975), the Delaware Chancery Court addressed arguments similar to those Plaintiffs assert in this action. The plaintiff in Baron asserted that the board of directors was in breach of its fiduciary duties by refusing to pay accumulated dividend arrearages. Id. at 655. The plaintiff stressed that he was not asking the court "to compel the payment of the dividend arrearages, but only that a new election be held because of the preferred board's allegedly wrongful refusal to do so." Id. at 657. The Baron court stated that "[d]espite the approach that plaintiff attempts to take, [it] fail[s] to see how his relief can be granted without reaching the question of whether the dividend arrearages should have been paid." Id. The court concluded:

> Plaintiff's attempt to distinguish his action by asserting that he does not seek to compel the payment of the dividend arrearages, but only to return control to the common stockholders, has a hollow ring. In either case the basic question is whether or not the board has wrongfully refused to pay dividends even if funds did exist which could have been used for such purpose. The established test for this is whether the board engaged in fraud or grossly abused its discretion. The mere existence of a legal source from which payment could be made, standing alone, does not prove either.

Id. at 659. The Court finds the present situation analogous with that in Baron and agrees with the Baron court's analysis. Plaintiffs' claims for equitable remedies are ancillary to the ultimate issue in this case which is whether Defendants breached their fiduciary duties by failing to declare dividends. Accordingly, the Court concludes Plaintiffs' sole cause of action is one for breach of fiduciary duty for Defendants' failure to declare dividends.

II. Direct vs. Derivative Suit

In its previous Order, the Court held that, under South Carolina law, a shareholder's suit to compel directors to declare dividends is the right of the corporation and therefore derivative. Order at 10-12; Johnson v. Brandon Corp., 221 S.C. 160, 160, 69 S.E.2d 594, 595-96 (1952); Thompson v. Thompson, 214 S.C. 61, 61, 51 S.E.2d 169, 172 (1948); see also Rule 23(b)(1), SCRCP. Contrary to Plaintiffs' arguments, this issue has been addressed by South Carolina courts.**[1]**

Generally, a cause of action is either derivative or direct. See Schuster v. Gardner, 127 Cal. App. 4th 305, 312, 25 Cal. Rptr. 3d 468, 473 (Cal. Ct. App. 2005) ("Shareholders may bring two types of actions, a direct action filed by the shareholder . . . or a derivative action . . . The two actions are mutually exclusive: i.e., the right of action and recovery belongs either to the shareholders (direct action) or to the corporation (derivative action).") (internal citations omitted). Only in rare situations have courts held claims to be both derivative and direct in character. For example, courts have found claims to be both derivative and direct in "a species of [a] corporate overpayment claim" where the "public shareholders are harmed, uniquely and individually, to the same extent that the controlling shareholder is (correspondingly) benefited," Gentile v. Rosette, 906 A.2d 91, 99-100 (Del. 2006), and in the rare scenario "where a controlling shareholder causes the corporate entity to issue more equity to the controlling shareholder at the expense of the minority stockholders," Dubroff v. Wren Holdings, LLC, 2009 WL 1478697, at *3 (Del. Ch. 2009). The case before the Court does not fall within one of those rare situations. Because the Court finds that Plaintiffs' sole cause of action is for breach of fiduciary duty for Defendants' failure to declare dividends, Plaintiffs may only recover from Defendants by bringing a derivative suit under Rule 23(b)(1), SCRCP.

III. Rule 23(b), SCRCP.

A. Requirements for Derivative Suits under Rule 23(b)(1), SCRCP

Pursuant to Rule 23(b)(1), SCRCP, a shareholder who initiates a derivative suit on behalf of the corporation "shall... allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority... and the reasons for his failure to obtain the action or for not making the effort." As a precondition for bringing a derivative action under Rule 23(b)(1), the plaintiff must make a demand on the board which the board refused or allege facts sufficient to show that a demand would have been futile. See Thompson v. Thompson, 214 S.C. 61, 61, 51 S.E.2d 169, 173 (1948); Carolina First Corp. v. Whittle, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000). A derivative action that does not meet the pleading requirements of Rule 23(b)(1), SCRCP, 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).

Defendants assert that Plaintiffs have failed to comply with Rule 23(b)(1) because (1) Plaintiffs never made a demand on Defendants and (2) Plaintiffs did not allege demand futility with particularity. Here, Plaintiffs allege that a demand would have been futile. See Am. Compl. ¶¶ 99-106, 120-27. In support of their claim that demand should be excused because it would have been futile, Plaintiffs allege: (1) Defendants have been aware of Plaintiffs' complaints since Plaintiffs filed the original Complaint and Defendants have still failed to declare a dividend (Am. Compl. ¶¶ 100-02; 121-22); (2) Blue Cross' Directors are not disinterested because the inside, interested director (Defendant Sellers) controls their decisions (Am. Compl. ¶¶ 103-06; 124-27); and (3) demand would have been futile because the Directors are not disinterested due to their financial interest in the surplus, which Plaintiffs argued in their Memorandum in Opposition to Defendants' Memorandum in Support of their Motion to Dismiss.

At the outset, the Court notes 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." Whittle, 343 S.C. at 185, 539 S.E.2d at 407 (2000). Our Court of Appeals further underscored the purpose of the pleading requirements of Rule 23(b)(1) by stating the following:

> This doctrine, thus abundantly supported by authority, is also well founded in reason... [T]o allow a single stockholder, or one or more of them, to force a corporation or its managing agents into a litigation, which the majority of the body or its officers may think unwise or unnecessary, would place it in the power of a single stockholder who may be dissatisfied with the management of the business of the corporation to involve the corporation in expensive litigation, which might be destructive to the interests of such corporation and would permit a single discontented stockholder to force the majority, who have the right to control, to adopt his views of policy, or incur the expense and hazards of a lawsuit. The business of a corporation must, necessarily, be committed to the management of its officers or agents... and as it would be unreasonable to expect that their views of the proper policy to be adopted in such management can always command the approval of every individual stockholder, it is very manifest that if one or more of the dissatisfied stockholders should be permitted to precipitate the corporation into litigation, whenever the policy of the managing board does not meet with their approval, it would be impossible to conduct the affairs of a corporation with any success.

Id. at 176, n. 6, 539 S.E.2d at 408, n. 6 (quoting Latimer v. Richmond & D.R. Co., 39 S.C. 44, 51-2, 17 S.E.2d 258, 260-1 (1893)); see also Thompson v. Thompson, 214 S.C. 61, 51 S.E.2d

169 (1948); Stahn v. Cawtawba Mills, 53 S.C. 519, 31 S.E.2d 498 (1898). "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 corporate wrong." Id. at 187, 539 S.E.2d at 408 (citing Blasband v. Rales, 971 F.2d 1034 (3d Cir. 1992) (applying Delaware corporate law)); see also Spiegal v. Buntrock, 571 A.2d 767, 775-6 (Del. 1990).

South Carolina courts have upheld Rule 23 demand requirements. "At a minimum, a demand must identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm caused to the corporation, and request remedial relief." Whittle, 343 S.C. at 189, 539 S.E.2d at 409. However, "[d]emand may be excused... if the complaint pleads particularized facts sufficient to create a reasonable doubt that the challenged transaction was the product of a valid exercise of business judgment." Id. at 195, 539 S.E.2d at 413; see also Rales v. Blasband, 634 A.2d 927, 932-937 (Del. 1993); Aronson v. Lewis, 473 A.2d 805, 812-818 (Del. 1984); White v. Panic, 783 A.2d 543, 551 (Del. 2001); Wesenberg v. Zimmerman and Federated Department Stores, Inc., 2002 WL 1398539 at *3 (D. Minn. 2002) (After the plaintiff pleads particularized facts alleging demand futility, then "[a] demand is considered futile and may be excused...if the particularized facts... create a reasonable doubt that: (1) the directors are disinterested and independent; or (2) the challenged transaction was otherwise the product of a valid exercise of business judgment."); Allison ex rel. General Motors Corp. v. General Motors Corp., 604 F. Supp. 1106, 1112 (D. Del. 1985) ("[T]he shareholder must either make a demand or plead with particularity the exceptional circumstances that demonstrate why a demand would be futile, i.e., why the Board of Directors should not be allowed to decide whether to institute litigation."). When the plaintiff-shareholder does not make a demand on the directors, then he or she has the "burden of alleging particularized facts to support the assertion that demand would have been futile." Id. at 193-94, 539 S.E.2d at 411 (quoting Lewis v. Curtis, 671 F.2d 779, 784 (3d Cir. 1982); Cramer v. Gen. Tel. & Elec. Corp., 582 F.2d 259, 275 (3d Cir. 1978)). "Particularized allegations" are more than notice pleading, and must include the specific facts that support the conclusions the plaintiff wishes to draw from those facts. Id. at 188, 539 S.E.2d at 409. See also In re Tyson Foods, Inc., 919 A.2d 563, 581 (Del. Ch. 2007) (Rule 23 "requires that a plaintiff who asserts that demand would be futile must 'comply with stringent requirements of factual particularity that differ substantially from the permissive notice pleadings'" (quoting Zimmerman ex. rel. Priceline.com, Inc. v. Braddock, 2002 WL 31926608, at *7 (Del. Ch. Dec. 20, 2002)). In other words, "[v]ague or conclusory allegations do not suffice to upset the presumption of a director's capacity to consider demand." Id.

Plaintiffs concede that they never made a demand on the Board. However, Plaintiffs argue that the Court should excuse the demand requirement because "[i]n evaluating the 'excuse' allegations in a derivative suit, 'Courts have generally been lenient in excusing demand.'" Grant v. Gosnell, 266 S.C. 372, 376, 223 S.E.2d 413, 415 (1976) (quoting DeHaas v. Empire Petroleum Co., 435 F.2d 1223 (10th Cir. 1970)). In Carolina First Corp. v. Whittle, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000), the court directly addressed the discrepancy created by this language contained in the Grant and DeHaas opinions**[2]** as follows:

> We first address Shareholders' argument that South Carolina follows a 'lenient standard' in excusing the demand requirement. Shareholders base this premise upon language contained in Grant v. Gosnell, in which our supreme court recognized that '[i]n evaluating the 'excuse' allegations in a derivative suit, '[c]ourts have generally been lenient in excusing demand.' We concluded Shareholders have misconstrued this statement. As stated in Kaufman v. Kansas Gas and Elec. Co.,
>
> > [t]his standard does not mean a court will be lenient in finding there are sufficient facts pled to establish futility. Rather, it means that if the court

> finds sufficient facts are pled, *then* it will be lenient in excusing demand- a matter within its discretion.

343 S.C. at 192, 539 S.E.2d 402 at 411 (2000) (emphasis added) (internal citations omitted). Therefore, Plaintiffs' reliance on a lenient standard for excusing demand is misplaced, and Plaintiffs must allege demand futility with particularity before the Court will excuse demand.

B. Demand Futility

I. Defendants' Response to the Filing of the Lawsuit

Plaintiffs allege that demand should be excused because Defendants have been aware of Plaintiffs' concerns since they filed their original complaint in 2008 and have not reacted by declaring a dividend in response to the lawsuit. (Am. Compl. ¶¶ 100-02). Courts have consistently held that the board's action or failure to act when responding to the plaintiff's initiation of litigation should not be considered when determining demand futility. See Kamen v. Kemper Financial Services 500 U.S. 90, 102, n. 6 (1991) ("All states require that a shareholder make a *precomplaint* demand on the directors.") (emphasis added); Kaster v. Modification Systems, Inc., 731 F.2d 1014, 1020 n.4 (2d Cir. 1984) ("[T]he directors' failure to act during the pendency of the instant suit" does not "necessarily indicat[e] their hostility to intra-corporate remedies. Business reasons or legal strategy might caution directors not to take remedial action after a suit is brought."); West Hill Farms, Inc. v. RCO AG Credit Line, Inc., 2008 WL 5341350 at *13 (Cal. Ct. App. 2008) ("[F]utility is to be determined on the basis of circumstances existing *before* the shareholder files the derivative suit, since that is the time the demand would have been made.") (emphasis added); Wesenberg, 2002 WL 1398539, at *5 (D. Minn. 2002) (finding plaintiffs' failure to plead futility was "not altered by [their] feeble contention that Defendants' opposition to this action demonstrate[d] that demand would have been futile"). When dismissing the plaintiff's argument that defendant's filing of a motion to dismiss "established board hostility and the futility of demand," the Delaware Supreme Court held that "futility is gauged by the circumstances existing at the commencement of a derivative suit," not after the plaintiff has initiated the lawsuit. Aronson, 473 A.2d at 810.

The requirement of making a demand prior to serving the complaint goes to the very purpose of Rule 23(b)'s gatekeeping role: "The purposes of requiring a *precomplaint* demand is to protect the directors' prerogative to take over the litigation or oppose it. Kamen, 500 U.S. at 101 (1991) (emphasis added); see also Speigal v. Bentrock, 571 A.2d 767, 773 (Del. 1990); Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 530 (1984). As stated above, most courts that have considered the issue have limited review to the board's conduct *prior* to the commencement of the lawsuit. Therefore, the Court finds that this allegation is insufficient to support Plaintiffs' claim that demand should be excused.

ii. Board Disinterestedness

Plaintiffs allege in their Amended Complaint that the Directors are not disinterested. However, they fail to allege misconduct specific to any Director other than Director Sellers. Defendants argue that general allegations that the directors are not disinterested are insufficient to excuse demand. The Court agrees.

In Whittle, the plaintiff attempted to demonstrate demand futility by alleging the board was not disinterested. In rejecting the plaintiffs' argument, the Whittle court held that "more than mere participation in the original decision" is required to allege futility. 343 S.C. 176, 193, 539 S.E.2d 402, 411-2 (Ct. App. 2000) (citing Kaufman v. Kansas Gas and Elec. Co., 634 F. Supp. 1573, 1579 (D. Kan. 1986)). The court indicated that determining disinterestedness depends on whether the directors engaged in self-dealing or otherwise benefitted personally from their decision at the expense of the corporation. Id. at 193-4, 539 S.E.2d at 411-12 (citing Lewis ex rel Nat'l Semiconductor Corp. v. Sporck, 612 F. Supp. 1316, 1322 (N.D. Cal. 1985) ("raising a presumption of bias 'depends on whether or not the act benefitted the directors personally at the expense of the corporation'") (quoting In re Kauffman Mut. Fund Actions, 479 F.2d. 257, 265 (1st Cir. 1973)); Vanderbilt v. Geo-Energy Ltd., 590 F. Supp. 999, 1002 (E.D. Pa. 1984); Weiss v. Temporary Inv. Fund, Inc., 516 F. Supp. 665, 672 (D. Del. 1981), *aff'd*, 692 F.2d 928 (3d. Cir. 1982), *vacated on other grounds by* 465 U.S. 1001, 104 S. Ct. 989, 79 L. Ed.2d 224 (1984) (interested director is one who engaged in self-dealing or "otherwise stood to obtain any personal advantage"); Pogostin v. Rice, 480 A.2d 619, 624 (Del. 1984) ("Directorial interest exists whenever divided loyalties are present, or a director either has received, or is entitled to receive, a personal financial benefit from the challenged transactions which is not equally shared by the stockholders."); Dockside Ass'n v. Detyens, 294 S.C. 86, 87, 362 S.E.2d 874, 875 (1987); Stahn v. Catawba Mills, 53 S.C. 519, 519, 31 S.E.2d 498, 498-499 (1898) (stating that "refusal need not be alleged, if it be shown that the directors or managing board are themselves the wrong-doers in some alleged breach of trust or fraudulent misappropriation of the corporate property, and have control of a majority of the stock, so as to control corporate action"). The Whittle court noted that the plaintiff made no allegations that the members of the board other than Director Whittle and another member had any improper motive or participated in any self-dealing or fraud. Id. at 194, 539 S.E.2d at 412. Thus, the court dismissed the complaint, concluding that the "vast majority of the directors received nothing of value... no improper bonus, and were not otherwise involved in self-dealing or fraud," and were disinterested. Id.

Here, the Amended Complaint does not contain particularized allegations specific to any Director that he or she received or may receive a personal benefit from the failure to issue dividends, or has engaged in self-dealing or fraud. Because the Amended Complaint contains no allegations that any Director had an improper motive or participated in self-dealing or fraud, the Court must accept as true that the Directors received no personal benefit, as the Court did in Whittle. Additionally, there are no allegations of misconduct specific to any Director, other than CEO Sellers. Therefore, based on the reasoning in Whittle, the Court finds that Plaintiffs' Amended Complaint does not sufficiently allege particularized facts to excuse demand on this basis.

iii. Controlling Director

Plaintiffs allege that the one inside Director, Chairman and CEO Sellers, controls the ten outside Directors. Plaintiffs support this claim by alleging in their Amended Complaint that in a four-year period, the Board voted unanimously in 84 out of 85 substantive votes and "most" of those votes supported proposals made by Sellers. (Am. Compl. ¶¶ 66, 105). Courts have routinely rejected conclusory allegations of board control similar to the claims made by Plaintiffs in their Amended Complaint. For example, the Delaware Supreme Court has held that "[t]here must be coupled with the allegation of control such facts as would demonstrate *that through personal or other relationships the directors are beholden to the controlling person.*" Aronson, 473 A.2d at 815 (emphasis added); see also Whittle, 343 S.C. 176, 195, 539 S.E.2d 402, 412; Orman v. Cullman, 794 A.2d 5 (Del. Ch. 2002); Ash v. McCall, 2000 WL 1370341, at *7 & n.12 (Del. Ch. Sept. 15, 2000) ("conclusory allegations of domination and control are insufficient to excuse pre-suit demand."); Caviness v. Evans, 229 F.R.D. 354, 361 (D. Mass. 2005) (A "bald assertion that [the CEO] controlled the Board does not particularize how the directors are 'beholden' to [the CEO] or so under [his] influence that their discretion would be sterilized." (quoting Rales v. Blasband, 634 A.2d 927, 936 (Del. 1993)); Grobow v. Perot, 526 A.2d 914, 924 (Del. Ch. 1987), *aff'd* 539 A.2d 180 (Del. 1988), *overruled in part on other grounds*, Brehm v. Eisner, 746 A.2d 244, 254 (Del. 2000) (dismissing complaint for failure to plead demand futility where plaintiffs did not allege "particularized supporting facts" to "show specifically how GM's 'outside' directors, who comprise[d] the majority of the Board and who, therefore, were presumptively independent, were dominated and controlled by the 'inside' directors.").

To establish that Director Sellers controlled the Board, the Court would have to rely on speculations based solely on the Board's voting patterns. Courts in other jurisdictions have held allegations of lack of independence based upon voting patterns insufficient to excuse demand upon the board, if not accompanied by allegations as to how the directors' alleged acquiescence benefited them. See Mills v. Esmark, Inc., 544 F. Supp. 1275 (N.D. Ill. 1982); In re Tyson Foods, Inc., 919 A.2d 563 (Del. Ch. 2007). In their Amended Complaint, Plaintiffs do not allege specific facts that Chairman and CEO Sellers himself is self-interested in decisions relating to the declaration and payment of dividends or that his conduct has been improper; nor do Plaintiffs allege facts specific as to any of the other directors. Moreover, the Amended Complaint does not allege that any of the Board's votes harmed the corporation. For these reasons, the Court finds Plaintiffs' allegation that Sellers controlled the Board insufficient to excuse demand.

iv. Directors' Financial Interest in the Surplus

Although not specifically alleged in the Amended Complaint, Plaintiffs argued in their opposition memorandum and at the hearing that the directors are not disinterested because they have a financial interest in the surplus. As stated previously, conclusory allegations are not sufficient to excuse demand. In its Order, the Court noted that Plaintiffs allegations that "Defendants utilized the surplus of Blue Cross as personal funds to pay inflated salaries, bonuses, and to purchase and maintain a corporate jet which is used for purposes other than for the benefit of the corporation" and that the aircraft is expensive and costly to maintain did not constitute ultimate facts on which the Court could rely in considering Defendants' motion to dismiss the Complaint. Order at 7-8. Likewise, these allegations are not grounds for excusing demand here. Therefore, because Plaintiffs did not include particularized allegations in their Amended Complaint to support the claim that the Directors have a financial interest in the surplus, the Court finds that demand is not excused on this basis.

IV. S.C. Code Ann. §§ 33-14-300 *et seq.*

Plaintiffs seek alternative or cumulative remedies under S.C. Code Ann. §§ 33-14-300 (1976) *et seq.* in addition to bringing an action under S.C. Code Ann. §§ 33-8-300 (1976) *et seq.* for breach of fiduciary duty for Defendants' failure to declare dividends. S.C. Code Ann. § 33-14-300 (2) describes the circumstances by which a court may dissolve a corporation when a shareholder initiates the lawsuit.**[3]** After sufficiently establishing one or more of the grounds for judicial dissolution enumerated in § 33-14-300, a court may grant remedies pursuant to S.C. Code Ann. § 33-14-310. Specifically relevant to the present case, §§ 33-14-310(d) lists remedies in actions sought by shareholders.**[4]** Moreover, §33-14-310(e) states that "[t]he relief authorized in subsection (d) may be granted as an alternative to a decree of dissolution or may be granted whenever the circumstances of the case are such that the relief, but not dissolution, is appropriate."

A. South Carolina Insurance Statutes & Equitable Relief under §§ 33-14-300 and 33-14-310

At the hearing on this motion, Plaintiffs acknowledged that they could not seek and do not seek dissolution or demutualization of Blue Cross. Rather, Plaintiffs request the Court to grant other equitable remedies under § 33-14-310. Defendants argue that because Plaintiffs cannot seek involuntary judicial dissolution of Blue Cross, they may not assert a claim under South Carolina

Code Ann. §§ 33-14-300 *et seq.* Particularly, they argue that the Court may grant equitable remedies under § 33-14-310(d) only if a plaintiff first pleads a cause of action under § 33-14-300 and demonstrates a ground for dissolution. Plaintiffs contend that South Carolina insurance statutes do not foreclose the Court's ability to grant equitable remedies, and therefore, the Court should grant them equitable relief pursuant to § 33-14-310(d).

The Court agrees that South Carolina law does not permit courts to dissolve or demutualize an insurance company involuntarily. See S.C. Code Ann. §§ 38-27-60 and 38-27-390; S.C. Code Ann. §§ 38-19-815 and 38-19-825. South Carolina insurance statutes place jurisdiction over the dissolution or demutualization of an insurance company within the province of the South Carolina Department of Insurance. South Carolina Code Ann. § 38-27-60(b) states that a court does not have jurisdiction to hear a claim for dissolution of an insurer, and § 38-27-390 provides the appropriate procedures for demutualization of a mutual insurance company. However, these statutes conflict with section 38-19-30(A) providing that the Business Corporations Act applies to mutual insurance companies. The Court need not resolve the conflict between §§ 38-27-60(b) and 38-27-390 with § 38-19-30(A) because Plaintiffs have conceded that they seek only equitable remedies under the corporate dissolution statutes. Neither § 38-27-60(b) nor § 38-27-390 prohibits the application of §§ 33-14-300 and 33-14-310 with regard to equitable remedies other than judicial dissolution.

Defendants argue that in order to invoke the equitable remedies of Section 33-14-310, Plaintiffs must first establish that they are entitled to judicial dissolution. In Hite v. Thomas Howard Company of Florence, Inc., 305 S.C. 358, 409 S.E.2d 340 (1991), *rev'd on other grounds*, Huntley v. Young, 319 S.C. 559, 462 S.E.2d 860 (1995), the South Carolina Supreme Court addressed this very issue. In Hite, the defendant argued that the plaintiff could not pursue equitable remedies pursuant to S.C. Code Ann. § 33-14-310(d)(4) because he did not seek dissolution of the corporation. The Hite court construed the language of S.C. Code Ann. § 33-14-310(e) broadly to allow the plaintiff to pursue alternative equitable relief and to avoid the drastic remedy of dissolution. Id. at 364, 409 S.E.2d at 343-44. The court stated the following:

> We construe the broad language of § 33-14-310(e) to allow a shareholder to seek the statutory relief enumerated in subsection (d). The purpose of allowing alternative equitable relief is to avoid the drastic remedy of dissolution. Where, as [in the Hite case], a shareholder alleges a legitimate ground for dissolution enumerated in § 33-14-300, he need not demand dissolution but may seek the alternative relief available under § 33-14-310(d).

Id.; see also Greenwood Supply Co., 295 B.R. 787, 796 (D.S.C. Bankr. 2002) (stating that even if the minority shareholder chooses not to seek the "drastic remedy of dissolving the corporation but only wishes to compel the purchase of their shares at a fair value by the majority shareholders," they must still invoke S.C. Code Ann. § 33-14-300 and demonstrate a ground for dissolving the corporation."). South Carolina insurance law precludes courts from dissolving a mutual insurance company, and Plaintiffs have conceded the drastic remedy of dissolution is inappropriate here. However, South Carolina insurance law does not foreclose Plaintiffs' claim for equitable relief under S.C. Code Ann. § 33-14-310 so long as Plaintiffs have established a ground for relief pursuant to S.C. Code Ann. § 33-14-300.

B. Application of S.C. Code Ann. § 33-14-300 to Public Corporations

Defendants contend that S.C. Code Ann. §§ 33-14-300 and 33-14-310 only apply to closely held corporations, while Plaintiffs argue that the dissolution statutes apply to all corporations. The plain language of the statutes do not limit private causes of action for dissolution or other equitable relief for oppression or unfairly prejudicial behavior of a corporation or its board of directors to closely held corporations. Importantly, these statutes do not appear in Chapter 18 of Title 33, the chapter applying solely to close corporations. Moreover, South Carolina's "Statutory Close Corporations Supplement" of Chapter 18 of Title 33 sets forth its own remedies for oppression and unfairly prejudicial conduct in the governance and administration of a closely held corporation.**[5]** The South Carolina Reporters' Comments to S.C. Code Ann. § 33-18-400 indicates that this section applies only to statutory close corporations formed under the "Statutory Close Corporations Supplement." However, it further states that "Sections 33-21-150 and 33-21-155 of the 1981 South Carolina Business Corporations Act apply to all corporations." S.C. Code Ann. §§ 33-14-300 and 33-14-310 succeeded §§ 33-21-150 and 33-21-155. The Comments to §§ 33-14-300 and 33-14-310 provide that "[a]lthough rare, involuntary dissolution suits against publicly-held corporations have been brought."

The plain language of these statutes indicates that judicial dissolution may apply to corporations other than close corporations. <u>See</u> S.C. Code Ann. § 33-14-300 ("The circuit courts may dissolve a corporation"); S.C. Code Ann. § 33-14-310(d) ("In any action filed by a shareholder to dissolve the corporation on the grounds enumerated in Section 33-14-300, the court may make such order or grant such relief, other than dissolution . . .") Additionally, the South Carolina Reporters' Comments provide that a closely held corporation also "may have such dissolution provisions under the Statutory Close Corporations Supplement," implying that equitable remedies pursuant to S.C. Code Ann. § 33-14-310 may apply to all corporations, not just close corporations. Therefore, the Court finds that the equitable remedies are available under § 33-14-310 against all corporations under South Carolina law.

<u>*C. Shareholder Oppression Pursuant to S.C. Code Ann. § 33-14-310(d)*</u>

Based on the foregoing, the Court will now address Plaintiffs' grounds for claiming equitable relief. S.C. Code Ann. § 33-14-300(2)(ii) states grounds for dissolution or other remedies under S.C. Code Ann. § 33-14-310(d) where "the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, fraudulent, or unfairly prejudicial to either the corporation or to any shareholder." Plaintiffs argue that they are entitled to equitable relief based on this ground.

Despite the Court's finding that S.C. Code §§ 33-14-300, *et seq.* apply to all corporations, shareholder oppression claims have traditionally arisen in the courts of South Carolina in the context of closely held corporations and in rare circumstances where a minority shareholder of a large corporation is being oppressed by the holder of the majority of the shares in the company. <u>See</u> Comments to S.C. Code Ann. §§ 33-14-300 and 33-14-310 ("[a]lthough rare, involuntary dissolution suits against publicly-held corporations have been brought.").

In support of their claims, Plaintiffs rely on the leading case in South Carolina defining shareholder oppression, <u>Kiriakides v. Atlas Food Systems & Services, Inc.</u>, 343 S.C. 587, 603, 541 S.E.2d 257, 266 (2001). <u>Kiriakides</u> involved a closely held family corporation in which the minority shareholders were in essence frozen out of the operations of the corporation after the majority shareholder employed fraudulent tactics to control the family-run corporation at the expense of his shareholder siblings. Rather than dissolve the corporation, the supreme court upheld equitable remedies based on the minority shareholders claims pursuant to 33-14-310 (d). The <u>Kiriakides</u> court discussed at length the requirements for shareholder oppression, including the development of the current oppression statutes stemming from the increasing abuse of minority shareholders in closely held family corporations. <u>See</u> <u>Kiriakides</u>, 343 S.C. at 597 n. 17, 541 S.E.2d at 263 n. 17. The court noted that the legislature has left the definitions of "oppressive" and "unfairly prejudicial" for the courts to resolve. <u>Id.</u> at 599, 541 S.E.2d at 264. Therefore, the <u>Kiriakides</u> court instructed the lower courts to apply a "case-by-case analysis, supplemented by various factors which may be indicative of oppressive behavior" when analyzing a claim under S.C. Code Ann. § 33-14-300. Id. at 602, 541 S.E.2d at 266. Moreover, the court stated that "the terms 'oppressive' and 'unfairly prejudicial' are elastic terms whose meaning varies with the circumstances presented in a particular case." Id. at 602, 541 S.E.2d at 266. Based on this language, Plaintiffs argue that the Court should apply the factors enumerated in Kiriakides to the present dispute. The Court disagrees.

Not only did Kiriakides involve a closely held corporation, but the court emphasized that the case-by-case approach "is well-suited to the diversified, fact-specific disputes among shareholders of *closely held corporations*." Id. at 602-3, 541 S.E.2d at 266 (emphasis added). Defendant Blue Cross is a large, publicly-regulated mutual insurer with thousands of policy-holders. The Kiriakides court further distinguished the facts of that case from those cases involving public corporations as follows:

> In the close corporation, a shareholder faces a potential danger the shareholder of a public corporation generally avoids- the possibility of harm to the fair value of the shareholder's investment. At its extreme, this harm manifests itself as the classic freeze out where the minority shareholder faces a trapped investment and an indefinite exclusion from participation in business returns. The position of the close corporation shareholder, therefore, is uniquely precarious.

Id. at 604, 541 S.E.2d at 267. Other prevalent "freeze out" tactics "include the termination of a minority shareholder's employment, the refusal to declare dividends, the removal of a minority shareholder from a position of management, and the siphoning off of corporate earnings through high compensation to the majority shareholder," which the court noted majority shareholders often combine to oppress the minority shareholders. Id. at 605, 343 S.E.2d at 267. In situations where majority shareholders withhold dividends, they usually employ tactics to force the minority shareholder to sell his or her shares of the corporation for less than their fair value.**[6]** Id. at 605, 541 S.E.2d at 267. The mere fact that the Board has not declared a dividend in recent years, without more, does not constitute a minority shareholder freeze out situation as envisioned by the court in Kiriakides. Therefore, the Court finds that Plaintiffs have not stated grounds for relief under § 33-14-300 such that they are entitled to remedies under § 33-14-310. See Davis v. Hamm, 300 S.C. 284, 387 S.E.2d 676 (1989); Hite.

D. Pleading Shareholder Oppression

Moreover, Plaintiffs have not alleged sufficient ultimate facts to establish that the Defendants "have acted, are acting, and will act in a manner that is illegal, fraudulent, oppressive, and/or unfairly prejudicial to Plaintiffs and class members . . . ." (Am. Compl. ¶ 91). Plaintiffs' allegations based solely upon Defendants' failure to declare a dividend, without more, are not sufficient to state a cause of action for oppression under S.C. Code Ann. §§ 33-14-300 *et seq.* See Whitehorn v. Whitehorn Farms, Inc., 346 Mont. 394, 399, 195 P.3d 836, 842 (2008); Baker v. Commercial Bodybuilders, Inc., 264 Or. 614, 630, 507 P.2d 387, 394 (1973). Because the directors' decisions regarding Blue Cross could serve a rational business purpose, their failure to declare a dividend in the present case is not "explicable only on the theory of an oppressive or fraudulent abuse of discretion." Gabelli & Co. v. Liggett Group, Inc., 479 A.2d 676, 280 (Del. 1984) (finding that "courts act to compel the declaration of a dividend only upon a demonstration 'that the withholding of it *is explicable only on the theory of an oppressive or fraudulent abuse of discretion*'" (emphasis added) (internal citation omitted)). The mere allegation that the directors decided not to declare a dividend or failed to address the issue, without proof of a sinister motive such as fraud, expectation of personal gain, or bad faith does not constitute ultimate facts sufficient to state a claim for breach of fiduciary duty or oppression. See e.g. Winters v. First Union Corp., 2001 WL 34000144, at *3-5 (N.C. Super. Ct. July 12, 2001) (dismissing plaintiff's claim pursuant to a 12(b)(6) motion).

E. Direct vs. Derivative Causes of Action for Shareholder Oppression

Because the Court finds that Plaintiffs have not stated grounds sufficient to bring a claim pursuant to §33-14-300(ii) or met the pleading requirements, the Court need not address at length Defendants' argument that Plaintiffs cannot satisfy the requirement for a direct action.

The Court notes that "[a] shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation." Hite, 305 S.C. at 361, 409 S.E.2d at 342. Plaintiffs have not alleged that their loss is separate and distinct from the injury allegedly sustained by all policyholders as a result of the failure to declare dividends. Rather, they allege that as a result of Defendants' breach of fiduciary duty, "Plaintiffs and Class Members have been harmed by paying higher premiums without receiving dividends" and that as a result of Defendants' acts or omissions, "Plaintiffs and Class Members have been actually, specially, incidentally, and consequentially damaged." (Am. Compl. ¶¶ 85, 92). Plaintiffs make no distinctions among policyholders and class members in the Amended Complaint.**[7]** They purport to represent all policyholders and allege all are similarly situated. Therefore, the Court finds that Plaintiffs failed to allege a separate and distinct loss from that of all policyholders which would be necessary for them to maintain a direct cause of action against Defendants. Thus, their claims are derivative. As discussed herein, Plaintiffs did not follow the required procedure set forth in Rule 23(b), SCRCP.

V. S.C. Code Ann. §§ 33-8-300, *et seq.*

Plaintiffs' remaining cause of action against Defendants is an action for breach of fiduciary duty to compel the declaration of dividends pursuant to S.C. Code Ann. §§ 33-8-300 (1976) *et seq.* **[8]** When dismissing Plaintiffs' original Complaint, the Court found that Plaintiffs did not alleged particularized facts sufficient to constitute a cause of action for breach of fiduciary duty under South Carolina law. The Court makes the same finding with respect to Plaintiffs' Amended Complaint.

To state a claim for breach of fiduciary duty, Plaintiffs must allege ultimate facts sufficient to support each of the following elements: (1) that there exists a fiduciary relationship between Defendants and Plaintiffs; (2) that Defendants breached a fiduciary duty owed to Plaintiffs; and (3) that Plaintiffs suffered damages as a result of Defendants' breach of their fiduciary duties. See Clearwater Trust v. Bunting, 367 S.C. 340, 626 S.E.2d 334 (2006).

The Court previously held that a fiduciary relationship existed between Defendants and Plaintiffs. Order at 5. However, the Court found that accepting as true all well-pleaded factual allegations, Plaintiffs "failed to satisfy the minimum pleading requirements because they did not allege ultimate facts upon which to support their claim that Defendants' actions were wrongful or based upon fraud, oppression, illegality, or similar lack of good faith." Order at 8. Further, the Court found that "Plaintiffs state[d] their allegations in a conclusory way seeking the Court to draw their inferences of bad faith and conclusions of law from the mere facts that (1) Defendant Blue Cross has a large surplus, (2) Defendants continue to increase premiums (although not to an excessive amount), and (3) Defendants have not declared a dividend for the past several years – a dividend to which Plaintiffs have no right until declared by Defendant Directors." Id. Moreover, the Court concluded that "Plaintiffs' allegations that the amount of capital retained by Defendants is excessive and as to the purposes for which the amount of capital retained might be used in the future are conclusory and speculative allegations not based on ultimate facts." Id. The Court is not required to regard as true conclusory or speculative allegations when deciding whether to dismiss a claim pursuant to Rule 12(b)(6). See Winters v. First Union Corp., 2001 WL 34000144 at *3 (N.C. Super. Ct. July 12, 2001).

Defendants again seek to dismiss Plaintiffs' cause of action for breach of fiduciary duty, contending Plaintiffs do not allege additional ultimate facts to establish that Defendants have breached their fiduciary duties to Blue Cross' policyholders by failing to distribute a portion of Blue Cross' capital surplus and that this failure to declare a dividend is based upon corrupt motive or bad faith, fraud, self-dealing, oppression, illegality, or other unconscionable conduct or incompetence. The Court agrees. Despite the Court's previous Order, the Amended Complaint contains many of the same conclusory and speculative allegations which the Court found insufficient in dismissing the original Complaint. In addition to re-asserting the factual allegations they included in the Complaint, Plaintiffs allege several new facts to support their claim that Defendants acted in bad faith and in violation of their fiduciary duties. These facts can be summarized as follows: (1) Blue Cross' Directors have never considered whether to declare a dividend (Am. Compl. ¶¶ 4, 32, 60, 64, 84, 91, 97, 116, 118, 123); (2) Blue Cross' directors discussed demutualization at a board meeting on August 23, 2005 (Am. Compl. ¶ 60); (3) Blue Cross issued a mission statement on May 16, 2006 (Am. Compl. ¶¶ 61, 62); and (4) if Blue Cross' Directors made a decision not to pay dividends, it was not made with all relevant information (Am. Compl. ¶ 65). Plaintiffs also allege new facts relating to the surplus amounts in 2008 and the amount of premiums in comparison to amounts needed to pay claims. In support of their claims, Plaintiffs provided a summary comparing Blue Plans in a number of statistical measures.

These new allegations are not sufficient to state a cause of action for breach of fiduciary duty. Plaintiffs do not allege any ultimate facts that would establish that the Board violated its fiduciary obligations towards the policyholders, except for the general conclusion that the Board should have declared a dividend from the excessive surplus. See Am. Compl. ¶ 65. In its previous Order, the Court held this general allegation to be insufficient. Order at 8; See Winters, at *3; Brehm v. Eisner, 746 A.2d 244, 254 (Del. 2000) (pleadings must meet "stringent requirements of factual particularity" to overcome business judgment rule). Plaintiffs make no allegation as to what specifically the Board did not consider in making decisions regarding the financial condition of Blue Cross, what information it should have but did not when making this decision, or ultimate facts to support the allegation that the Board did not have all relevant information in making the decision.

Plaintiffs rely on the Court's previous conclusion that "Defendants are obligated to *consider* from time to time whether dividends should be declared and must exercise their authority in compliance with the required standard of care." Order at 10 (emphasis added). However this reliance is misguided. In its previous Order, the Court also stated the following: "Thus, finding that the failure to declare dividends could possibly support a cause of action for breach of fiduciary duty, the Court reviews Plaintiffs' allegations to determine *whether they have alleged a sufficient factual basis to support such breach*." Order at 6 (emphasis added). Therefore, a plaintiff must do more than merely state that the directors have failed to consider declaring a dividend. See Churella v. Pioneer State Mut. Ins. Co., 258 Mich. App. 260, 671 N.W.2d 125 (2003).

In Churella v. Pioneer State Mut. Ins. Co., 258 Mich. App. 260, 671 N.W.2d 125 (2003), the plaintiffs brought a claim alleging breach of fiduciary duty because the board of directors of a mutual insurer had failed to consider issuing a dividend. As in Churella, Plaintiffs here "claim that the directors are not protected by the business judgment rule because they failed to exercise their discretion when they failed to consider whether to distribute the excess surplus." Id. at 271, 671 N.W.2d at 131.

In the present case, Plaintiffs have not alleged facts which would establish that Defendants' engaged in fraudulent conduct in addition to their general allegation that Defendants' have not considered whether to declare a dividend. On this point, the Court finds the following language from Churella persuasive:

> It is a well-recognized principle of law that the directors of a corporation, and they alone, have the power to declare a dividend... and determine its amount. Courts of equity will not interfere in the management of the directors unless it is clearly made to appear that they are guilty of fraud or misappropriation of the corporate funds, or refuse to declare a dividend when the corporation has a surplus of net profits which it can, without detriment to its business, divide among its stockholders, and when a refusal to do so would amount to such an abuse of discretion as would constitute a fraud, or breach of that good faith which they are bound to exercise towards the stockholders.

Id. at 270-71, 671 N.W.2d at 131 (quoting In re Butterfield Estate, 418 Mich. 241, 254-255, 341 N.W.2d 453 (1983)). When dismissing Plaintiffs' complaint, the Churella court held that:

> [B]ecause plaintiffs did not explain how the directors' failure to consider a distribution constitutes fraud or bad faith dealings, and because plaintiffs have not cited any cases indicating that a failure to declare a dividend, without more, constitutes an abuse of business discretion, we conclude that plaintiffs have not sufficiently pleaded facts that would overcome the business judgment rule. *Conclusory statements, unsupported by factual allegations, are insufficient to state a cause of action.*

Id. at 272, 671 N.W.2d at 132 (emphasis added). As in Churella, here Plaintiffs have failed to allege any facts to establish the alleged failure to consider whether to declare a dividend was due to fraud, self-dealing, or other wrongful conduct on behalf of Defendants. Moreover the Court notes, as it did in its previous Order, that "Plaintiffs do not allege a right or entitlement to a dividend pursuant to Defendant Blue Cross' bylaws, charters, or Plaintiffs' individual contacts with Defendant Blue Cross," Order at 6; nor do Plaintiffs allege a statutory right to a dividend. Absent such a requirement, the mere allegation that Defendants failed to consider declaring a dividend, without more, is insufficient to establish breach of fiduciary duty sufficient to overcome the business judgment rule.

Therefore, accepting as true all well-pleaded factual allegations in the Amended Complaint and not accepting inferences drawn by Plaintiffs from those facts or conclusions of law, the Court finds that Plaintiffs have failed to allege ultimate facts to support their claim that Defendants' actions breached their fiduciary duties to the policyholders or to Blue Cross under S.C. Code Ann. § 33-8-300.

CONCLUSION

As set forth herein, **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Defendants' Motion to Dismiss Plaintiffs' Verified First Amended Class Action Complaint **IS GRANTED** and Plaintiffs' Verified First Amended Class Action Complaint is **DISMISSED with PREJUDICE** as to all causes of action.

IT IS SO ORDERED.

The Honorable J. Michelle Childs
Circuit Court Judge
Fifth Judicial Circuit

Dated at Columbia, S.C.,
this 8th day of January, 2010.

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[1] This rule has not been challenged and continues to remain good law in South Carolina. Jurisdictions other than South Carolina also continue to hold that an action to compel the declaration of dividends is derivative. U.S. v. Byrum, 408 U.S. 125, 141-42 (1972) (applying Ohio law); Abbott v. McNeff, 171 F. Supp. 2d 935, 941-42 (D. Minn. 2001) (applying Minnesota law); In re Goerler, 227 A.D.2d 479 (N.Y. App. Div. 1996) (applying New York law); Cleaver v. Cleaver, 935 S.W.2d 491, 495-96 (Tex. App. 1996) (applying Texas law); Bernhard v. Buttner, 1995 WL 656772, at * 4-5 (Conn. Super. Ct. Oct. 30, 1995) (applying New York law); Boykin v. First Ala. Bank of Birmingham, 384 So. 2d 10, 12 (Ala. 1980) (applying Alabama law).

[2] Additionally, the Court notes that unlike the factual situation in the present case, the Grant and DeHaas cases involved corporations in which the controlling directors also owned or controlled a majority of the corporation's stock.

[3] A court may dissolve a corporation if the shareholder establishes that (i) the directors are deadlocked causing "irreparable harm" to the corporation; (ii) the directors are acting in an "illegal, fraudulent, oppressive, or unfairly prejudicial" manner towards the shareholders or the corporation; (iii) the shareholders are deadlocked and have not elected directors within two annual shareholder meetings; (iv) waste; (v) the corporation has "abandoned its business" but has failed to dissolve or wind up; or (vi) the corporation's period of existence as stated in the article has expired.

[4] A court may: (1) cancel or alter provisions of the corporation's articles of incorporation or bylaws; (2) terminate, change or enjoin acts or resolutions of the corporation; (3) instruct the corporation, shareholders, directors, officers, or other parties to the action to do an act or refrain from acting; or (4) order the corporation or other shareholders to purchase the complaining shareholders shares at their fair value.

[5] Specifically, S.C. Code Ann. § 33-18-400 permits a shareholder of a statutory close corporation to petition a circuit court for an accounting, payment of dividends, removal from office of an officer or director, dissolution, or purchase of shares for value if "the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, fraudulent, or unfairly prejudicial to the petitioner, whether in his capacity as a shareholder, director, or officer of the corporation." S.C. Code Ann. § 33-18-400.

[6] Holders of insurance policies and shareholders have different expectations when taking ownership interests. Holders of insurance policies expect that they will receive insurance coverage, whereas the expectations of shareholders are investment-related. See Churella v. Pioneer State Mut. Ins. Co., 258 Mich. App. 260, 271, 671 N.W.2d 125, 131 (2003). Therefore, the refusal to declare dividends as a freeze-out tactic in the context of a closely held corporation is not analogous to the failure of the board of a mutual insurance company to declare a dividend without additional allegations of abuse by the directors.

[7] Plaintiffs characterize their Amended Complaint as a class action under Rule 23 of the South Carolina Rules of Civil Procedure with the putative class defined as follows: "All current members and policyholders of Blue Cross health plans." (Am. Compl. ¶ 67).

[8] S.C. Code Ann. § 33-8-300(a) provides in pertinent part: "A director shall discharge his duties as a director, including his duties as a member of a committee:(1) in good faith; (2) with

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the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner he reasonably believes to be in the best interests of the corporation and its shareholders." Furthermore, S.C. Code Ann. § 33-8-300(b) states that "[i]n discharging his duties a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by: (1) one or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented; (2) legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the person's professional or expert competence; or (3) a committee of the board of directors of which he is not a member if the director reasonably believes the committee merits confidence.

Exhibit C

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	IN THE SIXTEENTH JUDICIAL CIRCUIT

James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato and Cathy Cato Evans,) Case No. 2008-CP-46-3171

Petitioners,)

vs.)

David Alan Burton as Successor Trustee for Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, and in the Right and on behalf of T.E. Cato Estate, LLC; Marjorie Cato Burton Living Trust; and The SC Department of Transportation,)

Respondents.)

David Alan Burton as Successor Trustee for Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, and in the Right and on behalf of T.E. Cato Estate, LLC;)

Third-Party Plaintiff,)

vs.)

Thomasson Apts., LLC,)

Third-Party Defendant.)

Thomasson Apts., LLC,)

Fourth-Party Plaintiff,)

vs.)

T.E. Cato Estate, LLC, James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, and Cathy Cato Evans, and David Alan Burton,)

)
Fourth-Party Defendants.)
)

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Mutual Release ("Settlement Agreement") dated April 4, 2013, is made and entered by, between, and among James Thomas Cato; Helen Cato Jones; Douglas E. Jones; Albert M. Jones; Sara L. Jones; Donn S. Johnson; Jane Cato West; Robert Lee Cato; Cathy Cato Evans; The Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, which is referenced in the above-captioned action as David Alan Burton as Successor Trustee for Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, but will be referred to hereinafter as "the Burton Trust"; Marjorie Burton; Sloan Marvin Burton; David Alan Burton, individually and as Successor Trustee of the Burton Trust; T.E. Cato Estate, LLC ("Cato, LLC"); Thomasson Apts., LLC ("Thomasson"); Broadus L. Thomasson, Sr.; B. Lee Thomasson, Jr.; B. Heath Thomasson; and Matthew J. Thomasson.

RECITALS:

WHEREAS, the property involved in this case was formerly owned by Thomas Edward Cato ("T.E. Cato"), who died on November 23, 1957 and ownership of this property later vested in the heirs of T.E. Cato and their successors, namely Marjorie Cato Burton through the Burton Trust, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, and James Thomas Cato ("T.E. Cato Heirs");

WHEREAS, on various dates ranging from May 30, 2007 to June 16, 2007, the T.E. Cato Heirs executed Articles of *Organization of* Cato, LLC;

WHEREAS, on the same day that each of the T.E. Cato Heirs executed the Articles of Organization of Cato, LLC, they each executed a deed in order to convey to Cato, LLC nine

tracts of land: Lots 42, 14, 13, 98, 175, and Areas A, B, C, and D, with such deed being recorded July 10, 2007 with the York County Clerk of Court in Book 9248 at Page 138, with the property being more particularly described therein ("Cato Deed");

WHEREAS, on August 3, 2007, James Thomas Cato, on behalf of Cato, LLC, executed a Letter of Intent regarding the sale of Areas A, B, C, and D to Thomasson for $1,000,000 ("Letter of Intent");

WHEREAS, it was later discovered that the legal description of Areas A, B, C, and D was not complete or correct because a certain piece of property described as the Roadbed Tract was not part of Area B;

WHEREAS, in December 2007, Cato, LLC and Thomasson entered into an Amendment to Contract, wherein all the members of Cato, LLC, *except the Burton Trust, ratified the terms* of the Letter of Intent and agreed to file an action for partition of the Roadbed Tract and to seek a private sale to Thomasson of the Roadbed Tract for $100,000.00 ("Amendment to Contract");

WHEREAS, on December 12, 2007, James Thomas Cato, on behalf of Cato, LLC, for consideration of $900,000.00 paid by Thomasson, executed a general warranty deed conveying to Thomasson Areas A, B, C and D, less the Roadbed Tract, which deed is dated December 12, 2007 and recorded December 17, 2007 with the York County Clerk of Court in Book 9673 at Page 150, with the property being more particularly described therein ("Thomasson Deed");

WHEREAS, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, and James Thomas Cato filed the above-captioned action against the Burton Trust for partition and the Burton Trust asserted various counterclaims and a Third-Party Complaint against Thomasson;

WHEREAS, Thomasson asserted counterclaims against the Burton Trust and a Fourth-Party Complaint against Cato, LLC, James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, and David Alan Burton (the above-captioned case including all counterclaims, the third-party complaint, and the fourth-party complaint all as amended shall be collectively referred to as "the Action");

WHEREAS, in the Action, the Burton Trust challenged the validity of the Cato Deed, the Thomasson Deed, challenged Cato, LLC's authority to enter into the various transactions referenced above, and challenged Thomasson's ownership of the subject property;

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

WHEREAS, Marjorie Burton, Sloan Marvin Burton, Broadus L. Thomasson, Sr., B. Lee Thomasson, Jr., B. Heath Thomasson, Matthew J. Thomasson, Douglas E. Jones, Albert M. Jones, and Sara L. Jones, are not parties to the Action but are parties to this Settlement Agreement to effectuate the agreement between the parties to resolve the Action in the manner set forth herein; and

NOW, THEREFORE, James Thomas Cato, Helen Cato Jones, Douglas E. Jones, Albert M. Jones, Sara L. Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, the Burton Trust, Marjorie Burton, Sloan Marvin Burton, David Alan Burton, Cato, LLC, Thomasson, Broadus L. Thomasson, Sr., B. Lee Thomasson, Jr., B. Heath Thomasson, and Matthew J. Thomasson (hereinafter sometimes collectively referred to as "the Parties") enter into this Settlement Agreement in exchange for the mutual promises, covenants, representations, and warranties contained herein, together with other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and further agree as follows:

1. INCORPORATION OF RECITALS. The above Recitals are incorporated herein and made a part of this Settlement Agreement.

2. COMPLETE RESOLUTION. It is the intent of this Settlement Agreement to resolve, fully and forever, any and all claims between the parties that were asserted or that could have been asserted in the Action pursuant to the terms contained herein, and to confirm that Thomasson henceforth owns the Roadbed Tract and Areas A, B, C, and D free and clear of any claim, right, title or interest of any of the other parties herein.

3. CONSIDERATION. For and in consideration of the total sum of Two Hundred Forty Nine Thousand and no/100 ($249,000.00) Dollars paid to the Burton Trust by or on behalf of Thomasson, Cato, LLC, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, and James Thomas Cato, and the Assignment set forth in paragraph 7 of this Settlement Agreement, and the mutual promises and covenants contained herein, the receipt and sufficiency of which are hereby acknowledged, the Parties agree to execute and deliver this Settlement Agreement and to be fully bound by its terms and to dismiss the claims asserted in the Action with prejudice.

4. CONSENT ORDER AND DISMISSAL OF ACTION. The parties to the Action through their counsel shall present to the presiding Judge of the York County Court of Common Pleas a Consent Order which dismisses all claims asserted in the Action with prejudice, finds and concludes the properties that are the subject of the Action-- Areas A, B, C, and D, and the Roadbed Tract-- are henceforth owned by Thomasson free and clear of any right, title, claim, or interest of the other parties to the Action, finds and concludes that the Cato Deed and the Thomasson Deed are henceforth valid, and approves and incorporates this Settlement Agreement. A copy of the Consent Order to be presented to the Court is attached hereto as **Exhibit A.**

5. QUITCLAIM DEED. James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, and the Burton Trust (in their individual capacities and as members of Cato, LLC), as well as Marjorie Burton, Sloan Marvin Burton, David Burton, Cato, LLC, Douglas E. Jones, Albert M. Jones, and Sara L. Jones shall execute a quitclaim deed, in a recordable form prepared by Thomasson conveying all of their right, title, and interest in Areas A, B, C, and D, and the Roadbed Tract to Thomasson with such quitclaim deed to also include in its legal description more recent surveys of these properties commissioned by Thomasson. A copy of this quitclaim deed is attached hereto as **Exhibit B.** As a condition of this Settlement Agreement, the quitclaim deed described herein shall be sent to and held in Trust by Thomasson's attorney, Demetri K. Koutrakos, and not deemed legally delivered unless the Consent Order is entered and filed with the York County Clerk of Court after which the quitclaim deed shall be deemed legally delivered and may be recorded, provided that, if the Consent Order is not entered and filed, then the quitclaim deed shall be null, void, and of no force or effect, it shall not be deemed legally delivered, and the signature pages for such

quitclaim deed shall immediately be returned to the attorneys of record for the respective signatories. The Parties agree and acknowledge that James Thomas Cato, as manager and authorized member of Cato, LLC, has the full and complete authority to execute the quitclaim deed on behalf of Cato, LLC and to also execute this Settlement Agreement and all associated documents on behalf of Cato, LLC.

6. SCDOT CONSENT ORDER. This Settlement Agreement is further conditioned upon the entry and filing of a consent order which orders that the quitclaim deed recorded November 4, 2006 with the York County Clerk of Court in Book 8577 at Page 187, wherein the South Carolina Department of Transportation ("SCDOT") quitclaimed its interest in the Roadbed Tract to Marjorie Cato Burton, Trustee of the Marjorie Cato Burton Revocable Trust, Helen C. Jones, Donn S. Johnson, Robert Lee Cato, James Thomas Cato, Martha Jane Cato West, and Cathy Cato Evans, be reformed by correcting the name of the grantees in that deed to David Alan Burton as Successor Trustee to Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, Helen C. Jones, Donn S. Johnson, Robert Lee Cato, James Thomas Cato, Martha Jane Cato West, and Cathy Cato Evans and dismisses the SCDOT as a party to the Action. A copy of this Consent Order is attached hereto as **Exhibit C.**

7. ASSIGNMENT OF CATO, LLC ASSETS. Cato, LLC shall convey certain rights, assets, and interests to the Burton Trust per the Assignment attached hereto and incorporated herein as ***Exhibit* D.**

8. OBLIGATIONS UNDER CONTRACTS. Upon the execution of this Settlement Agreement, all obligations of Thomasson and Cato, LLC, Helen Cato Jones, Donn S. Johnson, James Thomas Cato, Jane Cato West, Robert Lee Cato, and Cathy Cato Evans under the Letter

of Intent and the Amendment of Contract shall be deemed satisfied with no further payment from Thomasson due thereunder.

9. RELEASES.

A. The Burton Trust, Marjorie Burton, Sloan Marvin Burton, and David Burton, including, without limitation, their heirs, successors, assigns, trustees, co-trustees, settlors, employers, employees, predecessor trusts, successor trusts, affiliate trusts, and related entities hereby remise, release, and forever discharge Cato, LLC, James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, Douglas E. Jones, Albert M. Jones, and Sara L. Jones, including without limitation, their heirs, successors and assigns, in full of and from any and all claims, demands, liabilities, debts, rights, actions, costs, fees, expenses, compensation and causes of action, at law or in equity, either known or unknown at this time, apparent or not apparent, related in any manner whatsoever to the Letter of Intent, the Amendment to Contract, Areas A, B, C, and D, the Roadbed Tract, the Cato Deed, the Thomasson Deed, Lots 42, 14, 13, 98, 175, the creation, management, or operation of Cato, LLC, or the claims set forth in the Action, including any claims which were, or which could have been, set forth by The Burton Trust, Marjorie Burton, Sloan Marvin Burton, or David Burton against Cato, LLC, James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, Douglas E. Jones, Albert M. Jones, or Sara L. Jones in the Action.

B. Cato, LLC, James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, Douglas E. Jones, Albert M. Jones, and Sara L. Jones, including without limitation, their heirs, successors and assigns, hereby remise, release, and forever discharge the Burton Trust, Marjorie Burton, Sloan Marvin Burton, and David

Burton, including, without limitation, their heirs, successors, assigns, trustees, co-trustees, settlors, employers, employees, predecessor trusts, successor trusts, affiliate trusts, and related entities of and from any and all claims, demands, liabilities, debts, rights, actions, costs, fees, expenses, compensation and causes of action, at law or in equity, either known or unknown at this time, apparent or not apparent, related in any manner whatsoever to the Letter of Intent, the Amendment to Contract, Areas A, B, C, and D, the Roadbed Tract, the Cato Deed, the Thomasson Deed, Lots 42, 14, 13, 98, 175, the creation, management, or operation of Cato, LLC, or the claims set forth in the Action, including any claims which were, or which could have been, set forth by Cato, LLC, James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, Douglas E. Jones, Albert M. Jones, or Sara L. Jones against the Burton Trust, David Burton, Marjorie Burton, or Sloan Marvin Burton in the Action.

C. Thomasson, Broadus L. Thomasson, Sr., B. Lee Thomasson, Jr., B. Heath Thomasson, and Matthew J. Thomasson, including, without limitation, their heirs, successors, assigns, employers, employees, predecessor companies, successor companies, subsidiary companies, parent companies, affiliate companies, related companies, divisions, any and all past, present and future members and managers remise, release, and forever discharge James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, Cato, LLC, the Burton Trust, Marjorie Burton, Sloan Marvin Burton, David Burton, Douglas E. Jones, Albert M. Jones, and Sara L. Jones, including, without limitation, their heirs, successors, assigns, trustees, co-trustees, settlors, employers, employees, predecessor trusts, successor trusts, affiliate trusts, and related entities of and from any and all claims, demands, liabilities, debts, rights, actions, costs, fees, expenses, compensation and causes of action, at law or in equity,

either known or unknown at this time, apparent or not apparent, related in any manner whatsoever to the Letter of Intent, the Amendment to Contract, Areas A, B, C, and D, the Roadbed Tract, the Cato Deed, the Thomasson Deed, or the claims set forth in the Action, including any claims which were, or which could have been, set forth by Thomasson Broadus L. Thomasson, Sr., B. Lee Thomasson, Jr., B. Heath Thomasson, or Matthew J. Thomasson against James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, Cato, LLC, the Burton Trust, David Burton, Marjorie Burton, Sloan Marvin Burton, Douglas E. Jones, Albert M. Jones, or Sara L. Jones in the Action.

D. James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, Cato, LLC, the Burton Trust, Marjorie Burton, Sloan Marvin Burton, David Burton, Douglas E. Jones, Albert M. Jones, and Sara L. Jones, including, without limitation, their heirs, successors, assigns, trustees, co-trustees, settlors, employers, employees, predecessor trusts, successor trusts, affiliate trusts, and related entities remise, release, and forever discharge Thomasson, Broadus L. Thomasson, Sr., B. Lee Thomasson, Jr., B Heath Thomasson, and Matthew J. Thomasson including, without limitation, their heirs successors, assigns, employers, employees, predecessor companies, successor companies, subsidiary companies, parent companies, affiliate companies, related companies, divisions, related entities, successors in title, any and all past, present and future members and managers of and from any and all claims, demands, liabilities, claims of ownership and title, debts, rights, actions, costs, fees, expenses, compensation and causes of action, at law or in equity, either known or unknown at this time, apparent or not apparent, related in any manner whatsoever to the Letter of Intent, the Amendment to Contract, Areas A, B, C, and D, the Roadbed Tract, the Cato Deed, the Thomasson Deed, or the claims set forth in the Action, including any claims which were, or

which could have been, set forth by James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, Cato, LLC, the Burton Trust, David Burton, Marjorie Burton, Sloan Marvin Burton, Douglas E. Jones, Albert M. Jones, or Sara L. Jones against Thomasson, Broadus L. Thomasson, Sr., B. Lee Thomasson, Jr., B. Heath Thomasson, or Matthew J. Thomasson in the Action.

E. Cato, LLC remises, releases, and forever discharges James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, Cato, LLC, the Burton Trust, Marjorie Burton, Sloan Marvin Burton, David Burton, Douglas E. Jones, Albert M. Jones, and Sara L. Jones, including, without limitation, their heirs, successors, assigns, trustees, co-trustees, settlors, employers, employees, predecessor trusts, successor trusts, affiliate trusts, and related entities of and from any and all claims, demands, liabilities, debts, rights, actions, costs, fees, expenses, compensation and causes of action, at law or in equity, either known or unknown at this time, apparent or not apparent, related in any manner whatsoever to the Letter of Intent, the Amendment to Contract, Areas A, B, C, and D, the Roadbed Tract, the Cato Deed, the Thomasson Deed, or the claims set forth in the Action, including any claims which were, or which could have been, set forth by Cato, LLC in the Action.

10. ATTORNEYS' FEES. Each party shall bear its own costs, expenses and attorneys' fees in connection with this matter. To the extent a party to this Settlement Agreement files a legal action to enforce the terms of this Settlement Agreement, the prevailing party shall be entitled to an award of reasonable attorney's fees and costs.

11. NO ADMISSION OF LIABILITY. The Parties acknowledge and agree this settlement is a complete compromise of the matters involving disputed issues of law and fact.

The Parties understand and agree that this settlement is not to be construed as an admission of liability on the part of any party, all of whom expressly deny liability.

12. REPRESENTATION AND COMPREHENSION OF DOCUMENT. Except as to the promises, covenants, representations, and warranties contained herein and in the documents attached hereto, as applicable, no party is relying on any collateral, oral or written representations, or promise as an inducement to enter into this Settlement Agreement. All previous agreements between the parties regarding the subject matter hereof are merged herein. The terms of this Settlement Agreement are fully understood and voluntarily accepted by the Parties, and are not subject to modification or waiver except by means of a writing signed by the Parties. The Parties acknowledge and represent to each other that they have read this Settlement Agreement carefully, understand it, and have had the advice of counsel before signing same.

13. WARRANTY OF CAPACITY TO EXECUTE SETTLEMENT AGREEMENT. Each party represents and warrants that he, she, or it is properly identified and has the authority to enter into this Settlement Agreement and execute the associated documents. Each party represents and warrants that he, she, or it has not otherwise sold, assigned, transferred, conveyed or disposed of all or any portion of the claims, demands, liabilities, debts, rights, actions, costs, fees, expenses, compensation, causes of action, assets, and titles referred to in this Settlement Agreement and/or in the documents attached hereto, except as specifically stated herein or the documents incorporated by reference into this Settlement Agreement. Furthermore, the parties represent and warrant that no other person or entity related to him, her, or it has any interest in the property that is the subject of the Action or the claims asserted in the Action.

14. UNANIMOUS CONSENT OF THE MEMBERS OF CATO, LLC. By executing this Settlement Agreement, those parties to this Settlement Agreement who are members of Cato,

LLC represents, individually and as members of Cato LLC, that (s)he or it consents to Cato, LLC entering into this Settlement Agreement and executing this Settlement Agreement.

15. GOVERNING LAW. This Settlement Agreement shall be construed and interpreted in accordance with the laws of the State of South Carolina, without regard to conflicts of law principles.

16. SEVERABILITY. If any part or parts of this Settlement Agreement are held to be invalid or unenforceable, the Court shall nevertheless uphold and enforce the remaining provisions and construe the invalid portion(s), if any, as severable from the remaining terms of the Settlement Agreement.

17. ENTIRE DOCUMENT AND SUCCESSORS IN INTEREST. This Settlement Agreement, including all documents attached hereto or required herein, contains all agreements, conditions, promises, and covenants between the Parties regarding the matters addressed in it, and supersedes all prior or contemporaneous agreements, representations, or understandings with respect to the subject matter hereof. The Parties agree that the terms of this Settlement Agreement are contractual in nature and not a mere recital, and that these terms shall be binding on and inure to the benefit of the Parties' officers, employees, heirs, successors, and assigns.

18. CONSTRUCTION OF DOCUMENT. The Parties intend that the release provisions of this Settlement Agreement as set forth in paragraph 9 shall be construed as broadly and comprehensively as permitted by law.

19. EFFECTIVENESS. This Settlement Agreement is effective upon execution by all parties subject to the entry of the consent orders referenced herein. All requirements of this Settlement Agreement shall be completed on or before May 22, 2013 unless otherwise agreed to by the Parties.

20. COUNTERPARTS AND SIGNING. This Settlement Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which, together, shall constitute one and the same instrument. This Settlement Agreement may be executed by facsimile, which shall have binding effect. Copies of original execution pages of this Settlement Agreement shall have the same force and effect as the originals themselves.

IN WITNESS WHEREOF, the Parties set forth their hands and seals on the dates set forth below.

[SIGNATURES ON THE FOLLOWING PAGES]

T.E. Cato Estate, LLC, a South Carolina limited liability company [SEAL]

Witness

Witness 2

By: James Thomas Cato, Manager and Authorized Member of the Company

Witness 1

Witness 2

(SEAL)

James Thomas Cato

Robert C. Hoover

Witness 1

Witness 2

Donn S. Johnson (SEAL)

Donn S. Johnson

Expire date as of June 4, 2022

Tyleshia Bessard
Witness 1 Signature

Jennifer Georgen
Witness 2/Notary Signature

Jane Cato West (SEAL)
Jane Cato West

Case No: 2008-CP-46-3171

Maxine R. Smith
Witness 1

Amy A. Moore
Witness 2

(SEAL)
Robert Lee Cato

Witness 1

Witness 2

(SEAL)
Cathy Cato Evans

Case# 2008-CP-46-3171

Court of Common Pleas

Mia Galyasnic
Witness 1

Witness 2

_______________(SEAL)
Albert M. Jones 5/1/13

Helen Cato Jones by Albert M. Jones, her Attorney-In-Fact

Helen Cato Jones by Albert M. Jones, her Attorney-In-Fact

Tracie Cole
Witness 1

Jillian Goodman
Witness 2

Douglas E. Jones (SEAL)
Douglas E. Jones

Helen Cato Jones by Douglas E. Jones, her Attorney-In-Fact.
Helen Cato Jones by Douglas E. Jones, her Attorney-In-Fact

Kayla [illegible]
Witness 1

Adriana Snider
Witness 2

Sara L. Jones (SEAL)
Sara L. Jones

Helen Cato Jones by Sara L Jones her Attorney-In-Fact

Helen Cato Jones by Sara L. Jones, her Attorney-In-Fact

Witness 1

Witness 2

(SEAL)

Marjorie Cato Burton by David Alan Burton
as her Attorney-In-Fact

Witness 1

Witness 2

(SEAL)

Sloan Marvin Burton ~~by David Alan Burton~~
~~as his Attorney-In-Fact~~

Witness 1

Witness 2

(SEAL)

David Alan Burton, Individually

Witness 1

Witness 2

(SEAL)

David Alan Burton, as Successor Trustee
of the Sloan Marvin Burton and
Marjorie Cato Burton AB Living Trust

RECEIVED
APR 16 2013
Roger B. Jellenik, Esq.

Thomasson Apts., LLC [SEAL]

By: ____________,
Authorized Member of the Company

Witness

Witness 2

(SEAL)
Broadus L. Thomasson, Sr.

Witness 1

Witness 2

(SEAL)
B. Lee Thomasson, Jr.

Witness 1

Witness 2

(SEAL)
B. Heath Thomasson

Witness 1

Witness 2

(SEAL)
Matthew J. Thomasson

Witness 1

Witness 2

Witness

Witness 2

Thomasson Apts., LLC [SEAL]

By: Member/Agent,
Authorized Member of the Company

Witness 1

Witness 2

_____________________(SEAL)
Broadus L. Thomasson, Sr.

Witness 1

Witness 2

_____________________(SEAL)
B. Lee Thomasson, Jr.

Witness 1

Witness 2

_____________________(SEAL)
B. Heath Thomasson

Witness 1

Witness 2

_____________________(SEAL)
Matthew J. Thomasson

Thomasson Apts., LLC [SEAL]

By: General Manager
Authorized Member of the Company

Witness

Witness 2

(SEAL)
Broadus L. Thomasson, Sr.

Witness 1

Witness 2

(SEAL)
B. Lee Thomasson, Jr.

Witness 1

Witness 2

(SEAL)
B. Heath Thomasson

Witness 1

Witness 2

(SEAL)
Matthew J. Thomasson

Witness 1

Witness 2

AUTHORITIES CITED

Code of Laws of South Carolina 1976 Annotated
South Carolina Rules of Civil Procedure
IV. Parties

Rule 23, SCRCP

RULE 23. CLASS ACTIONS

Currentness

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if the court finds (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately protect the interests of the class, and (5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.

(b)(1) *Derivative Actions by Shareholders.* 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 derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

(2) *Actions Relating to Unincorporated Associations.* An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action, the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(c).

(c) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(d) Orders in the Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) As soon as practicable, after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits. (2) The court may at any time impose such terms as shall fairly and adequately protect the interest of the persons on whose behalf the action is brought or defended. It may order that notice be given in such a manner as it may direct of the pendency of the action by the party seeking to maintain the action on behalf of the class. It may order that notice be given in such manner as it may direct of a proposed settlement, of entry of judgment, or any other proceedings in the action including notice to the absent persons that they may come in and present claims and defenses if they so desire. (3) Whenever the representation appears to the court inadequate fairly to protect the interests of absent persons who may be bound by the judgment, the court may at any time impose additional conditions on the representative parties, or order an amendment of the pleadings, eliminating therefrom all reference to the representation of the absent persons, and in that event the court shall order entry of the judgment in such form as to affect only the parties to the action and those adequately represented.

Rules Civ. Proc., Rule 23, SC R RCP Rule 23
Current with amendments received thru October 1, 2014.

End of Document

381 S.C. 417
Supreme Court of South Carolina.

HISTORIC CHARLESTON HOLDINGS, LLC, Respondent,
v.
Gerard MALLON, Dixie Holdings, LLC, and Dixie Developers, LLC, Defendants, Of whom Gerard Mallon is the, Petitioner.

No. 26601. | Heard May 7, 2008. | Decided Feb. 17, 2009.

Synopsis

Background: Member of limited liability company (LLC) brought action, individually and derivatively on behalf of LLC, against other member of LLC for dissolution, an accounting, an injunction, and a declaration regarding each member's rights. After a bench trial, the Circuit Court, Charleston County, Mikell R. Scarborough, Master-in-Equity, 2004 WL 5614127, entered judgment for plaintiff. Defendant appealed. The Court of Appeals, Beatty, J., 617 S.E.2d 388, affirmed in part and reversed in part. Defendant appealed.

Holdings: The Supreme Court, Toal, C.J., held that:

[1] single determination of members' rights with respect to proceeds from sale of property, rather than full accounting of LLC, was appropriate;

[2] buy-out of plaintiff's interest in LLC by defendant constituted accord and satisfaction of any liability to LLC on part of plaintiff;

[3] defendant could not set-off his building expenses against proceeds of sale of property;

[4] any error committed by master-in-equity in granting plaintiff relief based on defendant's wrongful dissociation from LLC was harmless;

[5] exclusion of evidence of alleged self-dealing and misappropriation of funds was appropriate sanction for defendant failure to disclose evidence before trial;

[6] plaintiff was not entitled to award of prejudgment interest; and

[7] plaintiff was not entitled to award of attorney fees.

Reversed.

Pleicones, J., concurred in part and dissented in part and filed opinion.

Attorneys and Law Firms

****451** Deborah Harrison Sheffield, of Columbia, for Petitioner.

Charles P. Summerall IV, of Buist Moore Smythe & McGee, of Charleston, for Respondent.

Opinion

Chief Justice TOAL:

***423** This appeal arises out of a master-in-equity's order to dissolve a limited-liability company (LLC). The master distributed the remaining assets of the company between its two members, Appellant Gerard Mallon ("Mallon") and Respondent Historic Charleston Holdings ("HCH"), and awarded HCH prejudgment interest and attorneys fees. The court of appeals reversed the master's judgment and remanded the case for a full accounting of the LLC. This Court granted certiorari and we reverse.

FACTUAL/PROCEDURAL BACKGROUND

Mallon, HCH, and William Storen formed Dixie Holdings, LLC ("Dixie") in June 1998 for the purpose of acquiring, owning, and developing property in Charleston. Priestly Coker ("Coker"), who along with his wife comprised the entire membership of HCH, handled the financial accounting and management of properties acquired by Dixie; Mallon, the owner of a construction company, handled repairs and renovations to the properties; and Storen, a licensed realtor, acted as the real estate agent for the properties Dixie placed for sale. Mallon and HCH each held a 49.5% share of Dixie and Storen apparently held 1%. [1]

Mallon and HCH were also equal members in Dixie Developers, LLC ("Dixie Developers"), a company organized just ***424** one month prior to the organization of Dixie for the similar purpose of acquiring, owning, and developing property in Charleston. Although Dixie and Dixie Developers were distinct entities, the funds of the two companies were held in a single bank account under the name of Dixie Developers, on which both Coker and Mallon had signatory authority.

Dixie initially acquired four properties: 10 Felix Street, 12 Felix Street, 15 Felix Street, and 22 Felix Street. The sale of 12 Felix occurred in December 1998, and 10 Felix was sold in April 1999 after both had been repaired and renovated. The proceeds from the sale of these properties were used to reimburse authorized expense items associated with the particular piece of property being sold, and the net proceeds were equally distributed to HCH and Mallon. Meanwhile, Dixie Developers also acquired three properties which it renovated and placed for sale.

In late 1999, Mallon and Storen made the first of multiple requests from Coker for a full financial accounting of Dixie as well as copies of the company's bank records. The computer printouts and documents provided by Coker, which Coker testified comprised his entire financial record collection, were apparently unsatisfactory to Mallon and Storen. Thereafter, in December 1999, Mallon, Storen, and Coker met to discuss their differences regarding the accounting for Dixie. An agreement signed by the parties at the meeting stated that sales of Dixie's property ****452** would continue "while these matters are being dealt with" and further provided for the sales proceeds to be held in an escrow account in the meantime.

Around this same time, HCH sold its interest in Dixie Developers to Mallon, giving Mallon 100% interest in that company. The sale price of HCH's interest purportedly reflected HCH's one-half interest in the company minus HCH's share of Mallon's authorized expenses related to Dixie Developers' properties, all three of which had sold prior to the buy-out.

Following the December 1999 agreement between Mallon, Storen, and Coker, Dixie sold its remaining two properties. Number 15 Felix sold first in April 2000, and Mallon placed the net proceeds totaling $41,845.30 into a new Dixie Developers account he had opened as the now-sole member of that ***425** entity. Mallon refused HCH's demands to place the sale proceeds from 15 Felix into a "proper escrow account" in Dixie's name in accordance with the parties' earlier agreement. When 22 Felix later sold in December 2001, HCH and Mallon agreed to an equal distribution of the net proceeds without first placing the funds in escrow.

In October 2002, Storen dissociated from Dixie, leaving Mallon and HCH each with 50% of the company. That same month, unable to resolve their differences on the financial accounting and bank records for Dixie, and further unable to compel Mallon to move the sale proceeds from 15 Felix to an agreeable escrow arrangement or otherwise distribute HCH's share of the proceeds, HCH filed a civil claim against Mallon, Dixie, and Dixie Developers, individually and in a derivative capacity as a member of Dixie. The complaint sought a judicial dissolution of Dixie along with a full financial accounting of both Dixie and Dixie Developers, injunctive relief for Mallon's diversion of the 15 Felix proceeds, a declaratory judgment as to HCH's rights as a member of Dixie, prejudgment interest, and attorneys' fees.

Mallon initially responded to HCH's complaint in a *pro se* letter in November 2002 indicating he was interested in submitting the issue to binding arbitration. After further communication, Mallon retained counsel, and the parties referred the case to a master-in-equity in May 2003. Around this same time, Mallon issued a memorandum alleging he was entitled to reimbursement for construction work he performed and other miscellaneous expenses associated with properties he owned with HCH. Mallon formally asserted these charges in October 2003 when pursuant to the master's consent order, Mallon filed an amended answer in which he argued, among other things, that he was entitled to set off the proceeds from the sale of 15 Felix in the amount of his alleged expenses. Mallon's itemization of his expenditures included charges associated with each of the Felix Street properties acquired by Dixie, as well as charges associated with the three properties acquired by Dixie Developers.

At trial, the master-in-equity found that HCH was entitled to one-half of the 15 Felix sale proceeds, plus pre-judgment interest on HCH's share of the proceeds. The master further ***426** ordered the dissolution and termination of Dixie within thirty days and awarded HCH statutory costs and attorneys' fees and costs.

On appeal, the court of appeals reversed the master's award to HCH of one-half of the 15 Felix proceeds and prejudgment interest, and remanded the case for a formal accounting of Dixie. *See Historic Charleston Holdings v. Mallon,* 365 S.C. 524, 617 S.E.2d 388 (Ct.App.2005). The court also held that the master did not abuse his discretion in awarding attorneys' fees. *Id.* The court of appeals dismissed Mallon's other arguments on grounds of issue preservation. *Id.* This Court granted certiorari to review the decision of the court of appeals, and Mallon raises the following issues for review:

I. Is Mallon entitled to a full accounting for Dixie Holdings and Dixie Developers?

II. Is HCH entitled to one-half of the proceeds from the sale of 15 Felix Street?

III. Did the master err in holding that the relief granted to HCH was justified by Mallon's wrongful dissociation from Dixie?

****453** IV. Did the master err in excluding evidence of Coker's self-dealing and misappropriation of Dixie's funds?

V. Did the master err in awarding prejudgment interest because the amount awarded HCH was not liquidated?

VI. Did the court of appeals err in holding that the master properly awarded HCH statutory costs and attorneys' fees?

LAW/ANALYSIS

I. Accounting

Mallon argues that he is entitled to a full accounting for Dixie Holdings and Dixie Developers. Specifically, Mallon contends that a full accounting is necessary to the dissolution and distribution of assets of Dixie and that the scope of the action should not be limited to a determination of the parties' rights with respect to the proceeds from the sale of 15 Felix. We disagree.

***427** [1] [2] An action for an accounting sounds in equity. Therefore, this Court may review the record and make findings in accordance with its own view of the preponderance of the evidence. *See Lawson v. Rogers,* 312 S.C. 492, 495, 435 S.E.2d 853, 855 (1993).[2]

[3] Noting that an operating agreement is a binding contract that governs the affairs of an LLC, *see* S.C.Code Ann. § 33–44–103 (2006), the court of appeals held that section 12.6 of Dixie's operating agreement, which provides that each of Dixie's members "shall be furnished with a statement setting forth the assets and liabilities of the Company as of the date of the complete liquidation," entitled the parties to a formal accounting of Dixie. In our view, this was error. While we acknowledge that Section 12.6 requires a "statement" of assets and liabilities, we would distinguish this requirement from the equitable remedy of "accounting" sought by the parties in the instant case, which refers to "an adjustment of the accounts of the parties and a rendering of a judgment for the balance ascertained to be due." 1 Am.Jur.2d *Accounts and Accounting* § 52 (2005).[3] Accordingly, we find no prevailing requirement in the operating agreement obligating the Court to order a remedy in the form of a judicial accounting of Dixie.

[4] Moreover, even if, as the dissent argues, the "statement of assets and liabilities" provided for in the operating agreement entitles Mallon and HCH to a formal judicial ***428** accounting, we find that Mallon and Coker (on behalf of HCH) waived this right by refusing to effectively communicate and cooperate with one another, and further failing to independently resolve the matter when both had access to Dixie's bank records.[4] *See Janasik v. Fairway Oaks Villas Horizontal Prop. Regime,* 307 S.C. 339, 344, 415 S.E.2d 384, 387–88 (1992) (defining a waiver as a voluntary and intentional abandonment or relinquishment of a known right by a party who possessed actual or constructive ****454** knowledge of its rights, or of all the material facts upon which they depended).[5]

[5] Additionally, we can find no provision in the LLC Act requiring a court to order a complete accounting under the circumstances. Rather, we find that the LLC Act grants broad judicial discretion in fashioning remedies in actions by a member of an LLC against the LLC and/or other members. *See* S.C.Code Ann. §§ 33–44–410 cmt., –801 cmt. (2006). Accordingly, we hold that Mallon is not entitled to a full accounting of Dixie or Dixie Developers, and that this Court may determine the appropriate remedy in its discretion.

[6] To this end, we believe that a full financial accounting of both Dixie and Dixie Developers is not the appropriate remedy in this matter. First, HCH's only purpose in naming Dixie Developers as a party to the immediate action was because the funds which HCH sought were in a Dixie Developers bank account that was inaccessible to HCH. Otherwise, Dixie Developers is a completely separate entity from Dixie, ***429** and therefore, any right to an accounting for Dixie Developers is irrelevant in this case.

Second, as explained more fully in Section II, we find that the only contentious issue remaining incidental to the dissolution of Dixie is the distribution of approximately $42,000 from the sale of 15 Felix. The record reveals that Dixie's last business transaction occurred nearly seven years ago with the sale of 22 Felix in December 2001. In the meantime, neither the parties nor any creditors have asserted any legitimate outstanding liabilities incurred by Dixie, nor are there any other Dixie assets to which any member is legitimately claiming entitlement. Because the source of the parties' dispute is a relatively small sum of money generated from a single real estate transaction—the sale of 15 Felix—in April 2000, we find that a full financial accounting would unnecessarily prolong this otherwise simple matter. *See* 1 Am.Jur.2d *Accounts and Accounting* § 56 (2005) (noting that an accounting is an appropriate remedy when the accounts at issue are complicated or mutual).

For these reasons, we hold that a full accounting of either Dixie or Dixie Developers is neither required nor necessary in this action and that the proper resolution in this matter is for this Court to make a single determination of the parties' rights with respect to the proceeds from the sale of 15 Felix. Accordingly, we reverse the decision of the court of appeals remanding the case for a full accounting of Dixie.

II. Distribution of sale proceeds from 15 Felix

Mallon argues that HCH is not entitled to one-half of the proceeds from 15 Felix. Specifically, Mallon contends that he is entitled to set-off of the 15 Felix proceeds for nearly $10,000 in additional charges for construction work and miscellaneous expenses related to each of Dixie's Felix Street properties, and another $90,000 in similar outstanding charges associated with Dixie Developers' properties. We disagree.

[7] Because the underlying action primarily arises in the Court's equity jurisdiction, we review the master's determination of the parties' rights with respect to the 15 Felix proceeds de novo. *See Elias v. Firemen's Ins. Co.,* 309 S.C. 129, 132, 420 S.E.2d 504, 505 (1992) (finding that an action maybe legal ***430** or equitable, depending upon whether law or equity would have had jurisdiction if there had been no declaratory judgment procedure).

Mallon initially raised the issue of his additional expenses associated with Dixie Developers and each of Dixie's Felix Street properties in May 2003 and did not formally assert the right to set-off for these additional expenses until he filed his amended (and untimely) answer, without prejudice to HCH's rights, in October 2003. The preceding February, however, Mallon failed to respond to HCH's Requests for Admission, which included the admission that "HCH is entitled to about 50% of said proceeds." ****455** Rule 36, SCRCP, provides that a matter is deemed admitted when the party served fails to respond with a written answer or objection regarding the admission. Although the matter could be resolved at this juncture under Rule 36, we proceed with an analysis of Mallon's right to set-off, thereby providing additional legal and equitable grounds for the Court's conclusion.

a. Additional expenses associated with Dixie Developers
Mallon asserts that he underwrote the cost of numerous building repair projects and incurred other miscellaneous expenses, totaling nearly $90,000 with respect to Dixie Developers' properties. We hold that Mallon is not entitled to set-off of the funds at issue for charges associated with Dixie Developers based on the theories of accord and satisfaction and mutuality.

[8] [9] [10] The elements of an accord and satisfaction are an agreement between the parties to settle a dispute, and the payment of the consideration which supports the agreement. *Wilson v. Builders Transp., Inc.,* 330 S.C. 287, 297, 498 S.E.2d 674, 680 (Ct.App.1998). To constitute accord and satisfaction, there must have been a meeting of the minds. *Tremont Constr. Co. Inc. v. Dunlap,* 310 S.C. 180, 182, 425 S.E.2d 792, 793 (Ct.App.1992). In our opinion, Mallon's December 1999 buy-out of HCH's interest in Dixie Developers constitutes an act of accord and satisfaction with respect to HCH's liability for charges associated with the Dixie Developers properties. The amendment to the Dixie Developers operating agreement made pursuant to the buy-out, and reflecting Mallon's 100% ***431** ownership clearly indicates the parties' agreement to wind up their business relationship through Mallon's purchase of HCH's interest for fair value. The circumstances surrounding the negotiation of the terms of the buy-out are further evidence of the parties meeting of the minds in this regard. Although HCH and Mallon originally negotiated a price of $80,000 for HCH's interest in Dixie Developers, Mallon asserted additional charges related to the Dixie Developers property shortly thereafter. After further negotiations, the parties agreed on an adjusted purchase price of $63,500, and HCH refunded the difference to Mallon. For these reasons, we hold that the buy-out constituted an accord and satisfaction of any liability to

Dixie Developers on the part of HCH, and therefore, Mallon is not entitled to set-off for expenses alleged after the fact.

[11] [12] Lack of mutuality is an additional theory prohibiting the set-off of Mallon's alleged charges related to Dixie Developers from the proceeds of 15 Felix. The general rule governing set-off provides that the demands to be set off must be mutual, and that debts accruing in different rights cannot be set off against each other. *Peurifoy v. Gamble,* 145 S.C. 1, 11, 142 S.E. 788, 791 (1928). In our view, HCH's alleged debt to Mallon for Dixie Developers' work and Mallon's withholding of HCH's proceeds from the sale of 15 Felix, a Dixie property, are clearly not mutual demands. The two companies were distinct entities, set up at different times by different members, and at no time had any shared ownership of the properties they listed for sale. Although the companies apparently shared a bank account during the time that HCH was still a member of Dixie Developers, we find this to be more indicative of poor fiscal management skills than mutuality. Otherwise, Dixie Developers is a completely separate entity from Dixie, and Mallon is not entitled to set off his expenses associated with Dixie Developers from the proceeds of property belonging to Dixie. [6]

***432 b. Additional expenses associated with Felix Street properties**

Mallon's asserts that he is entitled to reimbursement for nearly $10,000 in construction work and miscellaneous expenses associated with Dixie's Felix Street properties. We ****456** hold that under theories of laches and waiver, Mallon is not entitled to set-off of the 15 Felix proceeds for expenses associated with the development of the Felix Street properties.

[13] [14] Laches is an equitable doctrine defined as "neglect for an unreasonable and unexplained 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, 371 S.E.2d 525, 527 (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. *See Strickland v. Strickland,* 375 S.C. 76, 83, 650 S.E.2d 465, 469 (2007).

A timeline of the relevant events is instructive to the Court's analysis. Number 12 Felix sold in December 1998, 10 Felix in April 1999, 15 Felix in April 2000, and 22 Felix in December 2001. The record reveals that except for the distribution of the 15 Felix proceeds at issue here, Mallon and HCH unconditionally agreed on a fifty-fifty distribution of proceeds at the closings for each of the Felix Street properties. The record also reveals that Mallon and HCH had established a course of dealing in each of their business ventures for reimbursement of additional expenses. [7] Pursuant to this course of dealing, Mallon would produce an itemized request for reimbursement, and HCH would tender the appropriate payment through either an adjustment in the standard distribution of sale proceeds at closing, or with a separate check for the total costs. [8]

***433** [15] Given this established course of dealing between the parties, Mallon's May 2003 demand for reimbursement for charges associated with the Felix Street properties—a three-year-plus delay from the date of sale of three of the properties, and a twenty-month delay from the date of sale of the fourth property—is unreasonable. Furthermore, HCH relied on Mallon's delay to its detriment by not seeking timely reimbursement of its own expenses in developing the property and by further agreeing to sell the properties at a specified price in anticipation of a certain profit. Accordingly, the doctrine of laches bars Mallon from setting off HCH's one-half interest in the 15 Felix proceeds with untimely allegations of his outstanding expenses on the Felix Street properties.

[16] To the extent that the clause in Dixie's operating agreement providing for reimbursement "for all authorized, direct out-of-pocket expenses incurred by [members] on behalf of the Company," entitles Mallon to recoup his expenses at this late date, we hold that Mallon has waived this right by untimely asserting the alleged expenses and in a manner totally inconsistent with the parties' prior course of dealing. *See Janasik,* 307 S.C. at 344, 415 S.E.2d at 387–88 (defining waiver as the voluntary and intentional abandonment or relinquishment of a known right by a party that knew of its rights, or of all the material facts upon which they depended).

For these reasons, we find that Mallon is not entitled to set-off for his latent expenses, and that therefore, Mallon and HCH are each entitled to half of the proceeds from 15 Felix representing their respective interests in Dixie.

III. Relief based on Mallon's wrongful dissociation

Mallon argues that the master erred in holding that the relief granted to HCH was justified by Mallon's wrongful dissociation from Dixie. We agree, but hold that the master's error was harmless.

*434 [17] [18] To warrant reversal based on the admissibility of evidence, an appellant must **457 prove both the error of the ruling and the resulting prejudice. *Conner v. City of Forest Acres,* 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005). The substance of the instant litigation involves matters of accounting and distribution incidental to the judicial dissolution of Dixie. Mallon's dissociation, which did not even occur until after HCH filed its complaint, is completely irrelevant and therefore, the master erred in basing his remedy on Mallon's allegedly wrongful dissociation. However, because there were additional legitimate grounds upon which the master granted relief to HCH, we hold the error was harmless.

IV. Exclusion of evidence of Coker's self-dealing

Mallon argues that the master erred in excluding evidence of Coker's self-dealing and misappropriation of Dixie's funds. We disagree.

[19] [20] The admission of evidence is a matter left to the discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion. *Hanahan v. Simpson,* 326 S.C. 140, 155, 485 S.E.2d 903, 911 (1997). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support. *Patel v. Patel,* 359 S.C. 515, 529, 599 S.E.2d 114, 121 (2004).

[21] In this case, the parties agreed to provide each other all documents to be presented at trial by November 21, 2003. On the last working day before trial in January 2004, Mallon alleged for the first time in an amended pre-trial brief that Coker misappropriated Dixie funds and engaged in self-dealing. The master granted HCH's motion *in limine* to exclude all "new documents" and sustained each of HCH's objections to Mallon's trial testimony which attempted to justify improperly escrowing the 15 Felix proceeds based on his alleged discovery of Coker's misappropriation of Dixie funds. Citing *Scott v. Greenville Housing Authority,* 353 S.C. 639, 652, 579 S.E.2d 151, 158 (Ct.App.2003), the master found that exclusion of evidence of Coker's self-dealing was proper because the rules of discovery "mandate full and fair disclosure to prevent a trial from becoming a guessing game or one of ambush for either party."

*435 [22] In deciding what sanction to impose for failure to disclose evidence during the discovery process under Rule 37, SCRCP, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice. *Samples v. Mitchell,* 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct.App.1997). In the order, the master noted Mallon's earlier failure to respond to HCH's requests for admission, along with both parties' stipulation that they had agreed to exchange their entire files on the case on or before November 21, 2003. Although Mallon asserts that HCH would not have been prejudiced by the evidence of Coker's self-dealing because it came from documents provided to Mallon by HCH itself, Mallon neglects to consider the prejudicial effect of an "ambush" at trial. For these reasons, we hold that the master did not abuse his discretion in excluding evidence of self-dealing by Coker.

V. Award of pre-judgment interest

Mallon argues that the master erred in awarding prejudgment interest on the distribution to HCH because the sum was not liquidated. We agree.

[23] [24] [25] The law permits the award of prejudgment interest when a monetary obligation is a sum certain, or is capable of being reduced to certainty, accruing from the time payment may be demanded either by the agreement of the parties or the operation of law. *Butler Contr., Inc. v. Court St., LLC,* 369 S.C. 121, 133, 631 S.E.2d 252, 259 (2006). Generally, prejudgment interest may not be recovered on an unliquidated claim in the absence of agreement or statute. *Id.* The fact that the amount due is disputed does not render the claim unliquidated for purposes of awarding prejudgment interest. Rather, the proper test is "whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose." *Id.*

[26] The award of prejudgment interest will not be disturbed on appeal unless the **458 trial court committed an abuse of discretion. *Jacobs v. Am. Mut. Fire Ins. Co.,* 287 S.C. 541, 544, 340 S.E.2d 142, 143 (1986). In this case, the master awarded prejudgment interest because "[HCH] is entitled to half of the funds, and because [HCH] has not had access to *436 the funds for almost four years now." We find that this

ruling conflicts with this Court's established law, and is not reasonably supported by the evidence in the record.

[27] The record reveals that the disagreement between Mallon and Coker over Coker's method of accounting led to the escrow of the 15 Felix proceeds at issue in the instant case. Prior to the sale of 15 Felix, the net proceeds from the sales of Dixie's property had been divided fifty-fifty. The logical conclusion to be drawn from this pattern of events is that the members of Dixie were contemplating a future distribution of the escrowed funds that, depending on the outcome of a complete accounting, may not have been the standard fifty-fifty split. Under these circumstances, we find that the measure of recovery for prejudgment interest was unliquidated at the time the parties' claims to the proceeds arose, and accordingly, we hold that the master erred in awarding prejudgment interest to HCH.

VI. Attorneys' fees

Mallon argues that the court of appeals erred in upholding the master's award of statutory attorneys' fees to HCH. We agree.

[28] [29] Attorney's fees are not recoverable unless authorized by contract or statute. *See Jackson v. Speed,* 326 S.C. 289, 307, 486 S.E.2d 750, 760 (1997). In this case, the master awarded HCH attorneys' fees pursuant to S.C.Code Ann. § 33–44–1104 (2006), which authorizes the award of reasonable costs and attorneys' fees to a plaintiff who prevails, in whole or in part, in a derivative action for an LLC. A claim for statutory attorneys' fees is an action at law resting within the sound discretion of the trial court and may not be disturbed on appeal absent an abuse of discretion. *Patel,* 359 S.C. at 533, 599 S.E.2d at 123.

Mallon argues that it is inequitable to award HCH attorneys' fees because Coker's failure to fulfill his responsibilities under the operating agreement necessitated the instant action. The court of appeals rejected this argument, ruling instead that Mallon's actions brought about the case, and therefore held that the master's award of attorneys' fees did not amount to an abuse of discretion. We disagree.

***437** [30] The award of statutory attorneys' fees does not fall within a court's equitable jurisdiction. *See Harvey v. S.C. Dep't of Corrections,* 338 S.C. 500, 507, 527 S.E.2d 765, 769 (Ct.App.2000) (holding that where the right to relief is entirely statutory, the action is one at law). Therefore, we hold that the court of appeals erred in affirming the master's award on these grounds. We note, however, that even if the award of attorneys' fees in this case sounded in equity, in our opinion, the equities fall in favor of each side bearing responsibility for their own attorneys' fees because both parties won on some matters and lost on others, and neither entered the instant litigation with clean hands.

[31] Rather, as a matter of law, we find that HCH failed to properly plead the instant case as a shareholder derivative action as required by the relevant attorneys' fee statute, and accordingly, we hold that the master committed an abuse of discretion in awarding attorneys' fees under the attorneys' fee provision of the LLC Act. Our courts have held that "[i]t is the substance of the requested relief that matters 'regardless of the form in which the request for relief was framed.' " *Richland County v. Kaiser,* 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct.App.2002) (quoting *Standard Fed. Sav. & Loan Ass'n v. Mungo,* 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct.App.1991)). Although in the instant case, HCH submitted a verified complaint declaring in the opening sentence that HCH brought the action "individually and in a derivative capacity," the complaint nevertheless failed to plead with particularity the allegations necessary to state a complaint in a shareholder derivative action. *See* Rule 23(b), SCRCP. Furthermore, the relief granted by the master was entirely personal to HCH in that the master ordered the distribution of HCH's interest in the Felix Street proceeds directly to HCH instead of an initial return of the converted funds in whole to Dixie as an ****459** entity. *See also Ward v. Griffin,* 295 S.C. 219, 221, 367 S.E.2d 703, 704 (Ct.App.1988) (determining that a suit may be classified as a shareholder derivative action "if the gravamen of the complaint is injury to the corporation and not injury to the individual interests of the stockholder"). For these reasons, we cannot construe the complaint to be a prayer for derivative relief on behalf of Dixie. *See also* Rule 8(f), SCRCP (providing that pleadings should be construed "to do substantial justice to all parties").

***438** Because HCH failed to plead the instant case as a shareholder derivative action, we hold that the master erred in awarding attorneys' fees under § 33–44–1104 of the LLC Act. Accordingly, we reverse the decision of the court of appeals and hold that Mallon and HCH are responsible for their own attorneys' fees in this matter. [9]

CONCLUSION

For the foregoing reasons, we hold that a full accounting of Dixie and Dixie Developers is not required and that HCH is entitled to one-half of the proceeds from the sale of 15 Felix. We further hold that the master's grant of relief based on Mallon's allegedly wrongful dissociation from Dixie was harmless error and that the master did not err in excluding evidence of Coker's self-dealing. Finally, we hold that HCH is not entitled to either prejudgment interest or statutory attorneys' fees in this matter. This dispute began in 2000, nearly eight years ago, and involves a relatively small amount of money and a small number of members. Although we respect the dissent's position, in our view, remanding this case after years of litigation for a full accounting is not required by law or equity or by the parties' agreement and no beneficial purpose would be served in prolonging this case. Accordingly, we reverse the decision of the court of appeals.

WALLER, J., and Acting Justices JAMES E. MOORE and JAMES E. LOCKEMY, concur.

PLEICONES, J., concurring in part and dissenting in part in a separate opinion.

Justice PLEICONES:
I respectfully dissent from part I and part II of the majority opinion.

I agree with the majority in their finding that the master committed harmless error in holding that the relief granted to ***439** HCH was justified by Mallon's dissociation from Dixie. I also agree with the majority's finding that the master did not abuse his discretion in excluding evidence of self-dealing and misappropriation of Dixie's funds by Coker. Moreover, I agree with the majority that the master erred in awarding prejudgment interest to HCH, because the amount awarded HCH was not liquidated at the time the parties' claims to the proceeds arose. Furthermore, I agree with the majority that HCH failed to plead the instant case as a shareholder derivative action; therefore, the master erred in awarding attorney's fees under § 33–44–1104 (2006) of the LLC Act. However, I respectfully disagree with the majority's finding that Mallon is not entitled to a full accounting for Dixie Holdings, and that HCH is entitled to one-half of the proceeds from the sale of 15 Felix Street.

Pursuant to S.C.Code Ann. § 33–44–103 (2006), operating agreements are binding contracts which are superior to statutory authority where they are in place. Statutory law; however, will apply if the operating agreement is silent as to some matter. Therefore, when a court is deciding a controversy between limited liability company members, it must first evaluate the operating agreement regarding a particular issue prior to looking to the statutory law governing areas not covered by the agreement.

Section 12.6 of the Dixie Holdings' operating agreement is relevant to Mallon's claims for reimbursement and the need for a full accounting. The section, entitled "Final Accounting," states that "each of the members shall be furnished with a statement setting forth the assets and liabilities of the ****460** Company as of the date of the complete liquidation," and "[u]pon compliance by the Company with the foregoing distribution plan, the Members shall cease to be such, and they shall execute and cause to be filed any and all documents necessary with respect to termination and cancellation."

Dixie Holdings' operating agreement thus requires an accounting prior to dissolution.[10] Because the operating agreement required an accounting, and since operating agreements govern the affairs of the company and the conduct of its ***440** business according to § 33–44–103 (2006) of the LLC Act, an accounting is necessary prior to the dissolution of Dixie Holdings' and the distribution of the $41,845.30 from the sale of 15 Felix Street.

Even if an accounting were not mandatory according to the operating agreement, a full accounting would have been necessary according to statute under the facts of this case. Pursuant to § 33–44–410(a)(1) (2006) of the S.C.Code, a member is entitled to maintain a suit for an accounting. When that request is made in the context of an action winding up the business of a limited liability company, courts are required to determine the assets, discharge obligations to creditors, and distribute the surplus to members. S.C.Code Ann. § 33–44–806(a) (2006). In order to complete the winding up of Dixie Holdings, I would hold that a full accounting is required and necessary under the LLC Act even if it were not required by the agreement.

***441** Further, I respectfully disagree with the majority that Mallon waived his right to an accounting. As defined by *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime,* 307 S.C. 339, 344, 415 S.E.2d 384, 387–88 (1992), a waiver is a voluntary and intentional abandonment or relinquishment of a known right.

The majority finds that Mallon waived his right to an accounting by failing to independently resolve the matter when he and Coker both had access to the bank records. I respectfully disagree. Dixie Holdings' operating agreement does not list each Member's role within the limited liability company. Each member; however, carried out specific duties: Coker performed accounting and financial related services, Storen acted as the real estate agent, and Mallon renovated the properties. Mallon was also a cosignatory on the first Dixie Developers bank account and equally capable of acquiring the bank records. Having access to the bank records is not the equivalent of an accounting. In order to complete a formal accounting necessary for the dissolution of a company, one must have access to all financial documents such as the company's income statements and balance sheets. Since Mallon did not have access to all documents necessary to compete a full accounting he could not have waived this right. Moreover, there is no **461 evidence of a voluntary and intentional relinquishment of Mallon's contractual statutory rights.

Both HCH and Mallon in their pleadings requested a full accounting. In his answer, Mallon asserted "an accounting is appropriate for both parties, and that Coker, who acted as the financial officer of Dixie [Holdings] has repeatedly and improperly failed to prepare a proper accounting, which should now be done." Therefore, there is no evidence that Mallon voluntarily and intentionally abandoned his right to an accounting.

In conclusion, I am in agreement with the Court of Appeals holding that this case should be remanded for a full accounting of the LLC, and the proceeds from the sale of 15 Felix Street should be held in an escrow account, in accordance with the operating agreement, for the benefit of Dixie Holdings until a final accounting is performed and the appropriate amounts distributed accordingly.

*442 For the reasons stated above, the Court of Appeals decision should be affirmed in part, reversed in part, and the matter remanded to the master for a full accounting.

Parallel Citations

673 S.E.2d 448

Footnotes

1 The parties' testimony on various aspects of Dixie's business arrangement, particularly with regard to Storen, was vague and often conflicting. Because Storen's participation is irrelevant to the issues before this Court, we do not attempt to parse out the details of Mallon's and HCH's business relationship with Storen.

2 The court of appeals remanded this case for a formal accounting of Dixie, but held that Mallon's request for an accounting for Dixie Developers and all Mallon's remaining issues except a subpart of the attorneys' fees issue were not preserved for appeal. Unless otherwise noted, we find that each of these issues were raised to and ruled upon by the master and that the court of appeals therefore erred in dismissing them on preservation grounds, *see I'On, LLC v. Town of Mount Pleasant,* 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (acknowledging that an issue raised to and ruled upon by the lower court is preserved for appellate review), and we proceed with an analysis of their merits in the interest of judicial economy. *See S. Bell Tel. & Tel. Co. v. Hamm,* 306 S.C. 70, 75, 409 S.E.2d 775, 778 (1991) (deciding an issue on appeal in the interest of judicial economy).

3 *See also* Carmen Harper Thomas, Note, *Limited Liability Companies Are Off and Running: Historic Charleston Holdings, LLC v. Mallon, Accountings, and Derivative Actions in LLC Litigation,* 57 S.C. L.Rev. 441, 453 (2006).

4 Mallon and Storen testified that they requested financial documents from Coker multiple times, and that when Coker finally complied, the documents provided were inadequate and incomplete. Mallon, however, as co-signatory on the first Dixie Developers bank account, was equally capable of acquiring the bank records and, upon receiving Dixie's financial documents from Coker, taking the documents to a certified public accountant for an accounting. Mallon claimed to have done this much, but refused to name the accountant and never produced any documents generated out of this review.

5 We also question the dissent's interpretation of the operating agreement to require that an accounting be provided "prior to dissolution." Under the express terms of the agreement, the financial statement is to be furnished "as of the date of complete liquidation." *See also* Thomas, *supra* note 3, at 454.

6 Mallon points out that the lack of strict mutuality does not *per se* prohibit a court exercising its equity jurisdiction from allowing set-off. *See W.M. Kirkland, Inc. v. Providence Wash. Ins. Co.,* 264 S.C. 573, 581, 216 S.E.2d 518, 521 (1975). However, considering the lack of strict mutuality in conjunction with the accord and satisfaction that occurred between the parties with respect to Dixie Developers' financial affairs, this Court is fully justified in refusing to permit an equitable set-off under the circumstances.

7 Aside from their relationship through Dixie and Dixie Developers, Mallon and HCH appear to have also jointly owned numerous other pieces of property for real estate development purposes.

8 The record contains at least two documents representative of the parties' course of dealing: (1) a September 1999 addendum to a settlement statement explaining the uneven distribution of funds from the sale of a Dixie Developers property to Mallon and Coker due to Mallon's expenses in performing construction and repair work on the property; and (2) a May 1999 reimbursement check from HCH to Mallon based on an itemized list of Mallon's expenses associated with their shared real estate assets, including several of the Felix Street properties.

9 In light of our holding, we need not address Mallon's remaining evidentiary arguments regarding the master's award of attorneys' fees. *See Futch v. McAllister Towing of Georgetown,* 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address additional issues if the resolution of another issue is dispositive).

10 I disagree with the majority's assertion that the operating agreement does not require an accounting prior to dissolution. In construing a contract, this Court's main concern is to ascertain and give effect to the intention of the parties. *D.A. Davis Const. Co., Inc. v. Palmetto Properties, Inc.,* 281 S.C. 415, 315 S.E.2d 370 (1984). The order of the sentences in section 12.6 suggests the chronology of the actions. The section sets forth the accounting requirement and then provides that "[u]pon the compliance by the Company with the foregoing distribution plan" the Company will terminate. This suggests that the accounting should be completed before dissolution. Reading the policy in this way also produces a more reasonable result, since an accounting prior to liquidation may have an impact upon distribution, while an accounting after liquidation will not. "Common sense and good faith are leading touchstones of construction of provisions of contract; where one construction makes provisions unusual or extraordinary and another construction, which is equally consistent with language employed, would make it reasonable, fair, and just, latter construction must prevail." *C.A.N. Enterprises, Inc. v. South Carolina Health and Human Services Finance Com'n,* 296 S.C. 373, 373 S.E.2d 584 (1988). Finally, in ascertaining the intent of the parties, we may examine the situation of the parties as well as their purposes at the time the contract was entered into. *Klutts Resort Realty, Inc. v. Down'Round Development Corp.,* 268 S.C. 80, 232 S.E.2d 20 (1977). As noted above, the parties met and signed the operating agreement in part due to dissatisfaction with Coker's responses to multiple requests by Mallon and Storen for full financial accounting of Dixie. Given the events leading up to the meeting, it is unlikely that the parties intended for the operating agreement to require a final accounting after dissolution, at which point the assets would be distributed. The more logical reading is that the provision was meant to provide Mallon and Storen with assurances that they were receiving their fair share of the assets.

End of Document

343 S.C. 176
Court of Appeals of South Carolina.

CAROLINA FIRST CORPORATION, a S.C. Corporation, proceeding pursuant to § 33–7–400 et. seq., S.C.Code of Laws, by and through its shareholders, Emory Lester, Beatrice Hutchinson, and John Wesley Purdie, Jr, Appellants,

v.

Mack Ira WHITTLE, Jr., William S. Hummers, III, Stephen Powell, Edward J. Sebastian, David Baker, R. Cobb Bell, Claude N. Epps, Jr., M. Dexter Hagy, Jr., Keith C. Henson, Michael R. Hogan, James J. Johnson, David L. Morrow, Walter J. Roberts, Jr., Jasper Salmond, Charles B. Schooler, Elizabeth P. Stall, James W. Terry, William R. Timmons, Jr., Thomas C. Vandiver, Judd B. Farr, C. Claymon Grimes, Jr., Carolina First Corporation, a S.C. Corporation, John Doe and Jane Doe, Defendants, of whom Mack Ira Whittle, Jr., William S. Hummers, III, Stephen Powell, Edward J. Sebastian, R. Cobb Bell, Claude N. Epps, Jr., M. Dexter Hagy, Jr., Keith C. Henson, Michael R. Hogan, James J. Johnson, David L. Morrow, Walter J. Roberts, Jr., Jasper Salmond, Charles B. Schooler, Elizabeth P. Stall, William R. Timmons, Jr., Judd B. Farr, C. Claymon Grimes, Jr., and Carolina First Corporation, a S.C. Corporation, John Doe and Jane Doe, are Respondents.

No. 3254. | Heard April 13, 2000. | Decided Oct. 30, 2000. | Rehearing Denied Jan. 8, 2001. | Certiorari Granted Aug. 23, 2001.

Shareholders brought a derivative action against directors to challenge stock bonuses, manipulation of the company's reports, and abusive or unfair personnel practices. The Circuit Court, Greenville County, Henry F. Floyd, J., dismissed the complaint. Shareholders appealed. The Court of Appeals, Howard, J., held that: (1) the shareholders failed to satisfy the particularity requirement for pleading a demand on the board of directors; (2) their letters were irrelevant to whether they satisfied the pleading requirements; (3) they could argue both the board of directors' refusal of a demand and the futility of making a demand; and (4) they failed to establish the futility of a demand.

Affirmed.

Attorneys and Law Firms

**405 *180 T.S. Stern, Jr., and John A. Hagins, Jr., both of Covington, Patrick, Hagins, Stern & Lewis, of Greenville, for Appellants.

David L. Freeman and Wallace K. Lightsey, both of Wyche, Burgess, Freeman & Parham; David Horton Wilkins and Timothy E. Madden, both of Wilkins & Madden, all of Greenville; and Jay B. Kasner, of Skadden, Arps, Slate, Meagher & Flom, of New York, NY, for Respondents.

Opinion

HOWARD, Judge:

In this stockholder's derivative suit, we are asked to consider the demand and pleading requirements of Rule 23(b)(1), SCRCP. Three shareholders of Carolina First Corporation brought this action, primarily seeking to recover disproportionate stock bonuses paid to three high level officers. The trial court dismissed the action pursuant to Rule 12(b)(6), SCRCP, because the complaint failed to allege particularized facts to meet or excuse the demand requirements of Rule 23(b)(1), SCRCP. We affirm.

***181 FACTUAL/PROCEDURAL BACKGROUND**

Carolina First Corporation ("Carolina First") is the parent corporation of Carolina First Bank ("Bank"). Plaintiffs are shareholders ("Shareholders") of Carolina First. Shareholders brought this derivative action in accordance with S.C.Code Ann. § 33–7–400 (Supp.1999) seeking rescission of a bonus paid to defendants Mack Whittle (President/CEO of the Bank), William Hummers (Executive Vice President and Chief Financial Officer of Carolina First and the Bank), and Stephen Powell (Vice President of Operations of the Bank) (collectively "Officers"). The bonuses were in the form of stock in Affinity Technology Corporation ("Affinity").

Affinity is a corporation formed by Edward J. Sebastian to manufacture Automatic Loan Machines. According to the complaint, Sebastian was the controlling stockholder and founder of Affinity. Sebastian was also a friend and associate of Whittle. Whittle served on the board of Affinity in addition to his duties at Carolina First and the Bank. During the time in question, Shareholders allege that Sebastian also participated as an ex officio member of the Carolina First Board of Directors, although he had a conflict of interest in doing so.

Carolina First and Affinity entered into an agreement by which Carolina First loaned Affinity $290,000 and provided "start-up" assistance. In return, Carolina First received stock and warrants in Affinity, representing approximately thirty percent of Affinity's then-outstanding stock. Carolina First also became one of Affinity's customers, ordering eleven machines. According to Shareholders, Carolina First received Federal Reserve Board approval to enter into the transaction with Affinity, but Carolina First was severely restricted in its ability to sell its shares of Affinity stock on the open market.

The Carolina First Board then awarded the three named officers a bonus of approximately ten percent of the Affinity shares owned by Carolina First. According to Shareholders, no restriction attached to the shares given as a bonus to the three officers. Whittle received 433,434 shares, and Hummers and Powell each received 116,600 shares.

At that time, a "fairness" letter was written at the Board's request, which valued the shares at $.88 per share. The complaint alleges that, unbeknownst to the disinterested members ***182** of the Carolina First Board, Sebastian and Whittle had a plan in place to publicly offer Affinity stock. The complaint further alleges that Whittle, Hummers, Sebastian, and Powell knew the value of the Affinity stock would be at least $10 to $15 per share once it was traded publicly, and they falsely misled the Board of Directors by failing to disclose this information at the time the Board awarded the bonuses.

Approximately ninety days after the bonuses were awarded, Affinity successfully completed its public offering, at an initial public offering price of $13 per share. The complaint alleges that the shares were ultimately traded at a high of $24 per share. ****406** Based upon this range, they allege the Whittle bonus had a market value between $5,634,642 and $10,402,160, and the Hummers/Powell bonuses had a market value between $1,615,800 and $2,798,400. These bonuses greatly exceed the total reported earnings of Carolina First in each of the previous years and are alleged to be unreasonable under any view of business judgment.

Shareholders essentially allege that this bonus scheme was devised as a method of self-dealing at the expense of Carolina First and the Bank. In this regard, they allege that Sebastian and Whittle used the Bank's relationship with Affinity to "hype" the Affinity stock at the time of the initial offering, knowing that the values could not be sustained, and knowing that Carolina First could not profit by selling its shares because of the Federal Reserve Board restrictions. [1]

Shareholders allege that Whittle, Powell, and Sebastian have a long-time personal and business relationship which they have used to facilitate their self-dealing at the expense of Carolina First and the Bank. Prior to the Affinity deal, Sebastian was the owner of two corporations which controlled Republic Bank. In 1993 and 1994, Carolina First Bank purchased various Republic Bank branches, credit card accounts and, ultimately, its assets and liabilities. They allege that these transactions were not financially sound and that Sebastian participated in them as a "de facto" member of the Carolina First Board during 1994 and 1995, before becoming an appointed member in 1996. They further allege that ***183** Whittle, Hummers, Powell, and Sebastian improperly manipulated the Bank's earnings reports to facilitate their self-dealing, using improper accounting practices. These improper accounting methods later required a "write down" of assets, which Whittle and Hummers then falsely painted to the disinterested majority of the Board in a positive light as a "restructuring." According to Shareholders, Whittle falsely and fraudulently represented to the Board that the accounting principles which required the "write down" were new, although they had always been the proper accounting principles to employ.

On February 25, 1997, Shareholders filed their Third Amended Complaint [2] alleging the Affinity stock bonus resulted in gross over-compensation, the Officers manipulated the corporation's earnings reports, and the Officers engaged in abusive or unfair personnel practices. Shareholders alleged that the Board refused to bring any action to recover funds to which the bank was entitled and that any further efforts to have the Board do so would be futile.

Carolina First and the other defendants [3] moved to dismiss the complaint for, among other things, failure to state a cause of action under Rule 12(b)(6), SCRCP. Specifically, they asserted that the Third Amended Complaint failed to meet the pleading requirements of Rule 23(b), SCRCP. The trial court granted the motions and dismissed the action. The court ruled Shareholders failed to allege particularized facts showing (1) that they complied with the demand requirements of Rule 23(b)(1), SCRCP, and that the demand thereafter was wrongfully refused, or (2) that there were adequate grounds to excuse compliance with the demand requirement. The trial court denied Shareholders' motions to amend the complaint a *184 fourth and fifth time[4] and subsequently denied Shareholders' motion for reconsideration. Shareholders appeal.

LAW/ANALYSIS

I. Demand Refused

Shareholders challenge the trial court's ruling that they failed to allege particularized **407 facts to establish a pre-suit demand upon the directors of Carolina First.

Rule 23(b)(1) of the South Carolina Rules of Civil Procedure, provides:

> **(b)(1) Derivative Actions by Shareholders.** 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 derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

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

The trial court found Shareholders failed to meet the pleading requirements of Rule 23 in four respects:

> (1) the plaintiffs fail[ed] to allege with sufficient particularity a pre-suit demand to the board of directors of Carolina *185 First Corporation; (2) plaintiffs in fact did not make any such demand, except as to one aspect of this lawsuit; (3) as to the one pre-suit demand that the plaintiffs actually did make (but failed to allege properly) and that the Board of Directors refused, the plaintiffs fail[ed] to allege specific facts to support the conclusion that the board's refusal of the demand was wrongful; and (4) the plaintiffs fail[ed] to allege a proper basis to excuse compliance with the demand requirement.

In South Carolina, the authority to direct the business and affairs of a corporation is delegated to a board of directors, not the shareholders. *See* S.C.Code Ann. § 33–8–101 (1990). Rule 23(b)(1) adopts the federal derivative suit provision.[5] *See* Rule 23(b)(1) Reporter's Note, SCRCP. The federal rule was designed to protect against two kinds of potential abuse stemming from derivative actions. *See* 5 James Wm. Moore et al., *Moore's Federal Practice,* ¶ 23.1.02[4] (3d ed.2000). "First, Rule 23.1 seeks to prevent the unrestrained use of derivative actions by minority shareholders, which would undermine the basic principle of corporate governance that the decisions of the corporation should be made by its management or, in certain situations, by an affirmative vote of a majority of the shareholders." *Id.* (citing *Daily Income Fund, Inc. v. Fox,* 464 U.S. 523, 530, 104 S.Ct. 831, 78 L.Ed.2d 645 (1984)). The second reason, not applicable to the states, is to prevent collusive creation of diversity jurisdiction. *Id.*

The protective principles underlying the pleading requirements of Rule 23(b)(1) have long been recognized as important gatekeepers in South Carolina corporate jurisprudence. In *186 *Latimer v. Richmond & D.R. Co.,* 39 S.C. 44, 51–52, 17 S.E. 258, 260–61 (1893), our supreme court recognized that equity will afford relief in a proper case to shareholders bringing an action on behalf of a corporation against the directors, notwithstanding the **408 general rule that only the corporation may pursue redress of a wrong committed against it. However, quoting extensively from *Hawes v. Oakland,* 104 U.S. 450, 26 L.Ed. 827 (1881), the court noted:

> [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. He must make an earnest, not a simulated, effort with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court.... 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.... [6]

***187** *Latimer,* 39 S.C. at 52–53, 17 S.E. at 261 (quoting *Hawes v. Oakland,* 104 U.S. 450, 460–61, 26 L.Ed. 827 (1881)).

These same principles are recognized as underlying Rule 23. *See RCM Sec. Fund, Inc. v. Stanton,* 928 F.2d 1318, 1326 (2d Cir.1991) ("Whether a corporation should bring a lawsuit is a business decision, and the directors are, under the laws of every state, responsible for the conduct of the corporation's business, including the decision to litigate." (citations omitted)); *Houle v. Low,* 407 Mass. 810, 556 N.E.2d 51, 57 (1990) ("Our cases have long recognized that the question whether a corporation should pursue a given lawsuit involves factors other than the merits of the claim. It is often a question of business policy.").

A derivative action is, in essence, a challenge to a board's managerial authority. Derivative actions have been characterized as a remedy of last resort because these actions impinge on the inherent role of corporate management to conduct the affairs of the corporation, including the power to bring suit. *Renfro v. FDIC,* 773 F.2d 657, 658 (5th Cir.1985). For this reason, the law imposes certain prerequisites on a stockholder's right to sue derivatively. *Kaplan v. Peat, Marwick, Mitchell & Co.,* 540 A.2d 726, 730 (Del.1988).

[1] 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. *Blasband v. Rales,* 971 F.2d 1034, 1048 (3d Cir.1992) (applying Delaware corporate law); *see also Spiegel v. Buntrock,* 571 A.2d 767, 775–76 (Del.1990) (stating that "stockholders who ****409** ... make a demand which is refused, subject the board's decision to judicial review according to the traditional business judgment rule" and that once the shareholder makes a demand, ***188** the shareholder can no longer argue demand is excused).

Rule 23 is a departure from the more liberal pleading requirements of Rule 8, SCRCP, in that it requires particularized allegations. Under Rule 23, "the shareholder must either make a demand or plead with particularity the exceptional circumstances that demonstrate why a demand would be futile, i.e., why the Board of Directors should not be allowed to decide whether to institute litigation." *Allison ex rel. General Motors Corp. v. General Motors Corp.,* 604 F.Supp. 1106, 1112 (D.Del.1985).

[2] **[3]** **[4]** "Demand 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 1117. As the United States Supreme Court explained, "The purpose of the demand requirement is to 'affor[d] the directors an opportunity to exercise their reasonable business judgment and waive a legal right vested in the corporation in the belief that its best interests will be promoted by not insisting on such right.' " *Kamen,* 500 U.S. at 96, 111 S.Ct. 1711 (alteration in original) (quoting *Daily Income Fund, Inc.,* 464 U.S. at 533, 104 S.Ct. 831). "Thus, the demand requirement implements 'the basic principle of corporate governance that the decisions of a corporation—including the decision to initiate litigation—should be made by the board of directors or the majority of shareholders.' " *Kamen,* 500 U.S. at 101, 111 S.Ct. 1711 (quoting *Daily Income Fund, Inc.,* 464 U.S. at 530, 104 S.Ct. 831); *see also Spiegel,* 571 A.2d at 773 ("The purpose of pre-suit demand is to assure that the stockholder affords the corporation the opportunity to address an alleged wrong without litigation, to decide whether to invest the resources of the corporation in litigation, and to control any litigation which does occur."). A demand alerts the board so that it may take the corrective action, if any, which it deems necessary.

As to the first allegation, it is generally recognized that the "interest" which is required to establish futility is more than mere participation in the original decision. *Kaufman,* 634 F.Supp. at 1579; *see Lewis ex rel. Nat'l Semiconductor Corp. v. Sporck,* 612 F.Supp. 1316, 1322 (N.D.Cal.1985) (stating ****412** that "whether an act [is] 'completely undirected to a corporate purpose' " raising a presumption of bias "depends on whether or not the act benefitted the directors personally at the expense of the corporation.") (quoting *In re Kauffman Mut. Fund Actions,* 479 F.2d 257, 265 (1st Cir.1973)); *Vanderbilt v. Geo–Energy Ltd.,* 590 F.Supp. 999, 1002 (E.D.Pa.1984) (finding demand excused because the complaint alleged that a majority of board members participated in self-dealing transactions); *Weiss v. Temporary Inv. Fund, Inc.,* 516 F.Supp. 665, 672 (D.Del.1981) (stating that interested director is one who engaged in self-dealing or "otherwise stood to obtain any personal advantage"), *aff'd,* 692 F.2d 928 (3d Cir.1982), *vacated on other grounds by* 465 U.S. 1001, 104 S.Ct. 989, 79 L.Ed.2d 224 (1984); *Pogostin v. Rice,* 480 A.2d 619, 624 (Del.1984) (stating that "[d]irectorial interest exists whenever divided loyalties are present, or a director either has received, or is entitled to receive, a personal financial benefit from the challenged transaction which is not equally shared by the stockholders"); *see also* ***194** *Dockside Ass'n v. Detyens,* 294 S.C. 86, 87, 362 S.E.2d 874, 875 (1987) (holding that "the business judgment rule precludes judicial review of actions taken by a corporate governing board absent a showing of a lack of good faith, fraud, self-dealing or unconscionable conduct"); *Stahn v. Catawba Mills,* 53 S.C. 519, 519, 31 S.E. 498, 498–99 (1898) (stating that " refusal need not be alleged, if it be shown that the directors or managing board are themselves the wrong-doers in some alleged breach of trust or fraudulent misappropriation of the corporate property, and have control of a majority of the stock, so as to control corporate action").

Shareholders do not allege that any member of the Board other than Whittle and Sebastian had any improper motive or participated in any self-dealing or fraud. Taking Shareholders' allegations as true, the vast majority of the directors received nothing of value from the Affinity stock transfer, received no improper bonus, and were not otherwise involved in self-dealing or fraud.

[17] The second assertion, that Whittle and Hummers controlled the board, is a conclusory allegation, and there are no particularized facts in support of this conclusion. This type of bald assertion, absent particularized facts to support it, is insufficient to meet Rule 23's pleading requirements. *See Aronson v. Lewis,* 473 A.2d 805, 815 (Del.1984) (stating that "[t]here must be coupled with the allegation of control such facts as would demonstrate that through personal or other relationships the directors are beholden to the controlling person"); *cf. Stahn,* 53 S.C. at 529–30, 31 S.E. at 499 (holding complaint stated basis for excusing demand where it alleged four of seven members of board were involved in self-dealing, and where self-dealing board member appointed two other "dummy" directors to board by purchasing stock in their name).

[18] Next, Shareholders argue that demand is futile because the majority of the board members are named as defendants and cannot be expected to sue themselves. Again, this reasoning has been uniformly rejected by courts which have considered the argument. *See Lewis v. Graves,* 701 F.2d 245, 248–49 (2d Cir.1983); *Lewis v. Curtis,* 671 F.2d 779, 785 (3d Cir.1982); *Heit v. Baird,* 567 F.2d 1157, 1162 (1st Cir.1977); *Kaufman,* 634 F.Supp. at 1580; ***195** *Allison,* 604 F.Supp. at 1114–15. As stated in *Kaufman,* "This argument lacks logic. If the Court were to accept it, derivative plaintiffs could readily circumvent [Rule 23's] demand requirements simply by naming all directors in the complaint." 634 F.Supp. at 1580.

[19] Next, Shareholders assert that the board was involved in the original action of which they complain, and, therefore, any further demand would be futile. We join with the other jurisdictions that have considered and rejected this argument as a basis, standing alone, for excusing demand. *See Lewis v. Graves,* 701 F.2d at 248; *Lewis v. Curtis,* 671 F.2d at 785; *Cottle v. Hilton Hotels Corp.,* 635 F.Supp. 1094, 1098 (N.D.Ill.1986); *Aronson,* 473 A.2d at 817. As the Court noted in *Cottle,* "If this were the only prerequisite to excusing demand, the demand requirement would be effectively repealed since, by definition, the directors have a hand in all corporate transactions of any consequence." 635 F.Supp. at 1098.

****413** **[20]** However, Shareholders argue that their allegations create a reasonable doubt that the challenged transactions result from the exercise of valid business judgment and that this fact excuses demand. Although Shareholders oppose the trial court's application of Delaware law in the analysis of other issues on appeal, by virtue of its perceived protection of the corporation and its directors, they urge that, if Delaware law is to be applied, then this test is appropriate.

Under Delaware law, demand may be excused even if the threshold presumptions of director disinterest or independence are not rebutted by well-pleaded facts, if the complaint pleads particularized facts sufficient to create a reasonable doubt that the challenged transaction was the product of a valid exercise of business judgment. *See Levine v. Smith,* 591 A.2d 194, 206 (Del.1991).

We first note that this second prong of the Delaware test is considered a narrow exception. *See Cottle,* 635 F.Supp. at 1099 (noting that "in rare cases a transaction may be so egregious on its face that board approval cannot meet the test of business judgment, and a substantial likelihood of director liability therefore exists.") (quoting *Aronson,* 473 A.2d at 815). It is premised upon the notion that when the Board makes a decision which is so egregious as to give rise to a reasonable ***196** doubt that it was the product of a valid exercise of business judgment, it may be inferred that the Board is incapable of exercising its power and authority to pursue the derivative claims directly. *Levine,* 591 A.2d at 205.

However, the facts as alleged by Shareholders negate this inference. Shareholders allege that Whittle, Hummers, Powell, and Sebastian misled the other members of the Board by undervaluing the Affinity stock at the time of acquisition, and by failing to divulge the proposed public offering of Affinity stock. They allege that these self-dealing officers and directors intentionally provided false information to the majority of the Board and withheld information. However, under their version of the facts, the market value of the shares was rapidly established at a higher value through the public offering following the allegedly improper bonus. Shareholders allege in the complaint that "On April 25, 1996, some 90 days after making the gift/bonus of the Affinity stock, the public offering, which had been forthcoming and which was well known by all observant and reasonably astute people to take place was publicly offered at the initial opening price of $13 per share." Consequently, under shareholder's version of the facts, the original decision to give the Affinity stock bonuses was based upon incorrect and incomplete information by disinterested members of the Board. Once the true information became public knowledge, and therefore available, we see no basis to infer that the disinterested majority of the Board was incapable of exercising valid business judgment to rescind the transaction, if the Board determined it to be in the best interest of the corporation to do so. Consequently, we find this argument to be without merit.

For the above reasons, we find no abuse of discretion in the trial court's ruling.

III. Refusal of Limited Discovery During Pendency of Motion to Dismiss

Lastly, Shareholders contend the trial court erred by refusing discovery prior to hearing the Motions to Dismiss.

After Shareholders initiated this action, the defendants moved for an order staying discovery pending a ruling on the motions to dismiss. However, the trial court never issued an ***197** order ruling on the motions to stay discovery, and Shareholders acknowledge this point on appeal.

They argue the trial court's scheduling order of February 1997 confirmed that discovery would be addressed after any ruling on a motion to dismiss. The scheduling order, dated January 31, 1997, initially scheduled argument on the motions to dismiss for May 1997. The order provided that "[i]f the motions are denied, the Court will enter another scheduling order to address discovery, motions for summary judgment, and motions relating to the conduct of trial...." It is clear from this language that the scheduling order made only a general reference to procedural matters and was not a ruling on the motion to stay discovery.

****414** The fact that the court never ruled on the stay is also clearly reflected in correspondence by and between counsel. On August 25, 1997, opposing counsel informed the trial court that Shareholders' attorneys had "graciously agreed not to pursue discovery until you have ruled on the motion to stay." Finally, Shareholders' counsel conceded as much in a letter to a third party on September 8, 1997, stating "[i]t is true that Plaintiffs' counsel and [opposing counsel] have agreed to stay discovery proceedings pending Judge Floyd's ruling on Carolina First's Motion to Stay Discovery."

Based on the above, it is clear that a ruling on the motion to stay discovery was never issued. No such order is before us on appeal, and there is no issue for us to consider. *SSI Med. Servs., Inc. v. Cox,* 301 S.C. 493, 499, 392 S.E.2d 789, 793 (1990) (issue must have been raised to and ruled upon by the court below to be considered for appellate review).

CONCLUSION

For the foregoing reasons, the decision of the trial court is

AFFIRMED.

GOOLSBY and CONNOR, JJ., concur.

Parallel Citations

539 S.E.2d 402

Footnotes

1 According to the complaint, the Affinity shares were selling at $7 per share at the time of suit.

2 Defendants responded to the initial complaint and subsequent amendments by filing a motion to dismiss in each instance, but agreed to allow Shareholders the opportunity to amend a third and final time.

3 Shareholders named ten other members of Carolina First's Board of Directors as defendants, although there is no allegation that they improperly received anything of value, or committed any acts of self-dealing or fraud. In addition, they identified seven other members of the Board who were not named as defendants and are not alleged to have participated in any self-dealing or fraud.

4 Shareholders have not appealed this ruling.

5 The reporter's notes to Rule 23(b)(1), SCRCP, state that the language of the rule is that of Federal Rule of Civil Procedure 23.1. The comments to S.C.Code Ann. § 33–7–400 note that "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." S.C.Code Ann. § 33–7–400 South Carolina Reporters' Comments (1990). This is an illusory benefit, however, because the scope of demand requirement is an issue of substantive law, and the federal courts look to state law to fashion a rule of decision, even in federal question cases. *Kamen v. Kemper Fin. Servs., Inc.,* 500 U.S. 90, 98–99, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991).

6 The justification for the rule is amply stated by the court as follows:

> This doctrine, thus abundantly supported by authority, is also well founded in reason. For while it may be very true that a court of equity will and ought to permit a stockholder to bring an action for the redress or prevention of a wrong done or threatened to the corporate property, in order to prevent a failure of justice, in certain well-defined exceptional cases, yet it is manifest that to allow a single stockholder, or one or more of them, to force a corporation or its managing agents into a litigation, which the majority of the body or its officers may think unwise or unnecessary, would place it in the power of a single stockholder who may be dissatisfied with the management of the business of the corporation to involve the corporation in expensive litigation, which might be destructive to the interests of such corporation, and would permit a single discontented stockholder to force the majority, who have the right to control, to adopt his views of policy, or incur the expense and hazards of a lawsuit. The business of a corporation must, necessarily, be committed to the management of its officers or agents, by whatever name they may be called, and as it would be unreasonable to expect that their views of the proper policy to be adopted in such management can always command the approval of every individual stockholder, it is very manifest that if one or more of the dissatisfied stockholders should be permitted to precipitate the corporation into litigation, whenever the policy of the managing board does not meet with their approval, it would be impossible to conduct the affairs of a corporation with any success. *It seems to us, therefore, that there is good reason for the general rule laid down above, and that when one or more stockholders undertake to bring an action like this, they should be rigidly required to state such a case as falls within one of the exceptions to such rule.*

Latimer, 39 S.C. at 53–54, 17 S.E. at 261 (emphasis added); *see also Thompson v. Thompson,* 214 S.C. 61, 51 S.E.2d 169 (1948); *Stahn v. Catawba Mills,* 53 S.C. 519, 31 S.E. 498 (1898).

7 Generally, a court may consider documents outside of the complaint if the complaint incorporates the documents by reference. *See Stoner v. Walsh,* 772 F.Supp. 790, 797–798 (S.D.N.Y.1991) (demand letters incorporated into complaint by reference).

End of Document

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

The Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust (the "Burton Trust") is precluded from asserting this claim against Carroll M. Pitts, Jr., Esq. ("Pitts") and Robinson Bradshaw & Hinson, P.A., (collectively, "RBH") because this claim was extinguished by the Settlement Agreement executed in the Partition Action.

FACTS

The Burton Trust executed a Settlement Agreement on or about April 4, 2013, to resolve the Partition Action that was filed to complete the commercial real estate transaction underlying this case. A copy of the executed Settlement Agreement is attached as **Exhibit A.** David Burton signed this agreement on behalf of the Burton Trust. In relevant part, the Settlement Agreement states as follows:

> WHEREAS, the parties have now amicably resolved their differences and disputes and by this Settlement Agreement, the parties wish to memorialize that resolution, to resolve the Action, to dismiss the claims asserted against each other with prejudice, and to *waive and renounce any and all claims* the parties have asserted against each other or could

> have asserted against each other in the Action or *in any way related to the subject property, the Cato Deed, the Letter of Intent, the Amendment to Contract, the Thomasson Deed, the creation or operation of Cato, LLC*, or the claims asserted in the Action, and to confirm that Thomasson shall henceforth own Areas A, B, C, and D and the Roadbed Tract free and clear of any right, title, claim, or interest of any of the other parties herein.

(Settlement Agreement, p. 4 (emphasis added); **Ex. A.**)

In consideration for executing the Settlement Agreement, the Burton Trust was paid $249,000. (Burton Dep. 17:5-16; May 12, 2014.) No other heir received any monetary proceeds under the terms of the Settlement Agreement. (*Id.* 88:14-15.)

ARGUMENT

The Burton Trust is precluded from asserting this claim against RBH because this claim was extinguished by the Settlement Agreement.

The terms of the Settlement Agreement are clear and unambiguous – the Burton Trust waived and renounced any and all claims in any way related to the subject property. The veracity of this interpretation of the relevant clause is proven by analyzing the choice and placement of the coordinating conjunctions "and" and "or." When diagramed according to sentence structure, it is easy to see that the clause contains five items the parties "wish to" do (i.e., memorialize, resolve, dismiss, waive, and confirm), and also contains a list of three types of claims the parties "waive and renounce," as shown below:

> WHEREAS, the parties have now amicably resolved their differences and disputes and by this Settlement Agreement, the parties wish:
>
> (1) to memorialize that resolution,
> (2) to resolve the Action,
> (3) to dismiss the claims asserted against each other with prejudice, and
> (4) to *waive and renounce any and all claims*:

a. the parties have asserted against each other or
b. could have asserted against each other in the Action or
c. *in any way related to the subject property, the Cato Deed, the Letter of Intent, the Amendment to Contract, the Thomasson Deed, the creation or operation of Cato, LLC,* or the claims asserted in the Action, and

(5) to confirm that Thomasson shall henceforth own Areas A, B, C, and D and the Roadbed Tract free and clear of any right, title, claim, or interest of any of the other parties herein.

The coordinating conjunction "or" links together a set of alternatives, which, in this case, is a list of three different types of claims that the parties wish to renounce. Therefore, in relevant part, the clause states that the Burton Trust renounced any and all claims "in any way related to the subject property, the Cato Deed, the Letter of Intent, the Amendment to Contract, the Thomasson Deed, the creation or operation of Cato, LLC." Dr. Burton appears to understand the implication of this renunciation as proven by his testimony that the Settlement Agreement "[did] away with everyone's complaint against the other; legal complaints, etc." (Burton Dep. 16:4-6.)

By executing the Settlement Agreement, the Burton Trust released the claim it seeks to assert here which is without question, "related to the subject property, the Cato Deed, the Letter of Intent, the Amendment to Contract, the Thomasson Deed, the creation or operation of Cato, LLC." The record proves that this release was intentional because the language was reviewed by the Burton Trust's attorneys. Dr. Burton testified that his attorneys reviewed the Settlement Agreement and consulted with him before it was executed. (*Id.* 11:7-17.) Further, he testified that he was in constant communication with his lawyers about the material terms of the Settlement Agreement. (*Id.* 14:12-17.) Additionally, as a practical matter, there is no unfairness to the Burton Trust in enforcing the release in the Settlement Agreement because it profited $249,000 under its terms (in addition to the $124,200 it previously received from the December 12, 2007 closing).

Additionally, under South Carolina law, a release of one tortfeasor releases other parties who contributed to the plaintiff's injuries when the plaintiff either intended to do so or when he has "received full compensation amounting to a satisfaction." *Bartholomew v. McCartha,* 255 S.C. 489, 491 179 S.E.2d 912, 913 (1971). Where "a party accepts 'a full and final compromise adjustment and settlement of any and all claims,' such amounts to a *Bartholomew* satisfaction, thereby extending the preclusive effect of the release to nonparties to the instrument." *Bowers v. Dep't of Transp.*, 360 S.C. 149, 154, 600 S.E.2d 543, 546 (Ct. App. 2004).

Dr. Burton's testimony proves that the Burton Trust received full compensation in the settlement of the Partition Action. When asked whether the Burton Trust benefitted economically from the Partition Action, Dr. Burton testified that "[i]t got its fair share. Let's put it that way." (Burton Dep. 88:7-8; May 12, 2014.) Further, he testified that the Burton Trust "received [the] money . . . for the sale of the land that [he] felt [the Burton Trust] was entitled to." (*Id.* 89:4-6.) The Burton Trust was fully compensated by the settlement it received in the underlying transaction and, therefore, the preclusive effect of the Settlement Agreement extends to this claim brought against Mr. Pitts.

CONCLUSION

Because the Burton Trust released the claim it seeks to assert here by executing the Settlement Agreement in the Partition Action, the Burton Trust is precluded from asserting this claim against RBH.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

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York, South Carolina
December 16, 2014
~#4817-0990-6719~

EXHIBIT A

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
IN THE SIXTEENTH JUDICIAL CIRCUIT

James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato and Cathy Cato Evans,

Petitioners,

vs.

David Alan Burton as Successor Trustee for Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, and in the Right and on behalf of T.E. Cato Estate, LLC; Marjorie Cato Burton Living Trust; and The SC Department of Transportation,

Respondents.

Case No. 2008-CP-46-3171

David Alan Burton as Successor Trustee for Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, and in the Right and on behalf of T.E. Cato Estate, LLC;

Third-Party Plaintiff,

vs.

Thomasson Apts., LLC,

Third-Party Defendant.

Thomasson Apts., LLC,

Fourth-Party Plaintiff,

vs.

T.E. Cato Estate, LLC, James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, and Cathy Cato Evans, and David Alan Burton,

)
Fourth-Party Defendants.)
)

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Mutual Release ("Settlement Agreement") dated April 4, 2013, is made and entered by, between, and among James Thomas Cato; Helen Cato Jones; Douglas E. Jones; Albert M. Jones; Sara L. Jones; Donn S. Johnson; Jane Cato West; Robert Lee Cato; Cathy Cato Evans; The Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, which is referenced in the above-captioned action as David Alan Burton as Successor Trustee for Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, but will be referred to hereinafter as "the Burton Trust"; Marjorie Burton; Sloan Marvin Burton; David Alan Burton, individually and as Successor Trustee of the Burton Trust; T.E. Cato Estate, LLC ("Cato, LLC"); Thomasson Apts., LLC ("Thomasson"); Broadus L. Thomasson, Sr.; B. Lee Thomasson, Jr.; B. Heath Thomasson; and Matthew J. Thomasson.

RECITALS:

WHEREAS, the property involved in this case was formerly owned by Thomas Edward Cato ("T.E. Cato"), who died on November 23, 1957 and ownership of this property later vested in the heirs of T.E. Cato and their successors, namely Marjorie Cato Burton through the Burton Trust, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, and James Thomas Cato ("T.E. Cato Heirs");

WHEREAS, on various dates ranging from May 30, 2007 to June 16, 2007, the T.E. Cato Heirs executed Articles of Organization of Cato, LLC;

WHEREAS, on the same day that each of the T.E. Cato Heirs executed the Articles of Organization of Cato, LLC, they each executed a deed in order to convey to Cato, LLC nine

tracts of land: Lots 42, 14, 13, 98, 175, and Areas A, B, C, and D, with such deed being recorded July 10, 2007 with the York County Clerk of Court in Book 9248 at Page 138, with the property being more particularly described therein ("Cato Deed");

WHEREAS, on August 3, 2007, James Thomas Cato, on behalf of Cato, LLC, executed a Letter of Intent regarding the sale of Areas A, B, C, and D to Thomasson for $1,000,000 ("Letter of Intent");

WHEREAS, it was later discovered that the legal description of Areas A, B, C, and D was not complete or correct because a certain piece of property described as the Roadbed Tract was not part of Area B;

WHEREAS, in December 2007, Cato, LLC and Thomasson entered into an Amendment to Contract, wherein all the members of Cato, LLC, except the Burton Trust, ratified the terms of the Letter of Intent and agreed to file an action for partition of the Roadbed Tract and to seek a private sale to Thomasson of the Roadbed Tract for $100,000.00 ("Amendment to Contract");

WHEREAS, on December 12, 2007, James Thomas Cato, on behalf of Cato, LLC, for consideration of $900,000.00 paid by Thomasson, executed a general warranty deed conveying to Thomasson Areas A, B, C and D, less the Roadbed Tract, which deed is dated December 12, 2007 and recorded December 17, 2007 with the York County Clerk of Court in Book 9673 at Page 150, with the property being more particularly described therein ("Thomasson Deed");

WHEREAS, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, and James Thomas Cato filed the above-captioned action against the Burton Trust for partition and the Burton Trust asserted various counterclaims and a Third-Party Complaint against Thomasson;

WHEREAS, Thomasson asserted counterclaims against the Burton Trust and a Fourth-Party Complaint against Cato, LLC, James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, and David Alan Burton (the above-captioned case including all counterclaims, the third-party complaint, and the fourth-party complaint all as amended shall be collectively referred to as "the Action");

WHEREAS, in the Action, the Burton Trust challenged the validity of the Cato Deed, the Thomasson Deed, challenged Cato, LLC's authority to enter into the various transactions referenced above, and challenged Thomasson's ownership of the subject property;

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

WHEREAS, Marjorie Burton, Sloan Marvin Burton, Broadus L. Thomasson, Sr., B. Lee Thomasson, Jr., B. Heath Thomasson, Matthew J. Thomasson, Douglas E. Jones, Albert M. Jones, and Sara L. Jones, are not parties to the Action but are parties to this Settlement Agreement to effectuate the agreement between the parties to resolve the Action in the manner set forth herein; and

NOW, THEREFORE, James Thomas Cato, Helen Cato Jones, Douglas E. Jones, Albert M. Jones, Sara L. Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, the Burton Trust, Marjorie Burton, Sloan Marvin Burton, David Alan Burton, Cato, LLC, Thomasson, Broadus L. Thomasson, Sr., B. Lee Thomasson, Jr., B. Heath Thomasson, and Matthew J. Thomasson (hereinafter sometimes collectively referred to as "the Parties") enter into this Settlement Agreement in exchange for the mutual promises, covenants, representations, and warranties contained herein, together with other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and further agree as follows:

1. INCORPORATION OF RECITALS. The above Recitals are incorporated herein and made a part of this Settlement Agreement.

2. COMPLETE RESOLUTION. It is the intent of this Settlement Agreement to resolve, fully and forever, any and all claims between the parties that were asserted or that could have been asserted in the Action pursuant to the terms contained herein, and to confirm that Thomasson henceforth owns the Roadbed Tract and Areas A, B, C, and D free and clear of any claim, right, title or interest of any of the other parties herein.

3. CONSIDERATION. For and in consideration of the total sum of Two Hundred Forty Nine Thousand and no/100 ($249,000.00) Dollars paid to the Burton Trust by or on behalf of Thomasson, Cato, LLC, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, and James Thomas Cato, and the Assignment set forth in paragraph 7 of this Settlement Agreement, and the mutual promises and covenants contained herein, the receipt and sufficiency of which are hereby acknowledged, the Parties agree to execute and deliver this Settlement Agreement and to be fully bound by its terms and to dismiss the claims asserted in the Action with prejudice.

4. CONSENT ORDER AND DISMISSAL OF ACTION. The parties to the Action through their counsel shall present to the presiding Judge of the York County Court of Common Pleas a Consent Order which dismisses all claims asserted in the Action with prejudice, finds and concludes the properties that are the subject of the Action-- Areas A, B, C, and D, and the Roadbed Tract-- are henceforth owned by Thomasson free and clear of any right, title, claim, or interest of the other parties to the Action, finds and concludes that the Cato Deed and the Thomasson Deed are henceforth valid, and approves and incorporates this Settlement Agreement. A copy of the Consent Order to be presented to the Court is attached hereto as **Exhibit A.**

5. QUITCLAIM DEED. James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, and the Burton Trust (in their individual capacities and as members of Cato, LLC), as well as Marjorie Burton, Sloan Marvin Burton, David Burton, Cato, LLC, Douglas E. Jones, Albert M. Jones, and Sara L. Jones shall execute a quitclaim deed, in a recordable form prepared by Thomasson conveying all of their right, title, and interest in Areas A, B, C, and D, and the Roadbed Tract to Thomasson with such quitclaim deed to also include in its legal description more recent surveys of these properties commissioned by Thomasson. A copy of this quitclaim deed is attached hereto as **Exhibit B**. As a condition of this Settlement Agreement, the quitclaim deed described herein shall be sent to and held in Trust by Thomasson's attorney, Demetri K. Koutrakos, and not deemed legally delivered unless the Consent Order is entered and filed with the York County Clerk of Court after which the quitclaim deed shall be deemed legally delivered and may be recorded, provided that, if the Consent Order is not entered and filed, then the quitclaim deed shall be null, void, and of no force or effect, it shall not be deemed legally delivered, and the signature pages for such

quitclaim deed shall immediately be returned to the attorneys of record for the respective signatories. The Parties agree and acknowledge that James Thomas Cato, as manager and authorized member of Cato, LLC, has the full and complete authority to execute the quitclaim deed on behalf of Cato, LLC and to also execute this Settlement Agreement and all associated documents on behalf of Cato, LLC.

6. SCDOT CONSENT ORDER. This Settlement Agreement is further conditioned upon the entry and filing of a consent order which orders that the quitclaim deed recorded November 4, 2006 with the York County Clerk of Court in Book 8577 at Page 187, wherein the South Carolina Department of Transportation ("SCDOT") quitclaimed its interest in the Roadbed Tract to Marjorie Cato Burton, Trustee of the Marjorie Cato Burton Revocable Trust, Helen C. Jones, Donn S. Johnson, Robert Lee Cato, James Thomas Cato, Martha Jane Cato West, and Cathy Cato Evans, be reformed by correcting the name of the grantees in that deed to David Alan Burton as Successor Trustee to Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, Helen C. Jones, Donn S. Johnson, Robert Lee Cato, James Thomas Cato, Martha Jane Cato West, and Cathy Cato Evans and dismisses the SCDOT as a party to the Action. A copy of this Consent Order is attached hereto as **Exhibit C.**

7. ASSIGNMENT OF CATO, LLC ASSETS. Cato, LLC shall convey certain rights, assets, and interests to the Burton Trust per the Assignment attached hereto and incorporated herein as **Exhibit D.**

8. OBLIGATIONS UNDER CONTRACTS. Upon the execution of this Settlement Agreement, all obligations of Thomasson and Cato, LLC, Helen Cato Jones, Donn S. Johnson, James Thomas Cato, Jane Cato West, Robert Lee Cato, and Cathy Cato Evans under the Letter

of Intent and the Amendment of Contract shall be deemed satisfied with no further payment from Thomasson due thereunder.

9. RELEASES.

A. The Burton Trust, Marjorie Burton, Sloan Marvin Burton, and David Burton, including, without limitation, their heirs, successors, assigns, trustees, co-trustees, settlors, employers, employees, predecessor trusts, successor trusts, affiliate trusts, and related entities hereby remise, release, and forever discharge Cato, LLC, James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, Douglas E. Jones, Albert M. Jones, and Sara L. Jones, including without limitation, their heirs, successors and assigns, in full of and from any and all claims, demands, liabilities, debts, rights, actions, costs, fees, expenses, compensation and causes of action, at law or in equity, either known or unknown at this time, apparent or not apparent, related in any manner whatsoever to the Letter of Intent, the Amendment to Contract, Areas A, B, C, and D, the Roadbed Tract, the Cato Deed, the Thomasson Deed, Lots 42, 14, 13, 98, 175, the creation, management, or operation of Cato, LLC, or the claims set forth in the Action, including any claims which were, or which could have been, set forth by The Burton Trust, Marjorie Burton, Sloan Marvin Burton, or David Burton against Cato, LLC, James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, Douglas E. Jones, Albert M. Jones, or Sara L. Jones in the Action.

B. Cato, LLC, James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, Douglas E. Jones, Albert M. Jones, and Sara L. Jones, including without limitation, their heirs, successors and assigns, hereby remise, release, and forever discharge the Burton Trust, Marjorie Burton, Sloan Marvin Burton, and David

Burton, including, without limitation, their heirs, successors, assigns, trustees, co-trustees, settlors, employers, employees, predecessor trusts, successor trusts, affiliate trusts, and related entities of and from any and all claims, demands, liabilities, debts, rights, actions, costs, fees, expenses, compensation and causes of action, at law or in equity, either known or unknown at this time, apparent or not apparent, related in any manner whatsoever to the Letter of Intent, the Amendment to Contract, Areas A, B, C, and D, the Roadbed Tract, the Cato Deed, the Thomasson Deed, Lots 42, 14, 13, 98, 175, the creation, management, or operation of Cato, LLC, or the claims set forth in the Action, including any claims which were, or which could have been, set forth by Cato, LLC, James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, Douglas E. Jones, Albert M. Jones, or Sara L. Jones against the Burton Trust, David Burton, Marjorie Burton, or Sloan Marvin Burton in the Action.

C. Thomasson, Broadus L. Thomasson, Sr., B. Lee Thomasson, Jr., B. Heath Thomasson, and Matthew J. Thomasson, including, without limitation, their heirs, successors, assigns, employers, employees, predecessor companies, successor companies, subsidiary companies, parent companies, affiliate companies, related companies, divisions, any and all past, present and future members and managers remise, release, and forever discharge James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, Cato, LLC, the Burton Trust, Marjorie Burton, Sloan Marvin Burton, David Burton, Douglas E. Jones, Albert M. Jones, and Sara L. Jones, including, without limitation, their heirs, successors, assigns, trustees, co-trustees, settlors, employers, employees, predecessor trusts, successor trusts, affiliate trusts, and related entities of and from any and all claims, demands, liabilities, debts, rights, actions, costs, fees, expenses, compensation and causes of action, at law or in equity,

either known or unknown at this time, apparent or not apparent, related in any manner whatsoever to the Letter of Intent, the Amendment to Contract, Areas A, B, C, and D, the Roadbed Tract, the Cato Deed, the Thomasson Deed, or the claims set forth in the Action, including any claims which were, or which could have been, set forth by Thomasson Broadus L. Thomasson, Sr., B. Lee Thomasson, Jr., B. Heath Thomasson, or Matthew J. Thomasson against James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, Cato, LLC, the Burton Trust, David Burton, Marjorie Burton, Sloan Marvin Burton, Douglas E. Jones, Albert M. Jones, or Sara L. Jones in the Action.

D. James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, Cato, LLC, the Burton Trust, Marjorie Burton, Sloan Marvin Burton, David Burton, Douglas E. Jones, Albert M. Jones, and Sara L. Jones, including, without limitation, their heirs, successors, assigns, trustees, co-trustees, settlors, employers, employees, predecessor trusts, successor trusts, affiliate trusts, and related entities remise, release, and forever discharge Thomasson, Broadus L. Thomasson, Sr., B. Lee Thomasson, Jr., B Heath Thomasson, and Matthew J. Thomasson including, without limitation, their heirs successors, assigns, employers, employees, predecessor companies, successor companies, subsidiary companies, parent companies, affiliate companies, related companies, divisions, related entities, successors in title, any and all past, present and future members and managers of and from any and all claims, demands, liabilities, claims of ownership and title, debts, rights, actions, costs, fees, expenses, compensation and causes of action, at law or in equity, either known or unknown at this time, apparent or not apparent, related in any manner whatsoever to the Letter of Intent, the Amendment to Contract, Areas A, B, C, and D, the Roadbed Tract, the Cato Deed, the Thomasson Deed, or the claims set forth in the Action, including any claims which were, or

which could have been, set forth by James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, Cato, LLC, the Burton Trust, David Burton, Marjorie Burton, Sloan Marvin Burton, Douglas E. Jones, Albert M. Jones, or Sara L. Jones against Thomasson, Broadus L. Thomasson, Sr., B. Lee Thomasson, Jr., B. Heath Thomasson, or Matthew J. Thomasson in the Action.

E. Cato, LLC remises, releases, and forever discharges James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, Cato, LLC, the Burton Trust, Marjorie Burton, Sloan Marvin Burton, David Burton, Douglas E. Jones, Albert M. Jones, and Sara L. Jones, including, without limitation, their heirs, successors, assigns, trustees, co-trustees, settlors, employers, employees, predecessor trusts, successor trusts, affiliate trusts, and related entities of and from any and all claims, demands, liabilities, debts, rights, actions, costs, fees, expenses, compensation and causes of action, at law or in equity, either known or unknown at this time, apparent or not apparent, related in any manner whatsoever to the Letter of Intent, the Amendment to Contract, Areas A, B, C, and D, the Roadbed Tract, the Cato Deed, the Thomasson Deed, or the claims set forth in the Action, including any claims which were, or which could have been, set forth by Cato, LLC in the Action.

10. ATTORNEYS' FEES. Each party shall bear its own costs, expenses and attorneys' fees in connection with this matter. To the extent a party to this Settlement Agreement files a legal action to enforce the terms of this Settlement Agreement, the prevailing party shall be entitled to an award of reasonable attorney's fees and costs.

11. NO ADMISSION OF LIABILITY. The Parties acknowledge and agree this settlement is a complete compromise of the matters involving disputed issues of law and fact.

The Parties understand and agree that this settlement is not to be construed as an admission of liability on the part of any party, all of whom expressly deny liability.

12. REPRESENTATION AND COMPREHENSION OF DOCUMENT. Except as to the promises, covenants, representations, and warranties contained herein and in the documents attached hereto, as applicable, no party is relying on any collateral, oral or written representations, or promise as an inducement to enter into this Settlement Agreement. All previous agreements between the parties regarding the subject matter hereof are merged herein. The terms of this Settlement Agreement are fully understood and voluntarily accepted by the Parties, and are not subject to modification or waiver except by means of a writing signed by the Parties. The Parties acknowledge and represent to each other that they have read this Settlement Agreement carefully, understand it, and have had the advice of counsel before signing same.

13. WARRANTY OF CAPACITY TO EXECUTE SETTLEMENT AGREEMENT. Each party represents and warrants that he, she, or it is properly identified and has the authority to enter into this Settlement Agreement and execute the associated documents. Each party represents and warrants that he, she, or it has not otherwise sold, assigned, transferred, conveyed or disposed of all or any portion of the claims, demands, liabilities, debts, rights, actions, costs, fees, expenses, compensation, causes of action, assets, and titles referred to in this Settlement Agreement and/or in the documents attached hereto, except as specifically stated herein or the documents incorporated by reference into this Settlement Agreement. Furthermore, the parties represent and warrant that no other person or entity related to him, her, or it has any interest in the property that is the subject of the Action or the claims asserted in the Action.

14. UNANIMOUS CONSENT OF THE MEMBERS OF CATO, LLC. By executing this Settlement Agreement, those parties to this Settlement Agreement who are members of Cato,

LLC represents, individually and as members of Cato LLC, that (s)he or it consents to Cato, LLC entering into this Settlement Agreement and executing this Settlement Agreement.

15. GOVERNING LAW. This Settlement Agreement shall be construed and interpreted in accordance with the laws of the State of South Carolina, without regard to conflicts of law principles.

16. SEVERABILITY. If any part or parts of this Settlement Agreement are held to be invalid or unenforceable, the Court shall nevertheless uphold and enforce the remaining provisions and construe the invalid portion(s), if any, as severable from the remaining terms of the Settlement Agreement.

17. ENTIRE DOCUMENT AND SUCCESSORS IN INTEREST. This Settlement Agreement, including all documents attached hereto or required herein, contains all agreements, conditions, promises, and covenants between the Parties regarding the matters addressed in it, and supersedes all prior or contemporaneous agreements, representations, or understandings with respect to the subject matter hereof. The Parties agree that the terms of this Settlement Agreement are contractual in nature and not a mere recital, and that these terms shall be binding on and inure to the benefit of the Parties' officers, employees, heirs, successors, and assigns.

18. CONSTRUCTION OF DOCUMENT. The Parties intend that the release provisions of this Settlement Agreement as set forth in paragraph 9 shall be construed as broadly and comprehensively as permitted by law.

19. EFFECTIVENESS. This Settlement Agreement is effective upon execution by all parties subject to the entry of the consent orders referenced herein. All requirements of this Settlement Agreement shall be completed on or before May 22, 2013 unless otherwise agreed to by the Parties.

20. COUNTERPARTS AND SIGNING. This Settlement Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which, together, shall constitute one and the same instrument. This Settlement Agreement may be executed by facsimile, which shall have binding effect. Copies of original execution pages of this Settlement Agreement shall have the same force and effect as the originals themselves.

IN WITNESS WHEREOF, the Parties set forth their hands and seals on the dates set forth below.

[SIGNATURES ON THE FOLLOWING PAGES]

T.E. Cato Estate, LLC, a South Carolina limited liability company [SEAL]

James Thomas Cato

By: James Thomas Cato, Manager and Authorized Member of the Company

Witness

Julia R Spencer

Witness 2

James Thomas Cato (SEAL)

James Thomas Cato

Witness 1

Julia R Spencer

Witness 2

AUTHORITIES CITED

255 S.C. 489
Supreme Court of South Carolina.

Dick BARTHOLOMEW, Respondent,
v.
Clyde H. McCARTHA, Donald Ray Shealy, individually and as partner in W. RayShealy and Son, a partnership, and W. Ray Shealy, individually and as partnerin W. Ray Shealy and Son, a partnership, of whom Donald Ray Shealy and W. RayShealy,individually and as partners, are, Appellants.

No. 19183. | March 4, 1971.

Action for injuries sustained in collision between automobile and truck. The Court of Common Pleas, Newberry County, Frank Eppes, J., dismissed complaint as to driver of automobile pursuant to settlement and denied truck driver's motion to dismiss and truck driver appealed. The Supreme Court, Brailsford, J., held that release of one tort-feasor does not release others who wrongfully contributed to plaintiff's injuries unless this was the intention of the parties, or unless plaintiff has, in fact, received full compensation amounting to a satisfaction.

Affirmed.

Attorneys and Law Firms

***490** ****913** Bernard Manning, Columbia, Robert D. Schumpert, of Pope & Schumpert, Newberry, for appellants.

E. Maxcy Stone, of Blease, Griffith, Stone & Hightower, Newberry, for respondent.

Opinion

BRAILSFORD, Justice:

Plaintiff was injured in a collision between an automobile driven by Clyde H. McCartha and a truck driven by W. Ray Shealy. He sued both drivers, charging that the negligence of ***491** each contributed to his injury. Thereafter, he accepted $14,000.00 from McCartha, and, in consideration of this payment, executed and delivered unto him an instrument styled 'Covenant Not To Sue'. At the same time he took an order dismissing the complaint as to McCartha, 'with prejudice.' After negotiations for settlement of plaintiff's claim against the defendant Shealy had failed, this defendant sought dismissal of the action against him upon the ground that the legal effect of the release of his codefendant was to release him from liability for plaintiff's injuries. The foundation of this appeal from the circuit court's contrary conclusion is the common-law rule that the release of one of multiple joint tort-feasors, regardless of the intention of the parties, releases all. The only issue on this aspect of the appeal is whether by virtue of this rule the court should have dismissed the action. We have neither adopted nor repudiated the rule relied upon. However, the result which we now reach was clearly foreshadowed in Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969), when we said:

'They invoke the ancient common-law rule that, regardless of the intention of the parties, the release of one joint tort-feasor releases all.

'This technical, often criticized rule, which rests upon the fiction, among others, that a release implies a satisfaction, has been the subject of much litigation in other jurisdictions. Courts and legislatures have been astute to mitigate its impact. The decided trend of modern authority is that the release of one tort-feasor does not release others who wrongfully contributed to plaintiff's injuries unless this was the intention of the parties, or unless plaintiff has, in fact, received full compensation amounting to a satisfaction. Professor Prosser says that by virtue of statutes in some states and court decisions in others, this is the rule now actually applied in some two-thirds of the American jurisdictions. Prosser on Torts, 272 (3d ed.). See also Annotation, 73 A.L.R.2d 403.

'No case in which this court has grappled with the problem has been cited, and we find none. We need not now either ***492** adopt or repudiate the controversial rule. We decline to give it novel application to the facts of this case, which do not involve a release from which the fiction of a satisfaction could be raised.' 252 S.C. at 224, 166 S.E.2d at 182.

****914** **[1]** Being untrammeled by the ancient rule which, in our view, tends to stifle settlements, defeat the intention of parties and extol technicality, we adopt the view that the release of one tort-feasor does not release others who wrongfully contributed to plaintiff's injuries unless this was the intention of the parties, or unless plaintiff has, in fact, received full compensation amounting to a satisfaction. It, therefore, becomes unnecessary for us to determine whether the instrument involved here is a release rather than a covenant. In either view of it, there was no error in overruling defendant's motion.

[2] [3] The appellant also excepts to the court's allowance of plaintiff's motion to amend the complaint by striking all reference to the defendant McCartha, with whom settlement had been effected. The allowance of the amendment appears to have been in furtherance of justice. Certainly, no abuse of discretion has been shown. The appellant contends, however, that the written order allowing the amendment was inconsistent with the court's oral ruling in disposing of the motion, stating that this change in the court's ruling either resulted from inadvertence or exceeded the authority of the judge. The record does not indicate that this complaint was brought to the attention of the circuit court, nor is it made the ground of an exception on this appeal. Hence, no issue thereabout is properly before us.

Affirmed.

MOSS, C.J., and LEWIS, BUSSEY and LITTLEJOHN, JJ., concur.

Parallel Citations

179 S.E.2d 912

End of Document

360 S.C. 149
Court of Appeals of South Carolina.

Lee BOWERS, As Guardian Ad Litem
For Jessica May Jones, A Minor
Under The Age Of (18), Plaintiff,
v.
South Carolina DEPARTMENT OF
TRANSPORTATION, Respondent,
and
Viola Bryan Byson, Appellant.
Larry Jones and Charlotte
Marie Jones, Respondents,
v.
South Carolina Department of
Transportation, Respondent,
and
Viola Bryan Byson, Appellant.
Tiffany Miranda Jones, Plaintiff,
v.
South Carolina Department of
Transportation, Respondent,
and
Viola Bryan Byson, Appellant.
and
Larry Jones and Charlotte Marie Jones, Appellants
v.
South Carolina Department of Transportation
and Viola Bryan Byson, Respondents.

No. 3810. | Heard May 12, 2004. | Decided June 1, 2004. | Rehearing Denied Aug. 23, 2004. | Certiorari Denied Oct. 5, 2005.

Synopsis

Background: Motorists and motorist's parents brought separate claims against South Carolina Department of Transportation (SCDOT), alleging that its negligence in failing to properly keep roadway clear of bushes and brush obstructed motorist's view of roadway, which led to collision causing serious injuries to motorists and passenger. SCDOT brought motion for summary judgment. The Circuit Court, Beaufort County, Jackson V. Gregory, J., granted motion. Plaintiffs appealed.

[**Holding:**] The Court of Appeals, Kittredge, J., held that releases signed by motorists and passenger barred their subsequent negligence suit against SCDOT.

Affirmed.

****544 *151** Consolidated Appeals from Beaufort County; Jackson V. Gregory, Circuit Court Judge.

Attorneys and Law Firms

James H. Moss, of Beaufort, for Appellant Viola Bryan Byson.

Darrell Thomas Johnson, Jr. and Mills Lane Morrison, Jr., of Hardeeville, for Appellants Larry Jones and Charlotte Marie Jones.

Marshall H. Waldron, Jr., of Bluffton, for Respondent South Carolina Department of Transportation.

Opinion

KITTREDGE, J.:

These actions arise from an automobile accident involving Viola Bryan Byson and the minor daughter of Larry and Charlotte Jones. The Joneses and Byson settled their property damage and personal injury actions and each executed a release of all other claims arising from the accident. Each later raised separate claims against the South Carolina Department of Transportation (SCDOT), asserting the department's negligence contributed to the accident. In both cases, the circuit court granted summary judgment in favor of SCDOT on the grounds the action was barred by the releases. We consolidate these appeals pursuant to Rule 214, SCACR, and affirm.

FACTS/PROCEDURAL HISTORY

In December 1998, Appellant Viola Byson was driving on Highway 21 in Beaufort County. At the same time, Appellant Charlotte Jones was traveling in the family pickup truck driven by her daughter, Tiffany Jones. The Joneses drove out of a parking lot along the highway into the path of Byson's car. The two vehicles collided causing serious injuries to all parties.

Byson later filed suit against Tiffany Jones, alleging her negligence caused the accident. In March 2000, Byson and Tiffany Jones settled the case. Byson accepted $9,000 from Tiffany Jones' insurance company and signed a release. From *152 the same carrier, Larry and Charlotte Jones accepted insurance payments for their property damage and personal injuries, and they too signed a release. The Joneses and Byson were represented by counsel.

The releases executed by Byson and the Joneses are identical, except for the signatures and amount of consideration. In pertinent part, they provide:

> [T]he undersigned hereby releases and forever discharges [the tort-feasor] and all other persons, firms or corporations liable or, who might be claimed to be liable ... from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever, and particularly on account of all injuries, known and unknown, both to person and property, which have resulted or may in the future develop from an accident which occurred on or about the 23 day of December, 1998 at or near Beaufort, S.C. .... Undersigned hereby declares that the terms of this settlement have been completely read and are fully understood and voluntarily accepted for the purpose of making a full and final compromise adjustment and settlement of any and all claims, disputed or otherwise, on account of the injuries and damages above mentioned, and for the express purpose of precluding forever any further or additional claims arising out of the aforesaid accident.

Shortly after signing the releases, the Joneses and Byson asserted separate claims against the SCDOT, alleging its negligence contributed to the accident. Specifically, they claimed SCDOT breached its duty to properly keep the roadway clear of bushes and brush thereby obstructing Tiffany Jones' view of the roadway and preventing her from safely entering traffic on Highway 21. On SCDOT's motion for summary judgment, the circuit court dismissed both claims, finding the suits were barred by the "clear and **545 unequivocal" terms of the releases. [1] The Joneses and Byson appeal.

1 SCDOT moved for summary judgment on multiple grounds. The circuit court granted summary judgment only as to the releases. The balance of the motion was denied due to disputed "factual issues."

STANDARD OF REVIEW

A trial court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, *153 and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; *see also Tupper v. Dorchester County,* 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997); *Wells v. City of Lynchburg,* 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct.App.1998). However, the circuit court may properly consider only "such facts as would be admissible in evidence." Rule 56(e), SCRCP; *Hall v. Fedor,* 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct.App.2002) (stating "materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence"). In reviewing a grant of summary judgment, this court applies the same standard that governs the circuit court: summary judgment is proper when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; *Baughman v. American Tel. & Tel. Co.,* 306 S.C. 101, 114-15, 410 S.E.2d 537, 545 (1991).

DISCUSSION

[1] Appellants argue the circuit court erred by finding their claims against SCDOT were barred by the releases they signed (collectively, the "Release"). We disagree.

[2] [3] [4] The Release is a contract. *See Hyman v. Ford Motor Co.,* 142 F.Supp.2d 735 (D.S.C.2001) (applying South Carolina law, contract principles invoked to determine validity of a release); *Lowery v. Callahan,* 210 S.C. 300, 300, 42 S.E.2d 457, 458 (1947) (noting that the "same principles of adequacy of consideration which apply to other contracts, govern as to releases"); 18 S.C. Jur. *Release* § 2 (2003)

("Because a release is a contract, principles of law applicable to contracts generally are also applicable to releases."). "In construing terms in contracts, this Court must first look at the language of the contract to determine the intentions of the parties." *C.A.N. Enterprises, Inc. v. South Carolina Health & Human Services Fin. Comm'n,* 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). Since the Release unambiguously sets forth the contracting parties' intent, we are bound by that clearly expressed intent without resort to extrinsic evidence. "Extrinsic evidence giving the contract a different meaning from that ***154** indicated by its plain terms is inadmissible." *Id.* at 377-78, 373 S.E.2d at 586. Accordingly, the circuit court applied the proper summary judgment standard and correctly determined Appellants' unmistakable intent from the terms of the Release without resort to affidavits and deposition excerpts. *Hall,* 349 S.C. at 175, 561 S.E.2d at 657.

In *Bartholomew v. McCartha,* 255 S.C. 489, 179 S.E.2d 912 (1971), our supreme court stated that "the release of one tort-feasor does not release others who wrongfully contributed to plaintiff's injuries unless this was the intention of the parties, or unless plaintiff has, in fact, received full compensation amounting to a satisfaction." *Id.* at 491, 179 S.E.2d at 913. The circuit court based its determination on both prongs of *Bartholomew,* concluding that, under the terms of the Release, the parties received full compensation and intended that all claims for injuries would be relinquished. We agree.

The terms of the Release do not evince an intent to limit its scope to any specifically identified parties. Rather, the Release is general and all encompassing in its scope. It clearly states that the Appellants released the tort-feasor "and all other persons, firms or corporations liable, or who might be claimed to be liable." This language is a clear, explicit, and unequivocal indication of the parties' intent that *all* claims arising from the accident-now and in the future-are barred under the terms of the Release. Had Appellants intended a contrary result and desired to limit the operation of the Release to named persons only, the terms of the Release could have been easily tailored to ****546** that end. We are constrained by the plain, unambiguous language of the Release to find that Appellants' claims against SCDOT fall within the terms of the Release.

This result is also compelled under the second prong of *Bartholomew.* The Release clearly and unequivocally contemplates that the respective settlement payments to Appellants constituted a "full compensation amounting to a satisfaction."

Appellants, however, argue that "damages to be awarded for injury and resulting pain and suffering cannot be determined with mathematical precision" and this determination is, therefore, always "an issue of fact." They essentially argue that full compensation is always a function of the jury's discretion, rendering summary judgment unavailable. While ***155** we agree that damages, especially non-pecuniary damages, in a personal injury claim are difficult to ascertain in light of the broad discretion accorded the trier of fact, Appellants misconstrue the precise issue before us. The issue is not determining the exact amount (assuming liability) a jury would award. Instead, the issue is "full compensation *amounting to a satisfaction.*" *Id.* at 491, 179 S.E.2d at 913. (emphasis added)

[5] A "satisfaction" is generally defined as "[t]he discharge of an obligation by paying a party what is due to him" or "[t]he performance of a substituted obligation in return for the discharge of the original obligation." *Black's Law Dictionary* 1342 (6th ed.1990). In cases involving a disputed or liquidated claim arising in contract or tort, the parties will reach an "accord" whereby one of the parties agrees to accept as "satisfaction" of the disputed claim some performance or undertaking different from that which he considers himself entitled. *See South Carolina Farm Bureau Mut. Ins. Co. v. Kelly,* 345 S.C. 232, 239, 547 S.E.2d 871, 875 (Ct.App.2001) (noting that "[a]n accord and satisfaction occurs when there is (1) an agreement to accept in discharge of an obligation something different from that which the creditor is claiming or is entitled to receive; and (2) payment of the consideration expressed in the new agreement.") (quoting *Tremont Constr. Co. v. Dunlap,* 310 S.C. 180, 182, 425 S.E.2d 792, 793 (Ct.App.1992); *Mercury Marine Div. v. Costas,* 288 S.C. 383, 386, 342 S.E.2d 632, 633 (Ct.App.1986)). Indeed, parties regularly reach compromise settlements for a variety of reasons, including the vagaries and unpredictability of litigation and the desire for finality. Where, as here, a party accepts "a full and final compromise adjustment and settlement of any and all claims," such amounts to a *Bartholomew* satisfaction, thereby extending the preclusive effect of the release to nonparties to the instrument.

We reject the suggestion that *Bartholomew v. McCartha* has been overruled by the Uniform Contribution Among Tortfeasors Act (UCATA). S.C.Code Ann. §§ 15-38-10 to 70 (Supp.2003). In our judgment, UCATA mirrors the rule in *Bartholomew.* Section 15-38-50 provides in part that a release "does not discharge any of the other tortfeasors from liability ... *unless its terms so provide* ...."(emphasis added). In any event, UCATA "shall not apply to governmental entities ... [and the] South Carolina Tort Claims Act is the ***156** exclusive and sole remedy for any tort committed by an employee of a governmental entity...." *S.C.Code Ann.* § 15-38-65 (Supp.1999). UCATA, thus, does not apply to SCDOT.

CONCLUSION

The terms of the Release here are clear and unambiguous: Appellants released "all other persons, firms or corporations liable or, who might be claimed to be liable" and the settlement was accepted as a "full and final compromise ... precluding forever any further or additional claims arising out of the aforesaid accident." The Release, by its unmistakable terms, establishes Appellants' intent as a matter of law, and forecloses the need for any further inquiry regarding both its scope and the presence of "full compensation amounting to a satisfaction." The explicit, plain language of the Release permits no other finding. We therefore find the Release bars Appellants' actions against SCDOT. The circuit court's grant of summary judgment in favor of Respondent is

AFFIRMED.

ANDERSON and HUFF, JJ., concur.

Parallel Citations

600 S.E.2d 543

End of Document

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT
Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust by and through David A. Burton as Attorney-in-Fact, Individually and in the right and on behalf of T.E. Cato Estate, LLC, Plaintiff, vs. Carroll M. Pitts, Jr., Esq. and Robinson Bradshaw & Hinson, P.A., Defendants.	)	Civil Action No. 2010-CP-46-2267 **<u>Trial Brief</u>** **<u>The Plaintiff's Ratification of the Underlying Transaction Precludes this Claim</u>**

The Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust (the "Burton Trust") is precluded from recovering against Carroll M. Pitts, Jr., Esq. ("Pitts") and Robinson Bradshaw & Hinson, P.A., (collectively, "RBH") in this lawsuit because the Burton Trust ratified the underlying commercial transaction by negotiating and retaining the proceeds of the sale to Thomasson Apartments, LLC ("TAL").

In the commercial land transaction underlying this case, each of the Cato heirs were paid their proportionate share of the proceeds from the December 12, 2007, closing with TAL. For its 20% share of the property sold, the LLC paid the Burton Trust $124,200 by a check dated December 20, 2007, which the Burton Trust negotiated on April 11, 2008[1]. (*See* Check attached as **Exhibit A.**) The Burton Trust retained these proceeds and never attempted to return the funds to the LLC.

[1] The LLC distributed 70% of the net amount received at the closing and withheld the remainder to pay the operating costs of the LLC. Accordingly, the Burton Trust received $124,200, which is 20% of the total funds distributed.

ARGUMENT

The Burton Trust's acceptance and retention of the proceeds from the December 2007 closing ratified that transaction, and therefore, preclude the Burton Trust from recovering against RBH in this lawsuit.

"Ratification, as the term implies, is the adoption by one person of an act done or bargain made for him by another under such circumstances that he would not have been bound but for his subsequent assent." *Brazell Bros. Contractors v. Hill*, 245 S.C. 69, 74, 138 S.E.2d 835, 837 (1964). The three essential elements necessary to prove ratification are (1) acceptance by the principal of the benefits of the agent's acts; (2) full knowledge of the facts; and (3) circumstances or an affirmative election indicating an intention to adopt the unauthorized arrangements. *Lincoln v. Aetna Cas. & Sur. Co.*, 300 S.C. 188, 191, 386 S.E.2d 801, 803 (Ct. App. 1989).

Each of the elements of ratification is satisfied here. First, there is no question that the Burton Trust accepted and retained the benefits of Mr. Pitts' acts by negotiating the proceeds of the sale to TAL. Second, the Burton Trust had full knowledge of the facts at the time it negotiated the check in April 2008 because this was five months after the closing was completed, and additionally, it consulted attorneys Dale Dove and Doug Gay before negotiating this check. (Burton Dep. 131:15-25; May 12, 2010.) Third, the Burton Trust never tendered the check back to the LLC, and thus its retention of the proceeds was an affirmative election indicating its intent to adopt the sale to TAL. Therefore, the Burton Trust's acceptance and retention of the proceeds of the sale to TAL ratified the underlying transaction and the work completed by Mr. Pitts.

CONCLUSION

Because the Burton Trust's acceptance and retention of the proceeds of the sale to TAL ratified the underlying transaction, the Burton Trust is precluded from recovering against RBH in this law suit.

Respectfully submitted,

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

York, South Carolina

December 16, 2014

~#4815-5871-5167~

EXHIBIT A

T E CATO ESTATE LLC
1033 VALLEY FORGE ROAD
LAKE WYLIE, SC 29710
(803) 831-5559

1502

DATE 12/20/07

PAY One hundred and twenty-four thousand and two hundred DOLLARS $ 124,200.00

TO THE ORDER OF S. M. Barton and M. C. Barton A/B Trust

JAMES THOMAS CATO, GENERAL MANAGER

FOR 70% of 1/21,000.00 DISTRIBUTION

James Thomas Cato

[redacted]

WACHOVIA
Wachovia Bank, N.A.

S M Barton - Trustee
M C Barton
Trustee

FOR DEPOSIT ONLY
STATE EMPLOYEES' CREDIT UNION
RALEIGH-BLUE RIDGE RD - 001 - TELLER #2

Account	Date	Amount	Serial Number	Sequence	Status
[redacted]	4/11/2008	$124,200.00	[redacted]		Posted Items

Wachovia Bank, N.A. certifies that the above image is a true and exact copy of the original item issued by the named customer, and was produced from original data stored in the archives of Wachovia Bank, N.A. or its predecessors.

EXHIBIT
Cato 31
11/22/2010 JS

BWB 273

RBH 002670 00766

AUTHORITIES CITED

245 S.C. 69
Supreme Court of South Carolina.

BRAZELL BROTHERS CONTRACTORS, Respondent,
v.
Fred C. HILL, Appellant.

No. 18273. | Nov. 9, 1964.

Action by partnership against automobile owner for damage to truck involved in collision with automobile, wherein automobile owner counterclaimed for damage to the automobile. An uncontested order dismissing the counterclaim in reliance upon release obtained by partnership's insurer was secured, and automobile owner thereupon moved for leave to amend answer by adding defense that reliance upon release was bar to partnership's recovery. The Common Pleas County Court of Richland County, Legare Bates, J., refused to allow the amendment, holding that the plea was insufficient to constitute a defense, and automobile owner appealed. The Supreme Court, Brailsford, J., held that partnership's reliance upon release in securing uncontested order dismissing counterclaim did not bar recovery by partnership where release provided only that it discharged partnership from any and all claims accruing to automobile owner.

Affirmed.

West Headnotes (7)

[1] **Action**
⇐ Parties and interests involved

Claims of opposing parties arising out of vehicular collision are separate and distinct causes of action, and either party when sued by the other has election of filing counterclaim or commencing independent action in any tribunal having jurisdiction of the controversy.

1 Cases that cite this headnote

[2] **Abatement and Revival**
⇐ Former action instituted by defendant

In case wherein one party involved in vehicular collision sues the other, and the other commences an independent action against the first, pendency of the first action is not ground for abatement of the second.

Cases that cite this headnote

[3] **Principal and Agent**
⇐ Nature and Grounds in General

"Ratification" is adoption by one person of act done or bargain made for him by another under such circumstances that he would not have been bound but for his subsequent assent.

Cases that cite this headnote

[4] **Principal and Agent**
⇐ Implied Ratification

Ratification may be either express or implied.

Cases that cite this headnote

[5] **Insurance**
⇐ Construction and Effect of Settlement or Release

Partnership's reliance upon release obtained by its insurer as bar to automobile owner's counterclaim against partnership for damage as result of collision with partnership's truck in order to secure dismissal of counterclaim was such an adoption thereof as to import partnership's assent to whatever was undertaken by insurer in order to induce automobile owner to settle.

2 Cases that cite this headnote

[6] **Principal and Agent**
⇐ Nature and Grounds in General

To "ratify" is to sanction or affirm, to give validity to something done for one by another, not to contract anew or upon different terms.

Cases that cite this headnote

[7] **Insurance**

Ratification

Partnership's reliance upon release obtained by its insurer from automobile owner in securing uncontested order dismissing counterclaim of automobile owner against partnership suing owner for damage to truck involved in collision with automobile did not constitute ratification of settlement and did not bar recovery by partnership for damage to truck where release provided only that it discharged partnership from any and all claims accruing to automobile owner.

3 Cases that cite this headnote

Attorneys and Law Firms

*71 **836 Boyd, Bruton & Lumpkin, Milledge T. Pitts, Columbia, for appellant.

Townsend & Townsend, Columbia, for respondent.

Opinion

*72 BRAILSFORD, Justice.

Brazell Brothers, a partnership, sued Fred C. Hill for damage to a truck, allegedly caused by the negligent operation of Hill's automobile with which the truck was in collision. Denying negligence in the operation of his automobile and alleging negligence of Brazells' driver, Hill filed a counterclaim for damage to his vehicle.

After the commencement of the action and the filing of the counterclaim, the Brazells' liability insurance carrier paid to Hill the sum of $475.00 as consideration for a release discharging the Brazells from any and all claims accruing to Hill as a result of the collision. The unilateral release was signed by Hill alone, and the consideration furnished by the insurance carrier was executed by the payment of the sum acknowledged. The release specified that this payment should not be construed as an admission of liability by Brazell Brothers, and that the entire agreement of the parties was expressed in the writing.

Some six months later, counsel for Brazell Brothers, relying upon the release as a bar to Hill's claim, secured an uncontested order dismissing the counterclaim. Thereupon, counsel for Hill moved for leave to amend the answer by adding a third defense as follows:

'That the defendant was paid the sum for Four Hundred Seventy-five Dollars ($475.00) by a liability insurance company, Commercial Insurance Company of Newark, New Jersey, representing plaintiff's interests, in full compromise and settlement of the damages which the defendant sustained in the collision; that such compromise and settlement was ratified and accepted by plaintiff in that his attorneys successfully moved for a dismissal of the defendant's counterclaim, on the basis of the release which defendant executed *73 pursuant to such compromise and settlement; that the compromise, settlement and release constitute an accord and satisfaction between the parties relating to the subject matter of this lawsuit and, as such, is a bar to the plaintiff's action and recovery.'

The Court refused to allow the amendment, holding that, in the light of undisputed facts, the plea was insufficient to constitute a defense. Hill has appealed on one exception which challenges this conclusion.

Hill does not contend that the payment to him by the insurance carrier of a sum of money in settlement of the cause of action set forth in his counterclaim, without participation by Brazell Brothers, was a bar to the cause of action set forth in the complaint. He does contend that by relying upon the release the Brazells *ratified* the compromise and settlement of his claim; wherefore, quoting from the plea, 'the compromise, settlement and release constitute an accord and satisfaction between the parties * * * (and) a bar to plaintiff's action.'

**837 Counsel rely upon the North Carolina cases of Bradford v. Kelly, 260 N.C. 283, 132 S.E.2d 886, and Keith v. Glenn, 262 N.C. 284, 136 S.E.2d 665, as supporting the conclusion that, after ratification, the compromise and settlement of Hill's claim by the insurance carrier is a bar to this action. These cases, and others cited therein, commit the North Carolina courts to this view, apparently without regard to the terms of the compromise and settlement or the intention of the parties. This result may be explained by North Carolina doctrine that as between the parties responsible for the operation of motor vehicles which have been in collision, '*[t]here is in this case but one cause of action, the collision,* and the remedy sought by plaintiff and that sought by the defendant depend upon identically the same state of facts and must be settled in one action.' (Emphasis added.) Allen v. Salley, 179 N.C. 147, 101 S.E. 545, 546, quoted with approval in Bullard v. Berry Coal & Oil Company, 254 N.C. 756, 119 S.E.2d 910, 911.

*74 When the claims of the opposing parties are viewed as a single cause of action, it is plausible to import mutuality to any settlement between them, thus barring the right of either party to pursue the other, even though the release is, by its terms, unilateral.

[1] [2] With us the rule is that the claims of opposing parties arising out of a vehicular collision are separate and distinct causes of action. Either party, when sued by the other, has the election of filing a counter-claim for his damages, or commencing an independent action in any tribunal having jurisdiction of the controversy. In such a case, the pendency of the first action is not ground for abatement of the second, even though the two actions are between the same parties and arise out of the same collision. Collins v. Johnson, 242 S.C. 112, 130 S.E.2d 185.

By the terms of its contract with the Brazells, the insurance carrier assumed responsibility for defending or settling the cause of action stated against them in Hill's counterclaim. It had the authority to settle this claim, with or without the consent of the insureds, whenever, in its judgment, this course was expedient. Since this cause of action was separate and distinct from the other, we perceive no legal impediment to settlement of it alone, leaving the Brazells untrammeled in the pursuit of their own claim, as to which the carrier owed no responsibility and had no authority.

Admittedly, the Brazells would not have been bound even if the carrier had expressly undertaken to settle their cause of action against Hill without their assent, Annotation, 32 A.L.R.2d 937. As already stated, Hill's reliance is upon their subsequent conduct as a ratification of the compromise and settlement of his claim against the Brazells.

[3] [4] [5] Ratification, as the term implies, is the adoption by one person of an act done or bargain made for him by another under such circumstances that he would not have been bound but for his subsequent assent. *75 First Carolinas Joint Stock Land Bank v. Stuyvesant Ins. Co., 168 S.C. 37, 166 S.E. 883, 886. Ratification may be either express or implied. We think that the reliance by the Brazells upon the release was such an adoption of it as to import their assent to whatever was undertaken by the carrier in order to induce Hill to settle.

[6] To ratify is to sanction or affirm, to give validity to something done for one by another, not to contract anew or upon different terms. Therefore, the adoption by the Brazells of the bargain made for them by the carrier can rise no higher as a bar to this action than the terms of that agreement. The critical question is whether the record is reasonably susceptible of an inference that the carrier and Hill intended that their agreement should acquit Hill of liability to the Brazells. If not, the subsequent ratification of the transaction by the Brazells, which raised no new promise, could not have that effect.

**838 [7] The written release is the sole evidence of the terms of the compromise and settlement between Hill and the carrier. No attempt whatever has been made to vary, enlarge or contradict its terms, which are clear and unambiguous. It would be useless to quote it or further expound its provisions. It is a classic example of a unilateral contract; a promise by Hill only, the consideration on the other side being executed by the payment of a sum of money. 43 Words and Phrases 242; McMahan v. McMahon, 122 S.C. 336, 115 S.E. 293, 26 A.L.R. 1295.

It is said of compromise and settlement agreements in 15 Am.Jur.2d 951, that 'the mutual concessions which constitute a compromise generally involve the performance or promise (express or implied) of (1) the relinquishment of a claim by one party in return for the relinquishment of a claim by the other party; or (2) the relinquishment of a claim by one party in return for a payment or transfer of property by the other party; or (3) a payment or transfer of property by one party in return for a payment or transfer of property by the other party-accompanied by at least an implied relinquishment of one or more claims.'

*76 The release here evidences a bargain of the second class, the relinquishment of a claim by one party in consideration of a payment by the other. With an action for damages pending against him in which he had filed a counterclaim, Hill simply released his claim for damages without exacting in return an acquittal from the claim asserted against him. The ratification of the compromise and settlement by the Brazells can not raise a promise on their part to forego something which the carrier did not renounce for them. In short, there was no attempted compromise and settlement of the Brazells' claim by the carrier to which they could be bound by ratification.

Counsel for Hill also cite Cochran v. Bell, 102 Ga.App. 617, 117 S.E.2d 645, and Aetna Casualty & Surety Co. v. Brooks, 218 Ga. 593, 129 S.E.2d 798, as supporting his appeal. We have carefully examined these opinions and gather therefrom that what we regard as the controlling point on this appeal was not relied upon by counsel in either case. Therefore, we respectfully decline to follow them.

Affirmed.

TAYLOR, C. J., and MOSS, LEWIS and BUSSEY, JJ., concur.

Parallel Citations

138 S.E.2d 835

300 S.C. 188
Court of Appeals of South Carolina.

Margie LINCOLN, Individually and as guardian of Tonia M. Lincoln and Roosevelt E. Lincoln, Respondent,
v.
AETNA CASUALTY & SURETY COMPANY, Appellant.

No. 1425. | Heard Nov. 6, 1989. | Decided Dec. 4, 1989.

General guardian for minor children brought action against workers' compensation insurer to recover money it agreed to pay to children as benefits resulting from death of their father. The Common Pleas Court, Charleston County, Ellis B. Drew, Special Circuit Judge, entered judgment in favor of guardian. Insurer appealed. The Court of Appeals, Gardner, J., held that general guardian did not ratify any conduct of office of judge of probate, whose court clerk embezzled the workers' compensation funds.

Affirmed.

West Headnotes (5)

[1] **Principal and Agent**
Agency Distinguished from Other Relations

Probate judge was not an "agent" of guardian with respect to handling of workers' compensation benefits for guardian's children inasmuch as guardian had no right to control acts of probate judge.

Cases that cite this headnote

[2] **Principal and Agent**
Acts Not Amounting to Ratification

General guardian's conduct in letting office of judge of probate deposit workers' compensation checks, which were for benefit of her children, without her endorsement did not constitute ratification of acts of office and did not preclude guardian from recovering from workers' compensation insurer money which was embezzled by court clerk; guardian never signed agreement authorizing endorsement or direct deposit of checks by judge of probate and had no knowledge of embezzlement until after investigation by new judge and thereafter she promptly took action to recover embezzled funds.

Cases that cite this headnote

[3] **Principal and Agent**
Nature and Grounds in General

Principal and Agent
Implied Ratification

"Ratification," as it relates to law of agency, means express or implied adoption and confirmation by one person of act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent.

8 Cases that cite this headnote

[4] **Principal and Agent**
Nature and Grounds in General

Principal and Agent
Knowledge of Facts

Principal and Agent
Acceptance of Benefits

Principal's ratification of agent's conduct exists upon occurrence of acceptance by principal of benefits of agent's acts, full knowledge of facts, and circumstances or affirmative election indicating intention to adopt unauthorized arrangement.

12 Cases that cite this headnote

[5] **Principal and Agent**
Implied Ratification

In the absence of circumstances putting reasonably prudent man on inquiry, ratification of agent's act cannot be implied against principal.

1 Cases that cite this headnote

Attorneys and Law Firms

****802** ***189** W. Andrew Gowder, Jr., of Wise & Cole, Charleston, for appellant.

Susan Sweat, of Altman & Sturgis, Charleston, for respondent.

Opinion

GARDNER, Judge:

Margie Lincoln (Lincoln), as general guardian for her two minor children, sued Aetna to recover money due under an agreement for payment of those sums due the children as workers' compensation benefits resulting from the death of their father. Both parties moved for summary judgment. The appealed order awarded summary judgment to Lincoln. We affirm.

ISSUE

The only issue of merit is whether the trial judge erred in holding as a matter of law that no agency relationship existed by virtue of Lincoln's alleged ratification of the activities of the Colleton County Probate Court.

FACTS

Margie Lincoln (Lincoln) is the mother of two children. She is described by her attorney as lacking a formal education. Her husband was killed by an industrial accident in 1979. A workers' compensation award was made to her and to her two children.

On May 22, 1980, Lincoln was appointed general guardian of the children by order of the then Judge of Probate for Colleton County, Marguerite S. Kinard (Judge Kinard) whose Clerk of Court was Janeal S. Steltzer.

Judge Kinard directed Edgar Bethea, Aetna's claims adjuster, to mail the children's compensation checks, which were made payable to Lincoln as general guardian, to the Judge of Probate's office. This was never put in writing.

Lincoln opened a savings account for the two children at ***190** the First Federal Savings and Loan Association of South Walterboro. On September 22, 1980, Lincoln signed a joint control agreement with the Savings and Loan Association whereby she agreed Judge Kinard would have joint control of withdrawals made from the account.

The record reflects that Lincoln initially went by the Judge of Probate's office to endorse the checks but was told that it was not necessary for her to continue to endorse the checks. She testified that she did not authorize the Judge of Probate to deposit the checks to the account without her signature. She then testified "[T]hey just told me I didn't have to come back and sign it to put it in the bank. So I trust them because the money was going." Lincoln signed no agreement authorizing either endorsement or direct deposit of the checks by the Judge of Probate. She testified that she thought the money was being held for her children. She further testified that she had no other choice than to let the Judge of Probate deposit the funds if she wanted to have the money for her children.

I.A. Smoak, III, was elected Judge of Probate in 1982. Upon his election he discovered that Steltzer had fraudulently endorsed and cashed a number of trust account checks, including many of those made payable to Lincoln as general guardian for her children. A SLED investigation followed and Steltzer, arrested for embezzlement, pled guilty to a lesser charge. Subsequently, Lincoln discovered that Steltzer had forged and embezzled approximately $17,000.00 of the checks made payable to Lincoln as general guardian for her children. When alerted, Lincoln employed an attorney and recovered approximately $8,900.00 from the Savings and Loan and those funds recovered by Aetna from the bank which had cashed the checks. There remained a balance due Lincoln of $8,048.64 representing checks issued from July 2, 1981, through November 17, 1983.

Judge Smoak, in his affidavit of record, stated the only instrument signed by Lincoln which was of record in the Judge of Probate's office was the joint control agreement with reference to the savings account in the Savings and Loan Association.

After full argument, briefing and the filing of the deposition of Lincoln and other ****803** affidavits, both parties moved for ***191** summary judgment. By order of July 25, 1988, the trial judge granted summary judgment to Lincoln in the amount of $10,594.38, which included prejudgment interest from August 4, 1986, the date that Lincoln, through her attorney, made demand for payment.

DISCUSSION

[1] The trial judge held in the appealed order that the Judge of Probate was not an agent of Lincoln because Lincoln had no right to control the acts of the Judge of Probate. This is good law. *See Fernander v. Thigpen,* 278 S.C. 140, 293 S.E.2d 424 (1982). We affirm this ruling; however, the relationship of agency need not depend upon the express appointment of the agent but may be implied from the words and conduct and circumstances of the case. *Moore v. Hardaway Contracting Co.,* 193 S.C. 299, 8 S.E.2d 511 (1940).

[2] There is no dispute as to the facts; however, Aetna argues that from the admitted facts the trial judge should have concluded that Lincoln's conduct amounted to a ratification of the Probate Court's agency. We reject this contention.

[3] [4] Ratification, as it relates to the law of agency, means the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent. *Barber v. Carolina Auto Sales,* 236 S.C. 594, 115 S.E.2d 291 (1960). Ratification exists upon the concurrence of three elements; (1) acceptance by the principal of the benefits of the agent's acts, (2) full knowledge of the facts, and (3) circumstances or an affirmative election indicating an intention to adopt the unauthorized arrangements. *See* 2A C.J.S. *Agency* Section 71 (1972).

[5] We hold under the facts of this case that Lincoln had no knowledge of the embezzlement of the funds which were supposed to be deposited to her account as guardian for her children in the Savings and Loan Association until after the investigation by Judge Smoak and that thereafter she promptly took action to recover the embezzled ***192** funds.[1] The Supreme Court of this state recognizes the principle that while generally the knowledge of an agent acquired in the course of his agency is chargeable to his principal, this rule does not apply when knowledge was obtained by the agent while engaged in the perpetration of a fraud on his principal. *Brown v. Bailey,* 215 S.C. 175, 54 S.E.2d 769 (1949). This rule is consonant with the law of the land to the effect that an agent's act, which is a fraud on his principal or which is illegal, cannot be ratified. *See* 2A C.J.S. *Agency* Section 68 (1972).

1 In the absence of circumstances putting a reasonably prudent man on inquiry, ratification of an agent's act cannot be implied against the principal, in this case Lincoln, who was ignorant of the facts. *Moore v. Hardaway Contracting Co., supra.*

Moreover, there is no evidence of record indicating Lincoln either expressly or impliedly adopted the embezzlement of her children's funds as her own act.

For the reasons above stated, the contention that Lincoln ratified the embezzlement of the funds is rejected; the appealed order is therefore affirmed.

AFFIRMED.

SANDERS, C.J., and GOOLSBY, J., concur.

Parallel Citations

386 S.E.2d 801

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF YORK	)	SIXTEENTH JUDICIAL CIRCUIT

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

Plaintiff,

vs.

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

Defendants.

Civil Action No. 2010-CP-46-2267

Trial Brief

The Plaintiff's Recovery in the Underlying Action Acts as a Setoff

Carroll M. Pitts, Jr., Esq., ("Pitts") and Robinson Bradshaw & Hinson, P.A. (collectively, "RBH") are entitled to a setoff in the amount of $249,000, because the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust (the "Burton Trust"), recovered that amount from adverse parties in the underlying transaction.

FACTS

In the commercial land transaction underlying this case, each of the Cato heirs received their proportionate share of the proceeds from the December 12, 2007, closing with Thomasson Apartments, LLC ("TAL"). For its 20% share, the Burton Trust received a check in the amount of $124,000 which it negotiated in April 2008. Additionally, as a result of the April 4, 2013, settlement of the Partition Action filed to complete the sale to TAL, the Burton Trust received another $249,000. It is undisputed that the Burton Trust negotiated and retained these funds.

In total, the Burton Trust received $373,200 for its 20% share in the property sold to TAL ($249,000 from the Partition Action, and $124,200 from the December 2007 closing).

ARGUMENT

RBH is entitled to a setoff in the amount of $249,000, because the Burton Trust recovered that amount from adverse parties in the underlying transaction.

Under South Carolina law, "[a] settlement by a joint tortfeasor 'reduces the claim against the others to the extent of any amount stipulated by the release or the covenant.'" *Smith v. Widener*, 397 S.C. 468, 471, 724 S.E.2d 188, 190 (Ct. App. 2012) (citing S.C. Code Ann. § 15–38–50(1)). In the context of a legal malpractice claim, "[t]he success of a client in settling or recovering from the adverse party will reduce the amount of the damages awarded against and, to that extent, benefit the attorney." Mallen & Smith, *Legal Malpractice* § 21:19 (2014 ed.). Stated differently, a plaintiff's settlement in the underlying transaction operates as a setoff against any damages he may later seek in a legal malpractice claim.

Courts around the country agree that a legal malpractice plaintiff is not entitled to double recovery based upon basic principles of fairness and justice. *See*, *e.g.*, *Katzenberger v. Bryan*, 206 Va. 78, 85, 141 S.E.2d 671, 676 (1965) (holding that because the plaintiffs settled the underlying action, they were "not entitled to secure a double recovery" and were therefore "estopped from collecting the full amount in the [legal malpractice] action if they were partially paid therefor[e] in the [underlying action]"); *Lowman v. Karp*, 190 Mich. App. 448, 453, 476 N.W.2d 428, 431 (1991) ("any settlement in the underlying action would most likely be set off against the client's recovery in the subsequent malpractice lawsuit").

Here, it is undisputed that the Burton Trust recovered $249,000 from adverse parties in the settlement of the partition action. The Burton Trust negotiated and retained these funds for its own benefit. It cannot now procure a double recovery from RBH based on the same transaction. Therefore, RBH is entitled to a setoff in the amount of $249,000 against any damages that could be awarded against it in this lawsuit.

Furthermore, Dr. Burton's testimony proves that the Burton Trust was fully satisfied by its recovery in the underlying action. When asked if the Burton Trust benefitted economically from the Partition Action, Dr. Burton admitted that "[i]t got its fair share. Let's put it that way." (Burton Dep. 88:7-8; May 12, 2014.) Further, Dr. Burton testified that the Burton Trust "received money . . . for the sale of the land that [he] felt [it] was entitled to." (*Id.* 89:4-6.) Therefore, Dr. Burton's own testimony proves that the Burton Trust has been fully compensated for its 20% share of the property. Accordingly, any supplemental award in this case would impermissibly allow the Burton Trust to obtain a double recovery at the expense of RBH.

CONCLUSION

RBH is entitled to a setoff of in the amount of $249,000 against any judgment that could be awarded against it in this case because the Burton Trust recovered that amount from adverse parties in the underlying transaction.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

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December 16, 2014

~#4828-6816-7712~

AUTHORITIES CITED

397 S.C. 468
Court of Appeals of South Carolina.

Sandra C. SMITH, Respondent,
v.
Tracy E. WIDENER, Stacy E. Currie, Ronald Widener, The Estate of James Donald Epting, CitiStreet, LLC, and Karen S. Erickson, Defendants, of whom Tracy E. Widener, Stacy E. Currie and The Estate of James Donald Epting are the Appellants.

No. 4959. | Heard June 7, 2011. | Decided March 28, 2012.

Synopsis

Background: Ex-wife brought action against personal representatives of ex-husband's estate, and ex-husband's deferred compensation program, employee benefits provider, alleging claims for civil conspiracy, conversion, slander, and fraud against estate representatives, and negligence against benefits provider. Following a jury trial in which the jury found for ex-wife against estate representatives in the amount of $35,410.38, the Circuit Court, Richland County, G. Thomas Cooper, J., denied representatives' motion for a set off by the amount of a settlement between benefits provider and ex-wife. Personal representatives appealed.

[Holding:] The Court of Appeals of South Carolina Few, C.J. held that Circuit Court was required to grant representatives' request for a setoff.

Reversed and remanded.

Lockemy, J., filed dissenting opinion.

Attorneys and Law Firms

****189** Amy Lohr Gaffney and John S. Nichols, both of Columbia, for Appellants.

Karl Stephen Brehmer, of Columbia, for Respondent.

Opinion

FEW, C.J.

***470** In this appeal we hold that when a plaintiff seeks actual and punitive damages arising out of the same injury, the two types of damages are part of the same claim for purposes of determining whether a nonsettling defendant is entitled to a setoff to account for funds paid to the plaintiff by a settling defendant. We reverse the circuit court's order to the contrary.

I. Facts and Procedural History

In March 1985, James Donald Epting designated his wife, Sandra Smith, to be the beneficiary on his South Carolina Deferred Compensation Program account. In December 1990, Epting and Smith divorced. However, Epting did not remove Smith as his designated beneficiary. When Epting died in October 2006, the account held $75,410.38. Epting's daughters, Tracy Widener and Stacy Currie, were named personal representatives of Epting's estate. After discovering that Smith remained the designated beneficiary on the account, Widener and Currie asked Smith to sign a document to waive her beneficiary rights. Smith admitted to signing a document, but denied that the document she signed was a waiver of her beneficiary rights. For convenience, we refer to this document as the waiver form.

****190** Smith also signed another form, this one seeking to enforce her beneficiary rights. We refer to this form as the beneficiary distribution form. The beneficiary distribution form listed LPL Financial Corporation, a brokerage firm where Smith already had an account, as the recipient of the funds she expected to receive from Epting's account. Smith sent the beneficiary distribution form designating LPL to CitiStreet, LLC. CitiStreet was the employee benefits provider for the ***471** deferred compensation program, and controlled the funds from Epting's account. The beneficiary distribution form requested that CitiStreet transfer the $75,410.38 into Smith's account at LPL. At approximately the same time Smith sent the beneficiary distribution form, Widener and Currie sent the waiver form to CitiStreet.

CitiStreet processed Smith's beneficiary distribution form first, and placed $75,410.38 in Smith's account with LPL. Smith immediately withdrew $40,000.00. When CitiStreet received the waiver form from Widener and Currie, it issued a stop payment order while it reviewed the competing claims. CitiStreet eventually concluded the waiver form was valid. CitiStreet then contacted LPL, which in turn contacted Smith requesting the $40,000.00 be returned. Smith claimed her signature on the waiver form was forged and refused to return the money. CitiStreet sent the remaining $35,410.38

to Widener and Currie as personal representatives of Epting's estate.

Smith filed a lawsuit against Widener, Currie, Epting's estate, CitiStreet, and others. She asserted causes of action for civil conspiracy, conversion, slander, and fraud against Widener and Currie, and civil conspiracy, conversion, slander, and negligence against CitiStreet. At the beginning of trial, Smith settled with CitiStreet for $35,410.38. At the conclusion of the trial, the jury found in favor of Smith on her conversion cause of action against Widener and Currie in the same amount—$35,410.38. Widener and Currie made a motion asking that the damages awarded be set off by the amount of the settlement between CitiStreet and Smith. The trial court denied the motion. Widener and Currie appeal claiming the trial court erred in denying the setoff.

II. Applicable Law

[1] **[2]** "[T]here can be only one satisfaction for an injury or wrong." *Hawkins v. Pathology Assocs. of Greenville, P.A.,* 330 S.C. 92, 113, 498 S.E.2d 395, 407 (Ct.App.1998) (internal quotation marks omitted). A settlement by a joint tortfeasor "reduces the claim against the others to the extent of any amount stipulated by the release or the covenant." S.C.Code Ann. § 15–38–50(1) (2005). Therefore, before entering judgment ***472** on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury. *Hawkins,* 330 S.C. at 113, 498 S.E.2d at 406–07. When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law. *Ellis v. Oliver,* 335 S.C. 106, 112, 515 S.E.2d 268, 271–72 (Ct.App.1999). Under this circumstance, "[s]ection 15–38–50 grants the court no discretion ... in applying a set-off." 335 S.C. at 113, 515 S.E.2d at 272; *see also Vortex Sports & Entm't, Inc. v. Ware,* 378 S.C. 197, 210, 662 S.E.2d 444, 451 (Ct.App.2008).

[3] In this case, Smith's claim against CitiStreet was for the same injury for which she sought damages from Widener and Currie. The essence of all Smith's claims was that the actions of the defendants denied her the right to the remaining $35,410.38 after she withdrew the initial $40,000.00. While Smith stated that claim in various causes of action, some of which overlapped between Widener and Currie and CitiStreet and some of which did not, the injury Smith alleged she suffered as a result of the tortious conduct of all defendants was the same. Therefore, the trial court was required to grant the request for a setoff.

[4] Smith argues, however, that the settlement with CitiStreet was for punitive damages only, and thus there was no right to a setoff. We disagree. Smith's claim for punitive damages against CitiStreet was not a separate claim arising out of a separate injury ****191** as she argues. Punitive damages are a different type of damages from actual or nominal damages. However, when a plaintiff seeks actual and punitive damages in the same claim, both types of damages arise out of the same injury. Our courts have long recognized that punitive damages serve to compensate a plaintiff and vindicate his rights arising out of a wrong suffered or injury sustained. Our supreme court recently summarized this history in *O'Neill v. Smith,* 388 S.C. 246, 252, 695 S.E.2d 531, 534 (2010), stating:

> Exemplary or punitive damages go to the plaintiff, not as a fine or penalty for a public wrong, but in vindication of a private right which has been willfully invaded; and indeed, it may be said that such damages in a measure compensate ***473** or satisfy for the willfulness with which the private right was invaded, but, in addition thereto, operating as a deterring punishment to the wrongdoer, and as a warning to others.... Punitive damages have now come, however, to be generally, though not universally, regarded, not only as punishment for wrong, but as vindication of private right. This is the basis upon which they are now placed in this state.

388 S.C. at 252, 695 S.E.2d at 534 (quoting *Clark v. Cantrell,* 339 S.C. 369, 379, 529 S.E.2d 528, 533 (2000) (quoting *Rogers v. Florence Printing Co.,* 233 S.C. 567, 573, 106 S.E.2d 258, 261 (1958))).

[5] Therefore, a plaintiff's claim for actual and punitive damages arising from the same injury is the same claim for purposes of setoff under section 15–38–50(1).

[6] In *Ellis,* this court held that when a prior settlement involves compensation for the same injury for which the jury awarded damages, the right to setoff arises as an operation of law. 335 S.C. at 112–13, 515 S.E.2d at 271–72. Likewise, when the prior settlement involves compensation for a different injury from the one tried to verdict, there is no setoff as a matter of law. *See Hawkins,* 330 S.C. at 114–15, 498 S.E.2d at 407 (holding that Georgia and South Carolina wrongful death actions involve different injuries and therefore are separate claims with no right of setoff). On the other hand, when a settlement is argued to involve two claims, one of which involves the same injury as the claim tried to verdict and one of which does not, the circuit court must make the factual determination of how to allocate the settlement between the two claims. [1] Here, the settlement is for the same ***474** injury as a matter of law. Therefore, the right to setoff arises as an operation of law, and the circuit court must award a setoff.

The dissent argues there are facts in the record supporting the circuit court's determination that the settlement with CitiStreet was for punitive damages only. As we have discussed, however, our ruling is based on the point of law that actual and punitive damages are part of the same claim for one injury. Therefore, the facts discussed in the dissent are not pertinent to the analysis of whether Widener and Currie were entitled to a setoff. In any event, the facts in the record do not support the circuit court's determination. First, Smith's position that she negotiated a settlement with CitiStreet for punitive damages in the exact same amount as her actual damages claim is not credible. Second, Smith's position that she had a settlement agreement with CitiStreet which called for the parties to allocate the proceeds of the settlement completely to punitive damages ****192** is not supported by the record. In fact, at the hearing on the motion for a setoff, counsel for CitiStreet specifically denied an agreement as to how the funds would be allocated, insisting instead that the agreement called for Smith "to allocate it however you would like to."

III. Conclusion

We hold that Widener and Currie were entitled to a setoff for the amount of Smith's settlement with CitiStreet. We reverse and remand the case to the circuit court to enter judgment in accordance with this opinion, and to conduct other proceedings as may be necessary to reach a final judgment.

REVERSED AND REMANDED.

PIEPER, J., concurs.

LOCKEMY, J., dissenting in a separate opinion.

***475** LOCKEMY, J.

I respectfully dissent. While I do not dispute the law cited by the majority that the right to a setoff automatically applies where the proceeds are for the same injury, I agree with the conclusion of the trial court that no portion of the settlement paid by CitiStreet accounted for the $35,410.38 actual damage claim submitted to the jury against Widener and Currie. The majority seems to combine the word "injury" with the word "claim." Smith claimed **actual** and **punitive** damages against Widener and Currie, as well as CitiStreet, for her injury due to conversion. She also separately claimed actual damages against CitiStreet alone for her injury due to negligence.

The premise set out by the majority describing the claims in this case does not reflect my reading of the complaint and record. The majority asserts that "Smith's claims against CitiStreet were for the same injury for which she sought damages from Widener and Currie." This overlooks the separate negligence claim Smith asserted against CitiStreet for its instructions to LPL. As the record reflects, LPL threatened legal action against Smith for the return of the money it advanced, and Smith sued CitiStreet for protection as well as a hold harmless assurance. Thus, Smith sought damages from CitiStreet that she did not seek from Widener and Currie. Moreover, the punitive damages Smith sought against the parties were not tied to each other. The conduct of each was different and the potential punitive liability of each differed tremendously. Nothing prevented a jury from awarding punitive damages against CitiStreet and not against Widener and Currie. In fact, in all likelihood a net worth statement would undoubtedly show significantly deeper pockets by CitiStreet than Widener and Currie. CitiStreet obviously had a lot more at risk if a jury deliberated on the ability to pay element in deciding whether to award punitive damages and against what party.

Having stated my position on the procedural premise facing the parties, let us examine the law. Interestingly, the majority seems to assert counter balancing positions. *O'Neill,* according to the majority, stands for the proposition that "a plaintiff's claim for actual and punitive damages arising from the same injury is the same claim for purposes of setoff under ***476** section 15–38–50(1)." I respectfully do not agree that this case stands for that proposition. Be that as it may, the majority subsequently asserts that Smith's claim that her settlement with CitiStreet was to be allocated to punitive damages was not credible nor supported by the record. Although this places direct aim at the points delineated below, it does seem superfluous if we accept that actual and punitive damages are the same. However, since the majority feels the need to engage in a credibility assessment of Smith's claim as well as a legal analysis of the similarity of actual and punitive damages, I will address my dissent to each.

I do not feel the law treats actual and punitive damages the same. The simple explanation that actual damages compensate for a loss but punitive damages punish the wrongdoer and deter others from the same conduct exudes truth in the difference far beyond the ability of the most complex legal text. *O'Neill* simply adds another public policy purpose in allowing the award of punitive damages which is to vindicate the private ****193** rights of an injured plaintiff. *O'Neill* focused on punitive damages and insurance coverage and not on the relationship between punitive and actual damages. The *O'Neill* court held "it does not violate South Carolina's public policy to allow a plaintiff to seek punitive damages after signing a covenant not to execute against the personal assets of an at-fault defendant." 388 S.C. at 255–56, 695 S.E.2d at 536.

Furthermore, a higher standard of proof is required for punitive damages than actual damages. Here, CitiStreet faced the possibility of a verdict against it for actual and punitive damages. Admittedly, Widener and Currie faced the same possibility. However, nothing prevented the jury, upon sufficient evidence, from awarding actual damages against CitiStreet as well as Widener and Currie, but punitive damages only against CitiStreet. Indeed, even after CitiStreet was removed from the case, the trial court determined that sufficient evidence was presented to send the issue of damages as to Widener and Currie to the jury. The jury did not award punitive damages against Widener and Currie, but what if CitiStreet had still been in the case and the jury decided to render a punitive damage verdict against it? Would that mean that Widener and Currie would have been entitled to a ***477** setoff relieving them of paying all of their assessed actual damages?

Before I address the issue of Smith's credibility, an interesting dilemma demands attention. CitiStreet realized it faced financial and publicity dangers that it wanted to avoid, and therefore, it desired to settle Smith's claim. In fact, CitiStreet agreed to give money to Smith and told her attorney "to allocate it however you would like to." Obviously, CitiStreet desired to get out of this case. If as the majority suggests, the settlement money is to be applied to a setoff, what incentive did Smith have in settling with CitiStreet? Why would one let out the deepest pockets in a case with a high probability of recovery? CitiStreet, and similar defendants in the future, remain without an avenue of rescue upon strict adherence to the majority decision. Plaintiffs will be hesitant to let out the deep pocket party if by doing so it cannot allocate the settlement for its benefit. The evidence in this case is very strong that Smith was due actual damages from someone. Why settle with CitiStreet to get only what you feel confident you will get anyway? CitiStreet agreed to pay Smith and let her allocate it any way she wished as long as it could get out of the case. This procedure has occurred in countless civil cases over many years.

I believe the majority walks on the edge of fact-finding by asserting that Smith's claim that the settlement from CitiStreet was to be allocated towards punitive damages was not credible. Although I hesitate to make credibility determinations at the appellate level of the judicial process as the majority does, I agree with the majority that we should examine the record to see if there is evidence to support the trial court's determination that this was not a setoff situation, but one involving damages for a different claim. This court outlined this procedure in *Rutland* when it stated "a motion for set-off is addressed to the discretion of the court and this discretion should not be arbitrarily or capriciously exercised." 390 S.C. at 83, 700 S.E.2d at 454. After the verdict against them, Widener and Currie made a motion for setoff and thus the issue presented itself to the trial court for evaluation utilizing *Rutland.* The trial court found that CitiStreet agreed to allocate the settlement proceeds for punitive damages, and, on at least two occasions, made findings that the ***478** money was paid by CitiStreet for punitive damages. The trial court also found that Smith had a "viable claim that could have potentially resulted in a punitive damage award against CitiStreet, LLC." [2]

****194** The following evidence supports the trial court's denial of the motion for setoff:

1. It is undisputed that Smith sued CitiStreet for the same causes of action it asserted against the other defendants with the addition of a negligence claim. This negligence claim was based on CitiStreet's action to stop payment on the transfer to LPL after Smith had already withdrawn

$40,000.00. This resulted in LPL threatening to sue Smith for the return of the money. Thus, in Smith's view, CitiStreet had not only converted her money but had damaged her credit and placed her in jeopardy of a lawsuit.

2. Smith sought actual and punitive damages against all defendants, including CitiStreet, on the conversion cause of action.

3. On the day of trial, Smith and CitiStreet announced they had reached a settlement of their case. Smith, through her attorney, stated to the Court that the settlement was for $35,410.38 and that the proceeds would be allocated "toward the plaintiff's punitive damage claim." A second part of the settlement was that CitiStreet would hold Smith harmless against any claim made against her by LPL for the return of the $40,000.00. [3] Thus, the money was to be allocated for ***479** punitive damages for conversion and the hold harmless agreement was to satisfy actual damages for negligence.

4. The trial judge inquired of the attorney for CitiStreet if he agreed with the terms of the settlement regarding punitive damages and the hold harmless agreement. CitiStreet's attorney replied, "[t]hat's correct, Your Honor."

5. During this colloquy between the court, Smith, and CitiStreet, it is significant that the attorney for Widener and Currie was present and did not object to the settlement or its terms. The court approved the settlement and CitiStreet was released from the case.

6. Because the court approved the settlement, CitiStreet, the defendant with the deepest pockets, did not have to face a jury with claims seeking actual and punitive damages. CitiStreet received what it wanted—it was out of the case.

7. The jury, in deciding the remaining issues before it, determined Widener and Currie converted money belonging to Smith and rendered a verdict in her favor for $35,410.38. [4] The jury decided not to assess punitive damages against Widener and Currie.

***480** 8. During the course of events leading up to this case and separate from the trial of the matter at issue here, the record indicates CitiStreet paid Widener and Currie the full sum of $75,410.38 that in essence a jury determined was not due them. Another effort by CitiStreet to not proceed to a jury but to settle issues in this case outside of a courtroom. Thus, even if Widener and ****195** Currie pay Smith what the jury ordered, they will still have $40,000.00 from CitiStreet.

9. The trial court held an extensive post-trial hearing in this matter pursuant to Widener and Currie's motion to designate CitiStreet and Smith's settlement as a setoff. It permitted each side to state its position and considered the applicability of section 15–38–50 to the facts and events of this case. At this hearing, counsel for CitiStreet acknowledged that he did not object to Smith allocating the proceeds of the settlement to punitive damages. In fact, counsel asserted that he "didn't care how he allocated it. We were just going to pay him, they can allocate it how they like." He even stated that during negotiations CitiStreet had proposed the wording of the settlement to be, "pursuant to your request, Plaintiff, we agree that you can allocate it to punitive damages." CitiStreet was concerned not that money was allocated toward punitive damages or that Smith had a viable claim for such, but that the record reflect that CitiStreet was dismissed from the case. To protect itself, CitiStreet requested and was granted language that clarified that it had not admitted to engaging in punitive conduct.

10. The trial court decided after considering the evidence, the arguments, the law, and the equities, that: "The record is clear that CitiStreet, LLC satisfied a potential unasserted actual damage claim against the Plaintiff by accepting responsibility for any unasserted subrogation claim by [LPL] and further extinguished any punitive exposure it may have had under the other causes of action by agreeing to pay Plaintiff [$35,410.38] toward a punitive damage award." After finding that this claim was separate from the claim presented to the jury against Widener and Currie, the ***481** court concluded the denial of the motion by stating, "[t]he Plaintiff had a viable claim that could have potentially resulted in a punitive damage award against CitiStreet, LLC (the settling party)." Furthermore, the trial court found that the "non-settling parties have presented no

evidence the allocation was fraudulent, invalid or an unreasonable apportionment."

For the foregoing reasons, I disagree with the majority holding that the actual and punitive damages claims in this case are the same. Further, I disagree that the evidence did not support the trial court's decision after a *Rutland* analysis that Smith's settlement with CitiStreet was properly allocated toward her punitive damages claim. Thus, I respectfully dissent.

Parallel Citations

724 S.E.2d 188

Footnotes

1 This is what the circuit court did in *Rutland v. S.C. Dep't of Transp.*, 390 S.C. 78, 700 S.E.2d 451 (Ct.App.2010), *cert. granted*, (Oct. 19, 2011). This court affirmed the *Rutland* trial court's determination that the settlement was not properly allocated between the different claims of wrongful death and survival because there was no evidence of conscious pain and suffering. 390 S.C. at 85–86, 700 S.E.2d at 455. In this respect, *Rutland* conflicts with *Ellis*. In *Ellis*, the court of appeals stated that wrongful death and survival are the same claim for the same injury. 335 S.C. at 112–13, 515 S.E.2d at 272. The conflict between *Rutland* and *Ellis* is resolved by reference to *Bennett v. Spartanburg Railway, Gas & Electric Co.*, 97 S.C. 27, 81 S.E. 189 (1914), in which the supreme court held that wrongful death and survival actions are different claims for different injuries. 97 S.C. at 29–30, 81 S.E. at 189–90. The court stated: "Necessarily, therefore, there must be separate verdicts and separate judgments, and hence there should be separate actions." 97 S.C. at 31, 81 S.E. at 190. The conflict does not affect the rule for which we cite *Ellis*.

2 The trial court did enter a third order upon the request of CitiStreet clarifying that it was not making an affirmative finding that CitiStreet engaged in "egregious conduct which would warrant a finding of punitive damages." As in all settlements, the trial court was not making a finding that either party was responsible but only that there was evidence for a jury to decide. To make sure its third order was not misinterpreted the court clarified that "[t]he remainder of the Court's order ... remains in full force and effect." The fact that the trial court entered three post-trial orders further indicates the full consideration the trial court gave to this issue.

3 Documents in the record indicate LPL did in fact make a claim against Smith, which pursuant to the settlement, CitiStreet paid. This was another issue that did not involve Widener or Currie.

4 The majority seems to feel that this amount is key evidence in its holding that the record does not support the trial court's decision. In other words, that Smith's assertion of a punitive damage settlement is not credible. Indeed, the jury verdict is exactly the same amount CitiStreet paid to settle with Smith and represents the amount owed to Smith to completely pay in full her claim as beneficiary. However, the record does not contain any evidence as to why this amount was chosen by the parties for settlement. Maybe it was an effort at poetic justice by the wronged Smith who had to go through so many legal hoops to get what was rightfully hers. Maybe it was the full extent that CitiStreet was willing to pay after already setting aside an additional $75,410.38 for Widener and Currie and having a looming obligation to LPL pending. Maybe it was a figure that resulted from negotiations back and forth between the parties. Based on the record, one can only make suppositions. Making decisions based on appearances does not remove the decision from the realm of conjecture. It is precarious for a court to become too involved with the reasons behind settlement negotiations. In most cases, this is better left to the parties with court involvement only coming afterward to ensure the parties agree as to terms and that the terms meet basic fairness.

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3 Legal Malpractice § 21:19 (2014 ed.)

Legal Malpractice
Database updated February 2014
Ronald E. Mallen [a0], and Jeffrey M. Smith [a1], with Allison D. Rhodes [a2].
Part IV. Damages
Chapter 21. Damages

§ 21:19. Reduction of damages—Settlement or recovery in the underlying matter

Often the attorney's negligence may partially impair or reduce the value of the client's claim or cause of action. The success of a client in settling or recovering from the adverse party will reduce the amount of the damages awarded against and, to that extent, benefit the attorney. [1] If the settlement or recovery would have fully compensated the client, the failure to do so can be a complete defense. [2] If the client is successful in mitigating damages, the reasonable expenses of such efforts are chargeable to the attorney, as are the expenses of a reasonable but unsuccessful effort. [3]

For example, a verdict against an attorney, who erred in searching title, was reduced by a settlement received by the client from the grantors of the property. [4] Similarly, an attorney, sued for failing to perfect a client's insurable interest in property, was given credit for the amount the client received for compromising its claim against its insurers. [5] Even a suit barred by the statute of limitations may have settlement value and provide financial benefit to an attorney. [6] A lawyer, who failed to sue a defendant, was liable only for $500 of a $2,500 legal malpractice verdict, because the client had settled for $2,000 against the other tortfeasor in the underlying case. [7]

Another situation is where the client has compromised a liability either attributable to or increased by the lawyer's negligence. A 1997 Arizona decision concerned a lawyer, who erred in having his clients sign a note in their personal capacity instead of in their representative capacity for an entity. [8] The clients settled their personal liability by stipulating to a judgment with a covenant not to execute in consideration of their promise to pursue a legal malpractice action against the lawyer and remit any recovery. The lawyer claimed that the covenant not to execute meant that the client's damages were limited to litigation expenses. The court held, however, that, because there was no release of liability, the clients could pursue the damage claim for the stipulated amount. The lawyer could defend on the ground that the settlement was unreasonable. [9]

The attorney may have a remedy under either the jurisdiction's common-law rules or statutes that allow joinder of a tortfeasor for indemnity, partial indemnity or contribution. [10] A Texas statute enabled a law firm to receive a credit for a settlement made by predecessor counsel. [11] An Illinois lawyer, liable for negligence in preparing an estate plan, was entitled to have the damage award reduced by the amount recovered in a compromise with the decedent's administrator. [12]

Double Recovery Doctrine. The Nevada Supreme Court applied a defense it labeled as the "double recovery" doctrine, meaning that there could be only one recovery for "one wrong or injury." [13] The plaintiff entered into a business relationship with Homayouni, an attorney employed by the O'Reilly firm, and transferred a controlling interest in the venture to him. After the relationship soured, Homayouni sued the plaintiff, who counterclaimed, contend that Homayouni injured his financial interest. The plaintiff was awarded $150,000 in damages, and $225,631.22 in costs and fees. The plaintiff subsequently settled for $50,000 and the return of his interest in the venture. He then sued the O'Reilly law firm for legal errors, and asserted as damages that he was not reimbursed for the remainder of the judgment. The court held that the "double recovery" doctrine applied, because the settlement also transferred Homayouni's interest in the venture, giving the plaintiff a combined value of $2 million. Thus, the court held that the settlement fully satisfied the judgment, and any further recovery would violate the double recovery doctrine, since his suit against O'Reilly did not allege any different damages. Also, the doctrine of collateral estoppel applied because the plaintiff sought to relitigate the amount of damages he sustained, which was identical to the damage issue in the Homayouni litigation and resolved by the judgment that was then settled and satisfied.

a0 Of The California Bar.

a1 Of The Georgia Bar.

a2 Of California and Oregon Bars.

1 **Ark.**—Rhine v. Haley, 238 Ark. 72, 378 S.W.2d 655 (1964).
D.C.—Wolcott v. Ginsburg, 746 F. Supp. 1113 (D.D.C. 1990).
Fla.—Kay v. Bricker, 485 So. 2d 486 (Fla. Dist. Ct. App. 3d Dist. 1986). *Cf.* Yusem v. Butler, 966 So. 2d 405 (Fla. 4th DCA 2007), decision quashed on other grounds, 3 So. 3d 1185 (Fla. 2009) (legal malpractice settlement was partial setoff in client's claim against others).
Ill.—Goldfine v. Barack, Ferrazzano, Kirschbaum & Perlman, 2013 IL App (1st) 111779 (Ill. App. Ct. 1st Dist. 2013); McLane v. Russell, 131 Ill. 2d 509, 137 Ill. Dec. 554, 546 N.E.2d 499 (1989); McLane v. Russell, 159 Ill. App. 3d 429, 111 Ill. Dec. 250, 512 N.E.2d 366 (3d Dist. 1987), judgment aff'd, 131 Ill. 2d 509, 137 Ill. Dec. 554, 546 N.E.2d 499 (1989).
Mass.—Brady v. Nestor, 398 Mass. 184, 496 N.E.2d 148 (1986); Drury v. Butler, 171 Mass. 171, 50 N.E. 527 (1898).
Nev.—Elyousef v. O'Reilly & Ferrario, LLC, 245 P.3d 547, 126 Nev. Adv. Op. No. 43 (Nev. 2010) (discussed below in this section as the "double recovery" doctrine).
N.Y.—Alva v. Hurley, Fox, Selig, Caprari & Kelleher, 156 Misc. 2d 550, 593 N.Y.S.2d 728 (Sup 1993) (citing text); Ninth Ave. & Forty-Second St. Corporation v. Zimmerman, 217 A.D. 498, 217 N.Y.S. 123 (1st Dep't 1926).
Tex.—Byrd v. Woodruff, 891 S.W.2d 689 (Tex. App. Dallas 1994), writ denied, (May 4, 1995) and writ withdrawn, (Sept. 28, 1995) and writ dismissed by agreement, (Sept. 28, 1995) (credit for settlement with other tortfeasors).
Va.—Katzenberger v. Bryan, 206 Va. 78, 141 S.E.2d 671 (1965).
Wis.—Gustavson v. O'Brien, 87 Wis. 2d 193, 274 N.W.2d 627 (1979).

2 *E.g.*, Elyousef v. O'Reilly & Ferrario, LLC, 245 P.3d 547, 126 Nev. Adv. Op. No. 43 (Nev. 2010); Brady v. Nestor, 398 Mass. 184, 496 N.E.2d 148 (1986) (underlying suit for wrongful termination, rejected employment offer).

3 Wolcott v. Ginsburg, 746 F. Supp. 1113 (D.D.C. 1990); Gustavson v. O'Brien, 87 Wis. 2d 193, 274 N.W.2d 627 (1979); Rhine v. Haley, 238 Ark. 72, 378 S.W.2d 655 (1964); Ninth Ave. & Forty-Second St. Corporation v. Zimmerman, 217 A.D. 498, 217 N.Y.S. 123 (1st Dep't 1926). *See also*, § 21:10, *supra*, Consequential damages—Expenses of mitigation.

4 Katzenberger v. Bryan, 206 Va. 78, 141 S.E.2d 671 (1965). *See also*, Hiss v. Friedberg, 201 Va. 572, 112 S.E.2d 871, 4 A.L.R.3d 261 (1960).

5 Gustavson v. O'Brien, 87 Wis. 2d 193, 274 N.W.2d 627 (1979).

6 Alva v. Hurley, Fox, Selig, Caprari & Kelleher, 156 Misc. 2d 550, 593 N.Y.S.2d 728 (Sup 1993) (citing text); Drury v. Butler, 171 Mass. 171, 50 N.E. 527 (1898). *Compare* Lally v. Kuster, 177 Cal. 783, 171 P. 961 (1918), where the court suggested that a barred note might have some value.

7 Kay v. Bricker, 485 So. 2d 486 (Fla. Dist. Ct. App. 3d Dist. 1986).

8 Monthofer Investments Ltd. Partnership v. Allen, 189 Ariz. 422, 943 P.2d 782 (Ct. App. Div. 1 1997).

9 The admission of the settlement agreement into evidence was for the court's discretion, considering the probative value and prejudicial effect.

10 *See* § 7:15, *supra*, Recurring issues—Liability for indemnity or contribution, and § 22:19, *infra*, Indemnity or contribution.

11 Hall v. White, Getgey, Meyer & Co., LPA, 347 F.3d 576 (5th Cir. 2003) (Tex. Civ.Prac. & Rem.Code § 33.012(b)). *See* subsequent decision Hall v. White, Getgey, Meyer Co., LPA, 465 F.3d 587 (5th Cir. 2006) (remand for calculation of prejudgment interest).

12 McLane v. Russell, 131 Ill. 2d 509, 137 Ill. Dec. 554, 546 N.E.2d 499 (1989); McLane v. Russell, 159 Ill. App. 3d 429, 111 Ill. Dec. 250, 512 N.E.2d 366 (3d Dist. 1987), judgment aff'd, 131 Ill. 2d 509, 137 Ill. Dec. 554, 546 N.E.2d 499 (1989).

13 Elyousef v. O'Reilly & Ferrario, LLC, 245 P.3d 547, 126 Nev. Adv. Op. No. 43 (Nev. 2010). The doctrine appears to be an alternative description of the damage doctrine described in this section.

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206 Va. 78
Supreme Court of Appeals of Virginia.

Walter M. KATZENBERGER et al.
v.
Stanley G. BRYAN.

April 26, 1965.

Proceeding on motion for judgment against attorney for alleged negligence in examining title to property. The Circuit Court, City of Norfolk, Clyde H. Jacob, J., set aside verdict of jury in favor of plaintiff purchasers, sustained defendant attorney's plea of accord and satisfaction and awarded summary judgment in favor of defendant, and plaintiffs brought error. The Supreme Court of Appeals, Carrico, J., held that settlement of purchasers' action against vendors for breach of warranty in deed to property did not constitute accord and satisfaction as to their tort claim against their attorney for negligence in failing to discover and report, after examining title, that vendors did not own portion of property which provided access to residue.

Affirmed in part; reversed in part, and remanded for new trial.

West Headnotes (5)

[1] **Accord and Satisfaction**
Accord and Satisfaction Accepted from Third Person

Settlement of purchasers' action against vendors for breach of warranty in deed to property did not constitute accord and satisfaction as to their tort claim against their attorney for negligence in failing to discover and report, after examining title, that vendors did not own portion of property which provided access to residue.

4 Cases that cite this headnote

[2] **Accord and Satisfaction**
Nature and Requisites in General

Accord is agreement of one party to give or perform, and of other party to accept, instead of some claim, something different from what he is or considers himself entitled to, and satisfaction is fulfillment, or carrying out, or execution of agreement, and effect is to bar recovery on original claim.

3 Cases that cite this headnote

[3] **Accord and Satisfaction**
Accord and Satisfaction Accepted from Third Person

Rule that if creditor accepts payment from stranger in satisfaction of debt of claim, debtor may rely thereon in subsequent action brought against him by creditor, is predicated on proposition that debt or claim so satisfied is, in fact, debt or claim owed by debtor, that payment is made on his behalf and that he either authorizes or participates in settlement or later ratifies it.

3 Cases that cite this headnote

[4] **Estoppel**
Acceptance of Benefits

Although purchasers, by settling action against vendors for breach of warranty, were not barred from seeking further recovery in their tort action against their attorney for negligence in examining title, they were not entitled to secure double recovery, and although they had two separate causes of action and were entitled to seek compensation in each, they were estopped from collecting full amount in second action if they were partially paid therefor in first.

6 Cases that cite this headnote

[5] **Attorney and Client**
Pleading and Evidence

Evidence relating to purchasers' settlement of their action against vendors for breach of warranty in deed to property conveyed was improperly excluded in purchasers' action against attorney for alleged negligence in failing to discover and report, while examining title, that vendors did not own portion of property which provided access to residue, in view of fact that there may have been duplication in element of damages for diminution in value of residue such as would estop purchasers from obtaining double recovery.

10 Cases that cite this headnote

Attorneys and Law Firms

***78** ****671** Walkley E. Johnson, Jr., Norfolk (Baird, Crenshaw & Ware, Norfolk, on brief), for plaintiffs in error.

***79** ****672** Fred E. Martin, John F. Rixey, Norfolk (Fred E. Martin & Son, Rixey & Rixey, Norfolk, on brief), for defendant in error.

Before EGGLESTON, C. J., and BUCHANAN, SNEAD, I'ANSON, CARRICO and GORDON, JJ.

Opinion

CARRICO, Justice.

Walter M. Katzenberger and Ruth C. Katzenberger, the plaintiffs, filed a motion for judgment against Stanley G. Bryan, the defendant, seeking to recover damages in the sum of $17,000.00.

The motion for judgment alleged that the plaintiffs had employed the defendant, an attorney-at-law, to examine and certify to them the title to property which they had contracted to purchase; that the defendant reported to the plaintiffs that marketable title to the property was vested of record in William E. Parker and Jeanne C. Parker; that, relying upon the defendant's assurances and certification of title, the plaintiffs purchased the property from the Parkers and accepted a deed thereto; that, as a result of his negligence, the defendant failed to discover and report that the Parkers did not own that portion of the property which provided access to the residue, and that because they had paid for property to which they did not receive title and had expended money for improvements on the residue, to which they had no access, the plaintiffs were damaged.

The defendant filed a response admitting his employment as asserted by the plaintiffs but denying liability for the damages allegedly sustained by them.

The defendant also filed a plea of accord and satisfaction, alleging that the plaintiffs had instituted an action against the Parkers, the grantors in their deed, to recover damages for breach of warranty; that the Parkers had paid the plaintiffs $1500.00 in settlement and satisfaction of that claim; that the action against the Parkers had been dismissed 'agreed', and that the settlement of the action against the Parkers constituted an accord and satisfaction of the claim against the defendant and was a bar to further proceedings in the action brought against him.

The trial court heard argument on the defendant's plea of accord and satisfaction, and dismissed the plea, over the objection and exception of the defendant.

At a pre-trial conference, the defendant again sought to have the trial court sustain his plea of accord and satisfaction but the court refused to do so. A jury trial was then held and the court excluded all testimony relating to the plaintiffs' settlement with the Parkers. ***80** The jury returned a verdict in favor of the plaintiffs in the sum of $3750.00.

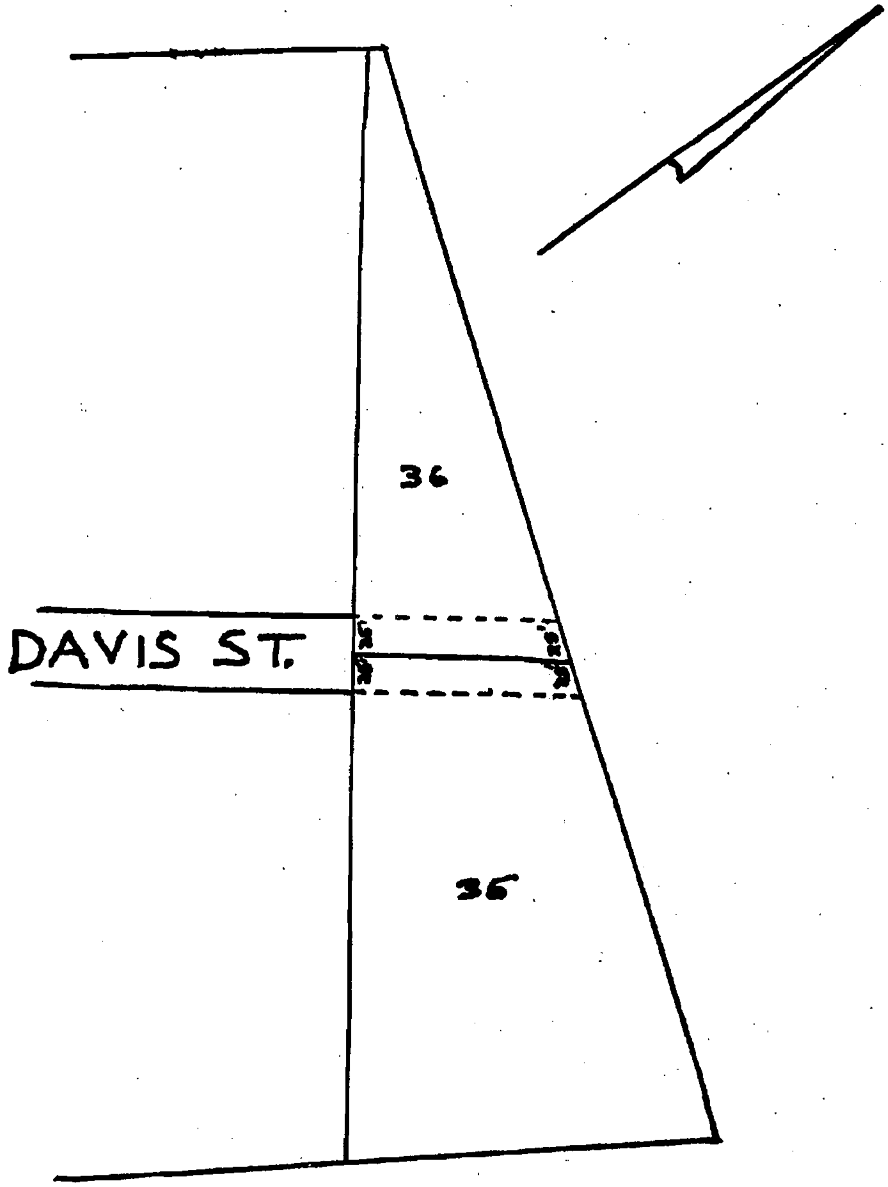
The defendant moved the court to set aside the verdict and award him a new trial on the ground that the verdict was contrary to the law and the evidence. The defendant also moved that his plea of accord and satisfaction be sustained.

The trial court set aside the verdict of the jury, sustained the plea of accord and satisfaction and awarded summary judgment in favor of the defendant. The plaintiffs were granted a writ of error to the final order embodying the court's action.

The evidence shows that the plaintiffs, on July 8, 1960, entered into a written agreement with the Parkers for the purchase, for $3000.00, of Lot 35 on the plat of Milburn Manor, located in Princess Anne County (now the City of Virginia Beach).

The only public road abutting the property was Davis Street, a dead-end street. Access to the street was available only over the westerly 25 feet of the lot. A drawing is attached to provide a better understanding of the physical layout of the property in dispute.

****673**



After the plaintiff employed the defendant to examine the title to the property, he was informed by Mrs. Parker that she and her husband owned not only Lot 35, but also the easterly 25 feet of Lot 36. The defendant prepared a general warranty deed which was executed by the Parkers, conveying to the plaintiffs all of Lot 35 and the easterly 25 feet of Lot 36. The plaintiffs made settlement of their purchase and the defendant delivered the deed to them. No additional compensation was paid by the plaintiffs for the portion of Lot 36 which they received.

According to the plaintiffs' evidence, the defendant assured them that the title to the property was good. Relying on such **674 assurance, the plaintiffs commenced erection of a dwelling on the erar of Lot 35. When the building was substantially completed, it was discovered that the westerly 25 feet of Lot 35 and the easterly 25 feet of Lot 36 were owned, not by the plaintiffs, but by one of their neighbors who owned the land adjoining Lots 35 and 36 on the north.

Lots 35 and 36 had previously been owned by May P. McDilda, a predecessor in title of the Parkers, the plaintiffs' grantors. In 1955, five years prior to the plaintiffs' purchase, Mrs. McDilda had conveyed the 25 foot strips of Lots 35 and 36 to the owner of the property adjoining the lots on the north. The defendant admitted that he failed to discover this conveyance in his title examination.

*81 The plaintiffs attempted to purchase the property in dispute but were unsuccessful in their efforts. For access to their property, they used the portion of the 25 foot strip of Lot 35 adjacent to Davis Street. However, Mr. Katzenberger, one of the plaintiffs, testified *82 that he had been told by the owner of the 25 foot strip that he was 'to stop that, that my driveway was on his property.'

The plaintiffs' evidence showed that the value of their property with the 25 foot strip of Lot 35 included was $13,400.00 but that its value without access to the street was only $6500.00. The plaintiffs also produced evidence tending to indicate that the value of the 25 foot strip, measured according to its relative value to the whole tract, was $350.00.

There is no question before us as to the negligence of the defendant in failing to discover and report that the Parkers did not own the westerly 25 feet of Lot 35. The only question presented is whether the trial court erred in sustaining the defendant's plea of accord and satisfaction.

The plea of accord and satisfaction and the trial court's action with respect thereto were based upon the allegations of the motions for judgment filed in the two cases under consideration. In the motion for judgment filed against the Parkers, the plaintiffs alleged that they were damaged because they were 'without legal title to a portion of the property purported to be conveyed' and were 'without lawful means of ingress and egress' and were 'in danger of being deprived of the use and enjoyment of the entire property.'

In the motion for judgment which they filed against the defendant, the plaintiffs alleged that they were damaged because they were 'caused to spend a large sum of money for property to which they did not receive legal title' and to expend 'large sums of money in the erection of improvements on property to which they did not have lawful means of ingress and egress.'

The plaintiffs contend that in their action against the Parkers, their recovery, had the case been tried, would have been limited to 'the prorata portion of the purchase price attributable to the property in which title actually failed.' The true measure of damages in such a case, the plaintiffs say, is as laid down in Otey v. Oakey, 157 Va. 314, 160 S.E. 8:
'If a title is found defective as to a part of the land, the vendee is entitled to damages for that part lost according to its relative value to the whole tract at the time of the conveyance. * * *' 157 Va., at p. 321, 160 S.E. at p. 10.

The plaintiffs further say that they could not have recovered, in their *ex contractu* action against the Parkers, any damages for the diminution in value of the residue of the land occasioned by the loss of ingress and egress nor could they have recovered anything for the *83 resulting reduction in the value of the improvements which they placed on the land. These latter elements of damage, the plaintiffs assert, were properly recoverable only in their tort action against the defendant.

Thus, the plaintiffs argue, their settlement with the Parkers for $1500.00 'was for items of damage decidedly distinct **675 from those proved' against the defendant and such settlement did not bar them from pursuing their action against the defendant. The trial court was in error, therefore, say the plaintiffs, in sustaining the plea of accord and satisfaction.

The defendant, on the other hand, contends that because the plaintiffs alleged in their case against the Parkers that they were damaged by the loss of land and legal access to the residue of Lot 35, and settled their claim for those damages, they are estopped to deny that they had a claim against the Parkers for the damages occasioned by the diminution in value of the residue of the land. Such settlement, the defendant argues, bars the plaintiffs from seeking the same damages from him. It makes no difference, the defendant asserts, that the plaintiffs would have been limited, as they claim, in their recovery against the Parkers had that case been tried. Thus, the defendant says, the plea of accord and satisfaction was properly sustained.

The defendant places great reliance upon our decision in the case of Shortt v. Hudson Supply, etc., Co., 191 Va. 306, 60 S.E.2d 900. There, Shortt brought an action for damages for personal injuries against Hudson and Morgan, the owner and operator, respectively, of a tractor-trailer truck which collided at a grade crossing with a poassenger train of the Norfolk and Western Railway Company on which Shortt was employed as a fireman. Hudson and Morgan filed a special plea in bar, alleging that Shortt had executed a release or covenant not to sue in which he had compromised his claim for personal injuries by accepting from the railway company the sum of $3500.00.

Shortt argued that his settlement with the railway company did not bar his action against Hudson and Morgan because there was no showing that the railway company and the owner and the operator of the truck were joint tort-feasors.

Mr. Justice Eggleston, now Chief Justice, writing for the court, noted that it did not appear what was the nature of Shortt's claim against the railway company. The opinion states, however, that it was shown that Shortt's action against Hudson and Morgan and the *84 settlement which he made with the railway company arose out of the same collision. It was ruled that '[h]aving settled with the Railway Company' Shortt was 'estopped to deny that he had no claim against it.' 191 Va., at p. 310, 60 S.E.2d at p. 902.

In sustaining the special plea, the court held that since Shortt 'had but a single claim,-an indivisible cause of action for damages for his personal injuries arising out of the collision,-in determining whether he has received satisfaction therefor and has released one of those responsible for the damage, it is immaterial whether those guilty of the wrongdoing were, strictly speaking, joint tort-feasors.' 191 Va., at p. 310, 60 S.E.2d at p. 902.

The holding in the Shortt case is not binding here. Where Shortt 'had but a single claim,-an indivisible cause of action for damages', the present plaintiffs had two separate and distinct causes of action-one in contract against the Parkers and the other in tort against the defendant.

The estoppel invoked against Shortt cannot be applied to the plaintiffs because of the crucial difference in the causes of action asserted in the plaintiffs' two cases. The plaintiffs do not deny, but admit, that they had a claim against the Parkers and that they settled it. They do deny, however, that the same claim was asserted against the defendant and that the Parkers were liable to them in damages to the same extent as the defendant. It is because of this, say the plaintiffs, that they made no accord and satisfaction of their cause of action against the defendant.

[1] [2] We agree with the plaintiffs that the settlement of their cause of action against the Parkers did not constitute an accord and satisfaction of their claim against the defendant. **676 'Accord is the agreement of one party to give or perform, and of the other to accept, instead of some claim, something different from what he is or considers himself entitled to; and satisfaction is the fulfillment, or carrying out, or execution of the agreement. The effect is to bar recovery on the original claim.' Burks Pleading and Practice, 4th Ed., § 4, p. 4.

The plaintiffs, by their settlement, agreed only to give up their cause of action in contract against the Parkers. It may in assumed that the Parkers, in satisfying that cause of action, paid only for the damages for which they were properly liable in that case. The plaintiffs' acceptance of the settlement, in an amount less than they considered themselves entitled to in that action, can only have the effect of barring further recovery on that claim. Any other holding would *85 contort the doctrine of accord and satisfaction to an extreme which it has not previously reached.

The Parkers and the defendant were not joint tort-feasors, they were not in privity one with the other and they were not acting in concert in any manner. Their acts which gave rise to the claims against them were separate, different and distinct. If the plaintiffs were wronged, it was because the Parkers separately breached their covenant that they had the right to convey the land and because the defendant separately breached his duty to use due care in examining the title to the property. The Parkers were strangers to the wrong allegedly committed by the defendant and he a stranger to the wrong allegedly committed by them.

The defendant was not a party to the action against the Parkers. He was not bound by the covenant which formed the basis of that action. He did not participate in any negotiations leading to the settlement and he did not contribute to the amount which the Parkers paid to the plaintiffs. There was, in short, no accord between the plaintiffs and the Parkers with respect to the claim against the defendant upon which the latter was entitled to rely.

[3] In so deciding, we do not overlook the rule, sometimes followed, that if a creditor accepts payment from a stranger in satisfaction of a debt of claim, the debtor may rely thereon in a subsequent action brought against him by the creditor. That rule is predicated upon the proposition that the debt or claim so satisfied is, in fact, the debt or claim owed by the debtor, that payment is made on his behalf and that he either authorizes or participates in the settlement or later ratifies it. These elements are not present in this case and the rule has no application here. 1 C.J.S. Accord and Satisfaction § 12, p. 482.

We hold that the plea of accord and satisfaction was improperly sustained. That does not mean, however, that the verdict of the jury in favor of the plaintiffs must be reinstated.

[4] While the plaintiffs, by settling their contract action against the Parkers were not barred from seeking further recovery in their tort action against the defendant, they were not entitled to secure a double recovery. While they had two separate causes of action and were entitled to seek compensation in each, they were, nonetheless, estopped from collecting the full amount in the second action if they were partially paid therefor in the first. These propositions are applicable to this case, not upon the doctrine of accord and satisfaction, but upon basic principles of fairness and justice.

As has been noted, it may be assumed that the Parkers did not pay ***86** for an element of damage for which they were not liable. And it is true that instruction P-1, granted without objection in the trial of the plaintiffs' claim against the defendant and, therefore, the law of the case, limited the damages which could be assessed against the defendant to the diminution in market value of the residue of Lot 35.

****677** But the plaintiffs alleged substantially the same elements of damages in their action against the Parkers and in their action against the defendant. And, it will be recalled, the plaintiffs' evidence tended to indicate that the value of the 25 foot strip of Lot 35, measured according to its value in relation to the whole tract, was only $350.00. And yet, the Parkers paid the plaintiffs $1500.00 in settlement of an action in which that same measure of value of the 25 foot strip of Lot 35 would have been the pivotal basis for the award of damages, had the case been tried.

Furthermore, Mr. Katzenberger, one of the plaintiffs, out of the hearing of the jury, was asked if, in the settlement with the Parkers, he had received payment 'for the loss of [his] right of way in and out.' He replied, 'Yes, sir.' He also said, however, that the settlement was 'a very, very small portion' of his loss, that he did not know what the purpose of the settlement was, 'they (the Parkers) were paying me', and that he had made the settlement on the advice of counsel. But the fact remains that this testimony indicates that there may have been included in the settlement some payment for the loss of the plaintiffs' 'right of awy in and out.' It is that very loss which the plaintiffs now claim to have caused the diminution in value of the residue of their property, the full damages for which they charge to the defendant.

[5] It thus appears that, in the satisfaction made by the Parkers and in the verdict rendered against the defendant, there may have been a duplication in the element of damages for diminution in the value of the residue of Lot 35. However, all evidence relating to the plaintiffs' settlement with the Parkers was excluded from the jury. That evidence should have been submitted to the jury so that, if it was shown that a portion of the settlement was applicable to the very same items of damages which the plaintiffs sought against the defendant, the plaintiffs' recovery could have been reduced by the extent of the duplication.

Since pertinent and proper evidence was withheld from the jury, its verdict was properly set aside and the trial court's action in that respect is affirmed. For the error in sustaining the plea of accord ***87** and satisfaction and entering summary judgment in favor of the defendant, the judgment of the court is reversed. The case is remanded for a new trial in conformity with the views herein expressed.

Affirmed in part; reversed in part, and remanded.

Parallel Citations

141 S.E.2d 671

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190 Mich.App. 448
Court of Appeals of Michigan.

Lisa C. LOWMAN, Plaintiff-Appellant,
v.
Ronald KARP and Hurwitz & Karp, P.C., a/k/a Hurwitz, Hirschman, & Wallach, P.C., Defendants-Appellees.

Docket No. 123754. | Submitted April 2, 1991, at Detroit. | Decided July 23, 1991, at 9:20 a.m. | Released for Publication Nov. 18, 1991.

Legal malpractice action was brought against former counsel after client settled underlying suit, and counsel moved for summary disposition. The 34th District Court, Henry Zaborowski, J., granted summary disposition for counsel, and the Wayne Circuit Court, John H. Gillis, Jr., J., affirmed. Client appealed. The Court of Appeals held that: (1) plaintiff in legal malpractice suit who had settled with defendants in underlying action was not thereafter precluded as matter of law from maintaining subsequent legal malpractice cause of action against counsel who represented plaintiff in underlying action, and (2) fact that legal malpractice plaintiff acted contrary to recommendations of attorney other than counsel who had represented her in underlying suit and experienced insurance claims adjuster in settling underlying suit did not estop plaintiff from suing her former counsel for legal malpractice, where plaintiff claimed that defendant counsel flatly refused to try case after plaintiff informed counsel that she did not want to settle, and matter arose so close to trial date that it would have been very difficult, if not impossible, for plaintiff to obtain other counsel.

Reversed and remanded.

West Headnotes (5)

[1] **Judgment**
⇐ Presumptions and Burden of Proof
Judgment
⇐ Hearing and Determination
In resolving motion for summary disposition which tests only legal sufficiency of pleadings, court must accept as true all well-pleaded factual allegations as well as any inferences which can reasonably be drawn from facts and motion should be granted only when claim is so clearly unenforceable as matter of law that no factual development could possibly justify right to recovery. MCR 2.116(C)(8).

2 Cases that cite this headnote

[2] **Attorney and Client**
⇐ Elements of Malpractice or Negligence Action in General
In action for legal malpractice, plaintiff must establish existence of attorney-client relationship, acts which are alleged to have constituted negligence, that negligence was proximate cause of injury, and fact and extent of injury alleged.

7 Cases that cite this headnote

[3] **Attorney and Client**
⇐ Trial and Judgment
Plaintiff in legal malpractice suit who had settled with defendants in underlying action was not thereafter precluded as matter of law from maintaining subsequent legal malpractice cause of action against counsel who represented plaintiff in underlying action.

21 Cases that cite this headnote

[4] **Attorney and Client**
⇐ Conduct of Litigation
Fact that legal malpractice plaintiff acted contrary to recommendations of attorney other than defendant counsel who had represented her in underlying suit and experienced insurance claims adjuster in settling underlying suit did not estop plaintiff from suing her former counsel for legal malpractice, where plaintiff claimed that defendant counsel flatly refused to try case after plaintiff informed counsel that she did not want to settle, and matter arose so close to trial date that it would have been very difficult, if not impossible, for plaintiff to obtain other counsel.

23 Cases that cite this headnote

[5] **Appeal and Error**
Scope of Inquiry

Court of Appeals is limited in its review to those issues actually decided by trial court.

9 Cases that cite this headnote

Attorneys and Law Firms

****429** ***448** L. Ray Bishop & Associates, P.C. by Barry Gates, Ann Arbor, for plaintiff-appellant.

Plunkett & Cooney, P.C. by Christine D. Oldani and Larry G. Mason, Detroit, for defendants-appellees.

Before DANHOF, C.J., and GRIFFIN and FITZGERALD, JJ.

Opinion

PER CURIAM.

Plaintiff appeals by leave granted from a circuit court order that affirmed a district court order granting summary disposition to defendants in this legal malpractice case. We reverse.

Plaintiff was injured in July of 1980 when she was kicked in the head by a horse. The horse was owned by Joseph Lutheran and was boarded by ***449** Charles and Mary Riddle at the Circle R Ranch. In June 1983, plaintiff retained defendant Ronald Karp (hereafter defendant) to represent her in a suit against Lutheran and the Riddles. Shortly thereafter, defendant filed a complaint on plaintiff's behalf. However, the Riddles were never served with the complaint, and they were later dismissed from the case. Defendant filed a second complaint against the Riddles, but that action was dismissed because the period of limitation had expired. Lutheran later added the Riddles as third-party defendants.

In 1985, a mediation panel evaluated the case against Lutheran at $20,000. Plaintiff accepted the evaluation, although she claims that it was only at defendant's urging. Lutheran rejected the evaluation. In July of 1986, as the case progressed towards trial, plaintiff wrote a letter to defendant, which included the following:

> My settlement demand remains at $100,000 plus interest and if it cannot be settled I would just as soon proceed to a jury trial as soon as we possibly can. Once again, my damages and injuries are severe and will be permanent and I feel I should receive more than the previous sum of $20,000 that was suggested in the mediation hearing.

Plaintiff claims that defendant's response to her letter was to refuse to try the case. According to plaintiff, defendant informed her that if the case was not settled, plaintiff would have to pay defendant an hourly rate for the time that he spent on her case, pursuant to their contingency fee agreement.

On August 4, 1986, a settlement conference was held, during which plaintiff signed a settlement agreement in the amount of $20,000. The agreement released Lutheran and the Riddles from all ***450** further liability. On the agreement, below her signature, plaintiff wrote, "Even though I feel this case is worth more I am accepting on the sole advise [sic] of my attorney." Plaintiff maintains that defendant intimidated and coerced her into signing the settlement agreement.

In April 1987, plaintiff commenced this legal malpractice suit against defendants. Following mediation and a final settlement conference in the circuit court, the case was removed to district court. Defendants then moved for summary disposition under MCR 2.116(C)(8), (10). In granting the motion, the district court focused on the fact that plaintiff had entered into a settlement agreement that purported to release the Riddles and Lutheran from liability. The court decided that because plaintiff had agreed to the settlement, she was estopped to complain of defendant's performance in the underlying action. The circuit court, noting that the district court had granted summary disposition "based on the fact ****430** that Ms. Lowman had accepted the settlement," affirmed the district court decision.

Neither the district nor the circuit court indicated the subsection of MCR 2.116 under which they were granting summary disposition. But it appears that the courts simply decided, on the undisputed fact that plaintiff agreed to the settlement, that she had failed to state a claim on which relief could be granted. Therefore, we will consider the motion to have been granted under MCR 2.116(C)(8).

[1] A motion for summary disposition under MCR 2.116(C)(8) tests only the legal sufficiency of the pleadings. The court

must accept as true all well-pleaded factual allegations as well as any inferences which can reasonably be drawn from the facts. The motion should be granted only when the ***451** claim is so clearly unenforceable as a matter of law that no factual development could possibly justify the right to recovery. *Pawlak v. Redox Corp,* 182 Mich.App. 758, 763, 453 N.W.2d 304 (1990).

[2] In an action for legal malpractice, the plaintiff must establish (1) the existence of an attorney-client relationship, (2) the acts which are alleged to have constituted negligence, (3) that the negligence was the proximate cause of the injury, and (4) the fact and extent of the injury alleged. *Adell v. Sommers, Schwartz, Silver & Schwartz, PC,* 170 Mich.App. 196, 204, 428 N.W.2d 26 (1988); *Basic Food Industries, Inc v. Grant,* 107 Mich.App. 685, 690, 310 N.W.2d 26 (1981).

In the instant case, plaintiff's allegations of negligence against defendant fell into two basic categories. First, plaintiff claimed that defendant was negligent in allowing the period of limitation to run against the Riddles. Second, plaintiff claimed that defendant failed to diligently prepare her case against Lutheran for trial, and that she was left with no other viable option but to accept the $20,000 settlement.

[3] As noted above, the lower courts focused on the $20,000 settlement and determined that this precluded plaintiff from suing defendants for malpractice. Thus, the narrow legal question presented in this appeal is whether a plaintiff in a legal malpractice case, having settled with the defendants in the underlying action, is thereafter precluded as a matter of law from maintaining a subsequent legal malpractice cause of action against the attorney who represented her in the underlying action. We hold that such a plaintiff is not precluded from maintaining the suit, and we therefore reverse the decisions of the lower courts.

There are apparently no published decisions from this state addressing this particular issue. ***452** However, other states have addressed the issue, and those decisions have been compiled and summarized in 2 Mallen & Smith, Legal Malpractice (3d ed), § 17.15, pp 58-59:

The attorney may assert as a defense that the client settled with or released the third party involved in the underlying claim or cause of action which was injured by the attorney's negligence. Despite the attorney's negligence, there may have been sufficient value left in the underlying cause of action which the client can compromise. The issue then arises whether in the subsequent malpractice action the attorney can advantageously assert the compromise or release. The rule is that the attorney will be benefited, but only to the extent to which the client's damages are satisfied. In other words, the defense is not complete because it only affects the extent of damages. Usually, the attorney whose negligence is a proximate cause of the client's injury cannot complain that the client made a good faith compromise of the claim for less than full value rather than pursue the matter to judgment. Of course, unreasonable conduct may be asserted as contributory negligence, whether the client mitigated reasonably, or on the issue of whether the attorney was a proximate cause of the client's injury.

* * * * * *

A release, compromise or accord and satisfaction with the third party does not exculpate the attorney. The attorney and tortfeasor do not act in concert. The causes of action are different. The attorney is liable for professional negligence, a wrong which was not present in the client's original cause of action or claim. Both the nature and measure of ****431** damages may be different. A recovery from the third party may be considered in mitigation where the payment involves substantially the same damages.

We agree that plaintiff's settlement of the underlying ***453** action should not act as an absolute bar to a subsequent legal malpractice action. We are not persuaded by defendant's argument that such a rule would act to dissuade attorneys from settling cases. To the contrary, because any settlement in the underlying action would most likely be set off against the client's recovery in the subsequent malpractice lawsuit, settlement remains the prudent option for both attorney and client where the chances for recovery at trial have been diminished because of the negligence of the attorney. Further, adoption of the "absolute bar" rule could provide an incentive for unscrupulous attorneys to "settle at all costs" to preclude a subsequent malpractice suit.

[4] Defendant argues that plaintiff should be estopped from suing defendant because she "knowingly and voluntarily" decided to settle the underlying suit, after having consulted with another attorney and an experienced insurance claims adjuster. Defendant points out that these other professionals apparently recommended that plaintiff insist on going to trial rather than settle for the $20,000 offer. Defendant argues that because plaintiff acted contrary to those recommendations, she should now be estopped from suing him.

Defendant's argument on this point, however, ignores an essential feature of plaintiff's malpractice action. Plaintiff claims that after she informed defendant that she did not want to settle, defendant flatly refused to try the case. The matter arose so close to the trial date that it would have been very difficult, if not impossible, for plaintiff to obtain another attorney. Thus, plaintiff was put in a position where settlement was her only reasonable choice despite her own reservations about the settlement and despite the advice of others. Plaintiff claims that it was defendant's lack of preparedness, ***454** not his reservations about the strength of her suit, which compelled defendant to urge plaintiff to settle. Under these circumstances, as noted above, settlement may very well have been the most prudent choice. Defendant's reliance on *Bessman v. Weiss,* 11 Mich.App. 528, 161 N.W.2d 599 (1968), lv. den 382 Mich. 764 (1969), cert. den. 396 U.S. 1008, 90 S.Ct. 564, 24 L.Ed.2d 500 (1970), and other cases applying the estoppel principle to legal malpractice cases, is clearly misplaced.

[5] Defendant also argues that we should affirm the decisions of the lower courts because there was no genuine issue of material fact concerning plaintiff's inability to prove that she was forced and coerced into accepting the settlement in the underlying action. In addition, defendant argues that summary disposition was properly granted because as a matter of law plaintiff could not have satisfied the "suit within a suit" requirement of this legal malpractice suit. However, neither of these issues was decided below, and our review is limited to issues actually decided by the trial court. *Michigan Mutual Ins. Co. v. American Community Mutual Ins. Co.,* 165 Mich.App. 269, 277, 418 N.W.2d 455 (1987).

Reversed and remanded.

Parallel Citations

476 N.W.2d 428

End of Document

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

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

Plaintiff,

vs.

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

Defendants.

Civil Action No. 2010-CP-46-2267

Trial Brief

The Actions of the Burton Trust Caused The Partition Action

Marjorie Cato Burton's refusal to sign the quitclaim deed caused the Partition Action, and therefore, the damages alleged by the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust (the "Burton Trust") were not caused by any alleged act or omission of Carroll M. Pitts, Jr. ("Pitts") and Robinson Bradshaw & Hinson, P.A. (collectively, "RBH").

FACTS

This legal malpractice lawsuit arises out of a commercial real estate transaction which closed in December 2007 in York County. In early 2007, James Thomas "Tommy" Cato ("Cato") engaged Mr. Pitts to form an LLC (the "LLC") and to draft a deed that would convey certain property owned by the Cato heirs into that LLC so that the property could be marketed and sold. After the LLC was formed and the property deeded into it, Mr. Cato located a buyer (Thomasson Apartments, LLC, or "TAL") and scheduled a closing for December 2007.

Before the closing, a question arose regarding the title to a strip of land (the "Roadbed Tract") that was situated within the property to be sold. To resolve that question, the closing attorney, Joshua Vann, Esq., of Morton & Gettys, LLC, prepared a quit claim deed to be signed by each member of the LLC, including Marjorie Cato Burton as Trustee of the Burton Trust. However, the Burton Trust refused to sign the quitclaim deed. Thereafter, a partition action was filed by Mr. Pitts on behalf of the other LLC members who sought to compel the Burton Trust to sell its share of the Roadbed Tract to complete the sale to TAL (the "Partition Action").

For several months after the closing, Mr. Cato and the other LLC members unsuccessfully encouraged the Burton Trust to sign the quitclaim deed to complete the sale to TAL. The Burton Trust, however, refused to sign and consequently Mr. Pitts filed the Partition Action at the direction of the other LLC members on August 13, 2008.

After more than four years of litigation, the parties to the Partition Action executed a Settlement Agreement on April 4, 2013. In exchange for $249,000, the Burton Trust executed a quitclaim deed to complete the sale to TAL.

ARGUMENT

The Burton Trust's refusal to sign the quitclaim deed caused the Partition Action. Dr. Burton unequivocally testified that that the other members of the LLC brought the Partition Action because the Burton Trust refused to sign the quitclaim deed:

> Q: Well, that's why they [the other LLC members] brought the partition action, wasn't it, because the Burton Trust refused to sign the Quit Claim Deed, right?
>
> A: Yep.

(Burton Dep. 93:2-6; May 12, 2014.) Further, Dr. Burton explained that if the Burton Trust had executed the quitclaim deed in 2007, there would have been no Partition Action:

> Q: Had the Burton Trust executed the Quit Claim Deed sent to it by Tommy Cato in November or December of 2007, there would have been no partition action, correct?
> MR. MCMASTER: Objection as to form.
>
> Q: Is that correct?
>
> A: I assume.
> MR. MCMASTER: Move to strike.
>
> A: I'm not an attorney, but I assume, yes, sir.
>
> Q: You believe that to be the case; is that correct?
>
> A: Yes, sir. I guess so.

(*Id.* 92:7-21.) Therefore, Dr. Burton's testimony proves that the Partition Action was caused by the Burton Trust's refusal to sign the quitclaim deed.

In an analogous case, a South Carolina trial court refused to impose liability on the defendant attorneys because their alleged failure to discover a potential title cloud was not the proximate cause of the foreclosure of which the client complained. In *Wilson v. Moseley*, 327 S.C. 144, 488 S.E.2d 862 (1997), the plaintiff asserted a legal malpractice claim arguing that her attorneys breached their duties because they failed to discover and disclose a tax deed in the chain of title to her property. She claimed that she was unable to sell the property because of the alleged defective title, and, therefore, she stopped making mortgage payments; consequently, the property was foreclosed. *Id.* at 146, 488 S.E.2d at 863. Affirming the trial court's grant of summary judgment, the South Carolina Supreme Court reasoned that "[t]he proximate cause of [the client's] loss was her failure to make payments according to the note, which obligations were separate and independent of any alleged problem with the title." *Id.* at 147, 488 S.E.2d at 864.

Similarly, the Partition Action of which the Burton Trust complains was caused by the Burton Trust's refusal to sign the quitclaim deed, which was a "separate and independent" act apart from any alleged act or omission of Mr. Pitts.

CONCLUSION

Because the Burton Trust's refusal to sign the quitclaim deed caused the Partition Action, the damages claimed by the Burton Trust were not proximately caused by any alleged act or omission of RBH.

Respectfully submitted,

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York, South Carolina

December 16, 2014

~#4821-6126-1088~

AUTHORITIES CITED

327 S.C. 144
Supreme Court of South Carolina.

Brenda WILSON, Appellant,
v.
James MOSELEY, James Fayssoux,
Samuel Stilwell and Tom Bozeman,
jointly and individually, Respondents.

No. 24664. | Heard June 6, 1996. | Decided Aug. 4, 1997.

Client brought legal malpractice action against attorneys, who represented her in connection with purchase, and refinancing, of property claiming attorneys negligently failed to discover and disclose tax deed in chain of title. The Circuit Court, Greenwood County, C. Victor Pyle, Jr., J., granted summary judgment for attorneys. Client appealed. The Supreme Court, Finney, C.J., held that: (1) attorneys' failure to discover tax deed was not negligent since more than two years had passed from time vendor acquired property through tax sale; (2) attorney's failure to discover tax deed was not proximate cause of foreclosure on client's mortgage; and (3) client had marketable title to property.

Affirmed.

West Headnotes (4)

[1] **Quieting Title**
Cloud on Title
"Cloud on title" is claim which on its face appears valid, but resort to extrinsic evidence will show its invalidity.

3 Cases that cite this headnote

[2] **Attorney and Client**
Acts and Omissions of Attorney in General
Attorneys who represented client on closings concerning purchase and refinancing of property had no duty to discover whether tax deed on property clouded client's title, where more than two years had passed from time vendor had acquired property through tax sale. Code 1976, § 12-51-160.

1 Cases that cite this headnote

[3] **Attorney and Client**
Acts and Omissions of Attorney in General
Failure of attorneys, who represented client in closings concerning purchase and refinancing of property which had been acquired by vendor through tax sale, to discover and remove alleged cloud on title caused by tax deed was not proximate cause of foreclosure on client's mortgage; proximate cause of foreclosure was client's failure to make payments.

1 Cases that cite this headnote

[4] **Attorney and Client**
Acts and Omissions of Attorney in General
Purchaser had marketable title to property, which had been purchased from vendor who acquired property through tax sale, for purposes of purchaser's legal malpractice action claiming attorneys who represented her during closings failed to discover and disclose tax deed in chain of title, where attorneys presented evidence that property had been resold at least once subsequent to purchaser's possession.

1 Cases that cite this headnote

Attorneys and Law Firms

****863** ***145** Brenda Wilson, pro se.

Thomas H. Bozeman, of Grayson, Smith, Stodghill & Price, Greenville, pro se.

Robin B. Stilwell, Greenville, for respondent Samuel Stilwell.

***146** Samuel W. Outten and Jack H. Tedards, Jr., both of Leatherwood, Walker, Todd & Mann, Greenville, for respondents James Moseley and James Fayssoux.

Opinion

FINNEY, Chief Justice:

In this attorney malpractice action, Appellant Brenda Wilson appeals the granting of summary judgment in favor of respondents. We affirm.

Appellant purchased real property from an individual who had acquired the property through a tax sale in 1983. Respondent Moseley closed this purchase for appellant. Appellant refinanced the property through Carolina Investors. Respondent Fayssoux closed the refinancing transaction and issued a title insurance policy. Appellant subsequently defaulted on the note and mortgage held by Carolina Investors and the mortgage was foreclosed.

Appellant commenced this action alleging respondents committed attorney malpractice. Respondents individually filed motions for summary judgment. The trial judge granted the summary judgment motions in favor of each of the respondents and appellant's complaint was dismissed with prejudice.

Appellant essentially asserts respondents breached their duties as attorneys because they failed to discover and disclose a tax deed in the chain of title. Appellant claims because of the alleged defective title, she was unable to sell the property and she stopped making mortgage payments; consequently, the property was foreclosed.

Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Cafe Associates, Ltd. v. Gerngross,* 305 S.C. 6, 406 S.E.2d 162 (1991). In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom should be viewed in the light most favorable to the non-moving party. *Id.*

****864 [1] [2] [3]** Based on the evidence presented, the circuit court found respondents were entitled to summary judgment as a matter of law. We agree. The circuit court was faced with the question whether the tax deed clouded appellant's title, thus imposing a duty on the closing attorneys to act with ***147** diligence to discover and remove the cloud. "A cloud on title is a claim which on its face appears valid, but resort to extrinsic evidence will show its invalidity." *Freeman v. Colwell Mortgage Corp.,* 297 S.C. 335, 377 S.E.2d 108 (1989). The deed of conveyance from a tax sale must be held and taken as prima facie evidence of a good title in the holder, that all proceedings have been regular and that all legal requirements have been complied with. S.C.Code Ann. § 12-51-160 (Supp.1996).[1] No action for the recovery of land sold under statutory provisions may be maintained unless brought within two years from the date of the tax sale. *Id.* Since more than two years had passed from the time of the tax sale, there was no factual issue whether there was a cloud on appellant's title. Even if there were a cloud, it was not the proximate cause of the foreclosure. The proximate cause of appellant's loss was her failure to make payments according to the note, which obligations were separate and independent of any alleged problem with the title.

1 Current statutory language was previously codified at S.C.Code Ann. § 12-49-570, *repealed by* 1985 Act No. 166, § 17, effective January 1, 1986.

[4] Further, appellant did not provide evidence that the property was unmarketable because of a defective title. Respondents presented evidence that the property has been resold at least once subsequent to appellant's possession and that she had marketable title. Accordingly, the trial judge properly found there was no genuine issue of fact whether there was a defect on appellant's title and granted summary judgment in respondents' favor.

The circuit court found that respondents Bozeman and Stilwell were not liable to appellant since neither represented her in connection with this matter. We agree. Accordingly, we affirm the circuit court's grant of summary judgment in favor of respondents Bozeman and Stilwell.

Since the above reasons for granting summary judgment are dispositive, we need not address the remaining grounds. We affirm the circuit court's grant of summary judgment in favor of all respondents and dismissal with prejudice.

AFFIRMED.

TOAL, MOORE, WALLER and BURNETT, JJ., concur.

Parallel Citations

488 S.E.2d 862

STATE OF SOUTH CAROLINA)
COUNTY OF YORK) IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT

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

Plaintiff,

vs.

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

Defendants.

Civil Action No. 2010-CP-46-2267

Trial Brief

This Court Previously Ruled that No Attorney-Client Relationship Existed with the Burton Trust

FILED-RECEIVED
2015 FEB -4 PM 2:23
DAVID HAMILTON
C.C.C.P. & G.S.
YORK COUNTY, SC

The Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust (the "Burton Trust") cannot relitigate the issue of whether an attorney-client relationship existed between it and Carroll M. Pitts, Jr., ("Pitts") and Robinson Bradshaw & Hinson, P.A. (collectively "RBH") because this Court previously ruled upon this issue.

FACTS

This legal malpractice lawsuit arises out of a commercial real estate transaction which closed in December 2007 in York County. In early 2007, James Thomas "Tommy" Cato ("Cato") engaged Mr. Pitts to form an LLC (the "LLC") and to draft a deed that would convey certain property owned by the Cato heirs into that LLC so that the property could be marketed and sold. After the LLC was formed and the property deeded into it, Mr. Cato located a buyer and scheduled a closing for December 2007.

Before the closing, a question arose regarding the title to a strip of land (the "Old Roadbed") that was situated within the property to be sold. To resolve that question, the closing attorney, Joshua Vann, Esq., of Morton & Gettys, LLC, prepared a quitclaim deed to be signed by each member of the LLC, including the Burton Trust. The Burton Trust refused to sign the quitclaim deed. Thereafter, a partition action was filed by Mr. Pitts on behalf of the other LLC members who sought to compel the Burton Trust to sell its share of the Roadbed Tract to complete the transaction with the buyer (the "Partition Action").

During the pendency of the Partition Action, the Burton Trust moved to disqualify Mr. Pitts based on a conflict of interest because Mr. Pitts allegedly had an attorney-client relationship with the Burton Trust. (Mot. to Disqual. Apr. 27, 2009; **Ex. A.**) Judge Alford denied the motion at a hearing on June 1, 2009. (Order Denying Mot. to Disqual.; **Ex. B.**) Mr. Pitts' representation in the Partition Action continued until he withdrew with the consent of the Court on August 17, 2010. (*See* Order Granting Mot. for Substitution; **Ex. C.**)

ARGUMENT

The Burton Trust cannot relitigate the issue of whether an attorney-client relationship existed between it and Mr. Pitts because this Court previously ruled upon this issue. As out Supreme Court affirmed in *Irby v. Richardson*, 278 S.C. 484, 298 S.E.2d 452 (1982), a legal malpractice plaintiff is precluded from relitigating an issue that was litigated during the underlying transaction.

The Motion to Disqualify placed the question of whether or not an attorney-client relationship existed between Mr. Pitts and the Burton Trust squarely before this Court. In that Motion, the Burton Trust alleged that Mr. Pitts could not maintain his representation in the Partition Action because he allegedly previously represented the Burton Trust during the commercial transaction described above. Specifically, the Burton Trust alleged that Mr. Pitts' formation of the LLC created an attorney-client relationship with the Burton Trust, as follows:

> . . . while [Mr. Pitts] may have communicated with and through its General Manager, the prior representation of [Mr. Pitts] with respect to the formation of the T.E. Cato Estate, L.L.C., and otherwise, was for the benefit of all members of the T.E. Cato Estate, L.L.C., including both Petitioners and [the Burton Trust], at the time the events giving rise to [the Partition Action] occurred . . . .

(**Ex. A**, ¶ 1.) The Burton Trust argued that Mr. Pitts could not maintain his representation in the Partition Action without the consent of the Burton Trust because of his alleged prior representation of the Burton Trust, as stated below:

> [Rule 1.7, SCRPC] prohibits a lawyer from representing a client without informed written consent from each affected client where there is a concurrent conflict of interest. [The Burton Trust] has not consented. Thus, the participation of Carroll M. Pitts, Jr. Esq., as Petitioner's counsel violates Rule 1.7, SCRPC, and constitutes an impermissible conflict of interest.

(**Ex. A**, ¶ 2.) Further, incorporated into the Motion was a letter wherein the Burton Trust's counsel asked Mr. Pitts to voluntarily disqualify himself from the Partition Action because Mr. Pitts allegedly "formerly represented both petitioners and my client [the Burton Trust] in forming the T.E. Cato Estate, LLC . . . ." (*See* Letter from Roger Jellenik to Carroll Pitts dated Feb. 28, 2009; **Ex. D**.) As proven by the plain language of the motion and the accompanying letter to Mr. Pitts, the precise question before the Court in deciding the Motion to Disqualify was whether or not Mr. Pitts had formerly represented the Burton Trust.

On June 1, 2009, Judge Alford denied the Motion to Disqualify, stating that the "motion [was] denied at this point in the action." **(Ex. B.)** By denying the Motion, Judge Alford ruled that Mr. Pitts did not previously represent the Burton Trust. If Judge Alford had determined that Mr. Pitts had previously represented the Burton Trust, he would have had no choice but to disqualify Mr. Pitts because a lawyer cannot represent a client "if the representation involves a concurrent conflict of interest." *See* Rule 1.7(a)(2), SCRPC. Judge Alford made no such finding. The Burton Trust never sought reconsideration of this Order and it was never overruled, reversed, or modified. Therefore, this Court effectively ruled that no attorney-client relationship existed between Mr. Pitts and the Burton Trust.

CONCLUSION

Because this Court previously ruled that no attorney-client relationship existed between the Burton Trust and Mr. Pitts, the Burton Trust should not be allowed to relitigate that issue in this case.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: Samuel W. Outten

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Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

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

York, South Carolina

December 16, 2014

~#4826-4661-2511~

Exhibit A

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) FOR THE SIXTEENTH JUDICIAL CIRCUIT

James Thomas Cato, Helen Cato Jones,) Case No. 2008-CP-46-3171
Donn S. Johnson, Jane Cato West,)
Robert Lee Cato, and Cathy Cato Evans,) MOTION AND ORDER INFORMATION
v.) FORM AND COVER SHEET
Marjorie Cato Burton, as Trustee of the Sloan)
Marvin Burton and Marjorie Cato Burton, AB
Living Trust

Plaintiff's Attorney: Roger B. Jellenik , Bar No. 13546 Address: 1111 Broad Street, Box J, Camden, SC 29020 phone: 803-424-1919 fax: 803-424-1922 e-mail: rbjatty@mac.com other:	Defendant's Attorney: Carroll M. Pitts, Jr. , Bar No. Address: phone: fax: e-mail: other:

MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion to Disqualify Opposing Counsel
Estimated Time Needed: 20 minutes Court Reporter Needed: YES / NO

SECTION II: Motion/Order Type

Written motion attached YES
Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Roger B. Jellenik 04-27-2009
Signature of Attorney for Plaintiff / Defendant Date submitted

SECTION III: Motion Fee

PAID – AMOUNT:
EXEMPT: Rule to Show Cause in Child or Spousal Support
(check reason) Domestic Abuse or Abuse and Neglect
Indigent Status State Agency v. Indigent Party
Sexually Violent Predator Act Post-Conviction Relief
Motion for Stay in Bankruptcy
Motion for Publication Motion for Execution (Rule 69, SCRCP)
Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
Other:

JUDGE'S SECTION Motion Fee to be paid upon filing of the attached order. Other:	JUDGE CODE: Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: ______________________

MOTION FEE COLLECTED: __________
CONTESTED – AMOUNT DUE: __________

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
FOR THE SIXTEENTH JUDICIAL CIRCUIT

James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, and Cathy Cato Evans, Petitioners

v.

Marjorie Cato Burton, as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, Respondent

Case No. 2008-CP-46-3171

NOTICE OF MOTION AND MOTION

NOTICE OF MOTION AND MOTION TO DISQUALIFY OPPOSING COUNSEL

YOU WILL PLEASE TAKE NOTICE that Respondent, Marjorie Cato Burton, as a Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, through the undersigned attorney will on the tenth day after service hereof at 10:00 AM, or as soon thereafter as counsel can be heard, move pursuant to Rule 7(b), SCRCP, before the York County Court of Common Pleas, move the Court to enter an order disqualifying Carroll M. Pitts, Jr., Esq., as attorney for Petitioners. In support of this motion, Respondent shows the following to the court:

1. Upon information and belief, while he may have communicated with and through its General Manager, the prior representation of Petitioners' attorney with respect to formation of the T.E. Cato Estate, L.L.C., and otherwise, was for the benefit of all members of the T.E. Cato Estate, L.L.C., including both Petitioners and Respondent, at the time the events giving rise to this case occurred, as shown by the correspondence attached as Exhibit A.

2. Rule 1.7 of the South Carolina Rules of Professional Conduct prohibits a lawyer from representing a client without informed written consent from each affected client where there is a concurrent conflict of interest. Respondent has not consented. Thus, the participation of Carroll M. Pitts, Jr., Esq., as Petitioners' counsel violates Rule 1.7, SCRPC, and constitutes an impermissible conflict of interest.

3. Given his participation in the matters and events related to the captioned action, Petitioners' attorney will quite likely be a witness with respect to issues in the Petition and the Third Party Complaint in the captioned action.

4. Respondent requested by letters dated February 28 and April 15, 2009, copies of which are attached as Exhibit B, that Carroll M. Pitts, Jr., Esq., agree to withdraw but, as of this date and time, he has refused to do so. Respondents respectfully request that Petitioners' attorney in this matter be disqualified.

WHEREFORE, Respondent moves the court to disqualify Carroll M. Pitts, Jr., Esq., as Petitioners' counsel in the above-captioned matter and for such other and further relief as the Court deems just and appropriate.

Respectfully submitted this 27th day of April, 2009.

Roger B. Jellenik
Attorney for Respondent and Third Party Plaintiff
SC Bar No. 13546

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

Exhibit B

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

FILED-RECEIVED
2009 JUN - 1 PM 3:07
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

JUDGMENT IN A CIVIL CASE

CASE NO: 2008CP4603171

James Thomas Cato *vs.* Marjorie Cato Burton

CHECK ONE:

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

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

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

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

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

Motion Denied at this point in the Action.

Dated at York, South Carolina, this 1st day of June, 2009.

Court Reporter: PHYLLIS BARRETT

PRESIDING JUDGE - LEE S. ALFORD

This judgment was entered on the 1st day of June, 2009, and a copy mailed first class this 1st day of June, 2009, to attorneys of record or to parties (when appearing pro se) as follows:

Carroll M Pitts Jr Robinson Bradshaw & Hinson, PA P.O. Drawer 12070 Rock Hill, SC 29731

ATTORNEY(S) FOR THE PLAINTIFF(S)

Roger B. Jellenik Roger B. Jellenik Attorney at Law 1111 Broad St., Box J Camden, SC 29020

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

SCRCP APP-24/FORM 4

CPFORM4M

RBH 001483

Exhibit C

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
FOR THE SIXTEENTH JUDICIAL CIRCUIT

Case No. 2008-CP-46-3171

James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato and Cathy Cato Evans,

Plaintiffs,

v.

Marjorie Cato Burton, as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust,

Defendant.

David Alan Burton, as Attorney-In-Fact for Marjorie Cato Burton, as Trustee of the Sloan Marvin Burton and Majorie Cato Burton, AB Living Trust, and in the right and on behalf of T.E. Cato Estate, LLC,

Third-Party Plaintiff,

v.

James Thomas Cato and Thomasson Apts., LLC,

Third-Party Defendants.

Thomasson Apts., LLC,

Fourth-Party Plaintiff,

v.

T.E. Cato Estate, LLC, James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato and Cathy Cato Evans, Majorie Cato Burton, as Trustee Of the Sloan Marvin Burton and Majorie Cato Burton, AB Living Trust,

Fourth-Party Defendants.

CONSENT ORDER
SUBSTITUTING COUNSEL

FILED-RECEIVED
2010 AUG 17 PM 4:16
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

3008656v1 99000.00100

ON MOTION AND FOR GOOD CAUSE SHOWN, and with the consent of the Plaintiff and Third-Party Defendant James Thomas Cato and the Plaintiffs Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato and Cathy Cato Evens, it is ordered that Brian S. McCoy, Esquire, of the firm of Horack Talley be substituted as counsel for the Plaintiffs and for the Third-Party Defendant James Thomas Cato and that Carroll M. Pitts of the firm Robinson, Bradshaw & Hinson, P.A. be relieved as counsel for said parties.

Presiding Judge
Sixteenth Judicial Circuit

~~July~~ August 5, 2010

WE SO MOVE:

Carroll M. Pitts
ROBINSON, BRADSHAW & HINSON, P.A.
140 East Main Street, Suite 420
Rock Hill, SC 29730
Telephone: (803) 325-2900
Facsimile: (803) 325-2929
bjohnson@rbh.com

Brian S. McCoy
HORACK TALLEY
633 East Main Street
Rock Hill, SC 29730
Telephone: (803) 366-2280
Facsimile: (803) 366-0643
bmccoy@horacktalley.com

WE CONSENT:

James Thomas Cato, *Plaintiff and Third-Party Defendant*

Helen Cato Jones, *Plaintiff*

Donn S. Johnson, *Plaintiff*

Jane Cato West, *Plaintiff*

Robert Lee Cato, *Plaintiff*

Cathy Cato Evans, *Plaintiff*

#2086

ON MOTION AND FOR GOOD CAUSE SHOWN, and with the consent of the Plaintiff and Third-Party Defendant James Thomas Cato and the Plaintiffs Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato and Cathy Cato Evens, it is ordered that Brian S. McCoy, Esquire, of the firm of Horack Talley be substituted as counsel for the Plaintiffs and for the Third-Party Defendant James Thomas Cato and that Carroll M. Pitts of the firm Robinson, Bradshaw & Hinson, P.A. be relieved as counsel for said parties.

____
Presiding Judge
Sixteenth Judicial Circuit

July ____, 2010

WE SO MOVE:

Carroll M. Pitts
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140 East Main Street, Suite 420
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Telephone: (803) 366-2280
Facsimile: (803) 366-0643
bmccoy@horacktalley.com

WE CONSENT:

James Thomas Cato, *Plaintiff and Third-Party Defendant*

Helen Cato Jones, *Plaintiff*

Donn S. Johnson, *Plaintiff*

Jane Cato West, *Plaintiff*

Robert Lee Cato, *Plaintiff*

Cathy Cato Evans, *Plaintiff*

#3086
288

3008656v1 99000.00100

ON MOTION AND FOR GOOD CAUSE SHOWN, and with the consent of the Plaintiff and Third-Party Defendant James Thomas Cato and the Plaintiffs Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato and Cathy Cato Evens, it is ordered that Brian S. McCoy, Esquire, of the firm of Horack Talley be substituted as counsel for the Plaintiffs and for the Third-Party Defendant James Thomas Cato and that Carroll M. Pitts of the firm Robinson, Bradshaw & Hinson, P.A. be relieved as counsel for said parties.

____
Presiding Judge
Sixteenth Judicial Circuit

July ____, 2010

WE SO MOVE:

Carroll M. Pitts
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bmccoy@horacktalley.com

WE CONSENT:

James Thomas Cato, *Plaintiff and Third-Party Defendant*

Helen Cato Jones, *Plaintiff*

Donn S. Johnson, *Plaintiff*

Jane Cato West, *Plaintiff*

Robert Lee Cato, *Plaintiff*

Cathy Cato Evans, *Plaintiff*

#4086

3008656v1 99000.00100

00823

ON MOTION AND FOR GOOD CAUSE SHOWN, and with the consent of the Plaintiff and Third-Party Defendant James Thomas Cato and the Plaintiffs Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato and Cathy Cato Evens, it is ordered that Brian S. McCoy, Esquire, of the firm of Horack Talley be substituted as counsel for the Plaintiffs and for the Third-Party Defendant James Thomas Cato and that Carroll M. Pitts of the firm Robinson, Bradshaw & Hinson, P.A. be relieved as counsel for said parties.

Presiding Judge
Sixteenth Judicial Circuit

July ____, 2010

WE SO MOVE:

Carroll M. Pitts
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Facsimile: (803) 366-0643
bmccoy@horacktalley.com

WE CONSENT:

James Thomas Cato
James Thomas Cato, *Plaintiff and Third-Party Defendant*

Helen Cato Jones, *Plaintiff*

Donn S. Johnson, *Plaintiff*

Jane Cato West
Jane Cato West, *Plaintiff*

Robert Lee Cato, *Plaintiff*

Cathy Cato Evans
Cathy Cato Evans, *Plaintiff*

45 B6
108

3008656v1 99000.00100

ON MOTION AND FOR GOOD CAUSE SHOWN, and with the consent of the Plaintiff and Third-Party Defendant James Thomas Cato and the Plaintiffs Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato and Cathy Cato Evens, it is ordered that Brian S. McCoy, Esquire, of the firm of Horack Talley be substituted as counsel for the Plaintiffs and for the Third-Party Defendant James Thomas Cato and that Carroll M. Pitts of the firm Robinson, Bradshaw & Hinson, P.A. be relieved as counsel for said parties.

Presiding Judge
Sixteenth Judicial Circuit

July ____, 2010

WE SO MOVE:

Carroll M. Pitts
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Facsimile: (803) 366-0643
bmccoy@horacktalley.com

WE CONSENT:

James Thomas Cato

James Thomas Cato, *Plaintiff and Third-Party Defendant*

Douglas Edgar Jones, P.O.A. for Helen Cato Jones

Helen Cato Jones, *Plaintiff*

Donn S. Johnson, *Plaintiff*

Jane Cato West, *Plaintiff*

Robert Lee Cato, *Plaintiff*

Cathy Cato Evans, *Plaintiff*

#676
188

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
2008-CP-46-3171

JAMES THOMAS CATO, HELEN CATO JONES, DONN S. JOHNSON, JANE CATO WEST, ROBERT LEE CATO AND CATHY CATO EVANS,

Plaintiffs,

vs.

MARJORIE CATO BURTON, AS TRUSTEE OF THE SLOAN MARVIN BURTON AND MARJORIE CATO BURTON, AB LIVING, TRUST,

Defendants.

vs.

DAVID ALAN BURTON, AS ATTORNEY-IN-FACT FOR MARJORIE CATO BURTON, AS TRUSTEE OF THE SLOAN MARVIN BURTON AND MAJORIE CATO BURTON, AB LIVING TRUST, AND IN THE RIGHT AND ON BEHALF OF T.E. CATO ESTATE, LLC,

Third-Party Plaintiff,

vs.

JAMES THOMAS CATO AND THOMASSON APTS., LLC,

Third-Party Defendants.

vs.

THOMASSON APTS., LLC

Fourth-Party Plaintiff,

vs.

T.E. CATO ESTATE, LLC, JAMES THOMAS CATO, HELEN CATO JONES, DONN S. JOHNSON, JANE CATO WEST, ROBERT LEE CATO AND CATHY CATO EVANS, MAJORIE CATO BURTON, AS TRUSTEE OF THE SLOAN MARVIN BURTON AND MAJORIE CATO BURTON, AB LIVING TRUST,

Fourth-Party Defendants.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of a Consent Order Substituting Counsel was deposited in the United States mail, postage prepaid, on the 30th day of July, 2010 addressed as follows:

Demetri K. Koutrakos, Esq.
Jennifer N. Stone, Esq.
P.O. Box 1390
Columbia, SC 29202-1390

Joshua B. Vann, Esq.
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Lucy L. McDow, Esq.
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Rock Hill, SC 29731

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FILED-RECEIVED
2010 AUG 17 PM 4:16
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)
)
)
James Thomas Cato, Helen Cato Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato and Cathy Cato Evans,)
Plaintiff,)
vs.)
)
Marjorie Cato Burton, as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust)
Defendant.)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

CASE NO.: 2008-CP-46-3171

MOTION AND ORDER INFORMATION

FORM AND COVERSHEET

FILED-RECEIVED
2010 AUG 17 PM 4:15
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

Plaintiff's Attorney: Brian S. McCoy, Bar No. 2155 Address: 633 East Main Street Rock Hill, SC 29730 Phone: 803-366-2280 Fax 803-366-0643 E-mail: _____ Other: _____	Defendant's Attorney: _____, Bar No. _____ Address: _____ Phone: _____ Fax _____ E-mail: _____ Other: _____

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☒ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: _____
Estimated Time Needed: _____ Court Reporter Needed: ☐ YES/ ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant 7-30-10 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ 25
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION ☒ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE CODE _____ Date: _____

CLERK'S VERIFICATION

Collected by: SG Date Filed: 8

☒ MOTION FEE COLLECTED: $ 25

☐ CONTESTED – AMOUNT DUE: $ ____

SCCA 233 (11/2003)

EXHIBIT D

From: "Roger B. Jellenik" <rbjatty@mac.com>
Subject: **Re Cato Estates**
Date: February 28, 2009 7:54:20 PM EST
To: "Carroll M. Pitts, Jr., Esq." <cpitts@rbh.com>
1 Attachment, 25.5 KB

Mr. Pitts:

Attached below in .pdf format is a letter requesting your voluntary withdrawal from the partition action involving Marjorie Cato Burton. Please feel free to call me if you wish to discuss anything concerning this matter.

I regret that this case has to move forward this way, but, given your clients' position, evidently we have no choice.

Regards.

Roger B. Jellenik
Attorney at Law
rbjatty@mac.com

ROGER B. JELLENIK
ATTORNEY AT LAW

1111 Broad Street
Camden, SC 29020

Telephone 803-424-1919
Facsimile 803-424-1922
rbjatty@mac.com

Saturday, February 28, 2009

BY E-MAIL

Carroll M. Pitts, Jr., Esq.
Robinson Bradshaw & Hinson, PA
P.O. Drawer 12070
Rock, Hill SC 29731

RE: Cato et al. v. Burton as Trustee, Case No. 2008-CP 46-
Request for Voluntary Disqualification

Dear Mr. Pitts:

As discussed, at the request of her son and attorney-in-fact, David A. Burton, I represent the Respondent in the referenced case, Marjorie Cato Burton as Trustee, and you are attorney for the petitioners. However, I recently learned that you formerly represented both petitioners and my client in forming the T.E. Cato Estate, LLC ("Cato Estate LLC"), a South Carolina member managed limited liability company related to the larger issues implicated here. Also, I expect that a third party complaint will have to be filed against the Cato Estate LLC, which you evidently have also represented. Due to the nature of the claims to be asserted in the third party complaint, I believe it likely that you will, at least, be called as a witness to testify about the conduct of real estate transactions engaged in by the Cato Estate LLC and that company's governance.

As you know, I only accepted this matter quite recently for the purpose of assessing it, after which I learned of this action and the imminent default confronting my client. As we have discussed, without an extension and continuance to gain time to explore options, I have no choice but to file pleadings and otherwise act to represent my client. Therefore, in view of the circumstances set forth above, I must now ask you voluntarily to disqualify yourself from representing the petitioners in the referenced case.

Please favor me with your reply on or before 12:00 noon on March 3, and thank you for your attention to this matter.

Sincerely yours,

Roger B. Jellenik

RBH 001585

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

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

Plaintiff,

vs.

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

Defendants.

Civil Action No. 2010-CP-46-2267

Trial Brief

No Attorney-Client Relationship Existed between the Burton Trust and RBH

No attorney-client relationship existed between Carroll M. Pitts, Jr. ("Pitts") or Robinson Bradshaw & Hinson, P.A. (collectively, "RBH") and the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust (the "Burton Trust") because: (1) the Burton Trust did not manifest the intent to form an attorney-client relationship to Mr. Pitts; and (2) Mr. Pitts never consented to form an attorney-client with the Burton Trust.

FACTS

This legal malpractice lawsuit arises out of a commercial real estate transaction which closed in December 2007 in York County. In early 2007, James Thomas "Tommy" Cato ("Cato") engaged Mr. Pitts to draft the documents necessary to the formation of an LLC and to draft a deed that would convey certain property owned by the Cato heirs into that LLC so the property could be marketed and sold.

In May 2007, Mr. Pitts drafted the Articles of Organization and Operating Agreement to form the T. E. Cato Estate, LLC (the "LLC"). Each heir was given an ownership interest in the LLC equal to his percentage ownership in the land. Mr. Cato was named the General Manager. Mr. Pitts also prepared a deed to convey each heir's interest in the property into the LLC using tax map numbers provided by Mr. Cato and certain probate records.

Mr. Cato mailed or hand-delivered the LLC documents and the deed to each heir during May and June 2007. Each of the heirs executed the documents. Mr. Pitts filed and recorded the necessary documents after they were executed. After the LLC was formed and the property deeded into it, Mr. Cato located a buyer, and ultimately, the property was sold to this buyer.

On May 27, 2010, the Burton Trust filed this legal malpractice lawsuit against Mr. Pitts and RBH. The Complaint alleges that Mr. Pitts represented the Burton Trust individually by virtue of its membership in the LLC. No other member of the LLC made this allegation.

ARGUMENT

No attorney-client relationship existed between Mr. Pitts and the Burton Trust because: (1) the Burton Trust did not manifest the intent to form such a relationship to Mr. Pitts; and, (2) Mr. Pitts never consented to represent the Burton Trust.

Under South Carolina law, "[t]he attorney-client relationship cannot be assumed since the relationship is created by the consent of the parties. The client cannot unilaterally impose the relationship upon the attorney, and neither can the attorney create the relationship without the client's consent." *Argoe v. Three Rivers Behavioral Center*, 2008 WL 8185836 (S.C. Comm. Pl. July 3, 2008) *aff'd*, 388 S.C. 394, 697 S.E.2d 551 (2010). Stated differently, "[t]he claimant's subjective belief does not establish an attorney-client relationship unless the lawyer reasonably induced that belief." Mallen & Smith, *Legal Malpractice* § 8:3 (2014 ed.).

As explained in The Restatement (Third) of The Law Governing Lawyers, an attorney-client relationship is premised upon mutual manifestation of consent:

> A relationship of client and lawyer arises when:
> (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
> (a) the lawyer manifests to the person consent to do so; or
> (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or
> (2) a tribunal with power to do so appoints the lawyer to provide the services.

Restatement (Third) of The Law Governing Lawyers § 14 (2000).

1. The Burton Trust never manifested the intent to form an attorney-client relationship to Mr. Pitts.

The Burton Trust never manifested the intent to form an attorney-client relationship to Mr. Pitts. Dr. Burton testified that the Burton Trust never communicated directly with Mr. Pitts about the work he did for the LLC:

> Q: Did your mother or you ever ask Mr. Pitts any questions about any of the work that he did on behalf of the LLC?
>
> A: No, sir.
>
> Q: Did you or your mother ever attempt to set up a meeting with Carroll Pitts to ask him any of the questions about the work he was doing on behalf of the LLC?
>
> A: No, sir.

(Burton Dep. 46:16-24; May 12, 2014.) Further, Dr. Burton testified that neither he nor his mother ever emailed or otherwise attempted to communicate with Mr. Pitts. (*Id.*

46:20-47:15.) In fact, Dr. Burton testified that Mr. Pitts never represented him or his mother individually. (Burton Dep. 165:1-14; May 10, 2010.) Conversely, Dr. Burton's understanding was that Mr. Pitts was the attorney for the LLC. (*Id.*)

Both of the expert witnesses hired by the Burton Trust agreed that there is no evidence in the record that the Burton Trust manifested its purported intent to form an attorney-client relationship to Mr. Pitts other than the filing of this lawsuit. Mr. Virzi testified as follows:

> Q: I'm talking about evidence in the record from Marjorie Cato Burton, as a trustee of the Burton Trust, that Carroll Pitts was her lawyer, not from Tommy Cato and not from Carroll Pitts. Where do we have something in the record from Marjorie Cato Burton manifesting this subjective intent?
>
> A: I don't believe we have –
>
>> MR. MCMASTER: Objection as to form.
>> BY MR. OUTTEN: Sir?
>
> A: I don't believe we have any statements from her in the record that I know of.

(Virzi Dep. 35:5-17; May 23, 2014.) Mr. Virzi then testified that the filing of this lawsuit was a manifestation of the Burton Trust's belief:

> Q: Is there evidence in the record that we have that Marjorie Cato Burton, as trustee of the Burton Trust, had a subjective belief that Carroll Pitts was her lawyer?
>
>> MR. MCMASTER: Objection as to form.
>
> A: Outside that implication in the hiring of counsel to sue him for malpractice and the caption of the case, I'm not sure if it exists beyond that.

(*Id.* 32:20-33:3.) Similarly, Mr. Freeman testified that the filing of this lawsuit was a manifestation of the Burton Trust's belief that Mr. Pitts was its attorney, as follows:

> Q: Where is the evidence in the record that the Burton Trust believed that Carroll Pitts was their lawyer?
>
> A: Lawsuit.

(Freeman Dep. 39:1-4; July 28, 2014.) The filing of a malpractice lawsuit after the fact cannot serve as competent evidence that the would-be client manifested the intent to form an attorney-client relationship to the attorney. Fundamentally, as Mr. Virzi testified, the belief that an attorney-client relationship exists must be contemporaneous with the existence of the alleged relationship. (Virzi Dep. 109:2-7.) Therefore, this lawsuit (which was filed over two years after the alleged malpractice occurred) cannot form the basis for the existence of an attorney-client relationship between the Burton Trust and Mr. Pitts.

Because the Burton Trust never manifested the intent to form an attorney-client relationship to Mr. Pitts, no attorney-client relationship existed between them.

2. Mr. Pitts never consented to the formation of an attorney-client relationship with the Burton Trust.

"Because the relationship is contractual, the predicate is that both lawyer and client have consented, expressly or impliedly, to its formation." Mallen & Smith, *Legal Malpractice* § 8:3 (2014 ed.). Mr. Pitts neither expressly nor implicitly consented to an attorney-client relationship with the Burton Trust; therefore, no attorney-client relationship existed between them.

a. Mr. Pitts never expressly consented to represent the Burton Trust.

Mr. Pitts never had any substantive conversation with any of the heirs, including the Burton Trust. (Pitts Dep. 109:21-24; June 15, 2012.) He did not talk on the phone with Marjorie Cato Burton, nor did he meet with her in person. (*Id.* 36:24-37:15.) Conversely, Mr. Pitts communicated solely with Mr. Cato in his capacity as General Manager of the LLC. (*Id.* 44:16-19.) In fact, Mr. Pitts testified that "[he] believe[d] Mrs. Burton had her own counsel." (*Id.* 41:15-16.) Therefore, Mr. Pitts never consented to an attorney-client relationship with the Burton Trust because he never communicated directly with its Trustees.

In addition, the email sent to Mr. Cato from Mr. Pitts where he stated "[f]eel free to share my opinions" fails to prove that Mr. Pitts consented to the formation of an attorney-client relationship with the Burton Trust. (Email from Carroll Pitts to James Thomas Cato dated Nov. 8, 2007; attached as **Exhibit A.**) In this email, Mr. Pitts simply offered that Mr. Cato could share his opinion that $1 million was a good price for the property with the LLC's members if Mr. Cato desired to do so – he did not manifest any consent to represent the Burton Trust. It defies logic that this email could form the basis of a relationship that is contractual in nature with a the Burton Trust when it was not even a recipient. Further, even if Mr. Cato forwarded the email to the Burton Trust, this action would be insufficient to prove the existence of an attorney-client relationship because the email lacks any indicia that Mr. Pitts consented to representing the Burton Trust individually. *See In re Ducane Gas Grills, Inc.*, 320 B.R. 312 (2004) (finding that forwarding a letter from a lawyer to a third party did "not sufficiently demonstrate that [the p]laintiffs were also clients of [the law firm] because nothing in the [] letter indicated that [the p]laintiffs were actively seeking legal advice *for themselves* from [the law firm]").

Therefore, Mr. Pitts did not expressly consent to an attorney-client relationship with the Burton Trust because he never expressly consented to such a relationship.

b. Mr. Pitts never implicitly consented to represent the Burton Trust.

There is also no credible basis for concluding that Mr. Pitts implicitly consented to an attorney-client relationship with the Burton Trust.

Because Mr. Pitts never directly communicated with the Burton Trust (or any other heir except Mr. Cato), the only reasonable basis for him to implicitly consent to an attorney-client relationship with the Burton Trust would be through Mr. Cato's communications. But Mr. Cato's communications clearly and consistently stated that Mr. Pitts was the "Corporation Attorney"; therefore, there is no reasonable basis to conclude the Burton Trust was induced to believe Mr. Pitts consented to represent it individually based on them. (*See, e.g.*, Email from Mr. Cato to Cato Heirs dated Aug. 20, 2007; attached as **Exhibit B**; email from Mr. Cato to Sloan Marvin Burton dated Dec. 8, 2007; attached as **Exhibit C**.)

Additionally, these two emails, which were cited by the Burton Trust's experts as evidence of Mr. Pitts consent to represent the Burton Trust, were both sent to the Burton Trust after Mr. Pitts drafted the Articles of Organization, the Operating Agreement, and the deed into the LLC. It follows that any belief the Burton Trust held based on these emails was necessarily formed after Mr. Pitts completed the tasks he was engaged to perform. Therefore, the Burton Trust could not have held the purported belief that Mr. Pitts represented it at the time the alleged negligent acts or omissions occurred.

Therefore, these two emails from Mr. Cato fail to prove that Mr. Pitts implicitly consented to represent the Burton Trust.

Because Mr. Pitts never expressly nor implicitly consented to an attorney-client relationship with the Burton Trust, no attorney-client relationship existed between them.

CONCLUSION

No attorney-client relationship existed between Mr. Pitts and the Burton Trust because: (1) the Burton Trust did not manifest the intent to form such a relationship to Mr. Pitts; and (2) Mr. Pitts never consented to represent the Burton Trust.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: Samuel W. Outten

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Columbia, SC 29201
(803) 799-2000

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

York, South Carolina

November 16, 2014

~#4824-5157-9168

EXHIBIT A

EXHIBIT 89

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

Opinion Ltr of Real Estate Attorney with 45 yrs experience

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

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

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

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

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

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

Feel free to share my opinions.

Carroll

'56 ... 1963 ... 44 yrs exp.

00841

EXHIBIT B

FINAL cc copies

EXHIBIT
Cato 5
11/19/2010 JS

Subj: **Burton questions on "TECato LLC letter of 8/1/07"**
Date: 8/20/07 1:28:51 P.M. Eastern Daylight Time
From: CharlnsOff
To: sloanmburton@hotmail.com(Marjie&Marvin), DBurton4@nc.rr.com(David), sara.TheFamilyConnection@cots-homeless.org(Sara), treblard@comcast.net(Albert), JONESCLIPPER, teamjohnson@charterinternet.com(Donn), bcato03@earthlink.net(Bob)

Dear Marjie and Marvin,

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

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

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

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

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

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

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

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

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00843

and Marvin reviewed them. There was no questioning of ownership percentages by any heir I met with - I guess it's pretty straight forward. The implementation of a Corporation is what you and Marvin have been working on for 30 years - I kept all those typewritten copies all this time. Bud Burton was ready to implement a L.L.C. per his letter to "Cato Family Members (and heirs)" dated 4/23/98 and 3/25/99 - I kept those, too. The 3/25/99 letter from Bud promised L.L.C. implementation. Everyone signed off and supported that. Dale Dove was to set up the L.L.C. and also was going to buy hte property for a hoped-for $613,000.00. according to Bud's report (I have that). Everyone agreed tp the Dale Dove deal. Now, all the heirs have agreed that Tommy's turn has come to be in charge and that interests in the Corporation are the same as the percentages of ownership. In the Corporation, no one has "veto power" over the majority.

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

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

Thanks for writing me,
Tommy

Letter references from:

Bud	11/16/96,4/23/98, 4/28/98,8/10/98, 3/25/99,3/31/99,12/31/04
Marjie & Marvin	6/2/67,7/31/68,2/28/69,5/5/94,11/26/99,3/20/07,3/21/07
Tommy	2/24/07,4/9/07,6/21/07,7/12/07,7/18/07,7/29/07,7/31/07,8/1/07,8/16/07

EXHIBIT C

Subj: **Re: Fw: Requirements for signing of Cato SCDOT quitclaim deed**
Date: 12/8/07 6:19:03 P.M. Eastern Standard Time
From: CharInsOff
To: SloanMBurton@hotmail.com

Saturday night

Dear Aunt Marjie,

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

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

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

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

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

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

In summation, it appears your demands cannot be satisfied. Sorry.

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

Regards,

Your nephew,
Tommy Cato

EXHIBIT
Cato 12
11/19/2010 JS

RBH 002557

00846

COPY

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
FOR THE SIXTEENTH JUDICIAL CIRCUIT

David A. Burton as Successor Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, Individually and in the Right and on Behalf of T.E. Cato Estate, LLC,
Plaintiff

v.

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

Case No. 2010-CP-46-2267

REPLY BRIEF

FILED-RECEIVED
2015 MAR 11 PM 12:55

REPLY BRIEF

Introduction

This Reply Brief responds on behalf of the Plaintiff to the nine trial briefs submitted by Defendants during the two sessions of trial of the captioned case, the first session from December 16 to December 18, 2014, and the second session from January 26 to January 27, 2015. Defendants' filings are identified as follows:

Brief ID #	Brief Title
1	**The Plaintiff Cannot Assert This Assigned Claim**
2	**Plaintiff Cannot Assert a Claim on Behalf of the T.E. Cato Estate, LLC**
3	**The Actions of the Burton Trust Caused the Partition Action**
4	**This Court Previously Ruled that No Attorney-Client Relationship Existed with the Burton Trust**
5	**The Plaintiff's Ratification of the Underlying Transaction Precludes This Claim**
6	**This Claim was Extinguished by the Settlement Agreement**
7	**The Plaintiff's Recovery in the Underlying Action Acts as a Setoff**
8	**The Plaintiff Cannot Prove It Was Damaged by Any Act or Omission of RBH**
9	**No Attorney-Client Relationship Existed Between the Burton Trust and RBH**

Definitions

As used in this Reply Brief, certain words and phrases are defined as follows:

- "Areas" refers only to the four parcels of York County real property involved in the real estate transactions underlying the facts of this case.
- "Burton Trust" refers to the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust.
- "Closing" refers to the closing of the purported sale of the Areas held on December 12, 2007.
- "CatoLLC" refers to T.E. Cato Estate, L.L.C., formed to facilitate the sale of the Areas.
- "Defendants", "Defendant Pitts", and "Defendant RBH" refer collectively or individually, as applicable, to the Defendants named in the caption of this case.
- "Dr. Burton" refers to Marjorie Cato Burton's son and successor Trustee of the Burton Trust.
- "Heirs" refers to the heirs of T.E. Cato, who died in 1957.
- "Mr. Cato" refers to James Thomas Cato, one of the Heirs and General Manager of CatoLLC.
- "Mr. Higgins" refers to William O. Higgins, Esq., an expert witness for Defendants.
- "Mr. Vann" refers to Joshua B. Vann, Esq., an attorney with Morton & Gettys, LLC, who conducted the Closing.
- "Ms. Burton" refers to Marjorie Cato Burton, the Trustee of the Burton Trust during the course of events at issue on the captioned action.
- "New Roadbed Tract" refers to the parcel(s) of land that were part of the Areas in 2004, but deeded by the Heirs to the S.C. Department of Transportation in that year to initiate a swap of roadbeds for the purpose of enhancing the value of the Areas.
- "Old Roadbed Tract" refers to the land deeded out of the Estate of T.E. Cato to the SC Highway Department, but deeded back to the Heirs in 2006 to complete the swap of roadbeds.
- "Partition Action" refers to Case No. 2008-CP-46-3171 filed in August 2008.
- "Plaintiff" refers to the Plaintiff as named in the caption of this case.
- "Settlement" refers to the Settlement Agreement, the Assignment Agreement, and other documents executed by the parties and approved by the Court to conclude the Partition Action.
- "Thomassons" refers to the party identified as the buyer at the Closing or, as applicable, the grantee identified in the deed delivered as a result of the Closing.

General Comments

Defendants' Trial Brief Contents. For the record, Plaintiff objects and takes exception to references in Defendants' Trial Briefs to documents or matters that are not part of the trial record in the captioned action.

Affirmative Defenses. For the record, Plaintiff objects and takes exception to references in Defendants' Trial Briefs to issues, claims, and discussions that represent or relate to affirmative defenses not pled by Defendants in the captioned action. *See* Rule 8(c), SCRCP.

Fact Background

This case arose out of efforts by all of the Heirs to sell their respective fractional interests in the Areas as to which Mr. Cato, one of the Heirs himself, acted as "point man". Acting in that capacity, sometime in early 2007, Mr. Cato hired Defendants to facilitate the efforts of the Heirs by, among other things, preparing i) Articles of Organization and an Operating Agreement for CatoLLC, a limited liability company yet to be formed, and ii) a deed conveying the Heirs' fractional interests in the Areas to CatoLLC. Neither then nor later did Defendants ever issue any sort of engagement letter or other writing identifying the "client" in the attorney-client relationship, the scope of services to be performed by Defendants, or any other terms of their representation. Nevertheless, Defendants claim to have viewed their "client", before the formation of CatoLLC, as Mr. Cato in his role as its promoter and future General Manager, and, after the formation of CatoLLC, as Mr. Cato as its General Manager and CatoLLC itself.[1]

Against this background, the record shows that Mr. Cato reassured the Burton Trust that Defendants were the "corporation attorney", that he instructed Defendants generally to protect all of the heirs and specifically to protect the other heirs from him, that he consulted "the corporation attorney" before he acted, and that he did nothing without the approval of the "corporation attorney".[2] However, unknown to the Burton Trust, Defendants were not in fact

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[1] *See, e.g.,* Trial Transcript at Interrogatory Responses Nos. 1a and 8 transmitted by Defendants' counsel's letter dated January 25, 2011, set forth in Plaintiff's Trial Exhibit 34.

[2] *See, e.g.,* email from Mr. Cato to Ms. Burton dated August 20 and Trial Transcript at 1019:20 - 1020:3, 1022:2-4, 1023:11-13. Mr. Cato's email notes that Mr. Cato's representations were the same as discussed in meetings and telephone conversations among Mr. Cato and the other Heirs during 2007.

following Mr. Cato's instructions as detailed by Mr. Cato in his emails and other communications.[3] Further, Ms. Burton as then Trustee of the Burton Trust was expressing serious concerns about Mr. Cato's authority, the value of the Areas, and other aspects of what was going on.[4] Notwithstanding, despite timely notice and possession of Mr. Cato's and Ms. Burton's email exchanges, at no time did Defendants communicate with Ms. Burton or any member of her immediate family to clarify Defendants' view of the attorney-client relationship or contradict Mr. Cato's explanation of his instructions to Defendants or of Defendants' role overseeing Mr. Cato.[5]

As to the services performed by Defendants, they produced a flurry of issues that wound up being litigated. As to the CatoLLC formation documents, the record shows that the Articles of Organization set up a "manager-managed" LLC, while the Operating Agreement arguably set up a "member-managed" LLC.[6] Also, the Operating Agreement was confusing as to the authority of Mr. Cato as the General Manager versus the authority of the members as managers.[7]

As to the intended conveyance of the Areas from the Heirs to CatoLLC, despite preparing and recording the general warranty deed, Defendants did not see a need to perform a proper title search, thus exposing the Heirs and CatoLLC to prospective risks.[8] Indeed, as prepared by Defendants, that general warranty deed incorrectly i) excluded the Old Roadbed Tract, ii) included the New Roadbed Tract, and iii) conveyed the Areas to a non-existent grantee because CatoLLC's Articles of Organization were not yet filed when the Heirs executed the deed.[9]

As to the Closing, Defendants reviewed and approved the Closing documents on behalf of CatoLLC as seller and grantor with full knowledge that the Burton Trust's concerns were

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[3] *See, e.g.*, Trial Transcript at 486:1-19, 506:6 - 507:9, and 564:18 - 565:2. Nor does the record contain evidence that Defendants gave any significant advice to Mr. Cato on this point.

[4] *See, e.g.*, emails from Ms. Burton to Mr. Cato dated August 4 and November 7, 2007.

[5] *See, e.g.*, Trial Transcript at 251:20 - 252:1 and 329:22-24.

[6] *See* Plaintiff's Trial Exhibits 6 and 7.

[7] *See, e.g.*, Plaintiff's Trial Exhibit 7 and Trial Transcript at 68:12 - 73:9.

[8] *See, e.g.*, Trial Transcript at 510:10 - 512:20. In the testimony following this citation, Mr. Cato claims not to have represented CatoLLC, but the record disagrees. *See, e.g.*, Footnote 1 *supra*.

[9] *See, e.g.*, Plaintiff's Trial Exhibits 3, 5- 8 and Trial Transcript at 672:4 - 673:12.

unaddressed, and litigation would likely follow.[10] And then, in August 2008, Defendants filed the Partition Action on behalf of the other Heirs against the Burton Trust.[11] That litigation went on until the parties arrived at the Settlement nearly five years later in June 2013.[12]

And, as to communications, Defendants never directly communicated with Ms. Burton or any member of her immediate family in any way to explain the legal significance and risks associated with the Articles of Organization, the Operating Agreement, or the deed of the Areas to CatoLLC that Defendants prepared; instead they gave those documents to Mr. Cato, an interested party who was not a lawyer, for him as their agent to explain to Ms. Burton as then Trustee of the Burton Trust,[13] a process that arguably facilitated the unauthorized practice of law by Mr. Cato. Defendants continued to advise Mr. Cato during the negotiations for the sale of the Areas to the Thomassons during the remainder of 2007, but never communicated with Ms. Burton or any member of her immediate family in any way to address her concerns regarding Mr. Cato's authority, the absence of an appraisal of the Areas, or the risk of litigation.[14]

Reply to Defendants' Trial Brief No. 1: The Plaintiff Cannot Assert This Assigned Claim

Defendants argue that "this Court ruled that assertion of this assigned claim would prejudice RBH", "this assigned claim is time-barred", and "this legal malpractice claim cannot be assigned under South Carolina law." *See* Defendants' Trial Brief No. 1 at 2. As to the prejudice issue, Plaintiff agrees that the Motion to Amend and Motion to Reconsider were denied by the Court, those denials struck the addition of new parties at that point in the proceeding, and those denials struck the more specific factual allegations that arose from the Settlement. However, nothing in the Court's rulings applies to the liability or damages discussed in the unamended

[10] *See* Plaintiff's Trial Exhibit 13. *See also* Plaintiff's Trial Exhibit 24 containing Defendant Pitts' email dated November 8, 2007. Despite the absence of an appraisal, Mr. Pitts advised acceptance of the Thomassons offer for the Areas based upon his own opinions and telling Mr. Cato to "Feel free to share my opinions."

[11] *See* Plaintiff's Trial Exhibit 14.

[12] *See* Plaintiff's Trial Exhibits 38a - 38f.

[13] *See, e.g.,* Trial Transcript at 424:17 - 427:2.

[14] *See, e.g.,* Ms. Burton's emails dated August 4 and November 7, 2007. *See also* Trial Transcript at 425:17 - 427:2.

Complaint. Paragraph 28 of that Complaint states that "Plaintiff is informed and believes that CatoLLC is entitled to an order allowing recovery for any liability, loss, or damage suffered or to be suffered by CatoLLC by reason of Defendants' failures." As to CatoLLC, what is sought in this case as damages are i) CatoLLC's legal fees in the Partition Action and ii) CatoLLC's loss related to the difference between the sale price of the Areas and the value of the Areas. In short, Defendants' prejudice argument is irrelevant.

As to the time-bar issue, to Plaintiff's knowledge, Defendants seem to express or imply an affirmative defense of statute of limitations. But Defendants did not plead that affirmative defense, and therefore Rule 8(c), SCRCP, bars it. Also, the assignment here by CatoLLC was an assignment of assets, which included its right of recovery to the claims brought on its behalf in this action. Since Plaintiff[15] filed this case nearly three years before the Settlement was executed, and within the applicable statute of limitations, the Settlement included any right to recovery that CatoLLC might have had with respect to its status in this case. In short, Defendants' conclusion here is based upon false premises.

As to the assignment issue, the case at bar is not dependent upon an assignment of a legal malpractice claim.[16] Further, there is no controlling South Carolina precedent supporting Defendants' statement of South Carolina law. The sole South Carolina precedent cited in Defendants' brief is a 2013 trial court decision in Pavilion Dev. Corp. v. Nexsen Pruet, LLC, a trial court opinion. It involved assignment of a legal malpractice cause of action yet to be filed.[17] Here, the legal malpractice action was filed in 2010 as part of Case No. 2010-CP-46-2267, while the assignment referred to by Defendants' brief was part of the 2013 Settlement of the Partition

[15] In addition to the Burton Trust filing individually, it also filed in the right and on behalf of CatoLLC pursuant to S.C. Code 33-44-1101.

[16] *See* Footnote 15 *supra*.

[17] The order states that "The terms of the settlement reached between Plaintiffs and DC & Sons are as follows. .... Second, the parties entered into an agreement in which Plaintiffs assigned to DC & Sons all proceeds from a case *to be brought* against Nexsen Pruet for legal malpractice and breach of fiduciary duty, as well as the right to elect to own the claims themselves. Id. Plaintiffs also gave DC & Sons the right to control the litigation, including trial, appeal, settlement, and the waiver of the attorney-client and work-product privilege with Nexsen Pruet. Id." (Emphasis added) *See* Pavilion Dev. at 2..

Action filed in 2008. Also, as noted above, what CatoLLC assigned in the Settlement was its assets, including but not limited to any right to recovery that CatoLLC might have with respect to its status as a party plaintiff in the case at bar.[18] Pavilion Dev. was later cited in Skipper v. ACE Property and Casualty Insurance Company, 2014 WL 4700220 (U.S. District Court, D.S.C., Aiken Division). Skipper did not decide this issue[19] and, in any event, it too is distinguishable on its facts. The Skipper settlement involved assignment of a legal malpractice cause of action in the case being settled, a situation that, as already noted, does not exist here. In short, Defendants' assignment argument is irrelevant.

Based upon the discussion above, Plaintiff respectfully submits that further consideration of the arguments in Defendants' brief is unwarranted.

Reply to Defendants' Trial Brief No. 2: Plaintiff Cannot Assert a Claim on Behalf of the T.E. Cato. Estate, LLC.

Defendants argue that "the Burton Trust cannot fairly and adequately represent the interests of the LLC's members", "the LLC has dissolved and, therefore, the relief sought is individual to the Burton Trust", and "the claim is moot." As to the fair and adequate representation issue, the Burton Trust's inclusion of CatoLLC as a party plaintiff in this action was in the interests of CatoLLC. As shown by trial testimony and exhibits referred to in the "Fact Background" above, Mr. Cato's acts and omissions as CatoLLC's General Manager led the Burton Trust to express concerns regarding Mr. Cato's authority, the lack of a proper appraisal of the Areas,[20] and potential exposure to lawsuits arising out of those circumstances. Each of these issues affected CatoLLC and the other Heirs as well as the Burton Trust. Further, at the time of the filing of this case, the Partition Action was already over 18 months old. In this context, the Burton Trust included paragraph 16 in the Complaint in this case specifically to protect the interests of CatoLLC and the other Heirs. That paragraph reads as follows:

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[18] *See* Footnote 15 *supra*.

[19] Judge Childs' decision in Skipper certifies the following question to the Supreme Court of South Carolina for adjudication: "Can a legal malpractice claim be assigned between adversaries in litigation in which the alleged legal malpractice arose?" (Emphasis added) *See* Skipper at 5.

[20] *See, e.g.*, Footnote 10 *supra*.

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

> a. Mr. Cato has initiated and is party to a related adversarial legal action against Plaintiff, Case No. 2008-CP-46-3171, dealing with the same real property that is in part the subject of this case;
> b. Mr. Cato is a third party defendant in Case No. 2008-CP-46-3171 and would be determining whether to seek redress for his own acts and omissions and/or recovery from himself; and
> c. Upon information and belief, the legal issues presented herein have arisen in part as a direct result of Mr. Cato's continuing course of conduct, and Mr. Cato has evidenced no desire or intent to alter that course of conduct.

Paragraph 16 was included pursuant to and in conformity with S.C. Code 33-44-11-01, which reads as follows:

> A member of a limited liability company may maintain an action in the right of the company if the members or managers having authority to do so have refused to commence the action or an effort to cause those members or managers to commence the action is not likely to succeed.

The other Heirs including Mr. Cato could have elected at any time to initiate an action or join in this action; their election not to do so was their decision. But that decision on their part has nothing to do with the facts alleged, the causes of action asserted, or the damages sought in this case. In this regard, Defendants' brief cites Covan v. Blue Cross and Blue Shield of South Carolina, a Richland County Court of Common Pleas case evidently decided in 2010, for the proposition that "(g)enerally a cause of action is either derivative or direct." *See* Defendants' Trial Brief No. 2, Exhibit B at 4. Here, there are two causes of action, one on behalf of the Burton Trust and one on behalf of CatoLLC. As noted at trial, damages sought in the Burton Trust's direct cause of action include only its legal fees and costs in the Partition Action; the Burton Trust has not sought damages for land value in this case because it was compensated for its share of land value in the Settlement.[21] As also noted at trial, damages sought in the Burton

[21] *See, e.g.*, Plaintiff's Trial Exhibit 32 and Trial Transcript at 318:20 - 319:17, 408:24 - 409:4, 912:17 - 913:6.

Trust's derivative cause of action include CatoLLC's legal fees and costs in the Partition Action[22] and the compensation that should have been realized by CatoLLC (not the Burton Trust) for the sale of the Areas less the sum already received by the Burton Trust as a result of the Settlement. Thus, if this Court decides that the Areas were properly valued, as of the Closing, at $1,866,000.00 based upon the total compensation received by Plaintiff, Plaintiff would seek 80% of $966,000.00 --- the difference between $1,866,000.00 and the $900,000.00 paid by the Thomassons at the Closing --- as damages for its land value claim. Alternatively, if this Court decides that the Areas' value should be based upon one of the appraisals admitted into evidence at trial, then Plaintiff seeks 80% of the difference between that appraised value and the $900,000.00 paid at the Closing as damages for its land value claim. In summary, as noted at trial, the Settlement recovered by Plaintiff for land value related only to its 20% individual interest, not to the remaining 80% interest. In short, one cause of action is direct, and the other cause of action is derivative, as noted in Covan.

As to the dissolution issue, Defendants' brief asserts that, since CatoLLC dissolved after the Settlement was approved by the Court, the only interests remaining belong to the Burton Trust. Defendants' brief then cites Ward v. Griffin, 295 S.C. 219, 367 S.E.2d 703 (Ct.App. 1988) for the proposition that "A derivative action is a suit brought by a stockholder to enforce a corporate right." Defendants conclude by noting that, since CatoLLC dissolved, there is no corporate right remaining. However, Defendants' argument here overlooks several material points. First, this action was filed three years before dissolution of CatoLLC pursuant to and in conformity with S.C. Code 33-44-1101. Second, the Settlement resulted in the Burton Trust acquiring all of the assets of CatoLLC. Third, the asset transferred by the Settlement to the Burton Trust in this regard was not CatoLLC's right to file this action against Defendants, but rather its right to recovery in the event that the Court awards damages to Plaintiff for the cause of action in Plaintiff's Complaint filed in the right and on behalf of CatoLLC. Fourth, as noted in the Plaintiff's Complaint and discussed in the preceding paragraph and at trial, the second cause of action in this case exists to enforce CatoLLC's right to recover damages to it, not to the Burton Trust. And, fifth, Defendants have presented no evidence or authority that dissolution

[22] *See, e.g.*, Plaintiff's Trial Exhibit 32 and Trial Transcript at 913:7 - 14.

following a sale of assets is at all unusual or negates the transfer of those assets. Thus, for purposes of this brief, Plaintiff submits that CatoLLC's dissolution is irrelevant.

As to the moot claim issue, the very language quoted from the Settlement Agreement by Defendants in their brief confirms that the parties to the Settlement released actual or potential claims by the parties to the Settlement "against each other". *See* Defendants' Trial Brief No. 2 at 6. The Settlement did not release any claims against third parties, that is, persons not signatories to the Settlement documents.

Based upon the discussion above, Plaintiff respectfully submits that further consideration of the arguments in Defendants' brief is unwarranted.

Reply to Defendants' Trial Brief No. 3: The Actions of the Burton Trust Caused the Partition Action.

Defendants allege that "Marjorie Cato Burton's refusal to sign the quitclaim deed caused the (P)artition (A)ction, and therefore the damages alleged by the ... [Burton Trust] were not caused by any alleged act or omission of ... [Defendants]." Defendants' Trial Brief No. 3 at 1. Defendants' position is premised upon a. its allegations of fact; b. Dr. Burton's deposition testimony; and c. Wilson v. Moseley *et al.*, 327 S.C. 144, 488 S.E.2d 862 (1997). As to each of these premises,

a. The Defendants' brief disregards the causal chain. The Partition Action underlying this case is just one link in that chain. Defendants admit that "[Mr. Cato] engaged Mr. Pitts to form an LLC ... and *to draft a deed that would convey certain property owned by the Cato heirs into that LLC* so that the property could be marketed and sold." (Emphasis added) Defendants' Trial Brief No. 3 at 1. Simply put, the deed prepared by Defendants does not do what Defendants' own brief says that it was supposed to do. Defendant Pitts, Mr. Higgins, and other witnesses testified accordingly, *viz,* that the deed prepared by Defendants failed to convey the Old Roadbed Tract that was part of the property that the Heirs owned and wanted to sell, and this omission caused the partition action. *See, e.g.,* Trial Transcript at 526:19 - 527:5 and 672:4 - 674:1.

b. Defendants assert that "Dr. Burton's testimony proves that the (P)artition (A)ction was caused by the Burton Trust's refusal to sign the quitclaim deed." Defendants' Trial Brief No. 3 at 3. First, Plaintiff objects to consideration of Dr. Burton's Partition Action deposition testimony as quoted in Defendants' brief because that deposition transcript is not in the trial record. Next, Dr. Burton's deposition testimony quoted in Defendants' brief is equivocal, using terms such as "assume" and "guess". "Assume" as used in this context is defined by dictionary.com as "to take for granted or without proof." Likewise, "guess" as used in this context is defined by dictionary.com as "to form an estimate or conjecture." Both of these terms provide significant equivocation and demonstrate no true commitment to any understanding of the question or answer. Also, Defendants' brief does not address the testimony of Defendant Pitts and Mr. Higgins, Defendants' expert witness, cited at the end of paragraph 3a above.

c. In Wilson v. Moseley *et al.*, the Supreme Court of South Carolina affirmed a trial court's award of summary judgment to defendant attorneys in a legal malpractice case asserting that defendants' failure to discover a tax deed in plaintiff's chain of title caused a mortgage foreclosure. Defendants' citation of this decision is not relevant to this case because it is distinguishable. Wilson was based upon expiration of the applicable statute of limitations set forth in S.C. Code 12-51-60, and there is no similar issue here. Also, in Wilson, the property at issue had a cloud on the title that was not discovered until after the purchase of the property. The plaintiff in that case had a mortgage on the property, a second legal obligation she had signed with a third-party not involved in the creation of the cloud on the title and not charged with finding the cloud on the title. The Wilson plaintiff then refused to pay the mortgage payments to the lender, and the lender foreclosed on the property pursuant to the secondary legal obligation. These facts differ significantly from the facts here. Plaintiffs here were under no legal obligation to sign a quitclaim deed, contrary to Wilson's separate legal obligation to pay a mortgage. As noted at trial, the only reason there was a quitclaim deed drafted in this case was because of the failures of these Defendants to do what was asked of them, *i.e.,* to transfer into CatoLLC all of the property owned by the Heirs. *See* Trial Transcript at 673:6-19 and 1041:11-20. Had Defendants properly performed within the standard of care, there would have been no need for a quitclaim deed.

Additionally, there was no legal obligation, such a contract or mortgage, requiring any action or execution by the Plaintiffs. The Plaintiffs did not sign any note or contract requiring them to execute subsequent documents such as a quitclaim deed. In fact, Defendants entire theory of the case revolves around their position that Tommy Cato had unilateral authority to execute the sale documents to Thommason without any vote or approval by the Plaintiffs.

Finally, nothing in Wilson suggests liability would not exist there if its fact pattern were aligned with the fact pattern here.

For the reasons set forth above, Plaintiff respectfully submits that Defendants' Brief No. 3 fails in its arguments and should not be considered further.

Reply to Defendants' Trial Brief No. 4: This Court Previously Ruled that No Attorney-Client Relationship Existed with the Burton Trust.

Defendants argue that "(t)he Burton Trust cannot relitigate ... whether an attorney-client relationship existed between it and Mr. Pitts because this Court previously ruled upon this issue." *See* Defendants' Trial Brief No. 4 at 2. The reason for the Court's ruling was the need to disposition Respondent's motion to disqualify Defendant Pitts as Petitioners' attorney in the Partition Action. That motion was based upon Rule 1.7, SCRPC, and also upon the likelihood of Defendant Pitts being called as a witness in the Partition Action. *See* Exhibit A attached to Defendants' Trial Brief No. 4. The ruling itself is a Form 4 order. Its face does not show any marked checkbox indicating a merits decision regarding any issue in the motion, let alone in the Partition Action itself. It simply states "Motion denied at this point in the action." *See* Exhibit B attached to Defendants' Trial Brief No. 4. The order sets forth no basis whatsoever for denial of the motion --- it contains no ruling, no factual finding, and no reference to the disposition of any issue set forth in the motion to disqualify. Against this background, Defendants' brief does not offer any transcript excerpt or any other evidence to support its position. Also, given Defendants' argument, one would logically have to conclude that the Form 4 order prohibited Defendant Pitts from being called as a witness in the Partition Action, also a ground for Respondent's motion in that case. Plaintiff respectfully submits that, on its face, such a conclusion is neither warranted nor reasonable.

Based upon the discussion above, Plaintiff respectfully submits that further consideration of the arguments in Defendants' brief is unwarranted.

Reply to Defendants' Trial Brief No. 5: The Plaintiff's Ratification of the Underlying Transaction Precludes This Claim.

Defendants argue that "(t)he Burton Trust's acceptance and retention of the proceeds from the December 2007 closing ratified that transaction, and therefore, preclude the Burton Trust from recovering against RBH in this lawsuit." *See* Defendants' Trial Brief No. 5 at 2.

Plaintiff acknowledges Ms. Burton's receipt of a check for the sum of $124,200.00 on or after December 20, 2007, as proceeds of the purported sale of the Areas. The funds remaining after payment of taxes were deposited in a bank account and not touched during the pendency of the Partition Action. *See* Trial Transcript at 313:2-4. Plaintiff is unaware of any evidence to the contrary ever being produced or introduced in the Partition Action or in the captioned action.

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

The proceeds paid to the Burton Trust as a result of the initial closing with Thomasson did not lead to a ratification of the Defendants' misconduct in this case. Dr. Burton testified at trial that the only reason the Closing check was negotiated was due to the need to pay taxes. *See*

Trial Transcript at 311:9 - 313:4. Further, after earlier communications had proven fruitless. the record demonstrates that the Burton Trust opposed the Closing absent a settlement, which was not reached prior to the filing of the Partition Action. *See* Defendant's Trial Exhibit 4/13.

Furthermore, insofar as Defendants argue the subsequent payment to the Trust as a part of the Settlement of the Partition Action, the Settlement that resulted in payment to the Burton Trust specifically identifies the persons to be released, and Defendants are not among them. A plain examination of the Settlement demonstrates no evidence of any intent to settle the legal malpractice and professional negligence claims asserted against the Defendants in the instant case. In fact, the plain language of the Settlement demonstrates the opposite.

Defendants' reliance on Lincoln v. Aetna Cas. & Sur. Co. is misplaced and mixes apples and tomatoes. While Lincoln uses the word "ratification", the application is substantially different than this matter. "Ratification, *as it relates to the law of agency*, means the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent." Lincoln v. Aetna Cas. & Sur. Co., 386 S.E.2d 801, 300 S.C. 188 (S.C. App., 1989) (emphasis added). Defendants here are not arguing an agency issue. In fact, Lincoln involved an unlawful embezzlement of trust funds, not the use of the defense of ratification in regard to a party's receipt of payments. Even if the Lincoln thinking was applicable to the ratification doctrine set forth within Brazell, *supra*, it is inapplicable to the instant case. "[M]ere silence or failure of a principal to repudiate the unauthorized act of an agent does not necessarily constitute a ratification, unless the silence or acquiescence in question cannot be explained on any other theory than that of ratification." Stiltner v. USAA Cas. Ins. Co., 395 S.C. 183, 192-3, 717 S.E.2d 74 (S.C. App., 2011) citing 2A C.J.S. Agency § 71 (2003). As noted above, the Burton Trust was faced with a taxable event. The Trust was therefore forced to negotiate the Closing funds so as not to violate the law. That act does not signify a voluntary adoption of the Closing. And, as noted above, Dr. Burton provided uncontroverted testimony that Burton Trust still has those funds, less taxes paid.

Based upon the discussion above, Plaintiff respectfully submits that further consideration of the arguments in Defendants' brief is unwarranted.

Reply to Defendants' Trial Brief No. 6: This Claim was Extinguished by the Settlement Agreement.[23]

Defendants argue that "(t)he Burton Trust is precluded from asserting this claim against RBH because this claim was extinguished by the Settlement Agreement [in the Partition Action]." *See* Defendants' Trial Brief No. 6 at 2. For the reasons set forth herein, Defendants motion is misplaced and must be denied by the Court.

a. **Defendants failed to plead the Settlement as an affirmative defense within their Answer to the Complaint in this action and have therefore waived it as a defense.** Rule 8(c), SCRCP, provides that "a party shall set forth affirmatively the defenses: accord and satisfaction, ... payment, ... release, ... and any other matter constituting an avoidance or affirmative defense." Where an affirmative defense is not pled in the Answer, it is waived and no longer available to the party asserting it. Adams v. B & D, Inc., 377 S.E.2d 315, 297 S.C. 416 (S.C., 1989). South Carolina has extended the effect of Rule 8(c), SCRCP, to the gamut of civil claims, including Post Conviction Relief applications and domestic actions. *See, e.g.,* Dearybury v. State, 625 S.E.2d 212 (S.C., 2006) ("State did not plead laches and accordingly is barred from asserting it now.") and Hentges v. Hentges, (S.C. App., 2011) (application of Rule 8(c), SCRCP to family court action). Since Defendants did not plead "Release" as an affirmative defense in their Answer to the Complaint, South Carolina law bars its assertion now.

b. **Defendants' arguments misconstrue the state of the law and the language of the release in the Settlement and fail to demonstrate an intent of the Plaintiff in this case to release Defendants.** Even if Defendants had pled the affirmative defense of release within their Answer, Defendants' arguments are misplaced and go to great lengths to pick and choose words and phrases without addressing the actual language set forth in the Settlement. South Carolina interprets releases pursuant to contract law. Southern Glass & Plastics Co., v. Duke, 367 S.C. 421, 626 S.E.2d 19, 22 (Ct.App.2005). The entire release must be examined to determine the intent of the parties. Betty Land v. Green Tree Servicing, LLC, C/A No.

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[23] Specifically. Defendants argue that the release provisions in the Settlement "extinguished" "this claim."

8:14-1156-TMC (D.S.C. 2014) citing Thomas-McCain, Inc., v. Siter, 232 S.E.2d 728, 729 (S.C. 1977). The Court will not pick a single phrase to determine the intention of the parties. "In construing the release, the court must seek to ascertain and give effect to the intention of the parties." Wilson Group, Inc., v. Quorum Health Rsrcs., Inc., 880 F.Supp. 416, 425 (D.S.C. 1995) citing Campbell v. Bi-Lo, Inc., 301 S.C. 448, 392 S.E.2d 477 (Ct.App. 1990). "Pursuant to the general rule, particular words and expressions in releases are given their ordinary meanings, unless the context indicates their use in a different sense." Wilson Group, *supra* at 425, citing Gardner v. City of Columbia Police Dept., 216 S.C. 219, 57 S.E.2d 308 (1950).

In the instant case, unlike in Bowers v. South Carolina Dept. of Transportation, 360 S.C. 149, 600 S.E.2d 543 (Ct.App. 2004), the release applies only to those released therein. In Bowers, the release was written so broadly to include any person for any thing. In fact, the Bowers release language specifically provided that the "undersigned releases and forever discharges [the tortfeasor] *and all other persons, firms, or corporations liable or, who might be claimed to be liable* .... from any and all claims ... causes of action or suits of any kind or nature whatsoever ... ." Bowers, at 152 (emphasis added). The Court noted that the language was so broad as to encompass any claims that could have been brought by anyone against anyone. That breadth of language is not found in the release provisions here. Instead, the release provisions refer only to the parties to the Settlement and confine their scope to the claims in dispute in the Partition Action. *See* Section 9 of the Settlement Agreement, Parts A, B, C, and D, which specifically and discretely identify the parties being released in the Settlement. There is no reference, as in Bowers, to "all other persons, firms, or corporations." *Ibid.* Additionally, the release sets forth in the preamble that the "the *parties* have now amicably resolved their differences and disputes ... the *parties* wish to memorialize that resolution .... to dismiss the claims asserted against *each other* .. and to waive and renounce any and all claims the parties have asserted against *each other* or could have asserted against *each other* .... ." (emphasis added) *Id.* at 4. This limiting language continues through the document and goes on to identify the parties bound and benefitted by the release provisions at page 5 as James Thomas Cato, Helen Cato Jones, Douglas E. Jones, Albert M. Jones, Sara

L. Jones, Donn S. Johnson, Jane Cato West, Robert Lee Cato, Cathy Cato Evans, the Burton Trust, Marjorie Burton, Sloan Marvin Burton, David Alan Burton, Cato, LLC, Thomasson, Broadus L. Thomasson, Sr., B. Lee Thomasson, Jr., B. Heath Thomasson, and Matthew J. Thomasson. Again, there is none of the broad, all-encompassing language found in the Bowers case cited by Defendants. Thus, the intent of the parties in the Settlement and resolution of the Partition Action was to release only those persons specifically listed and identified in the document. Had the signatories wished to expand the language and coverage of the release provisions to the breadth found in Bowers, they could have, but they did not do so. Accordingly, Defendants' arguments regarding the release are fatally flawed and must be disregarded by this Court.

Against this background, the Settlement does not evidence any intent to release either of the Defendants here. Neither of them is identified as a party to the Settlement and neither of them signed the Settlement. Indeed, the case at bar, filed three years before the Settlement, provides additional evidence that there was no intent to release the Defendants.

For the foregoing reasons, Defendants' arguments regarding the Settlement must be dismissed as untimely pursuant to Rule 8(c), SCRCP, and for failing to recognize the intent of the parties to the Partition Action to confine the release provisions in the Settlement to the parties to the Partition Action.

Reply to Defendants' Trial Brief No. 7: The Plaintiff's Recovery in the Underlying Action Acts as a Setoff.

Defendants argue that "RBH is entitled to a Setoff in the amount of $249,000, because the Burton Trust recovered that amount from adverse parties in the underlying transaction."[24] *See* Defendants' Trial Brief No. 7 at 2. Plaintiff acknowledges that, as part of the settlement of the Partition Action, Plaintiff received the sum of $249,000. Adding the proceeds of the Closing,

[24] Plaintiff is seeking damages due to Defendants' acts and omissions for legal fees paid by the Burton Trust and by CatoLLC as a result of the Partition Action and also for the difference in land value between what was received by CatoLLC for 80% of the value of the Areas at the Closing and what should have been received by CatoLLC for 80% of the value of the Areas at the Closing. This section of this Reply Brief addresses the issue of land value as an element of Plaintiff's damages. The next section of this Reply Brief addresses the issue of legal fees as an element of Plaintiff's damages.

Plaintiff acknowledges receiving a total of $373,200 for its interest in the sale of the Areas. However, as noted at trial, that compensation related to valuation of Plaintiff's 20% interest in the Areas that Plaintiff quitclaimed to the buyer, Thomasson Apts. Ltd., LLC, as part of the Settlement. In other words, given its 20% interest in the Areas, the compensation that Plaintiff received as a result of the Settlement reflected at least a $1,866,000 value of the Areas, approximately 100% more than the $900,000 value paid by the buyer as a result of the Closing.

Against this background and as noted during the trial,

- Plaintiff filed its Complaint in this case on May 27, 2010, individually and in the right and on behalf of T. E. Cato Estate, LLC, pursuant to S.C. Code 33-44-1101; and
- The Settlement included an Assignment Agreement pursuant to which Plaintiff acquired CatoLLC's assets, including but not limited to its right of recovery in this case.

Accordingly, as to land value alone, Plaintiff seeks as damages only the compensation that should have been realized by CatoLLC for the sale of the Areas less the sum already received by the Burton Trust as a result of the Settlement. Thus, if this Court decides that the Areas were properly valued, as of the Closing, at $1,866,000.00 based upon the Settlement received by Plaintiff, Plaintiff would seek 80% of $966,000.00 --- the difference between $1,866,000.00 and the $900,000.00 paid by the Thomassons at the Closing --- as damages for its land value claim. Alternatively, if this Court decides that the Areas' value should be based upon one of the appraisals admitted to evidence at trial, then Plaintiff seeks 80% of the difference between that appraised value and the $900,000.00 paid at the Closing as damages for its land value claim. In summary, there is no setoff. The recovery for land value in the Settlement related only to Plaintiff's 20% direct interest, not to recovery of the remaining 80% interest claimed here in the right and on behalf of CatoLLC.

Based upon the discussion above, Plaintiff respectfully submits that further consideration of the arguments in Defendants' brief is unwarranted.

Reply to Defendants' Trial Brief No. 8: Plaintiff Cannot Prove It Was Damaged by Any Act or Omission of RBH.

Defendants argue that "the Burton Trust cannot prove that it received less than fair market value for its share of the property"[25] and "attorneys' fees are not recoverable under the facts of this case." *See* Defendants' Trial Brief No. 8 at 3.

Defendants' motion for non-suit after presentation of Plaintiff's case was denied. Before that motion, Plaintiff introduced evidence at trial sufficient to carry its burden of proof by a preponderance of the evidence that Defendants' preparation of the Articles of Organization as a manager-managed entity and their preparation of the Operating Agreement as a member-managed entity, their preparation of the deed into CatoLLC as a general warranty deed without furnishing any advice to the Heirs of the risks that they were accepting as grantors,[26] their approval of the Closing documents for the sale of the real property without addressing the issue of Mr. Cato's authority, and the representation of other Heirs in the Partition Action filed against Plaintiff were *acts* of Defendants that proximately caused damage to Plaintiff in the form of legal fees and costs for the Partition Action proceedings. Plaintiff also introduced evidence at trial sufficient to carry its burden of proof by a preponderance of the evidence that Defendants' failure to conduct a title search on the property to be acquired by CatoLLC, failure to include the Old Roadbed Tract in the general warranty deed into the LLC, and failure to communicate with or advise Plaintiff to clarify or disagree with anything despite Mr. Cato's instructions and even after Defendants had written notice of disputes over Mr. Cato's authority were *omissions* by Defendants that proximately caused damage to Plaintiff in the form of legal fees and costs for the Partition Action proceedings.

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[25] Plaintiff is seeking damages due to Defendants' acts and omissions for legal fees paid by the Burton Trust and by CatoLLC as a result of the Partition Action and also for the difference in land value between what was received by CatoLLC for 80% of the value of the Areas at the Closing and what should have been received by CatoLLC for 80% of the value of the Areas at the Closing. This section of this Reply Brief addresses the issue of legal fees as an element of Plaintiff's damages. The preceding section of this Reply Brief addresses the issue of land value as an element of Plaintiff's damages.

[26] Indeed, as noted, Defendants chose to use Mr. Cato as their agent for this purpose, at best a questionable decision. *See* Trial Transcript 605:8-22.

Further, the damages sought in the form of legal fees and costs in the Partition Action were in the right and on behalf of the Burton Trust (*see* Trial Transcript at 318:20 – 319:2 and Plaintiff's Trial Exhibit 32) and in the right and on behalf of CatoLLC (*see* Trial Transcript at 129:25 – 131:9 and Plaintiff's Trial Exhibit 32).

Based upon the discussion above, Plaintiff respectfully submits that further consideration of the arguments in Defendants' brief is unwarranted.

<u>Reply to Defendants' Trial Brief No. 9: No Attorney-Client Relationship Existed Between the Burton Trust and RBH.</u>

Defendants argue that (1) "the Burton Trust did not manifest the intent to form ... [an attorney-client] relationship to Mr. Pitts and "Mr. Pitts never consented to represent the Burton Trust." *See* Defendants' Trial Brief No. 9 at 2. Essentially, these arguments amount to claims that, in the context of a contract, there was no offer and no acceptance, and therefore Defendants had no duty to Plaintiff.

But the facts of the case do not support Defendants' argument. Defendants admit that they were hired *to facilitate the sale of the respective interests of each one of the Heirs, including but not limited to the Burton Trust*, initially by preparing CatoLLC formation documents and a deed from the Heirs into CatoLLC.[27] In that context, throughout 2007, trial testimony and documentary evidence confirmed that i) both Defendants and the Heirs accepted Mr. Cato as the promoter and then General Manager of CatoLLC in his dealings with Defendants, and ii) both the Heirs and Defendants accepted Mr. Cato as an agent for communications purposes and behaved accordingly. These facts — and Mr. Cato's communications to the Heirs regarding Defendants' protection of their interests and oversight of his activities — fully supported the Burton Trust's contemporaneous belief that Defendants represented the Burton Trust as well as the other Heirs.[28] For their part, Defendants admitted that they did not issue any sort of

[27] As noted at trial, Defendants subsequently performed additional services including but not limited to reviewing and approving Closing documents on CatoLLC's behalf.

[28] *See also* 1 S.C. Jur. §80 and Rules 1.1 and 1.2, 1.4, 1.7, 1,10, and 1.13, South Carolina Rules of Professional Conduct, regarding rules and discussions of legal principles and duties that arguably apply to Defendants' relationship to the Burton Trust and to CatoLLC.

engagement letter or communicate in any way with the Burton Trust to clarify Defendants' understanding of whom they represented in this engagement. In short, Defendants chose to be silent on that subject.[29] As to the legal effect of silence in this setting,

> "Ordinarily, silence does not constitute acceptance of an offer.[footnote] However, acceptance need not be expressed in words, unless this is required by the terms of the offer,[footnote] where it can be inferred from acts and conduct that manifest acceptance. [footnote] Of course, if an offer prescribes the manner of acceptance, the offeree must comply in order to create a contract.[footnote]" 30 S.C. Jur. Contracts § 11.

This case and the case of In re Morgan, 288 S.C. 401, 343 S.E.2d 29 (1986) are astonishingly similar in their facts and the lawyers' failures. Morgan involved a real estate transaction involving the sale of a house owned in the name of the daughters of Morgan's putative client, the girls' father. Morgan sought to sell the house and acted on behalf of the father against the daughters when they refused to leave the house. Instead of filing a partition action, as in this case, Morgan sought to evict the daughters from the house. The Court found that Morgan committed misconduct and found that he had an attorney client relationship with the daughters, despite never having any communication or contact with them. Indeed, the Court held that Morgan undertook legal action on the daughters' behalf even though he had never met them or communicated with them in any way. Furthermore, the Court found that "In filing an action, *as the party plaintiff*, to evict his own clients, one a minor, he disserved the legal profession." Morgan, 288 S.C. at 405, 343 S.E.2d at 31.[30]

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[29] In fact, not only did Defendants remain silent, as already noted, Defendant Pitts testified at trial that, during his involvement in the matter, he never had any communications with any of the Heirs other than Mr. Cato. This testimony is in direct contradiction to Defendant Pitts' later act of signing pleadings in the Partition Action purporting to be acting on behalf of all Heirs other than the Burton Trust. Much like in Morgan, the "most disturbing aspect of this matter is Respondent's failure, or refusal, to recognize the very nature of the attorney-client relationship. It is patent from his actions and decisions throughout that he lacks a basic understanding of that relationship." Morgan, at 405, 343 S.E.2d at 31.

[30] *See also* 1 S.C. Jur. Attorney and Client § 21: "The attorney-client relationship may be implied when the assent of the parties is manifested by conduct.[footnote] The attorney's rejection of the undertaking should be communicated to the client. In some instances, a prospective client may reasonably rely on the attorney's lack of communication. If so, an attorney may be exposed to possible liability."

Here, Defendants performed services intended to address the reason why they were hired including but not limited to document preparation, review, and approval and communications with Mr. Cato and Mr. Vann, attorney for the Thomassons. However, as already noted, in doing so, they chose to ignore Mr. Cato's email communications regarding protection of the Heirs' interests, and they ignored Ms. Burton's email communications regarding her concerns about what was going on. Receipt of these communications provided Defendants with timely notice of existing issues, developing disputes, and potential conflicts of interest directly implicating their role as attorneys in this engagement. Specifically, Defendants had timely notice that Ms. Burton, as Plaintiff's then Trustee, was concerned about Mr. Cato's authority, the quitclaim deed and the Old Roadbed Tract title problem, the absence of a professional appraisal of the Areas, and the risk of litigation with a possible buyer. Yet Defendants remained silent.

Under these circumstances, if Defendants tacitly agreed to follow Mr. Cato's instructions, then they accepted his offer to represent all of the Heirs; if they did not agree, their silence under the circumstances of this case still constituted acceptance. *See* Ex parte Stevens, Stevens & Thomas, P.A. Respondent, In re William H. Morgan, Appellant, v. Honeycutt and Honeycutt, 277 S.C. 150, 283 S.E.2d 444 (1981) (overruled on other grounds), in which the Supreme Court of South Carolina noted that, "While silence alone is not regarded as acceptance, conduct which manifests assent to the offeror is acceptance. *See* Shealy v. Fowler, 182 S.C. 81, 188 S.E. 499 (1937); Moore v. Palmetto State Life Ins. Co., 222 S.C. 492, 73 S.E.2d 688 (1952)." Ex parte Stevens, Stevens & Thomas, P.A. Respondent, In re William H. Morgan, Appellant, v. Honeycutt and Honeycutt at 277 S.C. at 152, 283 S.E.2d at 445.[31] Thus, an attorney-client relationship existed between Defendants and Plaintiff.

However, even if such a relationship did not exist, nevertheless, Defendants owed duties to the Burton Trust.[32] As noted, the purpose of hiring Defendants in the first place was *to facilitate the sale of each of the Heirs' respective interests in the Areas — a task intended to serve all of the heirs, not just Mr. Cato*. But, despite the notice that they had of Mr. Cato's email communications to the Burton Trust and the Burton Trust's concerns detailing serious issues that

[31] *See also* Footnote 28.

[32] *See, e.g.,* Trial Transcript at 1027:19-23.

led to years of litigation, Defendants made no effort whatsoever at any time to communicate with the Burton Trust to explain or discuss in any way Defendants' view of the attorney-client relationship, Defendants' view of Mr. Cato's instructions and representations, Defendants' view of its role, Defendants' view of the Burton Trust's concerns, or Defendants' view of potential or actual conflicts of interest implicit in this situation. Instead, Defendants remained silent, later filed the Partition Action against the Burton Trust, and then, despite requests and suggestions from Plaintiff's counsel and the Court, refused to withdraw until after Plaintiff filed this lawsuit. Further, Defendants used Mr. Cato, an interested party who was not a lawyer, as their agent for communications with the Burton Trust. Thus, among other things, Mr. Cato was the agent used to present the general warranty deeds conveying the Areas into CatoLLC to Ms. Burton as then Trustee for execution on behalf of the Burton Trust.[33] However, at no time did Defendants offer any evidence that they asked Mr. Cato to explain that his email communications regarding the interests to be protected or the services to be rendered by Defendants were not recognized by or acceptable to Defendants.

Against this background, it is respectfully submitted that there are at least two bases, one in contracts and one in tort, that support a cause of action for professional negligence here.

Third-Party Beneficiary. As noted above, the purpose of hiring Defendants was to serve the interests of all of the Heirs owning fractional interests in the Areas. Mr. Cato's representations to the Burton Trust underline this point. Defendants' performance therefore needed to recognize that, even if the Burton Trust was not a client, it was a third-party beneficiary of the attorney-client arrangement between Defendants and Mr. Cato and between Defendants and CatoLLC. *See, e.g.,* Fabian v. Lindsay, 410 S.C. 475, 765 S.E.2d 132 (2014) and Moore v. Weinberg, 373

[33] *See* State v. Buyers Service Co., Inc., 292 S.C. 426, 433-434, 357 S.E.2d 15, 19 (1987): "[T]here is in practice no way of assuring that lay persons conducting a closing will adhere to the restrictions [of not offering legal opinions]. One handling a closing might easily be tempted to offer a few words of explanation, however innocent, rather than risk losing a fee for his or her employer. ... We are convinced that real estate and mortgage loan closings should be conducted only under the supervision of attorneys, who have the ability to furnish their clients legal advice should the need arise and fall under the regulatory rules of this court. Again, protection of the public is of paramount concern." In light of the Partition Action and this case, Buyer's Services was prescient, though thoroughly disregarded by the Defendants in this case.

S.C. 209, 644 S.E.2d 740 (Ct.App.2007). In reversing the circuit court's order dismissing plaintiff's complaint, Beatty, J., wrote in the majority opinion that the plaintiff should be able to sue an estate planning attorney, in tort or in contract, to enforce a testator's intent, noting "This does not impose an undue burden on estate planning attorneys as it merely puts them in the same position as most other legal professionals by making them responsible for their professional negligence to the same extent as attorneys practicing in other areas." 410 S.C. at 490-491, 765 S.E.2d at 140-141.

Breach of Fiduciary Duty. As noted above, Mr. Cato's instructions specifically asked that Defendants protect all of the Heirs and protect the other Heirs from him. In Lloyd v. Walters, 276 S.C. 223 (1981), the Supreme Court of South Carolina, held a corporate counsel liable for professional negligence. That counsel had certified that the corporate president was authorized to sell certain corporate property and disburse the proceeds of the sale to himself despite the absence of consent of the plaintiff in the case who also had an interest in that property. In his opinion, Ness, J., found that corporate counsel had breached a duty to protect the corporation and was therefore liable for professional negligence. Defendants were fiduciaries and owed duties to those individuals whose interests they were hired to further and to protect.

Based upon the discussion above, Plaintiff respectfully submits that further consideration of the arguments in Defendants' brief is unwarranted.

Dated this 11th day of March, 2015.

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STATE OF SOUTH CAROLINA

COUNTY OF York

Burton et al.

Plaintiff,

vs.

Pitts et al.

Defendant.

IN THE COURT OF COMMON PLEAS
JUDICIAL CIRCUIT

CASE NO.: 2010 -CP- 46 - 2267

MOTION AND ORDER INFORMATION FORM AND COVERSHEET

Plaintiff's Attorney	Defendant's Attorney
Plaintiff's Attorney: Roger B. Jelleniki, Bar No. 13546	Defendant's Attorney: Samuel W. Outten, Bar No.
Address: 1106 Little Street, Camden, SC 29020	Address: P.O. Box 10084, Greenville, SC 29603-0084
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☑ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion To Reconsider (Rule 59(e), SCRCP)
Estimated Time Needed: 1 hr. ±
Court Reporter Needed: ☑ YES/ ☐ NO

SECTION II: Motion/Order Type

☑ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Roger B. Jelleniki
Signature of Attorney for ☑ Plaintiff / ☐ Defendant

04-16-2015
Date submitted

FILED-RECEIVED
2015 APR 16 PM 2:12
DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

SECTION III: Motion Fee

☑ PAID – AMOUNT: $ 25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	JUDGE CODE
☐ Other:	Date:

CLERK'S VERIFICATION

Collected by:______ Date Filed:
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

ORIGINAL

STATE OF SOUTH CAROLINA COUNTY OF YORK	))	IN THE COURT OF COMMON PLEAS FOR THE SIXTEENTH JUDICIAL CIRCUIT
David Alan Burton Individually and as Successor Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, Individually and and in the Right and on Behalf of T.E. Cato Estate LLC, Plaintiffs v. Carroll M. Pitts, Jr., Esq., and Robinson Bradshaw & Hinson, P.A., Defendants	)	*Case No. 2010-CP-46-2267* NOTICE OF MOTION AND MOTION

FILED-RECEIVED 2015 APR 16 PM 2:12 DAVID HAMILTON C.C.C.P. & G.S. YORK COUNTY, SC

NOTICE OF MOTION AND MOTION TO RECONSIDER

TO SAMUEL W. OUTTEN, ESQ., AND EVERETT E. MCMILLIAN, ESQ.:

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, David Alan Burton individually and as Successor Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust individually and in the right and on behalf of T.E. Cato Estate, LLC (hereinafter referred to as "Plaintiff"), through the undersigned attorney(s) will on the tenth day after service hereof at 10:00 AM, or as soon thereafter as counsel can be heard, move pursuant to Rule 59(e), SCRCP, before the Hon. John Hayes, Judge of the York County Court of Common Pleas, for reconsideration of his order ("Order") dated April 3, 2015. Written notice of the Order was received by the undersigned attorney on April 9, 2015, said Order having been filed on April 3, 2015, and mailed on April 6, 2015. The Order as presently written exculpates Defendants Carroll M. Pitts, Jr., Esq. ("Mr. Pitts"), and Robinson Bradshaw & Hinson, P.A ("RBH") from liability for legal malpractice and professional negligence causes of action asserted against them in Plaintiff's Complaint.

This motion seeks significant alterations in the Court's Order including but not necessarily limited to the following points:

1. Drawing upon the record of this case, Inserting a more complete and chronologically correct summary of undisputed evidence of facts than presently noted in the Order including but not necessarily limited to references to the non-binding "letter of intent" issued by TAL; the email exchanges between Marjorie Cato Burton and James Thomas Cato raising the issues of Mr. Cato's authority, land value, and the risk of litigation and Mr. Cato's statement of his instructions to Defendant Pitts; Defendants' timely receipt and knowledge of those emails; the "Amendment to Contract"; Defendants' approval on behalf of Plaintiff LLC of the closing documents at the time of the purported sale of the Areas to TAL; and the link between the damages claimed by Plaintiff Trust and Plaintiff LLC and the defects in the deed into Plaintiff LLC prepared by Defendants.
2. Deleting the Court's finding that no attorney-client relationship existed between Defendants and Plaintiff Trust and inserting in its place findings that such a relationship did exist between Defendants and Plaintiff Trust.
3. Inserting a finding by the Court that Defendants had duties to Plaintiff Trust that went beyond preparation of i) the documents intended to form Plaintiff LLC and ii) the documents intended to convey the interests of the heirs of T.E. Cato in the Areas to Plaintiff LLC.
4. Inserting a finding by the Court that Defendants committed legal malpractice or, alternatively, if the Court finds that no attorney-client relationship existed, inserting a finding that Defendants committed professional negligence with respect to Plaintiff Trust by breaching multiple duties owed by Defendants to Plaintiff Trust.
5. Deleting the Court's finding that the cause(s) of action asserted in the right and on behalf of Plaintiff LLC against Defendants no longer exist(s) because of its dissolution and inserting in its place a finding that such cause(s) of action do exist.
6. Deleting the Court's finding that Plaintiff LLC's case is barred on the grounds of the affirmative defense of statute of limitations and inserting in its place a finding that the affirmative defense of statute of limitations does not apply here because it was not pled as an affirmative defense and because the statute of limitations period had not expired.
7. Deleting the Court's finding that no attorney-client relationship existed between Defendants and Plaintiff LLC and inserting in its place a finding that such a relationship did exist between Defendants and Plaintiff LLC or, alternatively, if the Court finds that no

attorney-client relationship existed, inserting a finding that Defendants owed multiple duties to Plaintiff LLC.

8. Inserting a finding by the Court that Defendants had duties to Plaintiff LLC that went beyond preparation of i) the documents intended to form Plaintiff LLC and ii) the documents intended to convey the interests of the heirs of T.E. Cato in the Areas to Plaintiff LLC.
9. Inserting a finding by the Court that Defendants committed legal malpractice or, alternatively, if the Court finds that no attorney-client relationship existed, inserting a finding that Defendants committed professional negligence with respect to Plaintiff LLC by breaching multiple duties owed by Defendants to Plaintiff LLC.
10. Deleting the Court's finding that the proximate cause of damages to Plaintiff Trust and Plaintiff LLC was Plaintiff Trust's refusal to sign the quitclaim deed and inserting in its place a finding that the proximate cause of damages to Plaintiff Trust and Plaintiff LLC was Defendants' own acts and omissions.
11. Inserting a finding by the Court setting damages suffered by Plaintiff Trust or Plaintiff LLC for legal fees and costs and for land value in accordance with the evidence offered on behalf of Plaintiff Trust and Plaintiff LLC in the record.
12. Inserting a finding by the Court that the damages suffered by Plaintiff Trust were unaffected by any set-off attributable to the 2013 settlement of the partition action.
13. Inserting a finding by the Court that Defendants had a specific duty to furnish advice to Plaintiff Trust regarding the legal significance and effect of, and risks related to, the provisions of the Plaintiff LLC's formation documents including but not limited to the Articles of Organization and the Operating Agreement.
14. Inserting a finding by the Court that Defendants had a specific duty to furnish advice to Plaintiff Trust regarding the legal significance and effect of, and risks related to, the provisions of the general warranty deed and legal description purportedly conveying the Areas into Plaintiff LLC.
15. Inserting a finding by the Court that the general warranty deed conveying the Areas into Plaintiff LLC was void due to the fact that the grantee named in that deed did not exist at the time that it was conveyed by any of the grantors.

16. Inserting a finding by the Court that Defendants' representation of the petitioners in the partition action filed against Plaintiff Trust constituted a conflict of interest supporting Plaintiff Trust's and Plaintiff LLC's causes of action for legal malpractice.

In addition to the foregoing, Plaintiff David Alan Burton individually and as Successor Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust individually and in the right and on behalf of T.E. Cato Estate, LLC,

A. Requests that the Court identify the "collateral matters" referred to in footnote 1 of the Order so that their effect on the Court's Order can be assessed; and

B. Intends to file a memorandum in support of this motion providing more detailed grounds and rationales for the alterations in the Court's Order requested herein.

WHEREFORE, based upon the foregoing, Plaintiff, David Alan Burton individually and as Successor Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust individually and in the right and on behalf of T.E. Cato Estate, LLC, respectfully requests that the Court grant this motion for reconsideration by

Withdrawing the existing Order dated April 3, 2015, and substituting a new order granting the relief sought in the Complaint based upon the findings listed above; and

Granting such other and further relief as the Court may deem just and appropriate.

Dated this 16th day of April, 2015.

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STATE OF SOUTH CAROLINA COUNTY OF YORK	))	IN THE COURT OF COMMON PLEAS FOR THE SIXTEENTH JUDICIAL CIRCUIT
David A. Burton as Successor Trustee of the Sloan Marvin Burton and Marjorie Cato Burton, AB Living Trust, Individually and and in the Right and on Behalf of T.E. Cato Estate, LLC, Plaintiff v. Carroll M. Pitts, Jr., Esq., and Robinson Bradshaw & Hinson, P.A., Defendants	)	Case No. 2010-CP-46-2267 PROOF OF SERVICE

FILED-RECEIVED
2015 APR 16 PM 2: 12
DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

PROOF OF SERVICE

The undersigned, Carole L. Jellenik, hereby certifies that, on April 16, 2014, she caused to be mailed to Samuel W. Outten, Esq., Post Office Box 10084, Greenville SC 29603-0084, via first class mail, postage prepaid, from the offices of Roger B. Jellenik, Attorney at Law, in Camden, South Carolina, the Notice of Motion and Motion to Reconsider and this Proof of Service in the captioned case.

This 16th day of April, 2015.

Carole L. Jellenik
Carole L. Jellenik
Administrator

Roger B. Jellenik
Attorney at Law
1106 Little Street
Camden, South Carolina 29020
Telephone: 803-424-1919
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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

MAY 15 2015

SC Court of Appeals

APPEAL FROM YORK COUNTY

JOHN C. HAYES III, CIRCUIT COURT JUDGE

CASE NO. 2010-CP-46-02267

Marjorie Cato Burton as Trustee[1] of the Sloan Marvin Burton and the Marjorie Cato Burton AB Living Trust by and through David A. Burton As Attorney in Fact, individually and in the Right and on behalf of T. E. Cato Estate LLC,

Appellant.

Vs.

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

Respondents.

NOTICE OF APPEAL

Marjorie Cato Burton as Trustee of the Sloan Marvin Burton and Marjorie Cato Burton AB Living Trust, individually and in the right and on the behalf of T.E. Cato Estate LLC, appeals from the judgment of Circuit Judge John C. Hayes III dated April 3, 2015, and his order denying reconsideration dated April 28, 2015. The former order was received by counsel for the

[1] As reflected in both orders being appealed, as of the date of trial and continuing subsequently, David A. Burton has been appointed as successor trustee in place of Marjorie Cato Burton, even though the caption in the underlying matter was not updated to reflect the appointment of David A. Burton in that capacity. Accordingly, this notice maintains the caption as appears in the appealed orders, but Appellants are willing to make whatever changes are necessary in the caption as directed by the Clerk of Court for the Court of Appeals.

on April 9, 2015. The latter order, denying reconsideration, was received by counsel for Appellants or about on May 4, 2015.

Copies of both orders on appeal are attached hereto as required by Rule 203, SCACR. Appellant also appeals any interlocutory orders issued during the case and certain rulings at trial.

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ATTORNEY FOR APPELLANTS

May 14, 2015

Other counsel of record:

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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
MAY 15 2015
SC Court of Appeals

APPEAL FROM YORK COUNTY

JOHN C. HAYES III, CIRCUIT COURT JUDGE

CASE NO. 2010-CP-46-02267

Marjorie Cato Burton as Trustee of the Sloan
Marvin Burton and the Marjorie Cato Burton
AB Living Trust by and through David A. Burton
As Attorney in Fact, individually and in the
Right and on behalf of T. E. Cato Estate LLC,

Appellant.

Vs.

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

Respondents.

PROOF OF SERVICE

I, Beth Cogan, a paralegal with Ballard & Watson, Attorneys at Law, do hereby certify that on May 14, 2015, I served a copy of the **Notice of Appeal** in the above-captioned case on the following individuals by United States Mail, with sufficient first-class postage affixed, addressed as follows:

The Honorable David Hamilton
Clerk of Court York County
Post Office Box 649
York, South Carolina 29745

Samuel Outten, Esquire
Nelson Mullins Riley & Scarborough, LLP
Post Office Box 10084
Greenville, South Carolina 29603

Beth Cogan

Beth Cogan, Paralegal

May 14, 2015
West Columbia, South Carolina

Ballard & Watson
Attorneys at Law
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May 14, 2015

RECEIVED
MAY 15 2015
SC Court of Appeals

Via U.S. Mail
The Honorable Jenny Abbot Kitchings
South Carolina Court of Appeals Clerk of Court
1205 Pendleton Street
Columbia, South Carolina 29201

Re: *Burton, et al. v. Pitts, et al.*
Case No.: 2010-CP-46-2267

Dear Ms. Kitchings:

Enclosed for filing with your office, please find the original and one (1) copy of the Notice of Appeal and Proof of Service for the above- referenced matter along with a check in the amount of $100.00 representative of the filing fee. Please clock and return the clocked copy in the self-addressed, stamped envelope enclosed.

By copy of this letter and as evidenced by the Proof of Service, same has been served upon counsel for the Respondents. Thank you for your time in this matter. If you have any questions please do not hesitate to contact me.

With warm personal regards, I am,

Sincerely yours,

Beth Cogan

Beth Cogan, Paralegal
beth@desaballard.com

cc: *Via U.S. Mail*
The Honorable David Hamilton
Samuel Outten, Esquire
Roger Jellenik, Esquire (via email)

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Law Offices of Desa Ballard
226 State Street
West Columbia, SC 29169

TO:

Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RECEIVED
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SC Court of Appeals

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State of South Carolina	)	In the Common Pleas Court of York
	)	
	)	Case No.: 2010-CP-46-02267
County of York	)	

Marjorie Cato Burton.,	)	
Plaintiff.,	)	
-vs-	)	Transcript of Record
Carroll M. Pitts.,	)	
Defendant.	)	

July 20, 2011
York, South Carolina

B E F O R E:

Honorable John C. Hayes, III, Judge.

A P P E A R A N C E S:

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(ON THE RECORD MONDAY, JULY 20, 2011 AT 10:20 AM.)

THE COURT: Now we've got our next case which I also have issues with. The next case is Marjorie Cato Burton versus Carroll M. Pitts and others.

All right. And this -- Let me kind of get myself straight on this. This is not -- There is another Marjorie Cato Burton in the case and this is not that one?

MR. JELLENIK: That's correct. The kids have a player without a score keeper.

THE COURT: Well, that's all right. The other one has a lot more people involved and a lot more -- The file is getting thicker. This one is the, I guess another legal malpractice case against Mr. Pitts, Mr. Robinson and Mr. Bradshaw, this is two motions to dismiss and Plaintiff's motion to substitute parties.

The motions to dismiss were filed first, is that right?

MR. OUTTEN: Yes, sir, Your Honor.

MR. JELLENIK: Your Honor, correct me if I am wrong, but I think there is, are there two motions to dismiss or one motion to dismiss?

MR. OUTTEN: Well, there is one motion to dismiss and one motion to substitute parties, as I understand it.

THE COURT: That's my -- my notes -- it's a little -- I'm not misleading. It says two motions, and then it's got those two additional ones.

MR. JELLENIK: Part of the confusion may be that other case you mentioned or set of cases that you mentioned, there's also a motion to substitute pending there. So that may have been part of the source of the confusion.

THE COURT: All right. Okay. So let's hear -- Mr. Outten, do you need to hear the motion to substitute first, or you let him go ahead and do the motion to dismiss without concerning who the parties are?

MR. OUTTEN: I think the motion to dismiss should be heard first, Your Honor.

THE COURT: All right. Proceed then.

MR. OUTTEN: May it please the Court, Your Honor. I'm Sam Outten. I represent Carroll Pitts, Robinson, Bradshaw, and Henson in this case. This is a motion to dismiss the Complaint. I'd like to provide the Court with a factual background of the case because I think it will be helpful.

Years ago, a man named T. Cato owned real property in the Ebenezer Township here in York County. He passed away, he left his property to the following children and grandchildren. Donna S. Johnson, twenty percent; Marjorie Cato Burton, twenty percent, Kelly Cato Jones, twenty percent; Robert Lee Cato, ten percent; Tommy Cato, ten percent; Kathy Cato Evans, ten percent; Jane Cato West, ten percent.

Now, in late 2006, early 2007, the Cato family decided to explore the possibility of selling this property. Tommy Cato was asked by the family to take lead in this project. Mr. Cato hired Carroll Pitts of Robinson, Bradshaw and Hinson to help him accomplish this. The plan was to form a limited liability company. Now, if all the heirs deed their interest in the property into the LLC, then have the LLC deed the property to the buyer at closing.

THE COURT: I won't say there was but there's an order in the other file that addresses to some degree the issue about the LLC and deeding the property. Have you had an opportunity to review that?

MR. OUTTEN: I have, Your Honor.

THE COURT: Okay. Well, I want to make sure you are aware of it.

MR. OUTTEN: I have, Your Honor. Thank you.

T. Cato Estate, LLC, was formed for this purpose on June 26, 2007. Now, Mr. Cato talked to five or six different real estate developers to try to engage their interest in the property. Ultimately, Thomason Developing Company expressed interest. The actual buyer was an entity called Thomason Apartments, LLC. They issued a Letter of Intent on July the 25th, 2007. The Letter of Intent was signed by Tommy Cato after the LLC on August 3rd, 2007.

The closing took place on December the 12th, 2007.

Now it's important for the Court to know that at the time of the closing, the property, which was deeded to Marjorie Cato Burton, had been deeded into the Sloan, Marvin Burton, and Marjorie Cato Burton AB Living Trust. That's who held the property.

At closing, it was discovered that a part of the property referred to as the Road-bed Tract had not been conveyed to Thomason. Now, the purchase price for the property was a million dollars. At the closing, $900,000 of the purchase price was disbursed to the Cato family members in the percentages that I talked about earlier. All of the family members, including Marjorie Cato Burton, on behalf of the Trust have received their part of the proceeds of that sale.

But at closing they had to do something to address the fact that the Road-bed Track had not been conveyed. And so, they executed an amendment to the contract for sale, and a $100,000 of the purchase price was allocated to the Road-bed Tract. All of the family members signed onto this amendment, except for Ms. Burton, on behalf of the Trust.

Now, as a result of this, the heirs brought a partition action against Ms. Burton as trustee, and this case was filed August 13, 2008. The purpose of the partition action was to force the sale of the Road-bed Tract to complete the conveyance to Thomason Apartments, LLC:

Now, my understanding is that Your Honor has heard several motions in the partition action. You may be familiar with it but it's gotten very complicated procedurally. There were third-party complaints filed and then fourth-party complaints filed. I've seen a number of motions, including the motion, Your Honor, of reference where the issue was whether or not the conveyance -- conveyances to the LLC were valid. And I've read Your Honor's order on that issue, which I believe is dated February 23rd, 2011. As I understood that order, the Court found that Ms. Burton intended to convey the property, intended to sign the deed, sign it of her own free will. The evidence showed that the delivery of the deed to the LLC was after the LLC was formed and registered with the Secretary of State. So there's been at least some determination that this deed is not void, that this deed was valid.

But in any event, that partition action is still pending. Discovery is still on going in that case. I am not involved in that case. Others involved, obviously, know more about the status of that case than I do but it's related to this legal malpractice case.

Now, the procedural history of this case, Your Honor, Ms. Burton, on behalf of the trust, filed this Complaint on

May 27th of 2010 against Carroll Pitts and Robinson, Bradshaw & Henson for legal malpractice. If you look at the Complaint, the attached affidavits, it makes generalized allegations regarding the failure to communicate, failure to explain certain documents, general allegations that somehow Mr. Pitts' representation fell below the standard of care.

Your Honor, it's important, I think, to look at the caption of this case to see how it was brought. The caption reads, Marjorie Cato Burton as trustee of the Sloan Marvin Burton, Marjorie Cato Burton AB Living Trust by and through David A. Burton as attorney in fact, individually and in the right on behalf of T. Cato Estate, LLC.

On January the 25th, 2011, Your Honor, we filed this motion to dismiss the Plaintiff's Complaint because David Burton does not have the authority to bring this claim on behalf of the trust pursuant to the power of attorney, which admittedly was executed by Marjorie Cato Burton in favor of David Burton on February 29th, 2008. David Burton, Your Honor, is not a trustee of this trust.

In April of 2011, about four months after Robinson, Bradshaw & Hinson filed this motion to dismiss, we received the document from Plaintiff's counsel, a first amendment to the Sloan Marvin Burton, Marjorie Cato Burton AB Living Trust signed by Sloan Marvin Burton and David A. Burton, again as Marjorie Cato Burton's attorney in fact, that said an affirmation ratification and consent signed by Sloan Marvin Burton as co-trustee.

On May the 6th, 2011, Your Honor, the Plaintiff filed a motion for substitution of parties which Your Honor referenced at the outset of this hearing.

In this motion, the Plaintiff's contend that this first amendment remedy is the pleading deficiency which we raised in our motion to dismiss. By the case, the Plaintiff's claim that David Burton, substitution as co-trustee, is not only valid, but it cures the real party interest issue raised by our motion.

So the issue before the Court this morning, Your Honor, is whether or not David Burton is a trustee of the Sloan Marvin Burton and Marjorie Cato Burton AB Living Trust. We that the answer to that question is a no. The result of that, Your Honor, is that this case must be dismissed because there is no plaintiff properly before this Court. A trust can only act through its trustee or trustees. Because David Burton is not a trustee, the trust is not before the Court in this case against my clients. It must be dismissed.

Now, our legal position, Your Honor, is straightforward. There are two ways to become a trustee: One, pursuant to the trust document or declaration of trust is the document, is the title of the document in this case. And the second is by court appointed. There is no allegation here that David Burton has been appointed by any Court to be a trustee. That is not an issue before this Court. So the issue to be decided is, is David Burton a trustee based on the trust document which Marjorie Cato Burton and Sloan Marvin Burton executed?

The problem, Your Honor, is that Mr. Burton seeks to appoint himself as trustee by virtue of the power of attorney. That's the fundamental problem we have with what the Plaintiff is attempting to do here. A power of attorney as Your Honor knows can be used for a variety of things in a variety of context. This power of attorney, which Mr. Burton executed, allows David Burton to act for her for her individual financial interest, which is common. We don't take issue with the power of attorney.

However, there is no legal basis, Your Honor, none, upon which a power of attorney granted for the purpose of acting on one's individual financial interest can be used to appoint someone as a trustee. Another way of saying this, Your Honor, is a power of attorney cannot be the legal vehicle by which one appoints himself or herself trustee. Again, you will see no legal authority for this proposition; that is, one can say, I designate myself or appoint myself trustee. There is not authority which allows that. In fact, the authority is to the contrary.

Again, Your Honor, and if I say this too many times, then I apologize to the Court. Two ways to become a trustee: A trust document or the court appoints you as trustee. That's it. It cannot be through a power of attorney.

So, Your Honor, I think it's appropriate for us to look at the declaration of trust in this case. To look at the language of the trust and see whether or not -- and see whether or not under the language of this trust David Burton is properly a trustee. And Your Honor, it is attached to our memorandum in support of the motion to dismiss as Exhibit B.

I think the first paragraph under this declaration of trust to look at is 2A. 2A says - -

THE COURT: Wait just a second.

MR. OUTTEN: I'm sorry, Your Honor. I apologize.

THE COURT: I don't know if I have that one.

MR. OUTTEN: I have an extra copy I can give you.

THE COURT: My memorandum, the reference, I got two copies they reference the exhibits but they are not attached. At least I don't find them.

MR. OUTTEN: May I approach, Your Honor?

THE COURT: Okay. I've got Exhibit B on Memorandum in opposition to Plaintiff's motion for substitution of the parties that has Declaration of Trust signed by Sloan, this is dated January 19, 2007.

MR. OUTTEN: That's it, yes, sir. If it will be helpful, Your Honor, I have extra copies that I can hand up.

THE COURT: Okay. Let me find it, I'll mark it up probably.

MR. OUTTEN: We'll start by looking, Your Honor, if we could to 2A, Sub-Paragraph 2A of the Declaration of Trust, the trust, the relevant trust document and it says in the second sentence, "So long as both grantors are alive, the grantors may jointly amend or modify any provision of this trust."

Now, it's clear that what this is saying is, in order for there to be an amendment or modification, both grantors must be alive. The grantors, as Your Honor can see on the last page or close to the end of this document, are Sloan Marvin Burton and Marjorie Cato Burton.

Well, it's not disputed in this case, Your Honor, that Marjorie Cato Burton is mentally incompetent. So Ms. Burton cannot execute a document amending any provision of this trust. That's not disputed. So it is a legal impossibility for Sloan Marvin Burton, Marjorie Cato Burton to jointly amend or modify the trust to allow David Burton to serve as successor co-trustee so David Burton cannot be a trustee under 2A.

So now, Your Honor, I think we ought to look at 2(B). 2(B) is titled Appointment of Trustee. And 2(B) says, "the Grantors, plural, may at any time appoint, substitute or otherwise change the person designated to act as trustee or successor trustee hereunder." Again, the trust requires both grantors to appoint, substitute, successor trustees. In other words, the person designated to act as the trustee, if that's going to change, it must to be executed by both of the grantors. Because Ms. Burton is incompetent, that precludes an appointment as contemplated by 2(B) therefore, David Burton cannot be a trustee of this trust under 2(B).

So now, Your Honor, let's look at 3(B) of the Trust. Paragraph three is titled Appointment of Trustee. 3(B) says, "If at any time both Sloan Marvin Burton and Marjorie Cato Burton cannot serve due to death, disability or incapacity, David Allen Burton shall be the successor trustee. 3(B) clearly requires the death, disability or incapacity of Sloan Marvin Burton and Marjorie Cato Burton. There is nothing in this record to suggest that Sloan Marvin Burton is incapacitated or incompetent. Therefore, 3(B) is not true. David Allen Burton can't be a trustee according to 3(B) of this Declaration of Trust.

So now, Your Honor, let's look back up at 3(A) and see what this says. It provides that Sloan Marvin Burton, Marjorie Cato Burton shall each be a trustee of this trust and any sub-trust of this trust, if any, with all rights, privileges and responsibilities set forth herein." It goes on to say, "Either trustee may exercise all the powers and rights according to a trustee under this Declaration of Trust without the requirement of acting in unison.

And here's the relevant provision of this paragraph for purposes of this hearing. It says, "In the event of a physical or mental incapacity or death of one of the trustees, the survivor trustee shall continue as the sole trustee with full authority, exercise all powers and rights according to a trustee under this declaration of trust."

So what this means is because Marjorie Cato Burton is incompetent, Mr. Burton shall act as the sole trustee. The language of paragraph 3(A) is clear. Looking at 3(A) we know that David Burton cannot be a trustee under paragraph 3(A).

So, Your Honor, after looking at these provisions, we believe it's clear David Burton has not been made a trustee pursuant to the terms of the Declaration of Trust. And as I said earlier, there's no issue about whether or not there's been a court appointment. There hasn't been.

Now, Your Honor, stepping back for a moment, if you look at the framework of this Declaration of Trust, it was drafted so that amendments or changes to the trust would be done jointly. If you look at the provisions about changing trustees or changing the terms of the trust, all of them refer to grantors or both grantors.

Now, if you look further at the document, what becomes obvious is that it was set up so that if there -- if one of the grantors becomes disabled or dies, then the trust provides that the survivor trustee shall serve. It doesn't say anything about that in that paragraph about getting a replacement trustee. In other words, we decide changes jointly. We decide changes together as husband and wife. If one becomes disabled or dies, then the one who is not, continues to serve as trustee, and that's the way this Declaration of Trust is set up. And if you review the document, Your Honor, it becomes clear.

So the next issue, Your Honor, is what about this amendment that the Plaintiff's drafted? We need to look at this amendment, and I know the Court is going to look at the amendment to see did they cure the problem, did they remedy the defect after at least by their conduct acknowledging that David Burton can't bring this lawsuit because of the existence of the power of attorney.

This document's in the record, Your Honor, titled First Amendment to the Sloan Marvin Burton and Marjorie Cato Burton AP Living Trust dated April 1st, 2011, about three months or so after we filed our motion to dismiss.

This document, Your Honor -- Do you have a copy of it before Your Honor? I've got a copy I can bring to you.

THE COURT: If you can give me one.

MR. OUTTEN: Yes, sir, I will. May I approach, Your Honor?

THE COURT: Yes.

MR. OUTTEN: So what happens is, Your Honor, we raise the defect in their pleading, and in response, they filed this first amendment in an effort to try to cure the fact that they don't have a trust properly before this Court. That's what the purpose of this document is.

Now, if you look at the middle paragraph, Your Honor, it says, "This appointment is made pursuant to the power granted to her under 2(D) of the aforesaid trust. We were just looking at 2(B). Is that accurate, Your Honor? Is it really made according to 2(D)? Well here's what 2(D) says. "The grantors, plural, may at any time appoint, substitute or otherwise change the person designated and act as trustee or successor trustee hereunder."

So this document is not pursuant to 2D, not what it says it is. In order for this document to comply with 2B, we would have to have Marjorie Cato Burton and Sloan Marvin Burton sign the document. Both grantors must sign. 2B makes that clear. There's no provision in the trust document for one grantor to act and change the trustee.

Furthermore, Your Honor, this ties back into the earlier argument I made. Respectfully, this shows the fundamental misunderstanding of what one can and cannot be accomplished through a power of attorney. In essence, what this first amendment purports to do is for David Burton to appoint himself as the trustee or grantor pursuant to a power of attorney. He cannot do it, and you will see no legal authority supporting the proposition that one can use a power of attorney and appoint himself or herself as trustee. It can't be used for that purpose. Again, it has to be pursuant to the terms of the Declaration of Trust or whatever the trust instrument is entitled.

Therefore, this document cannot, does not have the effect of making David Allen Burton a trustee. Again, Ms. Burton is incompetent. A change in the trustee or adding a trustee would require the action of both grantors, and that hasn't been done. The bottom line is, this amendment does not cure the problem that we have, Your Honor.

As I said at the beginning of my argument, look at all of these documents. You look at the Declaration of Trust, you looked at the First Amendment, you look at the applicable law. It's clear that David Allen Burton is not a trustee of this trust. This trust is not properly before this Court. There is no plaintiff, Your Honor. As odd as this sounds to say, there is not plaintiff before this Court. The only way this trust can be properly before this Court is if a properly appointed trustee brings the case, and that hasn't happened.

Your Honor, before I sit down, I want to address an affidavit that was filed by Plaintiff's counsel. They filed an affidavit with a man named Joe T. Milsaps's in opposition to my motion to dismiss and in support of a motion to substitute. If I could, Your Honor, I would like to approach and hand up a legal memorandum we prepared addressing that affidavit. May I approach?

THE COURT: You may, and I had that on mine but I hadn't printed that out. Does anybody have a copy of the amendment to reference?

MR. OUTTEN: I do, Your Honor. I have it right here.

In essence, Your Honor, what this affidavit says, if you review it, is that the - -

THE COURT: Wait.

Mr. Jellenik.

MR. JELLENIK: Excuse me. I apologize for interrupting. Might we have a copy of whatever the legal memorandum is?

MR. OUTTEN: Sure.

MR. JELLENIK: Appreciate it.

MR. OUTTEN: Here's the problem withe the affidavit, Your Honor. It offers a legal opinion by a North Carolina lawyer that the first amendment is effective in appointing David Burton as a trustee. That's, in essence, what the affidavit says. He basically says our arguments are incorrect, unsupported by law, and I've looked at this and I think the amendment's effective. Well, what's the problem with that?

Well in looking at this, and I haven't looked at this issue in a while, Your Honor. I quite frankly was surprised how clear our courts have come down and said, You don't offer legal opinions in affidavits. Mr. Milsaps is not presided over this case, Your Honor. We are representing this issue for you to decide.

There have been lots of cases where this has been attempted, affidavits which say the summary judgment motion should be denied or an affidavit simply soliciting a lawyer's legal opinion. I'm sure Your Honor knows that if I had been given another couple of other days I could have gotten an affidavit from a lawyer saying that my position was correct. But our courts have been clear that these affidavits should not be considered.

So, Your Honor, I don't believe that the affidavit of Mr. Milsaps should even be considered by the court in deciding this motion. A couple of cases, and they are in the memo that we handed up, Your Honor, Dawkins against

Fields was a similar issue as the one we are facing today.

In that case, the Court found that the expert's affidavit inappropriately attempted to assert the trial court's role in determining whether the Petitioner's were entitled to summary judgment. The Court noted that in general expert testimony on issues of law are inadmissible. The Court went on to state that although the affidavit could have served as Respondent's oral argument, the overwhelming majority of the affidavit is simply legal argument as to why summary judgment should be denied and, therefore, the affidavit was excluded. In that case, the trial court excluded the affidavit that was upheld. Here, Mr. Milsaps's affidavit does little more than offer conclusions of law.

In Green against State, the Court found that where the testimony contained in an affidavit is designed to present legal argument, such testimony falls outside of the 702 of the South Carolina Rules of Evidence. Now, here's my understanding, Your Honor, affidavits can serve basically two purposes. You can have a 56(E) affidavit of a witness in a case, and that affidavit can be an attempt to say there are material issues of fact preventing the grounds of summary judgment. Well we've all seen many 56(E) affidavits over the years. And I understand that.

There can also be affidavits of testimony pursuant to

Rule 702 of the South Carolina Rules of Evidence, but what does that say, Your Honor? It says if an expert testimony can assist a tryor of fact, then that testimony opinion evidence is admissible. This sure isn't a 56(E) affidavit and it's sure not a 7-0-2 affidavit. It is legal argument.

Again, Your Honor, look at the cases cited in our memorandum, look at those cases. Similar issues have been presented. Our courts, I think, have been very clear to say those kinds of affidavits, just like Mr. Milsaps, should be excluded from consideration by the Court in deciding issues like the one before the Court this morning.

Your Honor, thank you for letting me go on. I'd like to conclude by saying, in this alleged legal malpractice case, there is no claimant properly before this Court. David Burton is not a trustee of this trust. Respectfully, Your Honor, I think a proper ruling is for this Complaint to be dismissed.

Can I answer any questions that the Court has?

THE COURT: No.

Mr. McMaster or Mr. Jellenik.

MR. OUTTEN: Thank you, Your Honor.

MR. MCMASTER: Your Honor, I would hand up to the Court the affidavit of Mr. Milsaps which is attaching the first amendment to the trust as well as a copy of the durable power of attorney, if the Court wants to actually look at that. I've given you a pretty good record.

Your Honor, I'm George McMaster. I've practiced law with my dad at the law firm of Tompkins and McMaster. I'm here with my colleague, Roger Jellenik, assist co-counsel of this case and in this case there are a lot of cases out there, I got one.

Now, I've heard the arguments of Mr. Outten and he makes good arguments, but I want to make a few counter arguments as to why the amendment should be granted and that we have the appropriate parties before this Court. Excuse me, that the substitution, the motion for substitution of parties should be granted. That is our issue.

Mr. Outten has referred to Marjorie Cato Burton, and I can tell you this, she is ninety-three years of age as of this time. In January of 2007, Ms. Burton and her husband formed Sloan Marvin Burton and Marjorie Cato Burton AB Living Trust. Now, all of the Burtons' assets, everything, went into this trust. This is where the money is. There was a -- There's a lawsuit involving the creation of a family LLC, and that's what brings us here today because David Allen Burton, the son of Marjorie Cato Burton, was a plaintiff in this action with his uncle, and he brought that action as attorney in fact for his mother by virtue of her durable power of attorney. There was a motion to dismiss that pleading.

Now Mr. Jellenik who was operating independently at the time didn't really want to argue about it and thought it was right with the Cato's. So Mr. Jellenik hired a North Carolina counsel to assist him in preparing what documentation's or documents that may be needed to create a proper plaintiff under the North Carolina law. And I point out the obvious. Everything we're doing here is North Carolina law, not South Carolina Law. So to say that we don't need the consistency here or that Mr. Milsaps' affidavit is not assisting the tryor of facts is a little bit wide of the point. Its doing just that. He's a North Carolina lawyer, he is 76 years old, who drafted this first amendment and set up the corrective measures in his view to make this a proper cause of action and supply us with the proper plaintiff.

THE COURT: Are you telling me he did this amendment also?

MR. MCMASTER: Yes, sir.

THE COURT: Okay.

MR. MCMASTER: His office prepared that, he was the lawyer involved.

Now, as I've said, the controlling law from North Carolina, and David Allen Burton was installed as co-trustee by virtue of this first amendment to the trust agreement. Now, Mr. Outten has said that everything has to be done jointly. Both of the trustees have to do it. This was jointly. And the entire issue in this case that is before the Court is this: How did Mr. Burton become trustee? We don't need to delve into the trust documents. All we need to look at is that specific issue.

They are requesting how Mr. Burton became the trustee, and that answer is simple. He had a dual power of attorney from his mother. That power of attorney is the core issue, as this Court knows better than I do because you were practicing law back when they didn't have durable powers of attorney. And somebody who became mentally infirmed had to go back to the probate court and have a guardian ad litem appointed so they could handle their -- so someone could handle their affair.

The durable power of attorney was created, I was there, by Haley McDonald, a senator from Richmond County, to get around the guardian ad litem procedure and allow a power of attorney to continue to be in effect after a person lost their faculties and became infirmed. That's what's happened here.

All right. The power of attorney grants to David Allen Burton the authority to do all things which his mother could do if she was physically or mentally capable of doing in her state. If she couldn't do it, he can do it, and that's the law. And it does not matter if she subsequently becomes in firmed. He must act and can act in her stead. We don't need to get into all these other discussions. What we need to know is how was he appointed. He was appointed with the assistance of the agreement of his uncle, with the power of attorney from his mother, and that is a proper creation of the Plaintiffs, a proper creation of the trust granting -- and people that are grantors of this trust who control the trust.

It is true, Mr. -- his uncle, Sloan Marvin Burton, could serve individually but that doesn't mean he has to. There's no requirement, absolute requirement that prohibits him from adding another trustee which he wants to do because this is his sister's son.

Now, I would point out in Mr. Milsaps' affidavit that he says that the Defendant lacks standing to object to the administration of a private North Carolina trust. They're not beneficiaries, they're not contingent beneficiaries, and they don't have privity to the trust. That sounds good, but I'm gonna leave that aside for a moment because I want to get to the issues at hand.

Mr. Outten relies on Rule 17 that stands for the proposition that there are -- you can prosecute an action in the name of a trustee or any express trust. Rule 17 doesn't support his position. It does not bar David Allen

Burton, who has a durable power of attorney, from being a real party in interest, he is. We have had this issue before, we agreed to amend, and now we're told we can go to a North Carolina court and we can go a North Carolina Probate Court but we don't need to do that. We have done it correctly, we have done the amendment, and this is much a do about nothing, and this is unnecessary grinding of the wheels of this Court - period.

Now, there is the counter assertion that the -- and I want to stress this because it's stressed in the brief, that Marjorie Cato Burton only allowed David Cato Burton to handle her -- and that's in italic -- her financial affairs, her individual affairs. It did not allow him, by virtue of the power of attorney, to become trustee. That is not the facts and that is not the law. You cannot separate Ms. Burton's personal financial affairs from the trust. That's where the money is. Those are her personal finances. All this we're hearing is just dancing on a needle to try and inject reasons why this woman's son who has her durable power of attorney can't act as a trustee and he can. That's essentially all we're talking about.

There are a number -- I've given you the power of attorney. This is a classic power of attorney. It is redundant, it grants authority on top of authority, on top of authority, giving this man to do anything that his mother could do as if she was acting on her own.

There is a Paragraph 13, the subparagraph Seven, I should have marked it for you. I have it on my copy.

THE COURT: I've got it.

MR. MCMASTER: You've got it?

THE COURT: Yes, sir.

MR. MCMASTER: All right. That's just one of many clauses in there that says he can do anything in the trust, he can do anything in any fashion, and you can find that redundantly recited. It's in paragraph Four at the first thing it says he can -- he can handle any trust agreements, he can handle any legal affairs. Your Honor, it's all over the place in this trust agreement that she can -- he gets to handle any affairs as if she's handling herself - period.

So the appointment of David Allen Burton, as a co-trustee, which is all we're talking about here, is totally authorized pursuant to the durable power of attorney. She, obviously, is in firmed. I would take it from Mr. Outten's representation as fact: Daddy, he's a little bit older. She's 93 and it's going to happen, her faculties are certainly diminished, so that is the absolute reason to have a durable power of attorney.

Now I have read the article, note. There is evidence in the brief, an assertion in the brief, that this couldn't be the conclusion, that there can't be an absolute shift to David Allen Burton because that would cause adverse tax consequences to the trust. That's not right. It's a revocable trust. There is not tax implication involved. The IRS doesn't look at revocable trusts as even in existence. So there's no downside that would indicate that this is not what we meant to do as it is.

There's also argument that -- I'm going to read it to you. Argument number three, "that a power of attorney cannot delegate trust fiduciary powers not expressly granted by the trust document." That's in the main action here today. But, again, if you're acting pursuant to a durable power of attorney, to take the action which your mother would take had she been capable of doing so, that is the law, and I know I keep on stressing the same thing over and over again because this is not a complex issue. This is not an issue that you have to go through multiple trust documents. We have to go through even the law that is comprehensively cited by Mr. Milsaps. All we have to do is apply some common sense here, and that's what I'm urging that we do in addition to the law of North Carolina, which is controlling.

Thank you, Your Honor.

THE COURT: Mr. Outten, do you have any follow-up to that?

MR. OUTTEN: I do, Your Honor, and I'll try to be brief.

Again, here is the problem, Judge. A power of attorney can't be used for someone to appoint himself or herself a trustee. It has to be pursuant to the trust documents, and we'll brief that further if Your Honor would like. But on Page Two and Three of our memorandum in support of our motion to dismiss, we cite authority for that proposition. It just cannot be that David Burton can use a power of attorney which he has to act for her individual financial affairs and appoint himself a trustee.

Again, two ways: The trust document or the court appointed.

Now, let's also keep in mind that Mr. McMaster's suggesting that I perhaps in trying to get the case dismissed on technical grounds and these things aren't really important, and really the essence of this is that David Burton is really the party that should be the Plaintiffs. I couldn't disagree with that more. Certainly, my clients have a right to insist that if they're being sued by a trust, that the trust is properly before the Court. If that's not the case, all kinds of things can happen afterwards. I suppose then we could be exposed to liability to this trust and then sued subsequently by Sloan Marvin Burton who comes in and says, well, David Burton didn't never have the authority to bring a lawsuit on behalf of the trust that I do. So there can be all kinds of problems and it's absolutely appropriate for us to ask this Court to examine is he a trustee, and he's not, and this is not some technical requirement we're insisting upon.

The major point I wanted to make is, we have a fundamental disagreement with my colleagues, and, that is, a power of attorney can't be used with this. They have cited this Court to no legal authority in support that proposition, and the reason why they haven't is because there is none. We have given the Court authority that you cannot use the power of attorney for this purpose, and we'll brief that issue further if the Court would like us to.

The second thing I want to say is that they say that Rule 17 is, Mr. McMaster says that Rule 17 doesn't support our position. It absolutely supports our position. They suggest, or they plead, that this case is being brought on behalf of the trust. The law is uniform that the only way a trust can bring a lawsuit is through a trustee. Rule 17 absolutely supports the position that we're taking here, Your Honor.

So what we ask is for this Court to take a look at the authority which we presented about the fact that this power of attorney, which was in essence what Mr. McMaster argued. He said because -- he said, If he can do it, she can do it. Well, we disagree that the existence of a power of attorney gives him the authority to appoint himself trustee. And if we're right about that, Your Honor, then this case should be dismissed. If you find that Mr. McMaster's correct about that, then so be it. But if we're right, and I strongly believe that we are, and the legal authority supports the fact that we are right, the power of attorney can't be used for that, then this case, Your Honor, against my client should be dismissed.

Thank you.

THE COURT: Any reply?

MR. MCMASTER: Thank you, Your Honor.

I note that Mr. Outten's very concerned about time. Part of his motions is we've been deleterious in getting things done. We want to bring this matter to a head. One thing that I would point out, and I was making some notes, is that the grantor's of the trust, which Mr. Burton is standing in the shoes of his mother, and Sloan Marvin Burton, have both brought this action. Sloan Marvin Burton is a plaintiff along with his nephew. So there's no disjointment with respect to the present trustee, the present co-trustees of the trust bringing this action. And we need to move this case along.

There have been multiple motions to dismiss. Now they're arguing we should go to the North Carolina courts we can do that if it's not necessary; that we go to a North Carolina Probate Court, we can that but it's not necessary. We have a valid existing cause of action with the real party in interest and Mr. Outten under Rule 17, but the conclusion is this: We have properly brought this case by the virtue of the use of a power of attorney in a specific fashion in which it should be used. And I will stop there in the redundance and sit down.

MR. OUTTEN: Your Honor, I need to address that point. I respectfully disagree with Mr. McMaster that Sloan Marvin Burton is a plaintiff in this case as trustee of the trust. That has not been alleged. That has not been alleged. They purport to bring this case as follows: David Allen Burton as the trustee for the trust.

That's an important distinction, Your Honor. If Sloan Marvin Burton was bringing this case as trustee then that may change the posture of this case before the Court, but that has not been -- that's not what they've alleged. That's not how the case has been captioned and that's an important distinction to make.

THE COURT: I'm looking at the caption.

MR. JELLENIK: Your Honor, we're agreed that Sloan Marvin Burton in not the caption of the case.

I think the second document that is in possession of the Court at this time, that is, the first amendment is the first document. The other one is the ratification, and I think, if I may, slightly modify Mr. McMaster's comment. Mr. Sloan Marvin Burton is fully supportive as co-trustee of the actions that have been taken on behalf of Marjorie Cato Burton by David Burton, her son, and attorney in fact. He's fully supportive of the position in this litigation.

The other thing is that with regard to how did we get to this point where these documents are sitting here in front of you. We did not believe it was worth arguing about the motion to dismiss that was filed last December or January, and because of that we undertook quite deliberately to just take some directive action and avoid exactly what we're doing now.

In March, draft documents -- and the only reason I get into this is because in the -- if for any reason the Court doesn't agree that these documents are satisfactory, Mr. Outten is asking that this case be immediately dismissed. Rule 17 and 25 allow time. Mr. Outten's implication is we've used that time. Well, we have used time. In March, on March 16th, I believe, I e-mailed to Mr. Outten the draft documents that are before you. We received two days later an e-mail back that said -- I believe the quote is: These documents look fine. And asking when we were going to amend the Complaint to which we responded, instead of causing everybody to go through that, we were simply going to file a motion to substitute the parties.

We heard nothing further until in the middle of April when we were advised that this motion was going to be addressed. And by that time, the documents had been signed and filed, and that's how we got here.

We would respectfully ask the Court to allow the substitution. We can do it other ways if the Court would be more comfortable with us doing it other ways. But we really don't believe under North Carolina law as applied to the trust that is necessary. We also don't believe under North Carolina law as is applied to the trust that the Defendants in this case have standing to challenge what goes on in the internal workings of the trust.

Thank you, Your Honor.

MR. OUTTEN: I just want to raise that -- just talk about the new issue about the affirmation that Mr. Jellenik raised. Again, it does not comply with the trust document. The reason is because you can't change or add trustees unless there's consent of both grantors. That's why this affirmation of ratification and consent by Mr. Burton is invalid. Generally, this first amendment does not comply with the trust document, and it's invalid.

And I'm not going to address the e-mail traffic. We have taken the position for a long time they haven't pled it properly. They have been before this Court -- this case has been pending in this court for a year and a half. They've had plenty of time to get it right. They haven't gotten it right, and we're entitled to a dismissal. Rule 17 talks about a reasonable time. They've had more than a reasonable time.

We believe we are entitled to a dismissal.

THE COURT: I'm going to take it under advisement. Both sides stay civil.

MR. OUTTEN: Thank you, Your Honor.

THE COURT: Okay.

-- END OF TRANSCRIPT OF RECORD --

REPORTER'S NOTE: NO EXHIBITS WERE RECEIVED.

CERTIFICATE OF REPORTER

State of South Carolina)
)
County of York)

I, Wanda Nelson, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for York County, South Carolina, on the 20th day of July 2011.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

Wanda Nelson

Wanda Nelson, CVR
Certified Verbatim Reporter,
Official Court Reporter,
Notary Public, in and for
The State of South Carolina.

My Commission Expires: 1/21/2021

DATE: 10-27 / 2011