THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2016-002343
Opinion No. 5416 (S.C. Ct. App. filed June 15, 2016)

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

v.

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

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN HOLDING THAT THE TRUST FUND WAS NOT A TRUST?

II. DID THE COURT OF APPEALS ERR IN HOLDING THAT THIS ACTION INVOLVED DERIVATIVE CLAIMS SUBJECT TO RULE 23(b)(1), SCRCP?

III. DID THE COURT OF APPEALS ERR IN HOLDING THAT THE COMPLAINT DID NOT COMPLY WITH THE PLEADING REQUIREMENTS OF RULE 23(b)(1), SCRCP?

STATEMENT OF THE CASE

In September 1995, the South Carolina Home Builders Association created a trust to administer worker's compensation benefits for its members. That trust is titled the South Carolina Home Builders Self Insurers Fund (Trust Fund). (App. p. 351). The Trust Fund had several members of the South Carolina Home Builders Association on its board and worked in conjunction with the South Carolina Home Builders Association to sell worker's compensation insurance policies and administer the policies. (App. p. 125).

The Trustees have made significant actions towards dissolving the trust and creating a new insurance company with the proceeds. The new insurance company would be a mutual insurance company of which the Trustees would all be board members. The insurance company would not have any particular benefit to the beneficiaries of the trust. The assets of the trust would be used to set up a company competing with the trust. (App. pp. 53, 127). If the trust continues along its present course, there will be insufficient assets to cover its risks which will expose the beneficiaries to additional risk as they are subject to personal liability for any shortfall in trust assets. (App. pp. 125-129).

The Plaintiffs are beneficiaries of the Trust Fund. (App. p. 351). In February 2012, they sued the Defendants for breach of their duties as trustees. The Trustees moved to dismiss alleging that the action against them must be brought in probate court because they were the trustees of a trust. Judge Manning granted that motion. (App. p. 7). The Plaintiffs then sued in probate court and removed the case to circuit court. (App. pp. 53, 62). The Defendants again moved to dismiss, this time arguing that the entity was not a trust, but an unincorporated association subject to the additional pleading requirements of Rule 23. Judge Cooper denied the motion. (App. p. 10-18). The Defendants moved to reconsider.

Judge Cooper reversed his earlier position and held that the Trust Fund is not a "trust in its commonly recognized form." (App. p. 19-27). As a result, he treated the trust as an unincorporated association and held the pleadings to the standards required for derivative actions under South Carolina Rule of Civil Procedure 23(b). Judge Cooper then determined that the trust beneficiaries did not comply with Rule 23(b) because they did not allege with particularity the efforts they made to satisfy the pre-suit demand request in Rule 23(b). As a result, he dismissed the Complaint. The Plaintiffs moved to reconsider which Judge Cooper denied. (App. p. 28). The Plaintiffs filed their Notice of Appeal May 1, 2014.

The Court of Appeals affirmed the trial court's order dismissing Appellants' action for relief against the Trust Fund. *Allen Patterson v. Herb Witter*, Op. No. 5416 (S.C. Ct. App. filed June 15, 2016). (App. pp. 591-604). The Court of Appeals overlooked or misapprehended several matters of law and fact in rendering the opinion. First, the Court of Appeals improperly concluded that the Trust Fund is not a trust although it was created by a settlor as a trust, explicitly references trust law, was pled to be a trust by the fund itself, and was ruled to be a trust at the Trust Fund's request. Second, the Court of Appeals improperly concluded the action is derivative even though the beneficiaries have separate claims as beneficiaries of a trust. Third, the Court of Appeals improperly concluded the Appellants did not comply with Rule 23(b) even though the complaint references correspondence seeking relief, the correspondence was admitted in the hearing and in the record on appeal, and the Appellants had previously sued seeking the same relief which was denied by the Trust Fund when it asserted it was a trust.

ARGUMENT

I. THE COURT OF APPEALS MISAPPREHENDED THE FACTS SUCH THAT IT FOUND THE TRUST FUND HAD NOT REPRESENTED ITSELF AS A TRUST.

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

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

This matter was originally brought in February 2012 as case number 2012-CP-32-00757. (App. pp. 29-36). In that case, the Trustees moved to dismiss on the basis that the Trustees must be sued in probate court because they served a trust. The Trustees stated: "this action should be dismissed for lack of subject matter jurisdiction as it involves the internal affairs of a trust." (App. p. 139, ¶ 5). In support of this motion, the Trustees submitted the affidavit of Jeffrey Ranew. He continually refers to the South Carolina Home Builders Self Insurers Fund as a trust and the funds as a trust corpus. (App. p. 130-135).

Judge Manning granted the motion to dismiss, stating:

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

> in Probate Court to cure any alleged defects in subject matter jurisdiction.

(App. p. 7-8).

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

In their Second Motion to Dismiss, the Trustees took the position that the Trust Fund is not a trust, but an unincorporated association. (App. p. 148). The Trustees cannot now claim that the Trust Fund is not a trust when they previously maintained that it was a trust and received relief under that theory.

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

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

Likewise, the Trustees cannot now claim that the Trust Fund is not a trust. The Trustees obtained an order from the court dismissing the previous lawsuit based on their factual assertion that the South Carolina Home Builders Self Insurers Fund was a trust.

Now, the Trustees take the position that it is not a trust, but an unincorporated association, which changes the pleading requirements of the lawsuit. The Trustees cannot assert these two different versions of the facts. They are bound by the assertion made in the previous lawsuit and the order which resulted. Thus, the Trust Fund is a trust, not an unincorporated association, and its beneficiaries do not have to comply with Rule 23(b) regarding derivative actions.

II. THE COURT OF APPEALS MISAPPREHENDED THE FACTS AND LAW WHEN IT RECATEGORIZED THE TRUST FUND AS AN UNINCORPORATED ASSOCIATION.

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

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

To ascertain a settlor's intent, a court must first look to the language of the instrument. If the language is perfectly plain and capable of legal construction, the language determines the form and effect of the instrument. *See, Germann v. New York Life Ins.*, 286 S.C. 34, 37, 331 S.E.2d 385, 388 (Ct. App. 1985). The Trust Fund calls itself a trust, purports to be governed by trustees, and purports to follow trust law. The document

conveys clear intent to create a trust. It never mentions a corporate form or an unincorporated association as found by the Court of Appeals.

The Court of Appeals misapprehended the law when it found the Trust Fund was not a trust because it did not have a *res* or property owned by the trust. The Court of Appeals found that the Home Builders Association of South Carolina "did not transfer any money or property to the Board to hold in trust for the Fund's members." There is no support in the record for this statement. Because this issue was not raised at the pleadings stage, there is no information relating to whether the Trust Fund received investment funding from the settlor Home Builders Association of South Carolina. Thus, the Court of Appeals' conclusion is based on pure conjecture because there are no facts in the record to support it and it was not raised to the trial court. The Court of Appeals then found that because the Trust Fund was funded by its beneficiaries after the trust document was executed that it could not be a trust although the funds were held for the benefit of the beneficiaries. The Beneficiaries know of no requirement that a trust be fully funded at inception or prohibition from beneficiaries contributing to trust assets. The Court of Appeals cites no authority for this statement because there is none.

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

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

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

Thus, the Court of Appeals incorrectly found that the Trust Fund was not a trust because it was not funded.

The Court of Appeals also misapprehended the law when it found the Trust Fund was an unincorporated association because it does not have ascertainable beneficiaries as required for a trust. A trust does not require that specific beneficiaries be ascertainable solely from the trust document itself as the Court of Appeals indicates in its opinion. In fact, a "beneficiary is definite if the beneficiary can be ascertained now or in the future...." S.C. Code Ann. § 62-7-402(c). The Trust Fund refers to members as entitled to receive the benefit of the Trust Fund as follows:

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

(App. p. 214). The Trust Fund even contemplates its own termination and indicates that the remaining funds "shall be distributed . . . to the participating members." (App. p. 226). Finally, the Trustees themselves have recognized that the members are entitled to the benefits of the fund by distributing excess funds to the members in the past. (App. pp. 133-134). Thus, the Trust Fund has beneficiaries even though the document refers to them as members and they are not specifically listed.

The United States Supreme Court has considered whether a trust should be treated as an unincorporated association for diversity jurisdiction purposes. *Navarro Sav. Ass'n v.*

Lee, 446 U.S. 458, 458-59 (1980).[1] In that case, the respondents asserted that the "trust form masks an unincorporated association." *Id.* at 461. The Respondents also contended that because the trust's operations were characteristic of an association, including "centralized management, continuity of enterprise, and unlimited duration," that the trust was "in substance an association." *Id.* at 461-62.

The 5th Circuit Court of Appeals and the Supreme Court disagreed. The Supreme Court stated that while certain attributes of the trust were shared by associations, having business-like practices was not dispositive evidence that a trust was an unincorporated association. *Id.* at 462. Even though shareholder beneficiaries had the power to elect and remove trustees, to terminate the trust, and to amend the Declaration or approve a majority disposition of the estate, this was insufficient to classify the trust as an unincorporated association. The Court concluded that despite these association-like characteristics, the trust was indeed a trust because the trustees had real and substantial control over the property of the trust. *Id.* at 465 n. 14. "That the trust may depart from conventional forms in other respects has no bearing on this determination." *Id.* at 465. "We need not reject the argument that [the trust] shares some attributes of an association. In certain respects, a business trust also resembles a corporation. But this case involved neither an association nor a corporation. [The trust] is an express trust..." *Id.* at 462.

Like the trust in *Navarro*, the Home Builder's Trust may have some unconventional attributes. For example, the beneficiaries in the Home Builder's Trust are jointly and severally liable for underfunded losses. This is allowed under the South Carolina Trust

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

Code. *See* S.C. Code Ann. § 62-7-105.[2] The Trustees assert that because the beneficiaries are jointly and severally liable, this makes the trust an unincorporated association. This assertion is illogical. By this reasoning, joint tortfeasors would qualify as an unincorporated association. Although the beneficiaries of the Trust Fund share in liability for shortfalls in trust assets, this alone does not make the Trust Fund an unincorporated association.

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

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[2] The following items cannot be overridden by the trust code:
(1) the requirements for creating a trust;
(2) the duty of a trustee to act in good faith and in accordance with the purposes of the trust;
(3) the requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful and possible to achieve;
(4) the power of the court to modify or terminate a trust under Sections 62-7-410 through 62-7-416;
(5) the effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in Part 5;
(6) the limitations on the ability of a settlor's agent under a power of attorney to revoke, amend, or make distributions from a revocable trust pursuant to Section 62-7-602(e);
(7) the power of the court under Section 62-7-708(b) to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;
(8) the effect of an exculpatory term under Section 62-7-1008;
(9) the rights under Sections 62-7-1010 through 62-7-1013 of a person other than a trustee or beneficiary;
(10) periods of limitation for commencing a judicial proceeding;
(11) the power of the court to take such action and exercise such jurisdiction as may be necessary in the interests of justice; and
(12) the subject matter jurisdiction of the court and venue for commencing a proceeding as provided in Sections 62-7-201 and 62-7-204.
S.C. Code Ann. 62-7-105(a). Therefore, having joint and several liability on the part of the beneficiaries is allowed under the code.

III. THE COURT OF APPEALS MISAPPREHENDED THE LAW WHEN IT FOUND THE PETITIONERS' CLAIMS WERE SOLELY DERIVATIVE.

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

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

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

The Court of Appeals misapprehended the facts when it found the Petitioners' Complaint alleges that the fund has been injured, but not that the members have been injured. The Complaint says:

> 21. The Defendants have removed approximately five million dollars from the trust corpus for the purpose of establishing a separate member owned insurance company which will not provide any benefit to the Beneficiaries of the Trust.
>
> 22. The Trustees did not advise the beneficiaries that the funds could have been returned to them....
>
> 40. As a direct and proximate result of the Defendants' breach of their fiduciary duties and breach of the trust agreement, the Plaintiffs have been injured including, but not limited to, loss of funds, attorney fees, harassment and aggravation, loss of trust assets, higher payments into the Trust, and other damages all to their actual damage....
>
> 60. The beneficiaries' best interests would be served by a termination of the Trust and distribution of its assets to the beneficiaries.

(App. pp. 55, 57, 60). The Petitioners allege that the Trustees took monies from the Trust Fund, monies which were to be used for their benefit only, and used it for another purpose which injured them individually. The Complaint states the harm from the mismanagement of the trust flows directly to the beneficiaries, who are liable for any shortfalls in trust assets. The injury is to each beneficiary who must, individually, make up for any shortfall in trust assets.

There are two exceptions to the general rule that a shareholder cannot sue for injuries to a corporation: (1) where there is a special duty between the wrongdoer and the shareholder, and (2) where the shareholder suffered an injury separate and distinct from that suffered by other shareholders. *Rice-Marko v. Wachovia Corp.*, 398 S.C. 301, 308,

728 S.E.2d 61, 65 (Ct. App. 2012). The Trustees have a special duty to the member beneficiaries.

The Trust Fund document states that: "The Board of Trustees shall have all authorities and powers granted to Trustees generally under the laws of South Carolina including the powers and authorities conferred under the Uniform Trustee's Powers Act" (App. p. 361, ¶ j). The South Carolina Trust Code reads: "the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this article," and that a "trustee shall administer the trust solely in the interests of the beneficiaries." S.C. Code Ann. §§ 62-7-801 and 62-7-802 (a).

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

IV. THE COURT OF APPEALS MISAPPREHENDED THE FACTS AND LAW WHEN IT FOUND THE PETITIONERS DID NOT COMPLY WITH RULE 23(b)(1).

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

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

> 8. To the extent required by South Carolina Rule of Civil Procedure 23, the Plaintiffs allege:
>
> > a. The Plaintiffs were beneficiaries of the trust at all times relevant including when the transactions complained of were made.

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

(App. p. 54).

Petitioners' counsel also sent a letter to defense counsel setting forth the relief requested. This letter was referenced in the Complaint (App. pp. 120-124) and states:

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

(App. p. 324-325). The Trustees acknowledged to the court that this letter was received and was authentic. (R. pp. 120-121).

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

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

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

It should "describe the factual basis of the alleged wrongful acts..."

> 20. The Defendants have voted to remove assets from the Trust in order to incorporate a new member owned insurance company which confers no benefits upon the beneficiaries of the Trust.
>
> 21. The Defendants have removed approximately five million dollars from the trust corpus for the purpose of establishing a separate member owned insurance company which will not provide any benefit to the Beneficiaries of the Trust.

"and the harm caused..."

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

and "request remedial relief...."

> 41. The Plaintiffs are entitled to an Order of this Court ordering that the Trustees be removed for breach of their fiduciary duties and breach of trust, that new trustees be elected, that all trust assets be returned to the Trust, that all damages incurred and funds taken out of the trust in breach of fiduciary duties and trust agreement be awarded, enjoining further violations of the fiduciary duties and trust agreement, and awarding the Plaintiffs and the class actual and punitive damages.
>
> 53. The Plaintiffs request an order of this Court ordering that the Defendants must comply with the Agreement and Declaration of Trust Creating The South Carolina Home Builders Self Insurers Fund and their fiduciary duties.
>
> 54. In particular, the Plaintiffs are entitled to an order of this Court ordering that the Defendants may not take funds or assets from the trust for the purpose of setting up a member owned insurance company.
>
> 57. The Plaintiffs hereby demand an accounting pursuant to South Carolina trust law and common law for all expenditures made by the trust.
>
> 62. The Plaintiffs ask that a receiver be appointed and that the Trust be terminated with the assets distributed to the beneficiaries after costs and fees.

(App. pp. 25; 55-60). The wrongdoers are identified. The factual basis for the wrongful acts is established. The harm is identified, and the beneficiaries requested remedial relief. In addition, the Complaint is verified by beneficiaries. It alleges the action taken to obtain relief as well as the relief requested.

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

V. THE COURT OF APPEALS IMPROPERLY FOLLOWED INCONSISTENT PLEADING STANDARDS IN AFFIRMING THE MOTION TO DISMISS.

The Court of Appeals found that although the second Complaint references correspondence sent to the Defendants as a request for relief, and the January 20, 2013, letter requesting relief was received by the Defendants and in the record, the second Complaint did not specifically incorporate the letter. The Court of Appeals concluded this because the pleadings say correspondence but not "Letter of January 20, 2013." The Court of Appeals goes on to state that the ruling on the motion cannot include the January 20, 2013, letter because it was not attached to the Complaint. It cites *McCormick v. England*, 328 S.C. 627, 632-33, 494 S.E.2d 431, 433 (Ct. App. 1997), for the proposition that the ruling can only be based on the facts alleged in the complaint. However, earlier in the opinion, the Court of Appeals quotes from the affidavit submitted by the Respondents which alleges that the transfer of five million dollars in trust assets was done with the approval of 96.5 percent of Trust Fund members. (App. p. 593, n.3). Thus, the Court of Appeals supports its decision with the Respondents' affidavit, which the Petitioners have not had an opportunity to challenge. But, it will not consider the January 20, 2013, demand letter which is in the record, was received by the Respondents and to which the Respondents had not replied at the time of the ruling.

VI. THE COURT OF APPEALS RELIED ON *CAROLINA FIRST CORP. V. WHITTLE*, 343 S.C. 176, 539 S.E.2d 402 (CT. APP. 2000), TO DETERMINE THE BENEFICIARIES DID NOT COMPLY WITH RULE 23(b). THIS DECISION IS ERRONEOUS AND SHOULD BE OVERTURNED.

The Court of Appeals quoted extensively from *Carolina First Corp. v. Whittle,* 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000), to explain the requirements of Rule 23. *Whittle* states "that the sufficiency of the pleading in meeting the requirements of Rule 23 must be

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

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

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

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

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

S.C. Code Ann. § 33-7-400. Thus, the Corporation Act contemplates that South Carolina courts will rely upon federal precedent when construing Rule 23(b).

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

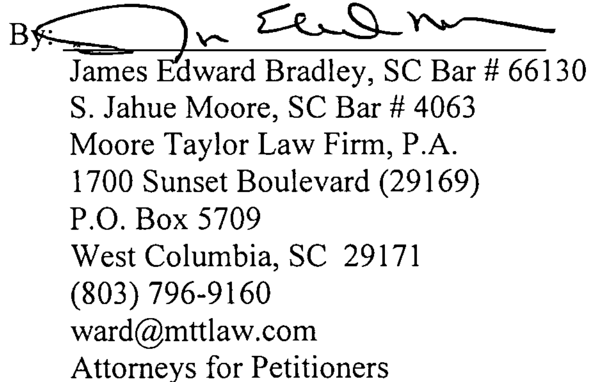
> We cannot construe Rule 23 or any other one of the Federal Rules as compelling courts to summarily dismiss, without any answer or argument at all, cases like this where grave charges of fraud are shown by the record to be based on reasonable beliefs growing out of careful investigation. The basic purpose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

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

CONCLUSION

For the reasons stated, Petitioner asks this Court reverse the Court of Appeals and find that the Trust Fund is a trust as it was created by a settlor as a trust, explicitly references trust law, was pled to be a trust by the fund itself, and was ruled to be a trust at the Trust Fund's request. Second, this Court should find this matter is not derivative because the beneficiaries have separate claims as beneficiaries of a trust. Third, this Court should find Petitioners complied with Rule 23(b) since the complaint references correspondence seeking relief, the correspondence was admitted in the hearing and in the record on appeal, and the Petitioners had previously sued seeking the same relief which was denied by the Trust Fund when it asserted it was a trust.

Respectfully submitted,



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November 1, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
NOV 03 2017
S.C. SUPREME COURT

Appeal from Richland County
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Appellate Case No. 2016-002343

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

v.

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

PROOF OF SERVICE

I certify that I have served the Brief of Petitioners on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on November 3, 2017, addressed to their attorneys of record as follows:

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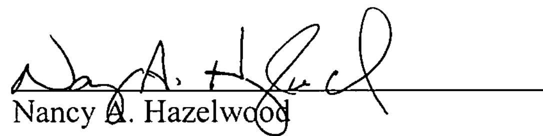

Nancy A. Hazelwood

West Columbia, South Carolina

November 3, 2017