

**STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS**

Appeal from the Court of Common Pleas
For Beaufort County
Honorable Carmen T. Mullen, Circuit Judge
Civil Action No.: 2015-CP-07-00913

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SC Court of Appeals

IN THE MATTER OF THE ESTATE OF JOHN JOSEPH MANNING, Jr.

Deanna Bushman, as Holder of Durable Power of Attorney
for Sally Manning and as Trustee of the Trust Agreement for
Sally Manning Dated 6 December 2004,

Respondent,

v.

The Estate of John Joseph Manning, Jr., John J. Manning, III,
Christopher Manning, and Linda Manning,

Appellants.

APPELLANTS' INITIAL BRIEF

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II. STATEMENT OF THE CASE

The Respondent, Deanna Bushman, as Holder of Durable Power of Attorney for Sally Manning and as Trustee of the Trust Agreement for Sally Manning, dated 6 December 2004 (Ms. Bushman”),¹ filed her Amended Complaint and Notice of Elective Share on 21 December 2015. (Amd.Comp., pp.1-16). She asserted claims against the Appellants, John J. Manning, III; Christopher Manning; Linda Manning; and the Estate of John J. Manning, Jr., (the “Mannings”)² for breach of fiduciary duty, conversion, constructive trust, undue influence and duress, removal of the current trustees, an accounting, injunctive relief, and a petition/request for elective share. (Amd.Comp., paras.57-108). The Mannings denied the material allegations (Answer, paras. 1-100, 141-150) and asserted several affirmative defenses. (Answer, paras. 101-116). They also asserted conversion and constructive trust counterclaims. (Answer/Counterclaim, paras. 121-139). Ms. Bushman denied the material allegations (Reply, paras. 2-3, 7-28) and asserted various affirmative defenses. (Reply, paras. 30, 32, 34, 36, 38, and 40).³

The Mannings moved for summary judgment asserting South Carolina law did not require outright distribution of an elective share amount from an illusory trust. (Mannings MSJ,

¹ Ms. Bushman is Sally Manning’s agent under a Durable Power of Attorney. Due to Ms. Manning’s 2006 dementia diagnosis, she has lived since mid-2008 at The Preston, the memory unit at The Cypress in Hilton Head retirement community. (Amd.Comp., para. 15; Answer, para. 16). Ms. Bushman is Ms. Manning’s niece by marriage. The Appellants, John J. Manning, III and Christopher H. Manning, are Ms. Manning’s step-children. The Appellant, Linda Manning, is Christopher’s wife.

² The Appellants, John III and Christopher are John J. Manning, Jr.’s only children. John III is the Personal Representative of the Manning Estate. He and Christopher are the Trustees of Mr. Manning’s Revocable Trust.

³ The Mannings submitted the Last Will and Testament of John Joseph Manning, Jr. for probate to the Beaufort County Probate Court. (Amd. Comp., para. 3). Ms. Bushman filed a Notice of Elective Share for Sally Manning. The matter was later removed to the Circuit Court.

p.1).⁴ Ms. Bushman moved for partial summary judgment on the Elective Share asserting the same law granted Sally Manning a full elective share of the Manning Estate. (Bushman PMSJ, p.1).

The Circuit Court considered the parties respective motions (Tr.4, lines 3-6) on 11 July 2017, (Tr.1) and, from the Bench, orally denied the Mannings' motion and granted Ms. Bushman's motion. (Tr.12, lines 16-19). By order dated 7 September 2017, the Circuit Court memorialized its verbal decision. (PMSJ Order, pp.1-6). The Mannings unsuccessfully moved for reconsideration (SCRCP Form 4C Order, p.1; Motion for Reconsideration, pp.1-5). This appeal followed.

III. STATEMENT OF THE FACTS

John J. Manning Jr. ("Mr. Manning") and Sally Manning were married (PMSJ Order, p.2; Amd.Comp., para. 10) in October 1997. Mr. Manning died testate on 4 September 2014. (PMSJ Order, p.2; Amd. Comp., para. 55; Answer, para. 51). Sally Manning is Mr. Manning's surviving spouse. (PMSJ Order, p.2; Amd.Comp., para. 55).⁵

Mr. Manning married Ms. Manning in October 1997. In 2004, Mr. Manning executed a revocable *inter vivos* trust (the "Trust") which, at his death, allocated his assets between two sub-trusts – a marital trust and a family trust; undisputedly Ms. Manning was the beneficiary of both during her lifetime. In 2008, Mr. Manning revised his 2004 estate planning documents in part to update the document to the then-Federal

⁴ See S. C. Code Ann. §§ 62-2-201, *et seq.* (Thomson Reuters West 2016).

⁵ Sally Manning was previously diagnosed with dementia and Alzheimer's disease since the late 2008. (Amd.Comp., para. 15; Answer, para. 16). She resides "at The Cypress of Hilton Head in The Preston Health Center and [receives] specialized care for her cognitive impairments." (Amd.Comp., para. 15; Answer, para. 16).

estate tax credit/exclusion amounts -effectively eliminating any provision for the marital sub-trust. In 2009, Mr. Manning again amended the Trust to exclude Ms. Manning as a beneficiary of the Trust except under specific conditions. (Order, p.2). In 2012, Mr. Manning again revised the documents by signing an amendment which amended and restated the Trust in its entirety. Ms. Manning was again excluded as a beneficiary except under specific circumstances. (Amd.Comp., paras. 12; Answer, para. 13).⁶

Mr. Manning's Last Will and Testament specifically stated Sally Manning ***shall take nothing*** under his will. (Order, p.2). Similarly, the relevant provisions of Mr. Manning's *inter vivos* Trust Agreement (the "Support Trust") specifically addressed asset dispositions to Sally Manning:

- (C) I hereby expressly make ***no provision*** in this Trust Agreement for my spouse, SALLY A. MANNING. Notwithstanding the above, in the event any portion of the Trust Estate shall be deemed payable to or for the benefit of my spouse [Sally Manning], such amount shall be held, administered and distributed as a separate share for the benefit of my spouse [Sally Manning] as provided in this Paragraph (C) of **ARTICLE 4**. In such event, JOHN J. MANNING, III and CHRISTOPHER H. MANNING, or the survivor of them, shall serve as trustee of such separate share.
- (1) The trustee shall pay to, or for the benefit of, my spouse [Sally Manning], during her lifetime, so much of the income of the separate share, if any, established in this Paragraph (C) as the trustee shall, from time to time, determine to be necessary for the health and support of my spouse [Sally Manning], in accordance with the

⁶ The balance of the Trust passed outright to John J. Manning, III and Christopher H. Manning. Furthermore, any assets remaining in any share established for Ms. Manning also passed to the both of them at Ms. Manning's death. When Mr. Manning died the Trust was funded with an investment account and real property. Additionally, Mr. Manning's estate also held tangible personal property and two small refunds payable as a result of his death. His tangible personal property was distributable to John J. Manning, III and Christopher H. Manning outright.

standard of living to which she has become accustomed, including medical, surgical, hospital or other institutional care, due regard being given by the trustee to the amount of income known to the trustee to be available to my spouse [Sally Manning] from other sources.

- (2) Upon the death of my spouse [Sally Manning], the principal and all accrued and undistributed income, if any, of such separate share shall be added to and become a part of the Manning Family Share to be held, administered and distributed as provided in **ARTICLE 5**.

(Order, pp.2-3).

After Mr. Manning passed,⁷ in concert with his expressed wishes, his estate planning documents prevented anything from passing to Sally Manning. (Order, p.3). In response, Sally Manning (via Ms. Bushman) filed her Notice of Elective share. (Amd.Comp., paras. 102-107). The Circuit Court concluded Sally Manning was entitled to an elective share and, in turn, found the Support Trust invalid. (Order, pp.4-5).

IV. ARGUMENT AND CITATION OF AUTHORITY

A. Mr. Manning's Trust Agreement Created A Valid Support Trust For Sally Manning

In 2013, the South Carolina Legislature significantly revised the elective share statute. These revisions reflected the modern use of *inter vivos* trusts and other probate substitutes to satisfy the stated purpose of the elective share statute.⁸ In Williams v.

⁷ Before Mr. Manning died, he had also developed his own "cognitive issues causing a cognitive decline . . . require[ing] the assistance of in-home caregivers. (Amd.Comp., para. 15; Answer, para. 16).

⁸ See generally 2013 Act No. 100, § 1, eff. 1 January 2014 modifying, among other provisions, S. C. Code Ann. §§ 62-2-201, et seq. The official Reporter noted:

Under the common law, a widow was entitled to dower which was a life estate in a fraction of lands of which her husband was seized of an estate of inheritance at any time during the marriage. The South Carolina Supreme Court [has] declared that dower was unconstitutional as a violation of the

Williams, the South Carolina Supreme Court concluded the “legislative purpose behind the elective share statute [wa]s to protect the family unit from becoming society's ward by preventing impoverishment of the surviving spouse.”⁹ This Court of Appeals, in Mullinax v. J.M. Brown Amusement Co., noted the “ ‘old dower and later elective share provisions of the South Carolina Probate Code [we]e prime examples of State policies protecting a family unit from becoming society's wards.’ ”¹⁰ Clearly, the elective share statute “is reasonably related to the legislative purpose of providing for the surviving spouses.”¹¹

In this context, a spousal support trust such as the one created by Mr. Manning’s trust agreement satisfied the statutory and legislative purposes of the elective share statutory purpose, as well as specifically provided for Sally Manning as a surviving spouse. As the official Reporter noted:

The 2013 amendment changes substantively the method of calculation of the elective share in South Carolina. . . . The amendment clarifies and makes certain that property passing directly to the surviving spouse in a revocable *inter vivos* trust, including a beneficial interest, **will satisfy the elective share**. The amendment eliminates the concern that property had to “pass under the will” first in order to be applied in satisfaction of the elective share.¹²

equal protection clauses of the South Carolina and United States Constitutions. South Carolina, like other states, substitutes an elective share in the whole estate for dower and the widower's common law right of curtesy.

Reporter’s Comment to S.C. Code Ann. § 62-2-201 (Thomson Reuters West 2015).

⁹ Williams v. Williams, 335 S.C. 386, 390–391, 517 S.E.2d 689, 691 (1999) (citing Berkebile v. Outen, 311 S.C. 50, 55, 426 S.E.2d 760, 763 (1993)).

¹⁰ Mullinax v. J.M. Brown Amusement Co., 326 S.C. 453, 458, 485 S.E.2d 103, 106 (Ct. App. 1997), *affirmed*, 333 S.C. 89, 508 S.E.2d 848 (1998) (quoting Berkebile v. Outen, 311 S.C. 50, 56 fn. 3, 426 S.E.2d 760, 763 fn. 3).

¹¹ Matter of Patrick, 303 S.C. 559, 563–564, 402 S.E.2d 664, 666 (1991).

¹² See Reporter’s Comments to S.C. Code Ann. § 62-2-207 (Thomson Reuters West 2015) (Emphasis added).

Therefore, the 2013 amendment to S.C. Code Ann. § 62-2-207 was promulgated with the legislative intention of allowing decedents to satisfy the elective share from beneficial interests in *inter vivos* trusts for the benefit of the surviving spouse. Mr. Manning's trust agreement created just such a beneficial interest for Sally Manning.

The South Carolina Trust Code¹³ describes several ways in which a settlor may create a trust, the applicable one for this case being as follows: "transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death"¹⁴ This Court of Appeal has stated that

"[t]o prove the existence of a trust, the following elements must be shown: (1) a declaration creating the trust, (2) a trust *res*, and (3) designated beneficiaries. . . . Furthermore, the trust declaration must be in writing when the trust property includes realty."¹⁵

The relevant statute addressing and governing the creation of trusts provides identical guidelines:

A trust is created only if:

- (1) the settlor has capacity to create a trust;
- (2) the settlor indicates an intention to create the trust;
- (3) the trust has a definite beneficiary. . .;
- (4) the trustee has duties to perform; and
- (5) the same person is not the sole trustee and sole current and future beneficiary.¹⁶

¹³ See generally S.C. Code Ann. §§ 62-7-102, *et seq.* (Thomson Reuters West 2015).

¹⁴ S.C. Code Ann. § 62-7-401(a)(1)(i) (Thomson Reuters West 2014).

¹⁵ Foster v. Foster, 384 S.C. 380, 384, 682 S.E.2d 312, 314 Ct.App. 2009) (*citing Whetstone v. Whetstone*, 309 S.C. 227, 231, 420 S.E.2d 877, 879 (Ct.App. 1992)), *rehearing denied* (17 September 2009), *certiorari granted* (23 September 2010), *affirmed in part and reversed in part on other grounds*, 393 S.C. 95, 711 S.E.2d 878 (2011).

¹⁶ See S.C. Code Ann. § 62-7-402(a) (Thomson Reuters West 2015).

In the context of the Support Trust Mr. Manning created, the trust agreement satisfied each of these statutory requirements:

- (1) None of the parties challenge Mr. Manning II's capacity to create the trust in the first instance;
- (2) Mr. Manning's Trust agreement indicated his intention to create the Support Trust;
- (3) Sally Manning was the definite beneficiary of the trust;
- (4) The trustees have duties to perform; and
- (5) The trustees and the beneficiaries are not the same person.

This trust is very similar to the one addressed in Rentz v. Polk, where the Supreme Court found the trust at issue was a validly created trust since “[t]here was a declaration of the trust, property to which the trust pertained, a trustee, and named beneficiaries.”¹⁷ As it is with most contracts, of whatever nature, in Sarlin v. Sarlin, this Court of Appeals recognized that “[i]n ascertaining the Settlor's intent, [a] court must resort first to the language of the trust instrument . . .”¹⁸

This Court of Appeals, again in Sarlin v. Sarlin, acknowledged that “the language of the trust provision [was] perfectly clear. The simple words of the provision state that the settlor established the trust for ‘the benefit of [his] wife.’ The purpose of the trust can be no plainer.”¹⁹ For the same reasons, this Court of Appeals should reverse the Circuit Court's finding the spousal support trust was invalid. Mr. Manning acted properly and his Estate and the trustees should not now be penalized.

¹⁷ Rentz v. Polk, 267 S.C. 359, 363, 228 S.E.2d 106, 107 (1976).

¹⁸ See Sarlin v. Sarlin, 312 S.C. 27, 29, 430 S.E.2d 530, 532 (Ct.App. 1993). See also Reporter's Comment to S.C. Code Ann. § 62-7-1006 (Thomson Reuters West 2015); Beattie v. J.M. Tull Foundation, 178 F.3d 1282, 1282 (4th Cir. 1999).

¹⁹ Sarlin v. Sarlin, 312 S.C. 27, 30, 430 S.E.2d 530, 532 (Ct. App. 1993) (Alteration in original).

B. The Circuit Court's Conclusion Sally Manning Was Entitled To An Elective Share Constituted The Contingent Event Creating The Support Trust

The Circuit Court held the Support Trust invalid because it “only purports to provide for [Sally] Manning at some point in the future and based upon a determination, through some unspecified process, that a portion of the estate was ‘deemed’ payable to her.” (Order, pp.4-5). Nevertheless, the Circuit Court overlooked the proposition that when it determined Sally Manning was entitled to her elective share, that decisional event triggered the contingent event creating the Support Trust. The Trust Agreement’s provisions vis-à-vis the Support Trust are triggered “in the event any portion of the Trust Estate **shall be deemed** payable to or for the benefit of my spouse [Sally Manning].” (Order, p.2) (Emphasis in original). The Trust Agreement further provides that once the Support Trust is triggered, the portion of the Trust Estate determined payable to or benefiting Sally Manning, “**shall be held, administered[,] and distributed as a separate share for the benefit of [Sally Manning]** as [otherwise] provided’ in the Trust Agreement. (Order, p.2) (Emphasis added). This language makes sense in light of the nature and purpose of the elective statute, as well as the procedure for a surviving spouse to take his or her elective share.

The elective share statute is a “statute of creation, and strict compliance with its terms is mandatory in order to exercise the right to an elective share.”²⁰ The spouse must exercise his or her right during his or her life.²¹ Also, the surviving spouse must notify the personal representative within a specific time period following decedent’s

²⁰ Simpson v. Sanders, 314 S.C. 413, 415, 445 S.E.2d 93, 94 (1994).

²¹ S.C. Code Ann. § 62-2-205 (Thomson Reuters West 2015).

death.²² Further, even though the elective share only attaches to the probate estate, it can be satisfied from certain other assets.²³ Of particular relevance in this matter is the legal requirement²⁴ that Mr. Manning's trust be found illusory under before trust assets can be used to calculate the elective share:

This subsection does not prevent a finding that a revocable *inter vivos* trust is illusory and thus invalid for purposes of determining a spouse's elective share rights pursuant to Article 2, Title 62. A finding that a revocable *inter vivos* trust is illusory and thus invalid for purposes of determining a spouse's elective share rights pursuant to Article 2, Title 62 does not render that revocable *inter vivos* trust invalid, but allows inclusion of the trust assets as part of the probate estate of the settlor only for the purpose of calculating the elective share.²⁵

The South Carolina supreme Court, in Dreher v. Dreher, concluded that S.C. Code Ann. § 62-7-401(c):

. . . confirms the validity of revocable *inter vivos* trusts by providing such trusts shall not be declared completely invalid because the trust creator or settlor retained substantial control over the trust. [S.C. Code Ann. § 62-7-401(c)] then provides, '[n]othing herein, however shall prevent a finding that a revocable *inter vivos* trust, enforceable for other purposes, is illusory for purposes of determining a spouse's elective share

²² S.C. Code Ann. § 62-2-205(a) (Thomson Reuters West 2015).

²³ S.C. Code Ann. § 62-2-207.

²⁴ See S. C. Code Ann. § 62-2-207(a)(8) (Thomson Reuters West 2015) (

²⁵ S. C. Code Ann. § 62-7-401(c) (Thomson Reuters West 2015). The South Carolina Trust Code further provides in the same statute that

In that event, the trust property that passes or has passed to the surviving spouse, including a beneficial interest of the surviving spouse in that trust property, must be applied first to satisfy the elective share and to reduce contributions due from other recipient of transfers including the probate estate, and the trust assets are available for satisfaction of the elective share only to any remaining extent necessary pursuant to [S.C. Code Ann. § 62-2-207].

S. C. Code Ann. § 62-7-401(c).

rights. . . .’ The second sentence clearly conveys that no part of the statute, including the first sentence, should be construed to prevent a finding that a revocable *inter vivos* trust is illusory for purposes of the elective share. This construction of the second sentence does not cause the first sentence to be superfluous because of the third sentence in the statute. The third sentence specifically provides that a revocable *inter vivos* trust found to be illusory and thus invalid for elective share purposes will not be rendered completely invalid. Further under [*S.C. Code. Ann.* § 62-7-401(c)], **if a revocable inter vivos trust is illusory for elective share purposes, the trust assets become a part of the probate estate only for the calculation of the elective share** and are available to satisfy the elective share to the extent necessary under [*S.C. Code. Ann.* §] 62-2-207.**26**

Consequently, Salley Manning’s entitlement to any portion of Mr. Manning’s trust assets was neither a given nor a fixed right at the time Mr. Manning passed away. Salley Manning had to affirmatively act by specifically electing to take her statutory elective share and, in turn, the Circuit Court was required to determine if the beneficial interest held in trust for Salley Manning (which comprised a portion of her elective share) had to be distributed outright to Sally Manning in satisfaction of her elective share or could be retained in trust for her benefit.

The Circuit Court’s decision effectively “deemed” a portion of the *res* of Mr. Manning’s *inter vivos* trust payable to Ms. Manning. (Order, pp.2-6). *Black’s Law Dictionary* defines the verb “deem” as “to hold” or “adjudge” or “determine”.**27** Using these definitions, Mr. Manning’s trust agreement provides that says “in the event any portion of

26 Dreher v. Dreher, 370 S.C. 75, 81, 634 S.E.2d 646, 649 (2006) (Emphasis added). At the time Dreher was issued *S.C. Code. Ann.* § 62-7-401(c) was then codified as *S.C. Code. Ann.* § 62-7-112 (Thomson Reuters West Supp. 2004).

27 Black’s Law Dictionary 6th ed., p.415 (West 1991). The term has also been defined as “to consider or judge something in a particular way.” Cambridge Dictionary Online (found at dictionary.cambridge.org/dictionary/English/deem).

the Trust Estate shall be [determined/adjudged/considered] payable to or for the benefit of my spouse [Sally Manning], such amount shall be held, administered and distributed as a separate share for the benefit of my spouse [Sally Manning]” (Order, p.2).

Clearly, this language required the placement of appropriate assets into the Support Trust for Ms. Manning’s benefit if and when it was determined some portion of the Trust Estate had to actually be paid to Ms. Manning. The Circuit Court undisputedly Ms. “Manning was entitled to take an elective share of one-third of [Mr. Manning’s] probate estate” . . . pursuant to S.C. Code Ann. § 62-2-201.” (Order, p.4). At the moment the Circuit Court rendered that determination, the contingent event triggering creation of the Support Trust occurred. Notwithstanding the Circuit Court’s direction that Ms. Manning take her elective share outright and free of any trust, S.C. Code Ann. § 62-7-401(c) permitted the assets attributable to Ms. Manning’s elective share to be placed separately in the Support Trust and not paid outright.

As set forth in Dreher v. Dreher, if a revocable *inter vivos* trust is [determined to be] illusory for elective share purposes, the trust assets become a part of the probate estate only for the calculation of the elective share and are available to satisfy the elective share [only] to the extent necessary under [S.C. Code Ann. §] 62–2–207.”**28**

The noted authorities recognize that

[I]n many states providing an elective share[, like South Carolina], the courts have had to consider whether the surviving spouse's electi[ve] [share] extends to property transferred *inter vivos* by the deceased spouse under one or more ‘will substitutes’, for example, a revocable trust established by the deceased spouse prior to his or her death.

28 Dreher v. Dreher, 370 S.C. 75, 81, 634 S.E.2d 646, 649.

Thus a settlor spouse may have declared a trust or transferred property in trust during his or her lifetime, generally for the settlor's own benefit for life, with remainder to others than the other spouse, reserving broad powers, including the power of revocation, the power to change the remainder beneficiary, and the power to control the trustee's management of the trust. The question has arisen whether these trusts are 'illusory' because of the great amount of control that the settlor has over the subject matter, and therefore were, in effect, wills, or alternatively, in some states, whether they were created with the intent to deprive the spouse of an elective share. In either case, in several states[, also like South Carolina,] the **value of the trust assets would be includible in the settlor's estate for purposes of determining the statutory share of the surviving spouse.**²⁹

Admittedly, Mr. Manning's estate plan and estate documents demonstrated he intended to exclude Ms. Manning from obtaining any assets by or through his will. On the other hand, Mr. Manning recognized that there was a possibility that a court, like the one in this case, could determine Ms. Manning was entitled to her one-third elective share. In that vein, he specifically provided for that contingency and directed that the portion of the "Trust Estate . . . deemed payable to or for the benefit of [Sally Manning, had to] be **held, administered and distributed as a separate share** for [Sally Manning's] benefit" (Order, p.2) (Emphasis added).

Even though the Circuit Court concluded otherwise, it seems clear that both South Carolina statutory law and judicial decisions permit the creation and use of this type of *inter vivos* trust. Nevertheless, the law also requires that if such a trust is determined to

²⁹ Helene S. Shapo, George Gleason Bogart, and George Taylor Bogart, The Law of Trust and Estates, § 211 (Thomson Reuters West 2017). See also Restatement (Second) of Property: Donative Transfers §§ 13.7 (spouse's rights on appointive assets), 34.1(3) ("inter vivos donative transfer to others than the donor's spouse that is a substitute for a will, or that is revocable by the donor. . . is subject to spousal rights of the donor's spouse in the transferred property . . .") and comment (3); J. R. Kemper, Anno., *Validity of Inter Vivos Trust Established by One Spouse that Impairs the Other Spouse's Distributive Share or Other Statutory Rights in Property*, 39 A.L.R.3d 14 (1971).

be illusory in nature, then the trust assets involved therein would (a) be considered as a part of the probate estate albeit solely for the elective share calculation and (b) remain available to satisfy the elective share to the extent required by S.C. Code Ann. §] 62-2-207.”**30**

This is the type of procedure the Circuit Court should have used in this case as opposed to directing payment of Ms. Manning’s elective share outright from trust assets. Directing payment outright was unnecessary in this case as there is a legal process in place to protect someone in Ms. Manning’s position. In fact, Mr. Manning anticipated such a procedure and provided that any assets deemed payable for Ms. Manning’s benefit would be segregated from the general trust assets. Practically speaking, Mr. Manning’s trust documents went beyond the minimum legal requirements and better protected Ms. Manning’s interest by requiring the assets at issue **be held, administered, and distributed as a separate share** for Sally Manning’s benefit.

This Court of Appeals should reverse to allow the assets representing Ms. Manning’s elective share be segregated and not paid outright as the law permits.

C. The Support Trust Is Subject To Discernable Guidelines And Standards For Trust Administration.

Under South Carolina law, the Trustees of the Support Trust clearly have discernable standards through which they must administer and manage the trust. First, the Trustees have the powers and duties which are imposed upon them by statute.**31**

30 See S.C. Code Ann. § 62-7-401(c); Dreher v. Dreher, 370 S.C. 75, 81, 634 S.E.2d 646, 649.

31 See S.C. Code Ann. §§ 62-7-801, *et seq.* (Thomson Reuters West 2015) (establishing duties for trustees). See also generally S.C. Code Ann. §§ 62-7-815, 816 (Thomson Reuters West 2015) (general and specific trustee powers).

Second, in making distribution decisions, the trustees must act selflessly and with utmost loyalty to the beneficiary.³² Finally, under a support trust like the one established for Ms. Manning's benefit it is well-established that " [a] trustee does not have absolute and uncontrolled discretion in disbursing trust funds." ³³ The Estate of Stevens court further acknowledged:

In any discretionary action, a trustee must eliminate all selfish interest and exercise the reasonable care, prudence and diligence in the management of trust assets as a reasonably prudent man would do with relation to his own affairs.³⁴

Specific to the Support Trust at issue in this appeal, South Carolina requires a trustee to pay nursing home and other bills unless the beneficiary otherwise has sufficient funds herself to pay such bills.³⁵ This is an ascertainable standard for a trustee which has been recognized around the country:

'The underlying concept in the definition of an ascertainable standard rests upon the premise that a person who holds the power to render decisions pursuant to an ascertainable standard, such as a discretion given to a trustee to make distributions out of income or accumulations, really does not have a power, but rather a duty. It is basically a question of accountability. . . . Words such as support, education,

³² See e.g., S.C. Code Ann. § 62-7-802 (Thomson Reuters West 2015) (duty of loyalty); S.C. Code Ann. § 62-7-803 (Thomson Reuters West 2015) (duty of impartiality); Cartee v. Lesley, 290 S.C. 333, 350 S.E.2d 388 (1986) ("A trustee must exclude all selfish interest in his dealings on behalf of the beneficiaries of the trust."); First Union Nat. Bank of S.C. v. Cisa, 293 S.C. 456, 461, 361 S.E.2d 615, 618 (1987); Ramage v. Ramage, 283 S.C. 239, 246, 322 S.E.2d 22, 27 (Ct.App. 1984) (trustees, were under a duty of loyalty to administer the trust property solely in the interest of the beneficiary).

³³ Estate of Stevens v. Lutch, 365 S.C. 427, 434, 617 S.E.2d 736, 739 (Ct.App. 2005) (quoting Page v. Page, 243 S.C. 312, 316, 133 S.E.2d 829, 831 (1963)).

³⁴ Estate of Stevens v. Lutch, 365 S.C. 427, 434, 617 S.E.2d 736, 739 (quoting Cartee v. Lesley, 290 S.C. 333, 336, 350 S.E.2d 388, 390).

³⁵ See e.g., Alexander v. Walden, 287 S.C. 126, 129, 337 S.E.2d 241, 243 (Ct.App. 1985) (holding trustee has power in support trust to require beneficiary to pay nursing home bills out of her personal funds if sufficient funds exist).

maintenance, care, necessity, illness, and accident are generally regarded as providing ascertainable standards; while words such as happiness, pleasure, desire, benefit, best interest, and well-being are generally not regarded as being sufficiently definite so as to provide ascertainable standards.

['A different result is not required] by reason of the fact that the trustees' power was discretionary, for the exercise of that power was limited by an external standard fixed by the agreement itself. And although it may be true that a court of equity ordinarily will not substitute its discretion for that of the trustee, nevertheless, even where the power is granted in terms of the 'sole' or 'uncontrolled' discretion of the trustee, it will review his action to determine whether in light of the standards fixed by the trust instrument, such discretion has been honestly exercised.'³⁶

Like the trust in Hemphill, Mr. Manning's trust provided the trustees would "pay to, or for the benefit of [Ms. Manning], so much of the income of the separate share . . . as the trustee shall, from time to time, determine to be necessary for [her] health and support . . . in accordance with the standard of living to which she ha[d] become accustomed, including medical, surgical, hospital or other institutional care." (Order, p.3).

Ms. Manning was, therefore, undeniably entitled to so much of the trust's income as was required for her support and care. Any argument that the trustees, as remainder beneficiaries,³⁷ will not provide support to Ms. Manning is (a) irrelevant to her entitlement, (b) immaterial to the Support Trust's validity, and (c) slanderous in its tone.

³⁶ Hemphill v. Shore, 295 Kan. 1110, 1120, 289 P.3d 1173, 1181 (2012) (quoting Estate of Fred A. Cutter, 62 T.C. 351 (U.S.Tax Ct. 1974) (Internal citations omitted)). See also generally Markham v. Fay, 74 F.3d 1347, 1358 (1st Cir. 1996); Outwin v. Commissioner of Internal Revenue, 76 T.C. 153, 161-162, 168-169 (U.S.Tax Ct. 1981); Hyde v. U.S., 950 F.Supp. 418, 419 (D.N.H.1996); Estate of Schlotterer v. U.S., 421 F.Supp. 85, 90 (W.D.Penn. 1976); Nat'l Bank of Com. of San Antonio v. U.S., 369 F.Supp. 990, 992 (W.D.Tex. 1973); Loyd v. U.S., 319 F.Supp. 237, 239 (W.D.Tenn. 1970); Carlson v. Sweeney, Dabagia, Donoghue, 895 N.E.2d 1191, 1193-1194 (Ind. 2008).

³⁷ The Circuit Court concluded the Support Trust did not qualify for "full value" satisfaction in part because the trustees were remaindermen. (Order, p.5 fn.3). The trustees were

D. The Circuit Court Improperly Relied On the Affidavit of Harry D. Ruff, Esquire To Support Its Decision.

Ms. Bushman submitted the Affidavit of Harley D. Ruff, Esquire in support of her Motion for Summary Judgment. (Ruff Aff., pp.1-4). Attorney Ruff's affidavit does not contain either material or admissible facts – merely argument and legal conclusions. For instance, Attorney Ruff quoted several of the Trust's provisions as well as the contents of certain South Carolina statutes. (Ruff. Aff., pp.1-2, paras. 3,4, 7). Furthermore, Attorney Ruff asserted various, albeit essentially identical, legal conclusions. (Ruff. Aff., p.1, paras. 5, 6). Moreover, Attorney Ruff attempted to usurp the Circuit Court's function by unilaterally *interpreting* the terms of the Trust agreement. (Ruff Aff., p.2, paras. 8-11). Additionally, Attorney Ruff unabashedly argued Ms. Bushman's position and suggested "any argument" to the contrary of his "testimony" was "without any merit". (Ruff Aff., pp.2-3, para. 12). Finally, Attorney Ruff *opines* that the Support Trust does not "fully satisfy" Ms. Manning's elective share under S.C. Code Ann. § 62-2-207(c) because, as he summarily states, "such trust does not qualify for the marital deduction under Internal Revenue Code [§] 2056". (Ruff Aff., p.3, para. 13).

Ironically, Attorney Ruff does conceded Mr. Manning could have created a spousal support trust which satisfied [S.C. Code Ann.] § 62-2-207(c), but Mr. Manning failed to do so since he "disinherited" Ms. Manning. (Ruff Aff., p.3, para. 14). Attorney Ruff wrapped up his "written lecture" to the Circuit Court by concluding (a) Ms. Manning was entitled to one-third of Mr. Manning's probate estate and (b) the Support Trust "[wa]s of no legal or practical effect." (Ruff. Aff., pp.3-4, para. 15).

cautioned to give "due regard . . . the amount of income known to the [them] to be available to [Ms. Manning] from other sources. (Order, p.3).

Even though the Circuit Court only referenced Attorney Ruff's affidavit in a footnote (Order, p.5 fn. 4), it must be presumed the Circuit Court relied on the positions asserted therein, especially in light of the specific reference. (Order, p.5 fn. 4). South Carolina law allows a party to seek summary judgment against another party for all or part of the claims asserted by or against it.³⁸ Furthermore, the law states the "judgment sought shall be rendered forthwith 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."³⁹

In a situation on point, this Court of Appeals, in Higgins v. Medical University of South Carolina, noted that "[w]hen ruling on a motion for summary judgment, the trial judge must consider all of the documents and evidence within the record, including the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits."⁴⁰ This Court of Appeals has specifically adhered to this principal and/or proposition on a number of different occasions since 1997.⁴¹ The United States Court of Appeals for the Fourth Circuit and other Federal Circuit Courts have followed the same line of

³⁸ Rules 56(a)-(b), SCRCivP.

³⁹ Rule 56(c), SCRCivP (Emphasis added). See Madison ex. rel. Bryant v. Babcock Center, 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006).

⁴⁰ Higgins v. Medical University of South Carolina, 326 S.C. 592, 599, 486 S.E.2d 269, 272 (Ct.App. 1997) (citing Anthony v. Padmar, Inc., 307 S.C. 503, 415 S.E.2d 828 (Ct.App. 1992); Gilmore v. Ivey, 290 S.C. 53, 348 S.E.2d 180 (Ct.App. 1986)) (Emphasis in original).

⁴¹ See Gould v. O'Shaughnessy Realty Co., 380 S.C. 548, 557, 671 S.E.2d 79, 84 (Ct.App. 2008); Platt v. CSX Transportation, Inc., 379 S.C. 249, 256, 665 S.E.2d 631, 634 (Ct.App. 2008), *affirmed in part, reversed in part on other grounds*, 388 S.C. 441, 697 S.E.2d 575 (2010); Rife v. Hitachi Machinery Co., Ltd., 609 S.C. 565, 568, 363 S.E.2d 209, 213 (Ct.App. 2005); BPS, Inc. v. Worthy, 608 S.E.2d 155, 159, 362 S.C. 319, 325 (Ct.App. 2005); Mulherin-Howell v. Cobb, 608 S.E.2d 587, 591, 362 S.C. 588, 595 (Ct.App. 2005).

reasoning.⁴² Consequently, even without the specific reference to Attorney Ruff's affidavit, this Court of Appeals must presume that the Circuit Court considered the affidavit, as well as the legal positions and interpretations Attorney Ruff asserted therein.

Consequently, under this Court of Appeals' own extensive precedent, as well, as under well-settled authority from the United States Court of Appeals for the Fourth Circuit, among other Federal Courts of Appeals, the Circuit Court, in assessing the validity of Ms. Bushman's summary judgment motion, was effectively presumed to have "searched the entire record" or, stated another way, to have reviewed the complete court record of filed documents, including Attorney Ruff's affidavit, to see if there was sufficient evidence upon which to grant Ms. Bushman summary judgment. This Court of Appeals must presume the Circuit Court made such a detailed inquiry before it granted Ms. Bushman's motion.

Given this proposition, the Circuit Court clearly erred in considering the Attorney Ruff's affidavit. In fact, South Carolina's appellate courts have regularly rejected affidavits like the one submitted by Attorney Ruff. For example, in *Dawkins v. Fields*, the Supreme Court rejected the affidavit of an alleged lawyer expert acknowledging "expert testimony on issues of law [wa]s inadmissible."⁴³ Like the affidavit at issue in *Dawkins v. Fields*, Attorney Ruff's affidavit clearly attempted to strongly "persuade" and "guide" the Circuit

⁴² See *Sinclair v. Mobile 360, Inc.*, Case No. 09-1188 (4th Cir. 2011, filed 3 March 2011) (citing *Campbell v. Hewitt, Coleman & Associates, Inc.*, 21 F.3d 52, 55 (4th Cir. 1994) (recognizing that, in assessing a summary judgment motion, a trial court is obliged to consider its "entire record"). See also *Stephanischen v. Merchants Despatch Transportation Corp.*, 722 F.2d 922, 930 (1st Cir. 1983); *Amnesty America v. Town of West Hartford*, 288 F.3d 467, 471 (2d Cir. 2002).

⁴³ *Dawkins v. Fields*, 354 S.C. 58, 66, 80 S.E.2d 433, 437 (2003) (citing Note, *Expert Legal Testimony*, 97 *Harv.L.Rev.* 797, 797 (1984); *Askanase v. Fatjo*, 130 F.3d 657, 673 (5th Cir. 1997); *U.S. v. Sinclair*, 74 F.3d 753, 758 n. 1 (7th Cir. 1996) (citing Rules 702,704, FREvid.)).

Court in the direction to where it would grant Ms. Manning summary judgment.⁴⁴ A cursory review shows Attorney Ruff's affidavit is merely his opinion, as well as "simply legal argument."⁴⁵ As the Supreme Court acknowledged in *Dawkins v. Fields*, "[w]hile it is true that 'an opinion . . . is not objectionable because it embraces an ultimate issue to be decided by the trier of fact', . . . Professor Freeman's affidavit inappropriately attempted to usurp the trial court's role in determining whether petitioners were entitled to summary judgment."⁴⁶

In *Green v. State*, this Supreme Court addressed the admission of expert opinion testimony in the context of a post-conviction relief hearing. This Supreme Court found such testimony inadmissible, noting

The expert offered no factual evidence. . . He proffered his opinion, assuming certain facts, [that] trial counsel's actions fell below acceptable legal standards of competence. **The testimony was not designed to assist the PCR court to understand certain facts, but, rather, was legal argument why the PCR court should rule, as a matter of law, trial counsel's actions fell below an acceptable legal standard of competence.** Such 'testimony' falls outside of Rule 702, SCRE[vid].⁴⁷

For these reasons, the Circuit Court should have declined to consider Attorney Ruff's affidavit in any manner in its decision to grant Ms. Manning summary judgment.

⁴⁴ *Dawkins v. Fields*, 354 S.C. 58, 65, 80 S.E.2d 433, 437.

⁴⁵ *Dawkins v. Fields*, 354 S.C. 58, 65, 80 S.E.2d 433, 437.

⁴⁶ *Dawkins v. Fields*, 354 S.C. 58, 65-66, 80 S.E.2d 433, 437 (quoting Rule 704, SCREvid. and citing *O'Quinn v. Beach Assocs.*, 272 S.C. 95, 106-107, 249 S.E.2d 734, 739-740 (1978) (where expert testimony was offered to establish a conclusion of law, the Court held that the trial court properly excluded the testimony because that was within the exclusive province of the trial court)).

⁴⁷ *Green v. State*, 351 S.C. 184, 198, 569 S.E.2d 318, 325 (2002) (Emphasis and first alteration in original) . See also *McKnight v. State*, 378 S.C. 33, 56-57, 661 S.E.2d 354, 365-366 (2008).

E. The Record Failed To Support The Circuit Court's Conclusion The Support Trust Had No Value.

The Circuit Court found that the Support Trust contained “such contingent and discretionary provisions [that those provisions] render[ed] any purported beneficial interest incapable of calculation for purpose of applying toward satisfaction of [Ms. Manning's] elective share.” (Order, p.5). There are, however, simply no facts contained in the record which either directly or inferentially support the Circuit Court's conclusion.

While not entirely clear, it appears most likely that the Circuit Court, in reaching this erroneous conclusion, was referring to S.C. Code Ann. § 62-2-207(c)(1). That provision reads, in relevant part, as follows:

For purposes of this provision, the value of the electing spouse's beneficial interest in property which qualifies for the federal estate tax marital deduction pursuant to Section 2056 of the Internal Revenue Code, as amended, or, if the federal estate tax is not applicable at the decedent's death, would have qualified for the federal estate tax marital deduction pursuant to Section 2056 of the Internal Revenue Code, as amended, in effect on December 31, 2009, must be computed at the full value of the qualifying property. Qualifying for these purposes must be determined without regard to whether an election has been made to treat the property as qualified terminable interest property.⁴⁸

This section merely requires the Circuit Court to accept, at full value, any beneficial interest in property which qualifies for the federal estate tax marital deduction. In addition, S.C. Code Ann. § 62-2-207(c)(2) then states the value of this property shall be the value as of the date of death (a) determined in the decedent's estate tax proceedings, (b) as

⁴⁸ S.C. Code Ann. § 62-2-207(c)(1). See generally 32 S.C. Juris., Wills, § 207 (S.C.Bar 2017 Update).

shown on the inventory and appraisal, or (c) as determined by the court.⁴⁹ The Reporter's comments to this section provides:

The 2013 amendment clarifies that the value of such qualifying property shall be the value at the date of death as finally determined in the decedent's estate tax proceedings, or if there is no federal estate tax proceeding, as shown on the inventory and appraisal or as determined by the court. **Generally this is fair market value.** The amendment makes clear, first, that in satisfying the elective share, probate assets will be valued at date of distribution values; second, the amendment provides that the elective share is pecuniary in nature and not fractional. This is less burdensome and requires revaluation only of assets in kind used to fund the elective share. Although the law prior to the 2013 amendment may have been unclear about whether the elective share was fractional or pecuniary, the treatment of the elective share as pecuniary will be clear prospectively from the effective date of the amendment.⁵⁰

The parties clearly dispute the value of the assets to be placed in the Support Trust. Ms. Bushman's legal counsel, as well as Attorney Ruff in his affidavit, merely "argued" there was no value to assets which were to be placed in the Support Trust. (Ruff Aff., pp.4-5, para. 15).⁵¹ Ms. Bushman did not otherwise present any admissible evidence on the issue.⁵² Moreover, "[i]n determining whether a genuine issue of fact

⁴⁹ See S.C. Code Ann. § 62-2-207(c)(2).

⁵⁰ Reporter's Comments to S.C. Code Ann. § 62-2-207, para. 3 (Thomson Reuters West 2016).

⁵¹ It is well-settled that "[a]rguments made by counsel are not evidence." S.C. Dept. of Trans. V. Thompson, 357 S.C. 101, 105 fn.8, 590 S.E.2d 511, 513 fn.8 (Ct.App. 2003) (*citing* McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered.")). See also Sessions v. Withers, 327 S.C. 409, 488 S.E.2d 888 (Ct.App. 1997); Gilmore v. Ivey, 290 S.C. 53, 348 S.E.2d 180 (Ct.App. 1986).

⁵² See generally Hall v. Fedor, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct.App. 2002) ("Our appellate courts have interpreted Rule 56(e) to mean materials used to support or refute a motion for summary judgment must be those which would be admissible in evidence.").

exist[ed], the evidence and all reasonable inferences from it must be viewed [by the Circuit Court] in the light most favorable to the [Mannings].”⁵³ Furthermore, the Circuit Court was not authorized to resolve a factual dispute on summary judgment.⁵⁴

Consequently, absent any admissible evidence to support her position as a matter of law, Ms. Bushman was not entitled to summary judgment. The Circuit Court improperly determined the Support Trust was on no value and seemingly relied on Attorney Ruff’s affidavit to do so. The Circuit Court’s decision must be reversed in all respects.

⁵³ Woodward v. Norfolk Southern Corp., 2012 WL 10864190, *1 (Ct.App., filed 5 December 2012) (*per curiam*) (*quoting Prince v. Liberty Life Ins. Co.*, 390 S.C. 166, 169, 700 S.E.2d 280, 282 (Ct.App. 2010)).

⁵⁴ South Carolina Elec. & Gas Co. v. Anson Constr. Co., 2017 WL 877324, *1 (S.C., filed 1 March 2017) (*citing Cunningham v. Helping Hands, Inc.*, 352 S.C. 485, 491, 575 S.E.2d 549, 552 (2003); Zurich Am. Ins. Co. v. Tolbert, 387 S.C. 280, 283, 692 S.E.2d 523, 524 (2010)).

V. CONCLUSION

Based upon the foregoing arguments and citation of authority, the Petitioner, Donald W. Lancaster, respectfully requests this Supreme Court reverse the Court of Appeals' decision and grant him judgment.

Respectfully submitted.

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**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from the Court of Common Pleas
For Beaufort County
Honorable Carmen T. Mullen, Circuit Judge
Civil Action No.: 2015-CP-07-00913
Appellate Tracking No.: 2017-002019

IN THE MATTER OF THE ESTATE OF JOHN JOSEPH MANNING, JR.
Deanna Bushman, as Holder of Durable Power of Attorney
for Sally Manning and as Trustee of the Trust Agreement for
Sally Manning Dated 6 December 2004,

Respondent,

v.

The Estate of John Joseph Manning, Jr., John J. Manning, III,
Christopher Manning, and Linda Manning,

Appellants.

**PROOF OF SERVICE FOR THE
APPELLANTS' INITIAL BRIEF
AND DESIGNATION OF MATTER**

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SC Court of Appeals

I, Stephen P. Groves, Sr., Esquire, hereby certify that on 12 January 2018, I served a copy of the **Initial Appellants' Brief and Designation of Matter** submitted by the Appellants, The Estate of John Joseph Manning, Jr., John J. Manning, III, Christopher Manning, and Linda Manning, on counsel for the Respondent via the United States Mail, postage pre-paid, and addressed as follows:

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12 January 2018

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SC Court of Appeals

12 January 2018

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court Of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: IN THE MATTER OF THE ESTATE OF JOHN JOSEPH MANNING, JR.

Deanna Bushman, as Holder of Durable Power of Attorney Sally Manning and as Trustee of the Trust Agreement for Sally Manning Dated 6 December 2004 v. The Estate of John Joseph Manning, Jr.; John Joseph Manning, III; Christopher Manning; and Linda Manning

Appeal from the Beaufort County Court of Common Pleas

Case Action No.: 2015-CP-07-0913

(Previous Probate Ct. No. 2014ES0700930)

Appellate Case Tracking No.: 2017-002019

NP File No.: 059181-00001

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Raleigh

Dear Ms. Kitchings:

Enclosed please find the original and two copies of the following documents in the above-referenced consolidated appellate matters which are being submitted on behalf of the Appellants, The Estate of John Joseph Manning, Jr.; John Joseph Manning, III; Christopher Manning; and Linda Manning:

- A. Initial Brief of the Appellants;
- B. Appellants' Designation of Matter to be Included in the Record on Appeal; and
- C. Proof of Service.

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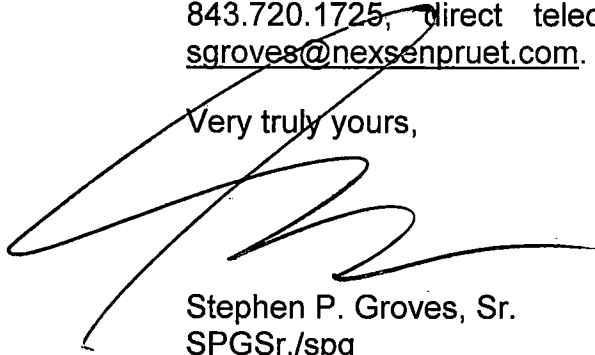
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Honorable Jenny Abbott Kitchings
Clerk of Court
12 January 2018
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I would greatly appreciate you filing the ***Initial Brief, the DOM,*** and the ***Proof of Service*** with the Court of Appeals and returning a date stamped copy of each to my attention in the enclosed self-addresses, stamped envelope.

If you need anything else or I otherwise may be of any assistance to you or to the Court of Appeals regarding this matter, please feel free to contact me at your convenience. My direct telephone number is 843.720.1725, direct telecopier is 843.414.8206, and the e-mail is sgroves@nexsenpruet.com.

Very truly yours,



Stephen P. Groves, Sr.
SPGSr./spg

CE: J. Ashley Twombly, Esquire/Jennifer A. Campbell, Esquire

C: Elizabeth B. Mayo, Esquire

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The Honorable Jenny Abbot Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street
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