The Supreme Court of South Carolina

Laurance H Davis, Jr , Mary Jane R Pike, Eva Marie Reynolds and Rhoda G Rentz, individually and in their capacities as the Limited Partners of Parkview Apartments, a South Carolina Limited Partnership — Appellants,

vs

Parkview Apartments, a South Carolina Limited Partnership, Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group, Inc , AmReal Corporation a/ka and f/k/a USS Corporation a/k/a and f/k/a U S Shelter Corporation, ISTC Corporation, N Barton Tuck Jr , and John Doe, a generic designation for a party or parties whose true identity is unknown — Respondents

Laurance H Davis, Jr , Marvin D McCarthy, James W Ivey and Erin E Ivey, individually and in their capacities as the Limited Partners of Palmetto Apartments, a South Carolina Limited Partnership — Appellants,

vs

Palmetto Apartments, a South Carolina Limited Partnership, Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group, Inc , AmReal Corporation a/ka and f/k/a USS Corporation a/k/a and f/k/a U S Shelter Corporation, ISTC Corporation, N Barton Tuck, Jr , and John Doe, a generic designation for a party or parties whose true identity is unknown — Respondents

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REPLY BRIEF OF APPELLANTS

Carolina Management Corporation of Beaufort James B Jackson, Whaley R Hinnant, Jr , Mary Gasser Rawl and Rhoda G Rentz individually and in their capacities as the Limited Partners of Pinewood Park Apartments a South Carolina Limited Partnership — Appellants,

vs

Pinewood Park Apartments, a South Carolina Limited Partnership Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group Inc AmReal Corporation a/ka and f/k/a USS Corporation a/k/a and f/k/a U S Shelter Corporation, ISTC Corporation N Barton Tuck Jr , and John Doe a generic designation for a party or parties whose true identity is unkno vn — Respondents

Rhoda G Rentz, Mary Jane Pike, Eva Marie Reynolds, and Joanne O Mercy, individually and in their capacities as the Limited Partners of Orleans Gardens a South Carolina Limited Partnership — Appellants,

vs

Orleans Gardens a South Carolina Limited Partnership, Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group Inc , AmReal Corporation a/ka and f/k/a USS Corporation a/k/a and f/k/a U S Shelter Corporation, ISTC Corporation, N Barton Tuck, Jr and John Doe, a generic designation for a party or parties whose true identity is unknown — Respondents

Laurance H Davis, Jr , Rhoda C Rentz, Mortimer M Weinberg, Jr Hodge Land Co , Inc and Anna Trotter, individually and in their capacities as the Limited Partners of Roosevelt Gardens a South Carolina Limited Partnership — Appellants,

vs

Roosevelt Gardens, a South Carolina Limited Partnership, Apartment Investment and Management Company a/k/a AIMCO, Insignia Financial Group, Inc , AmReal Corporation a/k/a and f/k/a USS Corporation a/k/a and f/k/a U S Shelter Corporation, ISTC Corporation, N Barton Tuck Jr , and John Doe a generic designation for a party or parties whose true identity is unknown — Respondents

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ATTORNEYS FOR APPELLANTS

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OTHER AUTHORITIES

In accordance with this Court's Order of 10-5-11, Appellants hereby file a consolidated reply brief in the five above-captioned cases Respondents have filed two motions to dismiss the appeals in these cases, asserting in their last motion that Appellants used paragraph numbers, as opposed to page numbers This Court ordered Appellants to file amended briefs, to include page numbers, which they did In their brief, however, Respondents have done exactly the same thing For example, on pages1, 6, 7, and 8, Respondents refer this Court to paragraph numbers, not page numbers As in the lower court, Respondents continue to operate under a double standard whereby they adhere to a different interpretation of the rules than they seek to impose upon Appellants Nevertheless, contrary to the positions taken by Respondents, Appellants are able to ascertain what documents the Respondents reference and have responded herein accordingly

STATEMENT OF THE CASE

Appellants reaffirm the Statement of the Case contained in their briefs in each of the five cases Respondents' Statement of the Case contains certain erroneous and misleading assertions Accordingly, Appellants do not adopt the Statement of the Case set forth by the Respondents

The first distortion in Respondents' Statement of the Case appears in their assertion that "Appellants falsely state that Respondents did not affirmatively plead statute of limitations as to all claims in the Pinewood case " Respondents provide no citation to any portion of Appellants' brief in support of this accusation, perhaps this is due to the fact that Appellants' brief contains no such statement On page 1 of Appellants' brief, the following language appears "Respondents answered on January 17, 2006, setting forth a general denial and twenty-two affirmative defenses including, *inter alia*, the statute of limitations, this defense specifically did not include any of Appellants' claims subsequent to 1999 " Appellants' statement is not false, it is taken directly from the Respondents' Answer in the Pinewood case

It is clear from Appellants' Complaints, including Pinewood, that the basis of their claims for damages resulted from Respondents' failure to take any action with respect to collection of

the outstanding note due to the Limited Partnership or retrieval of partnership properties between the time the note matured in 1999 and the expiration of the three-year statute of limitations period thereafter in 2002 Paragraph 149 of Respondents' Answer in Pinewood states, in pertinent part "To the extent Plaintiffs claim damages resulting from (c) the failure of the general partners to take action on behalf of the partnership *prior to the 1999 promissory note becoming due*, such claims are barred by the applicable statute of limitations " (R , p 638) (Emphasis added) Thus, Respondents clearly limited their reliance on the statute of limitations under their own language in this paragraph to claims relating to their failure to act *prior to the maturity date of the note in 1999* This is exactly what Appellants set forth in their original Statement of the Case

Paragraph 148 of Respondents' Answer states that "*one or more* of Plaintiffs' claims are barred by the applicable statutes of limitation " (R , p 638, Emphasis added) This paragraph clearly does not, as represented by Respondents, specifically apply to *all* claims of Appellants, it applies only to "one or more " Had Respondents intended for the statute of limitations defense to apply to all claims in the Pinewood case, they could have so stated in their Answer, but chose not to do so Appellants' brief accurately - not "falsely" - sets forth Respondents' statute of limitations defense

In discussing Respondents' motion for summary judgment, from which the Pinewood case was specifically excluded, Appellants' brief stated at page 10 "These motions were based on the defense of the statute of limitations and were limited by Respondents to Palmetto, Roosevelt and Orleans *As shown above the statute of limitations defense in Pinewood is limited to Respondents conduct prior to November 1999* " (Emphasis added) This statement is accurate, and contradicts Respondents' assertion that Appellants falsely represented their position

Respondents' Statement of the Case, in Footnote #2, contains an additional accusation against Appellants which has no basis in fact "Appellants *falsely* claim that Respondents' counsel *insisted* that Appellants postpone the filing of the Palmetto, Orleans, Roosevelt and

Pinewood case " (Emphasis added) Again, Respondents provide no citation to any portion of Appellants' brief in support of this accusation, again, Appellants' brief contains no such statement Instead, it states on page 2 "Following the filing of the Parkview case in 2003, counsel for the parties *agreed* to postpone any discovery in the case, as well as the filing of additional related cases, in order to pursue a universal resolution for all cases involved " (Emphasis added) This is consistent with the position maintained by the Appellants throughout this litigation In Appellants' submissions in connection with the hearings held on the statute of limitations issue, correspondence between counsel for the parties was presented These included

(1) letter of 8-5-03 from Respondents' counsel, confirming the "status quo" meeting "to discuss settlement of (Parkview), as well as potential causes of action for Orleans Apartment, Palmetto, Roosevelt I and Pinewood This meeting will be for the purposes of attempting to settle all such claims " (R , p 2636) ,

(2) letter of 1-19-04 from Appellants' counsel "Insofar as your *suggestion* of a stay of discovery is concerned, we earlier had *agreed* to stay all matters and keep the *status quo* pending receipt of the appraisals and mediation " (R , pp 2645-2646) (Emphasis added) ,

(3) letter of 6-9-04 from Appellants' counsel "We had *earlier agreed* to hold all motions, discovery, etc , in abeyance until after the mediation in August (R , p 2658) (Emphasis added),

(4) letter of 6-10-04 from Respondents' counsel to Beaufort County Clerk of Court re pending motion in the Parkview case, stating "*Attorneys for the parties have agreed* to postpone all motions, discovery, etc , pending mediation, Accordingly, if this case, *along with several others that have not been filed*, are not resolved through mediation, we will notify you and have the motion restored for hearing " (R , p 2662) (Emphasis added)

This correspondence corroborates Appellants' position concerning equitable estoppel and a *de facto* tolling agreement as stated in their briefs, and refutes Respondents' claim that delay of the filing of the cases in Palmetto, Roosevelt, Orleans and Pinewood was done at the *insistence* of the Respondents Appellants have always maintained that it was by agreement

Respondents' Statement of the Case also asserts, "The parties attempted to negotiate a compromise of Appellants' disputed claims and agreed to a mediation, *but nothing more* " As shown from the above correspondence, this statement is erroneous Furthermore, it is directly

contradicted by the sworn testimony of Respondents' former Vice-President, Mr Patrick Foye

Q Do you recall an agreement that we would hire someone to appraise the properties, and then we would see if we couldn't get a mediation set, that we could kind of negotiate on it at that point?

A I generally remember that, yeah

Q Was it your understanding that when we left the meeting, that basically we were not going to proceed with any discovery in the Parkview case, and *we were going to hold the status quo and filing of anything else* until we could get Mr Denatto (sic) or some appraiser hired and the cases mediated? (Emphasis added)

A I generally remember that *That s my recollection of what happened* (Emphasis added) (See Exhibit 90, Pendarvis Affidavit of 4-22-10, R , pp 5738, l 3 - 5739, l 25, 5740, ll 10-19)

Mr Foye's testimony shows that Respondents clearly agreed to do more than negotiate and mediate -they agreed " to hold the *status quo* and filing of anything else" until the mediation had taken place In light of these obvious misstatements by Respondents, Appellants decline to adopt their Statement of the Case and rely upon the Statement of the Case in Appellants brief

ARGUMENT

1 Non-Preservation of Appellate Issues Respondents assert objections to certain affidavits submitted to the lower court by or on behalf of Appellants Respondents argue that affidavits submitted after the lower court's sanctions order of 4-6-10 should not have been considered by the lower court, and cannot be considered by this Court (Respondents' brief, p 49) They also now challenge the content and evidentiary viability of the affidavits (*Ibid,* p 77-79) A review of the record in this case demonstrates the fallacy of these positions

Affidavits of Davis, Bailey, Rentz, Pike, Hodge, Reynolds, and Hinnant were submitted primarily in support of Appellants' Motion for Recusal and Vacation of Prior Orders, this is acknowledged by Respondents (*Ibid*, p 49, Footnote 48) The recusal/vacation motion was filed March 30, 2010, *prior* to the issuance of the sanctions order An affidavit from Appellants' counsel accompanied that motion, the other affidavits referenced above were submitted in support of the motion thereafter, in accordance with SCRCP 6(d) All were submitted and were before

the lower court *prior* to the issuance of the order denying the recusal/vacation motion

On April 20, 2010, Respondents moved to strike the aforesaid affidavits for the reasons which they now argue in this appeal (R , pp 3809-3811) The lower court never ruled on Respondents' motion with respect to the affidavits Respondents never filed a motion under SCRCP 59 requesting such a ruling Furthermore, Respondents have not appealed any portion of the recusal/vacation order Accordingly, Respondents have not preserved the issue of admissibility and/or viability of these affidavits for appellate review, and they are precluded as a matter of law from asserting this position in these appeals Cf , *Wilder Corp v Wilke*, 330 S C 71, 76, 497 S E 2d 731, 733 (1998) (an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review), *Atlantic Coast Builders and Contractors LLC v Lewis*, (SC Supreme Court, Opinion # 27044, decided 9-26-11) ("error preservation has been a critical part of appellate practice in this State for a long time, serving to ensure, as noted by the Chief Justice, that we do not reach issues which were not ruled upon by the trial court ")

While Respondents complain that affidavits were submitted by Appellants subsequent to the issuance of the sanctions order on 4-6-10, Respondents nevertheless reference and designate for inclusion in the record on appeal affidavits and exhibits which their counsel submitted after that date Accordingly, Respondents committed the very acts which they assert were improper on the part of the Appellants This, of course, is consistent with their "double standard" approach taken in the lower court and addressed in Appellants' briefs [1]

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[1] Respondents' unique approach that the applicable court rules should be interpreted and applied differently to them than to their opponents continued in these appeals By gaming the system through a non-meritorious motion to dismiss, Respondents were able to gain a significant advantage of several additional months to prepare their brief, while Appellants have abided by the rules and timely filed their briefs in accordance with such rules

2 Statute of Limitations Issue As stated in the briefs of the parties, the statute of limitations was an issue in the proceedings before the lower court While Appellants contended that it was only one of several issues, Respondents focused on it as being virtually the only issue and persuaded Judge Early to do the same Notwithstanding that the issue was raised as an affirmative defense by Respondents, they later claimed that the issue was raised by Appellants merely by filing their complaints, this argument was not made until Judge Early issued an order denying their motion for summary judgment based upon the statute of limitations defense (R , pp 38-39) Appellants' position concerning this argument is generally set forth in their brief and is adopted and incorporated by reference herein (Appellants' brief, pp 9-10)

Respondents made specific assertions in their brief relating to the statute of limitations They sought dismissal of Appellants' claims in these cases on two (2) separate occasions before Judge Early (*Cf*, R , pp 777-781, 858-895) The arguments presented were essentially the same in both instances, and resulted in denials of Respondents' motions In the first instance, Judge Early's denial granted Respondents' additional time to complete discovery (R , pp 33-37), but no similar provision was included in the subsequent denial of summary judgment (R , pp 38-39) Respondents now assert that these orders resulted from "the murkiness Appellants successfully created as to the facts " (Respondents' brief, p 10) As hereinafter discussed, any "murkiness" was inserted by Respondents' attempts to obtain confidential privileged information from Appellants

Appellants essentially presented three arguments to the lower court in opposition to Respondents' motions First, they contended that their claims, if subject to a three-year statute of limitations, were filed within that time period, *i e* , within three years of the 2002 date that Respondents had in which to initiate litigation to collect the outstanding notes and/or retrieve partnership properties Although Respondents claimed that Appellants were on notice of Respondents' misconduct in 2001, Appellants argued that this was not the criteria for accrual of

their claims In essence, Appellants contend that their claims would not accrue until they suffered a legally cognizable injury at the hands of the Respondents, and this did not occur until the time expired for Respondents to exercise their right to initiate litigation on behalf of the partnership, *i e* , in 2002 Cf , *Epstein v Brown*, 363 SC 372, 610 S E 2d 816 (2005) Furthermore, contrary to Respondents' assertions, Appellants' retention of counsel in 2000 was not for the purpose of initiating litigation against Respondents based on the claims in the cases *sub judice*, but for the purpose of determining Respondents' intentions concerning recovery of partnership assets

Second, Appellants contended that the respective partnership documents were executed under seal and thus subject to a 20-year statute of limitations, which clearly had not expired at the time of the filing of these cases In support of this position, an Affidavit of Laurance Davis dated 9-30-06 was submitted (R , pp 2674-2777) This affidavit contained all pertinent partnership documents in each of these cases as exhibits, together with a detailed explanation and history of each This evidence clearly established that the documents were executed under seal in accordance with the laws of South Carolina, accordingly, there was ample evidence before the lower court to support Appellants' position in this regard, contrary to Respondents' assertions in their brief

Third, Appellants contended that Respondents were estopped from asserting the statute of limitations as a defense to Palmetto, Pinewood, Orleans and Roosevelt Although Respondents, both before Judge Early and in their brief in this Court, continue to deny the essence of the agreement between counsel foi the parties, the evidence presented refutes their position As previously shown herein, Mr Johnston's correspondence to Appellants' counsel and to the Beaufort County Clerk of Court are at odds with his position that there was no "status quo" agreement The nail in the coffin, however, came with the deposition testimony of Respondents' own vice-president, Patrick Foye, which completely supports the position of Appellants Clearly the agreement between counsel called for the withholding of the filing of Palmetto, Orleans,

Pinewood and Roosevelt suits until appraisals could be done and the claims in all the cases mediated When it became apparent that Respondents were not going to proceed with the appraisals and mediation in good faith, suits were filed in the four cases The lower court recognized that there were genuine issues of material fact for determination by a jury

3 Discovery & Privilege Issues The lower court's dismissal of Appellants' claims as part of its Sanctions Order involved consideration of its prior Discovery and Privilege Orders The record reflects that the underlying litigation was proceeding toward a trial of the Parkview case, with a projected trial date of May 2009 As noted in Appellants' brief, Judge Early had issued conflicting rulings on discovery issues which established a "double standard" for the parties, Appellants' counsel then elected to attempt to obtain evidence *via* depositions Respondents' counsel tried a different tact Faced with the denial of their summary judgment motion and an impending trial date only months away, Respondents' counsel elected in August of 2008 to up the ante with new discovery requests which (1) were aimed at securing confidential communications between Appellants and their counsel, as well as materials protected by the work-product doctrine and (2) expanded the discovery emphasis from the Parkview case to include detailed information as to all cases The second goal succeeded in creating enormous problems for Appellants' counsel, who are both sole practitioners with limited support staff The first goal created problems for the Appellants themselves, as it invaded their right to privileged communications with their counsel and their right to protection under the work-product doctrine

Respondents' contentions as to the adequacy of Appellants' discovery responses as to non-privileged issues are refuted by the evidence and record in this case *Cf*, Appellants' briefs, pp 22-28, 47-48, Pendarvis Affidavit, R , pp 3882-5800 As noted in Appellants' brief, the 2008 discovery requests by Respondents went far beyond the limits of discovery provided by the South Carolina Rules of Civil Procedure Not only did they seek privileged information not subject to discovery under SCRCP 26, they were incredibly vague and broad, and required Appellants to

produce documents over a period of time encompassing several decades The requests included information relating to changes in tax laws during the 1980s, information relating to subsequent purchasers of the respective properties with whom Appellants had absolutely no involvement, criminal activities or suspected criminal activity at the properties or in the immediate vicinity of the properties, tax and estate planning information and financial information for the properties during the time they were being managed by Respondents, with no involvement by Appellants (R , pp 4667-4687) Respondents' discovery requests exceeded the bounds of discovery permitted under the rules of civil procedure and should not have been sanctioned *Oncology and Hematology Associates of S C v S C D H E C* , 387 SC 380, 692 SE2d 920 (2010)

Given the age and health of Appellants, their lack of involvement with the properties once Respondents became general partners, the fact that many of the original partners from whom Appellants received their interests were deceased, the breadth and vagueness of the requests, and the passage of so much time, they were presented with a virtually impossible task (R , pp 3722, 3738, 3772, 3777-3778, 3752-3753, 3612, 3614) Nevertheless, Appellants produced thousands of pages of documents in response to the discovery requests and informed Judge Early that they had produced everything in their possession or control (R , pp 1004, ll 18-24, 1007, l 24-1009,l 7, 1126 - 1128) Notwithstanding such compliance, Judge Early dismissed their cases based upon their failure to properly respond to Respondents' discovery requests As noted in Appellants' brief, this was clearly an abuse of discretion and was not supported by the evidence

The lower court's dismissal of Appellants' claims for failure to disclose and/or produce information or documents privileged as work-product or confidential communications, as previously discussed in Appellants' brief, also constituted an abuse of discretion As noted in Appellants' brief, both sides sought information relating to communications and documents exchanged between their opponents and their counsel, the difference is that Appellants sought information and documents from counsel retained to represent their limited partnerships in other

matters, while Respondents sought information and documents from counsel retained to represent Appellants in the cases *sub judice* Judge Early stated that he did not "have the time and resources to go through all of the attorney-client documents," and referred the privilege issue to the Honorable Gary E Clary, as "Special Master " (Appellants' brief, p 18) The order appointing Judge Clary is entitled, "Order Appointing the Honorable Gary E Clary as Special Master for Resolution of Specified Discovery Disputes " (R , pp 44-46) The "specified discovery disputes" set forth in the order were the parties' requests concerning communications with the aforesaid lawyers The order provided that Judge Clary was to "make his ruling as to whether each such document is subject to discovery and production should be compelled " The scope of Judge Clary's authority was later expanded to include examination of documents from the Bryan Cave law firm, which had not been disclosed by Respondents prior to the entry of the initial order appointing Judge Clary as "Special Master " (R , pp 47-48) The latter order also required that Judge Clary "provide this Court with a Report setting forth his findings and conclusions "

Judge Clary reviewed each and every document submitted by the parties with respect to the privilege issue, and issued his findings and conclusions on 2-9-09 (R , pp 49-64) and 4-14-09 (R , pp 79-96) Based on objections of counsel, Judge Clary further amended his findings and conclusions on 4-22-09 (R , pp 97-99) The findings and conclusions of Judge Clary specified the documents each party was required to produce Although Judge Early initially adopted the findings and conclusions of Judge Clary, he later issued, at Respondents' urging and without reviewing a single document on Appellants' privilege log, an order which significantly reduced the number of documents Respondents had to produce and greatly increased the number of documents Appellants had to produce (R , pp 103-113) Prior to the entry of this order, Appellants informed Judge Early of their belief that the lower court lacked authority to alter the rulings of the Special Master, citing SCRCP 53

SCRCP 53 relates to "Masters" and "Special Referees " Respondents' brief asserts that this rule does not apply to the findings and conclusions of Judge Clary because the order appointing him referred to him as "Special Master " Their position is obviously based upon their recognition that SCRCP 53 would prohibit the alteration of Judge Clary's findings and conclusions by Judge Early Appellants believe that, notwithstanding the designation given to Judge Clary by Judge Early, it is obvious that Judge Clary was to make the determination as to the production of the documents claimed to be subject to privilege Under SCRCP 53, Judge Clary's findings could only be altered by an appellate court, and such rule specifically prohibits referring matters "for the purpose of making a report to the circuit court " Judge Early's alterations of Judge Clary's findings and conclusions were inconsistent with SCRCP 53 and represent an abuse of discretion, accordingly, Judge Early's order of 7-28-09 should be vacated

The key arguments advanced with respect to production of documents claimed to be privileged were the "at-issue waiver," "common interest" and "divergence" arguments Judge Early determined that Appellants had waived their claim of privilege by (1) merely filing their complaints and (2) including language in two of the complaints concerning Appellants' claim for damages as a result of delays encountered by conduct of the Respondents These are discussed in Appellants' brief and the arguments contained therein are incorporated in this reply Respondents cite various cases to support Judge Early's ruling, but the fact remains that the cases cited do not emanate from the appellate courts of this State, South Carolina has never adopted the theory that the mere filing of a complaint places the statute of limitations at issue so as to impliedly waive the attorney-client privilege as to any information or documents related to that issue Respondents cite and quote from a decision by a United States Magistrate Judge in *City of Myrtle Beach v United National Insurance Company*, 2010 US Dist LEXIS 89725 (8-27-10, DSC) Notwithstanding the fact that this is not precedent with respect to this Court, the case is clearly distinguishable from the cases *sub judice* It involves a claim by a municipality against

its insurer for recovery of out-of-pocket costs in an underlying lawsuit, under a theory of bad faith The Magistrate Judge determined that the insurer had asserted a number of affirmative defenses in its answer which "injected issues of law and fact contained in the documents for which it seeks protection" under a privilege argument The court made it clear that the "bad faith" nature of the underlying claim made the decision unique, because "an insurer's thoughts and knowledge are at the center of a claim for bad faith " The court also noted that the insurer's attorneys had communicated and corresponded with the City in connection with the nature and merits of the underlying suit Under these facts, the Magistrate Judge concluded that the insurer had waived the attorney client privilege

Ironically, *City of Myrtle Beach* actually undermines Respondents' positions in several key areas First, the decision states, "The only exception to the attorney-client privilege recognized by the South Carolina Supreme Court includes communication in furtherance of tortious or fraudulent conduct " (Citing *State v Doster*, 284 SE2d 218 (1981)) This is exactly the exception Appellants asked the lower court to adopt as part of their requests to get communications between Respondents and counsel hired for the partnerships Second, the decision focused upon the "special relationship between an insurer and its insured," comparing it to a "fiduciary relationship " Again, this mirrors the position of Appellants in the lower court when they sought the aforesaid communications It undermines the "divergence of interest" theory adopted by the lower court as a basis for rejecting Appellants' request for the aforesaid communications Third, the decision rejected the "mere filing" waiver theory adopted by the lower court, stating, "There is no per se waiver of the attorney client privilege simply by a plaintiff making allegations of bad faith " In short, *City of Myrtle Beach* supports Appellants' position in the lower court with respect to communications between Respondents and partnership counsel

As discussed in Appellants' brief, there is no basis under South Carolina law for the "divergence" theory adopted by the lower court in order to avoid production of the

communications between Respondents and partnership counsel Respondents owed a continuing fiduciary duty to Appellants which would not be obviated simply because they chose to engage in conduct which placed their interests above those of Appellants, indeed, the very act of doing so was a breach of their fiduciary duty For the lower court to hold, as did Judge Early, that a generalized threat of litigation by a single limited partner (Mr Weinberg) in a single limited partnership (Roosevelt) at a time when the present claims could not possibly have accrued because the underlying properties had not even been sold (1998) constitutes such a divergence of interest as to insulate Respondents from their fiduciary duty is mind-boggling It is clearly an abuse of discretion and is unsupported by the law of this State (Appellants' brief, p 19)

4 Disqualification/Recusal Issue Confronted with the overwhelming evidence of lack of full disclosure of the extrajudicial relationships existing between Judge Early, Respondents' counsel of record, and members of their families, Respondents' brief seeks to minimize the role of Respondents' counsel Rosen and Infinger in the lower court (Respondents' brief, p 71) They note that Mr Infinger "appeared only once in court" and that neither Ms Rosen nor Mr Infinger signed any pleadings, letters, discovery, or documents filed with the court or Clerk " (*Ibid*) What Respondents fail to state to this Court is that Mr Infinger and Ms Rosen were consistently listed as counsel for Respondents in documents presented to the lower court, and made no attempt to move before the lower court to be relieved as counsel, indeed, they did not seek to be removed as counsel of record until these appeals were filed and pending in the Appellate Courts (*Cf*, R , pp 2807, 2869, 47-48) They remained counsel of record until relieved by this Court on 5-5-11

The listing of Mr Infinger and Ms Rosen as counsel of record for Respondents, coupled with Respondents' new claim that Mr Infinger and Ms Rosen had very little involvement in the case, presents a perplexing dilemma for Respondents If, as now contended by Respondents, Rosen and Infinger had no involvement in these cases since January, 2009, why did they remain

counsel of record until the matters were no longer before Judge Early? Perhaps more importantly, if their involvement was as minimal as now contended by Respondents, why were they ever listed as counsel of record at all? Were Mr Johnston, Mr Vick and Mr Belcher not able to represent Respondents without the assistance of Mr Infinger and Ms Rosen? If so, why was their involvement at the minimal level now claimed by Respondents? What, *other than their association with Judge Early*, did these attorneys bring to the table? Why was it important for them to remain counsel of record as long as the cases were pending before Judge Early? Unfortunately, the answers to these questions remain unknown, as Judge Early specifically denied Appellants' motion to have these attorneys make a full disclosure on the record and for limited discovery concerning this aspect of the case A reasonable person, presented with these facts and resulting unanswered questions, would certainly have reason to question the judge's impartiality

Respondents' brief attempts to belittle the nature and number of relationships between Judge Early, Respondents' counsel and members of their families In so doing, the brief erroneously seeks to convey the impression that Judge Early made an adequate disclosure of these relationships throughout the litigation, this is simply not true and is not corroborated by the record For example, Respondents assert, with respect to the Ross/Rosen wedding officiated by Judge Early, that " the bride's parents provided accommodations *to the entire wedding party*, which included Judge Early " (Respondents' Brief, p 71, emphasis added) Respondents cite a reference in the transcript of the 3-29-10 hearing as support for their statement A review of the transcript cited, however, shows that Judge Early's comments only related to accommodations provided to himself and members of his family, and make no reference to accommodations provided for "the entire wedding party " The attempt to lessen the financial benefit provided to Judge Early or his family by or on behalf of Respondents' counsel is not supported by the record

The relationships between Judge Early, Respondents' counsel and members of their families are specifically detailed in Appellants' brief Any reasonable person would view these

relationships as creating an appearance of impropriety or a serious risk of actual bias, particularly when coupled with the facts that (1) Judge Early never disclosed them on the record until Appellants moved that he do so, (2) the disclosure which he did make on the record, as noted in Appellants' brief, was either incomplete or inaccurate, (3) Judge Early declined to require Respondents' counsel to make a disclosure of the relationships under oath, and (4) Judge Early refused Appellants' request to conduct limited discovery with respect to these relationships

Respondents' brief relies extensively upon the requirement of establishing actual bias or prejudice in order for a party to prevail on a motion for disqualification or recusal (Respondents' brief, p 73-77) In denying the motion for recusal, Judge Early adopted Respondents' position that a showing of actual bias or prejudice was required (R , pp 148-152) Appellants' brief cited the Code of Judicial Conduct and the United States Supreme Court case of *Caperton v Massey*, 129 S Ct 2252 (2009) as authority for the proposition that the judge's ruling was based upon an error of law, Respondents understandably seek to minimize or distinguish these authorities (Respondents' brief, p 77-77) The fact remains, however, that the imposition of the requirement of demonstrating actual bias or prejudice deprives most litigants of any realistic ability to effect the recusal or disqualification of a judge As such, this requirement is directly at odds with the language of both the Code of Judicial Conduct and *Caperton*

While Respondents seek to limit the holding in *Caperton* to its specific facts, and rely almost exclusively upon language in the case referencing an "average judge," this Court should reject this position and should follow the requirements of *Caperton* In this regard, a more detailed analysis of the *Caperton* decision and the Code of Judicial Conduct is warranted Justice Kennedy's opinion in *Caperton* held that an appellate judge in West Virginia was disqualified on constitutional due process grounds from sitting on a case involving a financial contributor to his election campaign Respondents rely upon the fact that the campaign contribution was significant, *i e* , $3,000,000 00 (Respondents' brief, p 76) However, the amount involved was

not *per se* determinative of the court's decision Indeed, the court specifically adopted language from one of its earlier decisions, requiring judges "to hold the balance nice, clear and true" and to disqualify themselves when presented with "a possible temptation" to deviate from this standard *Caperton supra*, at 2264, quoting *Tumey v Ohio*, 273 US 510, 532 (1927) *Tumey* involved only $12 00 in financial benefit, yet found that lack of disqualification by the affected judge resulted in a denial of constitutional due process Noting that the small amount involved would probably not affect the judgment of "men of the highest honor," *Tumey* nevertheless required disqualification for "every procedure which would offer a possible temptation to the average man as a judge which might lead him not to hold the balance nice, clear and true " *Tumey*, at 532 Whether or not Judge Early's acceptance of financially beneficial favors by or on behalf of Respondents' counsel or members of their families actually influenced his decisions in these cases is immaterial in light of the decision in *Caperton*, all that need be shown is a likelihood that he would "feel a debt of gratitude" to that party *Caperton supra*, at 2262 As noted in Appellants' brief, Judge Early felt enough of "a debt of gratitude" to Mr Johnston's brother for inviting him on the fishing trip that he took him and his wife to dinner

Caperton and *Tumey* both represent disqualifications required under the due process clause of the United States Constitution *Caperton* specifically adopts the Code of Judicial Conduct language providing for judicial disqualification where there is "an appearance of impropriety," proof of actual bias, prejudice or misconduct is not required As noted in Appellants' brief, an objective "reasonableness" test supplants the subjective requirement of actual bias or prejudice heretofore required by the appellate courts of this State Appellants' position in this regard is supported by legal scholars and the American Bar Association

As previously discussed in Appellants' brief, Judge Early's order denying Appellants' motion for recusal likened his situation to that involving another judge, an obvious reference to the highly publicized case involving former Family Court Judge Segars-Andrews As pointed out

in Appellants' brief, such reference demonstrates an abuse of discretion for consideration of matters outside the record, it also provides insight into the present disqualification/recusal issue South Carolina Law Professor Nathan M Crystal suggested in 2010 that, in light of the Segars-Andrews case, the South Carolina Supreme Court should "reconsider the prejudice standard for review of disqualification decisions " Crystal, *The Segars-Andrews Case - Looking to the Future*, S C LAW, May, 2010 at 8 Professor Crystal specifically noted, as detailed in Appellants' brief, that "prejudice is almost impossible to prove " *Ibid*

Professor Crystal's suggestion is amplified by the American Bar Association's (ABA) Standing Committee on Judicial Independence's report to the House of Delegates in May, 2011 In that report, "the American Bar Association urges states to establish clearly articulated procedures for judicial disqualification determinations, and prompt review by another judge or tribunal of denials of requests to disqualify a judge " The ABA specifically references the *Caperton* decision, as well as its own "Judicial Disqualification Project," which began in 2007, and is consistent with Appellants' position The report specifically approves the objective test for recusal set forth in the Code of Judicial Conduct which was adopted in *Caperton*, and notes, "Approximately 10 states have proposed new judicial disqualification rules since *Caperton* was handed down " *Ibid*, p 2, Fn 6 Commenting on the need to enhance the public's perception of a fair and impartial court system, the report states

> Appearances matter because the public's perception of how the court's are performing affects the extent of its confidence in the judicial system And public confidence in the judicial system matters a great deal Public confidence in our judicial system is an end in itself *Ibid* p 2 , Fn 7, quoting from ABA, *Justice in Jeopardy Report of the Commission on the 21st Century Judiciary*, 10 (2003)

The ABA report specifically discusses *Caperton* and its rejection of the actual bias or prejudice requirement adopted by Judge Early, finding that an "objective risk of actual bias" represents a "constitutionally intolerable" situation, requiring disqualification *Ibid*, p 3 The ABA report provides recommended changes for states which have imposed the "actual bias or

prejudice" requirement for recusal or disqualification The report also references *Caperton*'s holding that "the due process clause demarks only the outer boundaries of judicial disqualifications," its favorable references to the Code of Judicial Conduct as "maintaining the integrity of the judiciary and the rule of law," and its distinguishment of the "constitutional floor" established by the due process clause versus the "ceiling set by common law, statute or the professional standards of the bench and bar " *Ibid*, quoting *Caperton* at 2266 and 2267 and *Bracy v Gramley*, 520 U S 899, 904 (1997) Thus, the report recognizes, as does *Caperton*, that the Code of Judicial Conduct requires less of a showing and, *a fortiori* provides greater protection to litigants than the higher standard required to establish a due process violation

The ABA report makes certain suggestions to states, such as South Carolina, which will need to modify their recusal/disqualification requirements in light of the *Caperton* decision The report recognizes as a worst case scenario the situation existing in the cases *sub judice* whereby "a variety of substantive or procedural matter (e g motions to dismiss, discovery disputes) may be decided by a judge who, it later turns out, should not be presiding over the case " *Ibid* , p 6 In order to avoid such a situation, the report notes that "disqualification can be effected in 36% of the States by so-called 'peremptory challenges ' Such challenges permit disqualification without the requirement of any showing of cause Once the challenge is filed, substitution of another judge follows automatically with no further proceedings required " *Ibid* The report does not reject disqualification for cause in non-peremptory challenge states but suggests as part of such procedure that a movant submit an affidavit together with a motion, if the affidavit is in proper form and meets the procedural requirements in effect, "the judge must grant the motion " *Ibid*, p 8 Under this arrangement, the motion for disqualification "must be predicated on the default standard [as set forth in the Code of Judicial Conduct] (i e , that the judge's impartiality may reasonably be questioned) or on specific factual basis for disqualification " *Ibid* These include those set forth in the Code of Judicial Conduct, including "disqualification where the

judge has a bias concerning a party's lawyer " *Ibid*

Directly on point to this discussion is a recent article by South Carolina School of Law Professor John P Freeman Freeman, *Appearance of Impropriety, Recusal and the Segars-Andrews Case*, 62 S C L Rev 485 Professor Freeman specifically details the decision in *Caperton*, its effect upon the disqualification requirements in South Carolina in general, and the Segars-Andrews case in particular As Professor Freeman notes, *Caperton* illustrates "that a judge's failure to recuse can have due process ramifications (and) also calls into question the legal test used by South Carolina's appellate courts " *Ibid*, p 487

Professor Freeman states, "Under the appearance of impropriety test, it is well established and understood that proof of actual misconduct is not required The rationale for keeping the admittedly vague appearance standard for judicial conduct is that 'judges represent the system as a whole and must be both right-acting and right-appearing '" Recognizing *Caperton*'s adoption of this test, Professor Freeman discusses Justice Kennedy's recitation of "objective standards that require recusal when the probability of actual bias on the part of the judge is too high to be constitutionally tolerable " *Ibid*, p 490 Under *Caperton*, proof of a high probability or serious risk of actual bias, rather than actual bias itself, "not only justifies recusal, but also provides grounds to recuse under the Due Process Clause " *Ibid*, p 491 Freeman points out that *Caperton* holds that the showing needed to establish a due process violation, while less than the "actual bias or prejudice" requirement currently imposed by South Carolina, is still greater than the showing required under the reasonableness standard of the Code of Judicial Conduct Justice Kennedy points out that states adhering to the reasonableness standard will normally resolve recusal disputes under that approach as opposed to a due process argument "Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution " *Caperton*, supra, at 2267

In terms of the effect of *Caperton* upon the disqualification procedures used in South Carolina, Professor Freeman analyzed the Segars-Andrews case to illustrate the fact that South Carolina's "actual bias or prejudice" requirement runs contrary to the holding in *Caperton*

> "*Caperton* will have a direct impact on appellate standards that require proof of actual bias in order to overturn a lower court judge's refusal to recuse It directly calls into question the validity of *Simpson v Simpson,*[2] which held that a complainant must make a showing of actual prejudice in order to overturn a trial court judge's refusal to recuse *Caperton* rejects any requirement that a party present on appeal some proof of actual bias or prejudice in order to win a reversal premised on a lower court judge's failure to recuse This result, tied to due process requirements, plainly amounts to lowering the bar for proof of unethical conduct Unquestionably, proving that a judge is subject to a serious risk of bias is far easier than proving that the judge's ruling actually was affected by bias
>
> Since proof of a serious *risk* of judicial bias establishes a due process violation under *Caperton* the need for a showing of *actual* prejudice in order to win a recusal case in South Carolina is a requirement that has in effect been overruled This result is only fair After all, why should a litigant whose trial has been tainted by the judge's violation of the appearance of impropriety standard have to prove something more than that in order to prevail on appeal? *Ibid*, pp 494-495

The Freeman article discusses the Segars-Andrews situation in great detail The Judicial Merit Selection Commission, notwithstanding that the South Carolina Court of Appeals upheld Judge Segars-Andrews' decision not to recuse herself, nevertheless determined that she should have done so in order to avoid an appearance of impropriety Specifically, the Commission determined that, as contended by Appellants in these cases, there should have been a "full and prompt disclosure to the parties who then would have had a right to agree or disagree on remittal of disqualification " *Ibid* , p 506 It was noted that, when a disclosure was finally made, it was done much later than it should have been, thus aggravating the perception of impropriety The Commission's decision was appealed to this Court, which denied the judge's request for relief *Segars-Andrews v Judicial Merit Selection Commission*, 387 SC 109, 691 S E 2d 453 (2010)

The Commission adopted the objective reasonableness test stated in the Code of Judicial Conduct and mandated in *Caperton* Importantly, "all members of the Commission concluded

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[2] 377 SC 519, 660 S E 2d 274 (Ct App 2008)

that there was an appearance of impropriety in Judge Segars Andrews's handling of Mr Simpson's divorce case " *Ibid* , p 510 The comments of Commission Chairman Senator Glenn F McConnell are particularly informative

> We cannot discount what Mr Simpson reasonably believes, especially when the circumstantial evidence could readily justify that belief Any reasonable person in the public in similar circumstances could also believe that justice in this case was not administered fairly This is the test enunciated in the commentary to Canon 2A This appearance of impropriety leads to lack of faith in the system, and the Commission must endeavor to ensure that the public believes that justice will be administered in an even manner without regard to who appears in the court or who represents them *Ibid* , p 509-510

The "appearance of impropriety" test employed by the Commission, embraced by the Code of Judicial Conduct and mandated by the United States Supreme Court is the proper test for determining disqualification or recusal issues Contrary to the assertions of Respondents, which were adopted by Judge Early, proof of actual bias or prejudice should not be required As demonstrated in Appellants' brief, there is ample evidence of such actual bias or prejudice

5 Misrepresentations On numerous instances, Respondents have asserted in their brief that Appellants have mis-characterized and/or misrepresented evidence to this Court and to the lower court Appellants vigorously dispute these assertions On pages 6 and 7 of their brief, Respondents assert, "Appellants' attorney was well aware of the tolling agreements *and suits*" filed by Respondents' counsel Johnston with respect to the Pinewood case (Emphasis added) In support of this assertion, they reference Exhibit G of Johnston Affidavit dated 6-7-10 An examination of that document, as well as the other documents submitted to the lower court by Respondents concerning this issue, demonstrates that Mr Johnston did not inform counsel for Appellants of the existence of the two suits which he had filed until 11-14-07, during the deposition of the 30(b)(6) witness in that case (R , pp 5859, 5816) While Mr Johnston informed Appellants' counsel of his intent "to obtain an additional extension of the Tolling Agreement" in prior correspondence, he never mentioned the filing of the suits until 11-14-07, *two years after the last of the suits had been dismissed*

Respondents go to great lengths in their brief attempting to justify the conduct of their counsel with respect to the ultimate sale of the Pinewood property (Respondents' Brief, pp 5-8) While they reference certain negotiations entered into on behalf of the partnership by Mr Johnston, they fail to mention the numerous continuing requests for information concerning those negotiations made to Mr Johnston by Appellants' counsel, as well as the lack of information provided with respect to those requests (Cf , R , pp 5826-5827) They also fail to note that the ultimate sale of the property was for less than the appraised value (Cf , R , pp 2655-2656, 5824-5825) Irrespective of these omissions, however, Appellants maintain that the filing of the lawsuits by Mr Johnston represents knowledge on the part of Respondents as to exactly what should have been done in each of these cases - counsel retained to represent the various partnerships for the purpose of retrieving partnership assets should have timely instituted litigation in order to accomplish that purpose The problem with the Pinewood lawsuits instituted by Mr Johnston is that Respondents obviously never intended to pursue the claims set forth in the lawsuits As shown in Appellants' brief, neither of the lawsuits were ever served after having been filed and were ultimately voluntarily dismissed by Respondents' counsel Most importantly, the lawsuits were dismissed nearly two years before the property was ultimately sold or before Respondents' counsel informed Appellants of their existence During this period of time, the partnership lost the negotiating advantage which would have been available under the two lawsuits, and the evidence indicates that the appraised value of the property, which was obtained by Respondents, had declined from $900,000 00 to $525,000 00 (R , p 5824)

One of the more egregious misrepresentations made by Respondents in their brief to this Court deals with their attempt to discredit Appellants' assertions relating to the management fee kickback scheme employed by Respondents with respect to various properties, including those involved in these appeals (Respondents' brief, p 78-79) Specifically, Respondents make the following assertion "None of the properties here were involved, nor were any Respondents,

except as a result of the subsequent acquisition of NHP " *Ibid*, p 79 This statement is incomplete and misleading, as shown by the evidence submitted in the lower court, prior submissions to this Court, and Respondents' own documents (Cf, R, pp 3739-3740, Appellants' Return to Respondents' Motion to Stay Time Limits, etc ,7-25-11, Ex 4, AmReal #015538) This documentation clearly reveals that (1) AIMCO's subsidiary NHP was receiving management fee kickbacks labeled as "supervisory management fees," (2) these included partnerships in which NHP affiliates were acting as general partner, and (3) the Parkview, Palmetto, Roosevelt and Orleans partnerships were included in those properties which involved the "supervisory management fees " (Appellants' Return to Respondents' Motion to Stay Time Limits, etc ,7-25-11, Ex 4, AmReal #015538, Ex 2) These documents also clearly support Appellants' position that Respondents were more concerned with the government's investigation concerning these illegal fees, and the resulting devastating economic effect which it was having on Respondents' pending 2530 applications relating to all of their properties, than they were with their fiduciary duties to the Appellants (R , pp 1487-1488)

The validity of Appellants' position was specifically acknowledged in a memo from the Bryan Cave law firm, the same firm hired by Respondents under the guise of recovering assets for these partnerships Appellants' Return to Respondents' Motion to Stay Time Limits, etc ,7-25-11, Ex 2) Contrary to Respondents' assertions in their brief, Appellants have made no misrepresentations concerning the conflict of interest created by Respondents Their statement that Appellants' position regarding this conflict has "no basis in fact" and "is an enigma" are totally disingenuous Respondents' inherent conflict between getting themselves out of the criminal and potentially economically devastating situation with HUD over the kickback scheme, on the one hand, and satisfying their fiduciary obligations to Appellants under these limited partnerships on the other, was clearly known to and appreciated by Respondents As Appellants have maintained throughout this litigation, this was the true reason why Respondents declined to

fulfill their fiduciary obligations to Appellants by recovering the subject properties, and why they violated their fiduciary duties of full disclosure concerning their conflict of interest Indeed, the evidence adduced during discovery in the lower court shows that AIMCO's own employees admitted as much to Boston Financial Group employee Ford Von Weise (R , pp 1487-1488)

Respondents also have misrepresented Appellants' knowledge and position with respect to the issue of disqualification and/or recusal of Judge Early On page 70 of their brief, they state, "As the record clearly shows, Appellants were not bothered by Judge Early's 'relationships,' *which they knew about for years*, until he informed them of the impending dismissal of their claims " (Emphasis added) Contrary to this assertion, the record "clearly shows" exactly the opposite As shown in Appellants' briefs, as well as the transcript of the March 29, 2010 hearing and Appellants' submissions to the lower court, Judge Early had made no disclosures on the record of any of his relationships with Respondents' counsel, and had only made brief comments off the record concerning his fishing trip with Mr Johnston's brother, his officiating at the wedding of Ms Rosen, and his prior relationship with Mr Infinger (See Appellants' brief, p 31-50) These were clearly not full and complete disclosures, and certainly did not include the close relationship between members of the judge's family and the family of Respondents' counsel (*Ibid*) To claim that Appellants had known about these relationships "for years" is a complete distortion of the record If Appellants possessed the knowledge represented by Respondents in their brief, and if they "were not bothered" by the implications of such relationships, they would have had no need to request a full disclosure on the record by Judge Early, or to request that Respondents' counsel make a similar disclosure under oath, or to request permission to conduct limited discovery in order to determine the true nature of such relationships They certainly would not have felt the need to issue a subpoena to the Fripp Island Resort in order to obtain information which they would have already had

CONCLUSION

For the reasons set forth in Appellants' briefs and this Reply, the sanctions of dismissal of Appellants' cases and imposition of attorneys' fees should be reversed Furthermore, the other orders of Judge Early which are subject to these appeals should be reversed and/or vacated, as they are clearly the result of abuses of discretion, or are tainted by the bias and prejudice demonstrated with respect to the relationships between Judge Early, Respondents' counsel and members of their families Finally, in light of the *Caperton* decision, this Court should immediately vacate the "actual bias or prejudice" requirement with respect to disqualification or recusal issues involving judges in this State As Professor Freeman noted, "*Caperton* performed a great service, making it easier for litigants and reviewing courts to protect against contamination of the judicial process After *Caperton* it would be incongruous for appellate courts to require litigants attacking a judge's failure to recuse on ethical grounds to provide a greater quantum of proof than what they would need to establish a due process violation *Caperton* will assist the recusal process by permitting a judge deciding a recusal motion to do the right thing and step aside on appearance grounds without conceding that there are grounds for proving actual bias This is because *Caperton* instructs that conduct sufficient to cause a judge to 'feel a debt of gratitude' to one side can tip the scale and thereby create an appearance of impropriety" Freeman, *supra*, at 512

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