THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Doyet A Early, III, Circuit Court Judge

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Case No 2005-CP-07-1989

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

# BRIEF OF APPELLANTS

Joel D Bailey (SC Bar # 00471)
THE BAILEY LAW FIRM, P A
PO Box 1437
Beaufort, SC 29901-1437
843-525-6090
843- 525-6070 fax
baileylawfirm@charter net
Attorney for Appellants

THOMAS A PENDARVIS (SC Bar # 064918)
PENDARVIS LAW OFFICES, P C
500 Carteret Street, Suite A
Beaufort, SC 29902-5066
843-524-9500
843-524-9501 fax
Thomas@PendarvisLaw com
Attorney for Appellants

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## STATEMENT OF ISSUES ON APPEAL

1 Did Judge Early err in dismissing Appellants' claims and requiring them to pay costs and attorneys fees to Respondents because Appellants did not disclose privileged communications with their attorneys, thereby requiring reversal and vacation of his order of April 6, 2010, as well as prior orders upon which it is based? In this regard, (a) did Judge Early err in holding that Appellants, merely by filing their complaints, put at issue the statute of limitations and waived their attorney-client privilege concerning that issue? and (b) did Judge Early err in holding that language in other complaints filed by other litigants in other counties put at issue the statute of limitations in this case and waived their attorney-client privilege concerning that issue?

2 Did Judge Early err in imposing the sanctions of dismissal of Appellants' claims and requiring them to pay costs and attorneys fees to Respondents for alleged deficiencies in their discovery responses, thereby requiring reversal and vacation of his order of April 6, 2010, as well as prior orders upon which it is based?

3 Was Judge Early legally qualified to accept and/or retain the assignment to preside over this case? Specifically, (a) Did Judge Early violate the duty to fully disclose to Chief Justice Toal and to Appellants and their counsel the full and complete nature of the long-term relationship between him and members of his family with Respondents' counsel, Ellis Johnston, and members of his family? (b) Did Judge Early violate the continuing duty to fully disclose to Chief Justice Toal and to Appellants and their counsel the additional relationships between him and members of his family with Ellis Johnston and members of his family which developed following his acceptance of the assignment of this case, as well as the full and complete nature of any such relationships involving attorneys Anne Ross Rosen and Marvin Infinger after they became counsel of record?

4 Did Judge Early err in failing to recuse himself and vacate his prior orders?

5 Did Judge Early fail to insure that the Appellants' claims were being litigated in a fair and impartial forum, thereby depriving them of their rights to due process of law under the Constitutions of the State of South Carolina and the United States of America?

## STATEMENT OF THE CASE

The complaint in this case was filed in the Beaufort County Court of Common Pleas on October 13, 2005, alleging seven causes of action at law for damages, including, *inter alia*, a claim for breach of fiduciary duty, and three causes of action for equitable relief (R , pp 484-504 ) Respondents answered on January 17, 2006, setting forth a general denial and twenty-three affirmative defenses including, *inter alia*, the statute of limitations (R , pp 507-542 ) Prior to

the filing of this case, a similar lawsuit had been filed against the Respondents in the Beaufort County Court of Common Pleas by the limited partners in Parkview Apartments Limited Partnership ("Parkview") One of the Appellants in this case, Laurance H Davis, Jr , is also an Appellant in the Parkview case, Appellants' counsel in this case is also counsel for the Appellants in Parkview Following the filing of the Parkview case, counsel for the parties agreed to postpone any discovery in that case, as well as the filing of this and other related cases, in order to pursue a universal resolution for all cases involved Counsel agreed to jointly employ an independent appraiser to establish fair market values for each of the properties involved, and then to mediate any disputed values The appraiser did not complete the appraisals within the time frame required, and the mediation was canceled Thereafter, in 2005, suits were filed in Beaufort, Charleston and Orangeburg counties against Respondents on behalf of the limited partners in other affordable housing projects/partnerships, *i e* , Pinewood Park Apartments, Roosevelt Gardens Apartments and Orleans Gardens Apartments [1] On March 7, 2006, South Carolina Supreme Court Chief Justice Toal assigned all five cases to Circuit Judge Doyet A Early, III ("the judge") "to hear and decide all pre-trial motions and other matters pertaining to these cases, including the trial and post-trial motions " (R , pp 31-32 )

Between the time of his appointment and the present appeal, the judge held hearings on various motions filed by the parties, including hearings on October 4, 2006, November 19, 2007, July 1, 2008, December 9, 2008, July 6, 2009, August 24, 2009, January 14, 2010 and March 29, 2010 As a result of these hearings, as well as pertinent motions under Rule 59, SCRCP, the judge issued orders dated August 18, 2008, December 17, 2008, March 3, 2009, June 2, 2009, June 16, 2009, July 28, 2009, April 6, 2010, September 16, 2010, October 7, 2010, October 22,

[1] See Appellants' briefs in the related pending appeals

2010, and December 11, 2010, from which this appeal is being taken The hearings and orders initially involved Respondents' motions for dismissal and change of venue, but then included discovery issues, and eventually evolved into rulings by the judge requiring disclosure of privileged communications between Appellants and their counsel in this case, as well as the four related cases on appeal Appellants retained other counsel and sought interim relief in this Court and also in the Court of Appeals, which was denied [2]

Following this action by the Appellate Courts, the judge issued his order of April 6, 2010, dismissing Appellants' claims in all cases, as part of the sanctions which he imposed Appellants' Amended Notice of Appeal was served on January 28, 2011 By Order dated March 9, 2011, these appeals were certified for review by the Supreme Court and transferred from the Court of Appeals

## STATEMENT OF THE FACTS

Appellants are limited partners in Palmetto Apartments Limited Partnership This limited partnership originally consisted of Appellant Davis, as general partner and Appellants James and Erin Ivey and Buccaneer Corporation, Inc , as limited partners Appellant McCarthy acquired his interest in the limited partnership from Buccaneer Corporation, Inc , which he replaced as a limited partner The original partnership was formed in 1971 in order to construct and operate Palmetto Apartments, an affordable housing project for low-income citizens in Beaufort, South Carolina In 1975, Respondents and/or their predecessors replaced Appellant Davis as general partner, and he became a limited partner A detailed history of this partnership is set forth in the affidavit of Davis dated April 7, 2010, (R , p 3724) and the Complaint (R , p 441) Appellants

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On November 19, 2009, this Court denied Appellants' Petition for writs of prohibition and certiorari, on December 1, 2009, the Court of Appeals dismissed Appellants' appeal

incorporate by reference herein the statements contained in such affidavit

Most of the individual Appellants are elderly, and are more than eighty years of age Appellant Davis has significant health issues (R , p 3722, 3788 ) Davis owns a seven (7%) percent interest in the limited partnership, the Iveys jointly own seventy five (75%) percent interest, McCarthy owns fifteen(15%) percent interest The remaining three (3%) percent ownership interest is held by the Respondents Tuck ("Tuck") and AIMCO, either directly or through its subsidiary, AmReal (R , pp 439-442 )

Following the inclusion of Respondents Tuck and US Shelter as general partners in 1975, the Appellants had little involvement in partnership affairs, as these were handled by the general partners While Mr Tuck remained as individual general partner, the corporate general partner changed through a series of mergers and acquisitions which are described more fully in the complaint Ultimately, Respondent AIMCO, through its subsidiary, Respondent AmReal, acceded to the role of corporate general partner (R , pp 442-444 ) In 1984, Respondents notified Appellants that they had contracted to sell the apartment complex to Boston Financial Group ("BFG") for approximately $817,460 00, plus interest The terms of the sale called for a small amount to be paid up front but the majority of the sales price was to be in a balloon payment, with accruing interest, to be made in 1999 (R , pp 448-449 ) Although told by the general partners that they had vetted the purchaser's ability to pay, the limited partners later discovered that the sale was actually made to a newly formed limited partnership with no assets other than the property being acquired (R , pp 3728-3729 )

Prior to 1999, the general partners advised Appellants of the potential for a problem with the final balloon payment, but made repeated assurances that they would make every effort to protect the partnership and to recover any assets due to it (R , pp 3729, 453 ) Appellants

repeatedly informed Respondents of the increasing value of the apartment complex in light of the then-existing real estate market and requested that Respondents pursue retrieval of the property in the event the note was not paid (R , pp 3728-3729, 453-454 ) In 1999, the purchaser defaulted, and Appellants began to make inquiries of Respondents, as their general partners, concerning the status of any efforts being made to recover the assets of the partnership Respondents provided no substantive information to Appellants (R , p 3729 ) As a result, Appellants consulted legal counsel in order to investigate the status of the monies due to the partnership (R , pp 3729-3730, 466 ) When their counsel was unable to obtain information from the general partners, Appellants called for a special meeting of the limited partnership to discuss available options, including replacement of any general partners who were unwilling to pursue recovery of the partnership assets The special meeting took place in Beaufort at the office of attorney Joel D Bailey on September 14, 2000 The general partners sent AIMCO employee George Buchanan to the meeting to provide information to the limited partners Mr Buchanan was not familiar with all of the details of the transaction with BFG, and it was agreed that a subsequent meeting of the partnership would take place which would be attended by other agents of the general partners possessing more knowledge (R , pp 3731, 468-471, 1250-1313 )

The subsequent meeting occurred at AIMCO's office in Greenville, South Carolina on October 24, 2000 This meeting was attended by general partners N Barton Tuck, Jr and AIMCO vice president Patrick J Foye Appellants discussed with Mr Tuck and Mr Foye numerous options available to the partnership, including pursuing potential sale of the past-due note to third parties, as well as legal efforts to recover monies due under the past-due note or, alternatively, recovery of the apartment complex (R , pp 3731-3732, 472-476, 2502 ) It was agreed that counsel would be hired for the partnership for this purpose BFG had previously

expressed a willingness to return the apartment complex in lieu of paying the note, and Respondents assured Appellants that they would again explore this possibility Both Mr Tuck and Mr Foye indicated, however, that they would not wish to remain as general partners in the event the apartment complex was retrieved by the partnership Years later, as part of the discovery undertaken in this case, Appellants would learn the real reason why the general partners were unwilling to remain in that position if the apartment complex was retrieved (R , pp 3731-3732, 1315-1486 )

By letter of November 10, 2000, Respondents informed Appellants that attorney Arthur L Howson, Jr had been retained on behalf of the partnership The letter also informed the Appellants that BFG had been acquired by an entity known as Lend Lease, and that former BFG officer Ford Von Weise had become an officer in Lend Lease The letter further advised that the property had been sold, but that the sale was not final and had not been approved by HUD, and that Mr Howson had been retained to represent the partnership interests concerning the pending sale, as well as exploring its options (R , p 2502 )

On December 8, 2000, Mr Howson wrote to Mr Von Weise, stating that the partnership intended "to pursue all remedies under the notes and security agreements " Appellants' counsel was provided copies of correspondence from Mr Howson to the defaulting parties On January 30, 2001, attorney Robert W Tomilson of the Washington, DC law firm of Bryan Cave, LLP also wrote to Lend Lease, stating that his firm "represents AIMCO and its subsidiaries with respect to the sale of the Carolina 9 properties," which included the property in this case and the four (4) related cases Mr Tomilson requested "that all correspondence be directed to me," and further noted his awareness of Mr Howson's prior letter of December 8, 2000 Mr Tomilson provided Appellants' counsel with a copy of this letter (R , pp 2509-2510, 2514 )

In response to the letter from Mr Howson, on February 1, 2001, William Leighton Lord, III, counsel for Lend Lease/BFG, stated his clients "surprise" upon receiving Mr Howson's letter, and noted that his client "had been working closely with AIMCO on the resolution and final disposition of these troubled properties " Mr Lord's letter then described the negotiations which had taken place between his client and AIMCO, specifically including the fact that AIMCO had taken "control of management of the properties in 1998 " The letter went on to state that his client had offered to return the properties to AIMCO "on two separate occasions," but AIMCO had declined the offer, "decided not to continue to manage the properties, and terminated the management contracts " The letter also identified Hediger Enterprises as being "the management agent" for the properties, this entity was owned by Gary Hediger, a former employee of the Respondent US Shelter Finally, the letter noted that the third-party "sale transaction that was eventually concluded was the plan of action discussed with AIMCO after they declined to take title to the properties " (R , pp 2515-2517 ) The facts as stated by Mr Lord were previously unknown to Appellants, as they had not been disclosed by Respondents

Mr Tomilson was copied with Mr Lord's letter Nothing in the record indicates that Mr Howson responded Mr Tomilson, however, responded by letter of February 5, 2001, claiming that BFG had sold the collateral without notice and provided a list of questions for BFG Mr Tomilson provided Appellants' counsel with a copy of this letter (R , pp 2518-2519 ) Appellants' counsel responded to Tomilson on February 6, 2001, expressing concern that the general partners had not acted properly to recover the partnership assets and that Appellants should be compensated (R , pp 2520-2522 ) Mr Tomilson responded on February 14, 2001, that "talk of settlement is entirely premature," stating that "AIMCO will use its best efforts to reclaim" money properly due to the partnership He further stated, "we must await Boston

Financial Group's reply to my inquiries " (R , p 2523 ) Appellants were thus left with no other option but to wait for Respondents to act to recover the partnership assets Respondents had until 2002 to file suit to recover these assets, but failed to do so (R , pp 3732-3734 ) At that time, Appellants incurred a legally cognizable injury by Respondents , the Parkview lawsuit was filed the following year, and the filing of this lawsuit was postponed in light of the *status quo* agreement referenced above

From the time this case was filed, the primary agenda of the Respondents and their counsel was to prevent Appellants' claims from ever being heard on the merits The reason, which was known only to Respondents, did not become known to Appellants until many years later, when the discovery in this litigation revealed the secret which Respondents and their counsel had fought so hard to conceal The revelation of the secret actually came in the form of three separate discoveries (1) a memo by BFG employee Ford Von Weise, detailing the transactions between BFG and AIMCO, evidencing a conscious decision by AIMCO to put its own interests ahead of those of the Appellants (R , pp 1487-1488), (2) the fact that AIMCO was under significant scrutiny by HUD and the United States Department of Justice as a result of kickback schemes involving management fees charged on properties owned and/or managed by AIMCO, its subsidiaries or affiliates, and (3) the fact that properties involved in this litigation were part of properties involved in the management fee kickback scheme, but their involvement had been concealed by AIMCO from HUD and/or the Justice Department when AIMCO was negotiating a fine for its participation (R , pp 3739-3740 ) It then became evident that AIMCO, although assuring Appellants that it was taking steps to recover the apartments complexes, never had any intention to do so, it was not willing to jeopardize the deal it had struck with HUD and the Justice Department in order to avoid criminal prosecution (R , pp 3739-3740 )

Respondents were unsuccessful on two (2) prior attempts before two (2) separate judges in Parkview to have the claims dismissed, and thus avoid a determination on the merits This did not deter them, however, from making yet a third attempt to do so in this and two other related cases, once they were assigned to the judge The judge ruled that he was bound by the prior decisions of Judges Buckner and Coltrane in Parkview as to the motions for dismissal in this case, but specifically noted that the issue of whether Appellants' claims were barred under the statute of limitations had not been decided The judge first heard arguments on this issue on October 4, 2006 Respondents limited their arguments to only the Palmetto, Roosevelt and Orleans cases Although not revealed at the time, Appellants' counsel later discovered that Respondents' counsel could not include the Pinewood case in the argument because Mr Johnston had, in fact, filed a suit against the defaulting purchaser but had failed to pursue it and it was dismissed with prejudice (R , pp 3907-3908, 5747-5800 )

Appellants asserted the equitable estoppel doctrine in defense of the statute of limitations argument, based on the "status quo" agreement referenced earlier whereby it was agreed to postpone filing the cases at issue Appellants also argued that a twenty-year statute of limitations was applicable, since the suits were brought for breach of partnership agreements executed under seal Appellants further asserted that, in any event, the suits were timely within a three year statute of limitations because there was no legally cognizable injury resulting to them *as a result of Respondents conduct* until Respondents permitted their statute of limitations to expire without taking action against the defaulting purchasers The judge made no decision at the time, but later denied the motion to dismiss based on the statute of limitations issue as to the three affected cases, he permitted Respondents to raise the issue again once discovery had been undertaken (R , pp 33-37 )

Respondents later moved for summary judgment in the Orleans, Palmetto and Roosevelt cases, based upon the statute of limitations defense It was heard on November 19, 2007 The arguments were virtually identical to those presented earlier in the motion to dismiss (R , p 850, ll 9-24 ) Finding that a genuine issue exists as to material facts concerning the statute of limitations, the judge denied Respondents' motion for summary judgment (R , pp 38-39 ) This was the last time that the judge declined any request for substantive relief by counsel for the Respondents Instead, he began to impose a double standard on the parties, holding Appellants to a significantly higher standard than Respondents He ultimately ordered Appellants to produce privileged communications with their counsel in this case and the related cases, and threatened to dismiss their claims if they failed to do so Appellants were thereby put in the untenable position of having to give up their right to privileged communications with their attorney in order to comply with the judge's order and preserve their claims Notwithstanding the detailed nature of Appellants' discovery responses and numerous supplements thereto, the judge adopted the argument of Respondents' counsel that the responses were deficient Appellants sought interim appellate relief, which was denied Appellants declined to produce the privileged documents and were unable to satisfy the judge as to their discovery responses This led to his dismissal of their claims in each of these cases This course of events, and Appellants' efforts to avoid the dismissal of their claims, are hereinafter discussed in greater detail

## ARGUMENTS

Given the time and space constraints applicable to these appeals, it is impossible to identify and discuss each abuse of discretion by the judge over the past five (5) years he has presided over these cases, as he repeatedly made rulings which were not supported by the evidence or were controlled by errors of law The arguments in this appeal, therefore, seek to

address the more obvious and egregious rulings and conduct on his part

1 Judge Early erred in imposing the sanctions of dismissal of Appellants' claims and requiring them to pay costs and attorneys fees to Respondents for Appellants failure to disclose privileged communications with their attorneys, therefore, his order of April 6, 2010, as well as prior orders upon which it is based, should be reversed and vacated **(Issue 1, Orders dated 12-17-08, 3-3-09, 6-2-09, 6-16-09, 7-28-09, 4-6-10, 9-16-10, 10-22-10, 12-11-10 )** Dismissal of Appellants' claims, which had been sought from the outset by Respondents' counsel, was the first and only sanction imposed or even seriously considered by the judge for what he perceived to be misconduct on the part of the Appellants Dismissal of Appellants' claims, coupled with an award of attorneys fees and costs, was the harshest sanction short of incarceration that the court could impose, Appellants contend that it should not have been utilized given the facts of this case, and that the judge abused his discretion in doing so This is particularly true in light of the facts that (1) less draconian alternatives were available, (2) Appellants offered to submit to lesser sanctions and took extraordinary steps to avoid the dismissal, (3) the judge repeatedly adopted arguments of Respondents' counsel as evidence for the factual basis to support his decision, and (4) the judge repeatedly deviated from the law of this State in order to effect the dismissal

"When the court orders dismissal, or the sanction itself results in dismissal, the end result is harsh medicine that should not be administered lightly The moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction " *Griffin Grading and Clearing Inc vs Tire Service Equipment Mfg Co Inc* 334 SC 193, 511 SE2d 716 (Ct App 1999) (striking of pleading as discovery sanction reversed) "The sanction imposed should be reasonable, and not go beyond the necessities of the situation to foreclose a decision on the merits of a case The sanction should be aimed at the specific misconduct of the party

sanctioned The sanction should be a rifle shot, not a shotgun blast " *The Balloon Plantation Inc vs Head Balloons Inc et al* 303 SC 152, 399 SE2d 439 (Ct App 1990) (trial court's dismissal for failure to comply with discovery order reversed, calling the sanction "a hydrogen bomb ") Dismissal has been held an inappropriate sanction where "any number of lesser, more narrowly tailored sanctions would have sufficed " *Karppi v Greenville Terrazzo Co , Inc* 327 SC 528, 489 SE2d 679 (Ct App 1997) The record in this case is clear that the judge did not comply with the law of this State, as cited above, in imposing sanctions in this case

The judge dismissed Appellants' claims on April 6, 2010, ("Dismissal Order") finding that Appellants' were in contempt for failing to abide by his orders of March 3, 2009, ("Discovery Order") requiring them to provide "adequate responses to discovery requests" and July 28, 2009 ("Privilege Order") requiring them to produce privileged communications with their counsel On April 22, 2010, Appellants moved to alter or amend the Dismissal Order (R , pp 3830-3881 ) This motion was denied on September 16, 2010 (R , pp 146-147 ) A review of the Dismissal Order necessitates a review of the two underlying orders The present discussion concerns the Privilege Order, the Discovery Order is discussed in detail under Issue 2

Rule 26(b)(1), SCRCP, excludes privileged materials from documents and information normally subject to discovery "Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter " (Id , Emphasis added) The exemption of privileged materials from discovery, particularly those protected under the attorney-client privilege, rests upon the historical and societal value attributed to that privilege As this Court has stated

> The attorney-client privilege is based upon a public policy that the best interest of society is served by promoting a relationship between the attorney and the client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client within the relationship is maintained The attorney-client privilege belongs to the client and not the attorney, and may be waived only by the client *Wilson v Preston*, 378 SC 348, 662 SE2d 580 (2008), citing *State v Doster*, 276 SC 647, 284 SE2d 218 (1981)

"The attorney-client privilege also applies to communications originating from the lawyer rather than from the client" *Marshall v Marshall*, 282 SC 534, 320 SE2d 44 (Ct App 1984) "The trial court must determine the question of privilege without first requiring disclosure of the substance of the communication" *Wilson, supra* In this regard, the "trial court should not require disclosure of attorney-client communications to other parties without first determining whether the communications are privileged by inquiring into all the facts and circumstances of the communication" *Ibid* As shown in the following discussion, the judge did not do this

Both sides sought discovery from attorneys, however, there was a substantial and critical difference in the positions of the respective parties Appellants sought information relating to attorneys hired by Respondents *to represent the limited partnership in separate proceedings*, ostensibly to recover the partnership assets Two of these attorneys, Mr Howson and Mr Brown, were listed as witnesses by Respondents in their initial discovery responses, a third, Mr Tomilson of the Bryan Cave law firm, became known to Appellants as a result of communications between Mr Howson and the defaulting purchaser The role of these attorneys was a critical component of Appellants' action, particularly with respect to their claim for breach of fiduciary duty (R , pp 3613-3614 )

Mr Howson was hired to represent the partnership following the October 2000 meeting Appellants were unaware at that time of the tremendous conflict of interest on the part of Respondents, whereby their role as general partner directly conflicted with their own self interest in avoiding criminal prosecution The instructions given to the attorneys by Respondents concerning the nature and scope of their retention were clearly relevant, Respondents, however, asserted a claim of attorney-client privilege to keep this information from Appellants Mr Howson contacted the defaulting purchaser, and received a response from their counsel, Leighton

Lord, which referenced AIMCO's prior refusals to take the property back when offered At that point, Mr Tomilson took over the communications from Mr Howson, of crucial importance is the fact that Mr Tomilson was a member of the Bryan Cave law firm - the very firm which represented AIMCO and negotiated a $5,000,000 00 fine in lieu of criminal prosecution[1]

Appellants served discovery requests and deposition notices relating to the involvement of these attorneys *with respect to their representation of the limited partnership they did not seek information concerning any communications between Respondents and their counsel in this case* When Respondents asserted the attorney-client privilege, Appellants filed a motion to compel on November 7, 2007 Appellants' positions were in keeping with the existing law of this State, and included, *inter alia*, (1) Appellants were members of the partnership "client", and therefore within the persons entitled to share privileged communications, (2) Respondents had waived the privilege by providing Appellants with communications generated by these attorneys and inviting Appellants to communicate directly with the attorneys, (3) Respondents were required as fiduciaries to make full disclosure to Appellants, including communications with counsel for the partnership, and (4) the evidence of fraud resulting from the Respondents' conflict of interest was sufficient to place Appellants within the "crime-fraud" exception to the attorney-client privilege [3] The judge rejected these arguments at the urging of Respondents, and ruled that, not only were Appellants not entitled to this information, but that every document listed on the 71-page Privilege Log of Respondents was privileged and not discoverable (R , pp 42-43), he made this ruling without ever seeing a single document, notwithstanding that Appellants had specifically asked him to conduct an in-camera review of those documents Furthermore, he received no information concerning the privileged nature of these documents other than from Respondents'

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[3] For a detailed discussion of these arguments which were presented to the lower court, see Appellants' Memoranda dated 11-19-07, R , pp 2268-2297 and 1-16-09, R , pp 3096-3099

counsel, by way of argument or statements in their memoranda Therefore, there was no proper evidence to support his findings in this regard *Higgins v MUSC*, 326 SC 592, 486 SE2d 269 (Ct App 1997) (" factual statements of the attorneys, whether made during argument or in written briefs or memoranda may not be considered by the court ") Likewise, he clearly did not inquire "into all the facts and circumstances of the communications," as required by *Wilson supra*, and *Tucker v Honda of SC Mfg Inc* 354 SC 574, 582 SE2d 405 (2003) Accordingly, there was a clear abuse of discretion, as the order was not supported by the evidence and was controlled by an error of law, the order of December 17, 2008 should be vacated

Conversely, Respondents sought documents relating to Appellants' privileged communications with their attorneys *in this case* This did not occur until August, 2008, even though many of these documents had been listed by Appellants in Parkview on their Privilege Log since 2005 Respondents claimed that the documents were discoverable because they were relevant to the statute of limitations issue It is important to note that the communications which Respondents sought were communications between Appellants and their counsel *in this litigation* The privileged nature of the communications between Appellants and their counsel, and the duty of counsel to protect such communications from disclosure, was acknowledged by counsel for Respondents as early as 2007 [4]

In an attempt to get around this obstacle and the prohibition of Rule 26(b), Respondents claimed that Appellants had waived their attorney-client privilege and work product protection "The definition of waiver, approved by this court in many cases, is 'the intentional relinquishment of a known right ' It may be either express or implied If claimed to have been express, *it must*

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In arguing against Appellants' request for information and documents concerning attorneys hired for the partnerships, Mr Johnston stated to the judge, "Clearly Mr Bailey is not going to turn over what he sent to his limited partners and what they sent to him " (R , p 849, ll 22-24 )

*appear to have been a clear unequivocal and decisive act showing such a purpose* If claimed to have been implied, *it must appear that the opposite party has been misled to his prejudice* into the honest belief that such *waiver was intended or consented to* (Emphasis added) *W S Gray Cotton Mills v Spartanburg County Mills* 139 SC 223, 137 SE 684 (1927) As herein discussed, Respondents failed to prove that Appellants waived their attorney-client privilege

There was no express waiver by Appellants, as they had asserted from the outset that their communications with their counsel were privileged Therefore, Respondents advanced the theory that Appellants had *impliedly* waived their privilege and protection through what they called an "at issue" waiver Under Respondents' theory, Appellants, *merely by filing their complaint*, had put the statute of limitations "at issue" and thereby impliedly waived any claim of privilege or protection as to any documents or information which might be relevant to that issue Appellants repeatedly pointed out to the judge that there was absolutely no support for such a position under the law of this State and that, in fact, South Carolina law was exactly the opposite - the statute of limitations is an affirmative defense under Rule 8(c), SCRCP, and must be affirmatively pled or it is waived This requirement was clearly recognized by Respondents, and is confirmed by their own Answer, which asserts the statute of limitations *as an affirmative defense* Furthermore, Respondents never made any showing that they had been misled to their prejudice into believing Appellants had intended or consented to any implied waiver *Cf W S Gray supra*

Nevertheless, the judge again adopted the argument of Respondents' counsel and held that, *merely by filing their complaint*, Appellants had put the statute of limitations at issue and impliedly waived any privilege or protection concerning any documents which might be relevant to that issue (R , pp 108, 137 ) The Discovery Order states that the finding of implied waiver was derived exclusively from Respondents' memorandum and their argument concerning the statute of limitations This reliance upon arguments of counsel is contrary to the laws of this

State *Cf Higgins, supra* The Dismissal Order states, "The factual bases for the Court's rulings on the privilege issues have not changed" (R , p 137 ) This order states that the judge "considered at length" the arguments and memoranda of Respondents' counsel, that he "disagrees" with Appellants' arguments showing the factual and legal errors in the Privilege Order, and concludes, "*Once privilege was waived as to the documents (by mere filing of the suits and/or by reasons of the allegations in the Orleans and Roosevelt complaints), they were subject to discovery in all five cases*" (R , p 137, emphasis added ) There is no law in this State to support such a finding, the judge abused his discretion and the order should be vacated

The Dismissal Order does not quote language from the Orleans and Roosevelt complaints which it references, the reference apparently relates to Respondents' assertion, *in their memoranda*, that certain language in the complaints in the two cases impliedly put at issue the statute of limitations These two complaints refer to the parties' agreement to forgo discovery and the filing of additional lawsuits in order to appraise the properties and mediate all claims, and allege that Respondents misled Appellants, thereby resulting in a delay of their ability to recover their damages A fair reading of these two complaints reveals that the statute of limitations is not mentioned at all, and that the allegations only serve to provide the basis for Appellants' claims for damages resulting from the delay occasioned by the Respondents' misuse of the appraisal and mediation process It does not meet the test for implied waiver under South Carolina law The implied waiver must be "reasonably inferable" from the conduct of the party *Canal Insurance Company v Caldwell*, 338 SC 1, 524 SE2d 416 (Ct App 1999), it must involve " circumstances *indicating an intent to waive* " (Emphasis added) *Bonnette v State*, 277 SC 17, 282 SE2d 597 (1981) "Waiver will not be implied from doubtful acts" *Zeller v Cumberland Truck Sales*, 272 SC 558, 253 SE2d 111 (1979) The language in the two complaints does not meet this criteria for waiver, to interpret the allegation concerning delay and resulting claim for

damages as injecting the issue of the statute of limitations so as to impliedly waive any attorney-client privilege with respect to such issue is a gross distortion of the language of the pleadings, represents a deviation from the law of this State and constitutes an abuse of discretion by the judge Incredibly, the judge adopted Respondents' arguments and held that such language justified his finding that Appellants had waived their right to claim privilege or protection *even though the complaint in this case does not contain the language referenced and relied upon*

The dismissal of Appellants' claims and imposition of monetary sanctions based on the implied waiver arguments demonstrates a clear abuse of discretion "An abuse of discretion occurs when the decision of the trial judge is unsupported by the evidence or controlled by an error of law " *Austin v Stokes-Craven Holding Corp* , 387 SC 22, 691 SE2d 135 (2010) The judge's reliance upon arguments of counsel, as set forth in their oral arguments, memoranda and proposed orders, in order to establish a factual basis for his decision, shows that his orders of July 28, 2009 and April 6, 2010 conflict with *Higgins supra* they were not supported by proper evidence, and were clearly controlled by errors of law Accordingly, they should be vacated

Respondents' argument that Appellants had waived their attorney-client privilege, so readily adopted by the judge, had previously been rejected by the Honorable Gary E Clary, who was appointed as Special Master for the specific purpose of examining this issue The judge, confronted with Appellants' request for an in-camera review of all documents claimed to be privileged by either party, acknowledged that he did not "have the time and the resources to go through all of the attorney-client documents," and referred the privilege issue to Judge Clary, including documents concerning the lawyers hired to represent the partnerships (R , pp 1016-1028, quote at p 1026, ll 17-19, 44-48, 77-78 ) The parties were required to share equally the fees charged by Judge Clary for his services as Special Master

Judge Clary spent several days reviewing the documents Respondents reasserted their arguments concerning implied waiver, Judge Clary rejected these arguments (R , p 82 ) Judge Clary also ruled that certain documents which Respondents claimed to be privileged were not privileged and were discoverable by Appellants (R , p 92 ) During Judge Clary's review, Appellants' counsel discovered that counsel for Respondents had, for several months, been in possession of documents from the Bryan Cave law firm, which Appellants had sought in their prior discovery requests Respondents had not disclosed that they were in possession of this evidence Once these documents became known to Appellants, Respondents immediately sought to include them on their growing Privilege Log The issue of their "privileged" status was added to the task of Judge Clary He determined that many of these documents were not privileged, and ruled that they were subject to discovery by Appellants

When the judge adopted Judge Clary's rulings *per se* (R , pp 100-101), Respondents moved that Judge Clary's rulings be altered in order to reinstate the protections earlier given by the judge They also asked that the judge reject Judge Clary's findings concerning the privileged nature of Appellants' communications with their counsel (R , pp 3158-3166 ) Appellants also noted significant errors in Judge Clary's findings, including, *inter alia*

(1) his adoption of Respondents' "divergence" theory which is not recognized in South Carolina and which materially alters South Carolina law as to fiduciary duties, *Cf , Anthony v Padmar Inc* 320 SC 436, 465 SE2d 745 (Ct App 1995) (general partners owe fiduciary duties to limited partners, and violate such duties when they fail to disclose all known information that is significant and material, especially in transactions in which they have a pecuniary interest), *Beck v Clarkson*, 300 SC 293, 387 SE2d 681 (Ct App 1989) (partners' fiduciary duty is continuous, and extends even past dissolution of the partnership) (R , p 3614),

(2) his rejection of the "common interest doctrine" concerning privileged communications, finding Appellants waiver of the attorney-client privilege concerning communications made to persons possessing a common interest with Appellants The judge's adoption of Judge Clary's rulings conflict with the law of this State *Cf Tobaccoville USA Inc vs McMaster*, 387 SC 287, 692 SE2d 526 (2010) (common interest doctrine adopted by Supreme Court under facts

> presented "The common interest doctrine protects the transmission of data to which the attorney-client privilege or work protect protection has attached when it is shared between parties with a common interest in a legal matter The inquiry is whether or not the matters discussed in the allegedly privileged documents are matters of common interest So long as the documents at issue were covered by an applicable privilege, when created, that privilege continues until waived When the common interest doctrine applies, it creates an exception to any potential waiver of privilege ")

Again, based on nothing but the arguments of Respondents' counsel, the judge modified his Order of June 2, 2009 to accommodate the requests of Respondents' counsel and deny the relief sought by Appellants By Order of July 28, 2009, he altered Judge Clary's rulings, providing Respondents with the protections they sought while requiring Appellants to produce communications with their counsel which Judge Clary had protected as privileged [5] The Privilege Order did not provide for any redaction of counsel's impressions or any other protections, if obeyed, it would render meaningless their attorney-client privilege, and place Appellants in the position of providing Respondents with their "game plan" for this litigation (R , pp 3614-3615 ) Furthermore, the order applied to all limited partners in all five cases, even though the Appellants in each case were clearly in different positions and the facts and circumstances in each case were different

Appellants made several attempts and efforts to find some alternative to the dilemma occasioned by the Privilege Order These included, *inter alia*

(1) First, they sought to have the order amended under Rule 60, SCRCP, in order to correct mistakes of fact and law At the urging of Respondents' counsel, this motion was denied by the judge (R , p 145 )

(2) Appellants were concerned that a partial production of their communications with their counsel could constitute a total waiver of their attorney-client privilege, in

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[5] Prior to the entry of the 7-28-09 order, Appellants' counsel objected to it on the basis that Rule 53, SCRCP, prohibited the judge from altering the rulings of the Special Master This issue was addressed in Appellants' prior Petition for Writ of Prohibition and the arguments stated therein are adopted and incorporated into this brief See also Bailey Affidavit 3-30-10, R , p 3618

light of the decision in *Marshall supra* (disclosure to a third party "waives the attorney client privilege not only to the specific communication disclosed but also to all communications between the same attorney and the same client on the same subject ") (R , p 1022,l 17- p 1023,l 7) The judge's ruling also began to cause Appellants to avoid communicating with their counsel, adversely affecting their representation in this case (R , pp 3743-3744, 3623, 3762, 3785, 3768, 3794, 3789-3790 )

(3) At the urging of Respondents' counsel, the judge threatened to dismiss their claims if Appellants withheld their privileged communications Appellants urged the judge to consider lesser sanctions, including a contempt citation which would entitle them to an immediate appeal (R , p 3619 ) This request was opposed by Respondents' counsel and, again, the judge acceded to their wishes, and prepared to dismiss their claims This placed Appellants in the untenable position of either (1) complying with the order, which would destroy their attorney-client privilege and give Respondents unrestricted access to their confidential communications with their counsel, or (2) declining to comply with the order, which would put them at risk of having their claims dismissed and deprive them of a trial on the merits

(4) Through independent counsel, Appellants then sought relief in the appellate courts, as documented above Simultaneously, Appellants asked Chief Justice Toal to transfer their cases to the Business Court, but their request was denied

(5) Appellants filed a motion for protection on February 22, 2010, requesting that the judge consider other options, including permitting them to submit their attorney-client documents under seal for an in-camera review The judge denied this request (R , pp 3590-3593, 154-157 )[6]

On April 6, 2010, the judge executed the order prepared by Respondents' counsel, finding Appellants in contempt of court and imposing the harshest sanction possible dismissal of their claims and requiring them to pay attorneys fees and costs to Respondents As shown above, this amounted to an abuse of discretion, it is not supported by the evidence in the case, and is controlled by numerous errors of law *Cf Grosshuesch v Cramer*, 377 SC 12, 659 SE2d 112 (2008) (trial court erred in holding party in contempt for failing to respond to discovery requests which would have required party to waive privilege against self incrimination) If it is allowed

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Although the judge denied Appellants' request to submit documents under seal for in-camera review, he earlier granted Respondents' request to submit documents to him under seal for in-camera review as part of their efforts to avoid the rulings of Judge Clary (R , pp 114-115 )

to stand, this decision will affect not only the litigants in this case, but litigants in all future cases Specifically, future litigants, *merely by filing complaints*, will be deemed to have put at issue the statute of limitations and impliedly waived their attorney-client privilege as to that issue, they may be deemed to have waived their attorney-client privilege because of language in other complaints filed by other parties in other cases Future defendants will no longer have to raise the statute of limitations as an affirmative defense and Rule 8(c), SCRCP will become a nullity Future litigants standing in a fiduciary relationship will be confronted with a significant change in existing law, as fiduciary duties will no longer include full and complete disclosure of significant and material information, including disclosure of conflicts of interest Fiduciary duties will no longer be continuing in nature, throughout the fiduciary relationship, but will end when there is a "divergence of interest" between members within the relationship Appellants contend that these deviations from existing law should not be adopted by this Court, as they were by the judge, accordingly, the orders discussed above should be reversed and vacated

2 Judge Early erred in imposing the sanctions of dismissal of Appellants' claims and requiring them to pay costs and attorneys fees to Respondents for alleged deficiencies in their discovery responses, thereby requiring vacation of his order of April 6, 2010, as well as prior orders upon which it is based **(Issue 2) (Orders dated 12-17-08, 3-3-09, 3-3-09 (Granting in Part and Denying in Part) 4-6-10 )** Apparently recognizing the deficiencies and reversible error of the rulings in the Privilege Order, Respondents sought to find a back-up excuse to justify the dismissals They did this by accusing Appellants of failing to comply with discovery rules Again, the judge readily adopted Respondents' position, notwithstanding that it was not supported by proper evidence or existing law In the Dismissal Order, and at the request of Respondents' counsel, the judge found Appellants in contempt of court for failure to comply with his prior order of March 3, 2009 (Discovery Order), and dismissed Appellants' claims in all five (5) cases as the

sanction for the contempt He further ordered that Respondents were entitled to "receive a monetary award to compensate them for the reasonable costs and attorneys fees incurred in connection with their Motion to Compel Discovery and their two Motions for Sanctions" Appellants contend that the rulings of the judge in this regard result from and are tainted by the bias and prejudice hereinafter discussed, and evidence the judge's imposition of a double standard concerning discovery

The finding of contempt and the imposition of sanctions also result from an abuse of discretion on the part of the judge and should accordingly be vacated, as these are unsupported by the evidence and controlled by errors of law *Austin supra* The factual findings in the Dismissal Order and the Discovery Order were taken from the memoranda supplied to the judge by counsel for Respondents As previously noted, it is improper for a judge to use the unsworn statements of counsel, whether in argument or in a memorandum, to establish factual findings Cf, *Higgins supra* The factual findings of both orders simply parrot the arguments of Respondents' counsel and the language of their memoranda

In order to understand the deficiencies in the Dismissal Order, it is necessary to examine the underlying Discovery Order upon which it is based The Discovery Order followed a motion to compel filed by Respondents, which was heard on December 9, 2008 The motion was accompanied by a memorandum containing Respondents' arguments, which was filed the day before the hearing The Discovery Order mirrors the memorandum and references seventeen (17) answers to interrogatories and forty three (43) responses to production requests which the judge found to be "incomplete and inadequate" This finding is not supported by the evidence An examination of Appellants' discovery responses clearly shows that they met or exceeded the requirements of the South Carolina Rules of Civil Procedure, and certainly exceeded the discovery responses provided by counsel for Respondents This Court is respectfully requested

to examine these responses in determining whether the judge abused his discretion concerning their adequacy Appellants' discovery responses are addressed in the affidavit of Thomas A Pendarvis, 4-22-10, R , pp 3882-3905 Due to the voluminous nature of the responses, it is impossible to discuss each of them, however, the Court is directed to the following examples

1 On July 14, 2005, Appellants in Parkview responded to Respondents' initial discovery requests in that case The responses were based upon the information and documents in the possession of the Parkview Appellants or their counsel at that time, and included, *inter alia* (a) valuation for the Parkview apartments, (b) eleven pages listing persons having knowledge or information concerning the facts of the case and a summary of their testimony, (c) seven pages listing generic categories of witnesses, as the specific individuals were then unknown, (d) twenty four pages specifically identifying documents in their possession, and enclosing copies of any documents not in possession of Respondents, and (e) information relating to the expert witness who had been retained *The information produced was in addition to more than 35 000 pages of documents already produced in the case* [7] (R , pp 1489-1550 ) Parkview Appellants also provided Respondents with a privilege log for documents being withheld under a claim of privilege between 2000 and 2003 (R , pp 1551-1556 ) Counsel for Respondents made no complaint regarding these responses

2 Appellants supplemented these discovery responses on November 6, 2007 by adding witnesses and documents relating to insurance valuations for the subject properties (R , pp 3885, 3993-3998 ) Supplemental responses were provided on numerous occasions prior to the issuance of the Dismissal Order as information became known to Appellants These included, *inter alia*, supplements identifying witnesses and documents relating to (a) assessed values of the subject properties (R , pp 3886-3887, 4004-4013, 4278-4284), (b) a title history for each of the subject properties (R , pp 3887, 4274-4276), and (c) appraised values, HUD rental comparability studies and subsequent sales information for the subject property (R , pp 3888-3889, 4381-4388 ) These supplements do not include the discovery responses by Appellants to Respondents' second set of discovery requests dated August 28, 2008

3 In August, 2008, more than three years after the filing of this case, less than one year before the trial date in May, 2009, and without having taken a single deposition, counsel for Respondents served a second set of discovery requests (R , pp 3892, 4667-4687 ) These requests were incredibly vague, burdensome,

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Nearly 34,000 pages of these documents came from one source, *i e*, Gary Hediger d/b/a Hediger Enterprises, Inc Although less than 5,000 pages of these actually related to the five (5) properties involved in the cases on appeal, Appellants' counsel was required to review each page in order to determine any relevancy to the issues involved in this litigation (R , p 933, ll 10-24 )

and overly broad, and far exceeded the abuses described in *Oncology and Hematology Associates of SC vs SC DHEC*, 387 SC 380, 692 SE2d 920 (2010) For example, interrogatory #13 sought voluminous information regarding accountants, financial planners and advisers, tax advisers or preparers, et al with regard to each of the partnerships, properties, notes, sales transactions, purchasers, subsequent sales, Mr Hediger, subsequent purchasers and/or the Respondents (R , p 4684 ) Interrogatory #17 required Appellants to "describe in detail all actions taken to study, assess, analyze, estimate or project the impact of the changes in the tax laws during the 1980s on the value of, or market for, the Properties or any other low-income housing or HUD-regulated properties " (R , pp 4685-4686 ) The interrogatories had no time frames, so that they covered the entire life span of each of the Appellants The Discovery Order sanctioned these and other interrogatories, finding Appellants' answers to be "incomplete and inadequate " (R , p 122 )

4 Respondents' requests for production were no better, requesting, for example, "all documents concerning any of the properties, the limited partnerships, the notes, the sales transactions, the purchasers, Hediger, subsequent sales transactions, and subsequent purchasers " (R , pp 4674-4675 ) They also requested documents regarding tax information, including estate and gift taxes and investments (R , p 4675) Incredibly, although the Respondents had managed the respective properties, and the Appellants, as limited partners, had nothing to do with them since 1975, Respondents sought documents concerning the "operating statements, financial statements, balance sheets, rent rolls" and other financial information for these properties, as well as documents concerning the "physical condition" of the properties (R , pp 4675-4676), as former managers, Respondents already had access to these documents *Respondents even sought all documents reflecting criminal activity or suspected criminal activity at the Properties or in the immediate vicinity of the Properties* (R , p 4676) The Discovery Order nevertheless sanctioned these requests, finding Appellants' responses to be "incomplete and inadequate "

5 Based on the ages and health of Appellants, some of whom are widows or heirs of original partners, Appellants responded to the best of their ability Many Appellants did not possess any responsive documents, and Appellants' counsel specifically pointed these facts out to the judge at the hearings on the Respondents' motions For example, on December 9, 2008, counsel stated

a "I can show you 15 supplemental discovery responses or better that we have done Every time we get something, we pass it along to them We send it in If I've got it, they've got it " (R , p 1004, ll 18-21 )

b "There were 4 primary partners originally in Parkview Mr Davis is now almost 80 years old One was Rentz He is dead One was Pike He is dead The fourth was Hodge He is dead The only living creature out of that original group is Mr Davis We didn't get a lot of materials from the Orleans partnership and different ones The reason is

we have asked for these documents but people are either dead or they're too old " (R , p 1007, l 24 - p 1008, l 9 )

c "In the case of Parkview widows have succeeded to their partnership interests and in the case of Mr Hodge, his daughter has as part of the estate So, we have asked them – each of them – to go back and look and see what you can find Get it to us whatever it is Go through old trunks Go through safe deposit boxes Go to anything you can find that relates to this They have presented it to us We have turned it over We have turned over every document that we have been presented with with the exception of documents that are listed on our privilege log It's just that simple " (R , p 1008, ll 11-22 )

Furthermore, at a later hearing on August 24, 2009, Appellants' counsel reiterated these ongoing concerns to the judge

a "We are having difficulty getting a lot of the documents from people who can't communicate because of their health issues " (R , p 1126, ll 5-7 )

b "We've had to send these people out searching for materials not in their immediate control We had our clients looking for these documents " (R , p 1126, ll 17-19, 23-24 )

c "This production is all we could do It's absolutely the best we can do Every time we've gotten new documents, we have delivered them Some of the things are things that are just not within the control of these people Life insurance applications they made back in the 60s they're having to go back We've gotten as many of these documents as we can And we're going to continue to comply as we're able " " (R , p 1127, ll 10-11, l 21- p 1128, l 4 )

6 The judge also found that Appellants' responses concerning their damages were deficient, both the Discovery Order and subsequent Dismissal Order specifically rely upon Respondents' Supplemental Memorandum to support this finding (R , p 127 ) Notwithstanding that the reliance on the memorandum violates *Higgins supra*, the finding is simply not supported by the evidence Parkview Appellants' initial discovery responses in 2005 were specifically incorporated into the discovery responses in this case, they set forth the manner in which their damages were calculated, and included the fair market value for the apartment complex as a component of this calculation Appellants had nothing to do with the apartments subsequent to Respondents' entry into the partnership in 1975, and were not privy to many documents which would establish the fair market value As part of their discovery efforts, however, they were able to obtain a number of values for each of the apartments from which the jury could ascertain the fair market value needed to calculate damages, and provided these to Respondents as noted above With the exception of Pinewood, Appellants provided an itemization of the values for each apartment complex to Respondents on multiple occasions, including

following the mediation in March, 2008 and again as to Parkview in their Third Supplemental Response to the August 28, 2008 discovery (R , pp 3508-3529 ) The itemizations showed ranges of values The Appellants are not required to itemize the amount of their damages to a mathematical certainty *Holly Woods Ass vs Hiller*, 392 SC 172, 708 SE2d 787 (Ct App 2011), *Whisenant v James Island Corp* , 277 SC 10, 281 SE2d 794 (1981) ("proof with mathematical certainty of the amount of loss or damage is not required ") These responses clearly comply with the rules of procedure and the laws of this State

7 The judge also found that Appellants' responses relating to their expert witnesses were deficient The Dismissal Order states, "the Parkview Plaintiffs' Third Supplemental Responses fall well short of what is required by the General Discovery Order, *as shown in Defendants' Second Supplemental Memorandum at pp 9-14*, Plaintiffs in the other cases have provided even less " (R , p 126 ) (Emphasis added ) Again, reliance on the memorandum violates *Higgins supra* furthermore, the finding is simply not supported by the evidence Following the hearing in January, 2010, Appellants' counsel provided the judge and Respondents with the Third Supplemental Response referenced above Though unmentioned in the Order, Appellants' counsel also provided a letter which stated that the supplemental responses were limited to Parkview in light of the judge's comments that it was the first case scheduled for trial The letter also expressed the belief that the supplemental responses were "in compliance with both your prior order and the South Carolina Rules of Civil Procedure," and added this sentence "*If you agree we will provide similar updated responses in the other cases* " The judge did not respond, other than to issue the Dismissal Order once he received Respondents' memorandum The supplemental responses addressed both the damages and expert witness "deficiencies" about which Respondents and the judge had complained Also, the valuations by the assessors, appraisers, insurance brokers, et al referenced above were included for Parkview, as well as a precise dollar valuation by two (2) experts (R , pp 3508-3529 ) In any event, Respondents knew the identities of all Appellants' experts since March 2008, and declined to depose them Therefore, they were not prejudiced by any alleged deficiencies in Appellants' responses Cf , *Holly Woods supra*, (" even if there was a discovery violation, we find no prejudice because Appellants failed to depose [the expert]")

The judge's interpretation of Respondents' discovery requests exceeds discovery envisioned or permitted under the South Carolina Rules of Civil Procedure, and validates the concern of this Court, as expressed in *Oncology supra*, that "discovery practice has become a cottage industry and the merits of a claim are being relegated to a secondary status " Appellants' counsel informed the judge that the third supplemental responses were "as detailed and complete as I know how to make it in a written discovery response " (R , pp 3508-3509 ) Appellants

believe that their responses were adequate and that their cases should not have been dismissed based on the discovery responses Respondents discovery requests, as was the case in *Oncology, supra* are "abusive and beyond the pale " As the Court there noted, " the trial court must make an effort to impose reasonable discovery limits The trial court abuses its discretion by ordering discovery that exceeds that permitted by the rules of procedure " The judge made no such effort and abused his discretion

It is also apparent that the judge, in order to exercise his discretion as to the discovery issues, failed to weigh the factors required in such undertakings *Cf*, *Samples v Mitchell*, 329 SC 105, 495 SE2d 213 (Ct App 1997), and cases cited therein The order does not address any weight given to the nature of the discovery requests, the discovery posture of the case, the existence of any wilfulness by Appellants, or the degree of prejudice to Respondents This omission, in and of itself, is fatal to the judge's findings As stated in *Samples supra*

> A failure to exercise discretion amounts to an abuse of that discretion When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred The mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised It should be stated on what basis that discretion was exercised

Accordingly, there was a clear abuse of discretion on the part of the judge, as both the Discovery Order and the Dismissal Order were not supported by the evidence and were controlled by errors of law, the orders of March 3, 2009 and April 6, 2010 should be reversed and vacated

3 Judge Early was not legally qualified to accept and/or retain the assignment to preside over this case **(Issues 3, Order 3-7-06)** The general rule with respect to a judge's qualification to preside over matters before him or her is set forth as follows

> *It is the judge s responsibility to disclose sua sponte all information of any potential conflict between himself and the parties or their attorneys when his impartiality might reasonably be questioned neither the client nor his attorney have any obligation to investigate the judge s impartiality* Litigants have a right to have their causes tried fairly in court by an impartial tribunal, and are entitled to the due process requirement of a

> hearing before an impartial and disinterested tribunal *Where the circumstances are such as to create in the mind of a reasonable man a suspicion of bias, there may well be a basis for disqualification though in fact no bias exists* For this reason, *a judge should disqualify himself where grounds for disqualification exist as well as in situations where his impartiality might reasonably be questioned A judge should disqualify himself when circumstances and conditions surrounding the litigation are of such nature that they might cast doubt and question as to the impartiality of any judgment* 75 Am Jur , 2d, *Trial*, §86 (Emphasis added)

The qualification of a judge in this State to preside over matters brought before them is ostensibly controlled by the Code of Judicial Conduct, which is entirely consistent with the foregoing general proposition of law The Code, adopted by this Court under Section V of the South Carolina Appellate Court Rules, together with the pertinent canons and sections, is "intended to govern conduct of judges and to be binding upon them " Rule 501, SCACR, Preamble "An independent and honorable judiciary is indispensable to justice in our society " Rule 501, SCACR, Canon 1A "Although judges should be independent, they must comply with the law, including the provisions of this Code *Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility Conversely violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law* *Ibid* , Commentary (Emphasis added )

Whenever the term "shall" is used in the Code, it imposes mandatory, non-discretionary conduct on judges, "it is intended to impose binding obligations " Rule 501, SCACR, Preamble Accordingly, "A judge *shall* respect and comply with the law and *shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary* " *Ibid* , Canon 2 A (Emphasis added) The Commentary to Canon 2 A explains

> Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges *A judge must avoid all impropriety and appearance of impropriety* The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge *Actual improprieties* under this standard include violations of law, court rules or other specific provisions of this Code The test for *appearance of impropriety* is whether the conduct would create in reasonable

minds a *perception* that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired (Emphasis added)

Furthermore, "A judge *shall be faithful to the law* and maintain professional competence in it," " *shall* perform judicial duties *without bias or prejudice*," and " *shall not*, in the performance of judicial duties, *by words or conduct manifest bias or prejudice* " *Ibid*, Canon 3B(2) & (5) (Emphasis added) As noted in the Commentary to this Canon, "A judge who manifests bias *on any basis* in a proceeding *impairs the fairness of the proceeding and brings the judiciary into disrepute* " (Emphasis added) Additionally, as a general proposition, "A judge *shall not initiate permit or consider ex parte communications* " unless such communications are " expressly authorized by law " *Ibid*, Subsection (7) and (7)(e) (Emphasis added) As stated in the Commentary to this section, *To the extent reasonably possible all parties or their lawyers shall be included in communications with a judge*

As to the issue of qualification *per se*, the Code provides, "A judge *shall* disqualify himself or herself in a proceeding in which the judge's impartiality *might reasonably be questioned*, including *but not limited to* instances where (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer " *Ibid*, Canon 3E(1) (Emphasis added) Under this Canon, which imposes an *objective standard* of reasonableness as opposed to a subjective standard of impartiality in fact, a judge is *automatically disqualified* if his impartiality might reasonably be questioned *Nothing else need be shown* The specifics mentioned in Canon 3E(1) are simply *examples* of instances when a judge's impartiality is reasonably at issue This position is supported by the Commentary to the Canon "Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, *regardless whether any of the specific rules in Section 3E(1) apply* " (Emphasis added )

At the time the judge was assigned by Chief Justice Toal to preside over this case, as well as the aforesaid four (4) related cases, the judge was disqualified to accept the assignment under Canon 3E At that time, he had a *personal* relationship with Ellis Johnston, lead counsel for the Respondents, which was substantially different from the *professional* relationship which he had with counsel for Appellants, and which went beyond the normally expected casual relationships existing between members of the bench and bar His relationship involving Mr Johnston inevitably leads to the conclusion that the judge's impartiality might reasonably be questioned This relationship between the judge and Mr Johnston involved members of their families and included, *inter alia*, the following information which was *not* disclosed by the judge until years after these cases were assigned to him (a) the judge had known Mr Johnston's wife for approximately 40 years, and she had been married to the judge's college fraternity brother (R , pp 1220, ll 21-22, 150), (b) the judge's son (Ross) and Mr Johnston's son (Caldwell) were close friends, had known each other for at least ten (10) years, were fraternity brothers in college, and had traveled together in Europe (R , pp 1220, ll 13-16, 150), and (c) the judge had a picture of his son and Mr Johnston's son together, which he keeps in his office (R , p 1220, ll 17-20 )

Appellants and their counsel were totally unaware of *any* personal relationship between the judge and Mr Johnston when this case was assigned to the judge Their close inter-familial relationship was clearly one whereby the judge's impartiality might reasonably be questioned, accordingly, the judge was automatically disqualified from accepting this assignment and should have made that fact known to Chief Justice Toal and to Appellants and their counsel At the very least, this was certainly information which was clearly *relevant to the issue* of the judge's qualification to fairly and impartially preside in these cases, and therefore *should have been fully and completely disclosed on the record at the outset*

Prior to accepting the assignment of these cases, the judge had an initial duty at least to fully disclose to Chief Justice Toal and Appellants the full and complete nature of this relationship with Mr Johnston This is true even if the judge did not believe that the relationship with Mr Johnston would require his disqualification As stated in the Commentary to Canon 3E, "A judge should *disclose on the record* information that the judge believes the parties or their lawyers *might consider relevant* to the question of disqualification, *even if the judge believes there is no real basis for disqualification* " (Emphasis added ) Canon 3E recognizes that the integrity of the judiciary depends upon the candor of judges not only to disqualify themselves *sua sponte* as stated above, but at the very least to disclose on the record all information potentially relevant to the judge's qualification to preside There is nothing in the record to indicate that the judge made any such disclosure prior to or contemporaneously with the assignment Order of Chief Justice Toal In fact, the only time the judge made any disclosures on the record concerning his relationship with counsel for Respondents was not until March 2010, and then only after Appellants filed a motion requesting that he do so (R , pp 3595-3597, 1211-1249 )

A judge's duty to disqualify himself, or to at least disclose on the record all information which the parties or attorneys might consider relevant to the issue of disqualification, is not temporally limited by Canon 3 Therefore, the judge had a *continuing duty* to fully disclose to Chief Justice Toal and Appellants not only the relevant information concerning the relationship with Mr Johnston existing at the time of his assignment to these cases, but also any additional information concerning this relationship which developed subsequent to his assignment Furthermore, this continuing duty required the judge to fully disclose *on the record* all relevant information concerning the full and complete nature of his relationships with attorneys Anne Ross Rosen and Marvin Infinger once they became counsel of record for Respondents in these cases The record in this case clearly reveals that the judge violated this duty by making only cursory and

partial disclosures, *off the record*, concerning relationships with Respondents' counsel prior to his formal disclosure in March of 2010 (R , pp 3608-3611 ) The record also shows that even the one belated disclosure which the judge finally made on the record was not complete, nor was it entirely accurate (R , pp 3621-3623, 3706-3720 ) This will be discussed in greater detail in the following section

Based on the relationships described above and the judge's failure and refusal to make a full and complete disclosure concerning those relationships, the judge was not qualified to accept the assignment of the five cases under the Order of March 7, 2006 Appellants believe that such order would not have been issued had Chief Justice Toal been made aware of the full extent of these relationships Accordingly, the order assigning these cases to the judge should be vacated, and the cases should be reassigned to a fair and impartial judge

4 Judge Early erred in failing to recuse himself and to vacate his prior orders **(Issue 4, Orders 8-18-08, 12-17-08, 3-3-09, 3-3-09 (granting in part, denying in part), 6-2--09, 6-16-09, 7-28-09, 4-6-10, 9-16-10, 10-7-10, 10-22-10, 12-11-10)** By order of October 7, 2010, the judge denied Appellants' motion for recusal On October 28, 2010 Appellants filed a motion to alter or amend the recusal denial order, the motion was denied by the judge on December 11, 2010 (R , pp 6157-6160, 158-159 ) As noted above, under the Canons, the onus for any inquiry or disclosure concerning a judge's qualification is placed upon the judge, not the litigants or their lawyers Theoretically, judges who act in accordance with Canon 3 will *sua sponte* disqualify themselves if there is any potential whereby a reasonable person could question their impartiality, if the theory held true, there would never be a need for a litigant or their attorney to request recusal of a judge In practice, however, it is extremely rare that judges *sua sponte* disqualify themselves Therefore, it becomes even more important that judges at least honor their obligation to make a full and complete disclosure on the record of any information which might lead a

reasonable person to question their impartiality This will at least permit the litigants and their attorneys to make an informed decision as to whether or not to pursue a motion for recusal

In the experience of the undersigned, motions to recuse judges are infrequently made It is axiomatic that such motions run the risk of alienating the presiding judge, not only in the case *sub judice* but in other proceedings as well, and most lawyers refrain from requesting recusal for that reason alone Furthermore, motions to recuse in this state are decided by the judge whose recusal is sought, so there is little chance that such a motion will be granted It is human nature for judges to resist any idea that they may not be fair or impartial, so they are not likely to make a ruling which, by its nature, must acknowledge that the possibility of unfairness or partiality exists Finally, our appellate court decisions regarding motions to recuse reveal that judges' refusals to recuse themselves are not likely to be overturned on appeal, so the potential benefit of making a recusal motion is far outweighed by the unlikelihood of success All of these act as deterrents to recusal motions As a general proposition, this is not necessarily bad We do not want our judges unnecessarily burdened with recusal requests from disgruntled litigants Unfortunately, it also creates an atmosphere whereby, as in the present appeal, judges recognize the probable outcome of a recusal request and take advantage of that reality, to the undeserving prejudice of litigants with legitimate grounds for recusal

An examination of the case law in South Carolina reveals that it is extremely rare for an appellate court to overturn a judge's denial of a motion to recuse, as our courts have imposed the additional burden of showing evidence of bias or prejudice in the record *Cf*, *Lyvers v Lyvers*, 280 SC 361, 312 SE2d 590 (Ct App 1984), *Burgess v Stern*, 311 SC 326, 428 SE2d 880 (1993) (Even though the trial judge admitted to *ex parte* contacts with counsel for one of the parties, and even though Supreme Court acknowledged the specific prohibitions against *ex parte* communications, no error found in trial court's order emanating from the *ex parte* contact because

court concluded "that no prejudice resulted "), *Simpson v Simpson*, 377 SC 519, 660 SE2d 274 (Ct App 2008) (court upheld trial judge's subsequent refusal to recuse herself, reversing her prior decision to *sua sponte* recuse herself, again finding no evidence of bias or prejudice), *Eadie v Krause*, 381 SC 55, 671 SE2d 389 (Ct App 2008) (court relegated discussion of recusal to a footnote, affirming trial judge's refusal to recuse himself notwithstanding that he was a former law partner of the named defendant, stating "we do not find evidence of bias or prejudice sufficient to warrant reversal ")

Given the legal talent in the South Carolina Bar, it is rather astonishing to find that virtually no appellant's counsel has been able to point to any evidence in the record sufficient to convince an appellate court in this State to reverse the decision of trial judges not to recuse themselves Unfortunately, the use of the "no evidence of bias or prejudice" standard by our appellate courts on a near universal basis for affirmation of trial judges' refusals to disqualify or recuse themselves has resulted in the fact that there are virtually no guidelines or criteria which have been established in order to determine precisely *what* evidence of bias or prejudice, or what degree of proof of such evidence, *would* warrant disqualification or recusal An exception to this, however, was presented in *Ellis v Proctor & Gamble*, 315 SC 283, 433 SE2d 856 (1993) There are three (3) points to be made in light of the *Ellis* decision

(1) Justice Moore, author of the opinion, utilized language entirely consistent with the Judicial Canons of Ethics, finding disqualification should occur if a judge's impartiality "might reasonably be questioned " Furthermore, Justice Moore set the appellate standard for reviewing disqualification or recusal issues as one which *limits the court s ability to affirm a trial judge s failure to disqualify himself*, stating "Under Canon 3C, a judge *should* disqualify himself if his impartiality might reasonably be questioned In cases involving a violation of Canon 3, *this Court will affirm a trial judge s failure to disqualify himself only if there is no evidence of judicial prejudice* " *Ellis supra* (Emphasis added )

(2) *Ellis* addressed the language of Canon 3C, which was the predecessor to our present Canon 3E, previously quoted herein An important distinction exists, however, between Canon 3C, under review in *Ellis*, and present Canon 3E the

present language of Canon 3E uses the mandatory term "*shall*" as opposed to the discretionary term "*should*" cited in *Ellis* Accordingly, under the present language of Canon 3, disqualification by the judge is *mandatory* as previously stated herein if his impartiality might reasonably be questioned

(3) Justice Moore's opinion in *Ellis* is unique in that it actually provides a small window for determining the *type of evidence* our appellate courts will deem sufficient to demonstrate a judge's bias or partiality requiring his recusal Even though the trial judge in *Ellis*, much like the judge in the present case, gave assurances of his impartiality, Justice Moore found the following "While we accord great weight to the trial judge's assurance of his own impartiality, we find *a judge s impartiality might reasonably be questioned when his factual findings are not supported by the record* Accordingly, we find evidence of judicial prejudice in this case " The evidence of prejudice referenced in Ellis consisted of an *ex parte* memorandum provided to the trial judge by counsel for one of the parties Justice Moore found this single *ex parte* communication sufficient to require recusal, even though the trial judge stated that it "had no bearing on the trial court's decision," specifically noting "the prohibition against *ex parte* communications under Canon 3A(4) of the Code of Judicial Conduct "

In the present case, the record is replete with evidence that the judge's findings are not supported by the record, so that his impartiality "might reasonably be questioned," thereby rendering his disqualification mandatory This evidence includes not only evidence of bias or prejudice against Appellants, but also evidence of partiality and bias in favor of counsel for the Respondents This is particularly true beginning in the Spring of 2008, when the judge and his son were treated to an all-expense paid fishing trip in Florida by Mr Johnston's brother, and when Mr Johnston, whose position as counsel for Respondents was in jeopardy, brought in Mr Infinger and Ms Rosen as additional counsel This evidence includes, *inter alia*

1 In the spring of 2008, the judge remarked that his son, Ross, and Mr Johnston's son, Caldwell, "have become friends " This gave the impression that the relationship between their sons was recent in origin, and was the first time that the judge had made any disclosure concerning any relationship between any member of his family and Mr Johnston's family since his acceptance of the assignment of these cases approximately two (2) years earlier (R , pp 3608-3609 ) It was not until 2010, in response to a motion by Appellants for a full and complete disclosure of the relationships between the judge and Respondents' counsel, that the judge made any disclosure on the record, and Appellants then became aware of the following additional facts which the judge had not previously disclosed

a The judge's son and Mr Johnston's son had not just become friends, but had been friends for years, and were actually college fraternity brothers, (R , p 1220, ll 14-15 )

b The judge's son and Mr Johnston's son traveled together in Europe, (R , p 1220, ll 15-16 )

c The judge's son had attended and possibly participated in the wedding of Mr Johnston's son, (R , p 1221, ll 2-3 )

d Mr Johnston's son and his wife had stayed at the judge's beach house as guests of the judge and his son, (R , p 1221, ll 7-10 )

e The judge kept a picture of Mr Johnston's son in his office (R , p 1220, ll 17-20 )

Other evidence in the record demonstrates that the judge's disclosures on March 29, 2010, concerning the relationship between the judge and Mr Johnston and members of their respective families were incomplete and/or inaccurate, while he made some disclosures concerning the relationships with Mr Johnston's son, he omitted any information relating to Mr Johnston's daughter In support of their motion for recusal, Appellants produced evidence that (a) the judge's son, Ross, was also friends with Mr Johnston's daughter, Annie, (b) both Annie Johnston and Respondents' counsel Anne Ross Rosen are listed as friends of Ross Early on his Facebook page, and (c) the judge's picture appeared on the Facebook page of Mr Johnston's daughter, Annie (R , pp 3706-3709 ) The judge failed to make any disclosure as to these additional relationships

2 In 2008 the judge also casually mentioned that his son had been invited by Mr Johnston's son to go on a fishing trip on a boat belonging to Mr Johnston's brother, that the judge had also been invited on the trip and that the judge had accepted the invitation (R , pp 3608-3609 ) It was not until 2010, in response to Appellants motion for disclosure, that Appellants became aware that the fishing trip took place in Islamorada, Florida, at no cost to the judge, that Mr Johnston's brother was present, and that the judge took Mr Johnston's brother and his wife to dinner on two (2) separate occasions during the trip at the judge's expense (R , p 1221, ll 10-13 )

3 On a subsequent occasion, the judge stated to Mr Johnston that he had gone to see Mr Johnston's brother when he was in Georgetown and that his brother had invited him to go fishing again (R , pp 3608-3609 ) The judge did not mention this visit with Mr Johnston's brother in his "disclosure" on the record, nor did he ever indicate whether he accepted the invitation

4 On another occasion, Mr Johnston stated to the judge that he was aware that the judge's son, Ross, was going fishing in Islamorada (Florida) and that Mr Johnston thought he would "go with him " (R , pp 3608-3609 ) The judge

denied Appellants' motion to require Respondents' counsel to disclose under oath the full nature and extent of their association with the judge, which prohibited Appellants from determining if, in fact, Mr Johnston ever accompanied the judge's son to Islamorada or to any other destination

5 Mr Johnston also casually mentioned on one occasion that he and the judge attend a "white tie and tails" affair each year, and also that there was an "incident in Europe" involving their sons (R , pp 3608-3609 ) Although the judge, as part of his "disclosure" on the record in 2010, made some comments concerning the common memberships of himself and Mr Johnston in the Carolinıana social organization, he made no reference to the "incident in Europe " Since the judge denied Appellants' motion to require Respondents' counsel to disclose under oath the full nature and extent of their association with the judge, Appellants were prohibited from access to any information concerning the "incident in Europe" involving their sons

6 On April 23, 2008, at a status conference before the judge, Mr Infinger appeared with Mr Johnston for the first time At the status conference, Mr Johnston stated to the judge and the others present that Mr Hilty, who was in-house counsel for Respondents, felt Mr Johnston had done "a shitty job" at the mediation the prior month, and that Mr Infinger was being named as an additional counsel of record for the Respondents At that point, the judge welcomed Mr Infinger to the case, and casually remarked that he had known Mr Infinger for several years, and that Mr Infinger had spent the night on one occasion at the judge's home several years earlier following a wedding All of the above occurred off the record (R , p 3610 )

7 Additionally, Mr Johnston stated at the status conference that an associate of Mr Infinger's, Ms Anne Ross Rosen, was also being assigned as counsel of record for the Respondents in these cases At that point, the judge commented that he knew Ms Rosen and had, in fact, "married her " He made no other disclosure concerning Ms Rosen This also occurred off the record (R , p 3611 ) It was not until 2010, in response to Appellants' motion for disclosure, that the judge finally disclosed that

a Ms Rosen was a native of the judge's hometown of Bamberg, South Carolina and that the judge had known her for her entire life

b Ms Rosen's parents and the judge moved to Bamberg around the same time and their careers grew side by side over the years

c Ms Rosen's father was a surgeon and the judge had been his patient, specifically, Dr Ross had performed one or two surgical procedures on the judge and had referred him to at least one other physician for another procedure

d Ms Rosen was the same age as the judge's son, Ross, and they went through school together

e Ms Rosen and her fiance, John Rosen, asked the judge to perform their wedding ceremony and the judge and his wife and son Ross were provided with a room for one (1) night at a condominium at Fripp Island by Dr Ross (R , p 1216, l 25 - p 1218, l 3 )

The record demonstrates that the judge's disclosures on March 29, 2010, concerning Ms Rosen were also incomplete and/or inaccurate For example, in response to a subpoena issued by Appellants, the Fripp Island Resort provided documentation which contradicts the "disclosure" made by the judge and reveals that (1) the condominium referenced by the judge was provided to him and a guest at no charge by the Ross family for two (2) nights, not one (1) night as stated by the judge in his "disclosure," and (2) the judge's other son, Will and another guest were also provided accommodations on Fripp Island as part of the Ross-Rosen wedding, at no charge (R , p 3621 )

All of the foregoing clearly document extrajudicial relationships and conduct on the part of the judge requiring his disqualification from accepting and from retaining the assignment of these five (5) cases Had he remained true to the language and intent of Canon 3, he would have recognized that these extrajudicial relationships create a situation whereby his impartiality might reasonably be questioned, and that the circumstances are certainly such as to create in the mind of a reasonable man at least a suspicion of bias Under Canon 3, this is as far as the situation should have gotten Since the judge did not *sua sponte* disqualify himself, however, he should have at least timely and fully disclosed the relationships and circumstances on the record, as provided in the Canons

Having failed to disqualify himself or even to reveal any information concerning his qualifications on the record, the judge should have granted Appellants' motion to recuse It is clear that these relationships and circumstances create an appearance of impropriety, they create

in reasonable minds a perception that the judge's ability to carry out his responsibilities with integrity, impartiality and competence is impaired *Cf*, Commentary to Canon 2A, *supra* Under these circumstances, whether pursuant to a *sua sponte* disqualification or an order of recusal, the judge should have removed himself from this litigation *A judge should disqualify himself where grounds for disqualification exist as well as in situations where his impartiality might reasonably be questioned A judge should disqualify himself when circumstances and conditions surrounding the litigation are of such nature that they might cast doubt and question as to the impartiality of any judgment* 75 Am Jur , 2d, *Trial*, §86 (Emphasis added )

The record in these cases, apparently unlike virtually any other case besides *Ellis supra*, also demonstrates that the factual findings in the orders issued by the judge, as previously shown herein, are not supported by the record Accordingly, there is evidence of judicial prejudice, requiring the disqualification or recusal of the judge under *Ellis* Subsequent to the said fishing trip, and following Mr Johnston's revelation that Mr Hilty was dissatisfied with his performance and the addition of Mr Infinger and Ms Rosen as counsel of record, the judge's attitude and conduct toward the parties and their counsel changed significantly This change in attitude and conduct is reflected in both his comments and the orders which he issued from that point Although promising to "feed everyone from the same spoon," (R , p 911, ll 1-2) he, in fact, established a double standard for discovery between the two parties, with the Respondents enjoying a lesser and more favorable standard than that imposed upon Appellants, this will be discussed in greater detail below Almost without exception, the orders which he issued were prepared for his signature by counsel for the Respondents As demonstrated herein, these orders reflect the double standard which he imposed, were often not based upon proper and credible evidence, misstated or disregarded existing applicable law and/or contained factual findings which were not supported by the record For example

1 Order of August 18, 2008, denying Appellants' motion to compel #6 Appellants sought certain financial information which had been requested by Dr Oliver G Wood, Jr , an economist and expert witness retained on behalf of Appellants The information was needed to formulate and support his opinions concerning the issue of punitive damages (R , pp 2809-2819 )

a Appellants' counsel presented the request to the judge at the hearing on this motion to compel, which took place July 1, 2008 (R , p 939, ll 6-8 ) The judge then alluded to personal knowledge which he had concerning Dr Wood and "his questionnaire," and indicated that Dr Wood's prior questionnaires had not included information being sought in these cases (R , p 939, ll 9-10, l 22 - p 940, l 6 ) The judge referenced a prior case in which Dr Wood testified, outlining his recollection of Dr Wood's testimony (R , p 945, ll 9-16 ) These are references to matters clearly outside and not supported by the record in this case

b At the hearing, Respondents' counsel handed to the judge a document identified as "a sampling of one 10K report" of Respondent AIMCO, stating that the document was "available on the SEC website," and expressing the opinion that the information contained was more "than I think an expert could ever use " This document was not marked or introduced into evidence to be considered by the judge The judge then stated, "I think that the information that Oliver can get out of the SEC ought to be enough " (R , p 941, ll 13-20, p 944, ll 4-6 ) Accordingly, the record reflects that the judge based his ruling upon a document and information which was not admitted into evidence or properly part of the record

c The judge stated that, notwithstanding his oral ruling, he would reconsider that ruling or hold it in abeyance, and require production of the information sought under a protective order if he received an affidavit from Dr Wood stating that he needed more information than was available through the SEC (R , p 944, ll 7-13, p 945, ll 3-9 ) By letter of July 30, 2008, Appellants' counsel provided the judge with a copy of a filed affidavit from Dr Wood dated July 28, 2008, which specifically stated that the items contained in Appellants' discovery requests were needed "to formulate my opinions," and that "*a substantial portion of the information I requested is not publically* (sic) *available* " The affidavit further states that the information sought in Appellants' discovery requests "is what I will need to prepare my opinion " (R , pp 2874-2875 ) (Emphasis added )

d No counter affidavit to Dr Wood's affidavit was ever submitted to the judge by Respondents Instead, they provided the judge with a letter from Mr Johnston to Appellants' counsel dated July 30, 2008, together with a "Definitive Proxy Statement" which AIMCO had purportedly prepared for submission to the SEC This information was sent to the judge by Mr

Johnston via an email dated August 12, 2008 Neither the letter nor the "Definitive Proxy Statement" were ever verified through affidavit or filed with the Clerk of Court as part of the record in this case The statements and information in the proxy statement, which was evidently intended for dissemination to shareholders, were not made under oath Even if these matters had been properly entered into the record, examination of the proxy statement reveals that it does not provide the information required by Dr Wood, as it states nothing concerning Appellants' requests for information relating to (1) financial information for the years 2004-2007, (2) profit sharing allocations, (3) specific conditions required in order for executive bonuses to be paid, (4) life or health insurance, (5) professional or social membership dues, (6) reimbursement of entertainment expenses, or (7) allowances for automobile travel, etc Notwithstanding these facts, the judge issued his order on August 18, 2008, finding "that there is sufficient information publicly available through filings with the Securities and Exchange Commission to satisfy this request " (R , pp 40-41 ) The order does *not* state that the judge ever looked at any SEC filings, other than the 10k report *which was never in evidence or made part of the record* Since this finding is clearly at odds with the express statements in Dr Wood's affidavit, and references information which is not part of the record, the judge's factual finding is not supported by the record This is not cured by the fact that counsel for the Respondents attempted to get the information before the judge in the form of memoranda, letters or oral arguments These do not constitute evidence Factual statements of an attorney, whether made during argument or in written briefs or memoranda, may not be considered or accepted by the court as proof *Higgins supra*, *Gilmore v Ivey*, 290 SC 53, 348 SE2d 180 (Ct App 1986)

2 Order of March 9, 2009, continuing the Parkview trial (R , pp 75-76 ) The subject of this order was the Respondents' request for a continuance of the Parkview case past the scheduled trial date of May 18, 2009 Appellants' counsel was not included in the communication process whereby the signed order was transmitted from the judge to counsel for the Respondents, and did not become aware of the executed order until receiving a copy of it from Respondents' counsel It is clear that the findings of the judge in the order are not only erroneous, but are not supported by the record

a The order states that the matter was before the judge "on Defendants' motion to continue the trial " In fact, there was no motion by Respondents, and the matter was never properly before the Judge (*Cf*, Rule 7(b)(1), SCRCP )

b The order also states that the Respondents' request for a continuance was granted "for good cause having been shown " In fact, *no* cause was shown for the continuance, certainly, no cause was shown which complied with the rules, since no motion was ever made

c The order further states that, "by prior order of the court," the Parkview case was to be the first of the assigned cases to be tried In fact, no such order was ever issued

All of these deficiencies were among those brought to the judge's attention in Appellants' motion to alter or amend dated March 23, 2009 The judge denied this motion, allowing the defective order to stand

3 Order dated October 7, 2010, denying Appellants' motion for recusal and vacation of orders The findings of the judge in this order are likewise erroneous and unsupported by the record These include, *inter alia*,

a The order states that the judge "complied" with Appellants' request that he "make a full disclosure of any type of relationship he had with the defense lawyers " This finding erroneously narrows the parameters of the disclosure request, which included "a full and complete disclosure on the record of any and all affiliations or relationships which (the judge), or any member of his family, presently has or has previously had with any of the Defendants or counsel of record for any named Defendants in these cases, as well as with family members of such counsel of record " The requested disclosure specifically included "recreational and/or social activities, and personal visits and/or contacts," whether "in person, via telephone, mail, electronic means or internet sites " The judge clearly failed to make a full and complete disclosure on the record relating to his involvement of the marriage of Respondents' counsel Anne Ross Rosen, as well as the relationships involving Mr Johnston's daughter The finding that the judge "complied" with Appellants' request for "full disclosure of any type of relationship" is both erroneous and unsupported by the record

b The order states that the judge "considered the heartache and loss of position suffered by a family court judge who recently refused to recuse herself in a case " At no time was the judge presented with any evidence relating to a family court judge who refused to recuse herself, much less any "heartache" or "loss of position suffered" by the unnamed family court judge Consideration of this extraneous matter is clearly erroneous and patently unsupported by the record in this case As such, it represents clear evidence of bias and prejudice under *Ellis supra*

c The order finds that Appellants' recusal effort did not commence until "immediately prior to the entry of a April 6, 2010 sanctions order, *after almost a year of sanctions and contempt orders entered against them*" While counsel for Respondents vigorously requested that the judge sign orders holding Appellants in contempt and imposing dismissal of their claims as an appropriate sanction, and the judge verbally threatened to sign such an order, he did not do so until he signed the order of April 6, 2010, the judge himself acknowledged as of March 29, 2010 that no such order had been filed, *i e* "entered " (R , p 1236, ll 16-17 ) The finding

that there have been "sanctions and contempt orders entered" against Appellants for "almost a year" is totally erroneous and is unsupported by the record This is another example of clear evidence of bias and prejudice under *Ellis supra*

d The order finds that the judge "held a hearing on March 29, 2010 and put on the record all of my relationships with counsel for both parties, *most of which had previously been disclosed in the course of litigation*" As shown in the prior discussion, this finding is patently false, any "disclosures" made by the judge during the course of the litigation prior to the hearing were minimal and cursory at best Accordingly, this finding is not supported by the record and is clear evidence of bias and prejudice

e The order also states, "at the hearing Plaintiffs made an oral motion to recuse me I respectfully denied it, having thoroughly addressed their concerns " The record clearly shows, in addition to the fact that the judge did not "thoroughly address" the concerns of Appellants, there was no oral motion for recusal made at the March 29, 2010 hearing (R , p 1234, ll 6 - 20, p 1236, ll 9-14, ll 19-25 ) The transcript of the hearing clearly shows that counsel for Appellants proposed, as a possible solution to the judge's reluctance to give Appellants time to review his disclosures before deciding whether or not to make a motion for recusal, that a verbal motion *could* be made and marked heard The judge denied that proposed option (R , p 1237, ll 2-6 )

f The order lists eight "disclosures" which the judge states were revealed not only at the March 29, 2010 hearing, but "openly throughout the litigation " The only *evidence* in the record on this issue contradicts this finding (R , pp 3607-3625 ) The only *reference* in the record to support this statement is found in the Respondents' Memorandum dated April 20, 2010 (R , p 3805 ) In fact, the language used in the judge's order, in many instances, is taken verbatim from this memorandum Statements of counsel in a written memoranda cannot be considered by the court in determining factual findings Cf , *Higgins supra*, *Gilmore supra* Inasmuch as the trial judge clearly based his findings in this regard solely on unsworn statements of Respondents' counsel set forth in a memorandum, and such reliance is prohibited by the law of this State, these findings are not properly supported by the record

g In an attempt to refute Appellants' allegations in their motion and affidavit, the order states that Appellants' motion for recusal is "made *without basis or justification*, with the *sole purpose of polluting the record and intimidating me* into recusal " (Emphasis added ) The record shows that separate motions for recusal were made in this case and the four related cases All of the motions were supported by affidavits from numerous Appellants in each case, as well as their counsel (R , pp 3603-3625, 3706-3798, 3910 ) These affidavits set forth specific facts and

circumstances justifying the motion for recusal and vacation of the judge's orders, and amply demonstrate circumstances which would create in the mind of a reasonable man at least a suspicion of bias, as well as demonstrating that his impartiality might reasonably be questioned While a judge may consider the legal sufficiency of facts alleged in a motion for recusal, he must nonetheless accept as true the factual allegations in the motion *Shaw v State*, 276 SC 190, 277 SE2d 140 (1981) Where affidavits are submitted in support of a motion for recusal, the judge "is required to accept as true the facts stated in the motion and accompanying affidavits" 46 Am Jur 2d, *Judges*, §214, *Mallett v Mallett*, 323 SC 141, 473 SE2d 804 (Ct App 1996) The judge, by attacking the facts stated by Appellants rather than accepting them, did not follow the law Since it is obviously controlled by an error of law, there is an abuse of discretion and the order should be vacated

h The finding of the judge that he had addressed the issue of recusal "repeatedly" is not supported by the record Appellants' motion was made following the "disclosures" made by the judge and he only addressed the issue briefly at the hearing on March 29, 2010 and in the written order of October 7, 2010 This is evidence of bias and prejudice under *Ellis supra*, as the finding is not supported by the record

i Incredibly, the judge's order makes a factual finding that Appellants ***"continue to harass and prod me to recuse myself"*** This is simply untrue and totally unsupported by the record Furthermore, the judge's finding of harassment on the part of Appellants, most of whom are elderly and in ill health, is ludicrous This statement is not only unsupported by the record, but is in itself a clear indicator of the bias and prejudice exhibited by the judge against Appellants "***A judge who is presented with a motion for disqualification and who looks beyond the mere legal sufficiency of a suggestion of prejudice and attempts to refute the charges of partiality exceeds the proper scope of his inquiry and on that basis alone establishes grounds for his disqualification***" 46 Am Jur 2d, *Judges*, §§95 and 214

Time and space constraints imposed in this appeal do not permit Appellants to address each and every instance whereby the judge made factual findings which were totally unsupported by the record The above instances are included as examples only In addition to these unsupported factual findings, Appellants direct this Court to the following examples in the record of other evidence indicating bias or prejudice on the part of the judge

a The evidence shows that the judge had completely abandoned any pretense of acting as a fair and impartial arbiter and had totally aligned himself with counsel for the Respondents As shown above, the orders simply parroted the arguments

and representations of Respondents' counsel, and incorporated them as factual findings The orders were either prepared by Respondents' counsel or the language in his orders was taken straight from memoranda or other arguments which they submitted to him He also verbally aligned himself with Respondents' counsel at hearings in this litigation For example, on January 14, 2010 he stated " when *they* didn't do that, you moved for compelling, and *we* signed the order of March 3, '09 And *we get in here today* and *they* still admit *they* haven't given it *to us* " (R , p 1207, ll 6-9 ) (Emphasis added ) The judge clearly included himself in the same "we" camp as Respondents' counsel, with Appellants and their counsel clearly being assigned to the opposing "they" camp Such comments and conduct create in the mind of a reasonable man at least a suspicion of bias, and demonstrate that the judge's impartiality might reasonably be questioned, accordingly, they provide evidence of bias requiring his recusal

b Additional evidence of the judge's bias and prejudice may be found in his comments at the "disclosure" hearing on March 29, 2010 The judge, referencing his reaction when he first read Mr Johnston's email enclosing the subpoena issued to Fripp Island by Appellants, stated "I got the thing I looked at it Of course, you know, when you first read something like that *your blood boils* a little bit " (R , p 1235, ll 18-20 ) This statement clearly evidences his bias and prejudice It also evidences anger and a "combative and defensive attitude" which caused "some concern" to the court in *Mallett supra*, as to whether the trial judge could impartially decide the recusal issue

c There is also evidence in the record of prohibited *ex parte* communications between the judge and counsel for Respondents which Appellants contend would at least add to the appearance of impropriety which is attendant to the judge's conduct in this matter Such evidence includes, *inter alia*,

(1) The order of March 9, 2009, previously discussed above Appellants' counsel was not included in the communication process whereby the signed order was transmitted from the judge to counsel for the Respondents, and did not become aware of the executed order until receiving a copy of it from Respondents' counsel (R , pp 75-76),

(2) The email from Respondents' counsel, Calvin T Vick, dated February 17, 2010, which precipitated Appellants' motion for a protective order in an effort to avoid the dismissal sanction ultimately imposed by the judge (R , pp 3590-3593 ) The email is an attempt by Mr Vick to explain the *ex parte* communication initiated by the judge that same day, wherein the judge ostensibly instructed Mr Vick to prepare an order holding Appellants in contempt and dismissing their cases Although the judge had previously indicated an inclination concerning this ruling, he had subsequently been provided with briefs and materials by counsel for both sides and had not announced his final decision before the *ex parte* communication with Mr Vick The practice of directing counsel for one party *ex parte* to draft an order prior to the judge announcing his final

decision to both sides is prohibited under Opinion 2-1988, Committee on Standards of Judicial Conduct A judge is prohibited from discussing a proposed order with counsel for one party without giving notice to counsel for the other side, because failure to provide such notice gives rise to an appearance of impropriety (Ibid ) This opinion has been cited with approval by our courts for many years *Cf Higgins supra*

d Evidence of bias and prejudice is also found in the judge's imposition of a double standard, as previously noted Examples of this double standard, include, *inter alia*

(1) Respondents' initial discovery responses of August 26, 2004 in Parkview contained 15 general objections, followed by specific objections and minimal responses to each discovery requests When Parkview Appellants moved to compel proper responses, the judge ruled Appellants "have an obligation to take the deposition" of witnesses to get more specific information and, as to documents, would "have to make your own determination as to what's there ," ordering Appellants to "go take the depositions and ask them what it meant " (R , pp 917, ll 12-15, p 935, ll 9-16, l 24- p 936, l 2, p 946, ll 20-23 ) The judge's ruling affected all related case, including this case Based upon the judge's promise to "feed both sides from the same spoon" (R , p 911, ll 1-2), Appellants aggressively undertook to depose witnesses who had been listed by Respondents

In responding to the Respondents' discovery requests, Appellants utilized their discovery technique of asserting general objections, actually using *verbatim* the language employed by Respondents which had been sanctioned by the judge When Respondents complained about these objections, the judge responded by dismissing Appellants' claims

(2) When Respondents sought a protective order prohibiting Appellants from deposing Respondents' officers, the judge granted their request, even though one of the officers was present at the meeting where the "*status quo*" agreement was reached and was a material witness on the issue of the statute of limitations Conversely, when Appellants sought a protective order as a means of complying with the judge's Privilege Order, their request was denied (R , pp 154-157 )

(3) When Appellants sought information from the corporate Respondents relating to lawsuits and other claims against them, the judge permitted Respondents to re-write Appellants' discovery requests In doing so, Respondents eliminated a responding party, as well as the time frame encompassed by the request The effect was to protect disclosures concerning the conflicts of interest which formed the basis of the Appellants' claims Conversely, the judge approved Respondents' document request #48, ordering Appellants to produce "all documents

concerning any litigation in which any of the Plaintiffs were a party (plaintiff, defendant or third-party plaintiff or defendant), or any person in which any of the Plaintiffs had an ownership or management interest was a party " Despite the lack of any time limitation or showing of relevancy, this request was included in those found to be deficient by the judge and used by him as a reason for dismissing Appellants' claims (R , pp 65-74 )

(4) The judge required Appellants to produce their confidential communications with their counsel in this case, while protecting Respondents from producing communications with attorneys in other proceedings which were relevant to this case

(5) The judge granted Respondents' motion to seal certain documents for his in-camera review, while denying relief to Appellants (R , pp 114-115, 154-157 )

Due to time and space constraints, Appellants direct this Court to the affidavit of Joel D Bailey dated March 30, 2010, paragraph 13, (R , pp 3611-3615) for a more detailed listing of instances wherein the judge imposed a double standard, and incorporate said affidavit herein by reference Given the abundance of evidence demonstrating bias and partiality on the part of the judge, he erred in failing to disqualify and/or recuse himself and to vacate his orders The rulings of the judge result from and are tainted by the bias and prejudice herein discussed, they contain factual findings not properly supported by the evidence and are evidence *per se* of the judge's bias and prejudice Furthermore, they are controlled by errors of law and result from abuses of discretion, and should be vacated on that basis, as well

5 Judge Early failed to insure that Appellants' claims were being litigated in a fair and impartial forum, thereby depriving them of their rights to due process of law under the Constitutions of the State of South Carolina and the United States of America **(Issue 5)** The right to due process of law is guaranteed to citizens of this State by the Constitutions of South Carolina (Article I, §3) and the United States (5th and 14th Amendments) It is axiomatic that a fair and impartial forum must include, at a minimum, a presiding judge whose impartiality and lack of bias is beyond question "Every litigate has the lawful right to expect utter impartiality

and neutrality in a judge who tries his case" 46 Am Jr 2d, *Judges*, §146 "The right to disqualify a judge for bias and prejudice is substantive and it is included within the right to a fair trial guaranteed by the due process clause of the United States Constitution" *Ibid* The constitutional guarantee of a fair and impartial judge and forum is recognized in this State *Mallett supra* (" the expectation of a fair and impartial tribunal is a basic tenet of all cherished notions of due process ") In determining the fairness or impartiality of a judge or tribunal under a due process inquiry, the United States Supreme Court has determined that the objective test of a reasonable perception of bias, referenced above in the Code of Judicial Conduct, as opposed to the subjective "bias in fact test" is the proper procedure to be followed *Cf Caperton v A T Massey Coal Co Inc*, 129 S Ct 2252 (2009) The decision in *Caperton* has particular application to this case For example

1 Part of the alleged bias claimed in *Caperton* involved the judge's personal relationship with a litigant, and his receipt of personal benefits derived from that relationship, *i e*, donations to his campaign for election In this case, the judge's personal relationship with counsel for a litigant is at issue, together with his receipt of personal benefits derived from that relationship, *i e*, all expense paid fishing trips and accommodations at an ocean-front resort Canon 3E(1) does not distinguish between "a party or a party's lawyer" where bias is alleged

2 Justice Kennedy's majority opinion, finding a judge's refusal to disqualify or recuse himself rose to the level of a denial of constitutional due process, specifically relies upon the language of the Code of Judicial Conduct, including Canon 3E(1) The Court discarded the judge's assertions of lack of personal interest on his part, as well as his assertion that there was no objective evidence of bias Instead, the Court adopted the "appearance of impropriety" and reasonableness language of the Code consistent with Appellants' position in this case

3 The present case amply demonstrates the concern expressed by Justice Kennedy if the focus is on proof of evidence to show bias in fact, rather than a reasonable perception of bias "This is particularly true where, as here, there is no procedure for judicial fact-finding and the sole trier of fact is the one accused of bias Objective standards may also require recusal whether or not actual bias exists or can be proved Due process may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties *The failure to consider objective standards requiring recusal is not consistent with the imperatives of due process*"

The personal relationships involving the judge and counsel for the Respondents create an appearance of impropriety, as well as a reasonable suspicion of bias, requiring the disqualification and recusal of the judge under the Code of Judicial Conduct and applicable laws These relationships, coupled with the overwhelming evidence that the judge abused his discretion time after time in favor of Respondents, denied Appellants a fair and impartial forum and violated their rights to due process under the Constitutions of the State of South Carolina and the United States

## CONCLUSION

For the reasons stated herein, Appellants request that this Court (a) reverse and vacate the order of March 7, 2006 assigning these cases to Judge Early and reverse and vacate the orders issued by Judge Early which are the subject of this appeal and (b) remand this case for a trial on the merits before a fair, unbiased, disinterested and impartial judge

Respectfully submitted,

THOMAS A PENDARIVS (SC Bar # 064918)
500 Carteret Street, Suite A
Beaufort, SC 29902-5066
843-524-9500 tel, 843-524-9501 fax
Thomas@PendarvisLaw com

and

Joel D Bailey
PO Box 1437
Beaufort, SC 29901-1437
843-525-6090 tel, 843- 525-6070 fax
baileylawfirm@charter net

Attorneys for Appellants

By _____
Joel D Bailey (SC Bar # 00471)

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