THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No.: 10-CP-26-9113
Appellate Case No.: 2012-213156

Scott Lemons and Gold Coast Resorts, LLC, Appellants,

v.

The McNair Law Firm, P.A., Respondent.

BRIEF OF RESPONDENT MCNAIR LAW FIRM, P.A.

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court correctly rule that Appellants' claim in the underlying case for breach of contract, in which Appellants had contracted to sell real property, was barred as a matter of law because Appellants did not have title to the property on the closing date?

II. Did the trial court correctly rule that Appellants were bound as a matter of law by the prior judicial finding that the contract that was the subject of the underlying case was null and void?

III. Did the trial court correctly rule that Appellants ratified the settlement agreement in the underlying case by their affirmative representations that the case was settled, their knowing acceptance of the benefits of the settlement, and their failure ever to disclaim the settlement?

IV. Did the trial court correctly rule that Appellants were bound by their signatures on the mutual release?

STATEMENT OF THE CASE

This is an appeal from an order granting summary judgment in favor of a law firm in a legal malpractice action. In this case, the Court must decide whether clients may recover against their attorney for allegedly settling a case without their authorization when (a) the case had no value and should have been dismissed as a matter of law; (b) the contract on which the case was based was declared null and void in a final order entered pursuant to a motion filed on behalf of the clients by independent counsel; and (c) the clients either agreed to or ratified the settlement by signing a release that they never sought to set aside and by retaining the settlement proceeds and other benefits of the settlement after knowledge of the settlement. These questions are controlled by well established principles of law that the trial court applied correctly to uncontested facts. The decision of the trial court granting the law firm's Motion for Summary Judgment was correct in all respects and should be affirmed by this Court.

On September 28, 2010, Scott Lemons and Gold Coast Resorts, LLC (collectively "Appellants") commenced this action with the filing of the Summons and Complaint. (R. pp. 63–68.) The Complaint alleged a single cause of action for legal malpractice against McNair Law Firm, P.A. ("McNair") and Mark McAdams ("McAdams"), an attorney formerly with McNair. The Complaint alleged simply that McAdams represented Appellants in an underlying breach of contract lawsuit and settled that lawsuit without Appellants' consent and for less than the claim was worth. Appellants never served McAdams and McAdams was therefore never a party to this action.

On June 11, 2012, McNair filed its Motion for Summary Judgment. (R. pp. 21–24.) The trial court held a hearing on the motion on July 30, 2012. Following the hearing,

the trial court gave the parties time to submit additional materials and authorities. By order entered on September 11, 2012, the trial court granted summary judgment in favor of McNair. (R. pp. 1–20.)

The trial court granted summary judgment in McNair's favor on four separate and independent grounds. First, the trial court held that Appellants' claim in the underlying case had no value and, therefore, Appellants were not damaged by the settlement of that claim. Second, the trial court concluded that the court in the underlying case had ruled that the contract at issue in the underlying case was null and void and that, because they took no action to challenge or appeal that beneficial ruling, Appellants were collaterally estopped from asserting otherwise. Third, the trial court concluded that Appellants had ratified the settlement agreement executed in the underlying case. Finally, the trial court concluded that Appellants were bound by the mutual release they executed in the underlying case.

On October 12, 2012, Appellants filed their Notice of Appeal from the trial court's September 11, 2012 Order.

FACTS

This legal malpractice action stems from an earlier suit involving both a claim against Appellants for a real estate commission in connection with a contract that was not closed, and Appellants' third-party claim against the purchaser for breach of that contract. The background facts[1] are as follows. On September 29, 2006, Appellant Scott Lemons ("Lemons"), a licensed real estate broker, entered into an agreement to purchase a parcel of real property (the "Property") from John Delduca for $1.4 million (the "Delduca Contract"). (R. pp. 356–365.) On September 27, 2006, Lemons signed an agreement committing to pay a 10% commission to Tom Naomi ("Naomi") and C.S.E. Enterprises, Inc. d/b/a Re/Max at the Coast ("Re/Max") if Naomi "procure[d] a party ready, willing and able to purchase" the Property. (R. p. 74.) Thereafter, Naomi introduced Kenny Hyatt ("Hyatt") to Lemons. (R. p. 410.)

On October 28, 2006, Appellant Gold Coast Resorts, LLC ("Gold Coast"), a company in which Lemons is and was the sole member, entered into a contract to sell the Property to Hyatt for $2.9 million (the "Hyatt Contract"). (R. pp. 81–86.) On that same date, Lemons drafted and signed an additional commission agreement agreeing to pay Re/Max a 10% commission upon the close of the Hyatt Contract. (R. p. 87.) The Hyatt Contract provided that the transaction would be closed on or before November 23, 2006 and stated that "**Time is of the essence**." (R. p. 81 ¶ 3.) The Hyatt Contract contained no provision by which the closing date could be extended. (R. p. 82 ¶ 12.)

[1] These facts are deemed to be correct for purposes of a Rule 56 Motion and for this appeal, although McNair would not have conceded the correctness of all of them in a contested trial.

Neither Gold Coast nor Lemons ever acquired title to the Property from Delduca, Gold Coast never tendered performance under the Hyatt Contract, and the November 23, 2006 closing date under the Hyatt Contract passed without a closing occurring. (R. p. 188, lines 15–16; p. 191, lines 23–25; R. p. 376 ¶ 18.) Thereafter, Naomi and Re/Max sued Lemons and Gold Coast claiming that they had produced a buyer (i.e., Hyatt) and thus were entitled to their commission under the commission agreement. Represented by McAdams, Lemons and Gold Coast answered and filed a third-party complaint against Hyatt alleging breach of contract and seeking specific performance of the Hyatt Contract. (R. pp. 373–384.)

On April 11, 2008, the parties mediated the underlying case. McAdams attended the mediation on behalf of Gold Coast and Lemons. Lemons was not present. At the mediation, McAdams signed an agreement by which Gold Coast and Lemons agreed to settle their claim against Hyatt for $5,000. (R. pp. 392–393.) On May 8, 2008, McAdams mailed Lemons a document entitled prominently "MUTUAL RELEASE" and asked Lemons to review it and contact him. (R. pp. 394–396.) Lemons claims not to have received this letter and the enclosed Mutual Release. (R. p. 216, line 20–p. 217, line 2.)

Two weeks later, on May 21, 2008, Lemons signed the Mutual Release at McNair's Myrtle Beach office. (R. p. 197, line 20–p. 198, line 4.) Lemons signed twice – once for himself and once on behalf of Gold Coast. (R. pp. 397–399.) Lemons' signature includes his own interlineation as to his position with Gold Coast. (Id.) Lemons admits signing the Mutual Release; however, Lemons claims that he had not known of the mediation, that he did not know of the settlement with Hyatt at the time he signed the Mutual Release, that he did not read the Mutual Release prior to signing it, and that he

would not have signed it if he had read it first. (R. p. 218, line 16–p. 219, line 24; R. p. 214, lines 10–16; R. p. 220, line 23–p. 221, line 1.) Lemons received and kept the $5,000 settlement paid by Hyatt. (R. p. 230, line 18–p. 231, line 17.)

On June 10, 2008, Naomi and Re/Max's claim against Lemons and Gold Coast went to trial before the Honorable J. Stanton Cross, Jr. McAdams represented Lemons and Gold Coast at the trial and Lemons was present throughout and testified. (R. p. 234, line 14–p. 235, line 13.) Hyatt was not present and, prior to the trial, Appellants understood that their claim against Hyatt had been settled. (R. p. 222, line 11–p. 223, line 1; R. p. 234, line 11–p. 237, line 3.) On June 18, 2008, Judge Cross entered an order and judgment in favor of Naomi and Re/Max in the amount of $270,000, which represented 10% of the purchase price in the Hyatt Contract. (R. pp. 400–403.) On June 26, 2008, McAdams filed a Motion to Alter or Amend the Judgment on Lemons' and Gold Coast's behalf. (R. pp. 405–406.)

McAdams' employment with McNair ended in early August of 2008 and, on August 12, 2008, McNair sent Lemons a letter informing him that McAdams had resigned and asking Lemons to instruct McNair concerning the further handling of his open matters. (R. pp. 407–408.) Lemons instructed McNair to forward his files to attorney Thomas C. Brittain ("Brittain"). (Id.) There is no evidence that prior to that time Lemons made any effort to terminate McAdams as counsel for Gold Coast or himself.

In November of 2008, Brittain filed a memorandum in support of the Motion to Alter or Amend that McAdams had filed on behalf of Lemons and Gold Coast. (R. pp. 409–414.) The memorandum stated that "[a]fter mediation of this matter, in April of

2008, Kenny Hyatt agreed to pay [Lemons and Gold Coast] $5,000 in exchange for a Release from the parties and a Dismissal from the case." (R. p. 409.)

The Honorable Ralph P. Stroman was assigned to hear the Motion to Alter or Amend. On December 10, 2008, Judge Stroman issued an order amending Judge Cross's order and overturning the judgment in favor of Naomi and Re/Max. (R. pp. 415–418.) Judge Stroman held that the Hyatt Contract was "null and void." (R. p. 417.) Judge Stroman's order also found, based upon the statement in the Memorandum in Support of the Motion to Alter or Amend filed on behalf of Lemons and Gold Coast, that "[p]rior to the hearing before Judge Cross, Mr. Hyatt paid [Lemons and Gold Coast] Five Thousand Dollars ($5,000) in exchange for a release from the parties and a dismissal from the case." (R. p. 416.)

Naomi and Re/Max appealed, and in their brief before this Court Lemons and Gold Coast stated that "[o]n May 21, 2008, all parties entered into a settlement agreement whereby Mr. Lemons agreed to dismiss Mr. Hyatt from the lawsuit in exchange for $5,000." (R. p. 428.[2]) By order dated June 7, 2011, this Court affirmed Judge Stroman's order. (R. pp. 419–422.) This Court's opinion also stated that "Hyatt settled with Lemons for $5,000." (R. p. 420.) Neither Lemons or Gold Coast challenged Judge Stroman's ruling that the Hyatt Contract was null and void.

Material Facts

Out of that background, only eight facts are relevant to this appeal. These facts are uncontested and dispositive:

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[2] The trial court considered the November 20, 2009 brief in granting summary judgment in favor of McNair. (R. pp. 117–118.) Moreover, this Court can take judicial notice of its own docket. Sloan v. Greenville County, 380 S.C. 528, 537, 670 S.E.2d 663, 668 (Ct. App. 2008).

1. Neither Lemons nor Gold Coast had title to the Property on the closing date. (R. p. 188, lines 15–16; R. p. 191, lines 23–25.)

2. Lemons and Gold Coast each signed the Mutual Release. (R. p. 197, line 20–p. 198, line 4; R. pp. 397–399.)

3. Lemons and Gold Coast cashed the settlement check for $5000, kept the proceeds, and never offered to return the money. (R. p. 230, line 18–p. 231, line 17.)

4. In their memorandum in support of Motion to Alter or Amend Judgment, Appellants represented to Judge Stroman that "Hyatt agreed to pay . . . [Appellants] $5,000 in exchange for a Release from the parties and a Dismissal from the case." (R. p. 409.)

5. Judge Stroman ruled that the Hyatt Contract was "null and void." (R. p. 417.)

6. Judge Stroman further found that "the parties were aware [that the claim against Hyatt had been settled] and recovered money from and released Mr. Hyatt." (R. p. 417.)

7. Appellants thereafter intentionally used the order finding that the Hyatt Contract was null and void to their benefit and did not appeal or otherwise challenge that finding in any way. (R. pp. 415–418; R. pp. 419–422.)

8. Appellants repeatedly represented to the lower court and to this Court that the case with Hyatt was settled, and never reserved any rights with respect thereto. (R. p. 409; R. pp. 428, 431.)

The straightforward application of established legal principles to these uncontested facts compelled the lower court to grant summary judgment to McNair.

In their initial brief, Appellants attempt to distract from these dispositive facts by referring to matters that are wholly irrelevant to the grounds on which the trial court granted summary judgment. For example, Appellants state that "McAdams told Lemons that he should not settle his case for under one million dollars." (Appellants' Br. 4.) This allegation, even if true, is immaterial to the issues before the Court. Appellants did not sue McNair for giving erroneous advice about the value of the case, but only for allegedly

settling it without Appellants' consent. (Appellants' Br. 6–7.) Additionally, Appellants contend that Lemons' "failure to close [on the Delduca Contract] was not an issue at trial or on appeal" in the underlying case. (Appellants' Br. 6.) Again, this allegation is irrelevant. As is addressed in detail below, the standard for deciding the underlying case is objective and Appellants' failure to acquire title should have been dispositive of the claim against Hyatt. Further, Appellants complain that the trial court's order states "that Lemons 'claims not to have read' the release." (Appellants' Br. 7.) This complaint is curious because the trial court accepted that allegation by Lemons as true and analyzed the case as if Lemons had not read the mutual release.

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a factfinder." Singleton v. Sherer, 377 S.C. 185, 197-98, 659 S.E.2d 196, 203 (Ct. App. 2008). When reviewin g an order granting summary judgment, this Court applies the same standard that governs the trial court under Rule 56(c), SCRCP. Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Ellis v. Davidson, 358 S.C. 509, 517, 595 S.E.2d 817, 821 (Ct. App. 2004) (citing cases); Rumpf v. Mass. Mut. Life Ins. Co., 357 S.C. 386, 392, 593 S.E.2d 183, 186 (Ct. App. 2004) (citing cases). "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." Quail Hill, LLC v. County of Richland, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010).

"Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on the mere allegations or denials contained in the pleadings." Singleton, 377 S.C. at 197-98, 659 S.E.2d at 203. Instead, "[t]he nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Id. at 198, 659 S.E.2d at 203. "It is not sufficient for one to create an inference that is not reasonable or an issue of fact that is not genuine." Evans v. Stewart, 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct. App. 2006). "Although summary judgment is a drastic remedy which should be cautiously invoked, where a verdict is not reasonably possible under the facts presented, summary judgment is proper." Id.

Applying this standard to the present case, this Court should affirm the trial court's order granting summary judgment in favor of McNair.

ARGUMENT

Appellants' sole cause of action in this case is for legal malpractice, which they described as follows:

> McNair Law Firm, while representing the Plaintiff, breached the standard of care, and was negligent by settling a valuable claim for less than it was worth without the knowledge or permission of their client.

(R. p. 44; see also Appellants' Br. 6–7.) Appellants have not alleged that McNair failed to represent them adequately in Naomi's suit against them.

Under South Carolina law, a plaintiff in a legal malpractice action must establish four elements: "(1) The existence of an attorney-client relationship; (2) A breach of duty by the attorney; (3) Damage to the client; and (4) Proximate cause of the plaintiff's damages by the breach." Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions, 388 S.C. 394, 402, 697 S.E.2d 551, 555 (2010) (citing Rydde v. Morris, 381 S.C. 643, 647, 675 S.E.2d 431, 433 (2009)). In establishing proximate cause in a South Carolina legal malpractice action, the plaintiff must establish that the attorney's negligence was a "but for" cause of the plaintiff's damages. See Eadie v. Krause, 381 S.C. 55, 64, 671 S.E.2d 389, 393 (Ct. App. 2008).

As is discussed in detail below, Appellants' legal malpractice case against McNair fails as a matter of law on four separate and independent grounds. First, Appellants' breach of contract claim against Hyatt in the underlying case should not have succeeded, and therefore had no value. Because Appellants' claim in the underlying case had no value, the allegedly unauthorized settlement of that claim did not, as a matter of law, proximately cause Appellants any damage. Second, in the underlying case seeking a commission from Appellants in connection with the Hyatt Contract, the court denied that

relief because the Hyatt Contract was null and void. Having not appealed that finding, Appellants are bound by it and are collaterally estopped from asserting in this action that the Hyatt Contract was valid and enforceable. Third, even if the settlement of Appellants' claim against Hyatt in the underlying case were unauthorized, Appellants ratified the settlement through their acceptance of the benefits of the settlement and their repeated affirmations of the settlement to this Court and to the court in the underlying case. Finally, Appellants are bound by the mutual release they executed in the underlying case.

The order for summary judgment was proper if even one of these four grounds is correct. All of these grounds are correct, however, and the trial court correctly granted McNair's Motion for Summary Judgment. This Court should affirm.

I. The Trial Court Correctly Ruled that Appellants' Claim in the Underlying Case for Breach of Contract, in Which Appellants Had Contracted to Sell Real Property, was Barred as a Matter of Law Because Appellants Did Not Have Title to the Property on the Closing Date.

A. The case within the case standard.

"The plaintiff in a legal malpractice action must prove a 'case within a case,' as he or she must prove the merits of the underlying case as part of the proof of the malpractice case." 7A C.J.S. Attorney & Client § 331; see also Summer v. Carpenter, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997) ("[A] plaintiff must show she most probably would have been successful in the underlying suit if the attorney had not committed the alleged malpractice."). The "case within a case" concept is "often employed to explain the causal relationship between the attorney's breach of duty and the harm suffered by the client." Wilburn Brewer, Jr., Expert Witness Testimony in Legal Malpractice Cases, 45 S.C. L. Rev. 727, 731 (1994). The case within a case doctrine is relevant when, as here, "the

theory of the malpractice case places the merits of the underlying litigation directly at issue." Eastminster Presbytery v. Stark & Knoll, No. 25623, 2012 WL 723331, at *2 (Ohio Ct. App., March 7, 2012).

"Under the case-within-a-case concept, the test is objective. Therefore, the test is not what the outcome *would have been*, but rather what it *should have been*." Doe v. Howe, 367 S.C. 432, 444 n.18, 626 S.E.2d 25, 31 n.18 (Ct. App. 2005) (citing Brewer, 45 S.C. L. Rev. at 766); see also Ambriz v. Kelegian, 146 Cal. App. 4th 1519, 1531 (Cal. Ct. App. 2007) ("The case-within-a-case or trial-within-a-trial approach applied in legal malpractice cases is an objective approach to decide what *should have been the result* in the underlying proceeding or matter.") (Emphasis supplied by court); Iacono v. Hicken, 265 P.3d 116, 129 (Utah Ct. App. 2011) ("A legal malpractice action necessarily presents a 'case within a case,' and requires the reviewing court to establish what the result of the underlying litigation *should have* been (an objective standard), not what a particular judge or jury *would have* decided (a subjective standard).") (Emphasis supplied by court). "The question of the success of the underlying claim . . . is a question of law." Doe, 367 S.C. at 442, 626 S.E.2d at 30. Because the question of the success of the underlying claim is a question of law, "decision of that question on summary judgment motion is appropriate." Manning v. Quinn, 294 S.C. 383, 386, 356 S.E.2d 24, 25 (1988).

B. Appellants' claim for breach of contract should not have succeeded.

In order to prevail in their case against McNair, Appellants had to prove that they should have been successful in the underlying case against Hyatt. The uncontested facts establish as a matter of law, however, that Appellants did not have a viable claim for breach of contract against Hyatt. Accordingly, Appellants do not have a valid malpractice

claim against McNair and the trial court correctly granted summary judgment in McNair's favor.

At the time a seller enters into a contract to convey real estate, the seller is not required to have title to the property he intends to sell. Searles v. Auld, 118 S.C. 430, ___, 111 S.E. 785, 785 (1922). Under the "American Rule," "a purchaser cannot, prior to the time fixed by the contract for conveyance, complain that a seller's title is deficient or encumbered." Wolken v. Wade, 406 N.W.2d 720, 723 (S.D. 1987). Thus, Gold Coast was legally entitled to enter into a contract to sell property that it did not own at the time the contract to sell was executed.

However, at the time for performance, the seller must have title to the property as a condition of enforcing the contract to sell it. See, e.g., Leiter v. Eltinge, 54 Cal. Rptr. 703, 710 (Cal. Ct. App. 1966) ("Ordinarily a vendor need not have any title at the time he contracts to sell real property, if, at the time set for performance, he is able to furnish the title he agreed to convey."). "[T]he [purchaser] may rightfully insist . . . that the title be perfect at the time fixed by the contract for final performance." Wolken, 406 N.W.2d at 723-24.

A real estate contract, like the Hyatt Contract, that provides that a deed shall be delivered to the buyer at the closing in exchange for the specified purchase price, creates what the law regards as dependent concurrent conditions.[3] A concurrent condition is "an elliptical expression for a condition precedent where performances are due at the same time." Restatement (First) of Contracts § 251 (2012). "Since concurrent conditions

[3] Appellants contend that the term "dependent concurrent conditions" is a rule of law "created" by the trial court. (Appellants' Br. 10). This contention is incorrect. Multiple authorities cited within the trial court's order and in this brief expressly recognize the concept of "dependent concurrent conditions."

protect both parties, courts endeavor, so far as possible in light of the expressed intention of the parties, to construe performances of mutual promises as concurrent conditions." 15 Williston on Contracts § 44:20 (4th ed. 2011); Am. Nat'l Bank of Winter Haven, Fla. v. Caldwell, 166 S.C. 194, __, 164 S.E. 613, 615 (1932) ("It is the tendency of the courts to construe the undertakings of the parties to such contracts as being dependent, unless a contrary intention clearly appears."); 35 A.L.R. 108 ("It is a fundamental rule that in contracts for the sale and purchase of real property the undertakings of the respective parties are considered to be dependent unless a contrary intention clearly appears [and where] the acts to be done are concurrent the covenants are dependent.").

When a contract contains dependent concurrent conditions, as the Hyatt Contract did, the law is clear that a party may sue for breach only if that party was prepared to perform at the designated time. As the South Carolina Supreme Court explained:

> Where the covenants are dependent and concurrent neither party can recover against the other without a performance or offer to perform on his part, unless performance shall be excused or rendered impossible by the other party. Hence, if a [purchaser] wishes to compel the vendor to fulfill his contract, he must make his part of the agreement precedent, and cannot proceed against the other without an actual performance of the agreement, on his part, or a tender and refusal.

Bishop v. Tolbert, 249 S.C. 289, 300, 153 S.E.2d 912, 918 (1967). This is the well established "American Rule," and applies to both parties to the transaction. Under this rule, a seller must tender the title to the property as a condition precedent to enforcement of the agreement against the purchaser. "[W]here all or part of the performances to be exchanged under an exchange of promises are due simultaneously, it is a condition of each party's duty to perform that the other party either render or with manifested present

ability to do so, offer performance of his or her part of the simultaneous exchange." 15 Williston on Contracts 43:31 (4th ed. 2011) (emphasis added). The rule also provides that when neither party is able to perform at the specified closing date, and the contract provides, as here, that time is of the essence, the contract becomes void upon the expiration of the time set for closing and both parties' duty to perform is discharged at that time. See Nadeau v. Beers, 440 P.2d 164, 166 (Wash. 1968) (holding that when an agreement makes time of the essence, fixes a termination date, and there is no conduct giving rise to waiver or estoppel, the agreement becomes "legally defunct" on the termination date if performance is not tendered); Pittman v. Canham, 2 Cal. App. 4th 556, 559-60 (Cal. Ct. App. 1992) ("The failure of both parties to perform concurrent conditions during the time for performance results in a discharge of both parties' duty to perform."); 15 Williston on Contracts 43:31 (4th ed. 2011) ("After the time fixed by the contract . . . the conditions become impossible of performance, so the contract must be considered discharged."); Restatement (Second) of Contracts § 238 (1981) (noting that until a party has made an offer of performance "the other party is under no duty to perform, and if both parties fail to make such an offer, neither party's failure is a breach").

In the present case, neither Lemons nor Gold Coast acquired title to the Property. (R. p. 188, lines 15–16; R. p. 191, lines 23–25.) Gold Coast therefore did not have the ability to tender title to Hyatt on or before the date required by the Hyatt Contract. Because time was expressly made of the essence in the Hyatt Contract, the failure of both parties to tender performance by the specified closing date resulted in the discharge of both parties' duties under that contract. Therefore, neither Hyatt nor Gold Coast could

hold the other in default and there was no breach of contract. Because there was no breach, Appellants' claim against Hyatt was worthless and should have been dismissed.

In their brief, Appellants raise several arguments in an attempt to avoid the inevitable conclusion that their case against Hyatt had no value. None of those arguments is availing. First, Appellants cite an internal McNair memorandum dated May 18, 2007. (Appellants' Br. 9; R. pp. 453–454.) As an initial matter, the conclusion reached in the McNair memorandum is irrelevant because the only issue is what *should have happened as a matter of law* in the underlying case against Hyatt. Doe, 367 S.C. at 444 n. 18, 626 S.E.2d at 31 n. 18. However, even if the McNair memorandum is relevant, it supports McNair's position in this case. The memorandum states that "if [Gold Coast] can acquire title *by the time performance is due* in the contract between [Gold Coast] and Hyatt, then Hyatt cannot rescind the contract." (R. p. 454.) (Emphasis added.) Again, neither Lemons nor Gold Coast had title to the Property at the time performance of the Hyatt Contract was due. As a result, Appellants did not have a breach of contract claim against Hyatt.

Second, Appellants correctly rely on Searles, 118 S.C. at ___, 111 S.E. at 785—a case cited in the May 18, 2007 McNair memorandum—for the proposition that "not having title to property *at the time of a contract* for sale is not sufficient to indicate an impossibility of compliance." (Emphasis added.) Searles also states, however, that "[i]f the title is defective . . . *but such defects are cured at the time fixed for performance*, a rescission will not be permitted." Id. at 787 (Cothran, J., concurring) (emphasis added). Thus, while a party may contract to sell property he does not own, he must "cure the defects," *i.e.*, "own the property," at the time fixed for closing in order to sue the purchaser for breach.

Third, Appellants suggest that Hyatt repudiated the contract and thus relieved Appellants of any duty to purchase the Property because doing so would be a "futile act." (Appellants' Br. 9–12). This argument is incorrect for at least two reasons. First, repudiation is a notice, given some period of time prior to a date fixed for performance of a contractual obligation, that the party giving notice does not have the intention or ability to perform. See, e.g., Franconia Assocs. v. U.S., 536 U.S. 129, 143 (2002) ("[T]he promisor's renunciation of a contractual duty *before* the time fixed in the contract for performance is a repudiation.") (citing 4 A. Corbin, Contracts § 959 (1951)) (emphasis supplied by court). Appellants do not and cannot cite to any evidence in the record indicating that Hyatt informed Appellants prior to the closing date that he would not be performing under the contract. Lemons testified that he never spoke with Hyatt at all. (R. p. 149.) The record contains two references to the timing of Hyatt's notice to Appellants that he was unable to perform, and neither supports a finding of repudiation. One, Appellants' own pleadings in the underlying case allege that Hyatt told Naomi, who was Lemons' agent, that Hyatt intended to close with Gold Coast. (R. p. 376 ¶ 18.) Two, Appellants state that "*[A]t the time of performance*, Mr. Hyatt indicated he was not able to go forward on his contract [and] Mr. Lemons did not go through with the purchase of the property *once he learned that Hyatt did not intend to honor his contract.*" (Appellants' Br. 9–10 (emphasis added).) Because neither statement reflects any pre-closing communication of an inability or unwillingness to close, Hyatt did not repudiate the contract.

Second, even if Hyatt had informed Appellants prior to the closing date that he did not intend to perform under the contract, the law nonetheless still required Appellants

to acquire title to the Property in order to maintain a breach of contract action against Hyatt. In arguing that Appellants did not have to obtain title because that would be a futile act in light of Hyatt's alleged repudiation, Appellants confuse the concepts of "tender of performance" and "readiness, willingness, and ability to perform." A tender of performance is "an offer to perform, [which] stands as a substitute for performance; that is to say, performance is imputed to that party who offers to perform." Jackson v. Rogers, 111 S.C. 49, ___, 96 S.E. 692, 693 (1918). The concept of "tender of performance" is distinct from readiness, willingness, and ability to perform. "Offering to perform does not establish the ability to perform, nor does having the ability to perform demonstrate a tender of that ability." DiGiuseppe v. Lawler, 269 S.W.3d 588, 599 (Tx. 2008). While a tender of performance may be "excused in the case where an obligee has manifested to the obligor that any tender made would not be accepted," Lewes Inv. Co., LLC v. Estate of Graves, No. 2893-VCG, 2013 WL 508486, at *12 (Feb. 12, 2013), readiness, willingness, and ability to perform is never excused. See, e.g., Empire Props., Inc. v. Equireal, Inc., 674 A.2d 297, 305, n.5 (Pa. 1996) ("While one party's breach of a contract may render the other party's tender of performance a futile act, it does not relieve the other party of the burden of proving its ability to perform under the contract."); Kane v. Borthwick, 96 P. 516, 518 (Wash. 1908) ("[T]o excuse a failure to make an actual tender, there must be an existing capacity to perform, coupled with a state of facts which establishes the futility of making the tender."); Frostar Corp. v. Malloy, 823 N.E.2d 417, 428 (Mass. Ct. App. 2005) (citing 9 A. Corbin § 978 (2002) ("The requirement that a party claiming breach of contract establish its ability to perform as a condition to recovery rests on the straightforward principle that a party claiming deprivation of the

benefit of a contract must show that it was in a position to obtain the benefit of the contract, but for the breach.")).

The record establishes, and Appellants acknowledge (Appellants' Br. 10), that they were never ready, willing, and able to perform because they never had title to the Property they had contracted to convey. Appellants argue that they were "ready, willing and able to obtain title to the property prior to Hyatt's breach of contract." (Id.) (emphasis added). However, the law requires more than that to support a claim for breach of contract. Because Appellants were never ready, willing and able to perform the contractual obligations they owed to Hyatt, the trial court was correct in granting summary judgment in McNair's favor. This Court should affirm the summary judgment in favor of McNair on that basis.

II. The Trial Court Correctly Granted Summary Judgment to Respondent Because Appellants Were Bound as a Matter of Law by the Prior Judicial Ruling that the Contract at Issue in the Underlying Case was Null and Void.

Judge Stroman found that the Hyatt Contract was "null and void." (R. p. 417.) Based on that key finding, Judge Stroman relieved Appellants from the $270,000 judgment previously entered against them in favor of Naomi and Re/Max. (R. pp. 415–418.) Appellants never challenged or appealed Judge Stroman's finding that the Hyatt Contract was null and void and, in fact, actively encouraged this Court to affirm Judge Stroman's order. (R. pp. 425–440.) This Court affirmed Judge Stroman's order without modifying the finding that the Hyatt Contract was null and void. (R. pp. 419–422.) As a result, Appellants are bound by the finding that the Hyatt Contract was null and void and are collaterally estopped from arguing otherwise. Simply put, Appellants cannot have it both ways—asking one court to grant them relief because the Hyatt Contract was null and

void and asking another court to grant them relief because the same contract was enforceable.

Collateral estoppel "'prevents a party from re-litigating an issue in a subsequent suit which was actually and necessarily litigated and determined in a prior action.'" Crosby v. Prysmian Commc'ns Cables & Sys., USA, LLC, 397 S.C. 101, 108, 723 S.E.2d 813, 816-17 (Ct. App. 2011) (quoting Aaron v. Mahl, 381 S.C. 585, 592, 674 S.E.2d 482, 486 (2009)). Collateral estoppel prevents the relitigation of issues "regardless of whether the claims in the first and subsequent lawsuits are the same." Carolina Renewal, Inc. v. South Carolina Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009); see also Aaron, 381 S.C. at 593, 674 S.E.2d at 486 (holding that because respondent raised the issue of the validity of an assignment to the Indiana circuit court and respondent's position was rejected by that court and not appealed by respondent, the respondent "[c]learly . . . should have been collaterally estopped from making the same argument about the Assignment to the South Carolina courts").

"A party claiming preclusive effect under collateral estoppel must demonstrate that the particular issue was '(1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.'" Crosby, 397 S.C. at 109, 723 S.E.2d at 817 (quoting Carolina Renewal, 385 S.C. at 554, 684 S.E.2d at 782). "While the traditional use of collateral estoppel required mutuality of parties to bar relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issues." Carolina Renewal, 385 S.C. at 554, 684 S.E.2d at 782; Zurcher v. Bilton, 379 S.C. 132, 135, 666

S.E.2d 224, 226 (2008) ("The doctrine may not be invoked unless the precluded party has had a full and fair opportunity to litigate the issue in the first action.").

The issue of the validity of the Hyatt Contract was actually litigated in the underlying case; and the finding, that the Hyatt Contract was null and void, was directly determined in the underlying case and was necessary to support the judgment in favor of Appellants in the underlying case and the attendant appeal. Because the Hyatt Contract was null and void, Appellants could not have recovered against Hyatt in the underlying case. As a result, Appellants are collaterally estopped from recovering against McNair on a claim premised on the validity and enforceability of the Hyatt Contract. The trial court correctly granted summary judgment in McNair's favor on this ground, and this Court should affirm the trial court's order.

III. The Trial Court Correctly Granted Summary Judgment to Respondent Because Appellants Ratified the Settlement Agreement in the Underlying Case.

Even assuming that Appellants did not authorize the settlement of the underlying lawsuit, the uncontested facts establish as a matter of law that Appellants ratified the settlement agreement by their subsequent conduct and by their repeated affirmations to the courts of both the fact and the amount of the Hyatt settlement.

Ratification is "the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent." Lincoln v. Aetna Cas. & Sur. Co., 300 S.C. 188, 191, 386 S.E.2d 801, 803 (Ct. App. 1989); Brazell Bros. Contractors v. Hill, 245 S.C. 69, 74, 138 S.E.2d 835, 837 (1964) ("Ratification . . . is the adoption by one person of an act done or bargain made for him by another under such circumstances that he would not have been

bound but for his subsequent assent."). "Ratification of an agent's acts applies only to acts beyond the scope of his agency." 23 S.C. Jur. Agency § 87 (citing Sparkman v. Supreme Council of the Am. Legion of Honor, 57 S.C. 16, 21, 35 S.E. 391, 397 (1900)).

"One asserting ratification must establish the following three elements: (1) acceptance by the principal of the benefits of the agent's acts, (2) the principal's full knowledge of the facts, and (3) circumstances or an affirmative election demonstrating the principal's intent to accept the unauthorized arrangements." Stiltner v. USAA Cas. Ins. Co., 395 S.C. 183, 191, 717 S.E.2d 74, 78 (Ct. App. 2011) (citing Lincoln, 300 S.C. at 191, 386 S.E.2d at 803). The relationship between client and attorney is predicated on that of principal and agent. See 7A C.J.S. Attorney & Client § 220.

While silence or mere failure of the principal to repudiate the act does not necessarily constitute ratification, ratification is apparent when "'the silence or acquiescence in question cannot be explained on any other theory than that of ratification.'" Stiltner, 395 S.C. at 191-92, 717 S.E.2d at 78 (quoting 2A C.J.S. Agency § 71 (2003)). "'The authority of an attorney, or a ratification of his unauthorized acts, may be inferred from circumstances, as for instance, from the silent acquiescence of the client for a long period, or from the client's acceptance and retention of the fruits of the unauthorized act of the attorney.'" Foxworth v. Murchinson Nat'l Bank, 136 S.C. 458, __, 134 S.E. 428, 431 (1926) (quoting 2 R.C.L., p. 977). Where there is a relationship between principal and agent, such as attorney and client, the presumption of ratification arising from silence is strong. See Hinson v. Roof, 128 S.C. 470, ___, 122 S.E. 488, 490 (1924).

In this case, all of the elements of ratification are present and the trial court correctly granted summary judgment in McNair's favor on that issue. First, Appellants had full knowledge of the facts, as demonstrated by their admission that at some time before the trial of Naomi's claim, Appellants knew the claim against Hyatt had been settled. (R. p. 222, line 11–p. 223, line 1.) Second, Appellants as principals accepted the benefits of the settlement of the underlying case. The record establishes conclusively that Appellants received and kept the $5,000 paid by Hyatt. (R. p. 230, line 18–p. 231, line 17.) Following the trial with Naomi, Appellants made no effort to avoid the settlement or to rescind the release and continued to keep the settlement proceeds. (R. p. 234, lines 5–10.) Third, Judge Cross's order plainly recites that Appellants had settled their claims against Hyatt for $5,000 (R. p. 401), but Appellants never moved to set aside the settlement or otherwise re-open the case against Hyatt even after receiving that order. Those actions, taken together, comprise "silent acquiescence" that is sufficient to establish ratification. See Foxworth, 136 S.C. at ___, 134 S.E. at 431.

However, this case does not hinge on silent acquiescence, because Appellants knowingly and actively obtained the benefit of that settlement multiple times. For example, Appellants represented to Judge Stroman—in support of their motion to alter or amend the judgment entered against them—that their claims against Hyatt had been settled for $5,000. (R. p. 409.) Appellants thereafter accepted the benefit of Judge Stroman's order relieving them of the Naomi judgment, which again recites that the claims against Hyatt were settled for $5,000. (R. p. 416.) When Naomi appealed, Appellants then represented to this Court that their claims against Hyatt had been settled for $5,000. (R. pp. 428, 431.) Thereafter, Appellants accepted the benefits of this Court's

order which affirmed Judge Stroman's order granting judgment in their favor. (R. p. 420.) Appellants' actions, silence, acquiescence in, and adoption of the settlement are only explainable as full acceptance of the settlement. The trial court was correct in holding that Appellants ratified the settlement agreement.

In their brief, Appellants make two arguments to support their contention that they did not ratify the settlement agreement. Neither argument is sound. First, Appellants claim that McAdams' misrepresentations concerning the contents and effect of the mutual release prevented Appellants from having full knowledge of the facts. (Appellants' Br. 14.) However, the alleged misrepresentations, assuming that they occurred, would only have prevented short-term knowledge of the contents of the mutual release and did not conceal other facts concerning the settlement. The record establishes conclusively that there were many other patently obvious facts that revealed the settlement of the case, none of which led Appellants to take any action to try to set the settlement aside. Moreover, the record establishes that by the time Appellants filed their memorandum in support of the motion to set aside the judgment entered in favor of Naomi, Appellants knew they had settled with Hyatt for $5,000. That document, submitted by Brittain as counsel for Appellants, states as much. (R. p. 409.) With that knowledge, Appellants kept the settlement proceeds and repeatedly affirmed the settlement through representations to the courts.

Second, in arguing that the trial court's finding of ratification was erroneous, Appellants rely on Crowley v. Harvey & Battey, P.A., 327 S.C. 68, 488 S.E.2d 334 (1997), to contend that Appellants may retain the benefits of the settlement agreement with Hyatt and still maintain a malpractice cause of action against McNair. Appellants'

reliance on Crowley is misplaced. The dispositive authority for the issue in this case is L.F.S. Corp. v. Kennedy, 287 S.C. 162, 337 S.E.2d 209 (1985), as discussed in Crowley. Kennedy controls on the facts of this case and the trial court was correct in ruling that Appellants' cause of action fails as a matter of law.

In Kennedy, a client sued its lawyer alleging that the lawyer failed to follow the client's instructions concerning settlement negotiations and permitted summary judgment to be entered based on an unauthorized agreement. 287 S.C. at 163, 337 S.E.2d at 210. The court found that, despite the lawyer's alleged failure to follow his client's instructions, the client was barred from suing the lawyer because the client ratified its lawyer's actions by accepting funds pursuant to the settlement agreement and taking action to enforce the agreement. Id. These facts are very similar to the present case, in which Appellants allege that McAdams acted without authority, yet Appellants accepted the funds and repeatedly cited the agreement to Judge Stroman and to this Court in aid of an argument to reverse the judgment in favor of Naomi and Re/Max.

In Crowley, a client sued her lawyer alleging that the lawyer was negligent in advising her in settling the property division issues in her divorce action. 327 S.C. at 70, 488 S.E.2d at 334. The lawyer relied on Kennedy and argued that, by accepting settlement funds and suing to enforce the agreement, the client had ratified the agreement. Id. at 70, 488 S.E.2d at 335. The court distinguished Kennedy, noting that in Kennedy "the malpractice claim was premised on allegations that the attorney had exceeded his authority in settling the client's case [and] *despite knowledge of this problem*, the client ratified its attorney-agent's acts by accepting the benefits of the settlement." Id. (Emphasis in original). The court found that the claim in Crowley was

"entirely different" from the claim in Kennedy in that the claim in Crowley concerned "the adequacy of the attorneys' advice to their client." Id. at 71, 488 S.E.2d at 335. The court thus held that "where . . . the settlement itself cannot be attacked and the issue is not one of agency but of negligence, the fact the client has accepted the benefits of the settlement and judicially sought to enforce its terms are not bars to maintenance of a malpractice claim." Id.

Thus, two distinct legal principles emerge from Kennedy and Crowley. If, on the one hand, the basis for the client's legal malpractice claim is that the lawyer was negligent in advising the client concerning settlement, then the client's signing the settlement agreement and accepting settlement funds do not constitute ratification that bars suit against the lawyer. Crowley, 327 S.C. at 71, 488 S.E.2d at 335. If, on the other hand, the basis of the client's legal malpractice claim is that the lawyer exceeded his authority in settling the client's case, then accepting settlement funds and affirming the settlement agreement constitutes ratification and bars suit against the lawyer. Kennedy, 287 S.C. at 163-64, 337 S.E.2d at 210.

This distinction is very logical. Ratification relates to the principal-agent relationship and not to negligence. When, as in Kennedy, the lawyer-agent purports to contract with a third person on behalf of the client-principal, the client-principal can confirm the lawyer-agent's authority to do so by acts of ratification or can disclaim the lawyer-agent's authority by not performing acts of ratification. In contrast, the lawyer's authority to commit the client is never an issue when the client commits itself directly, even when that action is in reliance on negligent advice from the lawyer. Under those

circumstances, Crowley confirms that a ratification theory would not preclude a suit against the lawyer.

The trial court was correct in ruling that this case is controlled by Kennedy and not by Crowley. Crowley cannot be applicable because Appellants allege only that McAdams settled Appellants' claim against Hyatt without Appellants' authority (Appellants' Br. 6–7.) For this reason, Kennedy is directly on point.

The uncontested facts establish as a matter of law that Appellants ratified the settlement with Hyatt and the trial court correctly granted summary judgment in favor of McNair on that basis. This Court should affirm the judgment of the trial court.

IV. The Trial Court Correctly Granted Summary Judgment to Respondent Because Appellants Were Bound by the Mutual Release They Executed.

It is well established under South Carolina law that a "person who can read is bound to read an agreement before signing it." Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2000) (citing Hood v. Life & Cas. Ins. Co. of Tenn., 173 S.C. 139, 175 S.E. 76 (1934); see also Burwell v. South Carolina Nat'l Bank, 288 S.C. 34, 39, 340 S.E.2d 786, 789 (1986). Thus, "[a] person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it." Wachovia Bank v. Blackburn, 394 S.C. 579, 585, 716 S.E.2d 454, 458 (Ct. App. 2011) (quoting Regions Bank v. Schmauch, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003); J.B. Colt Co. v. Britt, 129 S.C. 226, ___, 123 S.E.2d 845, 847 (1924) ("[O]ne cannot avoid a written contract into which he has entered on the ground that he did not attend to its terms, that he did not read the document which he signed, that he supposed it was different in its terms, or that it was mere form.") "A person signing a document is

responsible for reading the document and making sure of its contents." Wachovia Bank, 394 S.C. at 585, 716 S.E.2d at 458 (quoting Regions Bank, 354 S.C. at 663, 582 S.E.2d at 440). "One who signs a written instrument has the duty to exercise reasonable care to protect himself." Id.

A party cannot simply rely on the representation of others as to the contents of a written document, even when that person is in a fiduciary relationship. See Marion Partners, LLC v. Weatherspoon & Voltz, LLP, 716 S.E.2d 29, 31 (N.C. App. 2011) (finding that plaintiff's attorney owed plaintiff a duty to explain the consequences of a document, but holding that "this duty does not relieve [plaintiff] from her own duty to ascertain for herself the contents of the contract she was signing."). Under South Carolina law, "the right to rely upon representations as to the contents of a written instrument must be determined in the light of the duty on the part of the representee to use reasonable prudence and diligence under the particular circumstances for his own protection." Parks v. Morris Homes Corp., 245 S.C. 461, 466-67, 141 S.E.2d 129, 132 (1965); see also Florentine Corp, Inc. v. PEDA I, Inc., 287 S.C. 382, 386, 339 S.E.2d 112, 114 (1985). "What constitutes reasonable prudence and diligence with respect to reliance upon a representation in a particular case and the degree of fault attributable to such reliance will depend upon the various circumstances involved, such as the form and materiality of the representation, the respective intelligence, experience, age, and mental and physical condition of the parties, the relation and respective knowledge and means of knowledge of the parties, etc." Id. at 467, 141 S.E.2d at 132; Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 474, 581 S.E.2d 496, 504 (Ct. App. 2003) ("[T]he precedent in South Carolina is to look to the totality of circumstances to determine whether reliance was justified.")

While the question of reasonableness is, in most circumstances, a question of fact, courts have recognized that in appropriate circumstances a court may find a party's conduct unreasonable as a matter of law and may grant summary judgment on that basis. See, e.g., Schnellmann v. Roettger, 368 S.C. 17, 21, 627 S.E.2d 742, 745 (Ct. App. 2006) (finding reliance on approximation of square footage contained in property listing unreasonable as a matter of law); Caplan v. Ochsner Clinic, LLC, 799 F. Supp. 2d 648, 656-57 (E.D. La. 2011) (finding reliance on an oral representation that was inconsistent with the terms of a contract unreasonable as a matter of law). In this case, the uncontested facts establish conclusively that Appellants are bound by the Mutual Release and the trial court was correct in granting summary judgment on that ground.

First, Appellants admit that Lemons executed the two-page Mutual Release. (R. p. 197, line 20–p. 198, line 4.) In fact, Lemons executed the Mutual Release twice, once in his individual capacity and once on behalf of Gold Coast. (R. p. 398.) Second, Appellants claim that Lemons failed to read the Mutual Release (R. p. 219, lines 22–24), even though Lemons did read enough of the Mutual Release to insert, in his own writing, the capacity in which he was executing on behalf of Gold Coast. (R. p. 398.) Third, by his own account, Lemons is an experienced real estate broker who has been involved in "[o]ver two hundred million [dollars] in real estate transactions in [the] past 10 years." (R. p. 423.) The Mutual Release is only a two-page document conspicuously titled "MUTUAL RELEASE," and the first sentence clearly sets out that Appellants are releasing their claims against Hyatt in exchange for payment of $5,000. (R. pp. 397–399.) Fourth, Lemons clearly could have understood the contents of the Mutual Release because he testified that he would not have signed it if he had read it. (R. p. 220, line 23–

p. 221, line 1.) Appellants are charged with knowledge of the contents of the Mutual Release and cannot claim that they were misled by their attorney as to its contents. See, e.g., Doub v. Weathersby-Breeland Ins. Agency, 268 S.C. 319, 326, 233 S.E.2d 111, 114 (1977) ("It is well settled in this State that one cannot complain of fraud in the misrepresentation of the contents of a written instrument in his possession when the truth could have been ascertained by his reading the instrument."). The trial court correctly held that Appellants were bound by Lemons' signatures on the Mutual Release and could not avoid the Mutual Release or claim misrepresentation as to its contents. This Court should affirm summary judgment in favor of McNair on that basis.

CONCLUSION

The trial court was correct in finding that Appellants' legal malpractice claim against McNair fails as a matter of law. Each of the trial court's four bases to grant summary judgment is sufficient, by itself, to withstand this appeal. However, the record demonstrates that Appellants should not prevail on any of them. Even taken in the light most favorable to Appellants, the facts illustrate conclusively that Appellants suffered no damages as a result of any act or omission of McNair. Accordingly, this Court should affirm the order of the trial court granting summary judgment in favor of McNair.

[Signature Page Follows]

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October 3, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 10-CP-26-9113
Appellate Case No.: 2012-213156

Scott Lemons and Gold Coast Resorts, LLC.....Appellant,

v.

The McNair Law Firm, P.A.....Respondents.

PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent McNair Law Firm by hand delivery on October 7, 2013 on the Appellant, addressed to its attorney of record, Mark W. Hardee, The Hardee Law Firm, 2301 Devine Street, Columbia, South Carolina 29205.

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The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR

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