

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

R. Lawton McIntosh, Circuit Judge

Appellate (Court of Appeals) Case No. 2016-001653

William Rice Cook, III, ...Petitioner,

v.

Benny Richard Phillips, Jr., and the real property located at 207 North Avenue,
Anderson, SC 29625 TMS # 123-26-08-02.....Respondents.

APPENDIX

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

William Rice Cook, III, Appellant,

v.

Benny Richard Phillips, Jr. and the real estate property
located at 207 North Avenue, Anderson, South Carolina
29625, TMS# 123-26-08-02, Respondents.

Appellate Case No. 2016-001653

Appeal From Anderson County
R. Lawton McIntosh, Circuit Court Judge

Unpublished Opinion No. 2018-UP-470
Submitted October 1, 2018 – Filed December 19, 2018

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

Daniel L. Draisen, of Krause Moorhead & Draisen, PA,
of Anderson; Timothy Alan Nowacki, of The Clardy Law
Firm, P.A., of Greenville; and Andrew Sims Radeker, of
Harrison, Radeker & Smith, P.A., of Columbia, all for
Appellant.

Michael F. Mullinax, of Mullinax Law Firm, P.A., of
Anderson, for Respondent.

PER CURIAM: William R. Cook, III appeals a circuit court order granting summary judgment to Benny R. Phillips, Jr. on Cook's causes of action for unjust enrichment, conversion, constructive trust, and partition, and canceling a lis pendens on a parcel of Phillips's real property (the Property).

In its order, the circuit court ruled Cook's claims were barred by section 62-3-803 of the South Carolina Code (Supp. 2018) (setting a time limit on the filing of "claims against a decedent's estate"), and it granted summary judgment on that ground. However, Cook's claims were brought against Phillips in his individual capacity, not against the estate of Phillips's grandmother or Phillips in any representative capacity. Accordingly, section 62-3-803 is inapplicable to this action. Nonetheless, we affirm the grant of summary judgment to Phillips on Cook's conversion, constructive trust, and partition claims on other grounds. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

First, summary judgment is appropriate on the conversion claim because Cook alleged Phillips converted improvements to the Property, a parcel of real estate. *See Owens v. Andrews Bank & Tr. Co.*, 265 S.C. 490, 496, 220 S.E.2d 116, 119 (1975) ("Conversion has been defined in our case law as an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the exclusion of the owner's rights."); *Hawkins v. City of Greenville*, 358 S.C. 280, 297, 594 S.E.2d 557, 566 (Ct. App. 2004) ("It is well settled that a conversion action does not lie when alleging the exercise of dominion or control over real property."); *id.* ("Therefore, to the extent [a] conversion claim pertains to the actions of [a party] with respect to real property, the claim clearly fails as a matter of law."). Next, summary judgment is appropriate on the constructive trust claim because Phillips did not acquire the Property through "fraud, bad faith, abuse of confidence, or violation of a fiduciary duty." *Lollis v. Lollis*, 291 S.C. 525, 529, 354 S.E.2d 559, 561 (1987); *see id.* ("A constructive trust will arise whenever the circumstances under which property *was acquired* make it inequitable that it should be retained by the one holding the legal title." (emphasis added)).

Because Cook's constructive trust claim fails, and Cook has no other cognizable legal or equitable interest in the property, summary judgment is also appropriate on the partition claim. *See* S.C. Code Ann. § 15-61-10(A) (Supp. 2018) (allowing "joint tenants and tenants in common" to request partition "of . . . lands, tenements and hereditaments"); S.C. Code Ann. § 15-61-50 (2005) (allowing the court of

common pleas to order the partition of "real and personal estates held in joint tenancy or in common"). Similarly, because Cook has no interest in the Property, we affirm the circuit court's cancellation of the lis pendens. See S.C. Code Ann. § 15-11-10 (2005) (allowing the filing of a lis pendens "[i]n an action affecting the title to real property"); *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 17, 567 S.E.2d 881, 889 (Ct. App. 2002) ("Where no real property is implicated, . . . a notice of pendency of action need not be filed."); *Carolina Park Assocs., LLC v. Marino*, 400 S.C. 1, 9, 732 S.E.2d 876, 880 (2012) ("Because Appellants have failed to state a claim for a constructive trust, they have no claim affecting the title to real property and the lis pendens is not 'authorized by this chapter.' We therefore affirm the cancellation of the lis pendens.").

However, because Cook pled and presented facts supporting each element of his unjust enrichment claim, and a genuine issue of fact exists regarding Phillips's liability to Cook under this theory of recovery, summary judgment was improper and we reverse and remand for further proceedings on that claim. See *BPS, Inc. v. Worthy*, 362 S.C. 319, 324, 608 S.E.2d 155, 158 (Ct. App. 2005) ("When reviewing the grant of a summary judgment motion, the appellate 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.").

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.¹

HUFF, SHORT, and WILLIAMS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Judge

Appellate Case No. 2016-001653

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William Rice Cook, III,.....Appellant,

v.

Benny Richard Phillips, Jr., and the real property located at 207 North Avenue,
Anderson, SC 29625 TMS # 123-26-08-02.....Respondents.

PETITION FOR REHEARING OR REHEARING *EN BANC*

The Appellant, William Rice Cook, III, hereby respectfully moves and petitions, pursuant to Rules 219 and 221(a), SCACR, as well as all other applicable law, for an order granting rehearing or rehearing *en banc* in this case as to certain issues and submits the memorandum below in support of the same.

In its opinion issued on December 19, 2018, this court made the right decision in reversing and remanding the unjust enrichment claim against Respondent Phillips (hereinafter "Phillips") for trial. The court, however, should have remanded other claims and should have reversed the cancellation of this lis pendens. Appellant (hereinafter, sometimes, "Cook") respectfully submits that the court may have overlooked or misapprehended certain points in this case, as the following shows:

- I. For a constructive trust claim to lie, Phillips was not required to have *acquired* the property through inequitable conduct, and the court should have reversed as to the constructive trust cause of action.

The court ruled that “summary judgment is appropriate on the constructive trust claim because Phillips did not acquire the Property through ‘fraud, bad faith, abuse of confidence, or violation of a fiduciary duty.’” (Opinion Dec. 19, 2018, quoting Lollis v. Lollis, 291 S.C. 525, 529, 354 S.E.2d 559, 561 (1987).)

Respectfully, the court overlooked authority cited and quoted in Cook’s briefs that states that a constructive trust may apply in a situation in which a person *holds* or *retains* property under such circumstances. “A constructive trust arises against one who by fraud, actual or constructive, by duress or abuse of confidence, by commission of a wrong or by any form of unconscionable conduct, artifice, concealment, or questionable means and against good conscience, either has obtained *or holds the right to* property which he ought not in equity and good conscience hold and enjoy.” Halbersberg v. Berry, 302 S.C. 97, 106, 394 S.E.2d 7, 13 (Ct. App. 1990) (emphasis added). The *obtaining* does not have to be the bad act in order for a constructive trust to be imposed; rather, the *holding* of the property can be the bad act. Id.; accord Smith v. S.C. Ret. Sys., 336 S.C. 505, 529, 520 S.E.2d 339, 352 (Ct. App. 1999) (quoting SSI Medical Servs., Inc. v. Cox, 301 S.C. 493, 500, 392 S.E.2d 789, 793-94 (1990) (constructive trust may be imposed when a party obtains a benefit “which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it, as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty”). This is borne out by the Supreme Court’s decision in Briggs v.

Richardson, 273 S.C. 376, 256 S.E.2d 544 (1979), in which heirs brought an action against another heir to impose a constructive trust on properties that passed through the estate of their mother. The plaintiffs had not contested the will during the time period allowed and, similarly to this case, title to property had passed by operation of law. Id. The heirs were not included in the will, but they alleged that the heir who was also personal representative of their mother's estate repeatedly reassured the plaintiffs that he would divide the property equitably as per their mother's wishes. Id. On the basis that the plaintiffs had adequately alleged a cause of action for constructive trust, the Supreme Court upheld the trial court's decision to deny the defendant's motion to dismiss. Id. Briggs recognized the properly pleading of a constructive trust where it was alleged that a bad actor *held* property under circumstances justifying a constructive trust, even though he did not *obtain* the property through fraudulent means. Id.

If the court's position is that, because Phillips inherited the property by operation of law, he did not *acquire* the property through such inequitable means, that will not bar the trial court on remand from recognizing a constructive trust, since there is evidence that Phillips *holds* the property under circumstances justifying the imposition of a constructive trust, as the record demonstrates amply. This is consistent with the theory behind constructive trusts generally, that constructive trusts arise "under the broad doctrine that equity regards and treats as done what in good conscience ought to be done" and "the forms and varieties of constructive trusts are practically without limit, such trusts being raised, broadly speaking, *whenever* necessary to prevent injustice." Dominick v. Rhodes, 202 S.C. 139, 149, 24 S.E.2d 168 (1943) (emphasis). "[E]quity is less than demanding and quite flexible in

prescribing the elements essential to a constructive trust.” Whitmire v. Adams, 273 S.C. 453, 458, 257 S.E.2d 160, 163 (1979). Under existing precedent, none of which Phillips challenged and none of which this court’s opinion purports to overrule, a constructive trust is a remarkably flexible remedy, applicable whenever inequitable circumstances call for it. Id.; Dominick, 202 S.C. at 149; Halbersberg, 302 S.C. at 106. Whitmire, Dominick, Smith, SSI Medical, Briggs, and Halbersberg all remain binding precedent.

Appellant respectfully submits that, in light of that precedent, this court overlooked or misapprehended that *acquisition* of property under inequitable circumstances is not a required element of a constructive trust and that Cook pled and made a factual showing of all of the elements of this cause of action. The court should take another look at this issue.

II. Because Cook had an interest in the property regardless of whether Phillips held it in a constructive trust for him, the court should have reversed as to the partition/equitable title cause of action.

Respectfully, Cook notes that the opinion issued in this case gives short shrift to the analysis of Cook’s partition/equitable title cause of action. The opinion states that “[b]ecause Cook’s constructive trust claim fails, and Cook has no other cognizable legal or equitable interest in the property, summary judgment is also appropriate on the partition claim.” (Opinion Dec. 19, 2018.) There is more to this cause of action than whether Phillips holds the realty subject of this case in a constructive trust for Cook.

As discussed in Cook’s brief, Cook pled, independently of whether there was a constructive trust involved, that “he has acquired an equitable interest in the Property.” (R. p. 22.) Under the facts alleged in the complaint and set forth in Cook’s affidavit,

he did have an equitable interest in the property, particularly when the record is viewed in the light most favorable to him. (R. pp. 14-25, 91-92.) South Carolina case law does not make exactly clear what equitable title is. It appears that equitable title is a significant interest in the property; however, it is an interest that does not carry with it all the incidents of legal title. Lewis v. Premium Investment Corp., 351 S.C. 167, 173 & n. 4, 568 S.E.2d 361 (2002); Brooks v. Council of Co-Owners of Stones Throw Horizontal Property Regime I, 315 S.C. 474, 476-77, 445 S.E.2d 630 (1994); FCX, Inc. v. Long Meadow Farms, Inc., 269 S.C. 202, 206-07, 237 S.E.2d 50 (1977); Dempsey v. Huskey, 224 S.C. 536, 541-42, 80 S.E.2d 199 (1954); cf. Singleton v. Cuttino, 107 S.C. 465, 469, 92 S.E. 1046 (1917); Southern Pole Bldgs., Inc. v. Williams, 289 S.C. 521, 524, 347 S.E.2d 121 (Ct. App. 1986). It would appear to apply where a party has entered into an agreement to sell real estate. Singleton, 107 S.C. at 469 (vendee "equitable owner of the rents and profits of the land"). Its quantum or value may bear a strong relationship to "equity" in the lay or business sense of the word: the amount of the value of an owner's net interest when discounted by the value of other interests in a piece of real property. Lewis, 351 S.C. at 173 n. 4. It can function and operate much as a security interest in land. Dempsey, 224 S.C. at 541-42 (vendee corresponds to mortgagor and vendor to mortgagee, and court may sell property similarly to mortgage foreclosure sale).

Under his agreement with Harden (the previous owner of the property before Phillips), especially as amended, Cook was essentially treated as having purchased the property with a seller-financed mortgage loan that would be repaid upon the property's sale to a third party. (R. pp. 34, 91-92.) The amended sales agreement provides that

“[i]f the property has not sold by October 1, 2006, Cook Construction Co. shall begin paying an interest-only loan at 6.5% on the outstanding principal of \$155,000 until the house sells.” (R. p. 34.) The agreement also called for Cook to maintain insurance coverage and pay utility bills for the property. (R. pp. 31-34.)

Here are echoes of Lewis, 351 S.C. at 171, and Dempsey, 224 S.C. at 541-42, in which long-term, seller-financed land sales arrangements were recognized as corresponding in equity to a mortgagor-mortgagee relationship. As in Singleton, 107 S.C. at 469, Cook was treated under the sales agreement as the land’s equitable owner. Under the sales agreement, Harden, the nominal owner to whose position Phillips has succeeded, was treated as being owed a finite amount of financing money on loan terms, and Cook was treated being entitled to the rest of the sales proceeds, no matter how much they were – just as the owner of a mortgaged house would be upon its sale. Cook was the owner of the property’s “equity” in the lay sense of the word: the amount of the property’s value remaining after paying off Harden’s quasi-mortgage interest in the property. See Lewis, 351 S.C. at 173 n. 4.

When the record is viewed in the light most favorable to Cook, it is apparent that he has equitable title to the subject property – regardless of whether it is subject to a constructive trust. See Lewis, 351 S.C. at 173 & n. 4; Brooks, 315 S.C. at 476-77; FCX, 269 S.C. at 206-07; Dempsey, 224 S.C. at 541-42; Singleton, 107 S.C. at 469; Southern Pole Bldgs., 289 S.C. at 524. As owner of that title interest in the land, Cook is entitled to seek partition of the property. See S.C. Code Ann. § 15-61-10; cf. Dempsey, 224 S.C. at 541-42 (property sold and proceeds divided according to parties’

rights in equitable title scenario). He is at least entitled to some judicial recognition of his interest in the property.

Appellant respectfully submits that this court overlooked or misapprehended that, regardless of whether there is a constructive trust involved here, Cook has an interest in the subject real estate, and the court's conclusion that he does not is incorrect. The court should take another look at this issue, as well.

III. Because there are independent proper bases for a lis pendens in this case, the court should have reversed the trial court's cancellation of the lis pendens.

This court concluded that the trial court properly cancelled the lis pendens in this case "because Cook has no interest in the property[.]" (Opinion Dec. 19, 2018.) As discussed above, Cook must respectfully note that the court's conclusion that he has no interest in this real estate was wrong. Further, as a constructive trust will lie in this case on the facts presented by the record when viewed in the light most favorable to Cook, there are at least two reasons why the court should revisit this issue and reverse the cancellation of the lis pendens.

"[A] lis pendens that meets the statutory requirement for filing may not be canceled during the pendency of litigation." Carolina Park Assocs., LLC v. Marino, 400 S.C. 1, 9, 732 S.E.2d 876, 880 (2012). If, however, "the lis pendens does not 'affect[] the title to real property' as required under § 15-11-10, the lis pendens is not authorized by the statute and the statute does not limit the court's power to cancel it." Id. Here, this action pled at least two causes of action on which, as discussed above, the court should have reversed the trial court and for which a lis pendens is proper.

Not only is a lis pendens appropriate when a plaintiff brings a partition action, it is also appropriate where a plaintiff brings an action for a constructive trust affecting title to real property. Carolina Park Associates, 400 S.C. at 9; Pond Place Partners v. Poole, 315 S.C. 1, 17, 567 S.E.2d 881 (Ct. App. 2002) (proper actions for the filing of a lis pendens include “actions to establish a constructive trust over real estate”).

The court’s opinion also does not mention that this action was brought *in rem* with regard to the property at issue. When actions in rem are brought seeking relief with respect to specific real estate, a lis pendens is proper. See Bush v. Aldrich, 110 S.C. 491, 96 S.E. 922 (1918). While Cook’s constructive trust, partition/equitable lien, and unjust enrichment causes of action were directed at the property as well as at Phillips, even a simple declaration of Cook’s rights with regard to the property, which could occur under what is pled, would make a lis pendens proper in this case.

Upholding the trial court’s cancellation of the lis pendens will allow Phillips to do what he has been trying to do: sell the property that Cook spent his money and time improving and beat Cook out of any cut of the sales proceeds entirely. That is wrong.

Appellant respectfully submits that this court overlooked or misapprehended that the lis pendens Cook filed in this case was a proper one. Granting this petition for rehearing would allow the court to revisit this issue and prevent this injustice.

IV. The court appears to have misapprehended Cook’s argument concerning the conversion cause of action.

The court’s opinion concludes that Cook’s cause of action for conversion will not lie because it is based upon Phillips converting Cook’s improvements to the property. (Opinion Dec. 19, 2018.) With respect, Cook notes a clarification: his

conversion cause of action is based upon Phillips converting the money and items that Cook used up in improving the property.

Appellant respectfully submits that this court overlooked or misapprehended this point, and that the court should take another look at this issue.

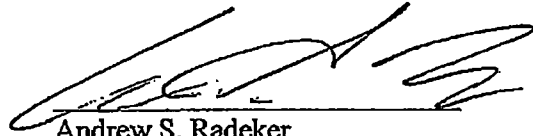
V. Rehearing *en banc* would be proper.

“A hearing or rehearing *en banc* is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.” Rule 219(a), SCACR.

Consideration by the full court appears necessary to secure or maintain the uniformity of its decisions, as well as to ensure adherence to Supreme Court precedent. This is particularly apparent with regard to this court’s decision on the constructive trust cause of action, as noted above.

WHEREFORE Appellant prays for an order granting rehearing or rehearing *en banc* in this case.

Respectfully submitted,



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January 3, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Judge

Appellate Case No. 2016-001653

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SC Court of Appeals

William Rice Cook, III,.....Appellant,

v.

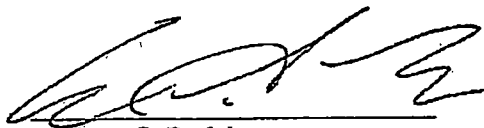
Benny Richard Phillips, Jr., and the real property located at 207 North Avenue,
Anderson, SC 29625 TMS # 123-26-08-02.....Respondents.

PROOF OF SERVICE

I certify that I served the foregoing petition for rehearing or rehearing *en banc*
by depositing a copy of it on the date shown below in the United States Mail, postage
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January 3, 2019


Andrew S. Radeker

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Judge

Appellate Case No.: 2016-001653

William Rice Cook, III Appellant

v.

Benny Richard Phillips, Jr., and the real estate property located at 207 North
Avenue, Anderson, SC 29625 TMS # 123-26-08-02 Respondent

RETURN TO PETITION FOR REHEARING OR REHEARING *EN BANC*

The Appellant either mistakenly or has intentionally, misread the quote from the case of Halbersberg v. Berry 302 S.C. 97, 106, 394 S.E. 2d 7, 13 (Ct. App. 1990). The Appellant misinterprets the Court's ruling in Briggs v. Richardson 273 S.C. 376, 256 S.E. 2nd 544 (1979). The Appellant cites the following from Halbersberg v. Berry 302 S.C. 97, 106; 394 S.E. 2nd 7, 13 (Ct. App. 1990) as his basis for claiming a constructive trust.

"A constructive trust arises against one who by fraud, actual or constructive, by commission of a wrong, or by any form of unconscionable conduct artifice... or questionable means and against good conscience, either has obtained or currently holds the right to property (emphasis added) which he ought not in equity and good conscience hold and enjoy."

There is no distinction between either "has obtained" or "holds the right" which affects the meaning of the phrase.

A constructive trust arises when the circumstances under which property was acquired (emphasis added) make it inequitable that it should be retained by the one holding legal title. Lollis v. Lollis, 291 S.C. 525, 354 S.E.2d 559 (1987). Halbersberg v. Berry, 302 S.C. 97, 106, 394 S.E.2d 7, 13 (Ct. App. 1990).

A constructive trust arises because the Defendant has, by bad acts, obtained title to property, or holds the right to property. (In the case before the Court, Phillips holds title by will of the decedent, without any actions on his part). It is the "bad act" that creates the remedy of a constructive trust, and the attempt by the Appellant to twist the words and meaning of those words, does not in actuality change the law, or the meaning of the words. The actions of the Defendant in Briggs, supra constituted a "fraud". Therefore the argument by the Appellants is specious and is wrong.

Phillips obtained and held the right to the property by virtue of operation of law. Phillips had no input into the Will of the decedent. He did not commit any bad act, nor was he holding title by virtue of any bad act. To state that this case is similar to Briggs v. Richardson, supra is misleading, incorrect, and an outrageous interpretation of the holding in that case. The Appellant's attempt to differentiate between obtaining and holds is specious, unreasonable, and unsound.

There is no situation before the Court, or that has been alleged by Cook, "where money [or property] has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust, or the violation of a fiduciary duty". See Appellant's Brief, page 2.

There are no bad acts committed by Phillips which led to him obtaining or holding the right to property. The right to property is the Deed of Distribution to the

property. Appellant continues to say "holds the property". It is more properly, "holds the right to property." The cases quoted by the Appellant Cook have no precedential value for the legal argument asserted. The actual quote as stated in Dominick v. Rhodes 202 S.C. 139, 24 S.E. 2d 168 (1943) as opposed to that stated in Appellant's Brief, page 3 is as follows:

" a constructive trust will arise whenever the circumstances under which property was acquired (emphasis added) make it inequitable that it should be retained by him who holds the legal title, as against another, provided some confidential relation exists between the two (emphasis added) and provided the raising of a trust is necessary to prevent a failure of justice. So, as has been said, the forms and varieties of constructive trusts are practically without limit, such trusts being raised, broadly speaking, whenever necessary to prevent injustice."

Therefore, there must be a bad act by the Defendant which results in the holding of title to the property. The only act resulting in Phillips holding the title to the property, is the will of the decedent, Claudia Harden. The misstatements of the Appellant are myriad in the Motion.

All of the cases cited by the Appellant on page 4 of the Brief contain fact situations which describe bad acts of the Defendant against whom the constructive trust is sought to be imposed. There were no bad acts by Phillips that permitted him to have title to the property in question. The Court did not overlook nor did the Court misapprehend the fact that Phillips' acquisition of the property was without any action his part. The Court did not overlook or misapprehend the fact that Phillips legally, openly, and equitably held title to the property by the Will of the decedent and by operation of the law. The holding of this Court should stand.

II. Because Cook had an interest in the property regardless of whether Phillips held it in a constructive trust for him, the Court should have reversed as to the partition/equitable title cause of action.

Appellant's Brief attempts to define and redefine "equitable title." The allegations of the Complaint and Cook's Affidavit are full of self-serving conclusions, not facts. The Defendant appears to be attempting to relate his claim of "equitable title" to an agreement which was purportedly signed by Claudia Harden. The Appellant attempts to define his right of "interest" to agreements between he and Claudia Harden which would clearly be barred by the non-claim statute, S.C. Code §62-3-801, 803 et seq. and has nothing to do in any way whatsoever with his purported action against Philips.

The Trial Court was consistently right in dismissing any attempt by this Appellant to base his claim on matters which were barred by the non-claim statute, S.C. Code §62-3-801, 803 et seq. Any action or purported cause of action that this Appellant may have had against Harden to establish his assertion of an "interest" is now and forever barred. There is and cannot be any interest in property or "equitable lien" to be established by Appellant because it would have had to have been established against Harden, who is the only person who is alleged to have had any "agreement" concerning the property, and any work alleged by the Appellant on the property, and if that in fact had existed, the Appellant Cook would have had to raise it against the Estate of Harden.

Cook continues to beat a dead horse with no basis in truth. The only injustice in the case before the Court is the wrongful allegations and acts of Cook in an attempt to assert a claim against a deceased person who cannot speak for herself. There is no injustice in dismissing the false claims of Cook in this case. The injustice would be the

opposite.

The Trial Court's holding as to the fact that the claim against Harden is barred, contains all of the precedent necessary to show that there is no substance in Cook's argument as to whether or not he acquired an interest in the property. The only "interest" that could have been acquired from Harden who is deceased and Cook's claims, if any he had against Harden, are barred by the non-claim statute (S.C. Code of Laws §62-3-801 et seq.)

- III. Because there are independent proper bases for a *lis pendens* in this case, the Court should have reversed the Trial Court's cancellation of the *lis pendens*.**
- IV. The Court appears to have misapprehended Cook's argument concerning the conversion cause of action.**
- V. Rehearing *en banc* would be proper.**

This Court properly addressed in its Order and dismissed the conversion claim. In addition, there can be no claim of any legal or equitable interest in the property based upon the fact that no constructive trust claim can arise and likewise, Cook cannot claim any equitable lien or other so-called "interest" in the property, because to do so, he would have to rely on a claim against the decedent's estate which is barred by the non-claim statute. The Appellate Court's Order succinctly addresses these issues and should stand because without an interest in the property, there can be no *Lis Pendens*.

Cook has no right to a constructive trust. Cook has no right or basis for an "interest" in the property. Cook has no right to file a *Lis Pendens*, because he does not have any interest in the property under any logical, reasonable, common sense interpretation of the law before the Court, as set forth in the Respondent's Brief and the

Order of the Appellate Court.

The Order of this Court should be upheld in its entirety. No rehearing is justified based upon the Motion. Further, the Motion on the Petition should be barred, based upon Rule 221(c).

Respectfully submitted,

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ATTORNEY FOR THE RESPONDENT

January 16, 2019

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Judge

Appellate Case No.: 2016-001653

William Rice Cook, III Appellant

v.

Benny Richard Phillips, Jr., and the real estate property located at 207 North
Avenue, Anderson, SC 29625 TMS # 123-26-08-02 Respondent

PROOF OF SERVICE

I certify that I have served the Return to Petition for Rehearing or Rehearing *En Banc* in the above matter on the Appellant, William Rice Cook, III, by depositing a copy of same in the United States Mail, postage prepaid, on January 16, 2019, addressed to his attorneys of record, as follows:

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January 16, 2019

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JAN 18 2019

January 16, 2019

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: William Rice Cook, III v. Benny Richard Phillips, Jr.
and the real estate property located at 207 North Avenue,
Anderson, SC 29625, TMS #123-26-08-02
Appellate Case No.: 2016-001653

Dear Ms. Kitchings:

Enclosed for filing, please find the original and seven copies of the Return to Petition for Rehearing or Rehearing *En Banc* in regard to the above matter.

Also enclosed is my original and two copies of my Proof of Service, indicating that a copy of the Return has been served on Mr. Andrew S. Radeker, Mr. Daniel L. Draisen, and Mr. Timothy Nowacki, Attorneys for the Appellant.

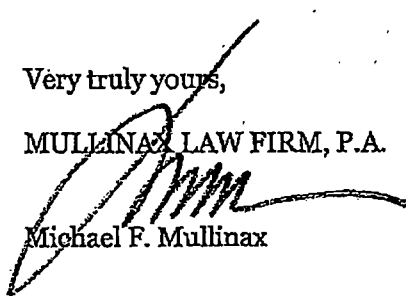
I would appreciate your returning clocked copies of the above documents to me in the self-addressed, stamped envelope I have provided.

Thank you for your assistance in this matter.

With kindest regards, I am

Very truly yours,

MULLINAX LAW FIRM, P.A.


Michael F. Mullinax

MFm/lcm
Enclosures.

cc: Mr. Andrew S. Radeker
Mr. Daniel L. Draisen
Mr. Timothy Nowacki

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Judge

Appellate Case No. 2016-001653

RECEIVED
JAN 22 2019
SC Court of Appeals

William Rice Cook, III,.....Appellant,

v.

Benny Richard Phillips, Jr., and the real property located at 207 North Avenue,
Anderson, SC 29625 TMS # 123-26-08-02.....Respondents.

REPLY TO RETURN TO PETITION
FOR REHEARING OR REHEARING *EN BANC*

The Appellant, William Rice Cook, III, hereby respectfully submits this reply to Respondent Phillips (hereinafter "Phillips")'s return to Appellant (hereinafter, sometimes, "Cook")'s petition for an order granting rehearing or rehearing *en banc* in this case as to certain issues and submits the memorandum below in support of the same.

- I. The precedent of Briggs and the plain language of Halbersberg show that constructive trusts are not limited to circumstances in which a bad actor *acquires* property under inequitable circumstances – and they should not be so limited.

Despite Phillips' insistence to the contrary, in a case that has not been overruled by the court's opinion in this case or in any other, this court observed, quite correctly,

that “[a] constructive trust arises against one who by fraud, actual or constructive, by duress or abuse of confidence, by commission of a wrong or by any form of unconscionable conduct, artifice, concealment, or questionable means and against good conscience, *either has obtained or holds the right to* property which he ought not in equity and good conscience hold and enjoy.” Halbersberg v. Berry, 302 S.C. 97, 106, 394 S.E.2d 7, 13 (Ct. App. 1990) (emphasis added). This court certainly has no need for Cook or any litigant to expound upon the meaning of the words *either* and *or*. This plain language from Halbersberg speaks for itself. No published opinion of this court or of the Supreme Court has ever stated that a constructive trust cannot lie where a party holds, but did not acquire, property “by fraud, actual or constructive, by duress or abuse of confidence, by commission of a wrong or by any form of unconscionable conduct, artifice, concealment, or questionable means and against good conscience[.]” Id.

Further, if there were any doubt about whether the above-quoted language from Halbersberg means what it says, that doubt would be dispelled by reference to the Supreme Court’s opinion in Briggs v. Richardson, 273 S.C. 376, 256 S.E.2d 544 (1979), in which, as discussed in the petition for rehearing, the Court recognized the proper pleading of a constructive trust where it was alleged that a bad actor *held* property under circumstances justifying a constructive trust, even though he did not *obtain* the property through fraudulent means. Id. In Briggs, the alleged bad actor obtained the property, as Phillips did here, through inheritance by operation of law. Id. The Supreme Court’s opinion in Briggs is binding precedent.

Lastly, imposing such a technical requirement of *acquisition* onto existing constructive trust law is antithetical to the spirit that has animated the law of constructive trusts. As discussed in the petition for rehearing, "equity is less than demanding and quite flexible in prescribing the elements essential to a constructive trust[.]" Whitmire v. Adams, 273 S.C. 453, 458, 257 S.E.2d 160, 163 (1979), and constructive trusts arise, "broadly speaking, *whenever* necessary to prevent injustice." Dominick v. Rhodes, 202 S.C. 139, 149, 24 S.E.2d 168 (1943) (emphasis added). The situation in the instant case is a situation that a constructive trust is *for*, and prior cases reveal that a rigid formalism is properly brushed aside in favor of equity's demands. See Whitmire, 273 S.C. at 458; Dominick, 202 S.C. at 149.

Most respectfully, Cook must note that this court appears to have decided Cook's appeal as to this cause of action on the basis of an element of a constructive trust that does not exist and which would contravene the flexibility that is one of the marks of this equitable remedy. See Whitmire, 273 S.C. at 458; Dominick, 202 S.C. at 149; Halbersberg, 302 S.C. at 106.

II. This court has already rejected the argument that any of Cook's causes of action in this case are barred by the probate non-claim statute.

Phillips again argues that Cook's cause of action relating to whether he has an interest in the title to the property is barred by the probate non-claim statute, citing S.C. Code Ann. § 62-3-801 and -803. Cook simply notes that this court has already rejected that argument and, correctly, held that the probate non-claim statute is not applicable to this case.

III. Phillips is the proper person with whom Cook should litigate issues about the nature and quantum of his interest in the property.

In addition, it is plain that, unlike what Phillips argues in his return, it is Phillips, not the Estate of Claudia Harden, who is the proper party against whom claims about Cook's interest in the property should be asserted. As Phillips has been quick to point out throughout this case, at the moment of Harden's death, Phillips obtained what been Harden's interest in the property. S.C. Code Ann. § 62-3-101. Accordingly, Phillips, and not Harden's estate, is exactly the party with whom such matters should be litigated.

IV. Rule 221(c), SCACR, does not bar Cook's petition for rehearing.

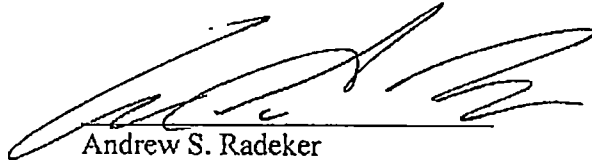
At the end of Phillips' return, he states that the petition for rehearing "should be barred, based on Rule 221(c)." Rule 221(c), SCACR, provides that "[t]he appellate court will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party's appeal." Cook's petition for rehearing arises from this court's opinion on the merits of this appeal, not from this court's decision on a motion or petition. Cook is at a loss to see how Rule 221(c), SCACR, could bar his petition for rehearing.

V. The strength of Phillips' invective does not make up for the weakness of his position.

Cook has tried to sift through the vituperation in Phillips' return to find what Phillips' arguments are, and Cook has addressed them above. The rest of Phillips' return appears to be an *ad hominem* diatribe that "only shows the paucity of [Phillips'] own reasoning." Huntington Beach City Council v. Superior Ct., 115 Cal. Rptr. 2d 439, 448, 94 Cal. App. 4th 1417, 1430 (Cal. App. 4th 2002).

WHEREFORE Appellant prays for an order granting rehearing or rehearing *en banc* in this case.

Respectfully submitted,



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January 22, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Judge

Appellate Case No. 2016-001653

RECEIVED
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SC Court of Appeals

William Rice Cook, III,.....Appellant,

v.

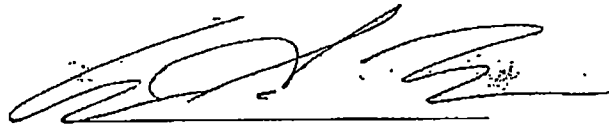
Benny Richard Phillips, Jr., and the real property located at 207 North Avenue,
Anderson, SC 29625 TMS # 123-26-08-02.....Respondents.

PROOF OF SERVICE

I certify that I served the foregoing reply to return to petition for rehearing or
rehearing *en banc* by depositing a copy of it on the date shown below in the United
States Mail, postage prepaid, addressed as follows:

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January 22, 2019



Andrew S. Radeker

The South Carolina Court of Appeals

William Rice Cook, III, Appellant,

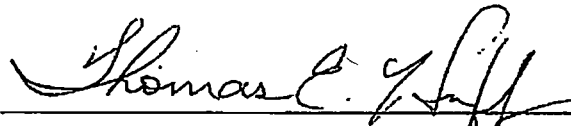
v.

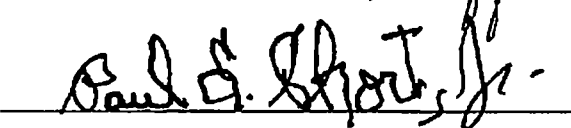
Benny Richard Phillips, Jr. and the real estate property
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29625, TMS# 123-26-08-02, Respondents.

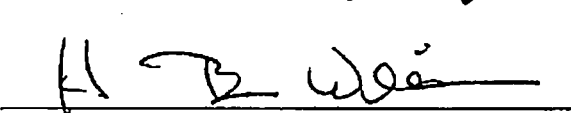
Appellate Case No. 2016-001653

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.


J.


J.

Columbia, South Carolina

cc: Daniel L. Draisen, Esquire
Timothy Alan Nowacki, Esquire
Michael F. Mullinax, Esquire
Andrew Sims Radeker, Esquire
The Honorable R. Lawton McIntosh

FILED
April 9, 2019 s.s.



The South Carolina Court of Appeals

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CLERK

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Re: William R. Cook, III v. Benny R. Phillips
Appellate Case No. 2016-001653

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. See Rule 219, SCACR.

Very truly yours,

V. Clair Allam, Deputy

CLERK

cc: The Honorable R. Lawton McIntosh

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Judge

Appellate Case No. 2016-001653

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William Rice Cook, III,.....Appellant,

v.

Benny Richard Phillips, Jr., and the real property located at 207 North Avenue,
Anderson, SC 29625 TMS # 123-26-08-02.....Respondents.

FINAL BRIEF OF APPELLANT

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John C.P. Goldberg & Robert H. Sitkoff, <u>Torts and Estates: Remedying Wrongful Interference with Inheritance</u> , 65 Stan. L. Rev. 353-354 (2013)	11
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STATEMENT OF ISSUES

- I. Where Appellant's claims were brought against a living individual, not the estate of a decedent, did the circuit court err in ruling that Appellant's claims were barred under the Probate Code's non-claim statute?
- II. Where Appellant pled and made a factual showing of proper claims for the sale of land owned by a living person, did the circuit court err in ruling that Appellant's claims were barred by the executor *de son tort* statutes or otherwise failed?
- III. Where the record shows that Appellant pled and made an evidentiary showing of all essential elements of his claims and the record did not establish any affirmative bar to them, was the Respondent entitled to summary judgment or dismissal on any alternative basis?
- IV. Where Appellant pled proper claims for the sale of real property and made an evidentiary showing to support them, did the circuit court err in canceling the lis pendens filed by Appellant?

STATEMENT OF THE CASE

Appellant, William Rice Cook, III (hereinafter "Cook"), filed a lis pendens, summons, and complaint to begin this case on December 31, 2015. (R. pp. 8-49.) He sued the Respondent, Benny Richard Phillips, Jr. (hereinafter "Phillips"), and, *in rem*, the real property located at 207 North Avenue, Anderson, South Carolina 29625, which has the tax mapping system number 123-26-08-02. (R. p. 14.)

The complaint alleges that Cook, a licensed residential builder, doing business as Cook Construction Co., entered into a contract with the then-owner of the property, Claudia P. Harden (Phillips' grandmother), under which Cook was to renovate and remodel the property and Harden was to sell the renovated and remodeled property, with Harden receiving \$155,000.00 from the sale and Cook receiving the remainder of the sales proceeds. (R. pp. 16, 31-34). The agreement, as amended, provided that if the property remained unsold by October 1, 2006, Cook would "begin paying an interest-only loan at 6.5% on the outstanding principal of \$155,000 until the house sells." (R. p. 34.) Cook completed the renovation and remodeling, and the appraised value of the property rose to \$260,000.00. (R. p. 17.) The complaint alleges that Cook made such payments to Harden for about a year before the property was listed for sale, at which time Cook and Harden "agreed that in lieu of monthly payments the monthly interest amount would be added to the principal amount (of \$155,000.00) and would be paid when the Property sold." (R. p. 17.)

The complaint states that when the economic recession hit around the end of 2008, Phillips' father assumed handling Harden's affairs and unilaterally took the property off the market. (R. p. 17.) Cook discovered this and met with Phillips' father

and then Phillips about it. (R. p. 17.) Both assured him that taking the property off the market was only a temporary measure and that that the property would be re-listed. (R. pp. 17-18.) The complaint specifically notes that Phillips, who was fully aware of the agreement between Cook and Harden, assured Cook “that nothing had changed, the he and his father had decided to put furniture in the home to ‘stage it,’ and that they planned to re-list the Property soon.” (R. pp. 17-18.)

Phillips was later appointed conservator for Harden and, as alleged in the complaint, continued to assure Cook that he knew Cook was owed for his work and that he would be paid for it. (R. pp. 18-19.)

Harden then died on December 3, 2013, without the property being sold and without Cook having been paid for his work. (R. pp. 19, 37-41.) Phillips was appointed as personal representative of Harden’s estate. (R. pp. 19, 37-41.)

Phillips’ father then died on February 11, 2015. (R. p. 19.) The complaint notes that after waiting an appropriate period of time, Cook brought the topic of performing the agreement to sell up to Phillips again, recounting Phillips’ previous assurances. (R. p. 19.) Phillips then stated that the agreement was between his father and Cook and that Cook’s “time was up and nothing could be done about it.” (R. p. 19.)

The property has not been sold; rather, Phillips issued a deed of distribution of the property from Harden’s estate to himself. (R. pp. 19-20, 42-49.) Cook “has never been paid a single cent for the labor, materials and improvements made to the Property.” (R. p. 20.)

Cook's complaint asserts causes of action against Phillips (and the property, *in rem*) that the complaint titled unjust enrichment, conversion, constructive trust/equitable title, and partition. (R. pp. 20-25)

Phillips made a motion to dismiss the complaint pursuant to Rule 12(b)(6), SCRCF, and for summary judgment. (R. p. 50.) Phillips' motion contended that Cook's claims were barred by S.C. Code Ann. §§ 62-3-801 and -803, the statute of limitations, the statute of frauds, and the "Dead Man's Statute," S.C. Code Ann. § 19-11-20. (R. p. 50.) It further sought the imposition of sanctions pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10. (R. p. 50.)

Later, Phillips also moved to quash the lis pendens filed in this case. (R. p. 51.) In that motion, Phillips contended "that the action is for money only[.]" (R. p. 51.)

Cook swore an affidavit, which was submitted on June 7, 2016. (R. pp. 91-93.) The affidavit states the facts alleged in the complaint and also specifically notes the following:

I was never paid anything for the labor, materials, renovations and remodeling work to the property. I did not invest my time and money into this project as a gift. The renovations and remodeling to the property greatly increased its value for which I have not been paid anything. I was repeatedly promised I would receive payment and that the property would be re-listed. I had no reason not to believe Benny Phillips, Jr. and I relied on his word and also his representations as the appointed Conservator and Personal Representative of Mrs. Harden's estate.

(R. p. 92.)

In the days before the motions were set to be heard, the parties both submitted memoranda concerning the motions. (R. pp. 94-114.) The circuit court heard Phillips' motions on June 13, 2016. (R. pp. 56-90.)

By order filed June 24, 2016, the circuit court granted Phillips' motion for summary judgment and ordered the clerk of court to cancel the lis pendens. (R. p. 6.) The court ruled that all of Cooks' claims were barred by the probate non-claim statute, S.C. Code Ann. § 62-3-803, because they were not presented as claims against the estate of Claudia P. Harden within the earlier of one year after her death or eight months from the publication of the notice to creditors in her estate. (R. pp. 3-6.) The court also ruled that the filing of the lis pendens was improper and cancelled it. (R. pp. 5, 6.)

Cook timely moved for the court to reconsider its rulings. (R. pp. 52-55.) The court denied that motion by form order, without a hearing. (R. p. 7.) This appeal followed.

STATEMENT OF FACTS

Phillips promised Cook, repeatedly, that the agreement with Harden would be honored and Cook would be compensated for his significant investment of time and money in the property involved in this case. (R. pp. 16-25, 91-92.) Phillips induced Cook not to file a creditor's claim with Harden's estate, then called time on Cook and distributed the property to himself. (R. pp. 17-20, p. 68 ln. 18-25, p. 87 ln. 6-11, pp. 91-92.) Cook sued the person who did him wrong – Phillips. (R. pp. 14-25.)

STANDARD OF REVIEW

Summary judgment. When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule

56(c), SCRCP. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). That standard is that “summary judgment may be rendered only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of the law.” Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986).

“All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.” Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). If “the parties vehemently dispute the inferences and conclusions to be drawn from the undisputed facts, . . . that simply establishes that summary judgment is not appropriate[.]” Montgomery v. CSX Transp., Inc., 656 S.E.2d 20, 29 (S.C. 2008).

“When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues.” Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008).

In 2009, the South Carolina Supreme Court clarified earlier confusion about whether a scintilla of evidence is sufficient to defeat summary judgment. Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 802-3 (2009). In Hancock, the Court held that “in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” Id. What is required to defeat a summary judgment motion in cases requiring heightened burdens of proof or applying federal law is simply more than a scintilla of evidence. Id.

Motion to dismiss. The ruling on a motion to dismiss under Rule 12(b)(6), SCRCF, for failure to state facts sufficient to constitute a cause of action must be based solely upon the allegations set forth in the pleading. Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601 (1995). “The motion cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. The question is whether in the light most favorable to plaintiff, and with every doubt resolved in her behalf, the complaint states any valid claim for relief.” Dye v. Gainey, 320 S.C. 65, 67-68, 463 S.E.2d 97, 98-99 (Ct. App. 1995). The complaint should not be dismissed even if the court doubts the plaintiff will prevail in the action. Id.

Cancellation of lis pendens. Pursuant to S.C. Code Ann. § 15-11-40, a court may “cancel a lis pendens ‘authorized by this chapter[,]’” i.e., Chapter 11 of Title 15 of the South Carolina Code of Laws, “‘at any time after the action is settled, discontinued, or abated.’ By implication, a lis pendens that meets the statutory requirement for filing may not be canceled during the pendency of litigation.” Carolina

Park Assocs., LLC v. Marino, 400 S.C. 1, 9, 732 S.E.2d 876, 880 (2012). If, however, “the lis pendens does not ‘affect[] the title to real property’ as required under § 15-11-10, the lis pendens is not authorized by the statute and the statute does not limit the court’s power to cancel it.” Id.

ARGUMENT

I. Cook did not sue the Estate of Claudia P. Harden. Cook sued Phillips individually for what Phillips did.

Nowhere does Cook’s complaint say that it was brought against Harden’s estate. (R. pp. 14-49.) Nowhere does Cook’s complaint say that it was brought against Phillips in his capacity as personal representative of that estate. (R. pp. 14-49.) The person who is a defendant in this case is Phillips, individually. (R. p. 14, p. 71 ln. 7-10, p. 76 ln. 9-11, p. 87 ln. 6-11, p. 102.) Nonetheless, the circuit court ruled as though Cook’s complaint had been brought against Harden’s estate, ending Cook’s case because of a statute – S.C. Code Ann. § 62-3-803, referred to as the probate non-claim statute – that sets a time limit for bringing a different kind of claim against a different kind of defendant. (R. pp. 3-6.) This was reversible error.

The Probate Code’s non-claim statute, S.C. Code Ann. § 62-3-803, contains time limits for the presentation of creditors’ claims against an estate. The non-claim statute does not limit, nor does it purport to limit, anything other than the time in which “claims against a decedent’s estate” may be presented. S.C. Code Ann. § 62-3-803(a)&(c). The lower court and Phillips cited a number of authorities and stated that they mean that the non-claim statute bars Cook’s claims against Phillips; however, as Cook’s counsel noted at the hearing, all of those cases concerned claims brought against an estate, not claims brought against an individual. (R. pp. 1-6, p. 74 ln. 14-

15.) For example, the Phillips v. Quick case relied upon by the circuit court concerns claims made against an estate, not claims made against a living individual. 399 S.C. 226, 228, 731 S.E.2d 327, 328 (Ct. App. 2012).

With some exceptions that are noted in the statute, if a “creditor fails to timely present a claim in compliance with the nonclaim statute, the creditor’s right of action *against the estate* is barred.” In re: Estate of Gurnham: Beach First Natl. Bank v. Estate of Gurnham, 407 S.C. 194, 754 S.E.2d 875, 881 (2014)¹ (emphasis added). “The presentation of claims *against an estate* is governed by the probate code.” In re: Estate of Tollison: Anderson Area Med. Ctr., Inc. v. Tollison, 320 S.C. 132, 136, 463 S.E.2d 611, 613 (Ct. App. 1995) (emphasis added). The non-claim statute does not bar actions against living individuals for wrongs those individuals have committed. That, however, was precisely the result the lower court reached in this case. (R. pp. 1-6.)

Underscoring that the General Assembly never intended the non-claim statute to bar actions against living individuals, including individuals who happen to be or to have been personal representatives, are two statutes that dispel any doubt about it. In S.C. Code Ann. § 62-3-808(b), the Probate Code notes that “[a] personal representative is individually liable for obligations arising from ownership or control of the estate or for torts committed in the course of administration of the estate only if he is personally at fault.” That is because, if the person who holds the office of an estate’s personal representative is the individual who committed a legal wrong, he is of course liable himself for the consequences of his own wrongful conduct, just as in other vicarious

¹ This opinion is referred to as “In Re Estate of Hover” in some filings made in the circuit court in this case, probably as a result of it concerning the estate of Margaret Dever Hover Gurnham and Hover being the last name of that estate’s personal representative.

liability situations. See, e.g., Steinke v. Beach Bungee, Inc., 105 F.3d 192, 195-96 (4th Cir. 1997) (corporate owner, director, or officer can be personally liable along with corporation for corporation's tort if that individual participated directly in the tort); Gilbert v. Mid-South Mach. Co., Inc., 267 S.C. 211, 227 S.E.2d 189 (1976); Mackey v. Frazier, 234 S.C. 81, 106 S.E.2d 895 (1959); Long v. Norris & Assocs., 432 S.C. 561, 538 S.E.2d 5 (Ct. App. 2001) (error to dismiss employee as defendant); Thomas v. Delta Enter., Inc., 302 S.C. 351, 396 S.E.2d 122 (Ct. App. 1990) (agent liable in tort). Further, S.C. Code Ann. § 62-1-106² provides as follows:

Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this Code or if fraud is used to avoid or circumvent the provisions or purposes of this Code, any person injured thereby may: (i) obtain appropriate relief against the perpetrator of the fraud and (ii) restitution from any person (other than a bona fide purchaser) benefiting from the fraud, whether innocent or not, but only to the extent of any benefit received. Any proceeding must be commenced within two years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than five years after the time of commission of the fraud. This section has no bearing on remedies relating to fraud practiced on a decedent during his lifetime which affects the succession of his estate.

When it was enacted in 1986, this statute simply adopted the language of Uniform Probate Code § 1-106 word for word. The comment to this section of the Uniform Probate Code reinforces the intent, force, and effect of the section to make clear that the provisions of the Probate Code are not to be used to shield or permit fraud.

It states:

This is an overriding provision that provides an exception to the procedures and limitations provided in

² This Code section was changed by an amendment effective January 1, 2014, but not in any material way. Cook quoted the pre-amendment language in his memorandum. (R. pp. 102-03.)

the Code. The remedy of a party wronged by fraud is intended to be supplementary to other protections provided in the Code and can be maintained outside the process of settlement of the estate.

In adopting this section and enacting it as S.C. Code Ann. § 62-1-106, our legislature intended to allow victims of fraud a remedy despite the time limitations and procedures found elsewhere in the statute, including the non-claim statute. One of the purposes envisioned for this section was to provide relief for persons induced not to bring their claims before the probate court as the result of fraud. See John C.P. Goldberg & Robert H. Sitkoff, Torts and Estates: Remedying Wrongful Interference with Inheritance 65 Stan. L. Rev. 353-354 (2013).

While these statutes and their history illustrate that the legislature did not intend for the non-claim statute to bar a claim against an individual who happened to serve as a personal representative, it is not necessary to resort to them. The plain words of S.C. Code Ann. § 62-3-803 provide that its limits are bars only to “claims against a decedent’s estate[,]” not bars to anything else. “When a statute’s terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning.” Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). When a court interprets a statute, “[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation.” Id. at 499.

With due respect to the lower court, what it did was force a construction of S.C. Code Ann. § 62-3-803 that expanded its meaning to cover claims against Phillips, a living person. (R. pp. 1-6.) This was error, and it is the error on which the circuit

court's entire decision was based. This court should reverse and remand this case for trial.

II. Cook's claims against the land were not against the estate and were not barred.

The circuit court appeared to conceive of Cook's claims against Phillips as sounding under the executor *de son tort* statutes, S.C. Code Ann. § 62-3-619 and -620. (R. pp. 5-6.) For that reason, the circuit court stated that Cook could not maintain an action with regard to the subject property because "actions pursuant to S.C. Code § 62-3-619 and/or actions by virtue of executor *de son tort* 'cannot be levied on the lands of the Testator.' Warren v. Raymond 17 S.C. 163 (1882)." (R. pp. 5-6.) The order then states that "[t]he Defendant received title by operation of law." (R. p. 6.)

Phillips did apparently receive title by operation of law under S.C. Code Ann. § 62-3-101; however, Cook's claims do not sound under the executor *de son tort* statutes. The purpose of the executor *de son tort* statutes is to require an executor *de son tort* to return to the estate, via the personal representative, what he has misappropriated from it or to render judgment in favor of the estate against him for what he has wasted. See S.C. Code Ann. § 62-3-620; Greenfield v. Greenfield, 245 S.C. 604, 615, 141 S.E.2d 920, 926 (1965) ("the language of the statute is clear and reflects an intention by the legislature to authorize the probate court to require an executor *de son tort* to account for assets not wasted or lost by delivering the same to the administratrix"). Cook, however, was not acting on behalf of the estate in bringing this case, and he did not seek the subject property to be returned to the estate. (R. pp. 14-26.) Cook did not seek executor *de son tort* remedies. Further, since the estate had already been closed and a deed of distribution issued to Phillips, the estate no longer

had any interest in the property at all, and there was no estate for anything to be returned to. S.C. Code Ann. § 62-3-101; S.C. Code Ann. § 62-3-907(B). The executor *de son tort* statutes are simply not brought into play by Cook's claims.

Also, Cook pled that "he has acquired an equitable interest in the Property." (R. p. 22.) Under the facts alleged in the complaint and set forth in Cook's affidavit, he did have an equitable interest in the property, particularly when the record is viewed in the light most favorable to him. (R. pp. 14-25, 91-92.) This is important because, even if this court were to view – incorrectly – the property subject of this case as property of Harden's estate, Cook's claims against the property would fall under the exception in S.C. Code Ann. § 62-3-803(d)(1) to the bar of the non-claim statute. That exception provides:

(d) Nothing in this section shall be construed as placing a limitation on the time for:

(1) commencing a proceeding to enforce a mortgage, pledge, lien, or other security interest upon property of the estate[.]

Id.

South Carolina case law does not make exactly clear what equitable title is. It appears that equitable title is a significant interest in the property; however, it is an interest that does not carry with it all the incidents of legal title. Lewis v. Premium Investment Corp., 351 S.C. 167, 173 & n. 4, 568 S.E.2d 361 (2002); Brooks v. Council of Co-Owners of Stones Throw Horizontal Property Regime I, 315 S.C. 474, 476-77, 445 S.E.2d 630 (1994); FCX, Inc. v. Long Meadow Farms, Inc., 269 S.C. 202, 206-07, 237 S.E.2d 50 (1977); Dempsey v. Huskey, 224 S.C. 536, 541-42, 80 S.E.2d 199 (1954); cf. Singleton v. Cuttino, 107 S.C. 465, 469, 92 S.E. 1046 (1917); Southern Pole

Bldgs., Inc. v. Williams, 289 S.C. 521, 524, 347 S.E.2d 121 (Ct. App. 1986). It would appear to apply where a party has entered into an agreement to sell real estate. Singleton, 107 S.C. at 469 (vendee “equitable owner of the rents and profits of the land”). Its quantum or value may bear a strong relationship to “equity” in the lay or business sense of the word: the amount of the value of an owner’s net interest when discounted by the value of other interests in a piece of real property. Lewis, 351 S.C. at 173 n. 4. It can function and operate much as a security interest in land. Dempsey, 224 S.C. at 541-42 (vendee corresponds to mortgagor and vendor to mortgagee, and court may sell property similarly to mortgage foreclosure sale).

Another equitable interest a party may have in property is an equitable lien. “For an equitable lien to arise, there must be a debt, specific property to which the debt attaches, and an expressed or implied intent that the property serve as security for payment of the debt.” Chase Home Finance, LLC v. Risher, 746 S.E.2d 471, 475 (S.C. App. 2013) (internal citations and quotation marks omitted). “Although not judicially recognized until a judgment is entered declaring its existence, an equitable lien relates back to the time it was created by the conduct of the parties.” First Fed. Savings & Loan Assn. of Charleston v. Bailey, 316 S.C. 350, 356, 450 S.E.2d 77, 81 (Ct. App. 1994) (citing Fibkins v. Fibkins, 303 S.C. 112, 116, 399 S.E.2d 158, 160 (Ct. App. 1990)); accord United Carolina Bank v. Caroprop, Ltd., 311 S.C. 376, 381, 429 S.E.2d 197, 199 (Ct. App. 1993), *rev’d on other grounds*. An equitable lien is a security interest in property. Chase Home Finance, 746 S.E.2d at 475.

Cook’s claims against the land were not against the estate and were not barred by any probate code provision or by anything else. The lower court erred reversibly.

III. Cook alleged and made a factual showing as to each element of his claims, and they are not barred by the statute of limitations, the statute of frauds, the hearsay rule, or the Dead Man's Statute.

The circuit court's grant of summary judgment is not a case of harmless error. Neither dismissal of Cook's claims nor summary judgment on them would have been proper on the content of his complaint or the factual record, respectively. The lower court erred reversibly in ending these claims.

While the matters addressed below were not the basis for the circuit court's ruling, Cook addresses them here to note that there is not an alternative basis for affirming the decision of the lower court.

a. Cook pled and made a showing of the necessary elements of his claims.

Constructive Trust. Cook pled facts sufficient to state a cause of action for constructive trust, and the facts appearing in the record, viewed in the light most favorable to him, provide more than a scintilla of evidence tending to establish the elements of this claim.

A constructive trust is distinguished from an express trust in that the former arises entirely by operation of law without reference to any actual or supposed intention of creating a trust. It is resorted to by equity to vindicate right and justice or frustrate fraud. All v. Prillaman, 200 S.C. 279, 20 S.E.2d 741 (1942). Generally, fraud is an essential element, but it need not be actual fraud. The case of Bank of Williston v. Alderman, 106 S.C. 386, 91 S.E. 296, 298 (1917) states: "Actual fraud is not necessary, but such trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by him who holds the legal title." See also Dominick v. Rhodes, 202 S.C. 139, 24 S.E.2d 168 (1943).

As evidenced by the above summary, equity is less than demanding and quite flexible in prescribing the elements

essential to a constructive trust. Further, a constructive trust is permitted to be proved by parol evidence despite the statute of frauds. Wolfe v. Wolfe, 215 S.C. 530, 56 S.E.2d 343 (1949).

Whitmire v. Adams, 273 S.C. 453, 457-58, 257 S.E.2d 160, 163 (1979).

The fraud element of a constructive trust is far broader than the narrow, nine-element definition of actual fraud. Halbersberg v. Berry, 302 S.C. 97, 106, 394 S.E.2d 7, 13 (Ct. App. 1990). "A constructive trust arises against one who by fraud, actual or constructive, by duress or abuse of confidence, by commission of a wrong or by any form of unconscionable conduct, artifice, concealment, or questionable means and against good conscience, either has obtained or holds the right to property which he ought not in equity and good conscience hold and enjoy." Id.; accord Straight v. Goss, 383 S.C. 180, 210, 678 S.E.2d 443, 459 (Ct. App. 2009); Macaulay v. Wachovia Bank of S.C., N.A., 351 S.C. 287, 294, 569 S.E.2d 371, 375 (Ct. App. 2002); Hendrix v. Hendrix, 299 S.C. 233, 235, 383 S.E.2d 468, 469 (Ct. App. 1989). In general, a constructive trust may be imposed when a party obtains a benefit "which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it, as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty." Smith v. S.C. Ret. Sys., 336 S.C. 505, 529, 520 S.E.2d 339, 352 (Ct. App. 1999) (quoting SSI Medical Servs., Inc. v. Cox, 301 S.C. 493, 500, 392 S.E.2d 789, 793-94 (1990)). Constructive trusts arise "under the broad doctrine that equity regards and treats as done what in good conscience ought to be done" and "the forms and varieties of constructive trusts are practically without limit, such trusts being raised, broadly speaking, whenever necessary to prevent injustice." Dominick, 202 S.C. at 149.

Here, Phillips has received a benefit, property with a value that has been greatly enhanced by Cook's work, that does not equitably belong to him, since that benefit was conferred under an agreement that provided for a sale of the property to compensate Cook for his materials and labor used to create that value. (R. pp. 14-25, 31-35, 91-92.) Cook has received no compensation, but Phillips is retaining the property, with full knowledge of the circumstances under which Cook enhanced its value. (R. pp. 14-25, 91-92.) Phillips' assurances induced Cook to take no action to enforce his rights, and now Phillips has raised a technicality in the hope – realized by the lower court's ruling – that he can forever retain the benefit of Cook's enhancement of the property without Cook ever being able to benefit from it. (R. pp. 17, 19, p. 68 ln. 18-25, p. 87 ln. 6-11, pp. 91-92.) This benefit does not equitably belong to Phillips and he cannot in good conscience retain or withhold the benefit from Cook. Phillips received this benefit as a result of fraud, bad faith, and an abuse of confidence, as Phillips repeatedly reassured Cook that the original agreement would be honored so that Cook would be compensated, which Phillips now refuses to do. (R. pp. 17-19, 91-92.) In other words, Phillips has been successful in lying to Cook long enough to prevent him from making a creditor's claim and long enough to allow Phillips to issue a deed of distribution to himself and cut Cook out. (R. pp. 17-19, 91-92.) Viewed in the light most favorable to Cook, Phillips' representations were intentionally made for the purpose of causing Cook not to take any legal action against Phillips' grandmother or her estate. (R. pp. 14-25, 91-92.)

Further, a confidential relationship existed between the parties, which Phillips abused to perpetuate his fraud. A confidential or fiduciary relationship exists when one reposes a special confidence in another so that the latter, in equity and good conscience,

is bound to act in good faith and with due regard to the interest of the one reposing the confidence. Chapman v. Citizens & S. Nat. Bank of S.C., 302 S.C. 469, 477, 395 S.E.2d 446, 451 (Ct. App. 1990) (citing SSI Medical Services, 301 S.C. 493). This court has stated that “[a]lthough a precise definition of a confidential relationship is elusive, a thorough review of available material left us impressed with the definition found in Black’s Law Dictionary 270 (5th ed. 1979)[.]” which includes the relation of “executors or administrators and creditors[.]” Chapman, 302 S.C. at 475-76 (quoting Black’s Law Dictionary 270).

The complaint and Cook’s affidavit state that Cook reposed his confidence in Phillips and Cook relied on Phillips’ promises to honor the agreement. (R. pp. 17-19, 23, 91-92.) It would be inequitable to permit Phillips to abuse that confidence and receive a windfall at Cook’s expense.

The instant case bears some similarity to Briggs v. Richardson, 273 S.C. 376, 256 S.E.2d 544 (1979), in which heirs brought an action against another heir to impose a constructive trust on properties that passed through the estate of their mother. The plaintiffs had not contested the will during the time period allowed. Id. The heirs were not included in the will, but they alleged that the heir who was also personal representative of their mother’s estate repeatedly reassured the plaintiffs that he would divide the property equitably as per their mother’s wishes. Id. On the basis that the plaintiffs had adequately alleged a cause of action for constructive trust, the Supreme Court upheld the trial court’s decision to deny the defendant’s motion to dismiss. Id.

Unjust enrichment. A party may be unjustly enriched when he has and retains benefits or money which in justice and equity belong to another. Deima v. Tenet

Physician Servs. Hilton Head, Inc., 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009).

Unjust enrichment is an equitable doctrine which permits the recovery from the defendant of the amount by which he has been unjustly enriched at the expense of the plaintiff. Ellis v. Smith Grading and Paving, Inc., 294 S.C. 470, 473, 366 S.E.2d 12, 14 (Ct. App. 1988). The test for unjust enrichment, per our Supreme Court, is as follows:

- (1) benefit conferred by plaintiff upon the defendant;
- (2) realization of that benefit by the defendant; and
- (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value.

Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872-73 (2000).

As discussed above with regard to the constructive trust cause of action, Cook conferred a benefit on Phillips, the enhanced value of the property Phillips now owns. Since Phillips now owns the property with its enhanced value, he has realized the value of the benefit. Phillips repeatedly reassured Cook that the original agreement would be honored so that Cook would be compensated, which Phillips now refuses to do, and Phillips has taken the position that Cook has no recourse whatsoever to realize any compensation. Phillips is keeping the benefit conferred by Cook under circumstances that make it inequitable for him to do so without paying Cook the amount by which Cook's work enhanced the value of the property.

Cook pled facts sufficient to state a cause of action for unjust enrichment, and the facts appearing in the record, viewed in the light most favorable to him, provide at least a scintilla of evidence tending to establish the elements of this claim.

Conversion. “Conversion is defined as the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner’s rights.” Moore v. Weinberg, 383 S.C. 583, 589, 681 S.E.2d 875, 878 (2009); accord Mullis v. Trident Emergency Physicians, 351 S.C. 503, 506-07, 570 S.E.2d 549, 550-51 (Ct. App. 2002); Green v. Waidner, 284 S.C. 35, 37, 324 S.E.2d 331, 333 (Ct. App. 1984).

Phillips has converted the improvements Cook made to the property. (R. pp. 16-17, 21, 91-92.) Without authorization from Cook, he is treating them as his own and excluding Cook from their use and benefit altogether. Cook pled facts sufficient to state a cause of action for conversion, and the facts appearing in the record, viewed in the light most favorable to him, provide at least a scintilla of evidence tending to establish the elements of this claim.

Equitable title/partition/equitable lien. Under at least two theories, Cook pled and made a showing of facts sufficient to survive Phillips’ motion to dismiss or for summary judgment as to his claims seeking the sale of the subject property. The record contains more than a scintilla of evidence indicating that Cook is entitled to relief on a claim seeking the sale of the subject land.

Cook pled that “he has acquired an equitable interest in the Property.” (R. p. 22.) The facts alleged in the complaint and set forth in Cook’s affidavit, viewed in the

light most favorable to him, tend to establish that he did have an equitable interest in the property. (R. pp. 14-25, 91-92.)

Under his agreement with Harden, especially as amended, Cook was essentially treated as having purchased the property with a seller-financed mortgage loan that would be repaid upon the property's sale to a third party. (R. pp. 34, 91-92.) The amended sales agreement provides that "[i]f the property has not sold by October 1, 2006, Cook Construction Co. shall begin paying an interest-only loan at 6.5% on the outstanding principal of \$155,000 until the house sells." (R. p. 34.) The agreement also called for Cook to maintain insurance coverage and pay utility bills for the property. (R. pp. 31-34.)

Here are echoes of Lewis, 351 S.C. at 171, and Dempsey, 224 S.C. at 541-42, in which long-term, seller-financed land sales arrangements were recognized as corresponding in equity to a mortgagor-mortgagee relationship. As in Singleton, 107 S.C. at 469, Cook was treated under the sales agreement as the land's equitable owner. Under the sales agreement, Harden, the nominal owner to whose position Phillips has succeeded, was treated as being owed a finite amount of financing money on loan terms, and Cook was treated being entitled to the rest of the sales proceeds, no matter how much they were – just as the owner of a mortgaged house would be upon its sale. Cook was the owner of the property's "equity" in the lay sense of the word: the amount of the property's value remaining after paying off Harden's quasi-mortgage interest in the property. See Lewis, 351 S.C. at 173 n. 4.

It is certainly not true that Cook "has no ownership interest in this property by any stretch of the imagination[.]" as the lower court concluded. (R. p. 5.) To see how

the record shows a genuine issue of fact about whether Cook has such an interest in this property, no imagination is needed at all. When the record is viewed in the light most favorable to Cook, it is apparent that he has equitable title to the subject property. See Lewis, 351 S.C. at 173 & n. 4; Brooks, 315 S.C. at 476-77; FCX, 269 S.C. at 206-07; Dempsey, 224 S.C. at 541-42; Singleton, 107 S.C. at 469; Southern Pole Bldgs., 289 S.C. at 524. As owner of that title interest in the land, Cook is entitled to seek partition of the property. See S.C. Code Ann. § 15-61-10; cf. Dempsey, 224 S.C. at 541-42 (property sold and proceeds divided according to parties' rights in equitable title scenario).

He is also entitled to seek the sale of the property under non-partition theories. He is entitled to seek a Dempsey-style sale of the property under the facts alleged and in the record. 224 S.C. at 541-42. He is also entitled to a sale of the property in enforcement of the equitable lien that the record, viewed in the light most favorable to Cook, indicates that he has in the subject property. While Cook labeled his causes of action seeking a sale of the property as "constructive trust/equitable title" and "partition," the complaint makes clear that Cook is seeking the sale of the property in order to liquidate and realize his interest in it. (R. pp. 22-25.) Phillips' motion to dismiss "cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle [Cook] to relief on *any* theory of the case." Dye, 320 S.C. at 67-68 (emphasis added). "For an equitable lien to arise, there must be a debt, specific property to which the debt attaches, and an expressed or implied intent that the property serve as security for payment of the debt." Chase Home Finance, 746 S.E.2d at 475. Here, there is a debt, the compensation owed to Cook under the sales agreement for his

work enhancing the value of the subject property. (R. pp. 14-25, 91-92.) There is specific property to which the debt attaches, the property subject of this case, which is the property that was improved by Cook and out of the proceeds of which he was to be paid. (R. pp. 14-25, 91-92.) There is intent that the property serve as security for Cook's right to be compensated, as the parties to the sales agreement intended that Cook be paid from the proceeds of that property's sale. (R. pp. 16, 31-34, 91-92.) When the record is viewed in the light most favorable to Cook, all the elements of an equitable lien are met. See Chase Home Finance, 746 S.E.2d at 475.

b. Cook did not offer hearsay evidence.

While not the basis for its ruling, the circuit court's order does state that "[m]uch, if not all of the alleged communications set forth in the Affidavit of the Plaintiff are hearsay[.]" (R. p. 1.) In fact, there is no hearsay problem with Cook's affidavit, and certainly nothing that precluded its key points from being considered by the court.

"Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. A statement by a party opponent is not hearsay. Rule 801(d)(2), SCRE.

The key statements of another person in Cook's affidavit are Phillips' statements. (R. pp. 91-92.) Phillips is Cook's opposing party in this case. None of those statements are or even can be hearsay. Rule 801(d)(2), SCRE.

"[N]ot all words or utterances are offered for the truth of the matter asserted." Fields v. J. Haynes Waters Builders, Inc. 376 S.C. 545, 658 S.E.2d 80, 87 (2008). "For

example, in some scenarios, words or utterances themselves from an out of court declarant may, regardless of their truth, accompany an ambiguous act and give the act legal significance, be used circumstantially, such as to show a state of mind, or form part of an issue in a case.” Id. The statements of Phillips’ father that are recounted in Cook’s affidavit were not offered for their truth, and they are thus not hearsay for that reason. Rule 801(c), SCRE. They were not offered to establish that Phillips’ father actually “felt we needed to wait until the market improved to try again[,]” that “nothing had changed and the agreement was still valid[,]” or that “they felt that by placing furniture in the home to ‘stage it,’ it would help with prospective buyers as they planned to re-list the property soon.” (R. p. 91.) These statements were offered to show their effect on the hearer, Cook, to show his state of mind (particularly, reliance). (R. pp. 91-92.) Cook was not trying to show that the things said in those statements were actually true, as part of his case is that they were not. Statements that are not offered to prove the truth of the matter asserted should not be excluded as hearsay. Deep Keel, LLC v. Atl. Private Equity Group, LLC, 413 S.C. 58, 69, 773 S.E.2d 607, 613 (Ct. App. 2015).

The only other statement by an out-of-court declarant in Cook’s affidavit is of Cook’s agreement with Julia Phillips, acting on Harden’s behalf, that “instead of making the monthly interest payments, the interest would be added to the principal amount of \$155,000.00 and would be paid when the property sold.” (R. p. 91.) This statement is not offered for the truth of the matter asserted but for its operative legal significance and is, thus, a statement of “words of contract,” which the Supreme Court

and this court have recognized do not constitute hearsay. See Fields, 658 S.E.2d at 87-88; Deep Keel, 413 S.C. at 70.

c. The Dead Man's Statute did not bar Cook's claims.

While also not a basis for the lower court's ruling, the order at issue does make the comment that the testimony in Cook's affidavit is "barred by the Dead Man's Statute[.]" (R. p. 2.) It is not.

None of the testimony in Cook's affidavit violates the Dead Man's Statute, S.C. Code Ann. § 19-11-20. Our Supreme Court has noted the following:

[Under the Dead Man's Statute], if a witness is either (1) a party to the action or proceeding, or (2) a person having an interest which may be affected by the event of the trial, of (3) a person who has had such an interest, but which has been in any manner transferred to, or has in any manner come to, a party to the action or proceeding, or (4) an assignor of a thing in controversy in the action, he is disqualified only if the testimony of the witness is (a) in regard to any transaction or communication between the witness and a person deceased, insane or lunatic, and (b) against a party prosecuting or defending the action as executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, or survivor of such deceased person, or as assignee or committee of such insane person or lunatic, and (c) when the present or previous interest of the witness may in any manner be affected by the testimony or by the event of the trial.

Long v. Conroy, 246 S.C. 225, 232, 143 S.E.2d 459, 462 (1965). All of its criteria must be present in order for the statute to operate. Id.

"Because this statute is an exception to the general rule of witness competency, it requires a restrictive reading on which the party requesting its muzzling effect bears the burden." Hanahan v. Simpson, 326 S.C. 140, 151, 485 S.E.2d 903, 909 (1997). The statute "has been sharply criticized in recent years[.]" and "the courts of this state

have strictly construed the rule and endeavored to limit its applicability to cases which clearly fall within its intended scope.” Id. at 151-52.

The statute does not bar testimony about communications or transactions with someone other than a deceased person. S.C. Code Ann. § 19-11-20; Long, 246 S.C. at 232. Cook’s recounting of Phillips’ statements does not fall within the ambit of the statute. Id. Further, an essential element of the statute is that the statement must be offered “against a party prosecuting or defending the action *as executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee, or survivor of such deceased person.*” Long, 246 S.C. at 232 (emphasis added). Our Supreme Court has observed that it is not enough that the opposing party simply *be* an heir of a deceased person for the statute to apply; rather, the party against whom the testimony is offered has to be prosecuting or defending the action in one of the capacities listed in the statute. Brown v. Moore, 26 S.C. 160, 2 S.E. 9, 10 (1887). Consistently with the history of narrow construction of S.C. Code Ann. § 19-11-20, the Court has also noted that “[i]t is at least doubtful whether the statute applies to this action in which the parties prosecute and defend as grantees or alienees of the deceased person, rather than as executor, administrator, heir-at-law, etc.” Branton v. Martin, 243 S.C. 90, 97, 132 S.E.2d 285, 288 (1963).

Here, Phillips was sued individually. (R. p. 14.) He is not defending this action in any capacity vis-à-vis a deceased person; rather, he is defending it as himself.

The Dead Man’s Statute does not provide an alternative basis for the circuit court’s ruling.

d. The statute of frauds did not bar Cook's claims.

The circuit court commented that Cook's affidavit is "barred" by "the Statute of Frauds." (R. p. 2.) The Statute of Frauds, S.C. Code Ann. § 32-3-10, operates only with regard to contract claims about the specific kinds of contracts listed in the statute. By its terms, the statute is not and does not purport to be an evidentiary rule. Id. Given that there are writings that show the only contract that is even in the background of this case was in writing, it is difficult to see how the lower court believed the Statute of Frauds was in play at all. (R. pp. 31-34.)

Further, none of the claims in this case are for breach of contract. (R. pp. 20-25.) And, as Cook pointed out below (R. p. 76 ln. 24 through p. 80 ln. 4) and as noted in Whitmire, "a constructive trust is permitted to be proved by parol evidence despite the statute of frauds." 273 S.C. at 458 (citing Wolfe, 215 S.C. 530.)

The Statute of Frauds does not provide an alternative basis for the circuit court's ruling.

e. The statute of limitations did not bar Cook's claims.

The statute of limitations is an affirmative defense in South Carolina. E.g., Glenn v. Sch. Dist. No. Five of Anderson County, 294 S.C. 530, 533, 366 S.E.2d 47, 49 (Ct. App. 1988). "[A]n affirmative defense ordinarily may not be asserted in a motion to dismiss under Rule 12(b)(6) unless the allegations of the complaint demonstrate the existence of the affirmative defense." Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869, 878 (2006). "The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and when the testimony is conflicting upon the question, it becomes an issue for the jury to decide." Turner v. Milliman, 381 S.C.

101, 110, 671 S.E.2d 636, 641 (Ct. App. 2009). Only “when there is no conflicting evidence or only one reasonable inference can be drawn from the evidence [does] the determination . . . become[] a matter of law[.]” Id.

First of all, statutes of limitation are not applicable to equity claims. Dixon v. Dixon, 362 S.C. 388, 400, 608 S.E.2d 849, 855 (2005); Parr v. Parr, 268 S.C. 58, 67, 231 S.E.2d 695, 699 (1977); Parrot v. Dickson, 151 S.C. 114, 148 S.E. 704, 707 (1929). An action to declare a constructive trust, a claim in unjust enrichment, a claim to enforce an equitable lien, and a claim for partition are all actions in equity. Halbersberg, 302 S.C. at 106 (“Constructive trusts are resorted to in equity”); Dema, 383 S.C. at 123, (“Unjust enrichment is an equitable doctrine”); Anderson v. Anderson, 299 S.C. 110, 382 S.E.2d 897 (1989) (“A partition action is an equitable action.”); Chase Home Finance, 746 S.E.2d 471 (claim to enforce equitable lien sounds in equity). Cook’s equitable claims could not be barred by a statute of limitations.

Most at-law claims in this state have a three-year statute of limitations under S.C. Code Ann. § 15-3-530. As Cook maintained below, his claims against Phillips did not come into being until Phillips refused to sell the property or otherwise compensate Cook, which was less than a year before this action was commenced. (R p. 77 ln. 6-15.)

Even were the court to conclude that Cook’s claim arose at some earlier time, that would not establish that Cook’s claim is necessarily barred by the statute of limitations. South Carolina follows the discovery rule. See S.C. Code Ann. § 15-3-535. “Under the discovery rule, the statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence,

that a cause of action exists for the wrongful conduct.” True v. Monteith, 327 S.C. 116, 119, 489 S.E.2d 615, 616 (1997). In some cases (e.g., a typical car wreck case), this date is fairly obvious. In others, among them cases involving deception, like the case at bar, this moment is not so easy to pinpoint. See Monroe v. Benson, 390 S.C. 153, 700 S.E.2d 273, 278 (Ct. App. 2010) (statute of limitations did not begin to run until over four and a half years after deceptive property transfer).

Further, the record does not establish that Cook is outside the time limits of S.C. Code Ann. § 62-1-106, which provides that a proceeding within its scope “must be commenced within two years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than five years after the time of commission of the fraud.” Nothing in the record indicates that Cook discovered Phillips’ fraud earlier than when Phillips refused to sell the property, which was in 2015, the same year this action was brought. (R. pp. 8-49, 91-92.)

The statute of limitations does not provide an alternative basis for the lower court’s ruling.

IV. This is a proper case for a lis pendens.

The circuit court ruled that Cook “has no ownership interest in this property by any stretch of the imagination” and canceled the lis pendens as being improperly filed. (R. pp. 5, 6.) As discussed above, this conclusion is inaccurate. Further, this was undoubtedly a proper case for a lis pendens, and the court had no discretion to cancel the lis pendens here.

A lis pendens is appropriate when a plaintiff brings an action for constructive trust affecting title to real property. Carolina Park Associates, 400 S.C. at 9. Indeed, the case

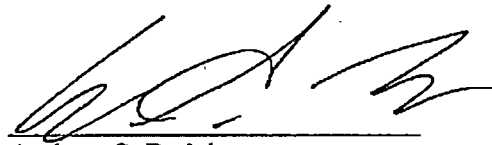
of Pond Place Partners v. Poole, 315 S.C. 1, 17, 567 S.E.2d 881 (Ct. App. 2002), cited by the lower court in support of its ruling, states that proper actions for the filing of a lis pendens include "actions to establish a constructive trust over real estate[.]"

The circuit court erred in cancelling the lis pendens.

CONCLUSION

The lower court's ruling left a victim of fraudulent and inequitable conduct with no recourse against the perpetrator. It did so on the basis of perceived technicalities that actually do not apply. This court should reverse the lower court, reinstate the lis pendens, and remand this case for trial.

Respectfully submitted,



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July 13, 2017

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Judge

Appellate Case No.: 2016-001653

William Rice Cook, III Appellant

v.

Benny Richard Phillips, Jr., and the real estate property located at 207 North
Avenue, Anderson, SC 29625 TMS # 123-26-08-02 Respondent

RESPONDENT'S FINAL BRIEF

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SC Court of Appeals

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STATEMENT OF COUNTER-ISSUE

I. Was the Circuit Court Judge correct in granting Summary Judgment to the Respondent and cancelling the Lis Pendens where the Complaint and Affidavit demonstrated that Appellants's entire case was based on 2006 contracts with decedent Claudia Harden?

Appellant's 4 Issues are discussed in the Argument.

STATEMENT OF THE CASE

This action was commenced by William Rice Cook, III (hereinafter "Cook") by the filing of a Summons, Complaint and Lis Pendens on December 31, 2015. The action named as Defendant, Bennie Richard Phillips, Jr. (hereinafter "Phillips, Jr."), and, *in rem* the real property situate at 207 North Avenue, Anderson, South Carolina 29625, Tax Mapping System No. 123-26-08-02.

Phillips, Jr. filed his Motion for Summary Judgement and Motion to Dismiss for Failure to State a Cause of Action, pursuant to S.C.R.C.P. Rule 12(b)(6), on January 26, 2016 and a Motion to Quash the Lis Pendens on March 22, 2016, on the basis that the claim fell outside of the Statute of Limitations, S.C. Code Ann. §15-3-530; and was further barred pursuant to the provisions of §62-3-801 and §62-3-803 of the South Carolina Probate Code (the Nonclaim Statute); and was further barred by the provisions of the South Carolina Dead Man's Statute as set forth in S.C. Code Ann. §19-11-20. The Motion further requested the Court consider imposing sanctions pursuant to the provisions of S.C. Code Ann. §15-36-10. It is important to understand that Cook had previously filed a Summons and Petition for Allowance of Creditor Claim (R. pp. 121-124) on September 16, 2015 against the Estate of Bennie Richard Phillips, Sr. ("Phillips, Sr."). The claim was denied by Motion (R. pp. 125-126) and the matter was removed to the Circuit Court for the Tenth Judicial Circuit by Order of the Probate Court filed October 23, 2015 (R. p. 127). The claims made by Cook in the action against the Phillips, Sr. Estate were substantially the same claims made in the present action. Prior to the Summary Judgement Motion hearing in this case, Cook's attorney initiated contact with Phillips, Sr.'s attorney and a Stipulation of Dismissal without Prejudice was

filed January 21, 2016 (R. p. 129). Cook filed an Affidavit June 7, 2016 (R. pp. 91-92). Cook filed a Memorandum in Opposition to the Motion to Dismiss and for Summary Judgement on June 9, 2016. Phillips, Jr. filed a Brief in Reply (R. pp. 110-114) to the Appellant's Affidavit on June 13, 2016 , and a Hearing Brief (R. pp. 94-99) and the matter was heard before the Circuit Court Judge on June 13, 2016. R. Lawton McIntosh issued his Order filed June 24, 2016, granting Phillips' Motion for Summary Judgement, and ordered the Clerk of Court to cancel this Lis Pendens (R. pp. 1-6).

The basis of the Appellant's claims were alleged sales agreements dated February 28, 2006, and August 11, 2006 (R. p. 32 and R. p. 34), allegedly entered into by Cook and Phillips' predecessor in title, Claudia P. Harden, and are grounded upon Cook's claims which existed before the death of Mrs. Harden. The Court ruled that the claims were barred by S.C. Code Ann. §62-1-106; §62-3-203. The Court further quashed the filing of the Lis Pendens and ordered the Clerk of Court to cancel it. (R. pp. 1-6); (Order Granting Summary Judgement).

Cook filed a Motion for the Court to reconsider its rulings. The Court denied the Motion by Order on July 26, 2016.

The Notice of Appeal was filed on August 10, 2016.

STATEMENT OF FACTS

Cook initially filed his claim in the Probate Court (R. pp. 121-124), which action was later stipulated to be dismissed, and then filed this action in Circuit Court against Phillips, Jr. alleging that he was due money based upon an alleged contract or sales agreement dated February 28 and August 11, 2006 which was allegedly signed by Claudia Harden's Attorney in Fact, and Cook. The alleged sales agreements concerned

the renovation and repair of a certain home situate at 207 North Avenue, Anderson, South Carolina, which was owned by Claudia P. Harden who was the grandmother of the Defendant, Phillips, Jr.

The agreements were allegedly signed by Julia H. Phillips on February 28, 2006, who had been appointed as attorney in fact for Claudia P. Harden by instrument recorded in Deed Book 1840 at page 190, in the Register of Deeds Office for Anderson County, South Carolina (R. pp. 28-30). This alleged agreement was amended by an additional written agreement dated August 11, 2006, again signed by the attorney in fact for Claudia P. Harden, Julia Harden Phillips, the mother of the present Defendant. Both sales agreements contain various obligations of the Appellant. Julia Harden Phillips (the Attorney In Fact) died October 26, 2011, and her Estate was administered in the Probate Court for Anderson County, Probate File 2011-ES-04-01168 and Cook filed no claims of any kind against the Estate. Ben R. Phillips, Jr. was appointed Conservator for Claudia P. Harden, in 2011 by Certificate of Appointment dated October 14, 2011. No claims against Claudia P. Harden, were filed with the Conservator, as noted by the Trial Judge.

Claudia P. Harden died testate December 3, 2013 with her Estate being probated in Anderson County Probate Court File 2014-ES-04-00047. The Estate was closed by Order of the Probate Court on June 1, 2015 and no claims were filed by Cook for the supposed debt due to him at any time. If any had been filed, the same would have been contested, *inter alia*, as being barred by the Statute of Limitations, S.C. Code Ann. §32-3-10.

The property at 207 North Avenue, Anderson, South Carolina, was devised by Claudia P. Harden to her daughter, Julia H. Phillips, who had pre-deceased her and in that event, to Phillips, Jr., pursuant to the Will (R. p. 119-120); and deeds of distribution conveying the subject property to Phillips, Jr. were recorded in the Register of Deeds Office for Anderson County on October 20, 2014, and a corrective deed on February 24, 2015, in Deed Book 11576 at page 245, and Deed Book 11717 at page 168 (R. pp. 43-45, and R. pp. 47-49).

Cook filed his claim, first, in the Probate Court in the Estate of Bennie Richard Phillips, Sr. , the father of the current Defendant based upon substantial similar allegations as are contained in the current Appellant's Complaint (R. pp. 11-26), at which time the claim was summarily denied. (R. pp. 125-126). The Probate Court claim was removed to Circuit Court and was resolved by Stipulation of Dismissal (R. p. 129). The action now before the Court was then filed December 31, 2015.

The Phillips, Jr. Motion for Summary Judgement and 12(B)(6) Motion was scheduled to be heard by the Court, and Briefs and Memoranda and Argument was presented to the Court on June 13, 2016. The Court issued its Order of Summary Judgement on June 24, 2016, and this appeal followed.

STANDARD OF REVIEW

The Matter before the Trial Court was governed by Rule 56(c) of the South Carolina Rules of Civil Procedure. This rule provides a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law.” Rule 56(c), SCRCF.

“When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party.” Fleming v. Rose 350 S.C. 488, 567 SE 2d 857. In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. Hancock v. Mid-South Mgmt. Co., Inc. 381 S.C. 326, 330, 673 SE 2d 801, 803 (2009). In cases requiring a heightened burden of proof, the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment. Id. at 330–31, 673 S.E.2d at 803. See Turner v. Milliman, 392 S.C. 116, 121 22, 708 S.E.2d 766, 769 (2011).

The party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact.” Baughman v. Am. Tel. & Tel. Co. 306 S.C. 101, 115, 410 SE 2d 537, 545 (1991). This initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the non-moving party's case, and it is not necessary for the moving party to support its motion with affidavits or other similar materials negating the opponent's claim. Id. Once the moving party carries its initial burden, the opposing party must do more than rest upon the mere allegations or denials of his pleadings, but must, by affidavit or otherwise, set forth specific facts to show that there is a genuine issue for trial. Id.; Rule 56(e), SCRCF. Lord v. D & J Enterprises, Inc., 407 S.C. 544, 552 53, 757 S.E.2d 695, 699 (2014), reh'g denied (May 22, 2014).

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. George v. Fabri, 345 S.C. 440, 548 S.E.2d 868 (2001).

"Summary judgment is appropriate in those cases in which plain, palpable and undisputable facts exist on which reasonable minds cannot differ." Priest v. Brown 302 S.C. 405, 408, 396 SE 2d 638 639 (Ct. App. 1990). "It is not sufficient that one create an inference [that] is not reasonable or an issue of fact that is not genuine." *Id.*

Once the moving party meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings but must come forward with specific facts showing there is a genuine issue for trial. Rule 56(e), SCRPC; Boone v. Sunbelt Newspapers, Inc. 347 S.C. 571, 579, 556 SE 2d 732, 736 (Ct. App. 2001).

ARGUMENT

In the action before the Court, Cook's Complaint is grounded and based on alleged contracts which he signed with Claudia Harden in 2006. Cook took no action to enforce his claim for work and labor within the Statute of Limitations as to his claims for supposed repairs or obligations of Claudia Harden during her lifetime; and at her death, then would be converted into claims to be made against her Estate; and since Cook did nothing within the time permitted by the Statute of Limitations [three years from 2006]; and the Nonclaim Statute, §62-3-803, his claims were barred by the Trial Court. He comes before the Court now, having no basis for any action and alleges in conclusions and hearsay allegations, and attempts to establish a claim against Phillips, Jr. for an obligation that Phillips, Jr. had nothing to do with; and attempts to revive and resurrect

his barred claims by conclusorily alleging that Phillips, Jr. defrauded him. Phillips, Jr. had no contractual agreement with Cook, and had no duty toward Cook. Cook bases his whole case on paragraphs 6 through 9 of his Complaint, making reference to the alleged contract that he entered into with Claudia P. Harden. Then in paragraph 12 of his Complaint, he attempts to hook the Defendant Phillips, Jr. by a conclusory allegation about something that Phillips, Jr. and his father, Philips, Sr. allegedly did. The claim he makes is "[Plaintiff has never been paid for the labor, materials and improvements made to the property" per the contract with Harden. (R. p. 20; R. p. 21, and R. p. 24). Cook took no action to enforce his alleged agreement with Harden, and that claim was barred. He cannot legally resurrect that claim by attempting to tag Phillips, Jr. with it, years beyond the Statute of Limitations and the Nonclaim Statute. He then sets forth four causes of action which will be discussed in turn.

The claims made by Cook are frivolous. The Statute of Limitations in South Carolina provides that actions upon contract must be brought within three years. S.C. Code §15-3-530(1). The alleged contracts were for services and materials only and, even if believed, are dated February 28, 2006 and August 11, 2006. Cook filed his first claim against the Estate of Bennie Richard Phillips, Sr. on September 16, 2015 and that action has been dismissed. Cook filed this action December 31, 2015, did not serve it until January 2016, well beyond the Statute of Limitation. Cook never performed any services or provided any labor for Phillips, Jr. There was no contractual obligation or duty that existed between Phillips, Jr. and Cook. He now says his claim is against Phillips, Jr. but he has no contract with Phillips, Jr. His claim, to have any origin, is in fact grounded upon the 2006 contracts with Claudia Harden, which he alleges in his Complaint; and then tries to deny that this alleged contract

has any bearing on this claim. He makes conclusory allegations (not facts) about oral conversations with Phillips, Jr. (which all relate back to the 2006 contract) but nowhere sets forth any fraud establishing that Phillips, Jr. wrongfully acquired title to the property.

As above set forth, the Statute of Limitations, S.C. Code Ann. §15-3-530(1), we believe, barred Cook from making a successful claim against Claudia Harden during her lifetime. Then he files a claim against the Estate of Bennie Richard Phillips, Sr., and subsequently agrees and stipulates to dismiss that claim, because evidently he understood and realized that the South Carolina Nonclaim Statute, S.C. Code Ann. §62-3-801, and §62-3-803 barred him from bringing that claim. Appellant has attempted to set out "agreements" with Benny Richard Phillips, Jr. which are barred by virtue of the Statute of Frauds, §32-3-10, and even attempted to set out an allegation as to conversations pertaining to Benny Richard Phillips, Sr. and such assertions or transactions as alleged are totally barred by the Dead Man's Statute, S.C. Code Ann. §19-11-20.

We believe, and the Trial Court agreed, the provisions of the Nonclaim Statute are mandatory and imperative under the laws of this state, and require that any outstanding claim against an individual be brought within one year of that individual's death. See S.C. Code Ann. §62-3-803(a)(1):

"(a) all claims against a decedent's estate which arose before the death of the decedent... whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis; if not barred earlier by another statute of limitations or nonclaim statute; are barred against the Estate, the Personal Representative, the decedent's heirs and devisees, [emphasis added] and the non-probate transferees of the decedent; unless presented within the earlier of the following: (1) one year after decedent's death.... [emphasis added].

Thus the Nonclaim Statute is actually is a stronger version of the Statute of Limitations and this alleged claim of the Appellant is completely barred, pursuant to the Statute of Limitations, the Nonclaim Statute and Earl Phillips as Personal Representative v. Brigitte Quick 399 S.C. 226, 731 S.E. 2d 327 (2012). Our Court has held that §62-3-803 is a Nonclaim Statute and unless the Statute is complied with, a creditor's claim is forever barred. If Cook has any status at all, which is denied, his status would be solely as a creditor of Claudia P. Harden, and he was mandated by law to comply with the Nonclaim Statute. In addition, Phillips, Jr. is protected by the very words set forth in the Nonclaim Statute as the Personal Representative and an heir and devisee of Claudia Harden. Even if you consider oral communications made by Phillips, Jr. (to constitute the basis for this action), such allegation has already answered by the Courts in South Carolina in the case of In Re: Estate of Hover 407 S.C. 194, 203, 204, 754 S.E. 2d 875, 879, 880 (2014), where the Court stated as follows:

"While equitable principles may extend the time for commencing an action under the Statute of Limitations, Nonclaim Statutes impose a condition precedent to the enforcement of a right of action and are not subject to equitable exceptions (quoting Estate of Decker v. Farm Credit Services of Mid-Am ACA 684 N.E. 2d 1137, 1139 (Ind. 1997); 34 CJS Executor and Administrators §547 (Supp. 2013) ("misleading statements, assurances or conduct of the representative inducing a creditor to refrain from the due presentation of his or her claim do not estop the representative from contesting the claim because of such a failure to present the claim"). [emphasis added]. See generally E. W. H. Annotation, Effect of Conduct of Personal Representative Preventing Filing of Claims Within Time Allowed by Statute of Nonclaim, 66 ALR 1415 (1930) (Citing State and Federal Cases addressing the general rule that no promise on the part of a Personal Representative is sufficient to prevent the bar of the Statute as to a claim not filed within the statutory period)." [Emphasis added].

In Phillips supra, page 230, the Court held "Nonclaim Statutes impose a condition precedent to the enforcement of a right of action and are not subject to equitable limitations... The time element is a built in condition of

the Nonclaim Statute and is of the essence of the right of action, and unless the claim is filed within the prescribed time set out in the statute, no enforceable right of action is created."

Cook continues to try to raise the claim in his Brief, by alleging a Constructive Trust and then denies that his claim has any basis on the contract he entered into and plead with Harden. A Constructive Trust is an equitable claim and is barred. Then he says that he is not making any claim against Benny Richard Phillips, Jr. as a distributee because he has evidently read the provisions of S.C. Code Ann. §62-3-106 which prevents him from having a cause of action against Phillips, Jr. as Phillips, Jr. never had any obligation to pay the claim that existed against Claudia Harden.

The Appellant's reading of 62-3-803(a) is simplistic in that it ignores the fact that the statute describes remedies which arose during the lifetime of a decedent but are not pursued until the Decedent's death. His supposed claim was against a living person, i.e., Claudia Harden, but he never pursued that claim legally.

Phillips, Jr. had no contractual obligation, nor duty to Cook in this matter in the context of anything. Evidently Cook attempts to conjure up an equitable interest out of thin air, again with no facts and with no basis; and just because he seems to call what he has an "equitable lien" does not mean that it is so. His pleading of equitable interest is a conclusion based on nothing. He has no facts to base his "right" except the contracts which expired in 2009. His attempt to bootstrap this on to 62-3-803(d)(1) is simply wrong again. The examples quoted on page 14 of his Brief to establish an equitable interest, are all connected with actual contracts or legal obligations created by the parties, between themselves. In this case, there are no relations between Cook and Phillips, Jr. and it is clear, as he quotes from Chase Home Finance, "for an equitable lien to arise, there must be a debt" ... and an

express or implied intent that property serve as security.

CONSTRUCTIVE TRUST

Cook appears to rely upon the case of Briggs v. Richardson 273 S.C. 376, 256 SE 2d 544 (1979) to state a claim for constructive trust. Briggs (1979) predated the Nonclaim Statute. This of course, is an equitable matter which is not allowed by virtue of the Nonclaim Statute. (See In Re: Hover supra). Cook fails to recognize and take note of the fact that the law of the Nonclaim Statute in this State bars all claims whether they be legal claims or equitable claims.

The Court defined a constructive trust as follows:

"A constructive trust, otherwise known as a trust *ex maleficio*, a trust *ex delicto*, a trust *dò son tort*, an involuntarily trust or an implied trust is a trust by operation of law which arises against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of a wrong or by any form of unconscionable conduct, artifice, concealment, or questionable means and against good conscience, either has obtained or holds the right to property which he ought not in equity and good conscience to hold and enjoy. 76 Am Jur 2nd §221, page 446. The burden of proof to establish constructive trust requires clear and convincing evidence"

Thus, this definition requires that someone obtain property by means of a fraudulent act. Cook failed to exercise his legal rights against Claudia Harden personally or against her estate, and Cook is now trying to revive and resurrect that claim against an heir, a devisee, and one who legally inherited property without any legal basis therefore as recognized by the Trial Judge.

Interestingly, the Court in Briggs v. Richardson 288 S.C. 537, 343 SE 2d 653 (1986) affirmed the lower court holding that there was not sufficient evidence to establish a constructive trust in the matter at all.

Our Court has repeatedly held that the Statute of Limitations applied equally to claims against an Estate and to all charges for services which may have been performed for the decedent. See Gaston v. Gaston 80 South Carolina 157, 61 S.E. 393 (1908); Sullivan v. Latimer 17 SE 701 (1893), (Statute of Limitations applies to all charges for services performed for decedent); Godbold v. Vance 14 S.C. 458, 1881 WL 5848 (1881), claim barred by Statute of Limitations cannot be waived by acknowledgment of the debt by the administrator of the Estate; see also Black v. White 13 S.C. 37 (1880) WL 5606, Reigne v. Desportes' Ex'r 23 SCL. 118 (1838), WL 1597, (1838); Moore v. Porcher 8 S.C. E.Q., 195, 1831 WL 1618 (S.C. App.) (1831), Knox v. McCall's ADIR, 3 SCL 531 1805 WL 347 (1805). Cook continues to address a hodge-podge of baseless conclusions, theories and statements [most of which are violative of the Statute of Frauds; and the Dead Man's Statute, S.C. Code Ann. §19-11-20)] attributable to Claudia Harden and to Bennie Richard Phillips, Sr. , this Defendant's father, in attempts throughout the Brief to divert the attention of the Court from the simple fact that he bases his claim on the 2006 sales agreements. The allegations denominated by hearsay contained in Cook's affidavit were recognized by the Trial Court to be non-factual, conclusory, insubstantial, illusory, and failed in every respect to constitute valid facts sufficient to constitute a cause of action, recognized by the laws of this State. The Court is entitled to disregard a conclusory affidavit when it appears to have been submitted solely to create a factual issue to avoid summary judgement. See Cothran v. Brown 350 S.C. 352, 566 S.E. 2d 548 (Ct. App. 2002). Cook alleges conversations with Ben Phillips, Sr. in paragraphs 11 and 12 of his Complaint, none of which are admissible and are barred by either the South Carolina Dead Man's Statute, S.C. Code Ann §19-11-20, or have no relevance or relation to any issue before the Court or the basis of Cook's claims, i.e. the

contract with Claudia Harden. The effect of the dismissal as to any claim against Bennie Richard Phillips, Sr. is that any claim that may have existed, if any at all could have, is now barred. There are no writings which create any obligation of Claudia P. Harden, other than the 2006 alleged contracts, and as to the other claims made by Cook in the pleadings, such are likewise barred by the Statute of Frauds and S.C. Code Ann. §32-3-10 as well as the Statute of Limitations set forth above.

The general rule in this State (as to Constructive Trust) was first established by the case of Wilkinson v. Wilkinson 192 S.C. 497, 7 SE 2d 447 (1940) where the Court quoted as follows:

"The general rule in this respect is well stated in 69 C.J. 750-751, as follows: "An exception to the rule that a trust cannot be established by evidence *dehors* the will is allowed and enforced in equity where the devisee or legatee has procured an absolute devise or bequest to himself by promising the testator, expressly or impliedly, that he would hold it for the benefit of another, and afterward refuses to perform his promise, but claims to hold the property in his own right and for his own benefit. In such a case equity will raise and enforce a constructive trust, unless the intention to create a trust is lacking." This doctrine was recognized by the Supreme Court in the case of Stuckey v. Truett, 124 S.C. 122, 117 S.E. 192, 195, where Judge Cothran in his concurring opinion quotes the following with approval from 1 Tiffany, Real Estate, Section 94: 'If one procures a devise by promising the testator to give the beneficial interests in the whole or a part of the property to a third person, he will be regarded as holding in trust for such person.'

It will thus be seen that a (constructive) secret trust is based principally upon a promise made by the devisee or legatee to the testator or testatrix, upon the faith of which an absolute devise or bequest was made."

In order to establish a constructive trust against Phillips, Jr., in the circumstances before the Court, Phillips, Jr. would have had to have obtained the property by the use of fraudulent means, and he did not. He obtained the property by operation of law through the

Will of his grandmother, not through any representations made to this Appellant.

"A constructive trust arises whenever a party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty."

S.S.I Medical Services, Inc., v Cox, 301 SC 493, 392SE2d 789 (1990).

EQUITABLE LIEN

Cook cites the South Carolina case of Chase Home Finance, LLC v. Risher 405 S.C. 202, 746 SE 2d 471 (Ct. App. 2013) for his position as to an equitable lien. This case actually establishes that Cook would not have any right to an equitable lien at all, because he fails to meet several of the requirements specified even were this remedy available to him. The Court in Chase Home Finance stated as follows:

"For an equitable lien to arise, there must be a debt, specific property to which the debt attaches, and an expressed or implied intent that the property serve as security for payment of the debt... If a party seeking an equitable lien cannot satisfy any of these requirements, the remedy is not available."

The remaining cases cited by the Appellant are all distinguishable and do not support the Appellant's case.

Cook has failed to show anywhere, an obligation to him of Bennie Richard Phillips, Jr. He failed to allege the nine elements of fraud necessary to constitute fraud. Phillips, Jr. obtained title solely through the devise made in the Will of Claudia Harden (R. pp. 119-120) and not through any independent actions of his own. The property was devised to him as a contingent beneficiary and was placed in his name due to the fact that his mother predeceased Mrs. Harden. Phillips inherited the property by operation of law. Cook attempts to create an equitable lien out of thin air based upon no recognizable legal theory or reason. His failure to pursue a claim against Claudia Harden based upon the alleged

contract bars any future attempt to do what he is now trying to do and which the Circuit Court recognized to be improper. In fact, the Mechanic's lien statute (S.C. Code 29-5-10 *et seq.*) provided him his only opportunity to establish a "Lien" against Harden, and he failed to establish same. Cook's supposed labor all took place evidently in the 2006-2007 time frame as admitted by his counsel (R. p. 68, lines 8-11) (Transcript of Record). He has conferred no benefit on Phillips, Jr. Phillips, Jr. has agreed to nothing with Cook and has no obligations to Cook under any theory of law, much less those propounded by Cook. Cook's conclusory, illusory allegations do not constitute facts, and without facts, no cause of action has been stated to overcome the law which was recognized by the Circuit Court Judge.

CONFIDENTIAL RELATIONSHIP

The Appellant misconstrues the definition of a confidential relationship. There was no relationship between Cook and Phillips, Jr., much less a confidential relationship. The Appellant defines confidential relationship as set forth in the case of Chapman v. Citizens & S. Nat. Bank of S.C. 302 S.C. 469, 395 SE 2d 446 (Ct. App. 1990) but there are no facts which connects Cook to Philips, Jr. Cook was not an heir of the Estate; he was not a beneficiary of the Estate; if he had a claim, he had a duty to file it against Phillips, Jr.'s predecessor in title. Cook failed to do that. The Nonclaim Statute of this State is a complete bar to any and all claims set forth in Cook's Complaint, including illusory claims, legal claims, equitable claims, or any possible obligation. In the case of In Re: Hover 407 S.C. 195, 754 S.E. 2d 875 (2014), our Supreme Court stated the following which bar Cook from pursuing against Phillips, Jr. all claims, including equitable claims, set forth in his Complaint.

"Pursuant to the general statutory scheme of the Probate Code, all claims against a decedent's estate and his successors must be presented after a personal representative is appointed and within the time limits prescribed by S.C. Code §62-3-803, which our appellate courts have designated as a 'nonclaim statute.' See S.C. Code Ann. §62-3-104(2009) ("Not proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by this article [§§ 62-3-101 et seq.]."); In re: Estate of Tollison 320 S.C. 132, 135, 463 SE 2d 611, 613 (Ct. App. 1995) ("Section 62-3-803 is a nonclaim statute.").

The Probate Code generally defines "claims" to include "liabilities of the decedent ... **whether arising in contract, in tort [emphasis added],** or otherwise, and liabilities of the estate which arise at or after the death of the decedent ..., including funeral expenses and expenses of administration." S.C. Code Ann. § 62-1-201(4) (2009). As stated in the nonclaim statute, claims against a decedent's estate include all claims "whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis." *Id.* § 62-3-803(a), (b). Thus, "[b]roadly speaking, all claims against the decedent should be presented for allowance, and the word 'claims' includes such **debts or demands as existed against the decedent in his or her lifetime and that might have been enforced against him or her by personal actions for the recovery of money.**" 34 C.J.S. Executors & Administrators § 548 (Supp. 2013) (footnotes omitted). "Stated another way, the term includes every species of liability that the personal representative can be called on to pay out of the general funds of the estate." *Id.* "However, claims against an estate are not limited to obligations of the decedent that could have been enforced against him or her while living." *Id.*"

UNJUST ENRICHMENT

Cook argues in his Brief, the doctrine of "Unjust Enrichment". Again, this is an equitable doctrine which is precluded to Cook under the Nonclaim Statute and would only apply to the Decedent Harden, with whom Cook had an "alleged agreement" and would not be applicable in any event to Phillips, Jr. who obtained the subject real estate through operation of law. No facts are alleged to show that Phillips, Jr. obtained this property through any interaction with Cook in any manner. Cook's supposed work and labor to this

property took place in 2006 - 2007, for Harden; no work or labor has been done since that time. No work and labor was done by Cook for Phillips, Jr.; no promise was made by Phillips, Jr. that if Cook did certain labor he would be compensated; there is just a failure and complete lack of factual allegations to support such claim. It is submitted that Cook has misquoted the test for "quantum merit/quasi-contract/IMPLIED BY LAW claim". In the case of Myrtle Beach Hospital, Inc. v. City of Myrtle Beach 341 S.C. 1, 532 SE 2d 868, the Supreme Court stated:

"We adopt the Scudder May Test (Columbia Wholesale Co. v. Scudder May, N. Y. 312 S.C. 259, 440 SE 2d 129 (1994)) as the sole test for a quantum merit/quasi-contract/IMPLIED BY LAW claim. . .

- (1) Valuable services or materials furnished;
- (2) To the Defendant,
- (3) Who accepted, used and enjoyed them,
- (4) Under such circumstances as reasonably notified, the Defendant that the Plaintiff was expecting to be paid by Defendant...."

This test indicates that Cook would have had to have had an agreement as to the furnishing of labor and materials with Phillips, Jr. back in 2006 - 2006; that Phillips, Jr. received a benefit from Cook based upon the promises made or contracts entered into in 2006 - 2007. This again, did not happen and therefore, Cook's claim has no merit. Also if there is an express contract which existed in this case, then Cook has no way to prevail on his quantum-merit (Unjust Enrichment Claim).

LIS PENDENS

The Lis Pendens filed in this matter was properly dismissed by the Court as it was filed in violation of S.C. Code Ann. §15-11-10. A Lis Pendens may be filed:

"[in] an action affecting the title to real property... not more than 20 days before filing the Complaint or at any time afterward... With the Clerk of each county in which the property is situated, a notice of the pendency of the action

containing the names of the parties, the object of the action and the description of the property in that county affected thereby". S.C. Code Ann. §15-11-10.

The filing of a Lis Pendens is an extraordinary privilege granted by statute, strict compliance with the statutory provisions is required. Pond Place Partners v. Poole 351 S.C. 1, 567 S.E. 2d 881 (Ct. App. 2002). As set forth in Pond Place Partners supra an action affecting the title to real property clearly allows the filing of a Lis Pendens by an interested party **in order to protect their ownership interest in the property subject to the litigation. The Appellant has no ownership interest in this property by any stretch of the imagination.**

See also Carolina Park Assocs. LLC v. Marino 400 S.C. 1, 732 SE 2d 876 (2012) where the Court reiterated that a Lis Pendens is only allowed "in an action affecting the title to real property".... The Carolina Park Assocs. Court further stated:

"However, if the Court finds that the Lis Pendens does not 'affect' the title to real property as required under S.C. Code Ann. §15-11-10, the Lis Pendens is not authorized by the Statute and the Statute does not limit the Court's power to cancel it. The Trial Court thus found that the Lis Pendens did not meet the requirements of the Statute and was therefore subject to being cancelled as was held by the Court."

The Appellant in this case does not even have a viable claim that can be made in the Courts of this state, as set forth by the numerous statutory prohibitions set forth above. Appellant's only purpose in filing the Lis Pendens is to harass and to subject the Defendant to a burdensome cloud on his title and to affect his ability to market the property.

CONCLUSION

Appellant has attempted to set out "agreements" with Benny Richard Phillips, Jr. which are barred by virtue of the Statute of Frauds, §32-3-10, and even attempted to set out

an allegation as to conversations pertaining to Benny Richard Phillips, Sr. and such assertions or transactions as alleged are totally barred by the Dead Man's Statute, S.C. Code Ann. §19-11-20.

The dismissal of the Appellant's claims require the dismissal of the Lis Pendens as there is no basis for an assertion of ownership interest in the property.

1. The first cause of action for unjust enrichment is an equitable action that is barred by the Nonclaim Statute. See Myrtle Beach Hospital supra.

2. The second cause of action for conversion against this Defendant, relates to unauthorized exercise of ownership over personal property of another and cannot arise over the Respondent's exercise of a legal right over property which he received as a distributee. See Richardson's Restaurant v. NBSC 30 S.C. 289, 403 SE 2d 669 (1991).

In addition, this cause of action is barred by the Nonclaim Statute and Statute of Limitations.

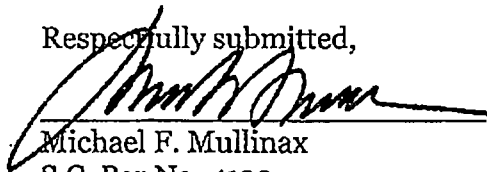
3. The third cause of action, constructive trust/equitable title, only arise from the initial alleged contract which was not with this Defendant and is barred by the Statute of Limitations, Statute of Frauds, and Nonclaim Statutes. Likewise, this cause of action is an equitable action barred by the Nonclaim Statute. See Whitmire v. Adams 273 S.C. 453, 257 SE 2d 160 (1991).

4. The fourth cause of action again has no basis in law or in fact; a partition action requires ownership as a tenant in common or joint tenancy, and this claim is likewise barred by the Nonclaim Statute, the Statute of Limitations, the Statute of Frauds. S.C. Code Ann. §15-61-10 *et seq*.

The Order of the Circuit Court Judge should be upheld in its entirety. The claims of Cook are solely based and have their origin in the 2006 sales agreements. The Statute of

Limitations and the Nonclaim Statute conclusively and finally prevent him from maintaining the within action as was recognized by the Circuit Court Judge.

Respectfully submitted,



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July 7, 2017

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Judge

Appellate Case No.: 2016-001653

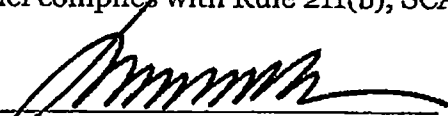
William Rice Cook, III Appellant

v.

Benny Richard Phillips, Jr., and the real estate property located at 207 North
Avenue, Anderson, SC 29625 TMS # 123-26-08-02 Respondent

CERTIFICATE OF COUNSEL

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



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William Rice Cook, III,.....Appellant,

v.

Benny Richard Phillips, Jr., and the real property located at 207 North Avenue,
Anderson, SC 29625 TMS # 123-26-08-02.....Respondents.

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STATEMENT OF ISSUES

- I. Where Appellant's claims were brought against a living individual, not the estate of a decedent, did the circuit court err in ruling that Appellant's claims were barred under the Probate Code's non-claim statute?
- II. Where Appellant pled and made a factual showing of proper claims for the sale of land owned by a living person, did the circuit court err in ruling that Appellant's claims were barred by the executor *de son tort* statutes or otherwise failed?
- III. Where the record shows that Appellant pled and made an evidentiary showing of all essential elements of his claims and the record did not establish any affirmative bar to them, was the Respondent entitled to summary judgment or dismissal on any alternative basis?
- IV. Where Appellant pled proper claims for the sale of real property and made an evidentiary showing to support them, did the circuit court err in canceling the lis pendens filed by Appellant?

ARGUMENT

The Appellant (hereinafter "Cook") submits this reply brief to address matters raised by the Respondent (hereinafter "Phillips") in his brief in this case. Rather than simply rehash the arguments presented in Cook's appellant's brief, this reply brief is an attempt to concisely address arguments raised in Phillips' brief.

At the heart of this appeal is the truth that, because Cook's claims are against a living person – Phillips – for what that living person did, it was reversible error for the lower court to summarily end those claims on the basis of a statute that puts time limits on the assertion of claims against an estate.

- I. The fact that Cook's contract with a deceased person is part of the factual background of this case does not transform Cook's claims against a living person into claims against an estate. Cook is suing Phillips for what Phillips did to him.**

Phillips argues that Cook's claims are barred under the probate non-claim statute, S.C. Code Ann. § 62-3-803, because "Cook's Complaint is grounded and based on alleged contracts which he signed with Claudia Harden in 2006." (Initial Brief of Respondent p. 7.) Phillips misapprehends the scope of the statute.

The non-claim statute does not limit, nor does it purport to limit, anything other than the time in which "claims against a decedent's estate" may be presented. S.C. Code Ann. § 62-3-803(a)&(c). Cook's claims are not for the enforcement of the contract he had with Claudia Harden and are not asserted against her estate. (R. pp. 14-25.) This statute does not and cannot impose a bar or limitation on Cook's claims asserted directly against Phillips for the things Phillips did to Cook.

And Phillips did quite a bit to Cook. After the subject property was taken off the market, Phillips assured Cook that taking the property off the market was only a

temporary measure and that that the property would be re-listed. (R. pp. 17-18, 91-92.) Phillips, who was fully aware of the agreement between Cook and Harden, assured Cook "that nothing had changed, the he and his father had decided to put furniture in the home to 'stage it,' and that they planned to re-list the Property soon." (R. pp. 17-18, 91.) As time went on, Phillips continued to assure Cook that he knew Cook was owed for his work and that he would be paid for it. (R. pp. 18-19, 91-92.) Later, Cook brought the topic of performing the agreement to sell up to Phillips again, recounting Phillips' previous assurances. (R. pp. 19, 92.) Phillips then stated that the agreement was between his father and Cook and that Cook's "time was up and nothing could be done about it." (R. pp. 19, 92.)

These are the things that Cook sued Phillips for. (R. pp. 14-25.) They are all things that Phillips did, not things Claudia Harden did. (R. pp. 14-25, 91-92.) Despite his awareness of his promises that the property would be sold and Cook would be paid, Phillips refused to sell the property and to pay Cook, and Phillips issued a deed of distribution of the property from Harden's estate to himself. (R. pp. 19-20, 42-49, 92.)

In other words, Phillips did not honor *his* repeated promises to Cook that the property would be sold and Cook would be compensated for his significant investment of time and money. (R. pp. 14-25, 91-92.) Phillips induced Cook not to file a creditor's claim with Harden's estate, then called time on Cook, reneged on his promises, and has taken the property for himself. (R. pp. 14-25, p. 68 ln. 18-25, p. 87 ln. 6-11, pp. 91-92.)

A person, even if that person is a personal representative at the time he commits a wrong, does not get to escape liability for his own tortious and fraudulent conduct by

hiding behind the non-claim statute. The probate code itself tells us that. S.C. Code Ann. §§ 62-1-106, 62-3-808(b).

II. The statute of limitations does not bar Cook's claims against Phillips, especially when those claims arise from acts Phillips committed within a year of the commencement of this action.

Phillips contends that the statute of limitations on Cook's claims began to run in 2006 but never offers any explanation of why that would be so. It is not so. It was not until 2015 that Phillips notified Cook that Phillips was reneging on his promises. This action was commenced in 2015. (R. pp. 8-49.) Cook's claims against Phillips could not be barred by the statute of limitations. S.C. Code Ann. § 15-3-530.

Further, as noted in Cook's brief, statutes of limitation are not applicable to equity claims and, thus, could not bar Cook's equitable claims, anyway. Dixon v. Dixon, 362 S.C. 388, 400, 608 S.E.2d 849, 855 (2005); Parr v. Parr, 268 S.C. 58, 67, 231 S.E.2d 695, 699 (1977); Parrot v. Dickson, 151 S.C. 114, 148 S.E. 704, 707 (1929).

III. Phillips had and undertook a duty to Cook.

Contrary to Phillips' contention, Phillips had a duty to Cook, both because of their relationship as personal representative and creditor and because Phillips, by making promises to Cook, would have undertaken a duty to him anyway:

Situations in which a confidential or fiduciary relationship exists include the relation of "executors or administrators and creditors[.]" Chapman v. Citizens & S. Nat. Bank of S.C., 302 S.C. 469, 475-76, 395 S.E.2d 446 (Ct. App. 1990) (quoting Black's Law Dictionary 270). While Phillips served as personal representative of Claudia Harden's estate, the parties were in that relation.

Further, by promising Cook that the property would be sold and Cook would get paid, Phillips would have undertaken a duty to Cook anyway. "At common law, when there is no duty to act, but an act is voluntarily undertaken, the actor assumes a duty to use due care." Hurst v. Sandy, 329 S.C. 471, 481, 494 S.E.2d 847 (Ct. App. 1997). "While the law imposes this duty on a volunteer, the question whether such a duty arises in a given case may depend on the existence of particular facts. Where there are factual issues regarding whether the defendant was in fact a volunteer, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact-finder." Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813 (1997).

IV. A constructive trust is, and ought to be, a flexible remedy.

Phillips argues that, because Phillips obtained title to the subject property by operation of law through inheritance, Cook's constructive trust claim must fail because the definition of a constructive trust "requires that someone obtain property by means of a fraudulent act." (Initial Brief of Respondent p. 12.) Phillips has misapprehended the law here.

"A constructive trust arises against one who by fraud, actual or constructive, by duress or abuse of confidence, by commission of a wrong or by any form of unconscionable conduct, artifice, concealment, or questionable means and against good conscience, either has obtained *or holds the right to* property which he ought not in equity and good conscience hold and enjoy." Halbersberg v. Berry, 302 S.C. 97, 106, 394 S.E.2d 7, 13 (Ct. App. 1990) (emphasis added).

Further, a constructive trust is a remarkably flexible remedy. Constructive trusts arise "under the broad doctrine that equity regards and treats as done what in

good conscience ought to be done” and “the forms and varieties of constructive trusts are practically without limit, such trusts being raised, broadly speaking, whenever necessary to prevent injustice.” Dominick v. Rhodes, 202 S.C. 139, 149, 24 S.E.2d 168 (1943). “[E]quity is less than demanding and quite flexible in prescribing the elements essential to a constructive trust.” Whitmire v. Adams, 273 S.C. 453, 458, 257 S.E.2d 160, 163 (1979).

V. Cook’s brief uses the correct analysis for unjust enrichment.

Phillips’ brief says that Cook has incorrectly stated the test for unjust enrichment/quantum meruit established as the proper analysis by the Supreme Court in Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872-73 (2000). A look at that case, though, reveals that Cook has stated the correct test and that it is Phillips who has misquoted the case.

The relevant passage from Myrtle Beach Hospital is below:

Further, we note this Court’s current test for *quantum meruit* differs from that used by the Court of Appeals, and further note a discrepancy between the two courts’ implied by law tests. Interestingly, the Court of Appeals’ implied by law test is the same as this Court’s *quantum meruit* analysis:

- (1) benefit conferred by plaintiff upon the defendant;
- (2) realization of that benefit by the defendant; and
- (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value.

Compare, e.g., Columbia Wholesale Co. v. Scudder May, N.V., 312 S.C. 259, 440 S.E.2d 129 (1994) (*quantum meruit* test) with Webb v. First Fed. Sav. & Loan Ass’n, 300 S.C. 507, 388 S.E.2d 823 (Ct.App.1989) (implied by law test).

We adopt the Scudder May test as the sole test for a *quantum meruit*/quasi-contract/implied by law claim. We therefore overrule the following cases to the extent they rely on this different quantum meruit test first announced by the Court of Appeals in Webb v. First Fed. Savings & Loan Ass'n, supra:

- (1) valuable services or materials were furnished;
- (2) to the defendant;
- (3) who accepted, used and enjoyed them;
- (4) under such circumstances as reasonably notified the defendant that the plaintiff was expecting to be paid by the defendant.

Bonaparte v. Bonaparte, 317 S.C. 256, 452 S.E.2d 836 (1995); Myrtle Beach Hosp. v. City of Myrtle Beach, 333 S.C. 590, 510 S.E.2d 439 (Ct.App.1998); Wade v. Brooks, 306 S.C. 553, 413 S.E.2d 333 (Ct.App.1992); Muller v. Myrtle Beach Golf & Yacht Club, 303 S.C. 137, 399 S.E.2d 430 (Ct.App.1990) *cert. dismissed* 305 S.C. 330, 408 S.E.2d 242 (1991); and Webb v. First Fed. Savings & Loan Ass'n, 299 S.C. 1, 382 S.E.2d 4 refiled 300 S.C. 507, 388 S.E.2d 823 (Ct.App.1989).

Id. (emphasis added). The test quoted by Phillips is the one rejected by the Court. Id.

VI. Phillips argues confusingly from materials that he has improperly included in the record on appeal.

Phillips' brief contains the following:

It is important to understand that Cook had previously filed a Summons and Petition for Allowance of Credit Claim on September 16, 2015 against the Estate of Bennie Richard Phillips, Sr. ("Phillips, Sr."). The claim was denied by Motion and the matter was removed to the Circuit Court for the Tenth Judicial Circuit by Order of the Probate Court filed October 23, 2015. The claims made by Cook in the action against the Phillips, Sr. Estate were substantially the same claims made in the present action. Prior to the Summary Judgment Motion hearing in this case, Cook's attorney initiated contact

with Phillips, Sr.'s attorney and a Stipulation of Dismissal without Prejudice was filed January 21, 2016.

(Initial Brief of Respondent pp. 2-3, citations to record omitted.) Phillips then writes that "[t]he effect of the dismissal as to any claim against Bennie Richard Phillips, Sr. is that any claim that may have existed, if any at all could have, is now barred." (Initial Brief of Respondent p. 14.)

Phillips has incorrectly designated the material he referenced for inclusion in the record on appeal; moreover, though, he is wrong about the conclusion he asks the court to make in this regard.

First, inclusion of materials in some other case that were never presented to the lower court in this case is against the Appellate Court Rules, as is argument made on the basis of such materials. Rule 210(c), SCACR, prohibits the inclusion in the record on appeal of "matter which was not presented to the lower court or tribunal." Accord State v. White, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007); Sanders v. Salley, 283 S.C. 458, 460, 322 S.E.2d 829, 830 (Ct. App. 1984); see Cobb v. Benjamin, 325 S.C. 573, 581 n. 2, 482 S.E.2d 589, 593 n. 2 (Ct. App. 1997). Making factual contentions in a brief on the basis of material outside the scope of Rule 210(c), SCACR, is similarly prohibited. "The brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [see Rule 210(c)] to support the salient facts alleged." Rule 208(b)(4), SCACR (bracket in original). The Rule's language regarding what can be referenced in the brief mirrors the language in Rule 209, SCACR, limiting factual references to material that was properly designated for inclusion in the record on appeal.

Second, Phillips is wrong about his conclusion that dismissal without prejudice of similar claims made by Cook against another party would bar his claims in this case. Phillips seems to be arguing res judicata, but that would not apply. "Res judicata bars a second suit where there is (1) identity of parties; (2) identity of subject matter; and (3) adjudication of the issue in the first suit." Judy v. Judy, 393 S.C. 160, 173, 712 S.E.2d 408, 412 (2011). Here, there is no identity of parties: Phillips and his father were not the same person. Further, there has been no adjudication of the issue in the first suit. Phillips himself observes that the dismissal in the first suit was without prejudice. As a dismissal without prejudice, it could not adjudicate anything. Rule 41(a)&(b), SCRCP; see Gamble v. State, 298 S.C. 176, 177, 379 S.E.2d 118 (1989) (discussing dismissal without prejudice); Jones v. City of Folly Beach, 326 S.C. 360, 483 S.E.2d 770, 773 (Ct. App. 1997) (dismissal with prejudice operates as adjudication on merits).

VII. This is no sham affidavit case.

Citing Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629 (2004), Phillips implies that Cook's affidavit is a sham and should be disregarded by this court. (Initial Brief of Respondent p. 13.) The essence of the concept of a sham affidavit is that it is an impermissible contradiction of previously given sworn testimony, as the following notes:

A trial court may exclude an affidavit when it was submitted "to contradict that party's own prior sworn statement" in "an attempt to create a sham issue of material fact." Cothran, 357 S.C. at 218, 592 S.E.2d at 633. Our supreme court delineated the following considerations for "distinguishing between a sham affidavit and a correcting or clarifying affidavit":

(1) whether an explanation is offered for the statements that contradict prior sworn statements; (2) the importance to the litigation of the fact about which there is a contradiction; (3) whether the nonmovant had access to this fact prior to the previous sworn testimony; (4) the frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact; (5) whether the previous sworn testimony indicates the witness was confused at the time; (6) when, in relation to summary judgment, the second affidavit is submitted.

McMaster v. Dewitt, 411 S.C. 138, 149, 767 S.E.2d 451, 456 (Ct. App. 2014) (quoting Cothran, 357 S.C. at 218).

Cook never gave any testimony in this case other than in his affidavit. Not only is his affidavit not a sham, the sham affidavit analysis never gets off the ground, because there is no prior testimony for Cook's affidavit to be inconsistent *with*.

VIII. Vitriol is no substitute for logic.

Throughout his brief, Phillips insults and accuses Cook. This occurs so many times in Phillips' brief that considerations of economy do not bear listing each instance here. Cook trusts that Phillips' brief makes his uncivil tone and personal attacks impossible for this court not to see.

"Ad hominem arguments, of course, constitute one of the most common errors in logic: Trying to win an argument by calling your opponent names ('Jane you ignorant etcetera . . .') only shows the paucity of your own reasoning." Huntington Beach City Council v. Superior Ct., 115 Cal. Rptr. 2d 439, 448, 94 Cal. App. 4th 1417, 1430 (Cal. App. 4th 2002). As the undersigned once read in a brief, there is a saying in our profession: "If you have the facts and not the law, argue the facts. If you have

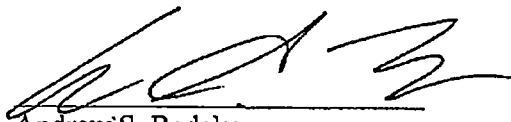
the law and not the facts, argue the law. If you don't have either the facts or the law, pound the table."

This court should not be cowed by Phillips' aggression. It "only shows the paucity of [his] own reasoning." Id.

CONCLUSION

Cook's claims are against a living person – Phillips – for what that living person did. It was reversible error for the lower court to summarily end those claims on the basis of a statute that puts time limits on the assertion of claims against an estate. This court should reverse and remand.

Respectfully submitted,



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July 13, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Judge

Appellate Case No. 2016-001653

William Rice Cook, III,.....Appellant,

v.

Benny Richard Phillips, Jr., and the real property located at 207 North Avenue,
Anderson, SC 29625 TMS # 123-26-08-02.....Respondents.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)

COUNTY OF ANDERSON)

WILLIAM RICE COOK, III)

Plaintiff)

vs.)

BENNY RICHARD PHILLIPS, JR.)

and the real estate property located)

at 207 North Avenue, Anderson,)

South Carolina 29625,)

TMS# 123-26-08-02)

Defendant)

IN THE COURT OF COMMON PLEAS

2015-CP-04-03024

A TRUE COPY

JUN 24 2016

ORDER FOR SUMMARY JUDGEMENT

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SC Court of Appeals

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COMMON PLEAS AND
GENERAL SESSIONS

FACTUAL PROCEDURAL HISTORY

This matter is before the Court pursuant to a Motion to Dismiss (Rule 12(B)(6) and Motion for Summary Judgement filed January 26, 2016, and Defendant's Motion to Quash the Lis Pendens filed in this matter. The action was commenced by the filing of the Summons and Complaint on December 31, 2015.

The Plaintiff alleged that he had entered into a Sales Agreement with the Defendant's Decedent, Claudia P. Harden, on February 28, 2006, and that the Agreement was amended by written instrument dated August 11, 2006. Both Agreements were attached as exhibits to the Complaint and were allegedly executed by Claudia P. Harden by her Power of Attorney, Julia H. Phillips, who was the Defendant's mother, and the daughter of the Decedent, Claudia P. Harden. The Plaintiff alleged that he was a residential builder at the time these agreements were made. Pursuant to the terms of the Sales Agreement, Plaintiff was to make improvements to real estate located at 207 North Avenue, Anderson, South Carolina 29625, TMS# 123-26-08-02. Both of these Agreements required Plaintiff to, *inter alia*, make improvements to the property within a specified time frame (6 - 7 months). Thereafter, the property was to be sold with Plaintiff receiving the net sales proceeds after specified amounts were paid to the Decedent, Claudia P. Harden. Plaintiff was not purchasing the property and had no ownership interest in that property. The Plaintiff (or his company) was responsible for the cost of improvements and closing.

The Plaintiff alleged in the Complaint, that subsequent to the completion of the improvements in 2007, that the Plaintiff and various people, including the Defendant as Conservator for the Decedent, Claudia P. Harden, [the Plaintiff having been appointed Conservator after the death of his mother on 10/14/2011] agreed to delay the sale of the property due to the existing dire real estate market conditions during that time period. Much, if not all of the alleged communications set forth in the Affidavit of the Plaintiff are hearsay, (with

no applicable exception thereto), and/or are barred by the Dead Man's Statute, or the Statute of Frauds.

The Decedent, Claudia P. Harden, ultimately died on December 3, 2013. At the time of her death, neither of the 2006 Agreements had been carried out and the subject property remained unsold. The Defendant was appointed Personal Representative of the Decedent's Estate. The Decedent's Estate was closed by Order of the Probate Court on June 1, 2015 and no claims were filed by the Plaintiff.

The Plaintiff in the Complaint asserts that the Defendant, in his capacity as Personal Representative of the Estate of Claudia P. Harden, allegedly, fraudulently induced him not to file claims against the Decedent's Estate by promising (orally) to honor the 2006 Sales Agreement(s). As a result, according to the Plaintiff, he did not file any claims against the Decedent's Estate. Thereafter, on October 20, 2014, the Defendant, as the sole heir under the Will of Claudia P. Harden, conveyed the property by Deed of Distribution to himself and subsequently refused to honor the 2006 Agreement(s). On December 31, 2015, the Plaintiff filed this action against the Defendant and an *in rem* action against the subject property, asserting causes of action as follows:

1. Unjust enrichment
2. Conversion
3. Constructive Trust/Equitable Title
4. Partition

All of the Plaintiff's claims relate back to, and are dependent on the 2006 Agreement. The Defendant has moved for Summary Judgment on the basis that the claims made by the Plaintiff violate the provisions set forth in the Non-Claim Statute established by S. C. Code Ann. §62-3-801 and S.C. Code Ann. §62-3-803.

LAW

The Defendant's filed their Motion for Summary Judgment, and the Plaintiff has submitted an affidavit in opposition to the Motion and therefore, it is governed by Rule 56(c) of the South Carolina Rules of Civil Procedure. This rule provides a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC.

"When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." Fleming v. Rose, 350 S.C. 488, 567 S.E.2d 857. In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 673 S.E.2d 801, 803 (2009). In cases requiring a heightened burden of proof, the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment. Id. at 330-31, 673 S.E.2d at 803. See Turner v. Milliman, 392 S.C. 116, 121 22, 708 S.E.2d 766, 769 (2011).

The party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact." Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). This initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the non-moving party's case, and it is not necessary for the moving party to support its motion with affidavits or other similar materials negating the opponent's claim. *Id.* Once the moving party carries its initial burden, the opposing party must do more than rest upon the mere allegations or denials of his pleadings, but must, by affidavit or otherwise, set forth specific facts to show that there is a genuine issue for trial. *Id.*; Rule 56(e), SCRCP.

Lord v. D & J Enterprises, Inc., 407 S.C. 544, 552-53, 757 S.E.2d 695, 699 (2014), reh'g denied (May 22, 2014)

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001).

"Summary judgment is appropriate in those cases in which plain, palpable and undisputable facts exist on which reasonable minds cannot differ." *Priest v. Brown*, 302 S.C. 405, 408, 396 S.E.2d 638, 639 (Ct.App.1990). "It is not sufficient that one create an inference [that] is not reasonable or an issue of fact that is not genuine." *Id.*

Once the moving party meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings but must come forward with specific facts showing there is a genuine issue for trial. Rule 56(e), SCRCP; *Boone v. Sunbelt Newspapers, Inc.*, 347 S.C. 571, 579, 556 S.E.2d 732, 736 (Ct.App.2001).

The Plaintiff bases his claim on the alleged Contract in 2006 with Claudia P. Harden, allegedly executed by her attorney in fact, Julia H. Phillips. Any other interpretation urged by the Plaintiff is unreasonable. Julia H. Phillips died October 26, 2011; no claim was ever made against Julia H. Phillips, nor her estate and the Plaintiff was appointed Conservator for Claudia H. Harden October 14, 2011 with no claim or action being filed against Claudia H. Harden, who died December 3, 2013. The Estate of Claudia H. Harden was closed on June 1, 2015 as appears by Probate Roll 2014-ES-04-00047 and no claim was filed against the Estate of Claudia Harden within the one year time limit permitted by the Non-Claim Statute, §62-3-803.

The causes of action in the Complaint all have their basis in the Agreement of Claudia H. Harden, signed in 2006. This Court finds that it is mandatory and imperative under the laws of this State that any claims that may be outstanding and in existence before the death of a decedent, must be brought within one year after decedent's death as provided by §62-3-803 (a)(1), or no later than eight months (following publication of notice for all creditors barred by publication) as provided in §62-3-801(a).

"(a) all claims against a decedent's estate which arose before the death of the decedent, . . . whether due or to become due, absolute or contingent, liquidated or unliquidated, found on contract, tort, or other legal basis, if not barred earlier by another statute of limitations or non-claim statute; are barred against the estate, the personal representative, the decedent's heirs and devisees, and the non probate transferees of the decedent; unless presented with the earlier of the following:

- (1) one year after the decedent's death;
- (2) the time provided by § 62-3-801 (b) for creditors who are given actual notice, and within the time provided in § 62-3-801 (a) for all creditors barred by publication." See, SC Code §62-3-803 (a)(1).

See, Earl Phillips as Personal Representative v. Brigitte Quick 399 S.C. 226, 731 S.E. 2d 327 (2012). (See Exhibit 5)

The Supreme Court has held that §62-3-803 is a non-claim statute and unless the statute is complied with, a creditor's claim is barred.

The Phillips Court held that "non-claim statutes impose a condition precedent to the enforcement of a right of action and are not subject to equitable exceptions." Estate of Decker 684 N.E. 2d at 1130; see also 51 AmJur 2nd Limitation of Actions Section 3 (2011); The time element is a built-in condition of a nonclaim statute and is of the essence of the right of action, and unless the claim is filed within the prescribed time set out in the statute, no enforceable right of action is created." Phillips at page 230.

The Plaintiff has attempted to get around the Non-Claim Statute by alleging a constructive trust, however this attempt is without merit, as both equitable and legal claims are likewise barred. In the Phillips case, our Court held that §62-3-803 makes no mention of the discovery rule; nor does it permit equitable exceptions to extend the time for commencing an action as is set forth above.

Also, in the case of In Re: Estate of Hover 407 S.C. 194, 754 S.E. 2d 875 (2014), our Supreme Court held that S.C. Code Ann. §62-3-803 is a Non-Claim Statute and stated as follows:

If the "secured" creditor [the Plaintiff in this case is an unsecured creditor] fails to timely present a claim in compliance with the Non-Claim Statute, the creditor's right of action against the estate is barred.

See also, Phillips v. Quick, 399 S.C. 226, 731 S.E. 2d 327, 329 (Ct.App.2012) "While equitable principles may extend the time for commencing an action under statutes of limitation, nonclaim statutes impose a condition precedent to the enforcement of a right of action and are not subject to equitable exceptions." (quoting Estate of Decker v. Farm Credit Servs. of Mid-Am., ACA, 684 N.E.2d 1137, 1139 (Ind.1997)); 34 C.J.S. Executors & Administrators § 547 (Supp.2013) ("Misleading statements, assurances, or conduct of the representative inducing a creditor to refrain from the due presentation of his or her claim do not estop the representative from contesting the claim because of such a failure to present the claim.") See generally E.W.H., Annotation, Effect of Conduct of Personal Representative Preventing Filing of Claims Within Time Allowed by Statute of Nonclaim, 66 A.L.R. 1415 (1930) (citing state and federal cases addressing the general rule that no promise on the part of a personal representative is sufficient to prevent the bar of the statute as to a claim not filed within the statutory period)." In re Estate of Hover, 407 S.C. 194, 211 12, 754 S.E.2d 875, 884 (2014). See also, In Re: Estate of Tollison 320 S.C. 132, 135, 463 S.E. 2d 611, 613 (Ct. App. 1995).

Therefore, this Complaint should be dismissed in its entirety with prejudice.

The Lis Pendens filed in this matter must be dismissed as it is in violation of the provisions set forth in S.C. Code Ann. §15-11-10.

The filing of a Lis Pendens is an extraordinary privilege granted by statute, strict compliance with the statutory provisions is required. Pond Place Partners v. Poole 351 S.C. 1, 567 S.E. 2d 881 (Ct. App. 2002). As set forth in Pond Place Partners supra an action affecting the title to real property clearly allows the filing of a Lis Pendens by an interested party in order to protect their ownership interest in the property subject to the litigation.

The Plaintiff has no ownership interest in this property by any stretch of the imagination. The Plaintiff in this case does not even have a viable claim that can be made in the Courts of this state, as set forth above and the Lis Pendens must be cancelled of record.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The right to assert any of the above claims, whether legal or equitable, originates from the 2006 Sales Agreement(s) between the Plaintiff and the Decedent, Claudia Harden, and arose during the life of the Decedent. Any other interpretation as urged by the Plaintiff is not reasonable. Accordingly, the Plaintiff was required to file a claim against the Decedent's Estate. Having failed to file any Estate claims, Plaintiff is barred from pursuing the claims arising under or out of the Contract and against the subject real estate by virtue of the Non-Claim Statute (§62-3-803).

Accordingly, Defendant's Motion for Summary Judgement as to all claims, and to cancel the Lis Pendens against the subject property is granted. This ruling is based on Rule 56 and not Rule 12(B)(6).

In arguments before the Court and in its Brief, the Plaintiff points to S.C. Code Ann. §62-1-106 and asserts that this Code Section is an exception to the Non-Claim Statute. If this Statute had the meaning claimed by the Plaintiff under this general statute, it would effectively eviscerate the specific procedures and provisions of the Non-Claim Statute created by the legislature and upheld by our Appellate Courts. These Statutes are required to be read *in para materia*. As is set forth above, the Non-Claim Statute bars all claims made by the Plaintiff in its Complaint. The attempt to use this provision of the Code [§62-1-106] to "bootstrap" their argument so as to establish the equitable remedy of a "constructive trust," clearly is barred by the South Carolina Non Claim Statute, §62-3-803. The statute primarily deals with fraud perpetrated in the making of a will, or relating to statements of creditor's claims; various forms filed under the Probate Code in the administration of Estates, and has no relevance to the Complaint allegations filed in this case.

In addition, the Plaintiff has argued that his claim and causes of action set forth in his Complaint are not against the Defendant in his representative capacity, but against the Defendant individually. The Plaintiff does not allege any individual promises of the Defendant to be responsible for the debt. S.C. Code §62-3-619 provides for personal liability (*Executor de son tort*) against "any person who obtains, receives, or possesses property... belonging to the Decedent, by means or fraud..." However, contrary to Plaintiff's intent, actions pursuant to S.C.

Code §62-3-619 and/or actions by virtue of executor *de son tort* "cannot be levied on the lands of the Testator". Warren v. Raymond 17 S.C. 163 (1882). The Defendant received title by operation of law.

The Plaintiff asserts that he is not precluded from bringing an independent action against Defendant, individually, for his alleged representations while Personal Representative of the Estate of Claudia P. Harden, however, in such a situation any judgement obtained may be only for monetary damages and not against the property.¹

CONCLUSION

After hearing arguments of counsel and considering the pleadings, the affidavits and oral arguments of the parties, it is ORDERED, ADJUDGED AND DECREED:

1. The Defendant is entitled to Summary Judgement (Rule 56 SCRCP) as a matter of law and the case is dismissed, with prejudice.

2. The Clerk of Court is ordered to cancel the Lis Pendens filed in this matter in Book 2015-LP-04-00680.

3. Nothing in this order shall prevent Plaintiff from bringing an independent action against Defendant, individually, as provided by the 4th order and which is incorporated herein.

[Signature]
R. LAWTON MCINTOSH
PRESIDING JUDGE, TENTH JUDICIAL CIRCUIT

Anderson, South Carolina

June 23, 2016

FILED-CLERK'S OFFICE
ANDERSON SC
2016 JUN 24 AM 9:33
COMMON PLEAS AND
GENERAL SESSIONS

¹ Without ruling such, the Court expresses doubt regarding whether Plaintiff may base "fraud" claims on alleged statements by Defendant while a Conservator due to the statutory requirements, that a Conservator must first obtain permission from the Probate Court before acting, and further, based upon the Court's above Findings of Fact and Conclusions of Law, as it pertains to the Non-Claim Statute.

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON
IN THE COURT OF COMMON PLEAS AND
GENERAL SESSIONS
William Rice Cook, III
FILED CLERK'S OFFICE
ANDERSON SC

FORM 4

JUDGMENT IN A CIVIL CASE

RECEIVED

AUG 01 2016

CASE NO. 2015-CP-04-03024

Benny Richard Phillips, Jr. and the real estate
property located at 207 North Avenue,
Anderson, South Carolina 29625
TMS # 123-26-08-02

7/16 JUL 26 AM 9:14

COMMON PLEAS AND
GENERAL SESSIONS

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Michael F. Mullinax

Attorney for : ☐ Plaintiff ☒ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☒ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

MOTION FOR RECONSIDERATION IS DENIED WITHOUT THE NECESSITY OF A HEARING OR FORMAL ORDER.

This order ☐ ends ☒ does not end the case.

AUG 10 2016

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

SCRPC Form 4C (03/2013)

2155
Judge Code

7-25-16
Date

Page 1

Appendix p. 124

ROA 7

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS

WILLIAM RICE COOK, III,

Plaintiff(s)

CIVIL ACTION COVERSHEET

2015-CP - 04- 03024

vs.

BENNY RICHARD PHILLIPS, JR., and the real
property located at 207 NORTH AVENUE,
ANDERSON, SC 29625, TMS # 123-26-08-02,

Defendant(s)

Submitted By: DANIEL L. DRAISEN
Address: 207 E. CALHOUN STREET
ANDERSON, SC 29621

SC Bar #: 13536
Telephone #: 864/225-4000
Fax #: 864/964-0788
Other:

E-mail: ddraisen@kmdlattorneys.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|--|---|--|
| Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ General (130)
☐ Breach of Contract (140)
☐ Fraud/Bad Faith (150)
☐ Failure to Deliver/Warranty (160)
☐ Employment Discrim (170)
☐ Employment (180)
☐ Other (199) | Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20 -NI-
☐ Notice/ File Med Mal (230)
☐ Other (299) | Torts - Personal Injury
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Assault/Battery (370)
☐ Slander/Label (380)
☐ Other (399) | Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☒ Building Code Violation (460)
☒ Other (499) |
| Inmate Petitions
☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599) | Administrative Law/Relief
☐ Reinstate Drv. License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899) | Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)
☐ Confession of Judgment (770)
☐ Petition for Workers Compensation Settlement Approval (780)
☐ Other (799) | Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Comm. (990)
☐ Employment Security Comm (991)
☐ Other (999) |
| Special/Complex /Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699)
☐ Sexual Predator (510) | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Motion to Quash Subpoena in an Out-of-County Action (660)
☐ Pre-Suit Discovery (670) | | |

Submitting Party Signature:

[Signature]

Date: 12-31-15

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

[Illegible text block]

FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals

 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS

WILLIAM RICE COOK, III,

Plaintiff,

vs.

BENNY RICHARD PHILLIPS, JR., and
the real property located at 207 NORTH
AVENUE, ANDERSON, SC 29625, TMS#
123-26-08-02,

Defendants.

A TRUE COPY

DEC 31 2015

Richard A. Phillips
ANDERSON CLERK OF COURT

SUMMONS

C/A No. 2015-CP-04-03024

TO THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscriber at his office at 207 East Calhoun Street, Anderson, South Carolina 29621, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the said relief demanded in the Complaint.

TO INFANT(S) OVER FOURTEEN YEARS OF AGE (AN IMPRISONED PERSON):

You are further summoned and notified to apply for the appointment of a Guardian ad Litem to represent you in this action within 30 days after the service of this Summons and Notice upon you. If you fail to do so, application for such appointment will be made by the Plaintiff(s) herein.

TO INFANT(S) UNDER FOURTEEN YEARS OF AGE (INCOMPETENT OR INSANE) AND TO, (GENERAL OR TESTAMENTARY GUARDIAN) (COMMITTEE) WITH WHOM (S)HE/(THEY) RESIDE(S):

You are further summoned and notified to apply for the appointment of a Guardian ad Litem to represent said infant(s) under 14 years of age (said incompetent or insane person) within 30 days after the service of this Summons and Notice upon you. If you fail to do so, application for such appointment will be made by the Plaintiff(s) herein.

KRAUSE, MOOREHEAD AND DRAISEN, P.A.

December 30, 2015

Thomas J. Krause

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS

WILLIAM RICE COOK, III,

Plaintiff,

vs.

BENNY RICHARD PHILLIPS, JR., and
the real property located at 207 NORTH
AVENUE, ANDERSON, SC 29625, TMS#
123-26-08-02,

Defendants.

A TRUE COPY

DEC 31 2015

Richard M. Kiley
ANDERSON CLERK OF COURT

LIS PENDENS

LP# 2015-LP-04-00680

C/A No. 2015-CP-04-03024

NOTICE IS HEREBY GIVEN that the Plaintiff above named, by virtue of a Summons and Complaint filed this same date, may claim some right, title or interest in and to the following property:

PARCEL NO. 1:

All that certain lot or parcel of land with the improvements thereon, situate in the City of Anderson, County of Anderson, State of South Carolina, facing on North Avenue, and having a width of ninety (90) feet; and bounded on the North by said North Avenue, on the East by lot now or formerly of Mrs. Cecelia Fretwell, on the South by lot now or formerly of W. E. Atkinson, and on the West by the remaining portion of Lot No. 52 (Fifty-two) hereinafter referred to. The lot of land herein conveyed is composed of all of Lot No. 51 (Fifty-one) as shown on plat of North Anderson made by W. A. Sanders, Surveyor, and of record in the Office of the Clerk of Court for Anderson County in Plat Book 6 at page 9, and composed further of a strip of land twenty (20) feet in width, taken from the Eastern side of Lot No. 52 (Fifty-two) as represented on said plat, the Eastern boundary line of said strip of land is co-extensive with the Eastern boundary line of Lot No. 51 (Fifty-one).

PARCEL NO. 2:

All that certain piece, parcel or lot of land situate, lying and being in the City of Anderson, County of Anderson, State of South Carolina, being known and designated as the western portion of Lot Number Fifty (50) on plat of Russell & Axon Engineers, Planners & Architects, Inc., dated June 30, 1980, of record in the Office of the clerk of Court for Anderson County, South Carolina, in Plat Book 87 at page 70, and being more particularly described according to said plat as follows: BEGINNING at an iron pin corner on the Southwestern side of North Avenue, said corner being the Northeasternmost corner of lot herein described, and running thence South 6 degrees 57 minutes West one hundred thirty (130) feet to iron pin corner, thence South 12 degrees 57 minutes West one hundred and

one-tenth (100.1) feet to iron pin corner, thence North 79 degrees 15 minutes west three and eighty-six one-hundredth (3.86) feet to iron pin corner, thence North 10 degrees 45 minutes East two hundred thirty (230) feet to iron pin corner on the Southwestern side of North Avenue, and running thence along North Avenue South 79 degrees 05 minutes East three and sixty-seven one hundredths (3.67) feet to the beginning corner; being bounded on the Northeast by North Avenue, on the Southeast by the eastern portion of Lot Number Fifty (50), and on the Northwest by lands of James Harden; and being a portion of the lands devised unto grantor herein by Will of Sue P. Thompson, deceased, as reference to Probate Roll #28546 in the Office of the Probate Judge for Anderson County will reveal.

This being the same properties conveyed unto Ben Richard Phillips, Jr. by Corrective Deed of Distribution from the Estate of Claudia P. Harden dated 2-24-15 of record in the Register of Deeds Office for Anderson County in Deed Book 11717 at page 168.

TMS# 123-26-08-002

Respectfully submitted,

KRAUSE, MOORHEAD AND DRAISEN, P.A.


DANIEL L. DRAISEN, SC Bar# 13536
207 East Calhoun Street
Anderson, SC 29621
(864) 225-4000
(864) 964-0788 facsimile
ddraisen@kmdlawyers.com
ATTORNEYS FOR THE PLAINTIFF

December 30, 2015
Anderson, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

WILLIAM RICE COOK, III,

Plaintiff,

vs.

BENNY RICHARD PHILLIPS, JR., and
the real property located at 207 NORTH
AVENUE, ANDERSON, SC 29625, TMS#
123-26-08-02,

Defendants.

IN THE COURT OF COMMON PLEAS

A TRUE COPY

DEC 31 2015

ANDERSON CLERK OF COURT

COMPLAINT

C/A No. 2015-CP-04-

03024

The Plaintiff, complaining of the Defendants herein, would respectfully show unto the Court and allege that:

1.

The Plaintiff, William Rice Cook, III, is a citizen and resident of the County of Anderson, State of South Carolina.

2.

The Plaintiff is informed and believes that Defendant Benny Richard Phillips, Jr. is a citizen and resident of the County of Anderson, State of South Carolina.

3.

The Defendant real property, located at 207 NORTH AVENUE, ANDERSON, SC 29625, and identified by TMS# 123-26-08-002 (hereinafter the "Property"), is situated and located in the County of Anderson, State of South Carolina, and is more particularly described as follows:

1

PARCEL NO. 1:

All that certain lot or parcel of land with the improvements thereon, situate in the City of Anderson, County of Anderson, State of South Carolina, facing on North Avenue, and having a width of ninety (90) feet; and bounded on the North by said North Avenue, on the East by lot now or formerly of Mrs. Cecelia Fretwell, on the South by lot now or formerly of W. E. Atkinson, and on the West by the remaining portion of Lot No. 52 (Fifty-two) hereinafter referred to. The lot of land herein conveyed is composed of all of Lot No. 51 (Fifty-one) as shown on plat of North Anderson made by W. A. Sanders, Surveyor, and of record in the Office of the Clerk of Court for Anderson County in Plat Book 6 at page 9, and composed further of a strip of land twenty (20) feet in width, taken from the Eastern side of Lot No. 52 (Fifty-two) as represented on said plat, the Eastern boundary line of said strip of land is co-extensive with the Eastern boundary line of Lot No. 51 (Fifty-one).

This being the same lot of land conveyed unto Claudia P. Harden by deed of James L. Harden Company, Inc. dated 11-30-56 of record in the Register of Deeds Office for Anderson County in Deed Book 10S at page 455.

PARCEL NO. 2:

All that certain piece, parcel or lot of land situate, lying and being in the City of Anderson, County of Anderson, State of South Carolina, being known and designated as the western portion of Lot Number Fifty (50) on plat of Russell & Axon Engineers, Planners & Architects, Inc., dated June 30, 1980, of record in the Office of the clerk of Court for Anderson County, South Carolina, in Plat Book 87 at page 70, and being more particularly described according to said plat as follows: BEGINNING at an iron pin corner on the Southwestern side of North Avenue, said corner being the Northeasternmost corner of lot herein described, and running thence South 6 degrees 57 minutes West one hundred thirty (130) feet to iron pin corner, thence South 12 degrees 57 minutes West one hundred and one-tenth (100.1) feet to iron pin corner, thence North 79 degrees 15 minutes west three and eighty-six one-hundredths (3.86) feet to iron pin corner, thence North 10 degrees 45 minutes East two hundred thirty (230) feet to iron pin corner on the Southwestern side of North Avenue, and running thence along North Avenue South 79 degrees 05 minutes East three and sixty-seven one hundredths (3.67) feet to the beginning corner; being bounded on the Northeast by North Avenue, on the Southeast by the eastern portion of Lot Number Fifty (50), and on the Northwest by lands of James Harden; and being a portion of the lands devised unto grantor herein by Will of Sue P. Thompson, deceased, as reference to Probate Roll #28546 in the Office of the Probate Judge for Anderson County will reveal.

This being the same property conveyed unto Claudia P. Harden, by deed of Mary Sue Thompson, dated July 9, 1980, and recorded July 14, 1980 in Deed Book 19-J at page 435 in the Register of Deeds Office for Anderson County.

4.

All parties, matters, and things herein are within the jurisdiction of this Court.

GENERAL FACTUAL ALLEGATIONS

5.

The Plaintiff, William Rice Cook, III, is and was, at all times relevant hereto, a South Carolina licensed Residential Builder, license number 21518, and a resident of the neighboring property located at 209 North Avenue, Anderson, South Carolina.

6.

On or about February 28, 2006, the Plaintiff entered into a Sales Agreement with Julia H. Phillips, attorney-in-fact for Claudia P. Harden by Power of Attorney dated March 28, 1994 and recorded in the Anderson County Register of Deeds office on March 28, 1994, in Book 1849 at Page 190, for the renovation, remodeling and sale of the Property owned by Mrs. Harden. See Exhibit A and Exhibit B attached hereto and incorporated by reference thereto.

7.

On or about August 11, 2006, the parties agreed to amend the terms of the agreement and the Plaintiff and Julia H. Phillips, as attorney-in-fact for Claudia P. Harden, entered into a second Sales Agreement. See Exhibit C attached hereto and incorporated by reference thereto.

8.

Pursuant to the terms of the amended Sales Agreement, all labor and materials were to be provided and paid for by the Plaintiff. The Plaintiff was allowed seven (7) months to renovate the Property. Upon completion of the renovations and remodeling, the Property was to be sold and Mrs. Harden was to receive \$155,000 from the sale and Plaintiff was to receive all sums above \$155,000.

3

The Plaintiff made interest payments to Mrs. Harden pursuant to the Agreement for approximately one year prior to the Property being listed for sale. At the time of listing the Property, the parties agreed that in lieu of monthly interest payments the monthly interest amount would be added to the principal amount (of \$155,000.00) and would be paid when the Property sold. The Property was then listed for sale.

10.

After the completion of the renovations and remodeling, the appraised value of the Property was \$260,000.00.

11.

In or around the end of 2008 and accelerating into 2009, the real estate market in Anderson County and throughout much of the country experienced a sharp down turn and the Property did not sell. Ben Phillips, Sr. assumed the handling of affairs for his wife, Julie H. Phillips, and for his mother-in-law, Claudia P. Harden. While not legally correct, Mr. Phillips, Sr. took the position that since he had Mrs. Phillip's Power of Attorney and Mrs. Phillips had Mrs. Harden's Power of attorney, that by extension he had Mrs. Harden's Power of Attorney.

12.

Mr. Phillips, Sr. unilaterally made the decision to take the Property off the market. He took down the realtor's sign and allowed Ben Phillips, Jr. to move into the home on the Property. The Plaintiff, upon discovering this, met with Mr. Phillips, Sr. and was informed that the Property would be re-listed when he felt the time was right. The Plaintiff also had a meeting with Defendant Phillips at this time and was assured by Defendant Phillips that nothing had

~~changed, that he and his father had decided to put furniture in the home to "stage it," and that~~
they planned to re-list the Property soon. While not in agreement with the decision to take the Property off the market, the Plaintiff reluctantly agreed with the Phillips' position that "staged homes" and homes that are lived in generally sell better.

13.

On or about October 26, 2011, Julia H. Phillips passed away.

14.

Prior to her death, Julia H. Phillips was unable to serve as attorney-in-fact for her mother, Claudia P. Harden, and on or about October 14, 2011 Benny Richard Phillips, Jr., Mrs. Harden's grandson, was appointed as Conservator for Mrs. Harden as is reflected in Anderson County

Probate Court Case Number 2011GC0400041. See Exhibit D attached hereto and incorporated by reference thereto.

15.

Defendant Phillips was fully aware of the existence of the agreement between the Plaintiff and Mrs. Harden for the renovation, remodeling and sale of the Property owned by Mrs. Harden.

16.

The parties met periodically during the downturn in the real estate market and always had cordial conversations about the Property. In December 2012, the Plaintiff had a more pointed meeting with Defendant Phillips about when the Property would be re-listed as promised. The Plaintiff also gave Defendant Phillips the option to compensate him for his investment in the Property if Defendant wanted to live there. Defendant Phillips assured the Plaintiff that he

~~understood the situation, and that he knew that the Plaintiff was owed for his investment in the~~

Property. In fact, Defendant Phillips informed the Plaintiff that Mrs. Harden received periodic disbursements from an investment fund, that she was expecting a disbursement in January 2013, and that he would begin paying the Plaintiff some of the money owed for the work done on the Property. No payment was ever received. The Plaintiff again asked Defendant Phillips about the situation in the spring of 2013. At that time, Defendant Phillips advised that Mrs. Harden's health care costs were substantial and that he was not able to pay any money at that time, but that the situation would be worked out.

17.

On or about December 3, 2013, Claudia P. Harden passed away. Richard Phillips, Jr. was appointed Personal Representative of the Estate of Claudia P. Harden as is reflected in Anderson County Probate Case Number 2014ES0400047. See Exhibit E attached hereto and incorporated by reference thereto.

18.

On February 11, 2015 Ben Phillips, Sr. passed away. The Plaintiff waited an appropriate amount of time before again asking Defendant Phillips about the Property, recounting to Mr. Phillips his repeated assurances of payments from Mrs. Harden's disbursements and assurances that the Property would be re-listed for sale. It was at this point that Defendant Phillips told the Plaintiff that the agreement was between Mr. Phillips, Sr. and the Plaintiff, and that unfortunately the Plaintiff's time was up and nothing could be done about it.

19.

The Property was never sold but was transferred by Defendant Phillips from Mrs.

~~Harden's estate into the name of Benny Richard Phillips, Jr. first by Deed of Distribution dated~~
October 20, 2014 and recorded on October 22, 2014 in the Office of the Register of Deeds for
Anderson County, South Carolina in Book 11567 at Page 245, and then by Corrective Deed of
Distribution dated February 24, 2015 and recorded in the aforesaid Register of Deeds Office on
February 25, 2015 in Book 11717 at Page 168, and the Plaintiff has never been paid a single cent
for the labor, materials and improvements made to the Property. See Exhibit F and Exhibit G
attached hereto and incorporated by reference thereto.

FOR A FIRST CAUSE OF ACTION
(Unjust Enrichment)

20.

The Plaintiff restates and incorporates all of the prior allegations contained herein above
by reference thereto as is fully restated herein verbatim.

21.

The materials and labor paid for and provided by the Plaintiff for renovation and
remodeling of the Property was not a gift to the Defendants. The materials and labor provided to
renovate and remodel the Property resulted in a significant increase in the value of the Property for
which the Defendants have not paid anything to the Plaintiff.

22.

As a direct and proximate result of Defendants' failure to compensate the Plaintiff for the
labor and materials provided for renovation and remodeling work done to the Property, the
Defendants, and each of them, have been unjustly enriched in an amount to be determined by
the Court at the trial of this case; the Plaintiff has lost the value of the money and services

~~provided to the Property; and the Plaintiff has been forced to retain the services of an attorney to~~
protect his interests and to incur the cost thereof, all to the Plaintiff's damage in an amount to be
determined by the Court at the trial of this case.

FOR A SECOND CAUSE OF ACTION
(Conversion)

23.

The Plaintiff restates and incorporates all of the prior allegations contained herein above
by reference thereto as is fully restated herein verbatim.

24.

By transferring title to the Property to Defendant Phillips without paying the Plaintiff for the
materials and labor paid for and provided by the Plaintiff for renovation and remodeling of the
Property, Defendant Phillips has converted the improvements to his own use and benefit and has
deprived the Plaintiff of same.

25.

As a direct and proximate result of Defendant Phillips' conversion, the Plaintiff has been
deprived of the labor and materials provided for renovation and remodeling work done to the
Property; the Plaintiff has lost the value of the money and services provided to the Property; and
the Plaintiff has been forced to retain the services of an attorney to protect his interests and to incur
the cost thereof, all to the Plaintiff's damage in an amount to be determined by the Court at the trial
of this case.

~~FOR A THIRD CAUSE OF ACTION~~
(Constructive Trust/Equitable Title)

26.

The Plaintiff restates and incorporates all of the prior allegations contained herein above by reference thereto as is fully restated herein verbatim.

27.

This action is brought pursuant to the Uniform Declaratory Judgments Act, S.C. Code Ann. 1976, Section 15-53-10 et seq., for the purpose of determining a question of actual controversy between the parties as hereinafter more fully appears.

28.

As more fully set forth herein above, the Plaintiff invested time and money into the renovation and remodeling of the Property thereby increasing the value of same and has not been compensated in any manner such that he has acquired an equitable interest in the Property.

29.

The Plaintiff further asserts that title to the Property is currently held in constructive trust by Defendant Phillips. The circumstances under which Property was acquired by Defendant Phillips make it inequitable that legal title (or at least full legal title) should be retained by Defendant Phillips. As Conservator for Mrs. Harden, and as the successor to his mother's Power of Attorney, Defendant Phillips was aware of the agreement between the Plaintiff and Mrs. Harden's prior attorney-in-fact, and knows the amount of time and money the Plaintiff has invested in the Property.

30.

Despite his express knowledge of the work performed and the monies expended by the

~~Plaintiff on the Property, and of the agreement between the parties, Defendant Phillips knowingly~~

and fraudulently represented to the Plaintiff that the Plaintiff need not worry, that the Property would be sold and that Plaintiff would be paid his share for his investment in the Property. The Plaintiff is informed and believes that the representations made by the decedent's Conservator and then Personal Representative were material to Plaintiff's decision not to take legal action against the Defendant and the decedent's estate.

31.

The Plaintiff is informed and believes that the Defendant Phillips intended for the Plaintiff to rely upon his representation that the Property would be sold that Plaintiff would be repaid for his investment in the Property, and further intended for the Plaintiff to act upon this representation by not taking legal action against the Defendant, decedent's estate or the Property.

32.

~~The Plaintiff did not have legal title to the Property. Defendant Phillips was appointed by~~
the Court as the Conservator for Mrs. Harden and then as the Personal Representative of the Estate of Claudia P. Harden, as such Defendant Phillips had the authority to make representations on behalf of Mrs. Harden and owed a duty to do so truthfully. The Plaintiff had no reason to disbelieve Defendant Phillips and therefore had to rely on the truth of the Defendant's representations, and had a right to rely upon the representations of the Court appointed Conservator and Personal Representative.

33.

Defendant Phillips' representations to the Plaintiff were false. Defendant Phillips executed a Deed of Distribution for the Property to himself and has now denied that Plaintiff has any claim or

~~right to an interest in the Property.~~

34.

As a direct and proximate result of Defendant's false representations and his fraud, Plaintiff has been deprived of the labor and materials provided for renovation and remodeling work done to the Property; has lost the value of the money and services provided to the Property, and is entitled to a declaration of the Court that Plaintiff is the owner of an equitable interest in and to the Property, that by virtue of the acts of Defendant Phillips that a constructive trust exists for the Property, and is entitled to a declaration of the Court determining and declaring the interest of the parties in and to the Property.

FOR A FOURT CAUSE OF ACTION
(Partition)

35.

The Plaintiff restates and incorporates all of the prior allegations contained herein above by reference thereto as is fully restated herein verbatim.

36

The Property at issue in this matter consists of a lot (made up of several parts of prior lots) with one home located and as such the Property is not capable of being equitably divided in kind.

37.

Pursuant to the Code of Laws of South Carolina, 1976, as amended, Section 15-61-10 *et. seq.*, and South Carolina Rules of Civil Procedure, Rule 71, the Plaintiff desires that the Court partition the Property owned by the Plaintiff and the Defendant as Tenants in Common by private or public sale according to their interests therein, and that the Court allocate any taxes and

11

~~assessments which may be due and owing on the Property in proportion to the parties' respective~~
interests therein, together with a reasonable fee for the maintenance of this action for Plaintiff's attorney.

38.

Pursuant to SCRCF, Rule 71(f)(5), the Plaintiff requests that the Court dispense with the issuing of a writ of partition, and that the Court determine by means of testimony taken before the proper officer and reported to the Court whether a partition in kind among the parties is practicable or expedient, or if such partition cannot be fairly had, that the Court order a sale of the Property and a division of the proceeds according to the rights of the parties.

WHEREFORE, the Plaintiff prays that he be granted the following relief:

1. That the Plaintiff be awarded damages against the Defendants, both jointly and severally, for unjust enrichment in an amount to be determined by the Court at the trial of this case;

~~2. That the Plaintiff be awarded damages against the Defendants, both jointly and severally,~~
for conversion in an amount to be determined by the Court at the trial of this case;

3. That the Court issue a declaration that Plaintiff is the owner of an equitable interest in and to the Property, that by virtue of the acts of Defendant Phillips the Court declare that a constructive trust exists for the Property, and that the Court determine and declare the interest of the parties in and to the Property;

4. That the Court partition the Property by private or public sale according to the interests of the parties therein, that the Court allocate any taxes and assessments which may be due and owing on the Property in proportion to the parties' respective interests therein, and that the Court divide the proceeds according to the rights of the parties; and

5. ~~That the Court award to the Plaintiff a reasonable attorney's fee for the maintenance of~~
this action.

Respectfully submitted,

KRAUSE, MOORHEAD AND DRAISEN, P.A.


DANIEL L. DRAISEN (SC Bar # 13536)
207 E. Calhoun Street
Anderson, South Carolina 29621
(864) 225-4000
(864) 964-0788 facsimile
ddraisen@kmdlawyers.com
ATTORNEYS FOR THE PLAINTIFF

December 30, 2015
Anderson, South Carolina

EXHIBIT A

08036

BOOK 1840 PAGE 190

STATE OF SOUTH CAROLINA,)
COUNTY OF ANDERSON.) POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, that I, CLAUDIA PREVOST HARDEN, Social Security Number [REDACTED], of 207 North Avenue, City of Anderson, County of Anderson, State of South Carolina, do hereby make, constitute and appoint JULIA HARDEN PHILLIPS, Social Security Number [REDACTED], of 806 Concord Avenue, Anderson, South Carolina, as my true and lawful attorney-in-fact for me and in my name, place and stead, on my behalf and for my use and benefit full power and authority to do and perform all and every act and thing whatsoever I may legally do through an attorney-in-fact, granting every proper power necessary to carry out the purposes for which this Power is granted. This authority to act for me and in my name, place and stead and on my behalf, includes, but is not limited to, depositing and/or withdrawing monies from any of my accounts in banks and/or savings institutions, endorsing checks, writing checks, purchasing, granting, bargaining, conveying, selling, contracting for purposes of sale of real or personal property and/or for the mortgaging thereof. I hereby ratify all my said attorney shall lawfully do or cause to be done by virtue hereof.

This Power of Attorney is to remain in effect until revoked in writing by me and notification of such revocation being sent to the said Julia Harden Phillips.

1

BOOK 1840 PAGE 190

Claudia Prevost Harden

BOOK 1840 PAGE 191

This Power of Attorney shall not be affected by the physical disability or mental incompetence of the principal which renders principal incapable of managing her own estate.

IN WITNESS WHEREOF, I have hereunto signed this Power of Attorney at Anderson, South Carolina on the 28th day of MARCH, A.D., 1994.

Claudia Prevost Harden (SEAL)
CLAUDIA PREVOST HARDEN

WITNESSES:

Caroline H. Harden
Kim M. Hart

BOOK 1840 PAGE 191

2

BOOK 1840 PAGE 192

STATE OF SOUTH CAROLINA,
COUNTY OF ANDERSON.

PROBATE

PERSONALLY appeared before me Emeloye W. Lovelace

and made oath that (s)he saw the above named Claudia Provost Harden sign,
seal and as her act and deed, deliver the within written Power of
Attorney; and that (s)he with Carolyn M. Jordan and
Kenneth M. Mattison witnessed the execution thereof.

Emeloye W. Lovelace

SWORN to before me this 28th
day of MARCH, A.D., 1994.
Kenneth M. Mattison (SEAL)
Notary Public for S. C.
My Commission expires: 7/11/2001

RECORDED THIS 28th DAY
OF MARCH, A.D., 1994
IN VOL 1840 PAGE 192
AT 11:00 A.M.
S. J. DOWNS, C.C.P.
ANDERSON COUNTY, S.C.

MAR 29 11 00 AM '94
FILED FOR RECORD
S.C.

Claudia Provost Harden

BOOK 1840 PAGE 192

EXHIBIT B

Sales Agreement

This contract constitutes an agreement between the owner of the property located at 207 North Ave, Anderson, SC29625 named as Claudia P Harden, represented by Julia Harden Phillips with full Power of Attorney and SC Residential Builder William Cook, owner Cook Construction Co. The purpose of this contract is the restoration/renovation and sale of said property.

The Following terms and conditions are binding for both parties:

1. Cook Construction Co will be allowed a period of six months to renovate and sell property. The cost for all renovations and remodeling will be paid by William Cook. This time limit may be extended to accommodate the closing of a pending sale for which an offer has been extended and accepted by Cook Construction Co. during the allotted time frame.
2. The Company agrees to pay the owner \$150,000 when the house is sold or September 1, 2006, whichever comes first.
3. All sales expenses shall be the responsibility of Cook Construction Co.
4. Any current liens on the property shall be the responsibility of the owner and satisfied at closing.
5. At closing, Cook Construction shall provide a statement that all items for which a lien might be filed, including materials and Sub-contractors have been satisfied.
6. The owner Claudia P Harden and representative Julia H Phillips will not be liable for any injuries or claims arising from the process of restoration/renovation by Cook Construction Co.
7. Owner and representatives agree to contact William Cook before entering property. If not, owner shall assume responsibility for all injuries sustained to themselves when failing to notify the Company of their desire to enter construction area.
8. William Cook shall maintain Liability Coverage and Workers Compensation (when required by law to do so) as well as comprehensive that covers improvements. The owner shall maintain current Home Owners policy until sale or September 1, 2006, whichever comes first.
9. Any additional cost for utilities not normal to the unoccupied property shall be satisfied by Cook Construction Co. The following are averages for one year cycle. Water/Sewer \$15.19, Electric \$44.76, Natural Gas \$20.00. All amounts over these averages shall be the responsibility of Cook Construction.
10. Security system monitoring by ADT shall be paid by the owner until the house is sold or September 1, 2006, whichever comes first.

Owner's representative Julia H. Phillips Date 02-28-06

Builder W Cook owner of Cook Construction Co.

Date 2/28/06

EXHIBIT C

Sales Agreement

This contract constitutes an agreement between the owner of the property located at 207 North Ave, Anderson, SC29625 named as Claudia P Harden, represented by Julia Harden Phillips with full Power of Attorney and SC Residential Builder William Cook, owner Cook Construction Co. The purpose of this contract is the restoration/renovation and sale of said property.

The Following terms and conditions are binding for both parties:

1. The Company agrees to pay the owner \$155,000 when the house is sold.
2. Cook Construction Co. will be allowed a period of seven months to renovate and sell property. Cook Construction will pay the cost for all renovations and remodeling. If the property has not sold by October 1, 2006, Cook Construction Co. shall begin paying an interest-only loan at 6.5% on the outstanding principal of \$155,000 until the house sells. This is an amount of \$840.00 per month, payable on the first of every month beginning October 1, 2006
3. Cook Construction Co from September 1, 2006 and forward shall satisfy any utilities. Security system monitoring by ADT will be cancelled. Electric, gas, water and insurance will all be established and maintained by Cook Construction.
4. All sales expenses shall be the responsibility of Cook Construction Co.
5. Any current liens on the property shall be the responsibility of the owner and satisfied at closing.
6. At closing, Cook Construction shall provide a statement that all items for which a lien might be filed, including materials and Sub-contractors have been satisfied.
7. The owner Claudia P Harden and representative Julia H Phillips will not be liable for any injuries or claims arising from the process of restoration/renovation by Cook Construction Co.
8. Owner and representatives agree to contact William Cook before entering property. If not, owner shall assume responsibility for all injuries sustained to them when failing to notify the Company of their desire to enter construction area.
9. William Cook shall maintain Liability Coverage and Workers Compensation (when required by law to do so) as well as comprehensive that cover improvements.
10. This agreement supersedes any previous agreement.

Owner's representative Julia H. Phillips Date 8-11-06

Builder W. Cook owner of Cook Construction Co.

Date 8/11/06

Witness: Cheryle C. Stowe

Name in print: Cheryle C. Stowe

EXHIBIT D

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

IN THE MATTER OF HARDEN, CLAUDIA PREVOST

CASE NUMBER 2011GC0400041

FIDUCIARY LETTERS

☐ PERSONAL REPRESENTATIVE

☐ GUARDIANSHIP

☒ CONSERVATORSHIP

☐ TRUSTEESHIP

On the 14TH day of OCTOBER, 2011

BEN R. PHILLIPS, JR.

was/were appointed and qualified as Fiduciary(ies) of the above matter by this Court, with all the authority granted to a fiduciary by law.

NOW, THEREFORE, LETTERS are issued as evidence of such appointment, qualification, and authority of the above fiduciary(ies) to do and to perform all acts which may be authorized by law.

RESTRICTIONS:

110019925 10/17/2011 01:02:30 PM
FILED, RECORDED, INDEXED
Bk: 10191 Pg: 00167 Pages: 001
Rec Fee: 10.00 St Fee:
Co Fee:
REGISTER OF DEEDS, ANDERSON CO, SC
Shirley McElhannon

Executed this 14TH day of OCTOBER, 2011

Martha D. Newton

Probate Court Judge

FORM #140PC (7/87)

EXHIBIT E

ANDERSON
COUNTY
SOUTH CAROLINA

WELCOME TO ACPASS
Anderson County Public Access System and Services

REAL PROPERTY / TAXES / FINANCES / COURTS / PERMITS / FORMS

Main=>Courts=>Probate Court=>Estate Search=>Estate Detail

Estate Detail

Case Number:	2014ES0400047 0	Case Date:	1/13/2014	Status:	Closed	Status Date:	
Case Type:							
Comment:							

Informal: ☒ Probate of Will ☒ Formal: ☐ Testacy..... ☐
 Appointment..... ☒ Appointment ☐

Petitioner

Name: PHILLIPS JR., BEN RICHARD
 Address1: 207 NORTH AVE.
 Address2:
 City, St Zip: ANDERSON SC 29625
 County: 04 Birthdate:
 Comment:
 Nature: GRAND SON

Decedent

Name: HARDEN, CLAUDIA PREVOST
 Address1: 806 CONCORD AVE.
 Address2:
 City, St Zip: ANDERSON SC 29621
 County: 04 Birthdate: 8/02/1910
 Date of Death: 12/03/2013 Age: 103

Domiciled in county at time of death..... ☒

Not domiciled S.C., own property in county.. ☐

Right for legal action in county..... ☒

Inventory

9/24/2014

Accounting

4/28/2015

Last Order

1/22/2014

Last Hearing

Devises

BEN RICHARD PHILLIPS, SR. 806 CONCORD AVE. ANDERSON, SC 29621 TRUSTEE
 SUE THOMPSON TURNER 305 D. ST. ANDERSON, SC 29625 NIECE
 SLOAN TURNER 307 D. ST. ANDERSON, SC 29625 GR NIECE
 CHAS TURNER 305 D. ST. ANDERSON, SC 29625 GR NEPHEW
 LISA SNOW HARRIS 1125 ODELL ST. NORTH WILKESBORO, NC 28659 FRIEND
 MARSHALL CATHCART KRAKEEL 475 FIRENDSHIP CHURCH RD. BROOKS, GA 30205 NIECE
 MEN'S BIBLE CLASS OF FIRST PRESBYTERIAN CHURCH
 302 W. WHITNER ST. ANDERSON, SC 29624
 PHILATHEA CLASS OF FIRST PRESBYTERIAN CHURCH
 302 W. WHITNER ST. ANDERSON, SC 29624
 BEN RICHARD PHILLIPS, JR. 207 NORTH AVE. ANDERSON, SC 29625 GR SON
 JULIA H. PHILLIPS DECEASED DAUGHTER LEAVING TWO CHILDREN: ONE LISTED ABOVE
 AND ONE DECEASED, BYRON PHILLIPS, LEAVING NO CHILDREN
 JAMES LEROY HARDEN DECEASED SPOUSE

	TROY TURNER DECEASED	
	WILLIAM GLADNEY HARDEN DECEASED NEPHEW LEAVING NO CHILDREN	
	Non Devisees	
	NONE	

5. Did decedent have any change of marital status or the birth or adoption of any children after execution of the Will (if one exist).
(This includes illegitimate children.)

☒ No ☐ Yes If yes, see case explanations.

6. To the best of your knowledge, was the decedent a patient in a South Carolina Mental health facility during his/her lifetime?

☒ No ☐ Yes If yes, see case explanations.

7. Has a guardian or conservator ever been appointed for this person?

☐ No ☒ Yes If yes, see case explanations.

8. Has a personal representative of the decedent been appointed prior to this date by a Court in this state or elsewhere?

☒ No ☐ Yes If yes, see case explanations for details, including name and address of Personal Representative

9. Have you received or are you aware of any demands for notice of any probate or appointment proceeding concerning the decedent that may have been filed in this state or elsewhere?

☒ No ☐ Yes If yes, see case explanations for details, including name and address.

10. Have more than ten years passed since the decedent's death?

☒ No ☐ Yes If yes, see case explanations for circumstances authorizing tardy probate.

11. The decedent died with a personal estate about the value of _____ and real estate of about the value of _____. (A full inventory

and appraisal, form #305PC, must be filed within 90 days. If decedent was a non-resident, please attach S.C. TAX COMMISSION form ET 101.

12. After the exercise of reasonable diligence, are you aware of any unrevoked will and/or codicil(s), other than the one(s) attached hereto, relating to property in this State?

☒ No ☐ Yes If yes, see case explanations then proceed to section II.

II. IF A WILL EXISTS, PLEASE COMPLETE THIS SECTION.

1. Regarding the decedent's will:

- ☒ the original is attached
☐ the original is in the Court's possession
☐ authorized copy of will probated in another jurisdiction is attached
☐ authenticated copy of a will not probated in another jurisdiction is attached.
☐ will is lost, destroyed, or otherwise unavailable; however, a description of its contents is attached.

2. Do you believe, to the best of your knowledge, the will described above was validly executed?

☒ Yes ☐ No If no, see case explanations.

3. The date of execution of the will was: 5/22/1992 codicil(s); 7/15/2002

4. Are you aware of any instrument or document amending or revoking the Will?

☒ No ☐ Yes If yes, see case explanations.

5. Have you exercised reasonable diligence to determine there is no instrument or document revoking the will?

☒ Yes ☐ No If no, see case explanations.

6. Do you believe the will defined in (1) above is the decedent's last will?

☒ Yes ☐ No If no, see case explanations.

Case Explanations					
BEN RICHARD PHILLIPS, JR. WAS GUARDIAN AND CONSERVATOR OVER THE DECEDENT. SEE FILES 2011GC0400040 AND 2011GC0400041					
Personal Representatives					
BEN RICHARD PHILLIPS, JR.	207 NORTH AVE.	ANDERSON	SC	29625	

III. IF APPLYING FOR INFORMAL OR FORMAL APPOINTMENT, PLEASE COMPLETE FOLLOWING

2. Priority for this appointment is:

- ☐ named as Primary Personal representative in will or nominee of Primary personal Representative
☐ named as Alternate Personal representative in will or nominee of Alternate Personal representative
☐ nominee of above Primary Personal Representative
☐ nominee of above Alternate Primary Personal Representative in Will
☐ surviving spouse of decedent who is devisee of decedent
☒ other devisee of decedent (describe): GRAND SON
☐ surviving spouse of decedent
☐ other heir of decedent (describe):
☐ creditor (Forty-five days after death must have passed)
☐ other (describe):

Additional Appointments	
JAMES LEROY HARDEN - DECEASED	
JULIA HARDEN PHILLIPS - DECEASED	
KENNETH M. MATTISON - NOW JUDGE	

IV. The undersigned, being sworn, states that the facts set forth in the foregoing statement are true to the best of the undersigned's knowledge, information and belief, and hereby submits to the Court's jurisdiction in this matter.

Signature:

Signature:

Name: BEN RICHARD PHILLIPS, JR.

Signature:

Name:

ORDER OF INFORMAL PROBATE

IT IS HEREBY ORDERED that the above application for probate of a will be

☒ GRANTED ☐ DENIED informally this day of 1/13/2014.

ORDER FOR HEARING ON FORMAL PETITION

DATE:

TIME:

PLACE:

Executed this date.

On hearing of the above petition, this Court finds that the person deceased, venue is proper, and the proceeding was commenced within appropriate time limits.

The court further finds that:

- ☐ The decedent died intestate. The heirs are:
☒ The decedent died testate. IT IS THEREFORE ORDERED that the last Will and TESTAMENT of the above-named decedent, dated , be admitted formally to probate.

Executed this date 1/14/2014.

☐ SEE ATTACHED ORDER

ORDER OF APPOINTMENT

IT IS HEREBY ORDERED that the above application/petition for appointment be granted upon the filing of a bond as appropriate, qualification and acceptance.

Executed this date 1/13/2014

I accept this appointment and agree to perform the duties and discharge the trust of the office of Personal Representative of this estate.

Name: BEN RICHARD PHILLIPS, JR.
Address: 207 NORTH AVE.
ANDERSON SC 29625

Name:
Address:

Attorney:
Address:

Legal Disclaimer - HELP - Privacy Disclaimer
COPYRIGHT 2002, ANDERSON COUNTY SC

EXHIBIT F

STATE OF SOUTH CAROLINA

140021336 10/22/2014 Bk: 11576 Pg: 00245
IN THE PROBATE COURT

COUNTY OF ANDERSON

DEED OF DISTRIBUTION

IN THE MATTER OF:
CLAUDIA P. HARDEN
(Decedent)

(Real Property Only)
NOT A WARRANTY DEED

CASE NUMBER: 2014-ES-04-00047

County where property is located if not above County:

The undersigned states as follows:

Decedent died on DECEMBER 3, 2013; and probate of the Estate is being administered in the Probate Court for ANDERSON County, South Carolina, in File #2014-ES-04-00047.

I/We was/were appointed Personal Representative (s) on JANUARY 13, 2014.

Decedent owned real property described as follows:

Tax Map Number: 123-26-08-002-000

Street/Property Address: 207 NORTH AVENUE, ANDERSON, SC 29621

Legal Description: SEE ATTACHED EXHIBIT "A" FOR PROPERTY DESCRIPTION

This transfer is made pursuant to:

- ☒ Decedent's Will
- ☐ Intestacy Statute: SCPC 62-2-103
- ☐ Private Family Agreement: SCPC 62-3-912
- ☐ Disclaimer by: _____
- ☐ Probate Court Order issued on _____
- ☐ Other: _____

In accordance with the laws of the State of South Carolina, the Personal Representative(s) does/do hereby release all of the Personal Representative's(s') right, title and interest, including statutory and/or testamentary powers, over the real property described to the beneficiaries named below:

Name: _____
Address: _____

Name: BEN RICHARD PHILLIPS, JR.
Address: 207 NORTH AVENUE
ANDERSON, SC 29621

Name: _____
Address: _____

Name: _____
Address: _____

☐ An additional sheet is attached for names of additional beneficiaries (check, if applicable)

IN WITNESS WHEREOF the undersigned, as Personal Representative(s) of the above Estate, has executed this Deed of Distribution, on this 21 day of OCTOBER, 2014.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

Witness: [Signature]

Print Name: MICHAEL F. MULLINAX

Witness: [Signature]

Print Name: LAURA C. MULLINAX

Estate of: CLAUDIA P. HARDEN

Signature of Personal

Representative: [Signature]

Print Name: BEN RICHARD PHILLIPS, JR.

If applicable,

Signature of Co-Personal

Representative: _____

Print Name: _____

STATE OF SOUTH CAROLINA)
)
)

ACKNOWLEDGMENT

COUNTY OF ANDERSON

I, LAURA C. MULLINAX, Notary Public, a notary for the State of South Carolina do hereby certify that BEN RICHARD PHILLIPS, JR., as Personal Representative(s) of the Estate of CLAUDIA P. HARDEN, personally appeared before me this day and acknowledged the due execution of the foregoing Deed of Distribution.

Witness my hand and seal this the 20 day of OCTOBER, 2014.

[Signature] (SEAL)
(Signature of Notary Public)
LAURA C. MULLINAX
(Print name of Notary Public)
Notary Public for State of SOUTH CAROLINA
My Commission Expires: 7/10/19

Note: It is recommended that an attorney prepare this document and determine if a title examination is necessary.

Property Description for
Deed of Distribution
Claudia P. Harden Estate

EXHIBIT "A"

All that certain piece, parcel or lot of land situate, lying and being in the City of Anderson, County of Anderson, State of South Carolina, being known and designated as the western portion of Lot Number Fifty (50) on plat of Russell & Axon Engineers, Planners & Architects, Inc., dated June 30, 1980, of record in the Office of the clerk of Court for Anderson County, South Carolina, in Plat Book 89 at page 10, and being more particularly described according to said plat as follows: BEGINNING at an iron pin corner on the Southwestern side of North Avenue, said corner being the Northeasternmost corner of lot herein described, and running thence South 6 degrees 57 minutes West one hundred thirty (130) feet to iron pin corner, thence South 12 degrees 57 minutes West one hundred and one-tenth (100.1) feet to iron pin corner, thence North 79 degrees 15 minutes west three and eighty-six one-hundredth (3.86) feet to iron pin corner, thence North 10 degrees 45 minutes East two hundred thirty (230) feet to iron pin corner on the Southwestern side of North Avenue, and running thence along North Avenue South 79 degrees 05 minutes East three and sixty-seven one hundredths (3.67) feet to the beginning corner; being bounded on the Northeast by North Avenue, on the Southeast by the eastern portion of Lot Number Fifty (50), and on the Northwest by lands of James Harden; and being a portion of the lands devised unto grantor herein by Will of Sue P. Thompson; deceased, as reference to Probate Roll #28546 in the Office of the Probate Judge for Anderson County will reveal.

This being the same property conveyed unto Claudia P. Harden, by deed of Mary Sue Thompson, dated July 9, 1980, and recorded July 14, 1980 in Deed Book 19-J at page 435 in the Register of Deeds Office for Anderson County.

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FILED, RECORDED, INDEXED
Ek: 11576 Pg: 00245 Pages: 003
Rec Fee: 10.00 St Fee: EXEMPT
Co Fee: EXEMPT
REGISTER OF DEEDS, ANDERSON CO, SC
Wendy Reffel

EXHIBIT G

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

IN THE PROBATE COURT

CORRECTIVE
DEED OF DISTRIBUTION
(Real Property Only)IN THE MATTER OF:
CLAUDIA P. HARDEN
(Decedent)

NOT A WARRANTY DEED

CASE NUMBER: 2014-ES-04-00047

County where property is located if not above County.

The undersigned states as follows:

Decedent died on DECEMBER 3, 2013; and probate of the Estate is being administered in the Probate Court for ANDERSON County, South Carolina, in File #2014-ES-04-00047.I/We was/were appointed Personal Representative (s) on JANUARY 13, 2014.

Decedent owned real property described as follows:

Tax Map Number: 123-26-08-002-000

Street/Property Address: 207 NORTH AVENUE, ANDERSON, SC 29621

Legal Description: SEE ATTACHED EXHIBIT "A" FOR PROPERTY DESCRIPTION

This deed is done in order to correct a plat reference

This transfer is made pursuant to:

- ☒ Decedent's Will
☐ Intestacy Statute: SCPC 62-2-103
☐ Private Family Agreement: SCPC 62-3-912
☐ Disclaimer by: _____
☐ Probate Court Order issued on _____
☐ Other: _____

In accordance with the laws of the State of South Carolina, the Personal Representative(s) does/do hereby release all of the Personal Representative's(s') right, title and interest, including statutory and/or testamentary powers, over the real property described to the beneficiaries named below:

Name: _____
Address: _____

Name: BEN RICHARD PHILLIPS, JR.
Address: 207 NORTH AVENUE
ANDERSON, SC 29621

Name: _____
Address: _____

Name: _____
Address: _____

☐ An additional sheet is attached for names of additional beneficiaries (check, if applicable)

IN WITNESS WHEREOF the undersigned, as Personal Representative(s) of the above Estate, has executed this Deed of Distribution, on this 24 day of FEB., 20 15.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

Witness: [Signature]

Print Name: MICHAEL F. MULLINAX

Witness: [Signature]

Print Name: LAURA C. MULLINAX

Estate of: CLAUDIA P. HARDEN

Signature of Personal
Representative: [Signature]

Print Name: BEN RICHARD PHILLIPS, JR.

If applicable,
Signature of Co-Personal
Representative: _____

Print Name: _____

STATE OF SOUTH CAROLINA)
)
)

ACKNOWLEDGMENT

COUNTY OF ANDERSON

I, LAURA C. MULLINAX, Notary Public, a notary for the State of South Carolina do hereby certify that BEN RICHARD PHILLIPS, JR., as Personal Representative(s) of the Estate of CLAUDIA P. HARDEN, personally appeared before me this day and acknowledged the due execution of the foregoing Deed of Distribution.

Witness my hand and seal this the 24 day of Feb., 20 15.

[Signature] (SEAL)
(Signature of Notary Public)
LAURA C. MULLINAX
(Print name of Notary Public)
Notary Public for State of SOUTH CAROLINA
My Commission Expires: 7/10/19

Note: It is recommended that an attorney prepare this document and determine if a title examination is necessary.

Property Description for
Corrective Deed of Distribution
Claudia P. Harden Estate

EXHIBIT "A"

PARCEL NO. 1:

All that certain lot or parcel of land with the improvements thereon, situate in the City of Anderson, County of Anderson, State of South Carolina, facing on North Avenue, and having a width of ninety (90) feet; and bounded on the North by said North Avenue, on the East by lot now or formerly of Mrs. Cecelia Fretwell, on the South by lot now or formerly of W. E. Atkinson, and on the West by the remaining portion of Lot No. 52 (Fifty-two) hereinafter referred to. The lot of land herein conveyed is composed of all of Lot No. 51 (Fifty-one) as shown on plat of North Anderson made by W. A. Sanders, Surveyor, and of record in the Office of the Clerk of Court for Anderson County in Plat Book 6 at page 9, and composed further of a strip of land twenty (20) feet in width, taken from the Eastern side of Lot No. 52 (Fifty-two) as represented on said plat, the Eastern boundary line of said strip of land is co-extensive with the Eastern boundary line of Lot No. 51 (Fifty-one).

This being the same lot of land conveyed unto Claudia P. Harden by deed of James L. Harden Company, Inc. dated 11-30-56 of record in the Register of Deeds Office for Anderson County in Deed Book 10S at page 455.

PARCEL NO. 2:

All that certain piece, parcel or lot of land situate, lying and being in the City of Anderson, County of Anderson, State of South Carolina, being known and designated as the western portion of Lot Number Fifty (50) on plat of Russell & Axon Engineers, Planners & Architects, Inc., dated June 30, 1980, of record in the Office of the clerk of Court for Anderson County, South Carolina in Plat Book 87 at page 70, and being more particularly described according to said plat as follows: BEGINNING at an iron pin corner on the Southwestern side of North Avenue, said corner being the Northeasternmost corner of lot herein described, and running thence South 6 degrees 57 minutes West one hundred thirty (130) feet to iron pin corner, thence South 12 degrees 57 minutes West one hundred and one-tenth (100.1) feet to iron pin corner, thence North 79 degrees 15 minutes west three and eighty-six one-hundredths (3.86) feet to iron pin corner, thence North 10 degrees 45 minutes East two hundred thirty (230) feet to iron pin corner on the Southwestern side of North Avenue, and running thence along North Avenue South 79 degrees 05 minutes East three and sixty-seven one hundredths (3.67) feet to the beginning corner; being bounded on the Northeast by North Avenue, on the Southeast by the eastern portion of Lot Number Fifty (50), and on the Northwest by lands of James Harden; and being a portion of the lands devised unto grantor herein by Will of Sue P. Thompson, deceased, as reference to Probate Roll #28546 in the Office of the Probate Judge for Anderson County will reveal.

This being the same property conveyed unto Claudia P. Harden, by deed of Mary Sue Thompson, dated July 9, 1980, and recorded July 14, 1980 in Deed Book 19-J at page 435 in the Register of Deeds Office for Anderson County.

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FILED, RECORDED, INDEXED
Bk: 11717 Ps: 00168 Pages: 003
Rec Fee: 10.00 St Fee: EXEMPT
Co Fee: EXEMPT
REGISTER OF DEEDS, ANDERSON CO, SC
Wendy Reffel

MOTION FEE PAID

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF ANDERSON)

2015-CP-04-03024

William Rice Cook, III)

Plaintiff)

vs.)

Benny Richard Phillips, Jr.
and the real estate property located
at 207 North Avenue, Anderson,
South Carolina 29625,
TMS# 123-26-08-02)

Defendant)

MOTION TO DISMISS (RULE 12(B)(6))
AND MOTION FOR SUMMARY JUDGEMENT

A TRUE COPY

JAN 26 2016

Reba M. Kirtley
ANDERSON CLERK OF COURT

TO: DANIEL L. DRAISEN, ATTORNEY FOR THE PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that the undersigned will move on the tenth day after service hereof, or as soon thereafter as the matter may be heard, for the following orders:

1. For an Order dismissing the claim on the basis that it has failed to state facts sufficient to constitute a cause of action pursuant to South Carolina Rules of Civil Procedure, Rule 12(b)(6);
2. You will further take notice that the undersigned will move to dismiss the claim on the basis that it alleges a claim against the Estate of Claudia Prevost Harden and that said claim falls outside of the Statute of Limitation and Non Claim Statute established by S.C. Code Ann. §62-3-801 and S.C. Code Ann. §62-3-803 of the South Carolina Probate Code based upon the fact that said legislation constitutes a Statute of Limitations or a "Non-Claim" Statute and that by virtue of the case of Earl Phillips as Personal Representative vs. Bridget Quick 399 S.C. 226, 731 S.E. 2d 327 (2012), the claims of the Plaintiff are barred in their entirety.
3. You will further take notice that the undersigned will further move for dismissal and for Summary Judgement of the entire causes of action alleged in the Complaint on the basis that same are violative of the Statute of Limitations as set forth in S.C. Code Ann. §15-3-530; §62-3-1006; and §15-3-530. That any and all allegations contained in the Complaint are in violation of the Statute of Frauds, S.C. Code Ann. §32-3-10.
4. You will further take notice that the undersigned will move to dismiss the claim and for Summary Judgement on the basis that the claim fails to state sufficient facts so as to constitute a cause of action and that the allegations of the Complaint are conclusory and are based upon allegations which are barred by both the Statute of Limitations and by the Non-Claim Statute are further barred by the provisions of the South Carolina "Dead Man's Statute" set forth in S.C. Code Ann. §19-11-20.
5. You will further take notice that the undersigned will move before the presiding Judge for an Order pursuant to S.C. Code Ann. §15-36-10, requesting that sanctions be imposed as a result of the filing of a "frivolous lawsuit" and that the Plaintiff be required to pay reasonable costs and attorney's fees of the Defendant in having to defend this frivolous action.

This Motion is based upon the applicable laws and statutes of the State of South Carolina.

MULLINAX LAW FIRM, P.A.

Michael F. Mullinax
Michael F. Mullinax
Post Office Box 2665
Anderson, SC 29622
(864) 261-6242

ATTORNEY FOR THE DEFENDANT

Anderson, South Carolina
January 19, 2016

MOTION FEE PAID

STATE OF SOUTH CAROLINA)

COUNTY OF ANDERSON)

WILLIAM RICE COOK, III,
Plaintiff)

vs.)

BENNY RICHARD PHILLIPS, JR., AND
THE REAL ESTATE PROPERTY LOCATED)
AT 207 NORTH AVENUE, ANDERSON,)
S.C. 29625, TMS: 123-26-08-02)

Defendant)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2015-CP-04-03024

DEFENDANT'S MOTION TO QUASH

A TRUE COPY

MAR 22 2016

Debra R. Kelly
CLERK OF COURT

TO: Daniel L. Draisen, Attorney for the Plaintiff

YOU WILL PLEASE TAKE NOTICE that the undersigned will move on the tenth day after service hereof, or on the 19th day of May, 2016, before the Presiding Judge of the Tenth Judicial Circuit, for an Order quashing the Lis Pendens which has been filed in this matter, on the basis that the filing of the Lis Pendens is improper and is in violation of the provisions of S.C. Code Ann. §15-11-10 and does not meet any of the provisions as are set forth in the case of Pond Place Partners, Inc. vs. Pool 351 S.C. 1, 567 S.E. 2nd 881 (Ct. App. 2002).

The movant would further show unto the Court that the action is for money only on a claim which is barred by the Statute of Frauds, the Statute of Limitations, the Non-Claim Statute and the Dead Man's Statute of the State of South Carolina; that the Lis Pendens is an extraordinary privilege to which the Plaintiff is not entitled, and such filing constitutes a cloud on title and causes irreparable damage and harm to the Defendant.

This Motion is based upon the applicable case law and statutes of the State of South Carolina.

MULLINAX LAW FIRM, P.A.

Michael F. Mullinax

Michael F. Mullinax
Post Office Box 2665
Anderson, SC 29622
(864) 261-6242
ATTORNEY FOR THE DEFENDANT

Anderson, South Carolina

March 22, 2016

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS

C/A No. 2015-CP-04-03024

WILLIAM RICE COOK, III,

Plaintiff,

vs.

BENNY RICHARD PHILLIPS, JR., and
the real property located at 207 NORTH
AVENUE, ANDERSON, SC 29625, TMS#
123-26-08-02,

Defendants.

**Motion to Reconsider Grant of
Defendant's Motion to Dismiss and
Motion for Summary Judgment**

TO: MICHAEL F. MULLINAX, ESQ., ATTORNEY FOR DEFENDANT:

COMES NOW, Plaintiff William Rice Cook, III, and brings this Motion to Reconsider pursuant to SCRCP 59. The Plaintiff respectfully requests that the court reconsider its order of June 24, 2016, granting summary judgment in favor of Defendants, dismissing the actions for constructive trust and partition, and dismissing the *lis pendens*. Plaintiff brings his motion on the following grounds:

1. That the court erred in holding the S.C. Code § 62-3-803, a non-claim statute, precludes the Plaintiff, a creditor, from bringing a claims for constructive trust and partition against the Defendant and his fraudulently obtained property.

Contrary to the court's holding in its order, S.C. Code § 62-1-106 does not eviscerate S.C. Code § 62-3-803 (the "Non-Claim Statute"). Rather, S.C. Code § 62-1-106 provides – and was intended to provide – a remedy for creditors who have been induced not to present claims within the timeframe prescribed by the Non-Claim Statute only when the alleged induction is the result of fraud. The Non-Claim Statute maintains its full force and effect in all circumstances not involving

fraud (i.e. creditors who are simply dilatory).

S.C. Code § 62-1-106 provides:

Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this Code or if fraud is used to avoid or circumvent the provisions or purposes of this Code, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud or restitution from any person (other than a bona fide purchaser) benefiting from the fraud, whether innocent or not, but only to the extent of any benefit received. Any proceeding must be commenced within two years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than five years after the time of commission of the fraud. This section has no bearing on remedies relating to fraud practiced on a decedent during his lifetime which affects the succession of his estate.

Gordon v. Busbee, 397 S.C. 119, 134, 723 S.E.2d 822, 830 (Ct. App. 2012).

S.C. Code § 62-1-106, as adopted in 1986, mirrors word-for-word the Uniform Probate Code § 1-106.¹ The comment to the uniform code reinforces the intent, force, and effect of the section to not shield or permit fraud. It states:

This is an overriding provision that provides an exception to the procedures and limitations provided in the Code. The remedy of a party wronged by fraud is intended to be supplementary to other protections provided in the Code and can be maintained outside the process of settlement of the estate.

It is therefore apparent that the drafters of the code, and our legislature in adopting this section, intended to allow victims of fraud a remedy despite the time limitations and procedures found elsewhere in the statute, including the Non-Claim Statute affecting creditors. Indeed, the Uniform Probate Code, S.C. Code § 62-1-106, was enacted to provide relief for persons induced not to bring their claims before the probate court as the result of fraud, otherwise known as extrinsic fraud. See John C.P. Goldberg & Robert H. Sitkoff, Torts and Estates: Remedying Wrongful Interference with Inheritance, 65 Stan. L. Rev. 353-354.

The breadth and expansiveness of the language in S.C. Code § 62-1-106, makes clear the intent not to allow those who commit fraud to use its provisions to escape justice. The statute

¹ Uniform Probate Code Section 1-106. Effect of Fraud and Evasion. Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this Code or if fraud is used to avoid or circumvent the provisions or purposes of this Code, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud or restitution from any person (other than a bona fide purchaser) benefiting from the fraud, whether innocent or not. Any proceeding must be commenced within 2 years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than 5 years after the time of commission of the fraud. This section has no bearing on remedies relating to fraud practiced on a decedent during his lifetime which affects the succession of his estate.

provides that "any person injured", not just beneficiaries, may seek relief.

Further, S.C. Code § 62-1-106 does not limit the type of relief. The statute provides that "any person injured thereby *may obtain appropriate relief* against the perpetrator of the fraud or restitution from any person (other than a bona fide purchaser) benefiting from the fraud." The statute does not foreclose action for a constructive trust and partition. Indeed, a constructive trust is appropriate relief. See John C.P. Goldberg & Robert H. Sitkoff, Torts and Estates: Remedying Wrongful Interference with Inheritance, 65 Stan. L. Rev. 353-354. A constructive trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by the one holding the legal title. *Lollis v. Lollis*, 291 S.C. 525, 529-30, 354 S.E.2d 559, 561 (1987); *Wolfe v. Wolfe*, 215 S.C. 530, 56 S.E.2d 343 (1949); *Dominick v. Rhodes*, 202 S.C. 139, 24 S.E.2d 168 (1943); *Bank of Williston v. Alderman*, 106 S.C. 386, 91 S.E. 296 (1917). A constructive trust results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution. *Searson v. Webb*, 208 S.C. 453, 38 S.E.2d 654 (1946). Fraud is an essential element, although it need not be actual fraud. *Whitmire, supra*; *Wolfe, supra*; *Dominick, supra*.

Lastly, the Defendant is alleged to have obtained the property in its entirety through fraud, and he is not a bona fide purchaser exempted under the statute. The statute allows and permits the court to divest innocent persons of property which came to them as a result of fraud.

In its summary judgment order, the court correctly held that the Plaintiff may maintain an action for fraud. The Plaintiff is "any person" under the statute. Where the Court erred is in holding that the Plaintiff may not pursue an action for constructive trust and the derivative partition action. Both are appropriate relief intended by that statute that this Plaintiff must be allowed to pursue and prove given the alleged fraud case.

2. That the court erred in dismissing the lis pendens action because the Plaintiff has properly asserted an action for constructive trust.

A *lis pendens* is appropriate when a Plaintiff brings an action for constructive trust affecting title to real property. *Carolina Park Associates, LLC v. Marino*, 400 S.C. 1, 9, 732 S.E.2d 876, 880 (2012). A constructive trust and *lis pendens* is appropriate when the "allegations present

circumstances in which there is a need to resort to this equitable remedy in order "to vindicate right and justice or frustrate fraud." *Id.* 400 S.C. at 8, 732 S.E.2d at 879. Here, to cancel the *lis pendens* would allow the Defendant to sell the property, waste the proceeds, and avoid any repercussions of the alleged fraud.

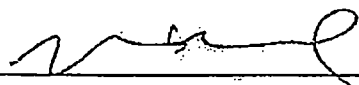
3. That the court erred in finding summary judgment in defendant's despite the early posture in this case and the facts and circumstances currently in dispute.

Under Rule 56(c), SCRPC: 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. *Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 584 S.E.2d 375 (2003). 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. *Sauner v. Public Serv. Auth.*, 354 S.C. 397, 581 S.E.2d 161 (2003); *Hendricks v. Clemson Univ.*, 353 S.C. 449, 578 S.E.2d 711 (2003). If triable issues exist, those issues must go to the jury. *Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 573 S.E.2d 830 (Ct.App.2002).

Based on the foregoing, the Plaintiff respectfully request that that the court reconsider its motion for summary judgment in Defendants' favor. The Plaintiff may submit additional grounds, basis for its motion, and memoranda in support of its motion for reconsideration.

Respectfully submitted,

KRAUSE, MOORHEAD AND DRAISEN, P.A.


DANIEL L. DRAISEN (SC Bar No. 13536)
TIMOTHY A. NOWACKI (SC Bar No. 13536)
207 E. Calhoun Street
Anderson, South Carolina 29621
(864) 225-4000
(864) 964-0788 facsimile
ddraisen@kmdlawyers.com
tnowacki@kmdlawyers.com
ATTORNEYS FOR THE PLAINTIFF

July 1, 2016
Anderson, South Carolina

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STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

IN THE COURT OF COMMON
PLEAS

WILLIAM RICE COOK III,
PLAINTIFF,

VS

BENNY RICHARD PHILLIPS,
JR.,

DEFENDANT.

2015-3024

JUNE 13, 2016

TRANSCRIPT OF RECORD

B E F O R E:

THE HONORABLE R. LAWTON MCINTOSH, JUDGE

A P P E A R A N C E S:

Timothy A. Nowacki, Esquire
Daniel Draisen, Esquire
Attorneys for the Plaintiff

Michael Mullinax, Esquire
Attorney for the Defendant

Renee H. Tollison, CVR
Official Court Reporter

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EXHIBIT INDEX

10 No exhibits were presented during the hearing.

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1 THE COURT: Mr. Mullinax, this is your motion or
2 motions.

3 MR. MULLINAX: Yes, Your Honor.

4 THE COURT: I've read your brief that I received
5 Friday. I haven't read your memorandum because it's in the
6 file and didn't make it up to me for some reason.

7 MR. MULLINAX: Your Honor, did they deliver the
8 reply brief?

9 THE COURT: Sir?

10 MR. MULLINAX: Did they deliver to you the reply
11 brief?

12 THE COURT: There is a reply brief that was filed
13 today.

14 MR. MULLINAX: May it please the Court.

15 THE COURT: Yes, sir.

16 MR. MULLINAX: Your Honor, we are here today on a
17 number of motions that were filed originally January 26,
18 2016. The motions are to dismiss the claim on the basis it
19 has failed to state facts to constitute a cause of action.
20 It is also to dismiss the claim because it violates not
21 only the statute of limitations, which is set forth in my
22 brief, but it also violates the non-claim statute,
23 § 62-8-83, which is also set forth in my brief. The
24 statute of limitations is in Section § 15-3-530,
25 § 62-3-1006. And the claims that are made also violate the

1 statute of frauds as they apply to this defendant, Benny
2 Richard Phillips, Jr., which is the only defendant named.
3 There is also a motion to quash the lis pendens which will
4 go along with dismissing the action if the Court sees fit
5 to do so.

6 Your Honor, the facts of this case are set forth in a
7 timeline that is attached as Exhibit 1 to my original
8 brief. The plaintiff, if he has any cause of action at
9 all, has one based upon an agreement or alleged agreement
10 that was signed in 2006, February 28 to be precise. And
11 then on August the 11th of 2006, the plaintiff allegedly
12 signed another agreement. These are the only documents
13 that set forth any type of viable claim.

14 The alleged agreement was signed by a conservator who
15 had been appointed for Claudia P. Hardin. And it was her
16 daughter, Julia Hardin Phillips. These agreements were
17 signed, and then nothing was done, to our knowledge, after
18 that. If the plaintiff had a claim under the statute of
19 limitations, he had three years to bring it from the time
20 that he signed or he says he signed the second amended
21 agreement in August of 2006. He had three years from that
22 date, and he did nothing.

23 Ms. Phillips, who was the conservator and signed the
24 agreement, died October the 26th of 2011, more than two
25 years after the statute had already passed. But nothing

1 was filed against her or her estate at all.

2 Mrs. Claudia P. Hardin died December the 3rd, 2013.

3 If a cause of action existed, which we say it did not, he
4 would have had to have filed an action within one year of
5 the date of her death. He did not do so.

6 The probate court has closed that estate, but really
7 that doesn't have any bearing on it. He is required by law
8 and by the statutes, the non-claim statute, to file that
9 claim, § 62-3-801 and 806, within one year after she dies,
10 or if he doesn't, he's out of court. And I'll cite some
11 case law in a moment that goes into that in more detail.

12 He made various allegations in the complaint, and it

13 looks like he took the allegations of the complaint, and

14 instead of having paragraphs, he ran them all together and

15 put them in an affidavit. But the affidavit is full of

16 hearsay. The affidavit is full of wording that violate the

17 statute of frauds, that violate the non-claim statute, that

18 violate the dead man statute and really have no bearing on

19 whether or not he can recover, as was set forth in my

20 brief, Your Honor.

21 The statute of limitations gave him from 2006 to do

22 something. He didn't do anything. If you give him the

23 benefit of the doubt and accept the hearsay and all the

24 allegations that he made in the affidavit, the only viable

25 claim he had would have had to have been based on that

1 contract that he signed or says was signed between he and
2 Claudia P. Hardin in 2006.

3 THE COURT: Was this a contract of sale?

4 MR. MULLINAX: It is a contract to perform work
5 and labor on the premises. And in their brief, Your Honor,
6 it is set forth in, I believe, Exhibit B and in Exhibit C
7 of the brief filed by Mr. Draisen which was attached to the
8 complaint.

9 Those are the only two written documents that would
10 pass muster under the statute of frauds of any claim.

11 There was no other documents, no other writings, no other
12 promises that he can set forth against Benny Richard
13 Phillips, Jr., who he named as a defendant in this case who
14 was the grandchild of Claudia P. Hardin.

15 The non-claim statute as is more fully explained in
16 the case of Earl Phillips as Personal Representative versus
17 Bridget Quick, which is Exhibit 5 in my brief that I filed
18 with the Court, the original brief. It states that it is a
19 non-claim statute and that it is mandatory that if a claim
20 exists before the death of a decedent -- this would be
21 Ms. Hardin -- that it be brought within one year of the
22 death of that decedent.

23 In reciting from the case or from the statute, §
24 62-3-803(a)(1), all claims -- it doesn't say some. It says
25 all claims against an estate which arose before the death

1 of the decedent, whether due or to become due, absolute or
 2 contingent, liquidated or unliquidated, founded on
 3 contract, tort or other legal basis if not barred earlier
 4 by another statute of limitations or non-claim statute are
 5 barred against the estate, the personal representative --
 6 who Benny Richard Phillips, Jr., was the personal
 7 representative -- the decedent's heirs and devisees -- he
 8 was also a devisee -- and the nonprobate transferees, et
 9 cetera, if it's not filed within one year, it's gone. It
 10 is abolished, and there can be no cause of action
 11 maintained as a result of that.

12 In addition to that, Your Honor, the additional case
 13 which is cited and set forth in my reply brief is IN RE
 14 Estate of Hover. And in that case, the court stated on a
 15 number of occasions and explained what the non-claim
 16 statute means and is reciting in that case stated, as
 17 stated in the non-claim statute, claims against a
 18 decedent's estate shall include all claims due or to become
 19 due, absolute or contingent, et cetera. It also says that
 20 the term includes every species of liability that the
 21 personal representative can be called to pay out of the
 22 general funds of the estate.

23 In addition, Your Honor, it also says, not only in
 24 Phillips versus Quick, but in the estate of IN RE Hover,
 25 that equitable claims and legal claims are likewise barred.

1 It makes no difference. Whatever the claim is, when they
2 say all claims, they mean all claims. That statute has
3 been upheld by Hover and been upheld by Phillips versus
4 Quick. And it stated specifically, while equitable
5 principles may extend the time for commencing an action
6 under statutes of limitation -- which are two different
7 things, the statute and the non-claim statute -- non-claim
8 statutes impose a condition precedent to the right -- to
9 the enforcement of a right of action and are not subject to
10 equitable exceptions.

11 It further even goes on to say based on some hearsay
12 allegations that they included in the documents filed with
13 this Court, misleading statements, assurances or conduct of
14 the representative inducing a creditor to refrain from the
15 due presentation of his or her claim do not estop the
16 representative from contesting the claim because of such a
17 failure to present the claim.

18 If the claim has any basis at all, it is based on
19 these two sales agreements in 2006. He has no allegation,
20 no fact presented that Benny Richard Phillips, Jr., ever
21 signed a document, that Benny Richard Phillips, Jr., ever
22 received any benefit from anything he did, that Benny
23 Richard Phillips ever contracted with him to do anything
24 whatsoever at all. And he tries then to loop all this
25 around and cite a bunch of equitable principles in asking

1 the Court that, oh, I'm not making a claim against the
2 Claudia Hardin estate; I'm making a claim against Benny
3 Richard Phillips, Jr. The only thing that Benny Richard
4 Phillips, Jr., did in this case was he was the grandson of
5 Claudia Hardin. He was the conservator at the end for
6 about a year after his mother died, then he was the
7 personal representative of the estate. If he had a claim,
8 he ought to have filed the claim. That's what the law asks
9 him to do, and he didn't do it.

10 Benny Richard Phillips, Jr., was an heir or
11 distributee of the will of Claudia Hardin. He didn't do
12 anything to get the property. He didn't represent anything
13 to get the property. Carl Wells said, my property goes to
14 my daughter, Julia Hardin Phillips, who had predeceased her
15 unfortunately, and in the event she predeceases me, to
16 Benny Richard Phillips, Jr. He received title to the
17 property by operational law by this will, and that's the
18 only thing he did.

19 Your Honor, there is no factual allegations that would
20 allow them to bring this action, and we're asking the Court
21 to dismiss it. I made the arguments and cited the cases in
22 both briefs for Your Honor to read, and I won't belabor the
23 points. I'll be glad to answer any questions that the
24 Judge has at any time.

25 THE COURT: On the claims ending cases, you said,

1 I'm pretty sure I understand, that any equitable related
2 defense or claim would be barred as well?

3 MR. MULLINAX: Yes, Your Honor. That is set
4 forth on any number of occasions in the IN RE Hover case.

5 THE COURT: Horton?

6 MR. MULLINAX: Hover, H-O-V-E-R.

7 THE COURT: Okay. I'm sorry.

8 MR. MULLINAX: And that case is attached to my
9 reply brief for the Court.

10 THE COURT: So if they are -- and I have not read
11 it. So if equitable tolling is an issue, that would not be

12 -- it would be barred by the non-claim statute as well?

13 MR. MULLINAX: Yes, sir. Yes, Your Honor.

14 Totally barred.

15 THE COURT: Okay. Thank you, sir.

16 Yes, sir?

17 MR. NOWACKI: May it please the Court.

18 Mr. Nowacki on behalf of the plaintiff.

19 We also submitted a brief which we appreciate Your
20 Honor's consideration in reviewing --

21 THE CLERK: I'm going to read it. I have not.

22 MR. NOWACKI: -- which covers everything I'm
23 about to go over, so I hope to cover that as best I can.

24 We agree the claim is not against the estate.

25 THE COURT: How could it not be against the

1 estate?

2 MR. NOWACKI: If, Your Honor, may permit me.

3 THE COURT: In fact, let me stop you and ask you.

4 MR. NOWACKI: Yes, sir.

5 THE COURT: How can it not be against the estate

6 of Ms. Hardin because the conservator is acting as a

7 fiduciary in her behalf and entered some type of contract?

8 If I understand, the basis of the agreement was this

9 gentleman agreed to fix up a house. They were going to

10 sell it. She was going to get a designated amount.

11 Anything above that, the man who's a licensed residential

12 contractor was going to get anything over and above that.

13 Is that correct?

14 MR. NOWACKI: That's correct, Your Honor.

15 THE COURT: So wouldn't the deed, if that had

16 been seen through to its end, have been a conservator deed

17 for and on behalf of Ms. Hardin, right?

18 MR. NOWACKI: That's correct, Your Honor. We're

19 getting --

20 THE COURT: So how -- I want you to explain to me

21 something though. How in the world would it not be a claim

22 against Ms. Hardin's estate when she passed away?

23 MR. NOWACKI: Your Honor, we've alleged equitable

24 claims against --

25 THE COURT: Do you disagree with Mr. Mullinax?

1 MR. NOWACKI: I don't disagree with that.

2 There's a specific reason we've alleged -- and this is a
3 12(b)(6) motion. We've alleged in the complaint --

4 THE COURT: I think 12(b)(6) is summary judgment,
5 is it not?

6 MR. NOWACKI: Well, it's just 12(b)(6) at this
7 point in time because there are facts we believe which we
8 dispute about the representation of both the conservator
9 who is the grandson who ultimately inherited this piece of
10 property while he was conservator and then in his position
11 as personal representative.

12 There is case law -- and if I may, Your Honor, just as
13 little factual history is that the agreement was -- as you
14 stated, the agreement was in 2006 the property was to be
15 improved by our client, the plaintiff. He expended all his
16 own money investing in the property in terms of goods and
17 services. He bought all the materials, even paid some of
18 the interest on the deck. And this was an agreement,
19 written and signed contract. He then became the
20 conservator and during that time period said -- well, the
21 property was taken off the market because the economy went
22 south. The real estate market went south, and it was in
23 our client's interest to take the property off the market
24 because they could have sold it for 155. It doesn't matter
25 to --

1 THE COURT: Let me stop you. In 2006 the
2 agreement was made for the improvements. Who signed the
3 agreement? Did mother?

4 MR. NOWACKI: The mother as conservator.

5 THE COURT: As conservator signed it for her
6 mother, this boy's grandmother?

7 MR. NOWACKI: Yes, sir.

8 THE COURT: And the work was completed in 2006?

9 MR. NOWACKI: Probably about 2007. It took
10 about -- I believe the contract allowed for about seven
11 months, so it was within the year.

12 THE COURT: Okay. All right.

13 MR. NOWACKI: The property was then taken off the
14 market because of how bad the real estate market was. I
15 think everybody kind of knows how that went south. And the
16 son and the grandson, the defendant in this case, said,
17 well, eventually, we'll put it back on the market.

18 When the grandmother passed away, whose estate it was,
19 he even said, look, don't worry, we'll take care of it. My
20 client then takes that representation and relies on that in
21 not challenging the estate. Now, there's case law -- and
22 we believe that's fraud, and we've alleged that's fraud
23 because we believe he never intended to make good on his
24 representation that he was going to take care of our client
25 who's a creditor of the estate.

1 There's case law to suggest and allow this claim to
2 continue even though it's equitable, the first of which we
3 cited in our brief. It's § 62-106 which is in the probate
4 code -- and, Your Honor, if I may approach I have got a
5 copy -- which talks about fraud. Whenever a fraud has been
6 perpetrated -- it says, whenever a fraud has been
7 perpetrated in connection with any proceeding or any
8 statement filed under this code or if the fraud is used to
9 avoid or circumvent the provisions of the code, any person
10 injured may obtain appropriate relief against the

11 perpetrator of the fraud. It doesn't limit it. It doesn't
12 exclude the personal representative.

13 Our main cause of action -- and I think this is going
14 to knock down the number of statements or arguments of
15 defense counsel -- is that we've alleged a constructive

16 trust in this case, Your Honor. And a constructive trust
17 as being an equitable remedy allows for somebody to get
18 back something that they've given to -- I need to
19 mention -- I apologize, Your Honor. We also brought this
20 action against the real property as well, in rem action as
21 well. But the constructive trust is an equitable remedy
22 which allows my client to get something he gave to somebody
23 who's benefited from it. In this instance, the defendant
24 who got the house, he did benefit. He ended up getting the
25 value of all that work. But it allows them to go after

1 what value he put into the property.

2 In Griggs versus Richardson -- which I have a copy of
3 for Your Honor. This is a 1979 case by Judge Ness which
4 talks about a constructive trust. And if Your Honor will
5 allow me to quote, our Supreme Court held that the
6 expiration of the time period to contest a will in probate
7 does not preclude a claim for the constructive trust
8 because permitting the defendant to raise such a shield
9 would undercut the utility of a constructive trust.

10 In that case, Richardson was the personal
11 representative. He was an heir. And all along in the time
12 period; he told the other heirs who were not actually
13 beneficiaries of the Will, he said to them, don't worry. I
14 will take care of you. I'm going to distribute this estate
15 equitably. I'm going to split it up. And so they didn't
16 contest the period -- they didn't contest it during the
17 period in probate. And the judge, the court went on the
18 whole that it would be inequitable to permit appellate to
19 assert the expiration of the period for contestate of
20 probate where he continued to assure respondents that he
21 would divide the estate between them.

22 THE COURT: Isn't that case where there was a
23 pre-code, pre probate code case?

24 MR. NOWACKI: Pre-code. But then again, Your
25 Honor, under § 62-106, constructive trust is a fraud. One

1 of the elements of a constructive trust is, and as I laid
2 out in the elements of a constructive trust, is it involves
3 a fraud. So the code specifically extends that and allows
4 for actions for fraud. And as this -- I don't think --
5 again, Your Honor, equitable remedies, due justice, there's
6 wide discretion for the Court. And I don't think this
7 changes -- we're not going against the estate; we're going
8 against the personal representative, his own
9 representations to our client saying, don't worry, we'll
10 take care of you. We'll sell it when it comes time.

11 And if I may continue, Your Honor.

12 THE COURT: Well, let me stop you right there.

13 MR. NOWACKI: Yes, sir.

14 THE COURT: In any kind of fraud, you have to
15 have any right to rely on an alleged representation
16 regardless of any evidentiary basis.

17 MR. NOWACKI: Yes, Your Honor. If I may
18 approach, I have the case of Chapman versus Citizens and
19 Southern National Bank.

20 Now, fraud with a constructive trust is a little
21 different. A constructive trust results when circumstances
22 under which property required make it inequitable for the
23 one holding it to retain legal title. The circumstances
24 include not just fraud, but bad faith, abuse of confidence,
25 and violation of the fiduciary duty which gives rise to an

1 obligation in equity to make restitution.

2 It says, the court in Whitner versus Adamson (phonic)
3 says, generally fraud -- and this is all in that case
4 particular case. Generally fraud is an essential element
5 but need not be actual fraud. And in this instance, I want
6 to highlight a particular case -- I showed you Chapman
7 there -- where the court dealt with a confidential
8 relationship involving from one heir to another. And they
9 said a confidential relationship exists where -- or a

10 fiduciary relationship exists where one reposes a special

11 confidence in another so the latter in equity in good
12 conscience is bound to act in good faith and with due

13 regard to the interest of the one proposing the confidence.

14 And the court in Chapman actually looked to the

15 definition of confidential relation in Black's Law

16 dictionary. And in that it says, confidential relations

17 and fiduciary relation is a peculiar relation which exists

18 between client and attorney, principal and agent, principal

19 and surety -- it goes on and on, but it concludes

20 administrators and creditors, legatees or distributees.

21 And to the extent that he's already admitted and argued

22 that our client's a creditor, as an executive

23 administrator, the defendant had an obligation when he made

24 these representations. There's that confidential

25 relationship. There's that trust.

1 And the equitable remedy provided here as for the
2 title of the property allowed my client to rely on those
3 representations. And those repeated representations -- I
4 think it was in Briggs versus Stratton -- allowed him to
5 rely on those representations. You can't allow -- equity
6 does not allow defendant to say, don't worry about it,
7 don't worry about it, we will take care of you, and then
8 call time, essentially is what they did here. They held
9 the property -- the defendant held the property in trust
10 all along. And I believe the case law --

11 THE COURT: He held it in trust?

12 MR. NOWACKI: Well, that's our argument, also, --

13 because of his relationship --

14 THE COURT: Oh, the constructive trust?

15 MR. NOWACKI: Constructive trust.

16 THE COURT: It's not an actual trust?

17 MR. NOWACKI: Not actual trust, but constructive
18 trust. And again, Your Honor, the case law and the
19 elements of constructive trust says if the person didn't
20 have to assume it, it isn't an actual legal duty that they
21 took on, it's one that the law imposes upon them because
22 they should have that duty.

23 And as cited in our brief, and I'm going to rely on
24 the brief because it's pretty heavy case law. And I
25 apologize, Your Honor, for having thrown this at you as I

1 have. But this is the remedy that the law provides. And
2 if there's ever an situation, this should be it.

3 If Your Honor will permit me, a couple of other. We
4 filed unjust enrichment which applies, the same argument
5 because of being an equitable remedy. Conversion being the
6 same as he's converted the value that's been taken.

7 THE COURT: How do you -- I hate to keep -- I'm
8 going to let you argue. I promise. How do you
9 reconcile -- I mean, I hear the fraud statute that you're
10 saying, but how do you reconcile the cases that

11 Mr. Mullinax is reciting saying that this non-claim statute
12 bars any and all claims whether it's a legal or equitable
13 claim?

14 MR. NOWACKI: Your Honor, I believe those cases
15 are all against the estate themselves. It should have been
16 brought against the estate.

17 THE COURT: Well, show me something -- I'm a
18 little further than the statute that you gave to me. But
19 it seems to me that the claims against the mother's estate
20 is where the claim should have originated, that she was the
21 original contractor through her conservator. And if
22 there's a non-claim, no claim filed against the mother,
23 maybe this statute allows a fraudulent type of activity to
24 be commenced within, a based claim within two years of when
25 the activity allegedly occurred. But what Mr. Mullinax is

1 reading to me, it's just a clear bar. And so how do you
2 piggyback these other claims that are non-fraud based?
3 They're inequitable -- unjust enrichment, things like that.
4 They're not fraud based.

5 MR. NOWACKI: Well, Your Honor, I'll submit to
6 you that the strongest claim would be our constructive
7 trust claim. Unjust enrichment I think has the same, if
8 you obtain something by fraud you can be unjustly enriched.
9 In that sense, I think there's a similar element in that.

10 THE COURT: I don't think there's any fraud
11 component to unjust enrichment, but go ahead.

12 MR. NOWACKI: But in that sense, it would be --

13 again, I don't want to lose focus on --

14 THE COURT: And I know I keep interrupting you,
15 so go ahead.

16 MR. NOWACKI: It just -- the focus is on that
17 constructive trust argument for us, and we do believe it is
18 one of our strongest arguments. And the partition one goes
19 with that because that's just the remedy -- the partition
20 goes with the constructive trust because that's just the
21 remedy. We also pled the other actions just in the
22 alternative should this title action and constructive trust
23 action not survive.

24 I do want to mention a couple of things and address
25 Your Honor's question because I think it's a good question.

1 I think the legislature in its wisdom when it enacted the
2 statute barring claims against the estate did so because
3 they wanted some finality in the state to allow people's
4 estates to be handled within a year, and after a year, and
5 then creditors could go on their way, that we wouldn't come
6 back and undo things. But then the legislature saw, and is
7 recognized under § 62-106, that some people could -- some
8 people involved in the administration of the estate in
9 whatever capacity could perhaps perpetrate a fraud. And so
10 that cause of action would be against that individual, not
11 the estate.

12 And in our instances, the courts have recognized in
13 prior cases if the personal representative caused somebody
14 not to file a creditor's claim, made representations to
15 them, telling them, don't worry, we'll take care of you,
16 don't worry, we'll handle it, which is similar to a --
17 which is basically it's a similar argument to when waiver
18 under statute of limitations -- I'm blanking on the word I
19 wanted to use, Your Honor. But he's induced that reliance,
20 and he's kept somebody from continuing or acting on their
21 legal rights, and now he's claiming a technicality.

22 You know, similar to how they've alleged the statute
23 of frauds -- and this goes with the case law in Briggs
24 versus Richardson which I've already handed up -- when
25 asserting a constructive trust, it is not necessary that it

1 be proved by arriving to satisfy the statute of frauds.
2 Again, it's an equitable remedy, and the courts, our
3 courts, have said that a constructive trust is permitted to
4 be proved by parol evidence. So his representations come
5 in in what he did.

6 Lastly, just a couple more points, Your Honor. With
7 regards to the statute of limitations argument, statute of
8 limitations don't apply to equitable principles. We also
9 are asserting that because of the way this contract was
10 structured, that it was for the house to be sold, and when
11 the house was sold, then the payment would be made. So it
12 wasn't until they made that -- the defendant in this case
13 made the representation he was no longer going to sell the
14 house, that's the breach. And that was in 2015, so we
15 filed within the appropriate time period.

16 THE COURT: I'm thinking it through. I'm not
17 denying anything or disagreeing with you.

18 MR. NOWACKI: I understand, Your Honor.

19 THE COURT: You filed December 3rd -- she died
20 December 3rd, and you filed December 31st?

21 MR. NOWACKI: She died -- and I'm looking at the
22 copy of our complaint which is attached. It was
23 December 31st, 2015, is when we filed. She died in ...

24 MR. MULLINAX: December 3rd, 2013.

25 MR. NOWACKI: -- 2013, and then the last day --

1 THE COURT: Of 2013.

2 MR. NOWACKI: Yes. And then the last --

3 THE COURT: When was her estate -- when did the
4 filing period against her estate close? In other words,
5 she died in 2013. Then you have, what, seven months?

6 MR. NOWACKI: It would have been December of
7 2013.

8 MR. MULLINAX: 12/3/2014, Your Honor. That would
9 be the one year period.

10 THE COURT: Okay. One year.

11 MR. NOWACKI: And, Your Honor, again, a couple of
12 points? We believe that this trust was created in equity
13 in the sense that the representations made by the
14 conservator and the personal representative. And this
15 trust, as we argued, is not destroyed by death.

16 I would also like to highlight -- and this is also in:
17 Chapman versus Citizen United -- some language which, if
18 Your Honor will permit me, I'd like to quote in its
19 entirety because I think it's very appropriate. And this
20 is a 1990 case, so I believe that this is after the 1986
21 passage of the code. It says, moreover, a constructive
22 trust arises by operation of law and not from the intention
23 of the trustee to assume a fiduciary duty. The invoking of
24 a trust is not enforcing the contract but is invoking
25 equitable relief from a fraud or breach of confidence.

1 Because of these rules, a constructive trust may be invoked
2 even though the agreement out of which it arose is not
3 legally enforceable.

4 The court goes on to say, an interesting aspect of the
5 cases in which courts have applied a constructive trust to
6 property or rights to property is that the defendant almost
7 always raises a contention that the agreement should not be
8 enforced because it violates public policy or some
9 statutory prohibition or is illegal. In those cases, the
10 defendant does not assert the defendant's statutory rights
11 or the defendant's legal or equitable rights; it has
12 attempted a technical avoidance which rests upon an
13 asserted public policy or illegality in some kind. The
14 courts have refused to accept this ruse because to do so
15 would be to compound the defendant's wrong. In those
16 instances as here, the defendant is really attempting to
17 assert not a public policy but a private policy to insulate
18 the defendant from his own wrong. Equity does not permit a
19 defendant to defeat justice by such a ploy.

20 Again, Your Honor, we're at the 12(b)(6) stage as well
21 as I know he has made motions for summary judgment. We
22 believe our equitable action stands on firm legal ground.
23 We pled the elements of fraud, breach of fraud which
24 doesn't have to be as specific as fraud. We've also pled a
25 breach of confidence, that the courts have recognized the

1 definition of breach of confidence involving an executor of
2 an estate and a creditor. So we believe that we've
3 essentially lived to see another day, Your Honor, and that
4 this case be heard by the factfinder.

5 THE COURT: All right. Thank you, sir.

6 Mr. Mullinax, under § 62-1-106 ...

7 MR. MULLINAX: Yes, sir.

8 THE COURT: If they filed a claim for
9 constructive fraud, wouldn't they have two years from the
10 time that that property -- I guess the best that I can
11 think, is that once he deeded the property to himself to
12 commence that action?

13 MR. MULLINAX: Your Honor, you would think so in
14 another context, but not in this context. That statute is
15 really apples and oranges as compared to the agreements
16 that were signed in 2006 with Mrs. Hardin and her death in
17 2013. And those issues were addressed completely in the IN
18 RE Hover case which is § 754 S.E.2d 875. And I'm going to
19 read it briefly, and I'll give the Court my copy. He also
20 makes an argument about constructive trust. That is an
21 equitable action.

22 THE COURT: Sure.

23 MR. MULLINAX: Everything he said, unjust
24 enrichment, is an equitable action. The Hover court
25 specifically said, furthermore, even though a decision in

1 favor of the estate may appear inequitable, equitable
2 considerations are not a factor in the claims barring
3 analysis. And more specifically to everything that he's
4 saying, although he didn't allege any facts in his
5 pleading, the Hover court says, misleading statements,
6 assurances or conduct of the representative inducing a
7 creditor to refrain from the due presentation of his or her
8 claim do not estop the representative from contesting the
9 claim because of such a failure to present the claim.

10 And again, Your Honor, we go back to the non-claim
11 statute. It prevents all claims, legal, equitable or
12 whatever they may be. And that's just my additional
13 argument.

14 THE COURT: Okay.

15 MR. MULLINAX: And another point just briefly,
16 Judge. I won't belabor the point. He cites this Briggs
17 case. Well, Briggs is a 1979 case that predates the
18 non-claim statute. And also, Briggs was against heirs,
19 heirs versus heirs. This plaintiff has no relationship to
20 to anyone in this case other than as a creditor of
21 Ms. Hardin.

22 THE COURT: Thank you.

23 Let me ask either one of you guys something. It seems
24 to me that at best that you have potentially -- and I'm not
25 saying that; I'm just thinking out loud -- a claim

1 potentially for constructive trust which would be an
2 equitable claim and then you petition because it's just a
3 mop-up under the equitable provision. This unjust
4 enrichment and other claims seem clearly out the door. And
5 that would be the claim for unjust enrichment, the claim
6 for conversion. In fact, there was nothing to convert. He
7 was entitled to partake in the funds, not in property. So
8 I don't think there's anything for him to convert, and I
9 don't think the elements of conversion were made.
10 Constructive trust potentially. Equitable title. I don't
11 know if I'm familiar with equitable title. I'm sure it may
12 be. But again, it's an equitable cause of action. And if
13 I were to find that it was constructive trust and then
14 action goes forward, and then the trial judge -- this is
15 nonjury, isn't it?

16 MR. MULLINAX: I'm sorry?

17 THE COURT: This is nonjury?

18 MR. MULLINAX: Nonjury.

19 THE COURT: I mean, it seems like that partition
20 would have to stay in too just because you have to mop it
21 up, but -- or some other related relief. Why?

22 MR. DRAISEN: Your Honor, may it please the
23 Court. I'll take responsibility. I pled this. I'm the
24 one that drafted the complaint.

25 THE COURT: I understand that, but here's where

1 we are now.

2 MR. DRAISEN: And so just to be clear to the
3 Court, I pled in the alternative. Originally we filed a
4 claim against the estate of Benny Phillips, Sr., because at
5 the time I originally was retained on the case, I
6 understood that Mr. Phillips, Sr., was really handling all
7 the affairs for his mother-in-law. And when we found -- as
8 we went through that process, Mr. Mullinax provided a copy
9 of the document, I believe, that showed that it was
10 actually Benny's wife who had signed the contract.
11 Although it may have been that mister was doing all the
12 talking, misses had the legal authority as power of
13 attorney, I believe, initially for her mother.

14 THE COURT: I thought she had a conservatorship.

15 MR. DRAISEN: No. I believe she had power of
16 attorney to begin with. I believe the son, junior,
17 Phillips, Jr., applied for conservatorship after mother
18 passed away because there was not an alternate named in the
19 power of attorney. And so then he ...

20 And I think that's correct, is that not, Mr. Mullinax?

21 MR. MULLINAX: That's correct, Your Honor.

22 MR. DRAISEN: So originally it was by power of
23 attorney. And so there was some confusion, even on my
24 part, initially about how the authority went. And so what
25 happened was: you had mom as power of attorney; mom fell

1 ill; grandmother was elderly; dad was kind of taking the
2 role of handling things with my client in particular; dad
3 got sick; son petitioned to become conservator.

4 THE COURT: Mama dies and then son --

5 MR. DRAISEN: Mom dies; son petitions to become
6 conservator; my client starts dealing with the son as
7 conservator. Now, at this time, Your Honor, here we are at
8 a point where in 2008, '9 or '10, the real estate market
9 was not good.

10 THE COURT: I'm familiar with that.

11 MR. DRAISEN: And so if my client would have been
12 in a position to say, well, let's just leave it on the
13 market and sell it. If we only get \$150,000 for it, I just
14 get nothing. Well, that wouldn't make sense. I mean, he
15 invested all this money in renovating the property. And so
16 by, we contend -- and it's in the affidavit -- by agreement
17 the property was delisted because the market was bad, so it
18 sat for years while the market was no good. In other
19 words, they didn't try to sell the property. And I remind
20 you this contract with misses was open-ended.

21 THE COURT: Is that the same reason why he didn't
22 file a claim against either one of these estates?

23 MR. DRAISEN: Because there's no breach. There
24 was no breach until 2015 when Benny, Jr., came in and said,
25 your time's run and we're done. Because my guy said, it

1 was an open-ended contract. Until the house is sold, I'm
2 not entitled to be paid.

3 THE COURT: He deeded the property to himself
4 clearly, but --

5 MR. DRAISEN: Well, it didn't sell.

6 THE COURT: -- I don't know if I can agree that
7 there's no breach until that happened.

8 MR. DRAISEN: Well, it didn't sell. The house
9 has never been sold as of today. Never been sold. So our
10 position was all along since they never sold it, our
11 entitlement to payment would come when the house is sold.

12 THE COURT: Do you agree, with me, though, would
13 you not, that the claim needed to be filed against the
14 original owner's estate? That's the one who made the
15 contract through her conservator or power of attorney?

16 MR. DRAISEN: No. I believe, Your Honor, that --

17 THE COURT: If I say you give me your power of
18 attorney to sell your house and you don't sell it, then
19 they sue me to make me sell your property? That's not the
20 way that works.

21 MR. DRAISEN: Not initially. And I agree with
22 you except for if there's fraud.

23 THE COURT: Well, that may make me individually
24 liable for a money judgment but not to transfer this
25 property. The only way to transfer it is the owner.

1 MR. DRAISEN: The transfer -- here is the problem
2 with the transfer. If the work was done in 2006, completed
3 in 2007, the trust, the constructive trust, existed as of
4 2007 when my client actually had invested the money and the
5 time and the labor into the property. That's when his
6 interest attached. Do you understand? I mean, at the
7 point in which -- because he didn't take a note and a
8 mortgage for the work that he did. They had a contract,
9 and the contract was open-ended. And the contract said,
10 when you sell this. Well, if they had sold it in
11 derogation of his interest, then he would have been able to
12 come back after the closing and say, you owe me money.

13 They they said, no, you're not entitled. You have no legal
14 title. We're not dispersing any money from the closing to
15 you. He said, you owe me money, though, because I had an
16 interest in the property. Well, show me you had an
17 interest. I have a constructive trust interest in that
18 property. I have equitable title in that property because
19 I put in \$60,000 and increased the value of that property,
20 which is also why we filed an in rem action, Your Honor,
21 because there's an increase in value in the property.

22 THE COURT: I understand, and that's a good point
23 that you brought up because you did file an in rem action.
24 But under your statute, at best you have a claim against
25 the individual who committed this alleged fraud.

1 MR. DRAISEN: And that's Benny Phillips, Jr.

2 That's the person we named.

3 THE COURT: I know. But that property, if you're
4 going to claim against that property, you would have had to
5 gone through her estate, I think. I think that.

6 MR. DRAISEN: Well, the reason we could go
7 through her estate is because at the time in which he could
8 have filed the claim, the material fraudulent
9 misrepresentations were made by junior who told the
10 creditor, who he had a fiduciary relationship with, don't
11 worry about it. We're going to get this property sold.
12 It's not a problem. I know the agreement. I know the
13 relationship. I understand we're supposed to sell the
14 property. That's by affidavit of my client.

15 But, Your Honor, just to address your other questions
16 about the real estate --

17 THE COURT: Other causes of action.

18 MR. DRAISEN: Other causes of action, which is
19 what you started with.

20 THE COURT: Right.

21 MR. DRAISEN: Those were pled in the alternative,
22 Your Honor. And quite frankly, if the Court is fine with
23 us going forward on the issue of -- if you decide --

24 THE COURT: Let me tell you something. I'm not
25 about to rule right now.

1 MR. DRAISEN: I understand. And I hope you'll
2 read our brief because actually there are a lot of cases.
3 The way this thing is set out, I think it's important to
4 read all the cases that everybody's presented because it
5 may be a unique issue slightly because of the issue of the
6 probate estates. The only thing that makes this more
7 difficult for the Court maybe is that you've got this
8 continuing relationship between Benny Phillips, Jr., as
9 conservator, personal representative and ultimate owner of
10 the property, which is why -- that's how we tied it all
11 together is that this gentleman was involved all the way
12 through this process. So obviously it's not like we just
13 sprung this on somebody who didn't know about the
14 agreement. Mr. Phillips, Jr., knew about this from the
15 time he was conservator until the time he owned the
16 property, so there's no surprise. It's not like I'm
17 throwing it on a personal representative who didn't know
18 these people's business.

19 THE COURT: Well, I'm sure that's probably the
20 case. I don't know that, but I'm just thinking out loud.
21 And again, you guys, I'm going to read everything. I do
22 think that the other causes of action are out, quite
23 frankly. The question in my mind is I don't think that you
24 can bring an in rem action against this property because
25 that should have been done against the mother's estate.

1 And constructive trust may come back in the back door maybe
2 with this guy. It may be just a matter of semantics. But
3 it may be that you're limited to a money judgment against
4 him too. I don't know.

5 I don't know. I'm just throwing things out. It's an
6 interesting case. I think Mike is a hundred percent
7 correct on the other causes of action though. I quite
8 frankly will tell you that. I'm going to read everything.
9 I'm not telling you when I'll give my decision because I
10 don't have a clue. Okay? It's pretty complex.

11 Anything else from anybody?

12 MR. MULLINAX: No, your Honor. I just -- what he

13 says doesn't make any sense whatsoever. The guy was a

14 laborer. He did something, he says, to the property in

15 2006. He had 90 days to file a mechanics lien. He didn't

16 do nothing. This lady didn't die until 2013. That's
17 seven years. He had a year under the law to file a claim.
18 He didn't do anything. He's out. Thank you, Judge.

19 MR. NOWACKI: Your Honor, if I may.

20 THE COURT: I got it. I'll hear you. I think
21 probably what happened is the guy didn't file a claim
22 against her estate because he knew back in the time he
23 wasn't going to get his money's worth back out of it. It
24 wouldn't be the 155. That's just my, not knowing anything,
25 opinion.

1 MR. NOWACKI: Your Honor, just a note. He wasn't
2 just a laborer. He was a neighbor. These were family
3 members and friends. So it has some added facts.

4 THE COURT: The labor neighbor claim? Guys,
5 thank you. It's interesting.

6 MR. MULLINAX: Thank you, Your Honor.

7 (WHEREUPON, the trial/hearing concluded at
8 approximately 3:33 p.m.)

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10 *** End of requested transcript of record ***

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STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON	

WILLIAM RICE COOK, III, Plaintiffs, -VS- BENNY RICHARD PHILLIPS, JR., and the real property located at 207 NORTH AVENUE, ANDERSON, SC 29625, TMS# 123-26-08-02, Defendants.	AFFIDAVIT OF WILLIAM RICE COOK, III C/A No. 2015-CP-04-00057	A TRUE COPY JUN - 7 2016 <i>Elaine M. Kline</i> ANDERSON CLERK OF COURT
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PERSONALLY APPEARED BEFORE ME, WILLIAM RICE COOK, III, who, being first duly sworn, states that he resides in Anderson County, South Carolina. He is the Plaintiff in this action and he freely and voluntarily gives the following statement:

On February 28, 2006, I entered into an agreement with Julia Phillips as the Power of Attorney for her mother, Claudia P. Harden, to renovate and remodel Mrs. Harden's home. On August 11, 2006, the agreement was amended where I would provide all the labor and materials for the renovation and I would have seven (7) months to complete this project. Upon the completion of the renovations and remodeling the property would be sold and Mrs. Harden would receive \$155,000.00 from the sale and I would receive all sums above \$155,000.00. At that time, I was making monthly interest payments to Mrs. Harden as agreed for the one year prior to the property being listed for sale. When the property was listed, Mrs. Phillips and I agreed that instead of making the monthly interest payments, the interest would be added to the principal amount of \$155,000.00 and would be paid when the property sold. The property was then listed. The property was appraised after the renovations and was valued at \$260,000.00. Toward the end of 2008 and into 2009, the real estate market took a sharp down turn and the property did not sell. It was at the time that Ben Phillips, Sr. assumed handling the affairs for his wife, Julia Phillips due to illness, and also for his mother-in-law, Claudia Harden. Mr. Phillips, Sr. made the decision to take the property off the market as it had not sold and he felt we needed to wait until the market improved to try again. He took down the realtor's sign and then allowed his son, Ben Phillips, Jr. to move into the home. Upon discovering this arrangement, I talked with Mr. Phillips, Sr. and also Ben Phillips, Jr. I was assured by both that nothing had changed and the arrangement was still valid. They felt that by placing furniture in the home to "stage it", it would help with prospective buyers as they planned to re-list the property soon. Around October, 2011, Mrs. Phillips passed away. Prior to her death, Benny Phillips, Jr. was appointed as Conservator for his grandmother, Mrs. Harden as his mother was unable to continue with this responsibility. Benny Phillips, Jr. was well aware of the agreement between his mother, Julia Phillips, his grandmother, Claudia Harden and myself. I met with Benny Phillips, Jr.

periodically to discuss the property and the real estate market. Around December 2012, I had a serious discussion with Benny Phillips, Jr. about when the property would be re-listed as promised. I also gave him the option to compensate me for my investment if he wanted to live there. I was assured that he understood the situation and that he understood that I was owed for my investment in the property. He told me that Mrs. Harden was receiving disbursements from an investment fund and that he would begin paying me some of the money I was owed for the work done. I never received a payment. I again talked with Benny Phillips, Jr. and he told me that Mrs. Harden's had substantial health care costs and was unable to pay any money at that time, but the situation would be worked out. In December, 2013, Mrs. Harden passed away. Benny Phillips, Jr. was then appointed as the Personal Representative of Mrs. Harden's estate. In February, 2015, Ben Phillips, Sr. passed away. After an adequate amount of time, I again talked to Benny Phillips, Jr. about his promise of making payments from Mrs. Harden's disbursements and assurance that the property would be re-listed. Benny Phillips, Jr. then told me that the agreement was between me and his father, Ben Phillips, Sr. and that my time was up and he did not have to honor it. The property was never sold, but was transferred by Benny Phillips, Jr. from Mrs. Harden's estate into his name by Deed of Distribution. I was never paid anything for the labor, materials, renovations and remodeling work to the property. I did not invest my time and money into this project as a gift. The renovations and remodeling to the property greatly increased its value for which I have not been paid anything. I was repeatedly promised I would receive payment and that the property would be re-listed. I had no reason to not believe Benny Phillips, Jr. and I relied on his word and also his representations as the appointed Conservator and Personal Representative of Mrs. Harden's estate.

William Rice Cook, III
WILLIAM RICE COOK, III

William Rice Cook, III states that he has read the foregoing Affidavit and all matters alleged therein are true and correct to the best of his knowledge. He acknowledges and understands that: A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO CRIMINAL PENALTIES AS PROVIDED BY LAW.

William Rice Cook, III
WILLIAM RICE COOK, III

Wanda J. Rogers
WITNESS

Nathaniel B. Campbell
WITNESS

STATE OF SOUTH CAROLINA)

PROBATE

COUNTY OF ANDERSON)

PERSONALLY APPEARED before me the undersigned witness who, being duly sworn, deposes and says that s/he saw WILLIAM RICE COOK, III sign the within AFFIDAVIT for the uses and purposes therein mentioned and that s/he with the other witness whose signature appears above witnessed the execution thereof. The witness further hereby certified that s/he is not a party to or beneficiary of the transaction, and that s/he physically witnessed the principal(s) sign this document.

WITNESS my hand and seal this 3rd day of June, 2016

Wanda J. Rogers
WITNESS

SWORN to before me this 3rd
day of June, 2016.

Nathaniel B. Campbell (SEAL)
Notary Public for South Carolina
My Commission Expires: 07-24-2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON	)	2015-CP-04-03024
WILLIAM RICE COOK, III	)	
Plaintiff	)	
vs.	)	<u>DEFENDANT'S MOTION BRIEF</u>
BENNY RICHARD PHILLIPS, JR.	)	
and the real estate property located	)	
at 207 North Avenue, Anderson,	)	
South Carolina 29625,	)	
TMS# 123-26-08-02	)	
Defendant	)	

Plaintiff brings an action filed December 31, 2015, but not served until January 2016. Plaintiff's action is based upon an alleged Contract or Sales Agreement dated February 28, 2006 and August 11, 2006 [see Time Line attached as Exhibit 1] almost ten years after the alleged documents were supposedly signed.

FACTS OF THE CASE

1. The alleged Sales Agreement concerned the renovation and repair of a certain home, situate at 207 North Avenue, Anderson, South Carolina owned by Claudia P. Harden.
2. The alleged Agreement was allegedly signed by Julia H. Phillips, on February 28, 2006, who had been appointed as Attorney in Fact for Claudia P. Harden by instrument recorded in Deed Book 1849 at page 90.
3. The alleged Sales Agreement was allegedly amended by an additional written agreement dated August 11, 2006, again signed by Claudia P. Harden through her agent, Julia Harden Phillips.
4. Both Sales Agreements contain various obligations of the Plaintiff, none of which were ever performed by the Plaintiff; but none of the agreements grant to Plaintiff any ownership interest in the subject property.
5. Julia H. Phillips died October 26, 2011. Her estate was administered in the Probate Court for Anderson County, Probate File 2011-ES-04-01168 and the Plaintiff filed no claims of any kind against the Estate.
6. Ben R. Phillips, Jr. was appointed Conservator for Claudia P. Harden by Order of the Probate Court on October 14, 2011. No claims against the Estate of Claudia P. Harden were filed with the Court or with the Conservator.

7. Claudia P. Harden died testate December 3, 2013 and her estate was probated in Anderson County Probate Court File 2014-ES-04-00047. This estate was closed by Order of the Probate Court on June 1, 2015 and no claims were filed by the Plaintiff at any time.

8. The subject property at 207 North Avenue was deeded pursuant to the Will of Claudia P. Harden to Ben R. Phillips, Jr. by deeds of record in the Register of Deeds Office on October 20, 2014, and a Corrective Deed on February 24, 2015 in Book 11576 at page 247 and Book 11717 at page 168.

Before a Plaintiff can state a Cause of Action, he must establish the facts necessary to serve as a basis for legal causation; and Plaintiff's claims are all based on the 2006 documents. Claims made by the Plaintiff in the Complaint are specious and are barred by the statutes and laws of this state, and the Complaint should be summarily dismissed based upon the following:

1.

STATUTE OF LIMITATIONS

S.C. Code §15-3-530(1) Provides that any actions upon contracts must be brought within three years. The alleged Contracts were for services only and, even if believed, are dated 2/28/2006 and 8/11/2006, and this action filed December 31, 2015, and served January 2016 and is well beyond the Statute of Limitations.

"Within three years:

"(1) an action upon a contract, obligation, or liability, express or implied, . . . S.C. Code §15-3-530(1)." (See Exhibit 2)

2.

NON-CLAIM STATUTE

S.C. Code Ann. §62-3-801 and §62-3-803

(See Exhibits 3 and 4)

The Plaintiff bases his claim on the alleged Contract in 2006 with Claudia P. Harden allegedly executed by her attorney in fact, Julia H. Phillips. Julia H. Phillips died October 26, 2011; no claim was ever made against Julia H. Phillips, nor her estate and Benny Richard Phillips, Jr. was appointed Conservator for Claudia H. Harden October 14, 2011 with no claim or action being filed against Claudia H. Harden, who died December 3, 2013. The Estate of Claudia H. Harden was closed on June 1, 2015 as appears by Probate Roll 2014-ES-04-00047 and no claim was filed against the Estate of Claudia Harden within the time permitted by the Statute.

Therefore the alleged claim was based solely on a contract of Claudia H. Harden, allegedly signed in 2006. Notwithstanding the fact the Statute of Limitations had expired on an action being brought on that contract; once Claudia H. Harden died, it is mandatory and imperative under the laws of this State that any claims that may be outstanding be brought

within one year of the date of death of Claudia H. Harden. As a matter of fact, a claim based on a contract which supposedly was in existence before the death of a decedent, must be brought within one year after decedent's death as provided by §62-3-803 (a)(1), or no later than eight months (following publication of notice for all creditors barred by publication) as provided in §62-3-801(a).

" (a) all claims against a decedent's estate which arose before the death of the decedent, . . . whether due or to become due, absolute or contingent , liquidated or unliquidated, found on contract, tort, or other legal basis, if not barred earlier by another statute of limitations or non-claim statute; are barred against the estate, the personal representative, the decedent's heirs and devisees, and the non probate transferees of the decedent; unless presented with the earlier of the following:

(1) one year after the decedent's death:

(2) the time provided by § 62-3-801 (b) for creditors who are given actual notice, and within the time provided in § 62-3-801 (a) for all creditors barred by publication." SC Code §62-3-803 (a)(1)

Thus the non-claim statute is actually a stronger version of a Statute of Limitations and this alleged claim of the Plaintiff is completely barred pursuant to the statute and the case of Earl Phillips as Personal Representative v. Brigitte Quick 399 S.C. 226, 731 S.E. 2d 327 (2012). (See Exhibit 5)

Therefore, this claim should be dismissed in its entirety with prejudice.

Our Court has held that §62-3-803 is a non-claim statute and unless the statute is complied with, a creditor's claim is barred. If the Plaintiff has any status at all, which is denied, his status would be solely as a creditor, and he is mandated by law to comply with the non-claim statute which he did not, and therefore, his claim must be summarily dismissed.

The Phillips Court held that "non-claim statutes imposes a condition precedent to the enforcement of a right of action and are not subject to equitable exceptions." Estate of Decker 684 N.E. 2d at 1130; see also 51 AmJur 2nd Limitation of Actions Section 3 (2011); The time element is a built-in condition of a nonclaim statute and is of the essence of the right of action, and unless the claim is filed within the prescribed time set out in the statute, no enforceable right of action is created." Phillips at page 230.

In addition, the Plaintiff has attempted to allege some type of claim against Benny Richard Phillips, Jr. who was a rightful distributee of the Estate of Claudia Phillips Harden. In addition to the other barring statutes referred to above, S.C. Code §62-3-1006 (See Exhibit 6) bars any claimant or creditor from bringing an action against a distributee [who was liable to pay the claim (and Phillips, Jr. is not a party to this contract, nor liable to pay the claim) and, if a distribution was improper, [which in this case it was not], more than one year after the decedent's death.

"The claim of any claimant to recover from a distributee who is liable to pay the claim, and the right of any heir or devisee, or of any successor personal

representative acting in their behalf, to recover property improperly distributed or the value thereof from any distributee is forever barred at the later of (1) if a claim by a creditor of the decedent at one year after decedent's death...."
S.C. Code §62-3-1006.

The Plaintiff has attempted to get around the Non-Claim Statute by alleging a constructive trust, however this attempt is without merit, as equitable and legal claims are likewise barred. In the Phillips case, this Court held that §62-3-803 makes no mention of the discovery rule, nor does it permit equitable exceptions to extend the time for commencing an action as is set forth above.

In the case of In Re: Estate of Hover 407 S.C. 194, 754 S. E. 2d 875 (2014), our Supreme Court held that S.C. Code Ann. §62-3-809 is a Non-Claim Statute and stated as follows:

If the "secured" creditor [the Plaintiff in this case is an unsecured creditor, if anything] fails to timely present a claim in compliance with the Non-Claim Statute, the creditor's right of action against the estate is barred.

62-3-803 is a Non-Claim Statute. See In Re: Estate of Tollison 320 S.C. 132, 135, 463 S.E. 2d 611, 613 (Ct. App. 1995).

"§62-3-803 is a Non-Claim Statute. Thus, unless the statute is complied with, the creditor's claim is barred..." Unless the claim is filed with the prescribed time set out in the statute, no enforceable right of action is created"

The Estate of Hover Court further stated that: " a Non-Claim Statute is a self-contained statute which absolutely prohibits the initiation of litigation based on it after a prescribed period". Estate of Hover at page 206, 881.

3.

MOTION S.C.R.C.P. 12(B)(6)

The Plaintiff has made various claims and stated conclusions without stating facts to support his claim under any of his theories or causes of action. He alleges conversations with Ben Phillips, Sr. in paragraphs 11 and 12, all of which are not admissible and barred by either the South Carolina Dead Man's Statute, codified in §19-11-20, or have no relevance or relation to a supposed contract by Claudia H. Harden in 2006. The Plaintiff in this case initially instituted an action against Benny Richard Phillips, Sr. who died testate February 11, 2015, and the Plaintiff dismissed this action and the effect of his dismissal is to bar any action at this time. There is no writing creating any obligation of Claudia P. Harden, other than the 2006 alleged contract, and there are no other writings so that the claims of the Plaintiff are likewise barred by the Statute of Frauds, S.C. Code Ann. §32-3-10 (See Exhibit 7) and the remaining Statute of Limitations as set forth in this Brief.

The Statute of Frauds, *supra*, likewise, precludes the Plaintiff from maintaining any action against Benny Richard Phillips, Jr., in addition, to the NonClaim Statue and Statue of Limitations as is set forth above which precludes any action.

MOTION TO QUASH THE LIS PENDENS

The Lis Pendens filed in this matter must be dismissed as it is in violation of the provisions set forth in S.C. Code Ann. §15-11-10 (See Exhibit 8). A Lis Pendens may be filed:

"[in] an action affecting the title to real property... not more than 20 days before filing the Complaint or at any time afterward... With the Clerk of each county in which the property is situated, a notice of the pendency of the action containing the names of the parties, the object of the action and the description of the property in that county affected thereby". S.C. Code Ann. §15-11-10

The filing of a Lis Pendens is an extraordinary privilege granted by statute, strict compliance with the statutory provisions is required. Pond Place Partners v. Poole 351 S.C. 1, 567 S.E. 2d 881 (Ct. App. 2002) (See Exhibit 9). As set forth in Pond Place Partners supra an action affecting the title to real property clearly allows the filing of a Lis Pendens by an interested party in order to protect their ownership interest in the property subject to the litigation. The Plaintiff has no ownership interest in this property by any stretch of the imagination. The Plaintiff in this case does not even have a viable claim that can be made in the Courts of this state, as set forth by the numerous statutory prohibitions set forth above. Plaintiff's only purpose in filing the Lis Pendens is to harass and to subject the Defendant to a burdensome cloud on his title and to affect his ability to market the property. The actions of the Plaintiff constitute slander of title and are made solely to disparage the Defendant's title to the real property which is described in the Complaint

CONCLUSION

The Courts of our State have stated unequivocally that Non-Claim Statutes impose a condition precedent to the enforcement of a right of action and are not subject to equitable exceptions, Phillips, supra and therefore the Plaintiff can have no enforceable right of action due to the fact that he did not file a claim within the time provisions of our South Carolina Non-Claim Statute. §62-3-803.

In fact, his claims are solely based on the purported 2006 Sales Agreement. There is no question that his claims are solely and totally based upon these contracts which he took no action to enforce on the death of Claudia P. Harden, nor if he could have, on the death of Julia Harden Phillips. This was his sole and only recourse as the Non-Claim Statute, S.C. Code §62-3-803 conclusively and finally prevents him from maintaining any action, legal or equitable, more than one year after the death of the Decedent, Claudia P. Harden. S.C. Code Ann. §62-3-1006 precludes him from bringing any action Benny Richard Phillips, Jr., as Benny Richard Phillips, Jr. never had any liability nor obligation to pay the claim and the real property in question was deeded to him by law under the probate and statutory rules pertaining to estate testate distribution.

He has attempted to set out "agreements" with Benny Richard Phillips, Jr. which are barred by virtue of the Statute of Frauds, §32-3-10, and even attempted to set out an allegation

pertaining to Benny Richard Phillips, Sr. and such assertions or transactions as alleged are totally barred by the Dead man's Statute, S.C. Code Ann. §19-11-20 (See Exhibit 10).

The dismissal of the Plaintiff's claims require the dismissal of the Lis Pendens as there is no basis for an assertion of ownership interest in the property.

1. The first cause of action for unjust enrichment is an equitable action that is barred by the Non-Claim Statute.

2. The second cause of action for conversion against this Defendant, relates to unauthorized exercise of ownership over personal property or another and cannot arise over the Defendant's exercise of a legal right over property which he received as a distributee.. In addition, likewise, this cause of action is barred by the Non-Claim Statute and Statute of Limitations.

3. The third cause of action, constructive trust/equitable title, only arise from the initial alleged contract which was not with this Defendant and is barred by the Statute of Limitations, Statute of Frauds, and Non-Claim Statutes. Likewise, this cause of action is an equitable action barred by the Non-Claim Statute.

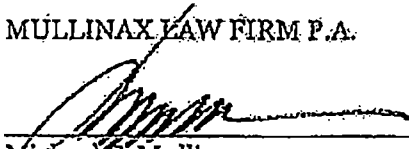
4. The fourth cause of action again has no basis in law or in fact; a partition action requires ownership as a tenant in common or joint tenancy, and this claim is likewise barred by the Non-Claim Statute, the Statute of Limitations, the Statute of Frauds.

5. Clearly, this action filed by the Plaintiff with no legal basis or reasonable basis to assert a legal challenge against property rightfully owned by the Defendant, is exactly the type of pleading denoted "frivolous" as set forth in S.C. Code Ann. §15-36-10.

It is respectfully submitted that the claim of the Plaintiff be dismissed with prejudice and that the Lis Pendens be cancelled immediately.

Respectfully submitted,

MULLINAX LAW FIRM P.A.



Michael F. Mullinax
Post Office Box 2665
Anderson, SC 29622
(864) 261-6242
ATTORNEY FOR THE DEFENDANT,
BENNY RICHARD PHILLIPS, JR.

June 8th, 2016

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS

C/A No. 2015-CP-04-03024

WILLIAM RICE COOK, III,

Plaintiff,

vs.

BENNY RICHARD PHILLIPS, JR., and
the real property located at 207 NORTH
AVENUE, ANDERSON, SC 29625, TMS#
123-26-08-02,

Defendants.

**Plaintiff's Memorandum in
Opposition to Defendant's Motion to
Dismiss and Motion for Summary
Judgment**

Plaintiff William Rice Cook, III files this Memorandum in Opposition to Defendant's several Motions to Dismiss under Rule 12(b)(6), SCRCF and Motions for Summary Judgment. Plaintiff brings his causes of action for constructive trust, unjust enrichment, conversion, and partition against the Defendant Benny Richard Phillips, Jr., as well as the real property located at 207 North Avenue Anderson. Defendant had served as conservator for his grandmother and then personal representative of his grandmother's estate before transferring title to the real property into his own name pursuant to his grandmother's will. Plaintiff had paid for and performed renovations to Defendant's grandmother's home prior to her death, but Plaintiff has received no remuneration for any of his investment in the property.

The central issue facing this Court boils down to whether the Plaintiff has properly pled and timely brought recognized causes of action under the laws of this State against *this Defendant*:

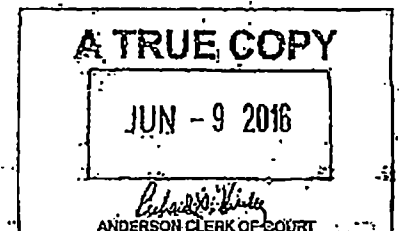
Pursuant to a written agreement with Defendant's grandmother in 2006, Plaintiff performed and entirely funded renovations to the grandmother's residence. The property was then to be listed for sale and Plaintiff was to receive all sums above \$155,000 upon the sale of the property as remuneration. The property was in fact listed for sale, but was later taken off the market by Defendant's father due to the downturn in the economy. The parties understood and agreed that the property

Plf's Brief in Opp. to Motion Dismiss/SJ Cook vs. Phillips

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would be relisted when the market improved. Defendant was later appointed conservator for his grandmother, moved into the residence in order to provide a "staged" appearance for the eventual sale, informed the Plaintiff that he was fully aware of Plaintiff's investment in the residence, and made repeated assurances in the spring of 2013 that Plaintiff would be compensated for his investment upon the sale of the property as per the agreement. In December 2013, Defendant's grandmother passed away and Defendant was appointed as her personal representative. In October 2014, Defendant transferred the residence into his own name by order of the probate court. Not until February 2015, did the Defendant state to the Plaintiff that Defendant would not list the house for sale or pay the Plaintiff for his investment in the property. To date, Plaintiff has not received any compensation for his investment in the residence which the Defendant has now taken for himself. Has the Plaintiff sufficiently plead and timely brought causes of action for constructive trust, unjust enrichment, conversion, and partition against the Defendant-grandson? That is the overarching issue which swallows all issues. In this memorandum, the Plaintiff seeks to develop this major issue and to treat the sub-issues raised in Defendants' motions as succinctly as possible.

Plaintiff requests that this Court deny Defendant's motion to dismiss because the Plaintiff has properly plead and timely brought his causes of action. Plaintiff also requests that this Court deny the Defendant's motion for summary judgment as improper because the parties have genuine disputes as to issues of material fact.

STANDARD OF REVIEW

Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. *Spence v. Spence*, 368 S.C. 106, 116-17, 628 S.E.2d 869, 874 (2006). In considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint. If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a

claim is improper. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom entitle the plaintiff to relief under any theory. *Id.*

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. *Lauren's Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 584 S.E.2d 375 (2003). 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. *Sauner v. Public Serv. Auth.*, 354 S.C. 397, 581 S.E.2d 161 (2003); *Hendricks v. Clemson Univ.*, 353 S.C. 449, 578 S.E.2d 711 (2003). If triable issues exist, those issues must go to the jury. *Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 573 S.E.2d 830 (Ct.App.2002).

LEGAL ARGUMENT

Plaintiff's Complaint is not barred by the Non-Claim Statute or the Statute of Limitations.

As an initial matter, Defendant seeks to dismiss Plaintiff's Complaint wrongly arguing that the Plaintiff is precluded from bringing his complaint because the action is actually against the grandmother's estate, is time barred by the Non-Claim statute, S.C. Code 62-3-801, governing the time period for bringing claims against the estate, and finally for violating the Statute of Frauds. Defendant mischaracterizes the Plaintiff's Complaint. Plaintiff does not bring any of his causes of action against the Estate of Defendant's grandmother, but rather the Defendant himself for causes of action sounding or laying in fraud.

Section 62-1-106 of the South Carolina Code (2009) provides:

Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this Code or if fraud is used to avoid or circumvent the provisions or purposes of this Code, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud or restitution from any person (other than a bona fide purchaser) benefiting from the fraud, whether innocent or not, but only to the extent of

any benefit received. Any proceeding must be commenced within two years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than five years after the time of commission of the fraud. This section has no bearing on remedies relating to fraud practiced on a decedent during his lifetime which affects the succession of his estate.

Gordon v. Busbee, 397 S.C. 119, 134, 723 S.E.2d 822, 830 (Ct. App. 2012). Plaintiff's Complaint alleged that he became aware of Defendants' fraud and conversion no earlier than February of 2015. (Compl. ¶ 18) Plaintiff filed his Complaint in December of 2015. Therefore, Plaintiff's causes of actions are timely.

Moreover, in *Briggs v. Richardson*, 273 S.C. 376, 378-79, 256 S.E.2d 544, 545-46 (1979), our Supreme Court held that the expiration of the time period to contest a will in probate does not preclude a claim for a constructive trust because permitting the Defendant to raise such a shield would undercut the utility of a constructive trust. In *Briggs*, the plaintiffs had alleged that the defendant, the personal representative of an estate, had misled the heirs into believing he would divide the estate equally among the heirs, and therefore they let the time to contest the will expire. The court went on to hold, in cases involving allegations of fraud, "[i]t would be inequitable to permit appellant to assert the expiration of the period for contest of probate where he continued to assure respondents that he would divide the estate between them." *Id.*

Lastly, the statute of limitations does not apply to actions in equity. *Dixon v. Dixon*, 362 S.C. 388, 400, 608 S.E.2d 849, 855 (2005). An action to declare a constructive trust, unjust enrichment, and partition are all actions in equity. *Halbersberg v. Berry*, 302 S.C. 97, 106, 394 S.E.2d 7, 13 (Ct. App. 1990) ("Constructive trusts are resorted to in equity..."); *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009) ("Unjust enrichment is an equitable doctrine..."); *Anderson v. Anderson*, 299 S.C. 110, 382 S.E.2d 897 (1989) ("A partition action is an equitable action."). Therefore Defendant's argument that Plaintiff Complaint is barred by the statute of limitations fails again.

II. Plaintiff has properly pled an action against the Defendant for Constructive Trust, Unjust Enrichment, Conversion, and Partition. Additionally, certain facts are in dispute which makes summary judgment inappropriate.

a. Constructive Trust

"A constructive trust results 'when circumstances under which property was acquired make it inequitable that it be retained by the one holding legal title. These circumstances include fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution.' " *Straight v. Goss*, 383 S.C. 180, 210, 678 S.E.2d 443, 459 (Ct. App. 2009); *Macaulay v. Wachovia Bank of S.C., N.A.*, 351 S.C. 287, 294, 569 S.E.2d 371, 375 (Ct. App. 2002) (quoting *Hendrix v. Hendrix*, 299 S.C. 233, 235, 383 S.E.2d 468, 469 (Ct.App.1989)). "A constructive trust 'arises entirely by operation of law without reference to any actual or supposed intentions of creating a trust.' " *Smith v. S.C. Ret. Sys.*, 336 S.C. 505, 529, 520 S.E.2d 339, 352 (Ct. App. 1999) (quoting *McNair v. Rainsford*, 330 S.C. 332, 356, 499 S.E.2d 488, 501 (Ct. App. 1998)). In general, a constructive trust may be imposed when a party obtains a benefit "which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty." *Id.* (quoting *SSI Medical Servs., Inc. v. Cox*, 301 S.C. 493, 500, 392 S.E.2d 789, 793-94 (1990)).

Generally, fraud is an essential element, but it need not be actual fraud. *Whitmire v. Adams*, 273 S.C. 453, 457-58, 257 S.E.2d 160, 163 (1979). "Actual fraud is not necessary, but such trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by him who holds the legal title." *Id.* quoting *Bank of Williston v. Alderman*, 106 S.C. 386, 91 S.E. 296, 298 (1917). Equity is less than demanding and quite flexible in prescribing the elements essential to a constructive trust. Further, a constructive trust is permitted to be proved by parol evidence despite the statute of frauds. *Wolfe v. Wolfe*, 215 S.C. 530, 56 S.E.2d 343 (1949). "A constructive trust is a flexible equitable remedy whose enforcement is subject to the equitable discretion of the trial court." *Hale v. Finn*, 388 S.C. 79, 89-90, 694 S.E.2d 51, 57 (Ct. App. 2010), quoting *Wendell Corp. Trustee v. Thurston*, 239 Conn. 109, 680 A.2d 1314, 1320 (1996).

Without restating the allegations of the Plaintiff's Complaint in detail, the Plaintiff's Complaint and the Affidavit of the Plaintiff, as attached hereto, allege and state that the Plaintiff conferred a benefit to the Defendant's elderly grandmother when he paid for and renovated her residence in 2006. (Compl. ¶ 7-10). Pursuant to the written agreement between the Plaintiff and the grandmother, the residence was to be put on the market and sold, and Plaintiff would be paid from

any proceeds from the sale exceeding \$155,000. (Compl. ¶ 7-9). The Plaintiff also made interest payments to Defendant's grandmother for approximately the year prior to the sale. (Compl. ¶ 7). The property appraised at \$260,000 following the completion of the renovations. (Compl. ¶ 10).

The same benefit was conferred on the Defendant when the property passed to him in probate. (Compl. ¶ 19). To date, the residence has not been sold, and the Plaintiff has not received a single cent as repayment for his investment in the property. *Id.* This benefit does not equitably belong to the Defendant and he cannot in good conscience retain or withhold the benefit from the Plaintiff.

In addition, the Plaintiff has alleged that the Defendant received this benefit as a result of fraud, bad faith, and an abuse of confidence when the Defendant repeatedly reassured the Plaintiff that the original agreement would be honored, but then called "time" on a technicality after the period for making a claim as creditor against Defendant's grandmother's estate had passed. (Compl. ¶ 16, 18, 30). The property was initially listed for sale, but when the real estate market crashed in approximately 2008 and 2009, the Defendant and Defendant's father, who were assisting the grandmother with her affairs, decided to take the property off the market and allow Defendant to live in the home. (Compl. ¶ 12, 16). This all occurred when Defendant's mother became ill and was unable to handle the grandmother's affairs as her power of attorney. (Compl. ¶ 14). Both ~~Defendant and his father assured the Plaintiff that they would honor the arrangement to compensate~~ Plaintiff for the investment in the property, and having Defendant in the residence would help it sell because "staged" homes look better for when it was eventually relisted. (Compl. ¶ 12, 15, 16).

The Plaintiff had reasonable grounds to rely on the statements of the Defendant that the original agreement would be honored. In October of 2011, Defendant was appointed conservator for his grandmother. (Compl. ¶ 14). In December 2012, Defendant, fully aware of the renovation agreement, reassured Plaintiff that he would be compensated for his investment. (Compl. ¶ 16). Plaintiff asked for periodic payments in lieu of forcing, but Defendant stated that his grandmother's health costs were too high, and that the situation would be worked out. *Id.* In December 2013, the grandmother passed and the Defendant was appointed personal representative of her estate. (Compl. ¶ 17). The Defendant transferred the property into his own name by order of the probate court. (Compl. ¶ 19). Despite the prior representations, Defendant first made clear his intention to the Plaintiff in February 2015 after the death of Defendant's father when he outright refused to sell the property and compensate the Plaintiff. (Compl. ¶ 18). Defendant's representations, as alleged,

were intentionally made to cause Plaintiff not to take any legal action against Defendant's grandmother or her estate. (Compl. ¶ 30-31).

Moreover, a confidential relationship existed between the parties which the Defendant abused to perpetuate his fraud. A confidential¹ or fiduciary relationship exists when one reposes a special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one reposing the confidence. *Chapman v. Citizens & S. Nat. Bank of S. Carolina*, 302 S.C. 469, 477, 395 S.E.2d 446, 451 (Ct. App. 1990) citing *SSI Medical Services, Inc. v. Cox*, 301 S.C. 493, 392 S.E.2d 789 (1990). Again, as alleged, the Defendant gave Plaintiff his confidences and Plaintiff relied on the promises that the

¹ In *Chapman v. Citizens & S. Nat. Bank of S. Carolina*, our court of appeals adopted the following definition of confidential relation when considering a constructive trust:

Although a precise definition of a confidential relationship is elusive, a thorough review of available material left us impressed with the definition found in *Black's Law Dictionary* 270 (5th Ed. 1979):

Confidential relation: A fiduciary relation. It is a peculiar relation which exists between client and attorney, principal and agent, principal and surety, landlord and tenant, parent and child, guardian and ward, ancestor and heir, husband and wife, trustee and *cestui que trust*, executors or administrators and creditors, legatees, or distributees, appointor and appointee under powers, and partners and part owners. In these and like cases, the law, in order to prevent undue advantage from the unlimited confidence or sense of duty which the relation naturally creates, requires the utmost degree of good faith in all transactions between the parties. It is not confined to any specific association of parties. It appears when the circumstances make it certain that the parties do not deal on equal terms, but on the one side there is an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed. The mere existence of kinship does not, of itself, give rise to such relation. It covers every form of relation between parties wherein confidence is reposed by one in another, and former relies and acts upon representations of the other and is guilty of no derelictions on his own part. *Peckham v. Johnson*, Tex. Civ. App., 98 S.W.2d 408, 416. [Emphasis ours.]

Confidential relations are deemed to arise whenever two persons have come into such a relation that confidence is necessarily reposed by one and the influence which naturally grows out of the confidence is possessed by the other, and this confidence is abused or the influence is exerted to obtain an advantage at expense of confiding party. *Ruebsamen v. Maddocks*, Me., 340 A.2d 31, 34.

302 S.C. 469, 475-76, 395 S.E.2d 446, 450-51 (Ct. App. 1990), (Emphasis added.) A confidential or fiduciary relationship exists when one reposes a special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one reposing the confidence. *SSI Medical Services, Inc. v. Cox*, 301 S.C. 493, 392 S.E.2d 789 (1990).

Defendant would honor the agreement. (Compl. ¶ 30-31). It would be inequitable to permit the Defendant to abuse that confidence and receive a windfall at Plaintiff's expense

Similarly in *Briggs* mentioned above, the heirs brought an action against another heir to impose a constructive trust on properties of the estate of their mother, including seeking an accounting and partition. 273 S.C. 376, 256 S.E.2d 544 (1979). The plaintiffs' had not contested the will during the time period allowed. The heirs were not included in the will, but alleged that the heir who was also personal representative of their mother's estate repeatedly reassured the plaintiffs that he would divide the property equitably as per their mother's wishes. The Supreme Court upheld the trial court's decision to deny Defendant's motion to dismiss on the basis that the plaintiffs had adequately alleged a cause of action for constructive trust.

The Plaintiff has adequately plead facts sufficient to support a cause of action for constructive trust. Furthermore, the facts as plead are in dispute and summary judgment is improper.

b. Unjust Enrichment

A party may be unjustly enriched when it has and retains benefits or money which in justice and equity belong to another. *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009). Unjust enrichment is an equitable doctrine which permits the recovery of that amount the defendant has been unjustly enriched at the expense of the plaintiff. *Ellis v. Smith Grading and Paving, Inc.*, 294 S.C. 470, 473, 366 S.E.2d 12, 14 (Ct.App.1988).

As argued above regarding the cause of action for a constructive trust, the Plaintiff has alleged, and it is not disputed, that Defendant has and retains a benefit. This benefit in justice and equity belongs, at least in part, to the Plaintiff. The Plaintiff has received no payment for his investment in the property now held by the Defendant. Plaintiff has sufficiently alleged a cause of action for unjust enrichment. Furthermore, the facts as plead are in dispute and summary judgment is improper.

c. Conversion

Conversion is defined as the unauthorized assumption and exercise of the rights of ownership over goods or personal chattels belonging to another, to the alteration of their condition or to the exclusion of the rights of the owner. *Mullis v. Trident Emergency Physicians*, 351 S.C. 503, 506-

07, 570 S.E.2d 549, 550-51 (Ct. App. 2002). *Green v. Waidner*, 284 S.C. 35, 37, 324 S.E.2d 331, 333 (Ct.App.1984). See *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 496, 220 S.E.2d 116, 119 (1975) (Conversion may arise by the illegal detention of another's property.). Here, Plaintiff alleges that the Defendant converted the goods and services of the Plaintiff that improved the value of the property. The Plaintiff has adequately plead facts sufficient to support a cause of action for conversion. Furthermore, the facts as plead are in dispute and summary judgment is improper.

d. Partition

The partition cause of action is dependent wholly upon a determination of this Court as to the preceding causes of action; namely whether the Plaintiff prevails in proving an interest in the property. The pecuniary interests of all of the parties is the determining factor in deciding whether to require a judicial sale or to allow a partition by allotment. *Campbell v. Jordan*, 382 S.C. 445, 451, 675 S.E.2d 801, 804 (Ct. App. 2009) Essentially, if this court permits any one of Plaintiff's preceding causes of action to survive Defendant's motions, then the Partition action survives as well.

III. Statute of Frauds Does Not Apply to a Constructive Trust

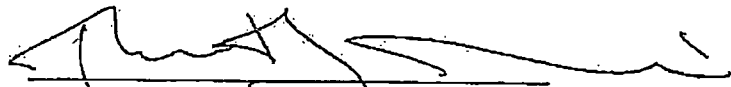
The Plaintiff's claims are not barred by the Statute of Frauds, S.C. Code § 32-3-10.

When asserting a constructive trust, it is not necessary that it be proved by a writing sufficient to satisfy the statute of frauds." *Briggs v. Richardson*, 273 S.C. 376, 378-79, 256 S.E.2d 544, 545 (1979). "A constructive trust is the creation of the court and is permitted to be proved by parole despite the statute of frauds upon the high and long established ground that the statute will not be permitted to shield a fraud." *Id. quoting Wolfe, et al. v. Wolfe, et al.*, 215 S.C. 530, 536, 56 S.E.2d 343, 346 (1949): See also *Searson v. Webb*, 208 S.C. 453, 38 S.E.2d 654 (1946).

Based on the foregoing, the Plaintiff respectfully request that Defendant's motions to dismiss and motions for summary judgment be denied.

Respectfully submitted,

KRAUSE, MOORHEAD AND DRAISEN, P.A.



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ATTORNEYS FOR THE PLAINTIFF

June 9, 2016

Anderson, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF ANDERSON)

WILLIAM RICE COOK, III)

Plaintiff)

vs.)

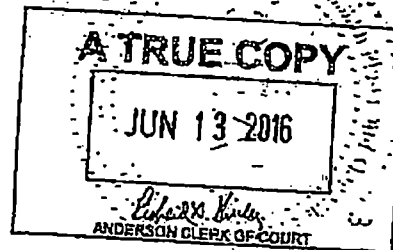
BENNY RICHARD PHILLIPS, JR.)
and the real estate property located)
at 207 North Avenue, Anderson,)
South Carolina 29625,)
TMS# 123-26-08-02)

Defendant)

IN THE COURT OF COMMON PLEAS

2015-CP-04-03024

**DEFENDANT'S BRIEF IN REPLY
TO PLAINTIFF'S AFFIDAVIT**



The Plaintiff in this case has no cause of action against Ben Phillips, Jr. If he had a cause of action, it existed as a result of the Complaint allegations concerning his contract with Claudia Harden, this Defendant's grandmother. This Defendant had nothing to do with the contract of renovations on which the Plaintiff bases his claim. The Plaintiffs has failed to plead the 9 elements of a cause of action for fraud, nor stated any claim upon which relief can be granted, based upon any actions or transactions with the Defendant.

The Plaintiff fails to distinguish between the Non-Claim Statute and Statute of Limitations and cites a case, Briggs v. Richardson which ostensibly allows a claim for a constructive trust, [which was a claim between heirs to an estate] which case is totally inapplicable to the fact situation before the Court and fails to take note of the law of the Non-Claim Statute which bars all claims whether they may be legal claims or equitable claims. Briggs was a 1979 case and the Non-Claim Statute was initially passed in 1986 and the Briggs case and its holding is effectively overruled by the Statute.

As to the Statute of Limitations barring this action, our courts have held as follows:

It has been repeatedly held that the Statute of Limitation applies equally to claims against an

estate, Gaston v Gaston, 80 S C 157, 61 S E 393, (1908) Sullivan v Latimer 17 S E 701 (1893) (statute of limitation applies to all charges for services performed for decedent,) Godbold v Vance, 14 S C 458, 1881 WL 5848 (1881) claim barred by statute of limitation cannot be waived by acknowledgment of the debt by the administrator of the estate see also Black v White, 13 S C 37 (1880) WL 5606, Reigne v Desportes' Ex'r, 23 SCL 118 (1838), WL 1597, 1838 Moore v Porcher, 8 S C Eq, 195, 1831, WL 1618 (SC App) (1831), Knox v McCalls Adir, 3 SCL 531 1805 WL 347 (1805),

The Plaintiff has filed a hodge-podge of baseless conclusions and statement violative of the Statute of Frauds and the Deadman's Statute, and has attempted to divert the Court's attention from the fact that his claim must be based, if it has any legal bearing at all, on the alleged contracts which he signed with Claudia Harden in 2006, and has taken no action at all within the Statute of Limitations, nor then, did he take any action against the Estate of Claudia Harden at the time of her death within the time permitted by the Non-Claim Statute § 62-3-803. His allegations, **hearsay dominated "affidavit"** and Brief are conclusions and are insubstantial, illusory and fail in every respect to constitute valid facts sufficient to constitute a cause of action to overcome the law.

FRAUD, CONSTRUCTIVE TRUSTS AND OTHER EQUITABLE ARGUMENTS

He has failed to show anywhere, an obligation of Benny Richardson Phillips, Jr. He has failed to allege the nine elements of fraud necessary to constitute fraud. Ben Phillips, Jr. did not obtain title to this property through any actions of his own; the property was willed to him under the Last Will and Testament of Claudia Harden, as a result of the fact that his mother, Julia Harden Phillips, had predeceased Ms. Harden and instead of the property going to her, it went to the Defendant. He performed no action nor act, to obtain title by fraudulent means. He inherited the property through the law.

This Plaintiff never, ever, at any time, had any equitable lien or claim upon the property, other than one that could have been claimed within three years of the date of the signing of the contract [i.e., 2009], but he did nothing to pursue that claim, and now that claim is barred, not only by the Statute of Limitations, but by the Non-Claim Statute, of the two, the Non-Claim

Statute is stronger in that the Non-Claim Statute bars both legal and equitable claims.

This Plaintiff conferred no benefit on this Defendant. The Defendant has agreed to nothing with this Plaintiff, and has no obligations to this Plaintiff under any theory of law. The Plaintiff's conclusory, illusory allegations do not constitute facts and without facts, no cause of action has been stated to overcome the law.

This Defendant has no obligations, never had any obligations to this Plaintiff, and it was the Plaintiff's legal responsibility, obligation and duty if he wanted to pursue a claim to have done so, within the time period of one year after the death of Claudia Harden, and he did not do so. He is out of Court, and has no options under the law.

The Plaintiff further misconstrues the definition of a confidential relationship. There was no relationship between Plaintiff and Defendant, much less a confidential relationship. The Plaintiff defines confidential relationship as set forth in the case of Chapman v. Citizens and Southern, but there are no facts which connect this Plaintiff to this Defendant. Plaintiff was not an heir of the Estate; he was not a beneficiary of the Estate. If he had a claim, the Plaintiff had a duty to file it. He did not do so. The Non-Claim Statute is a complete bar to any and all claims, allegations of claims, illusory claims, legal claims, equitable claims, or any possible obligation of the Estate of Claudia Harden. The basis for the Plaintiff's claim has to be the 2006 contract and that contract is void due to the Statute of Limitations and the Plaintiff's claims are void due to the Non-Claim Statute.

In the Case of In re: Estate of Hover, 407 SC 195; 754 SE2d 875 (2014) the Supreme Court stated as follows:

" 1. Statutory Progression

Pursuant to the general statutory scheme of the Probate Code, all claims against a decedent's estate and his successors must be presented after a personal representative is **880 appointed and within the time limits prescribed by section 62-3-803, which our appellate courts have designated as a "nonclaim statute." See S.C. Code Ann. § 62-3-104 (2009) ("No proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by this article [§§ 62-3-101 et seq.]."); In re Estate of Tollison, 320 S.C. 132, 135, 463 S.E.2d 611, 613 (Ct.App. 1995) ("Section 62-3-803 is a nonclaim statute.").

The Probate Code generally defines "claims" to include "liabilities of the decedent ... whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent ..., including funeral expenses and expenses of administration." S.C. Code Ann. § 62-1-201(4) (2009). As stated in the nonclaim statute, claims against a decedent's estate include all claims "whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis." Id. § 62-3-803(a), (b).

Thus, "[b]roadly speaking, all claims against the decedent should be presented for allowance, and the word 'claims' includes such debts or demands as existed against the decedent in his or her lifetime and that might have been enforced against him or her by personal actions for the recovery of money." 34 C.J.S. Executors & Administrators § 548 (Supp.2013) (footnotes omitted). "Stated another way, the term includes every species of liability that the personal representative can be called on to pay out of the general funds of the estate." Id. "However, claims against an estate are not *204 limited to obligations of the decedent that could have been enforced against him or her while living." Id."

In re Estate of Hover, 407 S.C. 194, 203 04, 754 S.E.2d 875, 879 80 (2014);

Further , the Hover court stated as follows:

"3. Equitable Considerations

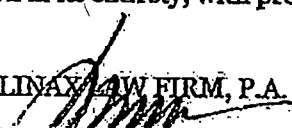
16Phillips v. Quick, 399 S.C. 226, 230, 731 S.E.2d 327, 329 (Ct.App.2012) (" 'While equitable principles may extend the time for commencing an action under statutes of limitation, nonclaim statutes impose a condition precedent to the enforcement of a right of action and are not subject to equitable exceptions.' " (quoting Estate of Decker v. Farm Credit Servs. of Mid-Am., 474, 684 N.E.2d 1137, 1139 (Ind.1997))); 34 C.J.S. Executors & Administrators § 547 (Supp.2013) ("Misleading statements, assurances, or conduct of the representative inducing a creditor to refrain from the due presentation of his or her claim do not estop the representative from contesting the claim because of such a failure to present the claim."). See generally E.W.H., Annotation, Effect of Conduct of Personal Representative Preventing Filing of Claims Within Time Allowed by Statute of Nonclaim, 66 A.L.R. 1415 (1930) (citing state and federal cases addressing the general rule that no promise on the part of a personal representative is sufficient to prevent *212 the bar of the statute as to a claim not filed within the statutory period)."

In re Estate of Hover, 407 S.C. 194, 211 12, 754 S.E.2d 875, 884 (2014)

Conclusion

There is absolutely no evidence of any obligation created by Benny Phillips, Jr. to the Plaintiff. The Plaintiff was not an heir or a distributee, and was never a fiduciary in any capacity. At best, he was a creditor of the estate of Claudia Harden, and the Statutory and Case Law of this State prevents claims such as those filed in the action in clear, concise and easily read terms.

The Defendant asks the Court to dismiss this action in its entirety, with prejudice.


MULLINAX LAW FIRM, P.A.

Michael R. Mullinax
Post Office Box 2665
Anderson, SC 29622
ATTORNEY FOR THE DEFENDANT,
BENNY RICHARD PHILLIPS, JR.

Anderson, South Carolina

June 12, 2016

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF ANDERSON)

2015-CP-04-03024

WILLIAM RICE COOK, III)

Plaintiff)

vs.)

DEFENDANT'S RETURN TO PLAINTIFF'S
MOTION TO RECONSIDER

BENNY RICHARD PHILLIPS, JR.)
and the real estate property located)
at 207 North Avenue, Anderson,)
South Carolina 29625,)
TMS# 123-26-08-02)

Defendant)

A TRUE COPY

JUL 14 2016

Robert S. Kinley
ANDERSON CLERK OF COURT

The Plaintiff's assertion that he is entitled to proceed pursuant to S.C. Code §62-1-106, is unequivocally wrong. The "Non-Claim Statute", S.C. Code §62-3-803, as recognized by the Legislature and the Courts, is just what it says, a "non-claim" statute. The Plaintiff's attempt to use the wording of §62-1-106 as the Court correctly pointed out, would eviscerate a Code provision which was intended to prevent claims being filed more than one year after a decedent's death, in order to preclude the use of misleading and fraudulent statements by a Claimant to pursue a claim exactly as has been done by the Plaintiff in this case. Non-claim means non ability and has no exceptions or caveats; and does not mean a claim if "alleged" fraud has occurred.

Our courts have recognized for years as is cited in the case of In re: Hover, 407 SC 194, 754 SE2d 875 (2014) our Supreme Court held that statements made by a conservator or representative can have no impact upon the non-claim statutes, even if such statements were made, exactly as is pointed out by the Supreme Court in Hover. Further, the Hover court provided as follows:

"3. Equitable Considerations

16Phillips v. Quick, 399 S.C. 226, 230, 731 S.E.2d 327, 329 (Ct.App.2012) (" 'While equitable principles may extend the time for commencing an action under statutes of limitation, nonclaim statutes impose a condition precedent to the enforcement of a right of action and are not subject to equitable exceptions.' " (quoting Estate of Decker v. Farm Credit Servs. of Mid-Am., ACA, 684 N.E.2d 1137, 1139 (Ind.1997))); 34 C.J.S. Executors & Administrators § 547 (Supp.2013) ("Misleading statements, assurances, or conduct of the representative inducing a creditor to refrain from the due presentation of his or her claim do not estop the representative from contesting the claim because of such a failure to present the claim."). See generally E.W.H., Annotation, Effect of Conduct of Personal Representative Preventing Filing of Claims Within Time Allowed by Statute of Nonclaim, 66 A.L.R. 1415 (1930) (citing state and federal cases addressing the general rule that no promise on the part of a personal representative is sufficient to prevent "212 the bar of the statute as to a claim not filed within the statutory period)."

In re Estate of Hover, 407 S.C. 194, 211 12, 754 S.E.2d 875, 884 (2014)

An entire treatise upholding this rule of law as was recognized in the Hover case, *supra* is found at 66 ALR 1415.

The general rule... to the effect that a Personal Representative cannot waive or suspend the so-called special client non-claim, or administration statute of limitations, as by conduct preventing the filing of a claim against an estate within the statutory period, as well as the particular application of that rule, also there referred to, that no promise upon the part of a Personal Representative is sufficient to prevent the bar of the statute as to a claim not filed within the statutory period are squarely supported in a Missouri case, Harrison Machine Works v. Aufderheide (1926) 280 SW 711, where the Court held as follows: "The Non-Claim Statute of Limitations is rigidly enforced, and one is not entitled either in law or equity, to file a claim after the expiration of the time fixed therein."

The Plaintiff's claims are obviously equitable and are precluded because as was set forth in this Court's Order, and the trial brief of this Defendant, both legal and equitable claims are encompassed within the Non-Claim Statute.

The only basis for the Plaintiff's purported claim was an agreement which was made in 2006 and was also barred by the Statute of Limitations (Three (3) Years). [This is an additional sustaining ground of this Court's Order] The Plaintiff can have no claim other than, or but for, that Claudia Harden agreement. The Non-Claim Statute precludes them, both legally and equitably, from bringing the claim. In addition, and as an additional sustaining ground, the Statute of Limitations itself precludes their bringing that claim. See §15-3-530 (1).

The Plaintiff jumbles many words and legal concepts together, but asserts no legal basis or facts sufficient to overcome the Non-Claim Statute. The Plaintiff continuously overlooks the fact that the Defendant in this case did nothing to obtain title to the real estate in this case. The Defendant inherited this real estate and only took title because the initial devisee, the mother of the Defendant, had died prior to the death of the Testatrix, Claudia Harden. The Defendant did not obtain title to the property by fraud, or by any actions of his own. He obtained title by operation of law.

The Plaintiff, for an unknown reason, continues to allege that he has a claim against the Defendant individually. He has no claim, never has had a claim, and his entire theory is based upon the alleged claim against Claudia Harden, or against the Claudia Harden Estate, and is based on the 2006 agreement. There is no other basis for his assertions. How he tries to piggy back that Claudia Harden agreement and alleges that this Defendant is liable, has no basis in law or fact, and the Court's grant of summary judgement was in all ways proper.

To further buttress this Court's Order, it is clear that the application of S.C. Code §62-1-106, to nullify the Non-Claim Statute, would lead to an absurd result. See Kennedy v. S.C. Retirement System 345 S.C. 339, 351, 549 S.E. 2d 243, 249 (2001) (Finding statute should not be construed so as to lead to an absurd result). (Citation admitted); Kiriakides v. United Artist Commc's, Inc., 312 S.C. 271, 275, 440 S.E. 2d 364, 366 (1994) (Citing Stackhouse v. County Board of Comm'rs for Dillon Cnty 86 S.C. 419, 422, 68 S.E. 561, 562 (1910) (Holding regardless of how plain the ordinary meaning of the words in the statutes, Courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not have been intended by the General Assembly)).

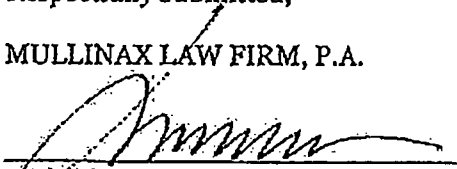
This Courts Order filed June 23 2016 is backed by the "In Re Hover", supra, and the Earl Phillips as Personal Representative v. Brigitte Quick 399 S.C. 226, 731 S.E. 2d 327 (2012).

CONCLUSION

The Court's grant of Summary Judgement in this matter is appropriate; is based upon Black Letter Law principles and the Statutes and case law of this State and the Motion to Reconsider should be summarily dismissed.

Respectfully submitted,

MULLINAX LAW FIRM, P.A.



Michael F. Mullinax
Post Office Box 2665
Anderson, SC 29622
(864) 261-6242
ATTORNEY FOR THE DEFENDANT

Anderson, South Carolina

July 13, 2016

08036

BOOK 1840 PAGE 190

STATE OF SOUTH CAROLINA,
COUNTY OF ANDERSON.

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, that I, CLAUDIA PREVOST HARDEN, Social Security Number [REDACTED], of 207 North Avenue, City of Anderson, County of Anderson, State of South Carolina, do hereby make, constitute and appoint JULIA HARDEN PHILLIPS, Social Security Number [REDACTED], of 806 Concord Avenue, Anderson, South Carolina, as my true and lawful attorney-in-fact for me and in my name, place and stead, on my behalf and for my use and benefit full power and authority to do and perform all and every act and thing whatsoever I may legally do through an attorney-in-fact, granting every proper power necessary to carry out the purposes for which this Power is granted. This authority to act for me and in my name, place and stead and on my behalf, includes, but is not limited to, depositing and/or withdrawing monies from any of my accounts in banks and/or savings institutions, endorsing checks, writing checks, purchasing, granting, bargaining, conveying, selling, contracting for purposes of sale of real or personal property and/or for the mortgaging thereof. I hereby ratify all my said attorney shall lawfully do or cause to be done by virtue hereof.

This Power of Attorney is to remain in effect until revoked in writing by me and notification of such revocation being sent to the said Julia Harden Phillips.

BOOK 1840 PAGE 190

Claudia Prevost Harden

Last Will and Testament

of

CLAUDIA PREVOST HARDEN

In the name of God, amen:



I, Claudia Prevost Harden, of the County of Anderson, and in the State of South Carolina, being of sound mind, memory and understanding, do hereby make, ordain, publish and declare this as and for my Last Will and Testament, hereby revoking any and all other wills heretofore by me made.

WITNESS:

Page 1
of 5
Pages

ITEM I.

I direct that all of my just and legally collectible debts and funeral expenses be paid by my Personal Representative, hereinafter named, as soon after my death as may be practicable. I further direct that my Personal Representative honor any memorandum or notes which I may leave concerning the disposition of certain items in my estate.

ITEM II.

All the rest and residue of my estate, both real and personal, of every nature and kind, and wheresoever situate, I will, devise and bequeath unto my beloved husband, James Leroy Harden, to be his absolutely and in fee simple.

ITEM III.

In the event my husband should predecease me or die with me in a common disaster, then and in that event, I will, devise and bequeath my lot and house with its contents [except for certain designated items of property located in my home which are the property of Sue Turner and not mine] located at 207 North Avenue, Anderson, South Carolina, unto my beloved daughter, Julia Harden Phillips of Anderson, South Carolina, to be hers absolutely and in fee simple.

WITNESS: (1) *Donalyn W. Lawrence*
(2) *Kenneth M. Mett*

Page 2
of 5
Pages

Claudia Prevost Harden, p.2

In the event my daughter, Julia Harden Phillips, should also predecease me or die with me in a common disaster, then I will, devise and bequeath my house, its contents [except for certain designated items of property located in my home which are the property of Sue Turner and not mine] and lot above in equal shares unto my grandsons, Bryon Phillips and Richard Phillips, share and share alike, to be theirs absolutely and in fee simple.

In the event either of my grandsons, above named, should predecease me or die with me in a common disaster, then his share shall go unto the surviving named grandson, absolutely and in fee simple.

ITEM IV.

All the rest and residue of my estate, of every nature and kind and wheresoever situate, including all monetary assets, I will and bequeath in the following manner:

(A) Forty-Five (45%) percent unto my daughter, Julia Harden Phillips, absolutely;

In the event Julia Harden Phillips is deceased at the time of this bequest, then her share shall be equally divided between Richard Phillips and Bryon Phillips, or to the survivor of them if one is deceased.

(B) Twenty (20%) percent unto my grandson, Richard Phillips of Anderson, South Carolina, absolutely;

In the event Richard Phillips is deceased at the time of this bequest, then his share shall be equally divided between Julia Harden Phillips and Bryon Phillips, or shall go unto Bryon Phillips if Julia Harden Phillips is deceased.

(C) Twenty (20%) percent unto my grandson, Bryon Phillips of Statesville, North Carolina, absolutely;

In the event Bryon Phillips is deceased at the time of this bequest, then his share shall be equally divided between Julia Harden Phillips and Richard Phillips, or shall go unto Richard Phillips if Julia Harden Phillips is deceased.

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON
IN THE MATTER OF:
BENNY RICHARD PHILLIPS, SR.

IN THE PROBATE COURT

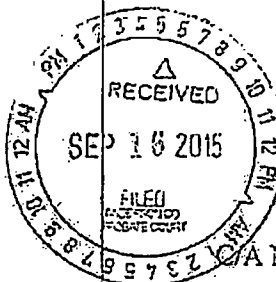
WILLIAM RICE COOK, III,

Petitioner,

vs.

FELICIA STOVALL, Personal
Representative of the Estate of Benny
Richard Phillips, Sr.,

Respondent.



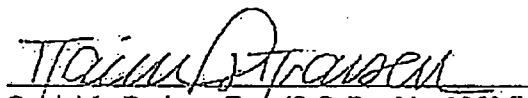
SUMMONS

Case No. 2015-ES-04-00211 0

TO THE RESPONDENT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Petition in this action, of which a copy is herewith served upon you, and to serve a copy of your reply to the said Petition on the subscriber at his office at 207 East Calhoun Street, Anderson, South Carolina 29621, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Petition within the time aforesaid, the Petitioner in this action will apply to the Court for the said relief demanded in the Petition.

KRAUSE, MOORHEAD & DRAISEN, P.A.



Daniel L. Draisen, Esq. (S.C. Bar No. 13536)
207 E. Calhoun St.
Anderson, South Carolina 29621
864/225-4000
864.964-0788-facsimile
ddraisen@kmdlawyers.com

ATTORNEY FOR PETITIONER

September 15, 2015
Anderson, South Carolina

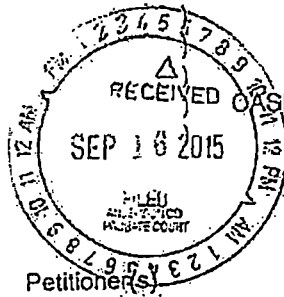
STATE OF SOUTH CAROLINA

IN THE PROBATE COURT

COUNTY OF ANDERSON

IN THE MATTER OF:
BENNY RICHARD PHILLIPS, SR.
(Decedent)

WILLIAM RICE COOK, III,



CASE NUMBER: 2015-ES-04-00211 0

*PETITION FOR
ALLOWANCE OF CREDITOR CLAIM

vs.
FELICIA STOVALL, Personal Representative of
the Estate of Benny Richard Phillips, Sr.,
Respondent(s)

The undersigned petitions the Court to allow the following claims against the Estate in the amounts set forth below:

Creditor Name and Address	Amount of Claim
William Rice Cook, III, 209 North Avenue, Anderson, SC 29625	\$110,000.00

In support of this Petition, Petitioner incorporates the claim(s) referenced above as presented to the Court and alleges that each claim is valid and (i) was presented within the period for the presentation of claims as provided by law and/or (ii) any claim not yet presented is attached to this Petition and made a part hereof and is being presented within the period for the presentation of claim(s) as provided by law.

(Other:) _____

Executed this 15th day of September, 2015.

Signature: William Rice Cook, III
Print Name: William Rice Cook, III
Address: 209 North Avenue
Anderson, SC 29625
Telephone (Work): 864/353-0125
(Home): _____
(Cell): _____
Email: _____

Attorney: Daniel L. Draisen, Esq.
Address: 207 E. Calhoun St.
Anderson, SC 29621
Telephone: 864/225-4000
Email: ddraisen@kmdlawyers.com

*NOTE: THIS IS A FORMAL PROCEEDING. IN ADDITION TO A PETITION, YOU MUST ALSO FILE
A SUMMONS (FORM SCCA 401PC) AND PAY THE STATUTORY FILING FEE OF \$150.00.
A HEARING IN THE PROBATE COURT ON THE PETITION MAY BE REQUIRED.

STATE OF SOUTH CAROLINA

IN THE PROBATE COURT

COUNTY OF ANDERSON

STATEMENT OF CREDITOR'S CLAIM

IN THE MATTER OF:

PHILLIPS, SR., BENNY RICHARD
(Decedent)

CASE NUMBER: 2015ES0400211

Decedent's Date of Death (if known): FEBRUARY 11, 2015

Decedent's Last Mailing Address: 806 CONCORD AVENUE, ANDERSON, SC 29621

Creditor:	WILLIAM RICE COOK, III
Address:	209 NORTH AVE
	ANDERSON, SC 29625
Telephone:	864 353-0125
Email:	WILL.COOK@ME.COM
Original Creditor:	SAME
Address (if different from above)	
Claim Amount Due:	\$110,000.00
Account Number:	
Other Reference Number:	
Basis of claim (Ex: Contract, Services Rendered for decedent, etc):	CLAIMANT ENTERED INTO AN AGREEMENT WITH DECEDENT FOR THE RENOVATION AND REMODELING OF 207 NORTH AVENUE OWNED BY DECEDENT'S MOTHER-IN-LAW. ALL LABOR AND MATERIALS FOR THE RENOVATIONS WERE PAID FOR BY CLAIMANT. WHEN RENOVATIONS WERE COMPLETED THE HOUSE WAS TO BE SOLD, DECEDENT, ON BEHALF OF HIS MOTHER-IN-LAW, WOULD RECEIVE \$150,000 FROM THE SALE AND CLAIMANT WOULD RECEIVE ALL SUMS ABOVE \$150,000. THE APPRAISED VALUE OF THE HOME AFTER RENOVATIONS WAS \$260,000. RATHER THAN SELLING THE HOUSE, DECEDENT ALLOWED HIS SON TO MOVE INTO THE HOME AND THE HOME HAS NOW BEEN TRANSFERRED FROM MOTHER-IN-LAW'S ESTATE TO DECEDENT'S SON. CLAIMANT HAS NOT BEEN PAID FOR THE LABOR, MATERIALS AND IMPROVEMENTS MADE TO THE PROPERTY.
Date claim will become due (if not already due)	IMMEDIATELY
Nature of uncertainty as to the claim, if any (i.e. contingent claim, amount of claim, due date):	N/A
Description of security as to the claim, if any (Ex: Collateral for the debt)	N/A

Signature: Daniel L. Draisen
 Printed Name: DANIEL L. DRAISEN/ESQ
 Title: ATTORNEY FOR CLAIMANT
 Date: SEPTEMBER 3, 2015

INSTRUCTIONS: Claims **MUST** be filed with the Probate Court of the county in which the Decedent's Estate is under administration and may be delivered or mailed to the fiduciary appointed to administer the Estate (see SCPC 62-3-803, 62-3-804, and 62-3-806).

No claim against a Decedent's estate may be presented or legal action commenced against a Decedent's Estate prior to the appointment of a Personal Representative to administer the Decedent's Estate (except see SCPC 62-3-804(1)(b)).

Satisfaction or withdrawal of claim **MUST** be filed once claim is resolved.

STATE OF SOUTH CAROLINA

IN THE PROBATE COURT

COUNTY OF: ANDERSON

NOTICE OF ALLOWANCE/DISALLOWANCE OF CLAIM

IN THE MATTER OF:
BENNY RICHARD PHILLIPS, SR.
(Decedent)

CASE NUMBER: 2015 ES-04-00211

TO:	Creditor:	WILLIAM RICE COOK, III
	Address:	209 NORTH AVENUE ANDERSON, SC 29625
	Telephone:	864-353-0125
	Email:	
	Original Creditor:	
	Address (if different from above):	
	Filed Date of Claim:	09/03/2015
	Claim Amount:	\$110,000.00
	Account Number:	
	Other Reference Number:	

Allowance of a claim is evidence the Personal Representative accepts the claim as a valid debt of the Decedent's estate.

The undersigned, as the fiduciary(ies), find(s):

☐ the claim is allowed and payment is to be made in full.

Allowance of a claim may not be construed to imply the estate will have sufficient assets with which to pay the claim.

☐ the claim is allowed; however payment cannot be made. Explanation (optional):

☐ the claim is partially allowed in the amount of \$; the balance is disallowed. Explanation (optional):

☒ the claim is disallowed in full. Explanation (optional):

The disallowed claim or the disallowed portion of your claim will be forever barred unless you commence a legal proceeding requiring a Summons, a Petition and a filing fee of \$150.00 for allowance of the claim in accordance with SCPC 62-3-804(2), within thirty (30) days after the mailing or other service of this Notice of Allowance/Disallowance of Claim.

Executed this 10th day of Sept, 2015.

Signature: _____

Print Name: _____

Address: _____

Telephone (Work): _____

(Home): _____

(Cell): _____

Email: _____

Attorney: MICHAEL F. MULLINAX, ESTATE
ATTORNEY

Address: PO BOX 2665
ANDERSON, SC 29622

Telephone: 864-261-6242

Email: _____

STATE OF SOUTH CAROLINA

COUNTY OF: ANDERSON

IN THE MATTER OF:
BENNY RICHARD PHILLIPS, SR.
(Decedent)

IN THE PROBATE COURT

PROOF OF DELIVERY

CASE NUMBER: 2015 ES 04 00211

On the 11th day of September, 2015, I mailed or delivered the following document(s):

NOTICE OF DISALLOWANCE OF CLAIM IN FULL

- ☐ A copy of which is attached hereto and incorporated herein, or
☒ The original of which is on file with the Court.

Delivery was accomplished by the following method (check appropriate box):

- ☐ personal delivery ☒ ordinary first-class mail
☐ certified mail ☐ registered mail
☐ commercial delivery ☐ electronic message (Article 7, Trust matters only)

to each of the following persons at the address shown:

NAME	ADDRESS
DANIEL L. DRAISEN, ATTORNEY FOR CREDITOR	207 EAST CALHOUN ST., ANDERSON, SC 29621

SWORN to before me this 11th day of
SEPTEMBER, 2015

Michael F. Mullinax

Notary Public for South Carolina
My Commission Expires: 7-10-19

Signature: [Signature]
Print Name: MICHAEL F. MULLINAX
Address: PO BOX 2665
ANDERSON, SC 29622

Telephone (Work):
(Home):
(Cell):
E-mail:

Relationship to Decedent/Estate: ATTORNEY FOR THE ESTATE

STATE OF SOUTH CAROLINA)
)
COUNTY OF ANDERSON)

IN THE PROBATE COURT
CASE NO.: 2015ES0400211

In the Matter of:
BENNY RICHARD PHILLIPS, SR.,)
)
WILLIAM RICE COOK, III,)
Petitioner)
)
vs.)
)
ARTHUR STATE BANK, PERSONAL)
REPRESENTATIVE OF THE ESTATE OF)
BENNY RICHARD PHILLIPS, SR.,)
Respondent)

ORDER



This matter is before the Court pursuant to a request for removal, pursuant to the provisions of S.C. Code Ann. §62-1-302.

Further, the Respondent has moved that the caption be corrected to reflect the correct Personal Representative, i.e. that "Arthur State Bank" be named as Respondent.

NOW THEREFORE IT IS ORDERED:

1. That Arthur State Bank be substituted as Personal Representative of the Estate of Benny Richard Phillips, Sr.;
2. That this claim is hereby removed to the Circuit Court for the Tenth Judicial Circuit.

IT IS SO ORDERED.

MARTHA D. NEWTON
THE HONORABLE MARTHA D. NEWTON
ANDERSON COUNTY PROBATE JUDGE

Anderson, South Carolina
October 23, 2015

I SO MOVE

Michael F. Mullinax, Jr.
Michael F. Mullinax, Attorney for
Benny Richard Phillips, Jr.

I CONSENT

Daniel L. Driscoll
Daniel L. Driscoll, Attorney for
William Rice Cook

MOTION FEE PAID

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)

IN THE COURT OF COMMON PLEAS

2015-CP-04- 02754

In the Matter of:
BENNY RICHARD PHILLIPS, SR.,)

WILLIAM RICE COOK, III,)
Plaintiff)

vs.)

ARTHUR STATE BANK,)
PERSONAL REPRESENTATIVE)
OF THE ESTATE OF BENNY)
RICHARD PHILLIPS, SR.,)
Defendant)

DEFENDANT'S MOTION FOR
SUMMARY JUDGEMENT
AND MOTION TO DISMISS FOR FAILURE
TO STATE A CAUSE OF ACTION

TO: DANIEL L. DRAISEN, ATTORNEY FOR THE PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that the undersigned will move on the tenth after service hereof, or as soon thereafter as the matter may be heard for an Order to be issued pursuant to the provisions of S.C. Code Ann. §62-3-803 (the "Non-Claim Statute"), on the basis that the alleged claim is barred by the provisions of §62-3-803, and by the case law as set forth in Phillips v. Quick 399 S.C. 226, 731 S.E. 2d 327 (2012).

Further, the Defendant moves to dismiss the claim on the basis that it has failed to state facts sufficient to constitute a cause of action, pursuant to S.C.R.C.P. Rule 12(b)(6).

The Defendant further moves to dismiss the alleged claim on the basis that it violates the Statute of Frauds and the Statute of Limitations and has no basis in truth or in fact.

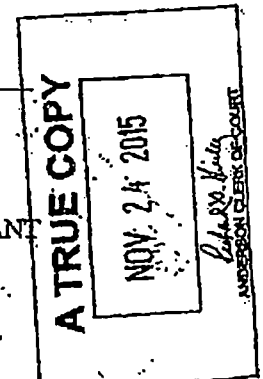
The within action appears to have been filed based upon an alleged sales agreements against the Estate of Claudia P. Harden; said agreements which are not admissible in court due to being in violation of the Statute of Frauds, Statute of Limitations, the Dead Man's Statute and the Non-Claim Statute. The alleged claims were required to have been submitted within one year of the death of Claudia P. Harden, who died testate, December 3, 2013 and whose Estate is filed in the Anderson County Probate Court, Probate file No. 2014-ES-04-00047, and that said claims were forever barred as a result of being in violation of the above referenced statutes and especially in violation of the South Carolina Non-Claims Statute, §62-3-803.

This Motion is based upon the applicable laws and statutes of the State of South Carolina.

MULLINAX LAW FIRM, P.A.

Michael F. Mullinax
Post Office Box 2665
Anderson, South Carolina 29622
(864) 261-6242
ATTORNEY FOR THE DEFENDANT

Anderson, South Carolina
November 24, 2015



STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON
IN THE MATTER OF:
BENNY RICHARD PHILLIPS, SR.

IN THE COURT OF COMMON PLEAS

WILLIAM RICE COOK, III,

Petitioner,

vs.

ARTHUR STATE BANK, as Personal
Representative of the Estate of Benny
Richard Phillips, Sr.,

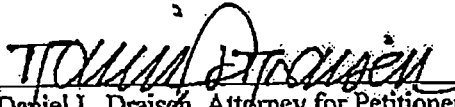
Respondent.

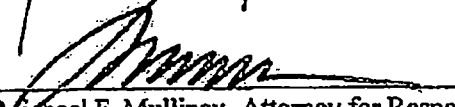
**STIPULATION OF DISMISSAL
WITHOUT PREJUDICE**

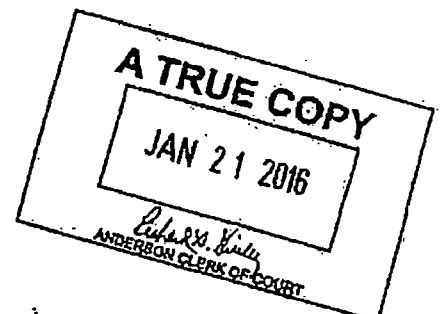
C/A No. 2015-CP-04-2754

COME NOW the parties in the above-captioned matter which is an action seeking enforcement of a Creditor's Claim against the estate of Benny Richard Phillips, Sr., by and through their undersigned counsel, and advise the Court that they consent to and stipulate to the dismissal of the matter *without* prejudice. Further, it is expressly agreed to and stipulated by the parties that the Petitioner will, in lieu of this action, pursue any remedy he seeks in the case captioned William Rice Cook, III vs. Benny Richard Phillips, Jr., et al., C/A No. 2015-CP-04-3024.

I SO STIPULATE:

 1/19/2016
Daniel L. Draisen, Attorney for Petitioner

 1/19/2016
Michael F. Mullinax, Attorney for Respondent



THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Judge

Appellate Case No. 2016-001653

William Rice Cook, III,.....Appellant,

v.

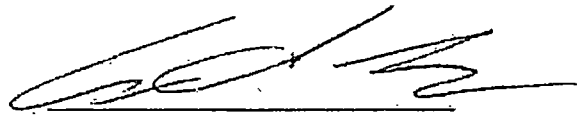
Benny Richard Phillips, Jr., and the real property located at 207 North Avenue,
Anderson, SC 29625 TMS # 123-26-08-02.....Respondents.

CERTIFICATE OF COUNSEL

I certify that the Record on Appeal contains all material proposed to be included
by any of the parties and not any other material.

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Respectfully submitted,



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