THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2012-213726
Civil Action No. 2012-CP-22-01056

Erika Fabian,..... Appellant,

v.

Ross M. Lindsay, III and Lindsay & Lindsay, LLC,..... Respondents.

RESPONDENTS' FINAL BRIEF

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April 18, 2013

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STATEMENT OF THE CASE

According to the Amended Complaint, the Respondents, a South Carolina attorney and his law firm, drafted a Trust Agreement for Dr. Denis Fabian (the "Decedent") which was executed on May 25, 1990. (R. p. 21, ¶ 4). The Decedent's wife, Marilyn, was to be the life beneficiary of the trust. (R. p. 22, ¶ 4). Marilyn's children from a prior marriage and the Decedent's two nieces, including the Appellant, were allegedly to be the remainder beneficiaries. (R. p. 22, ¶ 7). However, the Decedent's alleged intent to provide for the Appellant was—in the Appellant's view—defeated by a drafting error, resulting in the Appellant's disinheritance. (R. pp. 23-25, ¶¶ 11-12).

The Appellant filed a Complaint against the Respondents on October 1, 2012, alleging a single cause of action for negligence. (R. pp. 8-20). The Respondents moved to dismiss the Complaint on the grounds that it failed to allege the existence of an attorney-client relationship between the Appellant and the Respondents and it was not accompanied by an expert affidavit as required by S.C. Code § 15-36-100. (R. pp. 42-43). On October 29, 2012, the Appellant filed an Amended Complaint which added a new cause of action for breach of contract and was accompanied by an expert affidavit. (R. pp. 21-41). The Respondents moved to dismiss the Amended Complaint on the grounds that the causes of action asserted therein are not viable under South Carolina law. (R. pp. 44-45).

A hearing was held on the Respondents' Motion to Dismiss the Amended Complaint on December 6, 2012 before The Honorable Benjamin H. Culbertson. After carefully reviewing the pleadings, the legal memoranda submitted by the parties, and the applicable law, and after considering the arguments of counsel, Judge Culbertson granted

the Respondents' motion and entered an Order dismissing the Amended Complaint with prejudice on December 7, 2012. (R. pp. 1-7). The Appellant served a Notice of Appeal on December 13, 2012.

ARGUMENTS

I. BINDING SUPREME COURT PRECEDENT IMPOSES A PRIVITY REQUIREMENT AS A CONDITION TO MAINTAINING A LEGAL MALPRACTICE CLAIM IN SOUTH CAROLINA.

In dismissing the Amended Complaint, Judge Culbertson wrote that "South Carolina law imposes a privity requirement as a condition to maintaining a legal malpractice claim (which includes breach of contract), and thus any lawsuit which seeks to hold an attorney liable to a party with whom he or she lacks privity must be dismissed." (R. p. 7) (citations and quotations omitted). He was undoubtedly correct.

Though the Supreme Court has never addressed the precise question of whether an allegedly intended beneficiary of a will or trust has standing to sue the lawyer who prepared it, the court has held time and again that *no one* who is not in privity with an attorney has standing to sue the attorney. See, e.g., Rydde v. Morris, 381 S.C. 643, 650, 675 S.E.2d 431, 435 (2009) ("[E]xisting law . . . imposes a privity requirement as a condition to maintaining a legal malpractice claim in South Carolina."); Am. Fed. Bank, FSB v. No. One Main Joint Venture, 321 S.C. 169, 174, 467 S.E.2d 439, 442 (1996) ("Before a claim for malpractice may be asserted, there must exist an attorney-client relationship."). See also Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 390 S.C. 275, 282, 701 S.E.2d 742, 745 (2010); Rydde, 381 S.C. at 646, 675 S.E.2d at 433; Holy Loch Distribs., Inc. v. Hitchcock, 340 S.C. 20, 26, 531 S.E.2d 282, 285 (2000); and Smith v. Haynsworth, Marion, McKay & Geurard, 322 S.C. 433, 435, 472 S.E.2d 612, 613 n.2 (1996) (all holding that the elements of a legal malpractice claim are: "(1) *the existence of an attorney-client relationship*; (2) a breach of duty by the attorney; (3) damage *to the client*; and (4) proximate cause of *the client's damages* by the breach") (emphasis added);

Henkel v. Winn, 346 S.C. 14, 18, 550 S.E.2d 577, 579 n.3 (Ct. App. 2001) ("Although never addressed directly in South Carolina, related case law indicates that a plaintiff in an attorney malpractice action may have to be in privity with the attorney.").

Plaintiffs may not avoid the privity requirement by creatively labeling their causes of action as something other than "legal malpractice" or "professional negligence."[1] The Supreme Court has repeatedly recognized that "legal malpractice" is a broad term which encompasses a number of different causes of action against attorneys. See, e.g., Rydde, 381 S.C. at 645, 675 S.E.2d at 432-33 ("Appellants filed this legal malpractice action under various theories [including breach of contract], all of which are premised on the imposition of a duty on [the defendant attorney] in favor of the non-client prospective beneficiaries."); Epstein v. Brown, 363 S.C. 372, 375, 610 S.E.2d 816, 817 (2005) (referring to a complaint which alleged breach of fiduciary duty, negligence, and breach of contract as a "legal malpractice claim"); Holy Loch Distribs., 340 S.C. at 26, 531 S.E.2d at 285 (noting that the term "legal malpractice" encompasses a variety of theories of recovery against attorneys including negligence, breach of fiduciary duty, and breach of contract).

As noted by Judge Culbertson, the Amended Complaint does not allege that the Appellant ever had an attorney-client relationship with the Respondents or that the Appellant was otherwise in privity with the Respondents. (R. p. 6). Indeed, the Amended Complaint alleges the Appellant was merely an intended beneficiary of the Decedent's Trust Agreement. (R. p. 28, ¶ 24). Accordingly, the Appellant lacks standing to sue the

[1] In analyzing a complaint, courts are not obligated to accept the plaintiff's characterization of his or her causes of action. Rather, courts may look beyond a plaintiff's chosen labels to determine the true nature of the complaint's allegations. See Collins Holding Corp. v. Wausau Underwriters Ins. Co., 379 S.C. 573, 578-79, 666 S.E.2d 897, 900 (2008); Prior v. S.C. Med. Malpractice Liab. Ins. Joint Underwriting Ass'n, 305 S.C. 247, 249, 407 S.E.2d 655, 657 (Ct. App. 1991).

Respondents. Supreme Court precedent limits the class of plaintiffs with standing to sue an attorney to those in privity with the attorney. This court is bound by that precedent unless and until the Supreme Court decides to reconsider it. See, e.g., S.C. Const. art V., § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."); State v. Elmore, 368 S.C. 230, 238, 628 S.E.2d 271, 275 (Ct. App. 2006) ("As an error correction court, we leave it to our supreme court to determine if a retreat from [precedent] is warranted."); Am. Fast Print Ltd. v. Design Prints of Hickory, 288 S.C. 46, 47, 339 S.E.2d 516, 517 (Ct. App. 1986) ("The Supreme Court may want to grant certiorari in the instant case and modify or overrule its previous decision, but this court has no authority to change it."). The circuit court's Order should be affirmed for this reason alone.

II. THE PRIVITY RULE SHOULD BE PRESERVED.

Even if this court has authority to broaden the class of plaintiffs with standing to sue attorneys, it should decline to do so. The Appellants' arguments in favor of modifying the privity rule are unconvincing. On the other hand, strong policy justifications undergird the privity rule and weigh in favor of its preservation.

A. The fact that many states have abandoned the privity rule is no reason for South Carolina to do so.

The Appellant's first argument in favor of abandoning the privity rule is that South Carolina should join a number of other states which have allowed third parties dissatisfied with their distribution (or lack thereof) under a will or trust to bring suit against the drafting attorney. This court should reject the Appellant's *argumentum ad populum*. South Carolina must not abandon the privity rule simply for the sake of being in vogue. Our courts have never been primarily concerned with being trendy, but rather

with being correct. They are not afraid to adopt the so-called "minority" position on an issue if that position best reflects the public policy of this state. See, e.g., James v. Kelly Trucking Co., 377 S.C. 628, 634, 661 S.E.2d 329, 332 (2008) (adopting the minority rule that a plaintiff is not prohibited from pursuing a negligent hiring, training, supervision, or entrustment claim once respondeat superior liability has been admitted); Goodwin v. Johnson, 357 S.C. 49, 58, 591 S.E.2d 34, 39 (Ct. App. 2003) ("We adopt the minority rule that a court of equity possesses the plenary power to relocate an easement by necessity when the evidence supports such a move."); Calhoun v. Calhoun, 339 S.C. 96, 100, 529 S.E.2d 14, 17 (2000) (adopting the minority rule that pro se attorney litigants may not recover attorneys' fees); S.C. Dep't of Highways & Pub. Transp. v. E.S.I. Investments, 332 S.C. 490, 494, 505 S.E.2d 593, 596 (1998) (adopting the minority rule that trial judges in condemnation actions may exercise discretion in determining whether to admit or exclude evidence that an expert witness was initially employed by the opposing party); Perry v. Heirs at Law & Distributees of Gadsden, 316 S.C. 224, 226, 449 S.E.2d 250, 251 (1994) (recognizing that South Carolina follows the minority rule in boundary dispute cases that "possession under a mistaken belief that property is one's own and with no intent to claim against the property's true owner cannot constitute hostile possession"); Jones v. City of Columbia, 301 S.C. 62, 65, 389 S.E.2d 662, 663 (1990) ("South Carolina follows the minority rule that the issue of probable cause is a question of fact and ordinarily one for the jury."); Vickers v. Vickers, 255 S.C. 25, 31, 176 S.E.2d 561, 563 (1970) (reaffirming South Carolina's adherence to the minority rule that constructive desertion is grounds for divorce only where the leaving spouse left because of the other spouse's conduct which amounted to a fault ground for divorce);

Jacobson v. Yaschik, 249 S.C. 577, 584-85, 155 S.E.2d 601, 605 (1967) (adopting the minority rule that "officers and directors of a corporation stand in a fiduciary relationship to the individual stockholders and in every instance must make a full disclosure of all relevant facts when purchasing shares of stock from a stockholder").

Moreover, the privity rule—which the Appellant labels "antiquated"—has been reaffirmed by at least seven state high courts in the last 20 years, including three times in the last five years alone. See, e.g., Estate of Schneider v. Finmann, 933 N.E.2d 718, 721 (N.Y. 2010) ("[S]trict privity remains a bar against beneficiaries' and other third-party individuals' estate planning malpractice claims absent fraud or other circumstances."); Johnson v. Hart, 692 S.E.2d 239, 243 (Va. 2010) ("Virginia has adopted the strict privity doctrine in legal malpractice cases; as a threshold requirement, a plaintiff must demonstrate the existence of an attorney-client relationship."); Shoemaker v. Gindlesberger, 887 N.E.2d 1167, 1172 (Ohio 2008) ("We decline to change the rule of law in this state that bars an action for negligence against a lawyer by a plaintiff who is not in privity with the client."); Robinson v. Benton, 842 So.2d 631, 637 (Ala. 2002) ("[W]e decline to change the rule of law in this state that bars an action for legal malpractice against a lawyer by a plaintiff for whom the lawyer has not undertaken a duty, either by contract or gratuitously."); Nevin v. Union Trust Co., 726 A.2d 694, 701 (Me. 1999) ("[W]e conclude that individual beneficiaries do not have standing to sue estate planning attorneys for malpractice when they are not the client who retained the attorney and when the estate is represented by a personal representative who stands in the shoes of the client."); Noble v. Bruce, 709 A.2d 1264, 1275 (Md. 1998) ("[W]e hold that the traditional rule of strict privity applies in the instant cases, and thus [the beneficiaries

may not] maintain a malpractice action against the attorneys because no employment relationship existed between the beneficiaries and the attorneys."); Barcelo v. Elliott, 923 S.W.2d 575, 579 (Tex. 1996) ("We therefore hold that an attorney retained by a testator or settlor to draft a will or trust owes no professional duty of care to persons named as beneficiaries under the will or trust.").

B. There are strong policy justifications for preserving the privity rule.

The Appellant's second argument in favor of abandoning the privity rule is that the concerns undergirding it are outdated and that public policy now weighs in favor of permitting dissatisfied third parties to challenge the terms of a will or trust instrument on the grounds it allegedly does not reflect the testator's or settlor's intent. However, several strong policy justifications continue to support the privity rule.

First, the privity rule "protects the attorney's duty of loyalty to and effective advocacy for his or her client." Noble, 709 A.2d at 1270. Subjecting estate planning attorneys to potential lawsuits by disappointed beneficiaries "who simply did not receive what they believed to be their due share under the will or trust" would "create a conflict during the estate planning process, dividing the attorney's loyalty between his or her client and the third-party beneficiaries." Barcelo, 923 S.W.2d at 578. "[A]n attorney's preoccupation or concern with potential negligence claims by third parties might diminish the quality of legal services provided to the client if the attorney were to weigh the client's interests against the possibility of third-party lawsuits."[2] Shoemaker, 887

[2] The Appellant argues this concern is moot because the attorney's duties to the client and third party are allegedly "mirror images of one another." However, that is generally not the case. "In most cases where a defect renders a will or trust invalid, . . . there are concomitant questions as to the true intentions of the testator." Barcelo, 923 S.W.2d at 578. Alleged deficiencies in a will or trust could exist pursuant to the client's instructions, "which may have been based on advice from her attorneys attempting to represent her best interests." Id. "An attorney's ability to render such advice would be severely compromised if the advice could be second-guessed by persons named as beneficiaries[.]" Id.

N.E.2d at 1171. See also Noble, 709 A.2d at 1277 ("Adopting a new rule that would subject an attorney to liability to disappointed beneficiaries interferes with the attorney's ability to fulfill his or her duty of loyalty to the client and compromises the attorney's ability to represent the client zealously."). The privity rule guards against this danger by "ensur[ing] that attorneys may in all cases zealously represent their clients without the threat of suit from third parties compromising that representation." Barcelo, 923 S.W.2d at 578-79. See also Shoemaker, 887 N.E.2d at 1170 ("This rule is rooted in the attorney's obligation to direct attention to the needs of the client, not to the needs of a third party not in privity with the client.").

Second, the privity rule protects against the potential for unlimited liability against attorneys.[3] See, e.g., Shoemaker, 887 N.E.2d at 1171 (noting that without the privity rule, "there would be unlimited potential liability for the lawyer"); Noble, 709 A.2d at 1270 ("[A]bsent the strict privity rule there would be no limit as to whom a lawyer would be obligated."). This could in turn result in lower availability of affordable legal services because "potential clients . . . might not be able to obtain legal services as easily in situations where potential third party liability exists." Noble, 709 A.2d at 1270 (citations and quotations omitted). As the United States Supreme Court wisely recognized over 130 years ago:

> Unless we confine the operation of such contracts as this to the parties who entered into them . . . the most absurd consequences, to which no limit can be seen, will ensue[.] . . . [I]f we hold that the plaintiff can sue in such a case, there is no point at which such actions will stop. *The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty.*

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[3] The Appellant argues this concern is resolved because "intended third-party beneficiaries are a known, identifiable, and a definite subset of 'the general public.'" However, without the privity rule, almost anyone could claim to be a negligently disinherited, intended beneficiary of a will or trust.

Nat'l Sav. Bank of D.C. v. Ward, 100 U.S. 195, 203 (1879) (emphasis added). See also Shoemaker, 887 N.E.2d at 1171 ("Rather than expose the lawyer to the 50 [steps referenced in Ward], we conclude that lawyers should know in advance whom they are representing and what risks they are accepting.").

Third, the privity rule protects attorney-client confidentiality. The Noble court summarized this protection as follows:

> An attorney . . . should not be placed in the position where he or she would have to reveal a testator/client's confidences in an attorney malpractice action asserted by a nonclient beneficiary. For example, in the will drafting context, a testator/client may tell a relative that he or she will inherit part of the testator's estate. In reality, the testator/client intends that this relative inherit nothing because the testator/client secretly believes the relative is an evil person. The testator/client confides this secret belief to his or her estate planning attorney and requests the attorney to draft a will that leaves nothing to the relative. Allowing a nonclient beneficiary to maintain a cause of action against an attorney for professional malpractice may require the attorney to reveal confidences the testator would never want revealed.

Noble, 709 A.2d at 1278. If the Appellant is permitted to bring this action, the Respondents will be compelled to argue that that the Decedent—a very well educated, sophisticated, and highly respected surgeon who initialed each and every paragraph of his Trust Agreement—fully intended the Trust Agreement to provide as it did and, therefore, that the Respondents did not make a drafting error. In support of this defense, the Respondents would have little choice but to reveal confidential client communications, as permitted by Rule 1.6(b)(6), SCRPC, that the Decedent likely would not want disclosed. The privity rule prevents the necessity of such undesirable disclosures.

In short, it would be impossible "to craft a bright-line rule that allows a lawsuit to proceed where alleged malpractice causes a will or trust to fail in a manner that casts no

real doubt on the testator's [or settlor's] intentions, while prohibiting actions in other situations." Barcelo, 923 S.W.2d at 578. "A holding that attorneys have a duty to beneficiaries of a will separate from their duty to the decedent who executed the will could lead to significant difficulty and uncertainty, a breach in confidentiality, and divided loyalties." Shoemaker, 887 N.E.2d at 1172. See also Noble, 709 A.2d at 1270 ("[O]pening attorney-client contracts to the scrutiny of nonclients would place an undue burden on the attorney-client relationship and possibly the legal profession as a whole."). As the Texas Supreme Court and at least six other state high courts in the last 20 years have found, "the greater good is served by preserving a bright-line privity rule which denies a cause of action to all beneficiaries whom the attorney did not represent." Barcelo, 923 S.W.2d at 578.

C. The Appellant has not adequately pled a third-party beneficiary breach of contract claim.

This court should decline the Appellant's invitation to carve out a cause of action against estate planning attorneys based on a third-party beneficiary theory of liability for several reasons. First, the Supreme Court has recognized breach of contract as one of many different theories of liability falling under the umbrella of "legal malpractice," see Section I, supra, and thus approval of a third-party beneficiary theory would require abrogation of the privity rule, which is undesirable for the reasons discussed herein.[4] Second, a third-party beneficiary cause of action against estate planning attorneys would conflict with the principle announced by this court in Gaar v. N. Myrtle Beach Realty

[4] Cf. Barcelo, 923 S.W.2d at 579 ("Even assuming that a client who retains a lawyer to draft an estate plan intends for the lawyer's work to benefit the will or trust beneficiaries, the ultimate question is whether, considering the competing policy implications, the lawyer's professional duty should extend to persons whom the lawyer never represented. For the reasons previously discussed, we conclude that the answer is no.").

Co., 287 S.C. 525, 339 S.E.2d 887 (Ct. App. 1986), and recognized by the Supreme Court in Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006), and again in Rydde that "an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client." Gaar, 287 S.C. at 528, 339 S.E.2d at 889; Pye, 369 S.C. at 564, 633 S.E.2d at 509; Rydde, 381 S.C. at 646-47, 675 S.E.2d at 433. Third, the Appellant has not properly alleged the third-party beneficiary cause of action she urges this court to recognize.[5]

As correctly noted by the Appellant, "when [a] contract is made for the benefit of [a] third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 445, 494 S.E.2d 827, 833 (Ct. App. 1997). "A third-party beneficiary is a party that the contracting parties intend to directly benefit." Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). "To qualify as a third-party beneficiary under a contract, a third party must show that the intent of the contracting parties was to confer a direct and substantial benefit on the third party. In the absence of a clear intent to benefit the third person, he cannot sue on the contract." TC X, Inc. v. Commonwealth Land Title Ins. Co., 928 F.Supp. 618, 623 (D.S.C. 1995) (citations and quotations omitted). However, the Appellant has not alleged facts sufficient to establish these requirements.

Pursuant to Rule 8(a)(2), SCRCP, "[a] pleading which sets forth a cause of action . . . shall contain . . . a short and plain statement of the facts showing that the pleader is

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[5] "The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR. See also I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("[A] respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling[.]").

entitled to relief[.]" Thus, the Appellant was obliged to plead facts showing that, in contracting for the preparation of the Decedent's Trust Agreement, the Respondents and the Decedent clearly intended to confer a "direct and substantial benefit" on her. However, the Amended Complaint alleges little more than that the Appellant was told that she would take from the corpus of the Decedent's trust and that she was named in the Trust Agreement.[6] The actual contract between the Respondents and the Decedent—their engagement agreement—is referenced in the Amended Complaint only once, and even then only in passing. (R. p. 24, ¶ 12(c)). There is no allegation that the engagement agreement even mentioned the Appellant, much less indicated the parties intended to benefit the Respondent thereby.

D. If the privity rule is modified, this court should nevertheless continue its adherence to the four corners rule.

In the event this court decides to reject the long-standing privity rule—a course of action the Respondents urge the court not to take—it will be confronted with the question of how to best ascertain the Decedent's intent. For guidance, the court need look no further than its own opinion, handed down just a dozen years ago, in Henkel. In that case, the court recognized that "[a] will evidences the testator's intent at the moment of execution and may differ dramatically from statements he or she may have made in the past." Henkel, 346 S.C. at 19, 550 S.E.2d at 579. Accordingly, the court noted that it "presume[s] a person signing a will knows the content and nature of the will" and held that "the testator's intent must be determined from the will itself." Id. at 18, 550 S.E.2d at 579.

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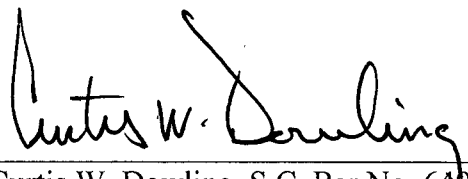
[6] The latter fact is irrelevant because "[t]he will [or trust instrument] is not the contract, it is a document prepared in compliance with the contract." Greenfield-Spector v. Fox, 844 N.E.2d 719 at *2 (Mass. App. Ct. 2006).

The reasons for this so-called "four corners rule" are obvious. "Attorney malpractice cases involving nonclients and arising out of will drafting or estate planning require special considerations because the testator/client is dead. If extrinsic evidence were admitted, the potential for fraud and the risk of misinterpreting the testator's intent increase dramatically. Such evidence might be pure speculation as to the testator's intent." Noble, 709 A.2d at 1276-77. See also Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner, 612 So.2d 1378, 1380 (Fla. 1993) ("If extrinsic evidence is admitted to explain testamentary intent, as recommended by the petitioners, the risk of misinterpreting the testator's intent increases dramatically. Furthermore, admitting extrinsic evidence heightens the tendency to manufacture false evidence that cannot be rebutted due to the unavailability of the testator."). Moreover, even courts which have abandoned the privity rule in estate planning cases have criticized the "modified balancing test" urged by the Appellant. See, e.g., Guy v. Liederbach, 459 A.2d 744, 749 (Pa. 1983) (finding California's modified balancing test "unworkable" and stating that it "has led to *ad hoc* determinations and inconsistent results").

CONCLUSION

For the reasons explained herein, the circuit court committed no error in granting the Respondents' Motion to Dismiss. Accordingly, the Respondents respectfully request that this court affirm the Order of the circuit court.



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PROOF OF SERVICE

I, the undersigned attorney with Barnes, Alford, Stork & Johnson, LLP, do hereby state that I have on April 18, 2013, served a copy of the enclosed **RESPONDENTS' FINAL BRIEF** upon all other parties, through their attorney(s) of record, by depositing copies of the documents in the United States Mail, first class, sufficient postage prepaid, with the return address(es) clearly noted, addressed as follows:

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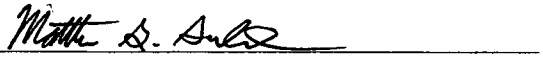

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