No. _____

In The
Supreme Court of the United States

RFT MANAGEMENT COMPANY, LLC,

Petitioner,

v.

TINSLEY & ADAMS, LLP,
and WELBORN D. ADAMS,

Respondents.

On Petition For Writ Of Certiorari To The South Carolina Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court has jurisdiction under 28 U.S.C. § 1257(a) to decide this Petition on its merits.

2. Whether the South Carolina Supreme Court violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution by denying Petitioner's Motion to Supplement the Record on Appeal with materials which were necessary in order to support the petition for rehearing and, thus, to respond to grounds set forth in the court's opinion.

3. Whether the South Carolina Supreme Court violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution by affirming denial of Petitioner's post-trial motions based upon grounds which had not been raised at trial or on appeal, and as to which Petitioner had no notice, no opportunity to be heard, and no opportunity to present evidence.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner hereby certifies that it is a limited liability company which is owned by private individuals and that it has no subsidiaries. The parties at the judgment stage in the Greenwood County Court of Common Pleas and in the South Carolina Supreme Court are all reflected in the caption.

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RFT Management Co. LLC, petitions the Court for a writ of certiorari to review the judgment of the South Carolina Supreme Court.

OPINION BELOW

The opinion of the South Carolina Supreme Court is reported at 399 S.C. 312, 732 S.E.2d 166 (2012), and reprinted at App. 1. The order of the Greenwood County, South Carolina, Court of Common Pleas denying petitioner's motions for JNOV and a new trial is unpublished, and is reprinted at App. 24.

JURISDICTION

The South Carolina Supreme Court entered judgment on August 15, 2012, and denied petitioner's petition for rehearing on September 19, 2012. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provision involved in this case is the Fourteenth Amendment to the United States Constitution, U.S. Const. Amend. XIV, which is reprinted at App. 93. The statutory provisions involved

in this case are South Carolina Code Ann. §§ 35-1-509(g)(5), 35-1-509(l) (Cum. Supp. 2011) and §§ 39-5-20(a), 39-5-40(a) (1985), which are reprinted at App. 94-96.

STATEMENT

This dispute between petitioner ("RFT") and respondents (collectively referred to as "Law Firm") arose out of Law Firm's representation of both RFT and the seller during the closing of a complex real estate investment transaction in which RFT purchased for $570,000.00 two parcels of real estate located on Lake Greenwood near Greenwood, South Carolina. RFT brought suit against Law Firm for legal malpractice, breach of fiduciary duty, aiding and abetting a violation of the South Carolina Uniform Securities Act ("SCUSA"), S.C. Code Ann. § 35-1-509(g)(5) (Cum. Supp. 2011), and a violation of the South Carolina Unfair Trade Practices Act ("UTPA"), S.C. Code Ann. § 39-5-20(a) (1985). These claims arose out of the following facts: that Law Firm improperly represented both the buyer and seller in the transaction while subject to an unwaivable, disqualifying conflict of interest; that Law Firm, while under a fiduciary duty to do so, failed to disclose to RFT numerous material facts regarding the seller of the lots; that Law Firm arranged the closing as an illegal "flip transaction" in which contemporaneous closings were performed, allowing the seller to use the funds received from RFT to purchase the same real estate

which was to be sold to RFT;[1] and that Law Firm facilitated the illegal transaction by continuing its practice of drafting false and misleading HUD-1 closing statements which misrepresented the sources and recipients of the closing funds and false deed affidavits of consideration which misrepresented the actual selling prices of the real estate.

1. The case was tried to a jury for five full days from June 28 through July 2, 2010. At the close of all the evidence, the trial court merged the fiduciary duty claim into the malpractice claim, instructing the jury only as to the latter; granted a directed verdict on the SCUSA claim in favor of Law Firm on the single legal ground that the real estate transactions did not involve the sale of a security;[2] and directed a verdict in favor of Law Firm on the UTPA claim on the sole ground that the legal profession was exempt from the UTPA under S.C. Code Ann. § 39-5-40(a).[3] The legal malpractice cause of action was then submitted to the jury by means of a verdict form[4] on which the jury responded only to the question, "Was

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[1] Descriptions of "flip transactions" may be found in In re Brown, 361 S.C. 347, 359, 605 S.E.2d 509, 515 (2004) and in United States v. Sallee, 984 F.2d 643, 644 & n.1 (1993).

[2] That ground was ignored by the supreme court in its opinion in favor of other alleged grounds which had not been raised at trial or in Law Firm's brief. See text accompanying n.27 infra.

[3] Section 39-5-40(a) is reprinted at App. 96.

[4] The Verdict is reprinted at App. 26.

the conduct of Tinsley and Adams, LLP, and Welborn D. Adams negligent?" The jury responded "no", and judgment was entered in favor of Law Firm. RFT thereupon timely moved for judgment notwithstanding the verdict or, in the alternative, for a new trial on the malpractice cause of action, for reconsideration of the directed verdicts on the SCUSA and UTPA causes of action, and for a new trial on the fiduciary duty, SCUSA, and UTPA causes of action. The trial judge denied RFT's post-trial motions by order dated October 6, 2010.[5]

2. On October 27, 2010, RFT timely noticed its appeal of the trial court's judgment to the South Carolina Court of Appeals, from which the case was subsequently transferred to the South Carolina Supreme Court. On August 15, 2012, that court issued an opinion affirming the result in the trial court.[6] Because of the grounds relied upon by the supreme court in its opinion, RFT moved the court on August 29, 2012, for permission to supplement the Record on Appeal with various materials upon which it planned to rely in its Petition for Rehearing.[7] On August 31, 2012, RFT timely filed its Petition for Rehearing and supporting Memorandum of Law which reflected clearly how RFT intended to rely upon the materials

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[5] The trial judge's order denying RFT's post-trial motions is reprinted at App. 24.

[6] App. 1.

[7] RFT's Motion to Supplement the Record on Appeal, App. 86; Affidavit of RFT's counsel, App. 89.

with which it sought to supplement the record.[8] *After* the filing of RFT's Petition for Rehearing, the supreme court denied RFT's motion to supplement the record.[9] In the petition and supporting memorandum, RFT called the supreme court's attention directly to the fact that its reliance upon various alleged grounds which had not been raised by the trial court nor by Law Firm at trial or on appeal denied RFT its due process right to be heard on those grounds and that portions of the opinion were fundamentally unfair.[10] RFT did not have an opportunity to advise the supreme court that its refusal to allow it to supplement the record constituted a denial of procedural due process in violation of the Fourteenth Amendment to the United States Constitution, given that South Carolina Appellate Court Rule ("SCACR") 221(c) does not permit petitions for rehearing of decisions on such motions.[11] A complete explanation as to why the Court does have jurisdiction to review the judgment below on writ of certiorari is provided at pages 13-20 *infra*.

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[8] RFT's Petition for Rehearing and Supporting Memorandum of Law are reprinted at App. 31 and 38 respectively.

[9] The South Carolina Supreme Court's order denying RFT's Motion to Supplement the Record is reprinted at App. 23.

[10] See, e.g., App. 32, 41, 43, 44, 70.

[11] SCACR 221(c) provides in relevant part: "The appellate court will not entertain petitions for rehearing on a motion . . . unless the action of the court on the motion has the effect of dismissing or finally deciding a party's appeal." It is reprinted in full at App. 96.

3. The opinion of the South Carolina Supreme Court, as fully explained in RFT's petition for rehearing and supporting memorandum of law, was based upon grounds which were not before the court and, with two minor exceptions, grounds to which RFT had never had an opportunity to respond or to be heard. Moreover, as reflected by the memorandum of law and record evidence referenced therein, RFT had full and dispositive responses to all of the supreme court's purported grounds for affirming the trial court's decision. Among the grounds relied upon by the supreme court were the following:

> a. Rather than addressing the issues actually raised by the post-trial motions as to whether there was any evidence supporting the jury verdict on the malpractice claim,[12] whether RFT was entitled to judgment as a matter of law on that claim, or whether the verdict was against the greater weight of the evidence,[13] the court misread selected portions of the record in order to raise for the

[12] An appellate court will reverse a trial court's denial of JNOV "only when there is no evidence to support the ruling or the ruling is controlled by an error of law." Burns v. Univ. Health Services, Inc., 261 S.C. 221, 232, 603 S.E.2d 605, 611 (Ct.App. 2004) (citing Hinkle v. Nat. Cas. Ins. Co., 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003)).

[13] Under South Carolina's "thirteenth juror doctrine," a new trial may be granted if the trial judge believes that the jury's verdict is contrary to a preponderance of the evidence. Norton v. Norfolk Southern Rwy. Co., 350 S.C. 473, 482 & n.7, 567 S.E.2d 851, 856 & n.7 (2002).

first time as a ground for affirming the verdict that RFT's attorney allegedly conceded that the malpractice claim presented a question of fact for the jury,[14] contrary to other portions of the record and to portions of the transcript that the court would not allow to be added to the record, all of which directly contradicted the court's ruling.[15]

b. The court also affirmed the jury verdict on the malpractice claim in part upon the supposed ground that RFT's counsel waived a major part of RFT's case regarding Law Firm's nondisclosures and orchestration of a "flip" transaction by failing to argue same in support of RFT's directed verdict motion at the close of all of the evidence,[16] despite the facts that Law Firm did not assert waiver in opposition to RFT's post-trial motions or on appeal and that such a ground is contradicted by the Record on Appeal and by portions of the trial transcript which the court would not allow to be added to the record,[17] and which materials demonstrated unequivocally that those issues were the central focus of RFT's arguments in support of its directed verdict motion.

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[14] App. 10, 13.

[15] App. 42-46.

[16] App. 9.

[17] App. 43-46. The Supreme Court stated no reasons or grounds for its denial of RFT's motion to supplement the record. App. 23.

c. The court incorrectly held that RFT's attorney somehow waived RFT's objections to the trial court's decision to send the malpractice claim to the jury by failing to present contrary authority at trial to a case raised by Law Firm for the first time at the close of all the evidence;[18] when such a ground had not been raised by Law Firm at trial or on appeal; where the case is not identified in the record or mentioned in the court's opinion; when the holding of the case appears nowhere in the record; and when the applicability of the unidentified case to the facts of this case does not appear in the record[19] and is not explained in the supreme court's opinion.

d. The supreme court affirmed the trial court's disposition of the breach of fiduciary duty, SCUSA, and UTPA claims based upon the erroneous application of direct estoppel allegedly arising from the jury verdict on the

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[18] Having never seen the unidentified case before and being present in the courtroom when it was first mentioned, RFT's counsel had no opportunity to study nor to conduct legal research regarding the case.

[19] By inferring acquiescence from the unidentified case, the supreme court ignored the established rule that

> where the "text of [the decision] was neither introduced into the trial record, nor included in the record on appeal . . . , no competent evidence exists from which [an appellate court] can glean the full implications of the decision."

Middleborough Horiz. Prop. Regime Council of Co-Owners v. Montedison, S.p.A., 320 S.C. 470, 476-77, 465 S.E.2d 765, 769-70 (Ct.App. 1990); see, also, Am. Nat. Bank of Winter Haven, Fla. v. Caldwell, 166 S.C. 194, 164 S.E. 613, 615 (1932).

malpractice claim,[20] despite the fact that estoppel was not relied upon by the trial judge in disposing of those claims; that it was not raised by Law Firm in opposition to RFT's post-trial motions on all three claims or on appeal of the SCUSA and breach of fiduciary duty[21] claims; and that it was impossible to determine from the verdict which issues had actually and necessarily been decided.[22]

e. The supreme court affirmed denial of a new trial on the malpractice cause of action in part because the trial judge did not list his grounds for denying a new trial in his order[23] even though that ground is directly contrary

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[20] App. 16, 19-21. "Direct estoppel" occurs within a single case where a ruling on an issue necessary to decide one claim is applied to another claim to which the issue is also relevant, unlike "collateral estoppel" where an issue decided in an earlier case may bar relitigation of the issue in a later case. See, generally, 18 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4418 at 479 (West 2002).

[21] South Carolina appellate courts will not consider grounds not raised by the parties to the trial court or on appeal. State v. Prioleau, 345 S.C. 404, 412, 548 S.E.2d 213, 217 (2001).

[22] This error is discussed at length in RFT's Memorandum of Law in Support of its Petition for Rehearing. App. 68-72. "'An extreme application of state law res judicata principles violates the Federal Constitution.'" Richards v. Jefferson City, Ala., 517 U.S. 793, 804-805 (1996) (quoting Brinkerhoff-Farris Trust & Savings Co. v. Hill, 281 U.S. 673, 681-82 (1930)).

[23] App. 11.

to settled precedent in South Carolina[24] and had not been raised by Law Firm on appeal.

f. The supreme court affirmed the jury verdict on the alternate ground that knowledge of RFT's alleged real estate agent of the contents of a title opinion letter could be imputed to RFT,[25] which ground had not been raised at trial or on appeal by Law Firm, and despite the facts that there was no record evidence supporting the ground and that other portions of the record established that, to the contrary, the agent testified that she represented the seller and not RFT and that she had never read the title opinion letter.

g. The supreme court affirmed denial of a new trial on the SCUSA claim on the ground that RFT allegedly waived the claim in an Attorney Representation Disclosure form ("ARD"), despite the facts that that ground had not been raised by Law Firm at trial or on appeal; that that ground was not relied upon by the trial judge;[26] that it was

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[24] Porter v. Labor Depot, 372 S.C. 560, 569, 643 S.E.2d 96, 100 (2007) ("a form order stating only that appellant's post-trial motions for JNOV and a new trial were denied, was, together with the record of the proceedings, adequate to enable appellate review.").

[25] App. 13.

[26] The supreme court's opinion mentions that the trial judge directed a verdict on the SCUSA claim only because he did not believe RFT's purchase of real estate involved the sale of a security. App. 20. Ultimately, the court refused to address that ground. Id. at 21-22.

contradicted by the fact that the ARD contained no waiver language; and that violations of SCUSA were rendered legally unwaivable by a provision in SCUSA which renders all such waivers void. *See* S.C. Code Ann. § 35-1-509(l).[27]

h. The supreme court denied RFT's motion to reconsider the entry of a directed verdict and to grant a new trial on the UTPA cause of action on the alternate ground that RFT "has not shown that it could have established all of the necessary elements of this claim . . . ,"[28] which ground misstates RFT's burden in opposing a directed verdict motion of showing only that there was *some* evidence supporting each element of its claim;[29] which ground does not specify any elements of the claim which RFT had not shown that it could prove, thereby defying response by RFT; and which ground had not been raised in the case prior to the court's opinion.

i. Because Law Firm did not assert on appeal that RFT waived even a single ground for appeal by failing to argue it in support of its motion for a directed verdict, RFT omitted from the record on appeal large portions of the transcript containing argument on those motions, as required by court

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[27] App. 95.

[28] App. 19.

[29] Hamilton v. Charleston County Sheriff's Dept., 399 S.C. 252, 731 S.E.2d 727, 728 (2012).

> rules.[30] When RFT discovered that, for the first time in the case, the supreme court raised as grounds for affirming the trial court, statements allegedly made by RFT's counsel at trial, certain facts not appearing in the record, and the supposed omission from the record of facts which were actually in the record, RFT moved the supreme court for permission to supplement the record with materials which directly contradicted those purported grounds. RFT's motion contained a full explanation as to why it wanted to supplement the record.[31] The motion was denied by the Supreme Court without explanation *after* RFT's Petition for Rehearing had been filed.[32]

RFT's Petition for Rehearing was denied on September 19, 2012.

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[30] SCACR 209(c) requires that when designating materials to be included in the Record on Appeal counsel must certify "that the Designation contains no matter which is irrelevant to the appeal." Rule 209(c) is reprinted at App. 96.

[31] App. 86.

[32] App. 23, 30. In other words, the court possessed information showing how the materials would be used to contest its opinion *before* it denied the motion to supplement the record.

REASONS SUPPORTING JURISDICTION TO CONSIDER THE PETITION

Section 1257(a) provides in relevant part that

> [f]inal judgments or decrees rendered by the highest court of a State in which decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of . . . the United States.

28 U.S.C. § 1257(a) (1988). The Court normally will not consider a petition submitted under this statute unless it is clear that the federal question involved was timely and adequately presented to the highest court of the state from which appeal is sought. *Webb v. Webb*, 451 U.S. 493, 496-97 (1981). Thus, mere incantation of "due process" and related terms such as "fundamental unfairness" and "opportunity to be heard" by themselves are usually insufficient to permit the Court to conclude that a right "is specially set up or claimed" under the Federal Constitution. *Adams v. Robertson*, 520 U.S. 83, 89 n.3 (1997). "[W]ith rare exceptions . . . ," therefore, a petitioner must demonstrate to the Court that it timely and in express words informed the state court that it was seeking to assert a federal right arising under federal law or under a particular provision of the United States Constitution. *Id*. at 86.

Nonetheless, it is not an absolute requirement that *federal* law or the *U.S.* Constitution be expressly

referred to in order to adequately present a federal claim under § 1257(a).

> No particular form of words is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or *by clear intendment* that this was done, the claim is to be regarded as having been adequately presented.

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928) (emphasis added). Indeed, the court will consider a petition if it shows "by clear implication that a federal claim was adequately presented in the state system." *Webb*, 451 U.S. at 496-97.

A federal claim will be considered timely presented "when it was raised at the first opportunity." *Brinkerhoff-Farris Trust & Savings Co. v. Hill*, 281 U.S. at 678. Raising the claim for the first time in a petition for rehearing is proper if that was the earliest opportunity under state law for raising the claim. *Herndon v. Georgia*, 295 U.S. 441, 443-44 (1935). Indeed, a federal claim may be raised in a petition for writ of certiorari to this Court, if there was no earlier opportunity before the state court in which to raise it. *Saunders v. Shaw*, 244 U.S. 317, 320 (1917).

There are also situations in which the Court has considered petitions even when there was no express or implied reference to federal law and when no

federal claim was raised before the state courts. Thus, the Court held that it "has jurisdiction to review plain error when necessary to prevent fundamental unfairness." *Wood v. Georgia*, 450 U.S. 261, 264-65 & n.5 (1981). In the same case, it recognized that even absent express reference to the Federal Constitution, "[w]here . . . a possible due process violation is apparent on the particular facts of a case [the Court is] empowered to consider the due process issue." *Id*.

As RFT will explain, there are two separate federal due process claims at issue in this case, both of which have been timely presented. The first involves the South Carolina Supreme Court's affirmance of the trial judge's denial of RFT's post-trial motions based upon grounds which had not been raised prior to the issuance of the court's opinion and of which RFT had no notice nor opportunity to be heard. That claim was first raised in RFT's petition for rehearing, which was the first opportunity for doing so, given that the claim arises from the court's opinion.

The second federal claim arose from the supreme court's denial of RFT's motion to supplement the record in order to oppose grounds in the supreme court's opinion which had not been raised earlier. Although filed before the petition for rehearing, the motion to supplement was not decided until after the filing of that petition. And although it made clear the purposes for which the materials were sought, the court denied the motion without explanation after the

filing of the petition for rehearing. Because SCACR 221(c) does not permit petitions for rehearing on non-dispositive motions, RFT had no further opportunity to assert a federal due process violation arising from the court's refusal to receive and to review the additional materials. As a result, this Petition constitutes RFT's first opportunity to raise the federal claim arising from that refusal.

RFT submits that assuming that it is correct regarding the timeliness of its presentation of the federal claim based upon the South Carolina Supreme Court's refusal to grant permission to supplement the record, that claim has been adequately presented to this Court through reference herein to RFT's federal right to procedural due process as guaranteed by the Fourteenth Amendment to the United States Constitution. The adequacy of presentation of the federal claim arising from the contents of the supreme court's opinion is not quite as obvious.

First, although the Petition for Rehearing does not refer expressly to federal law or to the Federal Constitution, the circumstances underlying the denial of the petition imply that the South Carolina Supreme Court understood that it had been presented with a federal due process claim. The Petition for Rehearing states that as a result of the court's opinion, "RFT had been denied its due process right to be heard . . . " on various grounds.[33] RFT's Memorandum

[33] App. 32.

of Law in Support of the Petition for Rehearing called attention to the fundamental unfairness of the court's opinion,[34] denial of the opportunity to confront new grounds raised in the opinion,[35] and denial of the right to be heard on those grounds.[36]

Because RFT's Petition for Rehearing in effect required the South Carolina Supreme Court to decide whether *its own order* violated due process, the court necessarily was aware that it was presented with a federal due process claim. Indeed, if one thing is clear from RFT's Memorandum, it is that the supreme court's opinion was based almost entirely on grounds which RFT had not had an opportunity to address. Moreover, it would have made no sense for RFT to present state and federal constitutional claims in the alternative, because that would enable the supreme court to choose to address only the state due process claim, and deny it. The federal due process claim would then be waived, and the case ended. For the same reason, the supreme court could not have rationally concluded that it was being presented with only a state due process claim. The court had to have known of the problems with its opinion before it received the petition for rehearing; and thus, it intentionally issued the opinion notwithstanding those known problems. Realistically, no appellate court could issue such an opinion without being acutely

[34] App. 44.

[35] App. 41.

[36] App. 70.

aware of its deficiencies. That being the case, it would have been grossly illogical for a court to conclude that a federal claim was not being asserted when such a claim was the only means by which the party was likely to receive a viable, fair, and unbiased opportunity to obtain relief from the court's opinion.

The supreme court surely was aware that RFT knew that asserting a due process claim attacking the opinion of the highest court in the state under only the state constitution, as to the meaning of which that same court had the final, unappealable say, would be a waste of time and effort. *See Brinkerhoff-Farris*, 281 U.S. at 680 ("the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state."). There was no chance that the supreme court would have reversed itself by holding that it had issued an opinion which it knew, or should have known, was contrary to RFT's due process rights under the state constitution, or that it had invented grounds to support its predetermined decision. Further, it also arises by necessary implication that the court knew, or should have known, that RFT knew that allowing the court to decide the petition for rehearing on state grounds would be pointless and, thus, that the court knew that RFT had no intention to assert a claim under the South Carolina Constitution, and that its sole intention was to assert a claim under the Fourteenth Amendment of the Federal Constitution.[37] For these reasons, RFT

[37] The fact that the Supreme Court's own opinion was under attack differentiates this case from cases in which the

(Continued on following page)

submits that, by clear implication and intendment, its federal due process claim arising from the South Carolina Supreme Court's opinion was adequately and timely presented to that court, notwithstanding the fact that there was no express reference to the Federal Constitution in RFT's petition for rehearing.

Second, RFT submits that even if the Court were to decide that the federal due process claim had not been adequately presented to the South Carolina Supreme Court, it should nonetheless consider RFT's Petition because of the need to remedy fundamental unfairness arising from the opinion and because the due process violation is apparent on the facts of this case. *Wood v. Georgia*, 450 U.S. at 265 n.5. Indeed, it is difficult to conceive of an appellate opinion which could be more obviously and fundamentally unfair to an appellant. The plethora of erroneous and legally and factually unsupported findings contained in the South Carolina Supreme Court's opinion are described in detail above and constitute "plain error". From them, it can at least be inferred that the court, apparently aware that evidence at trial was not sufficient to survive a JNOV motion, found it necessary to invent new grounds for affirming the jury on the

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constitutionality of a state statute is involved. In such cases, there is usually no reason to infer that the state supreme court would not render an unbiased and objective decision under the facts and applicable law. Thus, a failure to expressly refer to federal law or to the federal constitution in such cases does not eliminate the possibility that they were decided under state constitutional law. See, e.g., Webb v. Webb, 451 U.S. 493 (1981).

malpractice verdict, to include reliance upon alleged actions of RFT's attorney which, according to the trial transcript, never occurred. Although RFT's petition for rehearing cited the supreme court to portions of the transcript and other court records which directly refuted its chosen grounds, the court denied RFT's motion to supplement the record with those materials.

None of the grounds for the opinion of the South Carolina Supreme Court were raised in the proceedings before the trial court. Indeed, several of the trial court's grounds were ignored or reversed by the supreme court. Almost none of the supreme court's grounds were raised by Law Firm at trial or on appeal. Most of the grounds seem to have been developed by the court out of necessity in order to support the predetermined result reached in its opinion. Indeed, how could the court have identified the grounds upon which to rely without first knowing that it was going to affirm the decision below, albeit on grounds which appear nowhere in the record. Consequently, RFT submits respectfully that the South Carolina Supreme Court's disposition of its appeal could not be more palpably and fundamentally unfair and fully justifies this Court in taking up this Petition for Writ of Certiorari.[38] *Wood v. Georgia*, 450 U.S. at 265-66.

[38] Even if the Court were to deny RFT's Petition, "there is ample support for a remand required in the interests of justice." Wood, 450 U.S. at 265 n.5 (citing 28 U.S.C. § 2106). Section 2106 is reprinted at App. 94.

REASONS FOR GRANTING THE PETITION

There are strong constitutional and policy reasons for granting the writ. As an incontestable factual matter, the opinion of the South Carolina Supreme Court deprived RFT of any notice of the grounds for that opinion, of the ability to present evidence and argument opposing those grounds, of a hearing on those grounds, and, ultimately, of a fair appeal. In addition, the court's denial of RFT's motion to supplement the record also deprived RFT of any ability to submit evidence needed to support its petition for rehearing and thereby unfairly denied it the opportunity to fully respond to the court's opinion. Decisions of this Court leave little doubt that such deprivations constitute violations of a party's Fourteenth Amendment right to procedural due process.

As explained in *Morgan v. United States*, 304 U.S. 1, 18 (1938):

> The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one.

Moreover, "'there can be no doubt that at a minimum [the words of the Due Process Clause] require that

deprivation of life, liberty or property[39] by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) (citations omitted). The right to present evidence to the court is equally as essential to due process as are the rights to notice and an opportunity to be heard. *Jenkins v. McKeithen* 395 U.S. 411, 429 (1969); *Baltimore & Ohio Railroad Co. v. United States*, 298 U.S. 349, 369 (1936). A reading of the opinion of the South Carolina Supreme Court in light of the record and trial transcript shows that due process was violated by the court, and even may have been *ignored*. There was no notice of the previously unasserted grounds for decision, no opportunity to be heard, no opportunity to present evidence, no hearing, and no argument.

The court also violated due process by denying RFT's motion to supplement the record. This Court's decision in *Saunders v. Shaw* is instructive. There, the defendant did not place evidence in the record at trial because the need for the evidence had been obviated by a prior court decision. The trial court's decision was at first affirmed on appeal; but on rehearing the state supreme court reversed on authority of a case decided *after* the first decision.

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[39] As one district court noted, a litigant has a constitutionally recognized property right in her lawsuit and in the damages she seeks to recover. Petrousky v. United States, 728 F.Supp. 890, 892-93 nn.2-3 (N.D.N.Y. 1990) (citing inter alia Sun Oil Co. v. Wortman, 486 U.S. 717 (1988)).

The court's adoption of the rule stated in the later case made relevant the evidence which the defendant had elected not to present at trial. The defendant petitioned for a second rehearing, and the petition was denied because only one such petition could be filed in a case under court rules. In petitioning this Court, the defendant claimed a due process violation "because the case had been decided against him without him ever having a proper opportunity to present his evidence." *Id*. at 319. However, he did not refer to the Fourteenth Amendment in his petition for rehearing. The Court nonetheless entertained the defendant's writ, explaining,

> The record discloses the facts but does not disclose the claim of right under the 14th Amendment until the assignment of errors filed the day before the chief justice of the state granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation.

Id. at 320 (citation omitted).

The situation in *Saunders* is nearly identical to that in this case. Here, RFT did not enter portions of the trial transcript into the record on appeal because they were then not relevant to the grounds and objections raised by the parties in their briefs. When the South Carolina Supreme Court issued its opinion, however, those transcript pages were made relevant by grounds raised for the first time in this case by the court in its opinion, which was also the case in *Saunders*. RFT timely moved to supplement the record with the newly relevant materials, and the supreme court denied its motion. And, as in *Saunders*, RFT was prevented by court rule from filing a second petition for rehearing challenging the denial of its motion to supplement. Thus, RFT contends that *Saunders* is persuasive authority for the propositions that the supreme court violated due process under the Fourteenth Amendment by refusing to allow supplementation of the record and that the due process claim is timely presented in this Petition.

In addition to the deprivation of RFT's due process rights, there are important policy reasons for granting the writ. RFT certainly has no first-hand knowledge as to why the South Carolina Supreme Court would issue such a flawed and unfair opinion; however, the opinion itself necessarily implies that the court had decided to affirm the decision below even before the opinion was written. Obviously, the court could not have known which new grounds to raise without first knowing how it would decide the appeal. The opinion is susceptible to the further

implication that the court believed that the trial judge's decision and the jury verdict could not be supported by the record on appeal and/or by applicable law, thereby necessitating reliance on new grounds in order to uphold the verdict.[40] Why the supreme court went to such great lengths to achieve its desired result is a mystery. Poor draftsmanship must be ruled out as a cause by the obvious nature of the flaws in the opinion and by the fact that it was a unanimous opinion, signed off on by all five justices. Moreover, given the nature of, and lack of support in the record for, almost all of the grounds, it is very difficult to conclude that the court had a strong belief in the legal or factual merit of those grounds. RFT has no evidence or knowledge of what actually motivated the supreme court to write the opinion as it did.

The fact remains, however, that the South Carolina Supreme Court issued, then denied rehearing to, and then published, an opinion so replete with deep-seated unfairness, disdain for precedent and appropriate procedure, inaccuracies, and substantive legal errors, that all or most of which deficiencies presumptively should have been apparent to the highest court of a state. While the court's intentions

[40] Even if this Court were to view the South Carolina Supreme Court's opinion to have been issued *sua sponte*, failure to accord a litigant notice and opportunity to be heard and to argue in opposition to the new grounds would also violate due process. See Jefferson Fourteenth Associates v. Wonetco de Puerto Rico, Inc., 695 F.2d 524, 527 (11th Cir. 1983); Fingler v. Marshall, 716 F.2d 1109, 1111 (6th Cir. 1983).

and motivations may never be known, the damage resulting from the opinion is not difficult to predict.

The harm which the supreme court's opinion has already caused is not limited to the violation of RFT's due process rights. Coming as it does from the highest court in the state, the opinion unfortunately stands as precedent in South Carolina for a number of erroneous substantive and procedural rules which will bind litigants and lower courts until they are corrected. Thus, because of the opinion, it is now the law in South Carolina that a party may not challenge the denial of a new trial where the grounds for the denial are not expressly mentioned in the trial judge's order, a rule which is directly contrary to current precedent.[41] The opinion also establishes as law the legally nonsensical proposition that compliance with SCUSA can be waived notwithstanding the fact that SCUSA contains an express prohibition against waiver of such compliance. The court's opinion creates dangerous precedent with respect to collateral estoppel and res judicata to the extent that it can be read as granting preclusive effect to jury verdicts and court decisions from which it is impossible to determine which issues were actually and necessarily decided by the jury or court. Also identified above are a number of other meritless procedural and substantive findings by the court which could be relied upon by, or serve to confuse, attorneys and judges in other

[41] See n.25 supra.

cases. The point, of course, is that there must be some sort of disincentive to the South Carolina Supreme Court which is strong enough to dissuade it from issuing similar damaging opinions in the future.

Assuming that the opinion is not a once-in-a-century aberration, but is an example of a type of improper judicial decision-making which may occur from time-to-time, it *deserves* to be addressed by this Court. Granting certiorari in this case and issuing a strongly worded decision reversing the South Carolina Supreme Court would insure that the bar is aware that there are means by which a state's highest court may be held accountable when it tramples a litigant's federal constitutional rights, even when non-federal issues are being decided. As well, such an opinion could serve as a disincentive to state courts to engage in fundamentally unfair decision-making, while at the same time serving as an incentive for them to faithfully honor their obligation to decide cases strictly in accordance with applicable law, proven facts, and court rules. That obligation was not honored by the South Carolina Supreme Court in this case for reasons known only to it.

In the final analysis, RFT finds itself in the same position as the petitioner in *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), where the Court recognized:

> The trial court could have fully accorded this right [to an opportunity to be heard] to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean.

> Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place.

As in *Armstrong*, the only way RFT can be returned to the position which the Fourteenth Amendment guarantees to it is for the decision below to be reversed.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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