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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

Appellate Case No.: 2022-000556

JBCM Holdings, d/b/a Goodfellas Cabaret, Cheetah Charleston Gentlemen's Club & Generation X Cabaret, Appellants,

v.

Carolina Coin Amusement, LLC, and Ronald J. Davis, Respondents.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

This breach of contract, fraudulent inducement, and conversion action was filed in the Charleston County Court of Common Pleas on August 24, 2021 and can be identified as Civil Action No. 2021-CP-10-03905. The Appellants allege the Respondents were negligent in causing significant monetary losses due to their breach of contract and willful and intentional malice with regard to their contractual obligations.

This appeal results from the dismissal of the Appellants' case by the Honorable Clifton Newman, on March 31, 2022. Specifically, Appellants assert that Judge Newman erred in incorrectly interpreting the Statute of Frauds (S.C. Code §32-3-10), not allowing the Appellants to amend their Complaint, not allowing the completion of discovery, and that he abused his discretion in dismissing the Appellants' case.

FACTS

In 2015, the parties entered into an agreement wherein the Respondents' ATM machines would be used at Appellants' businesses located in North Charleston, South Carolina, and the Respondents would pay Appellants a percentage of the portion of the funds processed through said ATM machines at Appellants' business locations. The percentage payout is set internally on the machine and the Appellants had no access to the numbers to determine if the agreed-upon percentage was being paid. The Appellants relied on the Respondents to pay in accordance with their agreement. Respondents made payments every month and represented those payments were made pursuant to the agreed-upon terms.

Around 2018, the Appellants began to hear from others who had contracted with the Respondents that there were some questionable business practices by the Respondents. The Appellants began asking for printouts from the machines to verify that the amounts paid to the Appellants were consistent with the agreed-upon percentage. Respondents refused to provide said proof. The Appellants then hired an outside group to run reports on the ATM machines in 2018 and discovered the Respondents were shorting the numbers.

The Appellants thereafter confronted the Respondents and Respondent Ronald Davis admitted he had, unilaterally and without notice, changed the percentage and that he was keeping the Appellants' money. Documentation from Venco, the processor of the ATM machine transactions, shows that the Respondents owe the Appellants approximately $207,736.00. The Respondents have failed and continue to fail to pay any of the monies owed to the Appellants.

ARGUMENTS

I. BECAUSE THE CONTRACT COULD HAVE BEEN PERFORMED WITHIN ONE YEAR, THE COURT ERRED IN DISMISSING THE APPELLANTS' CASE PURSUANT TO THE STATUTE OF FRAUDS (S.C. CODE §32-3-10).

"[T]he Statute of Frauds requires that a contract that cannot be performed within one year be in writing and signed by the parties." Davis v. Greenwood Sch. Dist. 50, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005) (citing S.C. Code §32–3–10 (1991). If there is a possibility that a contract might be performed within one year, the statute of frauds is not a bar to enforcement of the contract. Springob v. Univ. of S.C., 407 S.C. 490, 757 S.E.2d 384 (S.C. 2014) (citing Roberts v. Gaskins, 327 S.C. 478, 484, 486 S.E.2d 771, 774 (Ct.App.1997). In other words, the Statute of Frauds applies *only* to contracts which are impossible of performance within one year Joseph v. Sears Roebuck & Co., 224 S.C. 105, 77 S.E.2d 583 (1953) (emphasis added) (finding an oral warranty of a pressure cooker was possible of performance within one year, thus removing it from the purview of the Statute of Frauds). A contract having a contingency which may occur within the year need not be supported by a written document. *Id.* at 111, 77 S.E.2d at 586. If there is a possibility of performance within a year, the contract is not barred by the Statute of Frauds. *Id.* The fact that performance within a year is highly improbable or not expected by the parties does not bring a contract within the scope of this clause. Roberts v. Gaskins, 327 S.C. 478, 486 S.E.2d 771 (S.C. App. 1997) (citing Joseph at 111, 77 S.E.2d 583).

In the instant matter, the parties agreed that the Respondents' ATM machines would be used at Appellants' businesses and the Respondents would pay Appellants a percentage of the portion of the funds processed through those machines. If at any point either party was dissatisfied with the arrangement, they could end the contract. There is and was nothing indicating this arrangement had to be in place for at least a year and therefore, innately had a countless number of

contingencies that could lead to the contract being completed within a year. For example, if the Appellants had found that Respondents were shorting them in the first six months (as opposed to three years), the contract would have been terminated at that time. Similarly, if the Respondents did not think Appellants' establishments were generating enough revenue to sustain the agreement, they could have terminated the agreement at any time – including in less than a year. Because the contract could have been terminated at any time, for any reason, by any party, the statute of frauds is inapplicable.

However, even if this Court were to agree with the Respondents' contention that the subject contract could not be completed within a year, there are still exceptions that would exempt the parties' agreement from the requirements of the statute of frauds. For example, "[u]nder the statute of frauds, the form of the writing is not material, and may be shown entirely by written correspondence...." *Barr v. Lyle*, 263 S.C. 426, 430, 211 S.E.2d 232, 234 (S.C. 1975) (citing *Speed v. Speed*, 213 S.C. 401, 408, 49 S.E.2d 588, 591 (1948)). Whether or not there were written correspondence sufficient to constitute "a writing" is an issue that would be addressed through the discovery phase of litigation, which has not yet occurred (*see Infra.* Argument III). Similarly, an oral contract accompanied by part performance may remove it from the statute of frauds. *See Settlemeyer v. McCluney, 359 S.C. 317, 596 S.E.2d 514* (S.C. App. 2004); *Gibson v. Hrysikos*, 293 S.C. 8, 13-14, 358 S.E.2d 173, 176 (Ct. App. 1987). Again, whether or not performance of the contract had begun is a factual question, appropriate for development in discovery, which would make dismissal on a Motion to Dismiss pursuant to 12(b)(6) inappropriate.

II. BECAUSE THE COURT DENIED APPELLANTS' REQUEST FOR LEAVE TO AMEND THEIR COMPLAINT TO CURE PURPORTED DEFICIENCIES RELATED TO THE STATUTE OF LIMITATIONS (S.C. CODE §15-3-530) AND STATUTE OF FRAUDS (S.C. CODE §32-3-10) AND SPECIFIC EVIDENCE WAS PRESENTED AT THE HEARING THAT SHOWED JUSTICIBLE ISSUES, DISMISSAL OF THE CASE WAS IMPROPER.

The court "should freely give leave when justice so requires" Fed. R. Civ. P. 15(a)(2). Trial courts have been instructed that "this mandate is to be heeded." *Foman v. Davis,* 371 U.S. 178, 182 (1962). The "right" to amend is broad; it encompasses the right to make "simple changes in phraseology as well as to add a new cause or theory of action" *Farrell v. Hollingsworth,* 43 F.R.D. 262, 363 (D.S.C. 1968). Indeed "[i]f the underlying facts or circumstances relied upon by a Plaintiff may be a proper subject for relief, he ought to be afforded an opportunity to test his claim on the merits." *Pittston Co. v. United States,* 199 F.3d 694, 705 (4th Cir. 1999). Moreover, courts regularly allow Plaintiffs to amend to "amplify" previously alleged claims. See 6 Wright & Miller, Federal Practice & Procedures §1474, n9 (1990). The right to amend is so broad that "leave to amend a pleading should be denied *only when* the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile". *Edwards v. City of Goldsboro,* 178 F.3d 231, 242 (4th Cir. 1999) (quoting *Johnson v. Oroweat Foods Co.,* 785 F.2d 503, 509 (4th Cir. 1986) (emphasis in original).

"When a trial court finds a complaint fails 'to state facts sufficient to constitute a cause of action' under Rule 12(b)(6), the court should give the plaintiff an opportunity to amend the complaint pursuant to Rule 15(a) before filing the final order of dismissal." *Foman, Supra.* It is well-founded law that a trial court has erred when it fails even to consider allowing a Plaintiff to amend its complaint. *See Skydive Myrtle Beach, Inc. v. Horry Cnty.*, 426 S.C. 175, 826 S.E.2d 585 (S.C. 2019); *Patton v. Miller*, 420 S.C. 471, 804 S.E.2d 252 (S.C. 2017). "Under Rules

12(b)(6) and 15(a), the circuit court may not dismiss a claim with prejudice until the plaintiff has been given a meaningful chance to amend the complaint, and after considering the amended pleading, the court is certain there is no set of facts upon which relief can be granted." *Patton, Id.* at 189.

Here, leave to amend the Complaint should have been granted because: (1) the Appellants sought to clarify the date the Appellants discovered the improper conduct of the Respondents; and (2) the Respondents have failed to articulate a legitimate reason the amendment should not be allowed.

A. Had the Court allowed Appellants to amend their Complaint, it would have resolved any issues related to the Statute of Limitations and provided a justiciable claim.

The Appellants' Complaint contains three causes of action: (1) breach of contract; (2) fraud in the inducement; and (3) conversion. The statute of limitations for breach of contract is controlled by S.C. Code §15-3-530(1) (providing that "an action upon contract, obligation, or liability, express or implied" must be brought within three years of the time the cause of action accrues); the statute of limitations for fraud in the inducement is controlled by S.C. Code §15-3-530(7) (providing that a Plaintiff has three years to bring a claim for fraud and further, that "any action for relief on the ground of fraud in cases which prior to the adoption of the Code of Civil Procedure in 1870 were solely cognizable by the court of chancery, the cause of action in the case not considered to have accrued until the discovery by the aggrieved party of the facts constituting the fraud"); and the statute of limitations for Appellants' conversation claim is controlled by S.C. Code §§15-3-530(4) and 15-3-530(5) (similarly stating that the statute of limitations is three years).

In South Carolina, the statute of limitations for causes of action for fraud is governed by the "discovery rule," and does not begin to run until discovery of the fraud itself or of "such facts as would have led to the knowledge thereof, if pursued with reasonable diligence." *Grayson v. Fidelity Life Ins. Co. of Philadelphia*, 114 S.C. 130, 135, 103 S.E. 477 (1920), quoting *Smith v. Linder*, 77 S.C. 535, 58 S.E. 610 (1907); *see also Burgess v. The Am. Cancer Soc'y*, 386 S.E.2d 798, 799 (S.C. Ct. App. 1989). The discovery rule also applies to breach of contract actions. *Santee Portland Cement Co. v. Daniel Int'l Corp.*, 299 S.C. 269, 384 S.E. 2d 693 (1989). In applying the discovery rule, inquiry is focused upon whether the complaining party acquired knowledge of any existing facts "sufficient to put said party on inquiry which, if developed, will disclose the alleged fraud." *Walter J. Klein Co. v. Kneece*, 239 S.C. 478, 123 S.E.2d 870 (1962), citing *Tucker v. Weathersbee*, 98 S.C. 402, 82 S.E. 638 (1914). Under this objective test, one is charged with discovery when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim might exist. *Cline v. JE Faulkner Homes, Inc.*, 359 S.C. 367, 597 S.E.2d 27 (S.C. App. 2004) (citing *Austin v. Conway Hosp., Inc.*, 292 S.C. 334, 339, 356 S.E.2d 153, 156 (Ct. App. 1987)).

In this case, although the Appellants entered into the contract with Respondents in 2015, they were not aware of any facts giving rise to a claim of breach, fraud, or conversion until 2018. Specifically, because Respondents had sole control over the internal processes of the machines at issue, there was no way the Appellants could have learned of these facts until and unless they were tipped off by outside sources. As indicated in the Affidavit of W. Scott Hendrix (R. p. _____) and raised at the hearing (R. p. _____), it was not until 2018 that the Appellants discovered the Respondents were shorting the numbers. Because the Complaint in this case was filed in 2021, the amendment to include a discovery date of 2018 would have clarified that

Appellants' claims do not run afoul of the statute(s) of limitations. In short, the date of the creation of the contract between the parties is immaterial. Pursuant to the discovery rule long recognized in South Carolina, the Appellants discovered facts giving rise to their claim in 2018, which would have provided an additional three (3) years before the expiration of the statute of limitations.

Additionally, the Respondents, by and through their own actions should be estopped from asserting any defense related to the statute of limitations. "A defendant is estopped to assert the statute of limitations defense against a plaintiff's claim if the defendant's conduct has induced the delay that otherwise would give operation to the statute." *Dillon County Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. at 218, 332 S.E.2d at 561; *Republic Contracting Corp. v. SCDHPT*, 332 S.C. 197, 503 S.E.2d 761 (Ct. App. 1998). A Defendant is estopped to assert the statute of limitations in bar of a plaintiff's claim when the delay that otherwise would give operation to the statute has been induced by the defendant's conduct. 53 C.J.S. Limitations of Actions §25 at 962-64 (1948). The doctrine is most clearly applicable where the aggrieved party's delay in bringing suit was caused the Defendant's intentional misrepresentation. *See T v. T.* 216 Va. 867, 224 S.E.2d 148, 152 (1976) (citing *United States v. Fidelity and Casualty Co. of New York*, 402 F.2d 893 (4th Cir. 1968)). North Carolina courts have also similarly held that "equity will deny the right to assert that defense when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith. *Nowell v. Great Atlantic & Pacific Tea Co.*, 250 N.C. 575, 108 S.E.2d 889, 891 (1959) (citing *McNeely v. Walters*, 211 N.C. 112, 189 S.E. 114, 115 (1937)).

Both in their Complaint (R. p. _____) and through the Affidavit of W. Scott Hendrix (R. p. _____), the Appellants clearly allege that they did not have access to the internal transaction

processes of the subject machines and therefore, were precluded from discovering impropriety on the part of the Respondents until a later date. Because Respondents' conduct kept the Appellants from discovering the pay shortages, they should be estopped from even raising a defense related to statute of limitations.

B. The Respondents have not articulated a legitimate reason as to why Appellants' request to amend should not be allowed.

"A trial court has discretion to deny a motion to amend if the party opposing the amendment can show a valid reason for denying the motion." *Skydive, Supra.* "Leave shall be freely given when justice so requires and does not prejudice the other party." *Skydive, Id.* The prejudice that Rule 15 "envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." *Pool v. Pool,* 329 S.C. 324, at 328–29, 494 S.E.2d at 823 (1998). "Prejudice occurs when the amendment states a new claim or defense which would require the opposing party to introduce additional or different evidence to prevail in the amended action." *Ball v. Canadian Am. Exp. Co.,* 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994). Ultimately, Rule 15 "strongly favors amendments and the court is encouraged to freely grant leave to amend." *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 717 (Ct. App. 2005). In addition, "the burden of establishing a reason for denying the motion is on the party opposing the amendment." *Skydive, Supra* (quoting *Forrester v. Smith & Steele Builders, Inc.,* 295 S.C. 504, 507, 369 S.E.2d 156, 158 (Ct. App. 1988)).

In this case, the Respondents did not articulate a legitimate reason basis refuting Appellants' request to amend and instead merely started that "we would object to that" because "they did not plead it properly." (R. p. _____). Therefore, the Respondents did not meet their burden of establishing a reason for denying Appellants' request to amend. Further, even if they had, the Respondents would not be able to show prejudice or any other basis which would have

given the Court cause to deny Appellants' request. The Amendment requested by the Appellants did not substantially change the nature of their underlying claims, nor did it deprive the Respondents of the opportunity to refute "new issues." The Appellants requested such amendment only to clarify the date of discovery of wrongdoing on the part of the Respondents.

The Respondents would have had a full and fair opportunity to explore details included in an amended complaint because discovery was not complete and no depositions had been taken at the time of the dismissal. Any amendment to the Complaint would not have required the Respondents to present additional or different evidence than what would have been presented in response to the Appellants' initial Complaint.

III. BECAUSE DISCOVERY HAD NOT BEEN COMPLETED, DISMISSAL OF THE APPELLANTS' CASE WAS PREMATURE.

"Generally, South Carolina courts favor deciding cases on the merits. *Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001) (noting South Carolina courts favor deciding cases on the merits rather than on technicalities)." *S. Support Servs., LLC v. S.C. Dep't of Health & Human Servs.* (South Carolina Administrative Law Court, 2017). The Fourth Circuit has "long adhered to "the sound public policy of deciding cases on their merits," *Colleton Preparatory Acad. Inc. v. Hoover Universal, Inc.*, 616 F.3d 413 (4th Cir. 2010); *Herbert v. Saffell*, 877 F.2d 267, 269 (4th Cir.1989) (quotation omitted); *Davis v. Williams*, 588 F.2d 69, 70 (4th Cir.1978); *Reizakis v. Loy*, 490 F.2d 1132, 1135 (4th Cir.1974), and not "depriving ... part[ies] of [their] 'fair day in court.' *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494, 504 (4th Cir.1977) (quoting *Gill v. Stolow*, 240 F.2d 669, 670 (2d Cir.1957) (Clark, J.)), cert. denied, 434 U.S. 1020, 98 S.Ct. 744, 54 L.Ed.2d 768 (1978)." "If the underlying facts or circumstances relied upon by a plaintiff may be proper subject of relief, he

ought to be afforded an opportunity to test his claim on the merits." *Foman, Supra*; *Patton, Supra.*

In this case, only the pleadings existed prior to the point of dismissal. The parties had answered no interrogatories nor requests for production and no parties or witnesses had been deposed. Respondents' motions were purely based on the Appellants' Complaint and the merits of the Appellants' claims were not even considered by the Court.

In addition, what little evidence did exist at the time of the hearing on Respondents' Motions to Dismiss showed that the Appellants' Complaint gave rise to justiciable issues. Specifically, the Affidavit of W. Scott Hendrix states not only that he discovered the breach of contract, fraud, and conversion by the Respondents in 2018, but also that Respondent Ronald Davis admitted that he had "unilaterally and without notice, changed the percentage and that he was keeping the Plaintiff's money." (R. p. _____).

It clear that because Appellants were not afforded a full and fair opportunity to conduct discovery and because evidence does exist showing a likelihood of success on the merits, the trial court erred in granting the Respondents' Motions to Dismiss.

IV. BECAUSE THE APPELLANTS PRESENTED JUSTICIBLE ISSUES, THERE WAS AN ABUSE OF DISCRETION IN THE DECISION TO DISMISS THE APPELLANTS' CASE.

The Supreme Court of South Carolina has ruled that a "circuit court erred by failing even to consider allowing [the plaintiff] to amend its complaint." *Skydive, Supra.* "...a circuit court's ruling on a Rule 15 motion to amend is within its discretion, [but] a court's failure to exercise its discretion is itself an abuse of discretion. *Patton, Supra*; *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (quoting *Samples v. Mitchell*, 329 S.C. 105, 114, 495 S.E.2d 213, 218 (Ct. App. 1997)). "Failure to exercise discretion amounts to an abuse of discretion." *Samples,*

Id.; Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) ("When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred."); *Balloon Plantation v. Head Balloons,* 303 S.C. 152, 155, 399 S.E.2d 439, 441 (Ct.App.1990) (quoting *State v. Smith,* 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) ("It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.")) A decision in and of itself does not show a judge exercised discretion. ("[T]he mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised. It should be stated on what basis that discretion was exercised.") *State, Id.*

Given the facts and procedural history as outlined above, it is abundantly clear not only that the dismissal of Appellants' case is unwarranted, but also that the trial judge abused his discretion by failing to consider Appellants' request to amend their Complaint.

CONCLUSION

The trial court erred in granting the Respondents' Motions to Dismiss and dismissing the Appellants' case without consideration of its premature posture of the case and Appellants' request for leave to amend their Complaint pursuant to Rule 15. The trial court further abused its discretion in ordering a dismissal. The Appellants have an absolute right to amend their Complaint (*see supra. Skydive*), but that right was denied by the trial judge. For these reasons, and due to the Court's error in dismissing this matter, this dismissal should be reversed and the case remanded.

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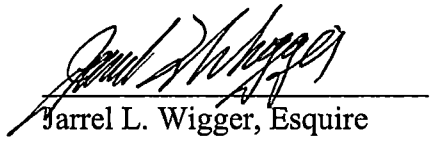
Respectfully submitted,



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v.

Carolina Coin Amusement, LLC, and Ronald J. Davis, Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief of the Appellants and Appellants' Designation of Matter to be included in the Record on Appeal on Carolina Coin Amusement, LLC and Ronald J. Davis, Respondents, by depositing a copy of the Motion in the United States Mail, postage prepaid, on July 25, 2022, addressed to Respondents' Attorney of record, Edward L. Phipps, Esquire, Mark R.H. Huber, Esquire, The Phipps Law Firm, 571 Savannah Hwy., Charleston, SC 29407.

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Appellate Case No. 2022-000556

Dear Ms. Kitchings:

Enclosed please find the Initial Brief of Appellants and Appellants' Designation of Matter. Additionally, I have enclosed the Proof of Service of same upon Counsel for the Respondent.

Thank you for your continued attention to this matter. Should you have any questions, please feel free to give me a call.

Respectfully,

Jarrel L. Wigger

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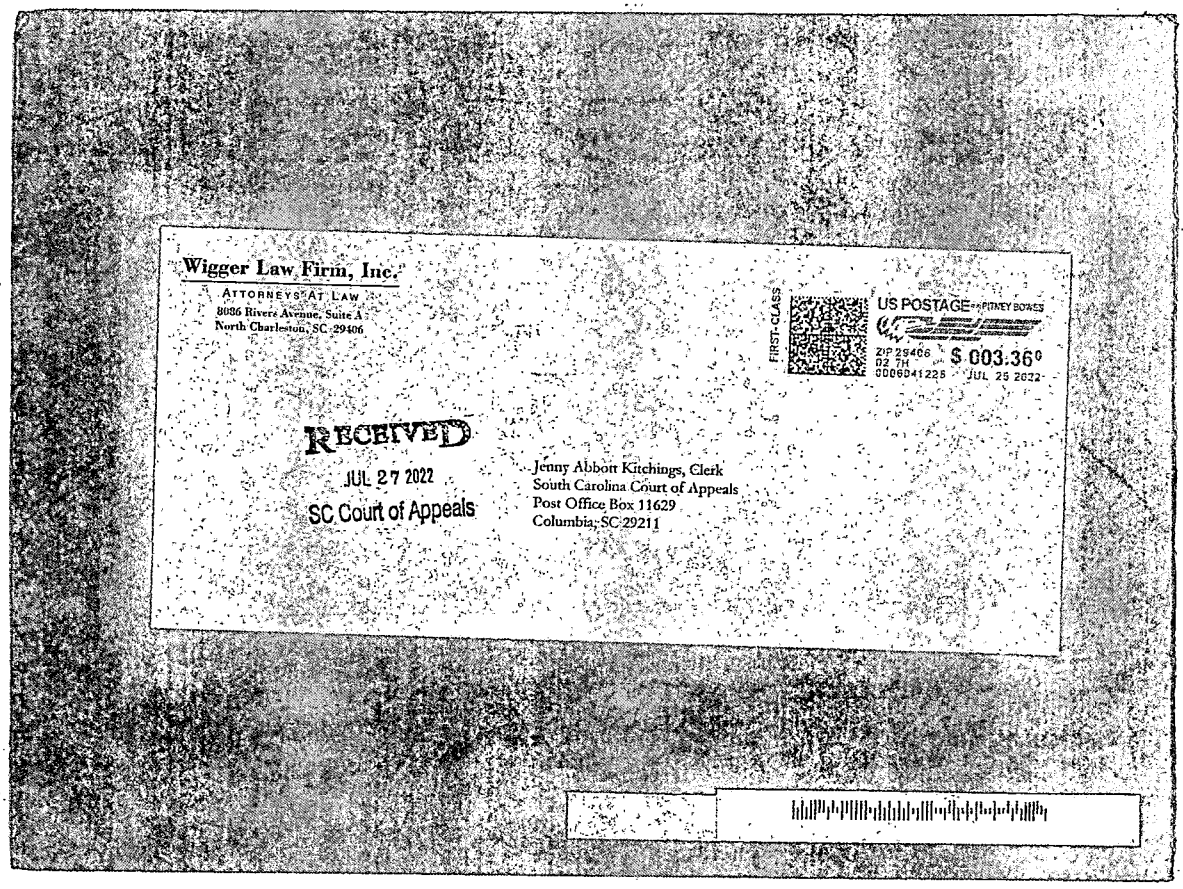

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