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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case No. 2019-CP-32-00607
Appellate Case No. 2022-000113

Pilot Travel Centers LLC, d/b/a Pilot Flying J, Myra Lashay Dixon, T.J. Jarre Bates, and Rico Shamar Sellers, Of Which Pilot Travel Centers LLC and Myra Lashay Dixon are Respondents, ... Respondents,

v.

Ray D. Fowler, ... Appellant.

FINAL BRIEF OF RESPONDENTS

HOWSER, NEWMAN & BESLEY, LLC

/s/ Andrew L. Hethington
Andrew L. Hethington, Esq.
R. Davis Howser, Esq.
1508 Washington Street
Columbia, SC 29201
Phone: (803) 758-6000
ahethington@hnblaw.com
rdhowser@hnblaw.com
Attorneys for Respondents

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STATEMENT OF THE CASE

This is an appeal by the plaintiff, Ray Fowler ("Fowler" or "Appellant"), from the trial court's grant of summary judgment for defendants Pilot Travel Centers LLC ("Pilot") and Myra Dixon ("Ms. Dixon") (collectivity "Respondents"). Mr. Fowler sued Respondents in negligence for injuries he sustained during a fight in the parking lot of a Pilot gas station the morning of May 20, 2018. (R. p. 31)

Mr. Fowler filed suit on February 7, 2019. (R. p. 24) An Amended Summons and Complaint were filed and properly served on December 19, 2019, naming Pilot, Ms. Dixon, Rico Sellers, and T.J. Bates. (R. pp. 29–34) After discovery, Pilot and Ms. Dixon moved for summary judgment. Respondents argued that their duty did not extend to protect Mr. Fowler from the inherent risks of fighting. (R. p. 95) Respondents also argued that Mr. Fowler's negligence claims were barred under secondary implied assumption of the risk, because he voluntarily exposed himself to a subjectively known danger by choosing to leave a place of safety and join the fight. (R. p. 98) A Webex hearing was held before Judge Goldsmith on October 21, 2021, and Respondents' motion for summary judgment was granted on October 29, 2021. The Court held that Respondents did not owe Appellant a duty of care to protect against the risk of severe bodily injury inherent in fighting. (R. p. 6) Additionally, the Court held, even assuming a duty was owed, summary judgment was still warranted because Appellant knowingly exposed himself to the dangers of bodily harm by voluntarily joining the subject fight. (R. p. 11) Appellant filed a subsequent motion to alter or amend, which was denied on January 6, 2022. This appeal follows.

STATEMENT OF FACTS

Pilot owns and operates a gas station on Charleston Highway in Cayce, South Carolina. Ms. Dixon was an employee of Pilot, and manager of the gas station. On the morning of May 20,

2018, a group of people came to the gas station at varying times—among them were two off-duty employees of Pilot, an unidentified man in a green shirt, and a several women. (R. p. 121) The group was at a Wendy's restaurant located within the Pilot. *Id*. While in the Wendy's area, the man in the green shirt threw something at the group of women, causing a disturbance. (R. p. 54, line 12) (R. p. 212)

After learning of the disturbance, Ms. Dixon called the police and told the group to leave the premises. (R. p. 121, line 6) The two off-duty Pilot employees, T.J. Jarre Bates ("Bates") and Rico Shamar Sellers ("Sellers") exited the gas station, followed shortly by Ms. Dixon. (R. p. 122, line 10) While outside of the front entrance to the gas station, Ms. Dixon continued to tell Bates and Sellers to leave the premises, and that law enforcement was coming. (R. p. 123, line 2) While Ms. Dixon was instructing Bates and Sellers to leave the premises, plaintiff Fowler was nearby smoking a cigarette. (R. p. 169, line 14 – p. 170, line 15) On that morning, Mr. Fowler accompanied a co-worker ("Farmer") to the gas station on their way to their employment at a steel company. (R. p. 164) He did not make any purchases that morning, nor did he enter the building. (R. p. 166, lines 5–22) Mr. Fowler witnessed Ms. Dixon instruct Bates and Sellers "very forcefully" to leave the premises. (R. p. 178, lines 18–22) Soon after, Bates attempted to force his way past Ms. Dixon to reenter the gas station. (R. p. 122, line 21– p. 123, line 23) Ms. Dixon grabbed Bates' shirt to stop him from entering, and a fight broke out between Bates and Dixon. (*Id*.)

Mr. Fowler testified that he was getting into Mr. Farmer's vehicle on the passenger side when the fight began. (R. p. 199, lines 10–18) He joined in the fight after seeing Sellers draw back his fist as if to strike a female Pilot employee. (R. pp. 182–185) Mr. Fowler "was raised to not let no man hit a woman," and got involved in the fight because "there was women involved

against men." (R. p. 110, lines 16–25) Mr. Fowler ran around Mr. Farmer's vehicle and tackled Sellers. (R. pp. 183 and 199) Sellers broke Mr. Fowler's leg in the ensuing brawl. (R. pp. 182–185; R. p. 152) Mr. Fowler was not threatened or attacked prior to joining the fight, nor was he encouraged by Ms. Dixon or any Pilot employee to join in. (R. p. 184, line 2 – p. 185, line 3; R. p. 208, lines 21–23). Mr. Fowler testified that he made the decision to join the fight. (R. pp. 184–185) Mr. Fowler knew the risk of getting hurt in the fight. (*Id*.) Nevertheless, in his own words: "I didn't care if I got hurt. The women weren't going to." (R. p. 184, lines 17–18)

STANDARD OF REVIEW

"When reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP . . . ." *Stokes-Craven Holding Corp. v. McKenzie*, 416 S.C. 517, 524, 787 S.E.2d 485, 489 (2016) (citing Rule 56(c), SCRCP; *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002)). Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Rule 56(c), SCRCP; *See Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact for trial. Rule 56 mandates the entry of summary judgment after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial. *See Carolina Alliance for Fair Employment v. S.C. Dept. of Labor, Licensing, & Regulation*, 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct. App. 1999).

In considering whether summary judgment is appropriate, the "court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party."

City of Columbia v. Town of Irmo, 316 S.C. 193, 195, 447 S.E.2d 855, 856 (1994). "For purposes of summary judgment, an issue is 'material' if the facts alleged are such as to constitute a legal defense or are of such a nature as to affect the result of the action." *Nelson v. Piggly Wiggly Center, Inc.*, 390 S.C. 382, 388, 701 S.E.2d 776, 779 (Ct. App. 2010) (quoting *PPG Indus., Inc. v. Orangeburg Paint & Decorating Ctr., Inc.*, 297 S.C. 176, 179, 375 S.E.2d 331, 332 (Ct. App. 1988)). A plaintiff, however, cannot create a genuine issue of fact through mere speculation. *See Hoard ex rel. Hoard v. Roper Hosp. Inc.*, 387 S.C. 539, 549, 694 S.E.2d. 1, 6 (2010). Importantly, the nonmoving party may not rest on the allegations of the complaint, without more, to overcome the motion but must demonstrate by other evidence that a genuine issue of fact exists. *See Klippel v. Mid-Carolina Oil, Inc.*, 303 S.C. 127, 399 S.E.2d 163 (Ct. App. 1990); *see also Dyer v. Moss*, 284 S.C. 208, 325 S.E.2d 69 (Ct. App. 1985).

ARGUMENT

I. BECAUSE RISK OF SEVERE BODILY INJURY IS INHERRENT TO FIGHTING, MR. FOWLER ASSUMED THAT RISK AND RESPONDENTS' DUTY DID NOT EXTEND TO PREVENT MR. FOWLER'S INJURIES UNDER THE DOCTRINE OF PRIMARY IMPLIED ASSUMPTION OF THE RISK.

In granting summary judgment for Pilot and Ms. Dixon under primary implied assumption of the risk, the trial court held "no duty of care was owed to protect Plaintiff from the risk of severe bodily injury inherent in a fight when he voluntarily decided to enter altercation after Defendant Bates attacked Defendant Dixon and assume the risk of his injury." (R. p. 6)

Primary implied assumption of the risk arises when "the plaintiff impliedly assumes those risks that are *inherent* in a particular activity." *Davenport v. Cotton Hope Plantation Horizontal Prop. Regime*, 333 S.C. 71, 80-1, 508 S.E.2d 565, 570 (1998). The "inherent" risks of an activity "should be determined 'by examining the objective factors . . . not on the subjective expectations of the parties.'" *Cole v. Boy Scouts of America*, 397 S.C. 247, 253, 725 S.E.2d 476, 479 (2011)

(quoting *Landrum v. Gonzalez,* 257 Ill. App. 3d 942, 629 N.E.2d 710, 714 (1994)). Primary implied assumption of the risk "is not a true affirmative defense, but instead goes to the initial determination of whether the defendant's legal duty encompasses the risk encountered by the plaintiff." *Id*. (citing Prosser & Keeton, §68 at 496). Where no legal duty is recognized, judgment as a matter of law is appropriate. *See Hurst v. East Coast Hockey League,* 371 S.C. 33, 37, 637 S.E.2d 560, 562 (2006).

In *Hurst v. East Coast Hockey League* ("*Hurst*"), the South Carolina Supreme Court affirmed the trial court's grant of summary judgment under the doctrine of implied primary assumption of the risk. 371 S.C. 33, 637 S.E.2d 560 (2006). In that case, plaintiff was a spectator at a professional hockey game. *See id*. at 35-6, 637 S.E.2d at 561. While watching warmups, a puck entered the stands and struck plaintiff in the face; plaintiff sued alleging negligence on the part of the hockey league. *See id*. The court found that defendant did not owe plaintiff a duty to protect him from flying hockey pucks because that risk "is inherent to the game of hockey and is also a common, expected, and frequent risk of hockey." *Id*. at 38, 637 S.E.2d at 562-3.

In another case, *Cole v. Boy Scouts of America* ("*Cole*"), the South Carolina Supreme Court affirmed the trial court's grant of summary judgment in a similar analysis to that in *Hurst*. 397 S.C. 247, 253, 725 S.E.2d 476, 479 (2011). In that case, plaintiff was playing catcher in a pick-up game of softball with his son's Cub Scout troop. *See Cole*, at 249-50, 725 S.E.2d 476, 477. Plaintiff's injury occurred when another father rounded third base too quickly and failed to stop before reaching home, causing a collision at home plate with plaintiff. *See id*. Plaintiff suffered serious trauma from the collision and sued the landowner and Cub Scouts. *See id*. In upholding the circuit court's grant of summary judgment, the Supreme Court noted that

collisions at home plate are "common" in softball and thus were an inherent risk assumed by plaintiff. *Id*. at 254, 725 S.E.2d 476, 480. The court also rejected the notion that the doctrine should be applied differently as to amateur or professional activities. *See id*.

Notably, while there are no South Carolina cases directly on point, other courts have found a plaintiff's decision to voluntarily join a fight carries the assumed risk of severe bodily injury sufficient to bar a negligence suit. For example, Georgia courts have held "that an adult of ordinary intelligence assumes the risk of possible injury when he deliberately and voluntarily joins in a fight, or enters into a fight for the purpose of breaking it up." *Carter v. Scott*, 320 Ga. App. 404, 408, 750 S.E.2d 679, 681 (2013) (citing *Cornelius v. Morris Brown College,* 299 Ga. App. 83, 86(3), 681 S.E.2d 730 (2009); *see also Fagan v. Atnalta, Inc.,* 189 Ga. App. 460, 462, 376 S.E.2d 204 (1988)).

Here, the trial court did not err in applying the law of primary implied assumption of the risk. As the trial court correctly acknowledged, fighting carries an inherent risk—if not expectation—of severe bodily injury. (R. p. 10) In a fight, the intent of the parties involved is to inflict harm upon the other by physically striking them. Violent contact is unavoidable in a fight; the risks of bodily injury during a fight are known to all. Just as a hockey spectator should expect errant pucks to fly into the stands (*Hurst*), or a softball catcher should expect potential collisions at home plate with a sprinting baserunner (*Cole*), a fighter should expect hitting, kicking, and other physical blows intended to cause bodily harm. When Mr. Fowler fought, he did so assuming the inherent risks of severe bodily injury; the scope of Respondents' duty of care did not extend to protect him from those inherent risks.

Appellant argues that the trial court erred in "finding that Respondents owed no duty" citing to *Easterling v. Burger King* for the proposition that Respondents owed him a duty to take

reasonable care to protect against dangerous conditions on the premises. (Brief of App. pp. 7-8) Appellant argues that an issue of material fact remains whether Respondents were negligent in "allow[ing] the two drunken off duty employees to hang out and linger on premises from 6:35 a.m. until finally calling the police at 6:58 a.m."

Respondents do not dispute that Appellant was owed a duty at common law as either an invitee or licensee. The *scope* of that duty, however, does not extend to protect against the inherent risk of injury assumed when participating in a fight. Defendants in *Hurst* and *Cole* undoubtedly owed plaintiffs a duty of care but, just like the present case, those duties of care did not extend to protect against risks of injury inherent to the activities joined in by the plaintiffs. This was the holding of the trial court. (R. p. 11; "the duty of care *did not extend* to prevent his injuries….") Moreover, Appellant's focus on events prior to the fight is not material to the issue of whether its willing participants impliedly assumed risk of bodily injury. Appellants' reliance on *Easterling* is also misplaced. That case involved an invitee whose nose was randomly and viciously bitten off in an unprovoked attack. *Easterling v. Burger King Corp.*, 416 S.C. 437, 445-46, 786 S.E.2d 443 (Ct. App. 2016). Assumption of the risk was not an issue in that case, as plaintiff was not a voluntary participant in the altercation.

Appellant next argues "the lower court misapplied primary implied assumption of the risk" as his activity "was stopping at a convenience store," which does not carry the inherent risk of "being confronted with a drunken off duty employee beating on the duty manager." (Brief of App. pp. 9-10) He further attempts to distinguish *Hurst* and *Cole*, arguing fights are not inherent to stopping at a convenience store in the way errant pucks and home plate collisions are to the sports of hockey and softball. (Brief of App. p. 10).

Of course, bodily injury is not an anticipated or inherent risk of stopping at a convenience store. It is, however, an expected and inherent risk when fighting. It was Mr. Fowler's participation in the activity of fighting which carried the inherent risk of bodily injury. Mr. Fowler's decision to fight is analogous to plaintiff Hurst's choice to watch a hockey game behind the goal, or plaintiff Cole's choice to stand on home plate with a baserunner barreling down the third base line. Indeed, Mr. Fowler's participation in what can be fairly described as a "street fight" surely carried an even greater objective risk of injury than watching a hockey game or playing softball.

Therefore, the trial court correctly applied primary implied assumption of the risk in finding that Respondents' duty of care did not extend to protect Appellant from the inherent risk of bodily harm when fighting.

II. BECAUSE MR. FOWLER HAD THE SUBJECTIVE UNDERSTANDING THAT HE COULD BE HURT, LEFT A PLACE OF SAFETY, AND WAS NOT ENDAGERED OR SOLICITED PRIOR TO JOINING THE FIGHT, HIS NEGLIGENCE CLAIMS ARE BARRED UNDER SECONDARY IMPLIED ASSUMPTION OF THE RISK.

The trial court held, even assuming Respondents owed a duty, that Appellant's claims should be barred under secondary implied assumption of the risk "because [Appellant's] voluntary choice to join the fight carried a known risk of sustaining severe bodily harm which far exceeded any slight negligence on the part of [Respondents]." (R. p. 11)

Secondary implied assumption of the risk focuses on the actions of the plaintiff, asking whether they "knowingly encountered a risk created by the defendant's negligence." *Davenport*, at 82, 508 S.E.2d 565, 571. Secondary implied assumption of the risk applies where "defendant's acts alone creat[e] the danger and caus[e] the accident with the plaintiff's act being that of voluntarily exposing himself to such an obvious danger with appreciation thereof which resulted

in the injury." *Cunningham ex rel. Grice v. Helping Hands, Inc.*, 352 S.C. 485, 492, 575 S.E.2d 549, 552 (2003).

Since the adoption of comparative negligence, secondary implied assumption of the risk remains as a viable legal doctrine. *See Singleton v. Sherer*, 377 S.C. 185, 695 S.E.2d 196 (Ct. App. 2008). Although secondary implied assumption of the risk is no longer a per se complete bar to recovery post-comparative negligence, summary judgment is still appropriate where, as a matter of law, a plaintiff's assumption of risk was greater than any negligence on the part of the defendant. *Id.* at 207, 659 S.E.2d at 207 ("We must determine whether [plaintiff]'s assumption of risk was, as a matter of law, greater than any negligence attributable to [defendant] and the more determinative factor in causing his injuries.") The four elements to establish assumption of the risk are: (1) the plaintiff must have knowledge of the fact constituting a dangerous condition; (2) the plaintiff must know the condition is dangerous; (3) the plaintiff must appreciate the nature and extent of the danger; and (4) the plaintiff must voluntarily expose himself or herself to the danger. *Id*. (citing *Davenport*, 333 S.C. at 78-79, 508 S.E.2d at 569).

In *Singleton v. Sherer*, the South Carolina Court of Appeals held that a plaintiff's voluntary choice in confronting a disheveled raccoon, which caused injuries after an attack, warranted application of secondary implied assumption of the risk. *See Singleton v. Sherer*, 377 S.C. 185, 695 S.E.2d 196 (2008). In that case, plaintiff, a licensee, was bitten by a domesticated raccoon while at the home of the defendants. *See id*. at 193, 695 S.E.2d at 200. Plaintiff was asked by his father to meet him at the home of the defendants because the raccoon, which appeared in a "disheveled" condition, bit someone. *Id*. Plaintiff, going against the directions of his father, went into defendant's home alone and attempted to soothe the raccoon, which promptly bit plaintiff on the hand. *Id*. Plaintiff sued defendant homeowners, and the trial court

granted defendant's motion for summary judgment due to, among other things, plaintiff's assumption of the risk in confronting the disheveled raccoon. *Id*. In holding that plaintiff's suit was barred under assumption of the risk, the court found that plaintiff "voluntarily exposed himself to a known danger which he understood and appreciated" and admitted was "pretty stupid" in confronting the raccoon. *Id*. at 207, 659 S.E.2d at 208. The court found that plaintiff's suit was barred as his "negligence exceeded fifty percent." *Id.*

Here, the trial court did not err in holding Appellant's voluntary choice to join the fight knowing the risk of bodily harm far exceeded any slight negligence on the part of Respondents. There is no doubt that Appellant knew that a violent fight was occurring prior to his intervention. Appellant testified that prior to the fight, he witnessed sellers "saying he was going to beat the cops" and "smelled alcohol on him." (R. p. 183, lines 8–10) Appellant saw Bates on top of Ms. Dixon, and several Pilot employees trying to pull Bates off of Ms. Dixon, prior to intervening. (R. p. 188, lines 7–12) Indeed, what eventually led to Appellant's joining the fight was seeing Sellers grab a female employee and "dr[a]w back to hit her." (R. p. 182)

Appellant testified that he was not attacked prior to joining the fight, and that it was his decision to join knowing the risks of doing so:

> **Q: Okay. Prior to tackling Mr. Sellers, did he threaten you?**
> A: No, sir.
> **Q: Okay. Prior to attacking Mr. Sellers, did he attack you in any way?**
> A: No, sir.
> **Q: All right. Prior to attacking Mr. Sellers, did Mr. Bates threaten you?**
> A: No, sir.
> **Q: Prior to tackling Mr. Sellers, did Mr. Bates attack you in any way?**
> A: No, sir.
> **Q: Okay. All right. You made the decision to get involved in the altercation, correct?**
> A: When they were harming ladies, yes, sir.
> **Q: Okay. And you knew that you can get hurt when you decided to get involved in that altercation, correct?**
> A: I didn't care if I got hurt. The women weren't going to.

Q: But you knew that was a risk, right?
A: Yes, sir.
Q: Okay. And you decided to get involved in the altercation understanding the risk of getting injured, correct?
A: I really didn't think of it that way.
Q: But you knew you could get hurt by getting involved in a -- in a fight?
A: I -- yes, sir. I'm intelligent. I know you can get hurt in a fight.

(R. p. 183, line 24 – p. 185, line 3) Additionally, Appellant was away from the fight an in a place of safety before intervening. He was on the passenger side of Mr. Farmer's vehicle when he noticed the fight, which was taking place near the store's front entrance on the driver's side of Mr. Farmer's car. (R. p. 199, lines 13–18) Had Appellant simply stayed on the passenger side of Mr. Farmer's vehicle and not intervened, he would not have been injured or otherwise involved in the fight. Nevertheless, Appellant "didn't care if [he] got hurt. The women weren't going to." (R. p. 184, lines 17–18)

Appellant's situation is analogous to that of plaintiff in *Singleton*. Appellant here left a place of safety and voluntarily confronted the known risks of fighting in the same way plaintiff in *Singleton* entered the house to tame the racoon. Appellant here also had a subjective understanding of the dangers of fighting, just as the plaintiff in *Singleton* knew that confronting a "disheveled" racoon carried the risk of bodily injury. The inescapable conclusion is that Appellant's voluntary decision to join the fight and encounter risk of severe bodily injury, as noble it may have been in his mind, was by far the "more determinative factor in causing his injuries." *Singleton*, at 207 695 S.E.2d at 207.

Appellant primarily focuses on Respondents' alleged failure "to remedy the situation" earlier. (Brief of App. p. 8) As the trial court recognized, Ms. Dixon and the Pilot staff went to incredible lengths to protect customers the morning of the fight. (R. p. 13) Ms. Dixon promptly asked the group to leave the premises and called the police when she was notified of a

confrontation between the man in the green shirt and the group of girls. (R. p. 121) Ms. Dixon successfully ejected Bates and Sellers (in addition to the girls and man in the green shirt) from the gas station prior to the fight. (*Id*.) She called the police—and told Bates and Sellers that the police were on the way—prior to the fight occurring. (R. pp. 122–123) And when Bates attempted to force his way back into the gas station, Ms. Dixon physically prevented him from reentering. (*Id*.) Moreover, Bates and Sellers' actions inside the gas station that morning did not give Ms. Dixon any reason to intervene earlier than she did. Indeed, the confrontation that caused Ms. Dixon to call the police was between the man in the green shirt and the girls—nevertheless, Ms. Dixon took the added step of asking everyone to leave the premises. (R p. 121) Thus, the evidence establishes, as a matter of law, that Respondents acted eminently reasonable.

Next, Appellant seeks to distinguish this case from *Singleton* arguing that this was a sudden, unexpected occurrence. (Brief of App. p. 11) Appellant's own testimony, however, shows that he observed the confrontation for some time before it became physical. Appellant witnessed Ms. Dixon "very forcefully" tell Bates and Sellers to leave prior to the fight beginning. (R. p. 178, lines 18–22) Appellant even decided not to call 911 prior to the fight because "it wasn't none of [his] business at the time," and he "was going to let [Pilot employees] handle it." (R. p. 183, lines 15–18) But when the fight began, Appellant (as an "intelligent" person) no doubt understood and appreciated the risks of bodily injury he faced by joining in. (R. pp. 183–184) He just simply "didn't care if [he] got hurt." (R. p. 184, lines 17–18)

Therefore, the trial court properly held that Appellant's suit was barred under secondary implied assumption of the risk because his voluntary decision to leave a place of safety to join the fight while knowing the risk of severe bodily injury was, as a matter of law, more negligent than any act or omission of Respondents.

CONCLUSION

Therefore, for the reasons stated in this Brief, Respondents respectfully ask this honorable Court to affirm the trial court's grant of summary judgment.

HOWSER, NEWMAN & BESLEY, LLC

/s/ Andrew L. Hethington
Andrew L. Hethington, Esq.
R. Davis Howser, Esq.
1508 Washington Street
Columbia, SC 29201
Phone: (803) 758-6000
ahethington@hnblaw.com
rdhowser@hnblaw.com
Attorneys for Respondents

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CERTIFICATE OF COUNSEL

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

HOWSER, NEWMAN & BESLEY, LLC

/s/ Andrew L. Hethington
Andrew L. Hethington, Esq.
R. Davis Howser, Esq.
1508 Washington Street
Columbia, SC 29201
Phone: (803) 758-6000
Attorneys for Respondents

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