

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

Appeal from the Court of Common Pleas
For Beaufort County
Honorable Marvin H. Dukes, III, Master-In-Equity
Civil Action No.: 2007-CP-07-3212
Appellate Case No.: 2013-000647

RECEIVED

MAY 29 2013

SC Court of Appeals

H. Marshall Hoyler,

Appellant,

v.

The State of South Carolina; Merry
Land Properties, LLC; and
Nancy Deering Carey,

Respondents.

MOTION TO DISMISS APPEAL
by the
RESPONDENT, MERRY LAND PROPERTIES, LLC

Stephen P. Groves, Sr., Esquire
Mary D. Shahid, Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400
Charleston, South Carolina 29401
Telephone: 843.720.1725
Telecopier: 843.414.8206
E-Mail: sgroves@nexsenpruet.com
E-Mail: mshahid@nexsenpruet.com

*Attorneys for the Respondent,
Merry Land Properties, LLC*

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA
COURT OF APPEALS

COMES NOW the Respondent, Merry Land Properties, LLC ("Merry Land"), pursuant to Rule 240 of the South Carolina Appellate Court Rules, and respectfully requests this Court of Appeals to dismiss the appeal of the Appellant, H. Marshall Hoyler ("Mr. Hoyler"), as was previously done with Mr. Hoyler's original appeal filed in 2011.

I. STATEMENT OF THE CASE AND THE FACTS

On 8 November 2007, Mr. Hoyler filed an action against the Respondent, State of South Carolina (the "State"), to have the Circuit Court declare title to a certain section of marshlands in Beaufort County. The State denied the material allegations and raised several affirmative defenses. Merry Land successfully moved to intervene.

The matter ultimately came before the Honorable Marvin H. Dukes, III, Master-In-Equity for Beaufort County, for a hearing on 31 January 2011, to address the merits of the case. During the hearing it became evident from a survey prepared by Mr. Hoyler's own land surveyor that there were approximately 32 **additional** abutting and/or adjoining property owners whose respective interests potentially could be significantly adversely affected by the Circuit Court's ultimate decision in the case.¹

¹ Mr. Hoyler was apparently unaware of the additional abutting landowners until the survey was prepared.

In response to this new information, Judge Dukes terminated the merits hearing and concluded that the all of the 32 or so additional abutting landowners needed to be joined as parties-defendant to this action before the matter could progress any further due to the potential negative impact on their respective property rights. He issued his written order on 17 March 2011 (the "Joinder Order"), directing the joinder and attaching thereto, as "Exhibit A", a list of the additional adjoin/abutting landowner parties who were to be joined to this action.² Mr. Hoyler sought reconsideration of the Joinder Order which the Circuit Court had not yet considered as of the date Mr. Hoyler initiated his first appeal.

Notwithstanding the still outstanding reconsideration motion, Mr. Hoyler filed his Notice of Appeal on 21 April 2011. The Court of Appeals, by letter dated 12 July 2011, requested both sides to address the issue of the appealability of the Joinder Order. After the parties submitted their respective memoranda addressing the issue, the Court of Appeals issued its order, dated 26 September 2011, which "dismissed [the appeal] because the underlying [Joinder Order] [wa]s not immediately appealable." (COA Order, p.1.). Mr. Hoyler unsuccessfully sought reconsideration. He then petitioned the Supreme Court seeking a Writ of Certiorari which the Supreme Court ultimately denied as meritless in 2012.

² See Order for Joinder of Parties dated and filed 17 March 2011 (the "Joinder Order"). A copy of the Joinder Order is attached hereto as **Exhibit "A"** and incorporated herein by reference. The list in the Joinder Order's Exhibit "A" included (where available), among other things, the prospective new parties' names, the parcel identification numbers, addresses, and telephone numbers.

When the case finally returned to the trial level, the Circuit Court then took up Mr. Hoyler's long-outstanding Motion for Reconsideration of Judge Duke's original Joinder Order issued on 17 March 2011.³ (*Dukes 2/15/2013 Order*, p.1).⁴ In addition, the Circuit Court also considered the 4 April 2011, Motion to Intervene by the Respondent, Nancy Deering Carey ("Ms. Carey"). The Circuit Court issued its written order on 15 February 2013, denying Mr. Hoyler's motion to reconsider the Joinder Order and permitting Ms. Carey to intervene. (*Dukes 2/15/2013 Order*, p.1).⁵ Mr. Hoyler then appeal that order to this Court of Appeals. Merry Land now files its Motion to Dismiss Appeal.

II. ARGUMENT AND CITATION OF AUTHORITY

The order under appeal – the 2/15/2013 Order – is merely a confirmation of the original Joinder Order and, in addition, approval of the joinder of another interested party whose property may be affected by the proceedings. Both the original order and the present order simply grant the joinder of additional parties to this litigation. No more, no less. There is nothing in the 2/15/2013 Order

³ This Joinder Order was, of course, the very subject of Mr. Hoyler's original appeal which **both this Court of Appeals and the Supreme Court determined was not immediately appealable.** Mr. Hoyler's filed his reconsideration motion on 4 April 2011, but, as noted, decided to pursue his appeal of the Joinder Order before the Circuit Court could address the merits of the reconsideration request.

⁴ See Order dated and filed 15 February 2013 (the "2/15/2013 Order"). A copy of the 2/15/2013 Order is attached hereto as **Exhibit "B"** and incorporated herein by reference.

⁵ As already noted, the Joinder Order contained an attachment captioned "*Merry Land Properties Property Owner Listing*". In the 2/15/2013 Order, Judge Dukes also modified the Joinder Order where "it reference[d] Exhibit 'A' [to the extent that] Exhibit 'A' shall consist of 'current adjoining property owners'." (2/15/2013 Order, p.1).

which does more than what was authorized in the Joinder Order. Given the fact that this Court of Appeals and the Supreme Court both concluded the Joinder Order was not immediately appealable, an order which merely affirms the Joinder Order and also permits an additional person to intervene would likewise not be immediately appealable. Mr. Hoyler's present appeal must be dismissed as it is no different than the original appeal.⁶

This Court of Appeals should dismiss this appeal on the alternative grounds that the 2/15/2013 Order is (1) interlocutory and not immediately appealable, (2) interlocutory and did not "involve the merits", and (3) interlocutory and did not "affect a substantial right."

A. The Appealed Order Is Interlocutory

The Supreme Court noted, in Edwards v. SunCom,⁷ that:

Absent some specialized statute, the immediate appealability of an interlocutory or intermediate order depends on whether the order falls within S.C. Code Ann. § 14-3-330 [Law. Co-op. 1976].⁸ Pursuant to S.C. Code Ann. § 14-3-330, the following types of orders are appealable:

- (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in

⁶ Since both this Court of Appeals and the Supreme Court have already determined the non-appealability of an order permitting joinder/intervention in this same case, this appeal should never have been filed in the first instance. Interestingly, Mr. Hoyler did not appeal the Joinder Order again, even though he was appealing the Circuit Court's affirmance of that same order.

⁷ Edwards v. SunCom, 369 S.C. 91, 631 S.E.2d 529 (2006).

⁸ Edwards v. SunCom, 369 S.C. 91, 93, 631 S.E.2d 529, 530 (citing Baldwin Const. Co., Inc. v. Graham, 357 S.C. 227, 593 S.E.2d 146 (2004)).

such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

- (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
- (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and
- (4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.⁹

In his appellate brief, dated 11 April 2013, Mr. Hoyler claims that S.C. Code Ann. § 48-39-220 (Thomson Reuters West 2010) constitutes a “specialized statute” taking this appeal out of the purview of S.C. Code Ann. § 14-3-330. (*Initial Brief*, pp.13-15).¹⁰ Mr. Hoyler misinterprets the effect of the “specialized statute” language as he apparently assumes it refers to the involvement in the case of some “specialized statute” of any variety. Nevertheless, it is clear the term “specialized statute” refers to some statute the South Carolina Legislature has adopted to which specifically governs the appellate review of a particular

⁹ Edwards v. SunCom, 369 S.C. 91, 93-94, 631 S.E.2d 529, 530. See also generally Ex parte Wilson, 367 S.C. 7, 625 S.E.2d 205 (2005).

¹⁰ This is the very same, albeit unsuccessful, argument Mr. Hoyler made in his original appeal. (Memo. Supp. Appeal, pp.6-9; Pet. for Writ of Cert., pp.8-9). See Appellant’s Memorandum in Support of Appeal filed 27 July 2011 (the “Memo. Supp. Appeal”). A copy of the Memo. Supp. Appeal is attached hereto as **Exhibit “C”** and incorporated herein by reference. See also Petition for Writ of Certiorari filed 14 December 2011 (the “Pet. for Writ of Cert.”). A copy of the Pet. for Writ of Cert. is attached hereto as **Exhibit “D”** and incorporated herein by reference.

decision, judgment, and/or order over and above the general appellate jurisdiction granted by S.C. Code Ann. § 14-3-330.¹¹ Nothing in S.C. Code Ann. § 48-39-220 provides for any specialized appellate review of decisions emanating from that provision. Since there is no “specialized statute” applicable in this case, the default appealability review goes through S.C. Code Ann. § 14-3-330.

As this Court of Appeals is aware, by appealing the denial of the Joinder Order,¹² Mr. Hoyler has challenged the Circuit Court’s authority to order the joinder of the additional 32 or so adjoining/abutting property owners – now, of course, only the 32 or so “current adjoining property owners”. Under long-standing South Carolina law, it has generally been held that “an order requiring, or permitting, or refusing to permit, the joinder of additional parties is not appealable, since it is interlocutory and not final in nature.”¹³

¹¹ See generally Charlotte-Mecklenburg Hosp. Auth. v. S. C. Dept. of Health and Envrtnl. Control, 387 S.C. 265, 266, 692 S.E.2d 894, 894 (2010) (citing S. C. Code Ann. § 1-23-610(A)(1) (Thomson Reuters West 2009) (Providing that “judicial review may only be sought from a **final** decision of the [Administrative Law Court].”) (Emphasis in original).

¹² As noted, Mr. Hoyler has not re-appealed the Joinder Order, but merely appealed the Circuit Court’s denial of his Motion to Reconsider that very same Joinder Order. Aside from the procedural quandary created by the proposition that if the Joinder Order is not immediately appealable, how can the 2/15/2013 Order which simply refuses to reconsider the very same order, therefore, be immediately appealable, has Mr. Hoyler now abandoned and/or waived his right to ever appeal the Joinder Order since he did not appeal it along with the 2/15/2013 Order?

¹³ E. H. Schopler, Appealability of Order With Respect to Motion for Joinder of Additional Parties, 16 A.L.R.2d 1023, § 3[a] (1951 and Cum.Supp. 2010) (citing Mack Mfg. Co. v. Mass. Bonding & Inc. Co., 108 S.C. 163, 164-165, 93 S.E. 713, 713-714 (1917); Ex parte Ferguson, 82 S.C. 563, 563-564, 64 S.E. 750, 750 (1909)).

Most recently, the Supreme Court, in Edgefield County Hosp. Trustees v. Cannon Const. & Supply Co.,¹⁴ addressed a situation in which the Circuit Court joined several party-defendants to an action “without notice and [without the] opportunity to be heard.”¹⁵ One of the joined parties appealed asserting it should have been granted pre-joinder notice and the opportunity to be heard.¹⁶ The Supreme Court disagreed, noting “the order was not appealable”, but addressing the merits, “inasmuch as the matter [wa]s before [it]. . . .”¹⁷

The Court of Appeals should dismiss Mr. Hoyler’s Notice of Appeal as it was clearly interlocutory in nature. Considering that both this Court of Appeals and the Supreme Court have already determined that the Joinder Order was not immediately appealable, it is not logical that the 2/15/2013 Order refusing to reconsider the very same non-appealable Joinder Order is, therefore, immediately appealable.

B. The Appealed Order Does Not Involve “The Merits Of The Case” As Required By S.C. Code Ann. § 14-3-330(1)

Notwithstanding the fact the 2/15/2013 Order is an interlocutory order, there is no reason for this Court of Appeals to still entertain this appeal even under the provisions set forth in S.C. Code Ann. § 14-3-330(1) (Thomson

¹⁴ Edgefield County Hospital Trustees v. Cannon Construction and Supply Co., 273 S.C. 500, 257 S.E.2d 501 (1979) (*per curiam*).

¹⁵ Edgefield County Hosp. Trustees v. Cannon Const. & Supply Co., 273 S.C. 500, 501, 257 S.E.2d 501, 501.

¹⁶ Edgefield County Hosp. Trustees v. Cannon Const. & Supply Co., 273 S.C. 500, 501, 257 S.E.2d 501, 501.

¹⁷ Edgefield County Hosp. Trustees v. Cannon Const. & Supply Co., 273 S.C. 500, 501, 257 S.E.2d 501, 501. *See also generally Goodson v. R. A. Taylor Const. Co.*, 266 S.C. 33, 221 S.E.2d 102 (1975).

Reuters West 2012). The 2/15/2013 Order does not come under any of the recognized exceptions which would have permitted and/or authorized its immediate appeal.

The 2/15/2013 Order, even if it had been properly appealed in the first instance, does not involve the merits of the case. As this Court of Appeals is aware, South Carolina law provides that an order, even though considered interlocutory,¹⁸ may be appealed when and if it constitutes an “intermediate judgment, order[,] or decree in a law case involving the merits in actions commenced in the [C]ourt of [C]ommon [P]leas . . . brought there by original process”¹⁹ As the Supreme Court noted in Mid-State Distributors v. Century Importers, Inc.,²⁰ “[a]n order which involves the merits is one that ‘must finally determine some substantial matter forming the whole or a part of some cause of action or defense.’ ”²¹

In this case, the merits of this matter involve the Circuit Court’s ultimate adjudication of title to the marshlands situated along the Beaufort River which Mr. Hoyler claims to own. On the other hand, the merits do not involve the ability of the Circuit Court, based upon Mr. Hoyler’s own land survey, to order the joinder of the heretofore unknown, unidentified, and/or undisclosed 32 or so additional

¹⁸ Mid-State Distributors v. Century Importers, Inc., 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993) (defining an interlocutory order).

¹⁹ S.C. Code Ann. § 14-3-330(1) (Law. Co-op. 1977). See also Ex parte Wilson, 367 S.C. 7, 13, 625 S.E.2d 205, 208.

²⁰ Mid-State Distributors v. Century Importers, Inc., 310 S.C. 330, 426 S.E.2d 777.

²¹ Mid-State Distributors v. Century Importers, Inc., 310 S.C. 330, 334, 426 S.E.2d 777, 780. See also Ex parte Capital U-Drive-It, Inc., 369 S.C. 1, 630 S.E.2d 464 (2006).

current adjoining/abutting landowners to this action given the fact that should Mr. Hoyler be found to actually own the marshland, the property rights and property values of the 32 or so additional current adjoining/abutting landowners may be seriously affected in a negative manner. (2/15/2013 Order, p.1).²² Nor do the merits of this matter involve the Circuit Court's authority to permit Ms. Carey's the right to intervene herein in order to protect her property rights. (2/15/2013 Order, p.1).

The Court of Appeals should dismiss Mr. Hoyler's Notice of Appeal as it is clearly interlocutory in nature and did not involve "the merits of the case" as required by South Carolina law. Considering that both this Court of Appeals and the Supreme Court have already determined that the Joinder Order was not immediately appealable, it is not logical that order refusing to reconsider the very same non-appealable order is, therefore, immediately appealable.

C. The Appealed Order Did Not Involve An Order Affecting "A Substantial Right" As Required By S.C. Code Ann. § 14-3-330(3)

Notwithstanding the fact the 2/15/2013 Order is an interlocutory order, there is no reason for this Court of Appeals to still entertain this appeal pursuant to S.C. Code Ann. § 14-3-330(3) (Thomson Reuters West 2010). Again, the 2/15/2013 Order is plainly interlocutory and does not come under any of the recognized exceptions which would have permitted its immediate appeal.

²² See Good v. Hartford Acc. & Indem. Co., 201 S.C. 32, 36, 21 S.E.2d 209, 211 (1942) ("The appeal[] in the present case [is] not based upon any final orders, but have [its] foundation entirely upon rulings which, since there was no determination of the case, related only to that hearing up to the time the [Circuit Court became aware of the additional affected abutting landowners].").

South Carolina law provides, in pertinent part, that an order is appealable when and if it is an “order affecting a substantial right made in an action when such order . . . in effect determines the action . . . or discontinues the action.”²³ As the Supreme Court noted in Mid-State Distributors v. Century Importers, Inc., “an order which ‘involves the merits’, [i]s an order which ‘must finally determine some substantial matter forming the whole or a part of some cause of action or defense. . . .’ ”²⁴

This appeal involves Mr. Hoyler’s challenge to the Circuit Court’s authority to order the joinder of the additional 32 current adjoining/abutting property owners, as well as, the Circuit Court’s authority to permit Ms. Carey to intervene. (2/15/2013 Order, p.1). The 2/15/2013 Order does not result in a judgment which ends this case nor does it affect any substantial right held by Mr. Hoyler. In fact, assuming the 32 or so current adjacent/abutting landowners are joined hereto and the Circuit Court eventually adjudicates title to the marshland in favor of Mr. Hoyler, the 2/15/2013 Order (and the preceding Joinder Order) will have actually benefited Mr. Hoyler because it will bind the 32 or so current adjoining/abutting landowners to a determination that he owns the property at issue.

In Thornton v. S.C. Elec. & Gas Co.,²⁵ this Court of Appeals noted:

an appellate court should look to the effect of an interlocutory order to determine its appealability under [S.C.

²³ S.C. Code Ann. § 14-3-330(2) (Law. Co-op. 1977). See Edwards v. SunCom, 369 S.C. 91, 94, 631 S.E.2d 529, 530.

²⁴ Mid-State Distributors v. Century Importers, Inc., 310 S.C. 330, 334, 426 S.E.2d 777, 780.

²⁵ Thornton v. S.C. Elec. & Gas Co., 391 S.C. 297, 705 S.E.2d 745 (Ct.App. 2011).

Code Ann. §] 14-3-330(2)(c) [(Thomson Reuters West 2012)]. An order affects a substantial right by striking a pleading if the order removes a material issue from the case, thereby preventing the issue from being litigated on the merits, and preventing the party from seeking to correct any errors in the order during or after trial.**26**

The 2/15/2013 Order has not eliminated any material issue from Mr. Hoyler's Complaint. The Circuit Court's determination of who holds title to the marshland still is the central issue and will be determined even when the 32 or so current adjoining/abutting landowner-parties, such as Ms. Carey, have been added.

26 Thornton v. South Carolina Elec. & Gas Co., 391 S.C. 297, 705 S.E.2d 745.

III. CONCLUSION

Based upon the forgoing arguments and citation of authority, the Respondent, Merry Land Properties, LLC, respectfully requests this Court of Appeals to dismiss this appeal as interlocutory.

Respectfully submitted,

~~NEXSEN PRUETT~~, LLC



By: _____

Stephen P. Groves, Sr., Esquire
Mary D. Shahid, Esquire
205 King Street, Suite 400
Charleston, South Carolina 29401
Telephone: 843.720.1725
Telecopier: 843.414.8206

*Attorneys for the Respondent,
Merry Land Properties, LLC*

Charleston, South Carolina

28 May 2013

NPCHAR1:1171991.1-NC-(SPG) 048740-00001

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

Appeal from the Court of Common Pleas
For Beaufort County
Honorable Marvin H. Dukes, III, Master-In-Equity
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H. Marshall Hoyler,

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Appellant,

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PROOF OF SERVICE
for the
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by the
RESPONDENT, MERRY LAND PROPERTIES, LLC

Stephen P. Groves, Sr., Esquire
Mary D. Shahid, Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400
Charleston, South Carolina 29401
Telephone: 843.720.1725
Telecopier: 843.414.8206
E-Mail: sgroves@nexsenpruet.com
E-Mail: mshahid@nexsenpruet.com

*Attorneys for the Respondent,
Merry Land Properties, LLC*

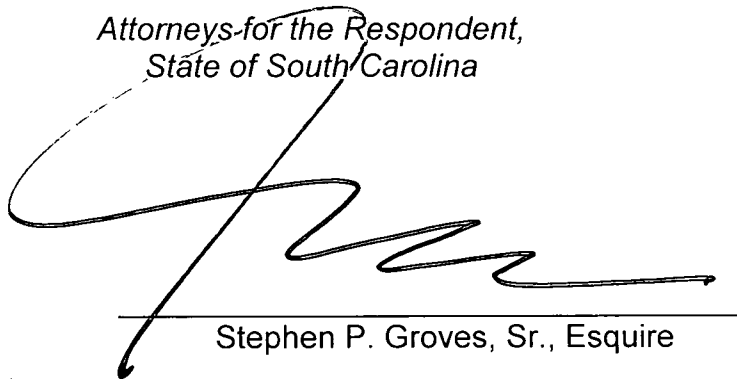
I, Stephen P. Groves, Esquire, hereby certify that on 28 May 2013, I served a copy of the **Motion to Dismiss Appeal** submitted by the Respondent, Merry Land Properties, LLC, on counsel for the Petitioner and the Respondents via the United States Mail, postage pre-paid, and addressed as follows:

Jefferson D. Griffith, III, Esquire
Richard L. Whitt, Esquire
AUSTIN & ROGERS, P.A.
508 Hampton Street, Suite 300
Columbia, South Carolina 29201

Attorneys for the Appellant

J. Emory Smith, Jr., Esquire
*SOUTH CAROLINA OFFICE OF
THE ATTORNEY GENERAL*
1000 Assembly Street
Columbia, South Carolina 29201

*Attorneys for the Respondent,
State of South Carolina*



Stephen P. Groves, Sr., Esquire

Charleston, South Carolina

28 May 2013

NPCHAR1:1171991.1-NC-(SPG) 048740-00001

28 May 2013

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court Of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

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MAY 29 2013

SC Court of Appeals

Re: **H. Marshall Hoyler v. The State of South Carolina; Merry Land Properties, LLC; and Nancy Deering Carey**

Appeal from the Beaufort County Court of Common Pleas

Civil Action No.: 2007-CP-07-3121

Case Tracking No.: **2013-000647**

NP File No.: 048740-00001

Dear Ms. Kitchings:

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Enclosed please the original and seven copies of a **Motion to Dismiss Appeal** submitted on behalf of the Respondent, Merry Land Properties, LLC, in the above-referenced appellate matter. I also enclose the original and one copy of a **Proof of Service** indicating service of a copy of the **Motion to Dismiss Appeal** upon all counsel of record in this appeal. Please note that I have also enclosed our firm check in the amount of \$25.00 as payment for the applicable filing fee for this motion.

I would appreciate you kindly filing this **Motion to Dismiss Appeal**, as well as the **Proof of Service**, with the Court of Appeals and returning one stamped copy of each to my attention in the enclosed self-addressed stamped envelope.

If you need anything else or I otherwise may be of any assistance to you regarding this matter, please feel free to contact me at your convenience. My direct telephone number is 843.720.1725, the direct telecopier number is 843.414.8206, and the e-mail address is sgroves@nexsenpruet.com.

NEXSEN PRUET

Hon. Jenny Abbott Kitchings
Clerk of Court
28 May 2013
Page 2

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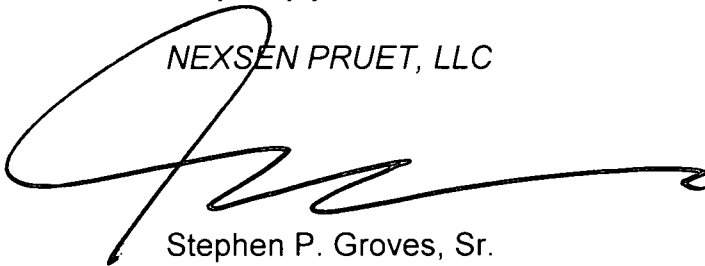
MAY 29 2013

SC Court of Appeals

With kindest regards, I remain

Very truly yours,

NEXSEN PRUET, LLC



Stephen P. Groves, Sr.

SPGsr:spg

Enclosures

CCE

Jefferson D. Griffith, III, Esquire/Richard L. Whitt, Esquire
Hon. J. Emory Smith, Jr., Esquire

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