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Postal Address:
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June 26, 2013

RECEIVED

JUL 01 2013

S.C. Supreme Court

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED

JUN 28 2013

The Honorable Beth Carrigg
Lexington County Clerk of Court
205 East Main Street
Lexington, SC 29072

SC Court of Appeals

RE: The State v. Roger Dale Burke, Appellant, Case No.2007-CP-32-1784

Dear Madam Clerks:

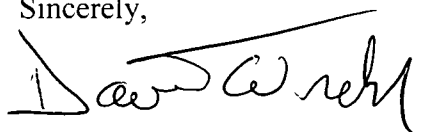
Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

- (1) Proof of service of the notice of appeal on the respondent.
- (2) A copy of the order which is to be challenged on appeal.

I have enclosed a copy of the above documents and respectfully request that you return the filed copy to me in the enclosed envelope.

Please note that my law firm has not been retained to represent Mr. Burke on his appeal.

Sincerely,



David W. Melnyk
Melnyk Law Firm
Post Office Box 687
Irmo, SC 29063
(803) 732-7800
Attorney for the PCR Applicant

cc: Kaelon E. May, Asst. Attorney General
P.O. Box 11549
Columbia, SC 29211

South Carolina Attorney General's Office
PCR Division
P.O. Box 11549
Columbia, SC 29211

Roger Dale Burke
#304613
BRCI Wateree 254- A side
Columbia, SC 29210

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Case No. 2007-CP-32-1784

RECEIVED

JUL 01 2013

S.C. Supreme Court

State of South Carolina

Respondent,

v.

Roger Dale Burke,

Appellant.

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JUN 28 2013

SC Court of Appeals

NOTICE OF APPEAL

Roger Dale Burke appeals the order of the Honorable W. Jeffrey Young, dated June 6, 2013. Appellant received written notice of entry of this order on or about June 24, 2013.

June 26, 2013



David W. Melnyk
Post Office Box 687
Irmo, South Carolina 29063
(803) 732-7800
Attorney for Appellant

Other Counsel of Record:
Kaelon E May
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Attorney for Respondent
(803) 734-3970

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Case No. 2007-CP-32-1784

RECEIVED

JUL 01 2013

S.C. Supreme Court

State of South Carolina

Respondent,

v.

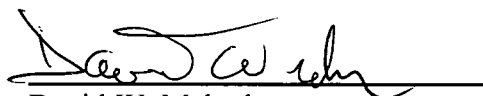
Roger Dale Burke,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on June 26, 2013, addressed to the attorneys of record, Kaelon E May, P.O. Box 11549, Columbia, South Carolina 29211, and the Office of the Attorney General, PCR Division, P.O. Box 11549, Columbia, South Carolina, 29211.

June 26, 2013



David W. Melnyk
Melnyk Law Firm, P.C.
Post Office Box 687
Irmo, South Carolina 29063
(803) 732-7800
Attorney for PCR Applicant

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ORIGINAL

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

) IN THE COURT OF COMMON PLEAS
) ELEVENTH JUDICIAL CIRCUIT

FILED

Case No. 2007-CP-32-1784

2013 JUN 19 A 11:13

Roger Dale Burke,
S.C.D.C. No. 304613

BETH A. CHIRIGG
CLERK OF COURT
LEXINGTON, SOUTH CAROLINA

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed May 18, 2007. Respondent made its return on August 27, 2007. An evidentiary hearing into the matter was convened on August 14, 2012, at the Lexington County Courthouse. Applicant was present at the hearing and was represented by David W. Melnyk, Esquire. Respondent was represented by Kaelon E. May, Esquire, of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Trial counsel, William N. Nettles, Esquire, was present and testified. This Court also had before it the records of the Lexington County Clerk of Court, the transcript of the proceedings against Applicant, Applicant's records from the South Carolina Department of Corrections, and the exhibits entered into evidence at the hearing.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was indicted at the September 2002 term of the Lexington County Grand Jury for murder (02-GS-32-3278), possession of firearm or knife during the commission of a violent crime (02-GS-32-3279), attempting to commit



arson (02-GS-32-3280), and burglary- 1st degree (02-GS-32-3281). William N. Nettles, Esquire, represented him. On August 23, 2004, Applicant underwent trial, pursuant to which he was found guilty. He was sentenced by the Honorable Marc H. Westbrook to life for murder, five years for possession of a firearm, twenty years for attempted arson and thirty years for burglary.

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BETH A. SANDICO
CLERK OF COURT
LEXINGTON, SC

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Burke, Op. No. 2007-UP-042 (S.C. Ct. App. filed January 24, 2007). Applicant filed a Petition for Rehearing which was denied by order of the South Carolina Court of Appeals on March 22, 2007.

At the August, 14, 2012, evidentiary hearing, Applicant alleged that he was being held unlawfully pursuant to the following allegations of ineffective assistance of counsel: (1) failure to pursue an insanity defense; (2) failure to object to the solicitor's opening statement; (3) failure to object to a question posed by the solicitor on cross-examination; (4) failure to object to testimony given by a defense witness; (5) failure to object to a jury charge; (6) failure to object to the solicitor's closing statement.

II. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate

assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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BETH A. CARROLL
CLERK OF COURT
LEXINGTON, SC

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

III. SUMMARY OF TESTIMONY

At the PCR hearing, Applicant alleged trial counsel was ineffective for failing to pursue an insanity defense. Applicant stated trial counsel had numerous consultations with him in preparation for trial. Applicant stated he participated in trial counsel's pre-trial preparations. Applicant stated he provided names of persons to investigate to trial counsel, but never requested trial counsel call any particular witnesses to testify at trial. Applicant stated that he trusted trial counsel and would hire him again. Applicant stated his first attorney desired Applicant undergo a criminal responsibility evaluation that Applicant found unnecessary. Applicant stated he was pleased to have trial counsel substituted on his case because he believed trial counsel was one of the best criminal defense lawyers in the Southeast. Applicant stated family problems precipitated his mental health issues. Applicant stated he

was unable to understand the extent of his illness at the time of trial. Applicant stated that he killed his wife because he did not want to lose custody of his children and was unable to distinguish right from wrong. Applicant stated that he was increasingly experiencing depression at the time of the offense. Applicant stated he was hearing voices prior to trial but did not share the occurrences with trial counsel. Applicant testified he never received mental health treatment. Applicant testified trial counsel did not arrange a competency evaluation for Applicant. Applicant stated that numerous witnesses testified at trial to the extent of his emotional instability. Applicant stated trial counsel brought his state of mind into the forefront at trial. Applicant testified that although trial counsel called numerous witnesses at trial to testify to Applicant's state of mind, trial counsel erroneously did not present an insanity defense. Applicant stated that he was not qualified as a mental health expert.

Applicant alleged trial counsel was ineffective for failing make objections at various junctures during trial. Applicant stated trial counsel was ineffective for failing to object to the solicitor's opening statement when the solicitor analogized Applicant as an executioner and for failing to object when the solicitor did not explain the State's burden of proof.

Applicant alleged trial counsel was ineffective for not objecting to prosecutorial misconduct. Applicant stated two crime scene officers inspected the murder scene. Applicant stated he received an incident report in discovery that indicated that one officer touched the blood. Applicant stated trial counsel was ineffective for not objecting to a question posed by the solicitor on cross-examination regarding whether Applicant washed the blood from his hands after killing his wife.

Applicant alleged trial counsel was ineffective for failing to object to prosecutorial misconduct regarding an alleged Rule 5 ScrimP violation. Applicant stated that a defense witness, Frank Addy, upon cross-examination provided testimony regarding Applicant's designs to harm his children by "putting them in solution." Applicant stated that he was not provided notice of any statements on the



matter by Frank Addy in discovery. Applicant testified he told trial counsel that Frank Addy would be a beneficial witness but was unaware that he would testify adversely.

Applicant alleged trial counsel was ineffective for failing to object to the trial judge's jury instruction on inferred malice. Applicant stated the instruction improperly shifted the burden of proof. However, Applicant stated the trial judge charged the jury that it may but was not required to infer malice from the use of deadly weapon.

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BETH A. CAMPBELL
CLERK OF COURT
LEXINGTON, SC

Last, Applicant alleged trial counsel was ineffective for failing to object to the solicitor's closing argument. Applicant testified the solicitor vouched for a State's witness, Officer Frier's, credibility. Applicant testified the solicitor pitted Officer Frier's credibility against Applicant's lack of credibility. Applicant additionally stated the solicitor told the jury that Applicant was a liar.

At the PCR hearing, trial counsel testified. Trial counsel obtained discovery from Applicant's previous attorney and that he hired a private investigator. Trial counsel met with Applicant on numerous occasions. Trial Counsel stated Applicant did not entertain guilty plea negotiations.

Trial counsel discussed an insanity defense with Applicant but did not find the defense viable in Applicant's case. Trial counsel stated Applicant was distraught at the time of the offense because he was coping with an acrimonious divorce proceeding. However, trial counsel did not find Applicant's disposition, stemming from his familial problems when he killed his wife, warranted an insanity defense. Trial counsel stated Applicant never expressed a desire to proceed to trial on an insanity defense. Trial counsel stated an expert witness would not have been beneficial in presenting Applicant's defense. Trial counsel stated he would have presented an insanity defense if he reasoned it had merit.

Trial counsel testified his trial strategy was to show the jury the offense was not committed with malice. It was trial counsel's objective to obtain an acquittal on the murder charge. Trial counsel



stated overwhelming evidence of guilt proved Applicant killed his wife and ensured a conviction for manslaughter at the minimum. Trial counsel executed his strategy by calling witnesses Applicant provided who could testify to Applicant's grief-stricken state at the time of the offense. Trial counsel stated he was pleasantly surprised to have been able to introduce beneficial testimony regarding Applicant's state of mind he believed to be inadmissible. Trial counsel testified he discussed his trial strategy at length with Applicant.

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BETH A. GIBSON
CLERK OF COURT
LEXINGTON, SC

Trial counsel stated the solicitor's alleged inflammatory opening statements did not warrant an objection. Next, trial counsel testified the solicitor's cross-examination of Applicant was proper. Trial counsel stated the solicitor's question was supported by facts in evidence. Trial counsel was aware witness Frank Addy might provide some adverse testimony. Trial counsel's private investigator interviewed the witness and the solicitor disclosed Frank Addy's potential harmful testimony. Trial counsel stated the benefits of having Frank Addy testify outweighed the minimal harm. Trial counsel stated the notion was irrational that Applicant would harm his children by placing them in a pool of acid. Trial counsel testified the solicitor's closing argument was proper. Trial counsel stated the solicitor did not vouch for a State's witnesses during his closing argument. Last, regarding Applicant's assertion trial counsel was ineffective for failing to object to an improper jury charge, trial counsel testified he did not recall finding the inferred malice instruction objectionable at the time of trial.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, the exhibits introduced

into evidence at the hearing, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

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This Court finds trial counsel's testimony more credible than Applicant's testimony. Trial counsel thoroughly investigated and prepared Applicant's case for trial. This Court finds trial counsel adequately investigated potential witnesses and defenses provided by Applicant.

BETH A. CHIRGGS
CLERK OF COURT
LEXINGTON, SC

This Court finds Applicant failed to meet his burden to prove trial counsel was ineffective for failing to present an insanity defense at trial. This Court finds Applicant had an opportunity to undergo a competency and criminal responsibility evaluation, but declined to do so on his own volition prior to trial counsel's substitution on his case. First, this Court finds Applicant's claim is based on speculation and is inherently unreliable. A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence. Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) This Court finds trial counsel's testimony credible that after diligent investigation, he decided not to pursue an untenable insanity defense.

Second, this Court finds the trial strategy pursued by trial counsel was valid. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005). This Court finds trial counsel was an accomplished and renowned capital defender and that trial counsel had abundant experience on presenting mental health defenses. This Court particularly finds trial counsel's testimony compelling regarding his trial strategy to negate malice. By pursuing this strategy, trial counsel precluded the solicitor from utilizing experts in rebuttal to his presentation of Applicant's case.



This Court finds Applicant failed to meet his burden to prove trial counsel was ineffective for calling Frank Addy to testify at trial. This Court finds trial counsel's decision to call Frank Addy as a witness reasonably aligned to his trial strategy. Frank Addy testified to Applicant's emotional instability prior to the murder. (Tr. 320-5). Frank Addy additionally testified Applicant had lost weight and had made irrational statements regarding executing a murder. On cross-examination, Frank Addy testified he never believed Applicant would kill his entire family by placing them in acid. (Tr. 330). This Court finds the benefits derived to Applicant's case from Frank Addy's testimony overshadowed the alleged detriment.

This Court finds Applicant's allegation that counsel was ineffective for failing to object to the solicitor's opening statement is without merit. The proper inquiry is not whether the solicitor's remark was undesirable or condemnable, but whether the comment "so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Bennett, 369 S.C. 219, 232, 632 S.E.2d 281, 288 (2006) (quoting Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)). The solicitor's executioner comment was merely descriptive of the offense charged, murder. (Tr. 59). Furthermore, the comment was supported by testimony of Applicant's son who witnessed Applicant kill the victim. (Tr. 78).

This Court finds Applicant's allegation that trial counsel was ineffective for not objecting to various closing statements made by the solicitor is without merit. This Court agrees with trial counsel that the solicitor did not improperly pit witnesses or vouch for a State witnesses' credibility. See Gichrhrst v. State, 350 S.C. 221, 565 S.E.2d 281 (2002). When discussing motives of the trial witnesses, the solicitor did not convey a personal opinion nor make any assurances regarding the credibility of the State's witnesses. Furthermore, the solicitor's statements were confined to the evidence and testimony presented at trial.



This Court finds Applicant's allegation that trial counsel was ineffective for not objecting to the solicitor's cross-examination of Applicant regarding the blood in the sink is wholly without merit. This Court finds the question was proper and inferable from evidence presented at trial.

Last, this Court finds Applicant's allegation that trial counsel was ineffective for failing to object to the implied malice jury instruction is without merit. Applicant's trial occurred in 2004 prior to State v. Belcher. See State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). Importantly, Belcher specifically precludes retroactive application. Id. Therefore, pre-Belcher jury charge was not improper.

Furthermore, this Court finds Applicant failed to prove Strickland's second prong on the above allegations. Overwhelming evidence of guilt supported Applicant's conviction. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994). First, Applicant confessed to committing the murder. (Tr. 269). Second, the forensic pathologist testified to the cause of death and he catalogued the physical evidence linking Applicant to the offense. (Tr. 249-58). Last, Applicant's son testified to witnessing the murder. (Tr. 78).

All Other Claims

Except as discussed above, this Court finds that the Applicant affirmatively waived the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all

remaining allegations are denied and dismissed.

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CONCLUSION

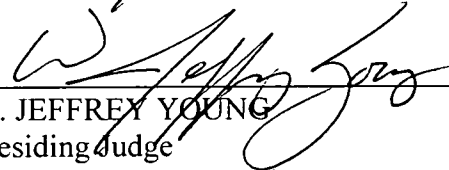
Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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W. JEFFREY YOUNG
CLERK OF COURT
COLUMBIA, SC

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 6 day of June, 2013.


W. JEFFREY YOUNG
Presiding Judge
Eleventh Judicial Circuit

Sunter, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2007CP3201784

Roger Dale Burke	State Of South Carolina
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

	2156	6/20/2013
Circuit Court Judge	Judge Code	Date

For Clerk of Court Office Use Only

This judgment was entered on **n/a**, and a copy mailed first class or placed in the appropriate attorney's box on **20th day of June 2013**, to attorneys of record or to parties (when appearing pro se) as follows:

David W. Melnyk PO Box 687 Irmo, SC 29063

ATTORNEY(S) FOR THE PLAINTIFF(S)

John Walter Whitmire 1301 Heidt St. Columbia, SC 29204

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/wh

Beth A. Carrigg - Clerk of Court

Court Reporter

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Melnyk Law Firm, P.C.
P.O. Box 687
Irmoo, SC 29063

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

SC Court of Appeals

JUN 28 2019

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