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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
The Honorable Alex Kinlaw Jr., Circuit Court Judge

Appellate Case No: 2024-000245

ANGELEE MEDVE..... Respondent,

v.

MICHAEL'S WHOLESALE FLOORING ..... Appellant.

BRIEF OF APPELLANT

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Columbia, SC
April 1, 2024

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STATEMENT OF THE CASE

This case originated in Magistrate Court in late 2018. Appellant raised the defense of failure to include a necessary party and made motion to dismiss. October of 2019 the parties agreed to settle the motion and Respondent agreed to add a third party to the suit. "On January 3, 2020, a Motion for Joinder to add Prolex Flooring as a Defendant was Granted and an Order of Joinder was signed." Civil Answer, 2 (Sept. 29, 2023)[1].

For reasons unexplained, Respondent did not add Prolex Flooring to the case for over three (3) years. In May of 2023 Respondent served the third party Prolex Flooring. Prolex Flooring raised the defense of statute of limitations, and Appellant raised the defense of failure to join a necessary party, laches, and failure to prosecute. "A Motion Hearing was scheduled for 9:30 AM on June 21, 2023" for Appellant's and Prolex Flooring's motions. *Id.*

The morning of the hearing, counsel for Respondent "called the [Magistrate] Court and informed the Clerk that she woke up not feeling well and verbally requested a continuance." *Id.* Respondent did not contact Appellant's counsel nor request a consent to continuance. Appellant did not learn of this request until the hearing began and the Judge informed Appellant that a continuance request had been made and denied. The Magistrate Court indicated that the hearing would proceed and Appellant obliged the Court.

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[1] A written Order for Joinder was later issued on September 4th, 2020.

Upon close of the hearing, the Magistrate Court dismissed the case with prejudice. Order of Dismissal, 2 (June 23, 2023). The Order was mailed the same day to all parties. Civil Answer, 3 (Sept. 29, 2023).

Respondent failed to file a Motion for a Rehearing pursuant to Rule 59(e) SCRCP. Respondent further failed to appeal the Order of Dismissal. Instead, Respondent collaterally attacked the Order of Dismissal via a Rule 60(b) SCRCP Motion made fifty four (54) days later to the Magistrate Court.

Respondent did not serve the Rule 60(b) Motion upon Appellant, and Appellant only learned of the Motion after the Court sent a notice that the motion was denied.[2] The Notice of Appeal of the Rule 60(b) Motion was mailed to Appellant's Counsel On September 18, 2023.[3] The Appeal was not served upon Appellant directly nor upon Prolex Flooring.[4] Appellant had no opportunity to file a notice of appearance in the Magistrate Court for the Rule 60(b) Motion, and Appellant did not file a notice of appearance in the Circuit Court until after an initial hearing was had on the appeal.

Without providing notice of a hearing to Appellant, a pro-se party at that time, the Circuit Court held a hearing on November 2nd, 2023 on Respondent's appeal of the

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[2] Counsel for Appellant moved addresses in 2021. Despite updating AIS and changing the address on signature lines for both email and all court filings, Respondent continued to use the previous address.

[3] The Notice of Appeal was sent via regular first class postage and not properly served upon Appellant.

[4] Prolex Flooring, the third party added to the case in 2023, was included and served in the underlying Rule 60(b) Motion in Magistrate Court. No service has been made upon Prolex Flooring since.

denial of her Rule 60(b) Motion. The Circuit Court granted Respondent's Appeal on the Rule 60(b) Motion remanding the case to the Magistrate Court.

Appellant learned of the hearing and Form 4 Order days later and timely filed a Motion under Rule 59(e) to reconsider. The Circuit Court held a rehearing on February 12th, 2024 where Respondent and Appellant were present.[5] After hearing from both parties, the Circuit Court denied the Motion under Rule 59(e) and left intact its Form 4 Order from November 6, 2023.

This appeal of the Circuit Court's Order overturning the Magistrate Court's denial of Appellant's Rule 60(b) Motion follows.

[5] Prolex Flooring was not present. By all knowledge of Appellant, Prolex Flooring has not been made aware of these proceedings.

STANDARD OF REVIEW

"The decision to grant or deny a motion under Rule 60(b) is within the sound discretion of the trial court." *Lanier v. Lanier*, 364 S.C. 211, 215-16, 612 S.E.2d 456, 458 (Ct.App.2005) (citing *Coleman v. Dunlap*, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992)). "Therefore, the decision can be reversed only if the [magistrate] court abused its discretion." *Gainey v. Gainey*, 382 S.C. 414, 675 S.E.2d 792, 796 (Ct.App.2009) (citing *Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 18, 594 S.E.2d 478, 482 (2004)). "An abuse of discretion occurs when the judge issuing the order was controlled by an error of law or the order is based on factual conclusions that are without evidentiary support." *Id.*, 675 S.E.2d at 797 (citing *BB&T v. Taylor*, 369 S.C. 548, 551, 633S.E.2d 501, 503 (2006).

"It is equally well settled that it is incumbent upon the party seeking relief under this [Rule] to show (1) that the judgment was taken against him 'through his mistake, inadvertence, surprise or excusable neglect'; and (2) that he has a meritorious defense." *McInerny v. Toler*, 260 S.C. 382, 196 S.E.2d 122, 124 (S.C. 1973) (citing *Williams v. Ray*, 232 S.C. 373, 102 S.E.2d 368 (S.C.1958)).

Motions for new trials "are addressed to the sound discretion of the Court, and are granted or denied, not as matters of strict right, but as the substantial justice of the case may appear to require." *Gibbs v. Elliott*, 8 S.C. 50, 60-61, (S.C. 1876). "Discretionary power under this section is vested in the trial, not the appellate, court. In an appeal from such an order of the circuit court it is not our function, nor is it within our power, to substitute our judgment for that of the circuit judge simply because we might have reached a different conclusion had we been in his place."

Williams v. Ray, 232 S.C. 373, 102 S.E.2d 368, 372 (S.C. 1958) (citing *Bishop v. Jacobs,* 108 S.C. 49, 93 S.E. 243 (S.C. 1917); *Morgan v. State Farm Mutual Insurance Co.*, 229 S.C. 44, 91 S.E.2d 723. (S.C.1956)).

ARGUMENT

I. Did the Circuit Court use the Wrong Standard of Review?

Respondent's Motion for Relief From Judgment was originally heard by Magistrate Judge Clare T. Sims who denied it. Respondent then appealed this decision to the Greenville County Court of Common Pleas.

"A matter of this kind is addressed to the sound discretion of the Judge before whom the motion is heard, and the appellant must make a clear showing of an abuse of discretion by the trial Judge to disturb his ruling." *Poston v. State Highway Dept.*, 192 S.C. 137, 143, 5 S.E.2 729 (S.C. 1939).

At the hearing on appeal, Respondent informed the Circuit Court that the standard of review was *de novo*. Resp't's Appeal of Mot. For Relief Tr. 5:14-18 (Nov. 2, 2023) ("So we would ask that Your Honor, in de novo, review that you do for magistrate court decisions, remand, and direct the court that we need to have access to that summary judgment hearing."). The Court accepted Respondent's representation and proceeded in *de novo* review overturning the trial court without finding an error of law or fact or an abuse of discretion. *Id*. 6:19-25.

At the re-hearing on appeal, Appellant clearly stated the standard of review. Appellant's Mot. Reh'g Tr. 11:2-6 (Feb. 12, 2024) ("The decision to grant or deny a motion under Rule 60(b) is within the sound discretion of the trial court. That is well established in *Lanier v. Lanier, Coleman v. Dunlap, Gainey v. Gainey*. Therefore, the decision can be reversed only if the [] trial court [] abused its discretion. *Raby Construction v. Orr, Gainey v. Gainey*.").

Upon deciding the Motion to Reconsider, the Circuit Court, acting as a court of appeal, neither acknowledged the incorrect standard of review used in overturning the Magistrate Court's decision denying the Rule 60(b) Motion nor identified any errors of law or fact or abuse of discretion by the Magistrate Court. Rather, the Circuit Court summarily denied the Motion for Rehearing thereby overturning the Magistrate Court's order.

The '*de novo*' standard of review cited by Respondent and used by the Court is incorrect when considering a trial court's decision regarding a Rule 60(b) motion. The Circuit Court, rather than finding an abuse of discretion or errors of law or fact, merely substituted its judgment for that of the Magistrate Court. This is error. *Williams v. Ray*, 232 S.C. 373, 102 S.E.2d 368, 372 (S.C. 1958).

II. Is it error for a party to invoke Rule 60(b) where it could have pursued the issues on appeal?

Respondent brought a Motion by way of Rule 60(b) to set aside the final order in the underlying case. Respondent sought "relief from a Judgment or Order on the grounds of mistake, excusable neglect, inadvertence, or surprise." Pls.' Mot. For Relief From J., 1 (Aug. 14, 2023). This motion was made fifty-four (54) days after the Magistrate Court issued the Order of Dismissal (June 23, 2023).

Respondent had a clear avenue to raise all issues through a Motion for Reconsideration under Rule 59(e) and/or to seek an appeal of the Order of Dismissal. *See* Appellant's Mot. Reh'g Tr. 11:25, 12:1-7 (Feb. 12, 2024) . All of the issues raised by Respondent, namely that her attorney woke up ill the morning of the hearing, were

both i) known to Respondent when the Order of Dismissal was issued and ii) were raised to the trial court in a request for continuance. Civil Answer, (Sept. 29, 2023) ("At approximately 8:35am the morning of the scheduled Motion Hearing, Ms. Wooten called the Court and informed the Clerk that she work up not feeling well and verbally requested a continuance.").

Instead of pursing her appellate rights, the Respondent sought the exact same relief by way of Rule 60(b). This was error. Respondent knew all her alleged grounds and facts, namely illness of counsel, the Court's decision to deny a continuance, and the decision to dismiss, when she received the Order of Dismissal. The correct time to raise these known issues was in motion for rehearing or on an appeal.

This same situation came up in *Tench v. South Carolina Dept. of Educ*., 347 S.C. 117, 553 S.E.2d 451 (S.C. 2001). In *Tench*, the South Carolina Department of Education lost on an order of summary judgment. In an appeal, the underlying order was misconstrued and the appeal erroneously dismissed. Our Supreme Court observed that the "Department should have filed a Petition for Rehearing." *Id.* 347 S.C. at 121.

> "Instead of pursuing its appellate rights, the Department sought the exact same relief by way of Rule 60(b), and the trial court ultimately granted the Department that relief under Rule 60(b)(1) and Rule 60(b)(5). Appellant contends this was error, and we agree. The 60(b)(1) motion was untimely since it was filed in April 1998, well more than a year after the 1996 orders were filed. Rule 60(b), SCRCP (motion pursuant to Rule 60(b)(1) must be filed "not more than one year after the judgment, order or proceeding was entered or taken"). Further, we hold the circuit court erred in granting relief under Rule 60(b)(5). A party may not invoke this rule where it could have pursued the issue on appeal. See *Smith Companies of Greenville v. Hayes*, 311 S.C. 358, 428 S.E.2d 900 (Ct.App.1993) (finding relief from judgment is not a substitute for appeal from final judgment, particularly when it is clear party seeking relief could have litigated at trial and on appeal claims he now makes by motion). When the Department failed to petition the

> Court of Appeals for rehearing, it effectively abandoned its right to relitigate under Rule 60(b)(5) the issues raised in that appeal."

Id. (emphasis added). Like the Department, Respondent knew the facts of the case when the Order to Dismiss was issued. There were no new facts that arose which the Court could not have considered either in the motion for continuance or in a rehearing on the motion to dismiss. "Relief from judgment under Rule 60 should not be considered a substitute for appeal from a final judgment, particularly when it is clear the party seeking relief could have litigated at trial and on appeal the claims he now makes by motion." *Smith Companies of Greenville, Inc. v. Hayes*, 311 S.C. 358, 359, 428 S.E.2d 900, 901 (S.C. App. 1993).

When Respondent failed to motion the Magistrate Court for rehearing of its orders, and failed to appeal the Order to Dismiss, she "effectively abandoned [her] right to relitigate under Rule 60." *Tench*., 347 S.C. at 121. Respondent's collateral attack of the settled order through Rule 60 is untimely and attempts to litigate issues that were raised in the case, could have been raised on a rehearing, and could have been raised on appeal. Rule 60(b) is not a substitute for an appeal from a final judgment, and the Circuit Court's Order allowing Respondent to substitute a Motion under Rule 60(b) for an appeal is error and should be reversed.

III. May a court deny a continuance when an attorney is ill?

Respondent's Rule 60(b) motion effectively questions whether a Court has authority to deny a request for a continuance when an attorney states he is ill. Here the Magistrate Court determined "that enough information had not been provided to justify granting said request" for a continuance due to the attorney's alleged illness.

Civil Answer, 2 (Sept. 29, 2023). The Court noted the only information provided was a statement from the attorney "that she woke up not feeling well." *Id*.

"[N]ot feeling well" is a very subjective assessment. The Magistrate Court was given little to evaluate, and it proceeded in a reasonable manner to apply its discretion. Even later on, after the Respondent had time to collect evidence and refine her argument, her statements of sickness were similarly vague. *See* Pls.' Mot. For Relief From J., 1 (Aug. 14, 2023) ("Plaintiff's counsel awoke on the June 21, 2023, with COVID symptoms such as fever and a cough."); Resp't's Appeal of Mot. For Relief Tr. 4:11-13 (Nov. 2, 2023) ("I told that person that I was very sick and didn't want to get anyone else sick."). Respondent did not provide simple facts such as her attorney's temperature. Respondent's attorney likewise failed to provide any substantiating evidence from dis-interested sources such as a doctor or test results.

Respondent further attempts to use COVID as a means to control the schedule of the Magistrate Court. Pls.' Mot. For Relief From J., 1 (Aug. 14, 2023) ("Of course, as the Court realizes, all people across the United States have been warned not to go out with COVID symptoms."). The relevant hearing however was on June 21, 2023; more than a full three years after COVID arrived in South Carolina. The Supreme Court's COVID orders expired in early 2022 a full year before the June 21, 2023 hearing. Operation of the Trial Courts During the Coronavirus Emergency (As amended February 4, 2022) (Appellate Case No. 2020-000447) ("[T]his order will expire on May 5, 2022."). The urgency of COVID was over, multiple vaccinations and booster shots available, herd immunity had taken hold, and our courts were trying to clean up a log jam of cases created over the previous years.

Respondent's own stated authority, the Civil Procedure in Magistrate's Court, clearly states a continuance may be granted and it might be justified. Pls.' Mot. For Relief From J., 2 (Aug. 14, 2023). Our Supreme Court has also upheld the denial of a continuance when an attorney was sick. *Muckenfuss v. Fishburne*, 68 S.C. 41, 46 S.E. 537 (S.C. 1903) (finding no grounds for exception even though defendant's attorney had been sick and unable to attend trial).

A trial court must have discretion to deny or grant a continuance, even when an attorney is ill. Whether to grant a continuance was in the proper discretion of the Magistrate Court, and the Court did not abuse its discretion when denying said request with such little information provided. Here Respondent hired a firm with eleven (11) attorneys. Even if one attorney was ill, another should have been able to appear for the hearing. This matter had been pending with the Magistrate Court for nearly five years, three during which the Court had not heard from Respondent, and it is well within the Magistrate Court's discretion to deny a request for continuance that it believes is for delay.

IV. Did the Magistrate Court properly exercise its discretion in denying Respondent's Motion for Relief From Judgment pursuant to Rule 60(b)?

The significant question in this appeal, and in the Circuit Court below, was whether the Magistrate Court properly exercised its discretion in denying Respondent's Motion for Relief. Appellant avers it did for the reasons noted above.

Respondent requested a continuance from the Magistrate Court which was denied. Civil Answer, 2 (Sept. 29, 2023). In requesting that continuance, Respondent

provided scant information to the Magistrate Court, and the Court considered that information insufficient to grant a continuance. *Id.* "Deciding whether to grant or deny a motion for continuance rests within the sound discretion of the trial court." *Wilson v. Walker*, 340 S.C. 531, 540, 532 S.E.2d 19, 23 (Ct. App. 2000).

The Magistrate Court proceeded with a hearing on a motion to dismiss a case which the Court had already administratively closed, and the Court then issued an order to dismiss the matter. Respondent chose not to ask for reconsideration under Rule 59(e) of either the denial of the motion for continuance or the order of dismissal.

Respondent instead raised a Rule 60(b) motion more than thirty days after issuance of the final order in the matter. In the Rule 60(b) motion, Respondent failed to raise any new grounds for mistake, excusable neglect, inadvertence, or surprise. Respondent's failure to file an appeal was calculated and purposeful. *See* Appellant's Mot. Reh'g Tr. 16:7-14 (Feb. 12, 2024). Rule 60(b) however is not for rehashing arguments which were, or could have been, heard by the trial court. Failure to assert defenses or take available actions, such as filing for a rehearing "does not amount to the kind of mistake, surprise, inadvertence, and excusable neglect contemplated by the rule 60(b)." *Greenville Income Partners v. Holman*, 308 S.C. 105, 107, 417 S.E.2d 107, 108 (Ct.App.1992).

The Magistrate Court correctly observed that nothing new was raised in the Rule 60(b) Motion which was not already raised in the request for a continuance. Therefore the Magistrate Court was correct to deny the motion for failure to raise a mistake, excusable neglect, inadvertence, or surprise. The Magistrate Court already decided, at the June 21, 2023 hearing, that Respondent's attorney's failure to appear

was not excusable. Further, Respondent's own action of calling the Magistrate Court the morning of said hearing shows her failure to appear was not a mistake, a surprise, or inadvertence.[6] It is axiomatic to say where there is no mistake, excusable neglect, inadvertence, or surprise that a Rule 60(b)(1) motion cannot be granted. This is why Rule 60(b) is not a substitute for a request for rehearing nor an appeal.

On appeal to the Circuit Court, Respondent did not raise any new facts or information which was unavailable to it, or the Magistrate Court, when the final decision was made on the request for a continuance or a motion to dismiss. The only reason given to justify the Rule 60(b) motion was the illness of counsel which had already been raised with the Magistrate Court before the issuance of final judgment.

Even if, arguendo, Respondent did show some new fact or surprise, the Magistrate Court would also have to consider the following factors: "(1) the timing of the motion for relief, (2) whether the party requesting relief has a meritorious [claim or] defense, and (3) the degree of prejudice to the opposing party if relief is granted." *Williams v. Watkins*, 384 S.C. 319, 324, 681 S.E.2d 914, 917 (Ct. App. 2009).

Respondent made her motion for relief shortly after the time for appeal expired. Respondent, as discussed supra, used this motion as a substitute for an appeal. As an appeal, it was not filed timely, and the Magistrate Court could have dismissed the motion on this alone.

Respondent further failed to make a showing, either in the Magistrate Court or in the Circuit Court, that she had a meritorious claim. In fact, Respondent failed to

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[6] Neither Respondent nor her attorney appeared at the hearing. While Respondent's attorney has provided reason why she did not appear, no reason has been provided for why Respondent herself did not appear at the hearing.

raise her claims at all in either court. Pls.' Mot. For Relief From J., (Aug. 14, 2023) (failing to discuss the meritorious claim of Respondent). Without a showing of a meritorious claim, the Magistrate Court was bound to dismiss the Rule 60(b) motion and was correct to do so. *Bowers v. Bowers*, 304 S.C. 65, 403 S.E.2d 127, 129 (S.C. App. 1991)(upholding a Rule 60(b) denial because the movant failed to demonstrate a meritorious claim).

Finally, this matter had been opened since late 2018 with little to no progress made since initial filings. To breathe new life into this case after such passage of time would prejudice the Appellant with having to defend a case where much evidence has been lost.

Respondent made no showing on these factors. The Magistrate Court, being familiar with the underlying case, correctly concluded that these factors had not been met and denied Respondent's Rule 60(b) Motion. Respondent failed to raise these factors to the Circuit Court, and it was an abuse of discretion for the Circuit Court to grant Respondent's Rule 60(b) Motion without considering such factors required by *Williams v. Watkins*, 384 S.C. 319, 324, 681 S.E.2d 914, 917 (Ct. App. 2009).

CONCLUSION

Respondent brings her Rule 60(b) Motion in lieu of a motion to reconsider and/or an appeal. All the issues raised in the Rule 60(b) Motion, namely her attorney's illness, were raised in the underlying action and could have, and should have, been litigated fully there. A Rule 60 (b) Motion is not a substitute for an appeal, and

Respondent has abandoned her right to litigate these issues. *Smith Companies of Greenville, Inc. v. Hayes*, 311 S.C. 358, 359, 428 S.E.2d 900, 901 (S.C. App. 1993).

Even if Respondent has not abandoned her rights to litigate, she has failed to serve Prolex Flooring and she has failed to correctly serve Respondent. Respondent did not receive notice of the original hearing in Circuit Court and was prejudiced by not being able to attend said hearing.

The Circuit Court, acting as an appeal court, adopted a '*de novo*' standard of review to consider the trial court's decision regarding the Rule 60(b) Motion. The Circuit Court simply substituted its judgment for that of the Magistrate Court without finding an abuse of discretion or errors of law or fact. This clearly contravenes the standard of review for examining a denial of a Rule 60(b) Motion. *Gainey v. Gainey*, 382 S.C. 414, 675 S.E.2d 792, 796 (Ct.App.2009) (citing *Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 18, 594 S.E.2d 478, 482 (2004)). This substitution of judgment is reversible error.

Under the correct standard of review, the decision to grant or deny a Rule 60(b) Motion is within the sound discretion of the trial court. A trial court must have authority to make its schedule and to decide when to grant a continuance and when not to. Here, Respondent provided the scantest of evidence of an alleged illness, and the Magistrate Court chose not to grant a continuance. Whether to grant the continuance was in the discretion of the court, and Respondent admits as much. Pls.' Mot. For Relief From J., 2 (Aug. 14, 2023) . The Magistrate Court acted within its discretion to deny the original motion for continuance.

Upon raising the Rule 60(b) Motion, Respondent did not allege or raise any new facts and rather treated the Rule 60(b) Motion as an untimely filed motion for rehearing. Further, Respondent did not address the factors required to grant a Rule 60(b) Motion as described in *Williams v. Watkins*, 384 S.C. 319, 324, 681 S.E.2d 914, 917 (Ct. App. 2009). The complete failure to raise a meritorious claim is grounds to deny the Rule 60(b) Motion. Under such circumstances, the only reasonable action of the Magistrate Court was to deny the Rule 60(b) Motion.

There was no error of law or fact and no abuse of discretion by the Magistrate Court. The Magistrate Court's dismissal of Respondent's Rule 60(b) Motion was correct because: 1) Respondent failed to show mistake, excusable neglect, inadvertence, or surprise, 2) Respondent could have raised all issues in the Rule 60(b) Motion in either a motion for rehearing or in an appeal from the final judgment, 3) Respondent has failed to show the Court a meritorious claim, and 4) refusing to grant a continuance for an attorney's illness is within the sound discretion of the trial court which is closest to the facts and best able to judge the same.

The Circuit Courts overturning of the Magistrate Court's dismissal of Respondent's Rule 60(b) Motion 1) disregarded case law that forbids substituting a Rule 60(b) Motion for a rehearing or appeal, 2) substituted the Circuit Court's judgment for the Magistrate Court's judgment in violation of the standard of review, 3) was an abuse of discretion for failure to find any mistake, excusable neglect, inadvertence or surprise to Respondent, 4) was an abuse of discretion for removing discretion from the Magistrate Court to control its on docket in case of alleged attorney illness, and 5) was an abuse of discretion for failing to consider the factors

required by *Williams v. Watkins*, 384 S.C. 319, 324, 681 S.E.2d 914, 917 (Ct. App. 2009).

For the reasons stated above, the Order of the Circuit Court should be overturned and the Magistrate Court's denial of the Rule 60(b) Motion should be reinstated.

Respectfully,

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RULE 211(B) CERTIFICATE

I certify, as counsel for Michael's Wholesale Flooring in this matter, that the Brief of Appellant was filed and served according to South Carolina Appellate Court Rules and that, to the extent it applies, this brief complies with the Rule 211(b).

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CERTIFICATE OF FILING AND SERVICE

I certify that, on April 1, 2024, the Appellant Brief was filed and served on Respondents and Respondent's counsel, by mailing a copy via certified mail in the US Mail, in envelopes addressed as follows:

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