

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
In The Circuit Court

SC Court of Appeals

G. D. Morgan, Jr., Circuit Court Judge

Appellate Case No. 2023-001129

DANNY ROSE,

Respondent,

v.

ROBERT ROSE, GLORIA ROSE-RUCH,
MARY MARGARET DOLL ROSE, and
JOHN DOES 1-99,

of whom ROBERT ROSE, GLORIA ROSE-RUCH,
and MARY MARGARET DOLL ROSE are the

Appellants.

INITIAL BRIEF

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Attorney for Appellants

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Rule 12(c), S.C.R.C.P.

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28 AM.JUR.2D *Estoppel and Waiver* § 74 (04/1994)

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STATEMENT OF ISSUES ON APPEAL

- I. IS THE RESPONDENT'S MOTION GOVERNED BY RULE 12(c), S.C.R.C.P.
- II. DOES RULE 12(c), S.C.R.C.P. REQUIRE THE APPLICATION OF THE STANDARD FOR SUMMARY JUDGMENT.
- III. DOES THE DOCTRINE OF JUDICIAL ESTOPPEL PREVENT A DENIAL OF USE OF THE STANDARD FOR SUMMARY JUDGMENT.
- IV. DOES THE STANDARD FOR SUMMARY JUDGMENT PRECLUDE THE RELIEF GRANTED BY THE CIRCUIT COURT.
- V. SHOULD CONTEMPT HAVE BEEN FOUND AGAINST THE APPELLANTS

STATEMENT OF THE CASE

The Respondent Danny Rose, age 76, sold his house and placed the proceeds in an existing joint account with his son Robert Rose. Robert Rose and Gloria Rose-Ruch, Danny's daughter, also held Danny Rose's Power of Attorney. Robert withdrew funds and he and his sister Gloria made investments in their names. The only withdrawal of funds by either Appellant of was for a sum of some \$16,000.00 Robert claimed as repayment for advances to his father. The

The Appellants maintain their father¹ Danny knew of the investments made and allowed them. Danny Rose filed suit claiming theft of the monies and breach of a trust relationship, fraud and related causes. The Circuit Court issued its Orders freezing the Defendants' accounts and, on May 26, 2023, granted sanctions for a failure to account for funds, and judgment on the pleadings as to the majority of causes of action. After a Rule 59 Motion was refused by Order on June 14th, 2023, the Appellants hereby appeal that Order. All claimed funds, plus interest and accepting market losses, have been returned to the Respondent.

The Respondent Danny Rose, age 76, sold his house and placed the proceeds in an existing joint account with his son Robert Rose. Robert Rose and Gloria Rose-Ruch, Danny's daughter, also held Danny Rose's Power of Attorney. Robert withdrew funds and he and his sister Gloria made investments in their names. The only withdrawal of funds by either Appellant of was for a sum of some \$16,000.00 Robert claimed as repayment for advances to his father. The Appellants maintain their father Danny knew of the investments made and allowed them.

1. The Appellant Mary Margaret Doll Rose is the ex-wife of the Appellant Robert Rose.

Danny Rose filed suit claiming theft of the monies and breach of a trust relationship, fraud and related causes. The Circuit Court issued its Orders freezing the Defendants' accounts and, on May 26, 2023, granted sanctions for a failure to account for funds, and judgment on the pleadings as to the majority of causes of action. After a Rule 59 Motion was refused by Order on June 14th, 2023, the Appellants hereby appeal that Order. All claimed funds, plus interest and accepting market losses, have been returned to the Respondent.

To counsel's knowledge, Appellants' former counsel conducted no discovery in this matter. He was relieved on March 2, 2023; present counsel was retained in April, 2023. Given the centrality of Danny Rose's intention in this case, discovery – specifically in the form of a deposition of the Respondent – must be undertaken for the factual issue of his intention and knowledge to be determined. Respondent's Counsel have consistently refused such discovery since present counsel's involvement.

STANDARD OF REVIEW

The Appellants contend that the proper standard of review is that for a grant of summary judgment. This Court has stated that standard in *Carolina Chloride Inc. v. South Carolina Dep't of Transp.*, 391 S.C. 429, 706 S.E.2d 501 (2011) as follows:

When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court. *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 of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRPC. Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *USAA Property and Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008). In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Fleming*, 350 S.C. at 493–94, 567 S.E.2d at 860. *Carolina Chloride Inc. v. South Carolina Dep't of Transp.*, 391 S.C. 429, 706 S.E.2d 501 (S.C. 2011).
[*Id.*, 391 S.C. at 434, 706 S.E.2d at 504]

The Appellants maintain that there are open questions of fact that preclude Summary Judgment.

ARGUMENT

I. THE RESPONDENT'S MOTION IS GOVERNED BY RULE 12(c), S.C.R.C.P.

The Circuit Court bases its Order on Rule 12(c), S.C.R.C.P., dealing with judgment on the pleadings. That Rule states, in relevant part:

(c) Motion for Judgment on the Pleadings. . . . If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

[Emphasis added.]

The Appellants draw attention to the comment to Rule 12(c), which states:

Note:

This Rule 12(c) preserves the present common law practice in this State; and it is more important than the Federal Rule, because of the requirement for fact pleading. It may also be treated as a motion for summary judgment in proper circumstances.

The language requiring treatment of a Motion under Rule 12(c), where there is no exclusion of matter outside the pleadings, does not exist in the Federal Rule 12(c), Fed.R.Civ.P.

II. RULE 12(c), S.C.R.C.P. REQUIRES THE APPLICATION OF THE STANDARD FOR SUMMARY JUDGMENT.

The Respondent's Motion was filed as one for Summary Judgment or Judgment on the Pleadings. [RECORD ON APPEAL, Motion]. Along with this Motion, the Respondent filed various exhibits outside the pleadings. [RECORD ON APPEAL, Exhibits to Motion.] At the hearing, the Circuit Court described the Plaintiff's Motion as one for Summary Judgment. [RECORD ON APPEAL, Transcript of Hearing, p.4, l.3-4].

Affidavits were submitted by the Appellants; that is to say, in the language of Rule 12(c), matter outside the pleadings was presented to and not excluded by the Court. The Court referenced those Affidavits at the hearing:

And I've read the affidavits and the various accounts, and I remember at the hearing too of the detail that was set out that - - what your clients did with the money and the various accounts they went to.

[RECORD ON APPEAL, Transcript of Hearing, p.14, l.20 – p.15, l.3].

During the hearing, counsel for the Respondent stated:

Your Honor, on this matter. I understand from the affidavits that were filed on behalf of the defendants this week that they contend that their previous counsel to quit prior to this hearing or prior to the hearing on the writ of attachment.

[RECORD ON APPEAL, Transcript of Hearing, p.6, l.5-7].

No Motion to exclude the matter contained in the Appellants' Affidavits was made by the Counsel for Respondent nor ruled on by the Circuit Court. [RECORD ON APPEAL, Transcript of Hearing, generally.].

The Appellants acknowledge that portion of the Circuit Court's Order of May 26th, 2023 that grants judgment on the pleadings under Rule 12(c), S.C.R.C.P. They further acknowledge the precedent that states:**(c) Motion for Judgment on the Pleadings.** . . . If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

[Emphasis added.]

The Appellants draw attention to the comment to Rule 12(c), which states:

Note:

This Rule 12(c) preserves the present common law practice in this State; and it is more important than the Federal Rule, because of the requirement for fact pleading. It may also be treated as a motion for summary judgment in proper circumstances.

On appeal from an order granting a Rule 12(c) motion the reviewing court may not consider matters outside the pleadings.

[*Firemen's Ins. Co. of Newark, New Jersey v. Cincinnati Ins. Co.*, 394 S.E.2d 855, ___, 302 S.C. 234, 236 (Ct.App. 1990).]

However, the doctrine quoted from *Fireman's* can have no effect where, as here, the Affidavits of the Appellants were considered by the Court and were not excluded by that Court. Because the evidence contained in the Affidavits of the Appellants was not excluded, the standard by which the Order below must be judged is that of summary judgment, as specifically required by the language of Rule 12(c), S.C.R.C.P.

III. THE DOCTRINE OF JUDICIAL ESTOPPEL PREVENT A DENIAL OF THE USE OF THE STANDARD FOR SUMMARY JUDGMENT.

This conclusion is also supported by the doctrine of judicial estoppel, as recognized by our precedent. The doctrine of judicial estoppel has been stated as follows:

As a general rule, a party is bound by allegations or admissions of fact in his own pleadings. In other words, he may be estopped or precluded by his pleadings.

[28 AM.JUR.2D *Estoppel and Waiver* § 74 (04/1994).]

In *Quinn v. Sharon Corp.*, 343 S.C. 411, 540 S.E.2d 474 (Ct.App. 2000), this Court stated:

The supreme court expressly adopted the doctrine of judicial estoppel, as it relates to matters of fact, in the case of *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472 (1997). The doctrine precludes a party from adopting a position in conflict with one previously taken in the same or related litigation. *Id.*

[*Id.*, 343 S.C. 411, 414, 540 S.E.2d 474, ____.]

The Respondent made his motion under a claim for summary judgment or judgment on the pleadings. The evidence admissible under those claims are different, as recognized by Rule 12(c). The Respondent made no attempt to exclude the Appellants' evidence which, under Rule

12(c), requires the Court to apply the standard for summary judgment in making its ruling. The Respondent is estopped from any attempt to limit the evidence or apply a standard other than that for summary judgment.

IV. THE STANDARD FOR SUMMARY JUDGMENT PRECLUDES THE RELIEF GRANTED BY THE CIRCUIT COURT.

An appellate court reviews a grant of Summary Judgment under the same standard applied by the Trial Court. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006).² The Trial Court should grant summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), S.C.R.C.P.; *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003).

A Court considering Summary Judgment makes neither factual determinations nor considers the merits. An appellate court reviews the grant of Summary Judgment under the same standard which must be applied by the Trial Court. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006).³

A Court considering Summary Judgment makes neither factual determinations nor considers the merits of competing testimony. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5. (2006). In ruling on a motion for summary judgment, the Court must construe all ambiguities, conclusions, and inferences arising in and from the evidence most strongly against the moving party. *Glasscock, Inc. v. US Fidelity & Guar.*, 348 S.C. 76, 80, 557 S.E.2d 689, ___ (Ct.App. 2001)

In ruling on a motion for summary judgment, the Court must construe all ambiguities, conclusions, and inferences arising in and from the evidence most strongly against the moving party. *Glasscock, Inc. v. US Fidelity & Guar.*, 348 S.C. 76, 80, 557 S.E.2d 689, ___ (Ct.App. 2001)

To survive a motion for Summary Judgment, the non-moving party must offer some evidence that a genuine issue of material fact exists as to each element of the claim. *Steele v. Rogers*, 306 S.C. 546, 552, 413 S.E.2d 329, 333 (Ct.App. 1992).

2. This paragraph is quoted, with stylistic changes only, from *Chastain v. Hiltabidle*, 381 S.C. 508, 673 S.E.2d 826, 829 (Ct.App. 2009).

3. This paragraph is also quoted, with stylistic changes only, from *Chastain v. Hiltabidle*, 381 S.C. 508, 673 S.E.2d 826, 829 (Ct.App. 2009).

In the case at hand, the Appellants Robert Rose and Gloria Rose-Ruch, affirmed as follows, *inter alia*⁴:

- (a) That the Respondent executed a Will and accompanying documents, and supplied the Appellants with copies. Under this Will Robert Rose and Gloria Rose-Ruch are the Respondent's main heirs. [RECORD ON APPEAL, Affidavits of Robert Rose and Gloria Rose-Ruch, Para. 5, p.____.].
- (b) That the Respondent executed a Durable Power of Attorney, making Robert Rose and Gloria Rose-Ruch his attorneys in fact, and had those persons sign an acceptance of that position. [RECORD ON APPEAL, Affidavits of Robert Rose and Gloria Rose-Ruch, Para. 6, p.____.].
- (c) That the Respondent and Robert Rose executed a signature card from the Bank of America, naming them as Joint Owners with Rights of Survivorship to account 0007 7826 0091. Robert Rose believes there is a similar Signature Card for Bank of America account xxxx xxxx 0575. [RECORD ON APPEAL, Affidavits of Robert Rose and Gloria Rose-Ruch, Para. 7, p.____.].
- (d) The Appellants know of no lawyer who was involved in drawing or executing the documents above (Will, Power of Attorney, Signature Card). [RECORD ON APPEAL, Affidavits of Robert Rose and Gloria Rose-Ruch, Para. 8, p.____.].
- (e) The Appellants believe the Will and Power of Attorney forms used were found by their father were off the The Internet. They were not told to consult a lawyer and did not do so. The Appellants were not told to keep the money sent to us by the Respondent, their father, in his name alone, or jointly with him. No documents, other than those listed above, exist setting out the Appellants' duties or the limits of their authority as to the Respondent's affairs. [RECORD ON APPEAL, Affidavits of Robert Rose and Gloria Rose-Ruch, Para. 9, p.____.].
- (f) The Appellants understood from talks with the Respondent, their father, and pursuant to the documents referenced above, that they were to manage his money and invest it for the Respondent's benefit. Robert Rose was also told that under the Bank of America Signature Cards he could understand the funds in the joint bank account xxxx xxxx 0091 and account xxxx xxxx 0575 with the Bank of America were his own. [RECORD ON APPEAL, Affidavits of Robert Rose and Gloria Rose-Ruch, Para. 10, p.____.].

4. The quoted language of the Affidavits has been changed as to grammar and to state the proper tense.

(g) In March, 2022, the Respondent sold his house and deposited what the Appellants took to be the net proceeds of that sale - \$300,786.39 - into the joint bank account with Robert Rose, number xxxx xxxx 0091 with the Bank of America. [RECORD ON APPEAL, Affidavits of Robert Rose and Gloria Rose Ruch, Para. 11, p.____].

(h) On March 10, 2022, Robert Rose deducted from the net proceeds deposited an amount of \$16,000.00. \$ 11,000.00 of this was for money he maintains he had advanced to his father; and he is in possession of documents that show that figure and what it was for. [RECORD ON APPEAL, Affidavit of Robert Rose, Para. 12, p.____].

(i) Of that \$ 16,000.00 so withdrawn, \$ 5,000.00 was for a concrete pad Robert Rose had promised to pour for the Respondent at his new location, and this deduction was known to the Respondent and agreed to by him. [RECORD ON APPEAL, Affidavits of Robert Rose and Gloria Rose-Ruch, Para. 13, p.____].

(j) Of the sales proceeds received, Robert Rose parked \$175,000.00 with my his ex-wife and Appellant Mary Margaret Doll Rose; those funds were later transferred back to his account; his ex-wife having access to a fund yielding a higher rate of interest. Mary Margaret Doll Rose did not retain any part of this money on her own behalf. [RECORD ON APPEAL, Affidavit of Robert Rose, Para. 14, p.____].

(k) After the return of the above funds, the money was divided up as follows with all accounts being in the name of Robert Rose. During the period from March 10, 2022 through July, 2022:

\$ 75,000.00 in CDs with Fifth Third Bank;
\$ 16,766.17 in a TD Ameritrade IDA account as of 08/31/22;
\$ 78,330.39 in Founders Federal Credit Union.

[RECORD ON APPEAL, Affidavit of Robert Rose, Para. 15, p.____].

(l) Other than the amounts stated above, Robert Rose made no withdrawals from the joint accounts from March 10, 2022 when the sales proceeds were deposited until those accounts were closed in July, 2022. Withdrawals were made by my the Respondent for his day-to-day expenses, with deposits of what Robert Rose took to be his social security checks. Copies of the bank statements for those accounts were attached incorporated with the Affidavit. [RECORD ON APPEAL, Affidavit of Robert Rose, Para. 16, p.____].

- (m) Of the net proceeds received on March 10, 2021, \$50,000.00 was transferred to Robert Rose's sister, Gloria Rose-Ruch. [RECORD ON APPEAL, Affidavit of Robert Rose, Para. 17, p.____; Affidavit of Gloria Rose-Ruch, Para. 12, p.____].
- (n) After Robert Rose's discussion with the Respondent, \$8,000.00 of that \$50,000.00 went to purchase a lifetime subscription with Brownstone Research relating to advice on crypto currency investments. [RECORD ON APPEAL, Affidavit of Robert Rose, Para. 18, p.____; Affidavit of Gloria Rose-Ruch, Para. 13, p.____].
- (o) After a discussion between the Respondent and Gloria Rose-Ruch's husband, \$8,000.00 of that \$50,000.00 went to purchase a lifetime subscription with Brownstone Research relating to advice on crypto currency investments. [RECORD ON APPEAL, Affidavit of Gloria Rose-Ruch, Para. 13, p.____].
- (p) The net of the funds transferred to Gloria Rose-Ruch were invested in an account dealing in crypto-currencies, and held in the name of Gloria's husband Joshua Rose-Ruch. As of the time of the Deposition of Joshua Rose-Ruch, the value of that account had shrunk to \$4,397.03. A copy of that Deposition was attached incorporated with the Affidavit. [RECORD ON APPEAL, Affidavit of Robert Rose, Para. 19, p.____; Affidavit of Gloria Rose-Ruch, Para. 14, p.____].
- (q) The investment of the \$50,000.00 into crypto currencies was made after a full discussion with the Respondent, and with his approval. The Appellants confirm that everything that was done by Gloria Rose-Ruch and her husband was done in good faith. [RECORD ON APPEAL, Affidavit of Robert Rose, Para. 20, p.____; Affidavit of Gloria Rose-Ruch, Para. 15, p.____].
- (r) During this time, and during her weekly conversations with the Respondent, he started to deny that conversation with Gloria Rose-Ruch and/or her husband had taken place. Because of this Gloria Rose-Ruch taped one conversation with her my father. A copy was attached to her Affidavit. [RECORD ON APPEAL, Affidavit of Gloria Rose-Ruch, Para. 16, p.____].
- (s) Gloria Rose-Ruch could not tell if her father, the Respondent, is lying about the conversations or if he has forgotten. [RECORD ON APPEAL, Affidavit of Gloria Rose-Ruch, Para. 17, p.____].
- (t) Whatever names the investments set out in this Affidavit were placed in, there was no intention and no effort to deny the Respondent's interest in that money. Robert Rose did understand, under the Will, Power of Attorney and Signature Cards listed

above, that the Respondent intended that he could have used any of this money for his own benefit. [RECORD ON APPEAL, Affidavit of Robert Rose, Para. 21, p.____].

(u) The Appellants confirmed that the funds recited above are all those resulting from the net proceeds from the sale of his house, with additions for interest and deductions for bank charges. Neither Robert Rose, Gloria Rose-Ruch or Mary Margaret Doll Rose have withdrawn any funds their own use. The money discussed above was still where it was put, and still in those large amounts intended to be investments. [RECORD ON APPEAL, Affidavit of Robert Rose, Para. 22, p.____].

(v) The money received by Robert Rose, Gloria Rose-Ruch was understood by us to be intended for the Respondent while he lived. The Appellants did not steal any of this money nor was it used for their benefit. [RECORD ON APPEAL, Affidavit of Robert Rose, Para. 23, p.____].

(w) All remaining funds referenced above were frozen by the Order of this Court. Since he has instituted this law suit, the Appellants stood willing to transfer all the accounts mentioned (other than those already recovered by him) to him in his name. [RECORD ON APPEAL, Affidavit of Robert Rose, Para. 25, p.____].

The allegations of the Appellants, as set out in their Affidavits, set out factual matter sufficient to show, at the least, “ambiguities, conclusions, and inferences” (to quote the language of *Glasscock, infra*) which must be construed against the Respondent as the moving party. The Appellants are entitled to have the Order of the Circuit Court set aside as precluded by the standard for summary judgment.

V. CONTEMPT SHOULD NOT HAVE BEEN FOUND AGAINST THE APPELLANTS

By his Motion of February 15, 2023, the Appellants’ counsel moved to be relieved. [RECORD ON APPEAL, Motion to be Relieved, p.____]. The Circuit Court then ordered the Appellants to disclose funds in question by its Order of February 24, 2023. [RECORD ON APPEAL, Order, p.____]. An Order relieving prior counsel was issued on March 2, 2023. [RECORD ON APPEAL, Order, p.____].

The Respondent filed his Motion for sanctions on March 22, 2023. [RECORD ON APPEAL, Motion for Sanctions, p.____]. After a search, the Appellants retained their present counsel on April 20, 2023. The Rose Appellants filed their Affidavits, with attachments, on May 1, 2023. The Appellants contend that their Affidavits contained all information available to them,

considering the Respondent's freeze on the assets. [RECORD ON APPEAL, Affidavit of Robert Rose, Para.s 11-16, p.____; Affidavit of Gloria Rose-Ruch, Para.s 11-15, p.____].

The Respondent's Motion for Summary Judgment joined various exhibits showing the amounts and status of the monies in question. [RECORD ON APPEAL, Motion for Summary Judgment or Judgment on the Pleadings, p.____]. Nothing contained within the Appellants' Affidavits contradicted the information known to the Respondent. As stated, the Appellants did not understand they were in possession of any further information than that which they disclosed. [RECORD ON APPEAL, Affidavit of Robert Rose, Para.s 11-16, p.____; Affidavit of Gloria Rose-Ruch, Para.s 11-15, p.____]. They also stated their willingness to cooperate in transferring the funds remaining after those expenses referenced in the Affidavits, *infra*, to the Respondent. [RECORD ON APPEAL, Affidavit of Robert Rose, Para.s 25-27, p.____; Affidavit of Gloria Rose-Ruch, Para.s 22-24, p.____].

Under these circumstances, the Appellants argue that neither has the Respondent been damaged nor the procedure of this Court unduly delayed.

The Appellants plead their good faith in failing to meet the deadline set by the February 23, 2023 Order, for the reasons stated, precludes a finding of contempt. *Burnell v. Burnell*, 359 S.C. 361, 597 S.E.2d 24 (Ct.App.2004); *EX PARTE Lipscomb*, 398 S.C. 463, 730 S.E.2d 320 (Ct. App. 2012). They also plead their inability to obtain the information sought in greater detail than that which they communicated by their Affidavits.

Inasmuch as the award of attorney fees are based upon the finding of contempt, the same cannot stand. *EX PARTE Lipscomb, supra*.

CONCLUSION

For the reasons stated herein, this Court should reverse the judgment of the Circuit Court.

Respectfully submitted,

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March 17, 2024

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CERTIFICATE OF COUNSEL

The undersigned certifies that the final Brief of Appellant complies with Rule 211(b), S.C.A.C.R.

May 6, 2024

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