THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Thomas A. Russo, Circuit Judge

Appellate Case No. 2020-000054

Noel Owens,...……..……...Appellant,

v.

Mountain Air Heating & Cooling, South Market Real Estate, Demetra Caldera, and Ronald Gilmer, Defendants,

Of whom South Market Real Estate and Demetra Caldera are the.....Respondents.

FINAL BRIEF OF APPELLANT

Andrew S. Radeker
S.C. Bar No. 73743
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant

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II. Did the lower court err in granting summary judgment on the basis that the Appellant's claim was not beyond the scope of the release language at issue?

III. Did the lower court err in finding that summary judgment was proper on the question of whether Respondent Caldera was an agent of Respondent South Market?

IV. Did the lower court err in finding that Appellant was not entitled to a jury trial on the remainder of the Respondents' claims?

STATEMENT OF THE CASE

The Appellant, Noel Owens (hereinafter "Owens"), brought suit against Mountain Air Heating & Cooling (hereinafter "Mountain Air"), South Market Real Estate (hereinafter "South Market"), Demetra Caldera (hereinafter "Caldera"), and Ronald E. Gilmer (hereinafter "Gilmer"), making claims relating to representations concerning the state and soundness of the heating and air conditioning system at a house she purchased from Gilmer. (R. pp. 10-18.) As to Caldera and South Market, the complaint alleged that Caldera, working for realty company South Market, was Owens' realtor and materially misrepresented the condition of the heating and air conditioning system of a house that Owens bought, relying on that misrepresentation. (R. pp. 11-12.) The complaint alleged claims that Caldera and South Market violated their agency duties to Owens, engaged in fraud, constructive fraud, and negligent misrepresentation, violated S.C. Code Ann. § 27-50-65 (hereinafter "the Residential Property Condition Disclosure Act"), and violated the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*. (R. pp. 12-17.) Defendants Caldera and South Market are the Respondents in this appeal.

Caldera and South Market made motions for summary judgment, arguing that Owens released these claims upon signing a document containing release language on April 3, 2015. (R. pp. 44-71.) Following a hearing on the matter on October 17, 2019, the lower court made an order granting both motions for summary judgment, finding that Caldera was not an agent of South Market, that Owens prospectively released her claims against the Respondents, that Owens' claims against Caldera and South Market fell within the scope of the release and indemnification language, and that Owens was not entitled to a jury trial on Respondents' claims against her. (R. pp. 1-5.)

STATEMENT OF FACTS

Owens engaged Caldera to act as her real estate agent in purchasing a home. (R. p. 10.) At all times until after being sued in this case, South Market held Caldera out to be its agent. (R. pp. 11, 118-19.) Based on this representation and Owens' reasonable belief in that representation, Owens signed up with South Market. (R. pp. 118-19.) While Owens discovered the subject property at 8025 Nightingale Drive, Columbia, South Carolina, herself, she nevertheless asked Caldera to arrange a viewing and the eventual sale of the home to her. (R. p. 11.) Owens signed up to buy the subject property on April 12, 2015. (R. p. 119.)

Caldera hired Respondent Mountain Air to perform an inspection on the system in the subject property. (R. pp. 11, 122.) Following the inspection, Caldera represented to Owens that "[t]he heating and air look[ed] good[.]" (R. p. 121.) Neither Caldera, South Market, nor Gilmer, at any point relevant to this case, disclosed any concerns regarding the heating and air system. (R. p. 11.) Mountain Air also represented that the system was fine. (R. pp. 12, 122.) Despite these assurances, numerous problems with the heating and air system arose shortly after Owens' purchase of the home. (R. p. 12.) Owens requested another inspection by another company, which found the following:

> The condenser is extremely dirty and the evaporator coil is dirty. The unit top is missing insulation and the compressor has weak valves. This system has multiple issues and is not cooling or heating properly at this time. The gas line is improperly installed. The gas line is in contact with the ground and is supposed to be either 12" above ground or 18" below. That code precedes 1999 when this unit was manufactured. Code requires that gas line be hard pipe through unit casing, this system has flex gas line through casing. Numerous sections of supply ducts are missing insulation. The main supply and return trunk lines need to be replaced and hung off the ground. Shipping holes in [system's] base should be filled to prevent rodent infestation under house. Flashing should be waterproof to keep duct insulation dry and intact . . . . Air conditioning duct supplies have

> always been required to be insulated and ductwork has never been allowed to be in contact with the ground. The gas line issues on this property were not up to code at the time of installation.
>
> Due to the age and condition of the unit, we recommend the unit be replaced and that duct work be repaired to meet code requirements. This duct system is not that old but was improperly installed.

(R. pp. 12, 127.) Mountain Air, Gilmer, Caldera, and South Market failed to inform Owens of any of these issues, and Owens ultimately had to replace the system altogether. (R. pp. 12, 119-20.) The new unit cost about $8,400.00. (R. p. 120.)

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). That standard is that:

> summary judgment may be rendered only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of the law.

Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986) (citing Spencer v. Miller, 259 S.C. 453, 192 S.E.2d 863 (1972)).

"All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct. App. 2004) (citing Bayle v. South Carolina Dep't of

Transp., 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001); Hall v. Fedor, 349 S.C. 169, 173-74, 561 S.E.2d 654, 656 (Ct. App. 2002)) (internal citations omitted). If "the parties vehemently dispute the inferences and conclusions to be drawn form the undisputed facts, . . . that simply establishes that summary judgment is not appropriate[.]" Montgomery v. CSX Transp., Inc., 656 S.E.2d 20, 29 (2008) (citing Wilson v. Style Crest Products, Inc., 367 S.C. 653, 656, 627 S.E.2d 733, 735 (2006)).

> When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues.

Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008) (citing David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006); Rule 56(c), SCRCP) (internal citations omitted).

In 2009, the South Carolina Supreme Court clarified earlier confusion about whether a scintilla of evidence is sufficient to defeat summary judgment. See Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 802-03 (2009). In Hancock, the Court held that "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Id. at 330, 673 S.E.2d at 803. More than a scintilla is required only in cases requiring heightened burdens of proof or applying federal law. Id. at 330-31, 673 S.E.2d at 803.

ARGUMENT

I. A release signed on April 3, 2015 could not have released a claim that did not arise until April 13, 2015.

To hire South Market and Caldera, Owens signed a document stating that she released them from claims relating to the "recommendation of and selection of inspectors, contractors, and service providers[,]" to "the acts, claims, performance, and omissions of selected inspectors, contractors, and service providers[,]" and to "the verification of property information." (R. p. 53.) Owens signed this document on April 3, 2015. (R. p. 53.) On April 13, 2015, Mountain Air, as chosen and ordered by Caldera (R. p. 122), performed an inspection of the heating and air system. (R. p. 119.) Caldera then represented to Owens that "[t]he heating and air looks good[.]" (R. p. 121.) However, after hiring other inspectors and receiving a report that was actually accurate, Owens discovered that the heating and air system did not work at all and had to be replaced in its entirety. (R. pp. 119, 127.)

The general rule is that a release does not operate to apply to and get rid of claims that have not yet arisen when the release is signed. Gardner v. City of Columbia Police Dept., 216 S.C. 219, 223, 57 S.E.2d 308, 310 (1950). Moreover, "[a] 'general release' is an understood term under traditional contract interpretation: it . . . ordinarily covers all claims and demands due *at the time of its execution*, and within contemplation of the parties.'" Doe v. Spartanburg County School District Three, 314 F.R.D. 174, 179 (D.S.C. 2016) (emphasis added). So, analysis is two-fold: we have to look at the claims and demands due at the time the document was executed, and we have to determine whether those claims and demands were within contemplation of both of the parties.

To the first prong, Owens' claims that arose on April 13, 2015, did not and could not have been released ten days earlier, on April 3, 2015 when Owens signed the document. It was not possible for that claim to have existed when the parties signed this document.

The lower court's order, however, does not reach this conclusion, because it does not apply this component of the rule and does not provide any reason why the general rule regarding applicability of releases would not apply here. The lower court, rather, seems to jump to the second prong, stating that "the terms of both the disclaimer and release of liability are clear" and that Respondents "make[] no warranties as to the reliability of any of the inspectors, contractors, or service providers." (R. p. 3.) Even if this could be read to contemplate releasing claims that had not yet arisen, the lack of evidence in the record to the effect that this is what was intended reveals a question of fact about whether this is so. That question of fact precluded summary judgment. Englert, 377 S.C. at 133-34.

The conclusion that this language was intended to release prospective claims with regard to the *Respondents'* representations is far from clear. The lower court's determination otherwise cannot stand for at least two reasons. First, the release language expressly only applies to "the acts, claims, performance, and omissions *of selected inspectors, contractors, and service providers*[,]" and not of either Respondent. (R. p. 53.) Accordingly, as detailed below, the language does not apply to direct representations by the Respondents about the condition of the property *at all*, let alone claims concerning representations the Respondents had not yet made. Second, to conclude that the language is "clear" in its application to claims against the Respondents under the summary judgment standard assumes a clarity that is not present in the record, certainly not when viewed in the light most favorable to Owens. The lower court could have (and was legally obligated to) read the plain language of the release

document in the light most favorable to Owens. In doing so, the court would have seen that it does not cover nor even mention direct representations by the Respondents about the condition of the property. Caldera's representation, viewed in the light most favorable to Owens, did not verify information about the property; rather, it was a direct misrepresentation about the condition of the property. (R. p. 121.) If Caldera knew the condition of the property, this misrepresentation was willful, and, if she did not know the condition of the property, this misrepresentation was negligent. As pointed out at the hearing on these motions, Caldera did not say that she was told that the heating and air system looks good. (R. p. 10 ln. 11-12, p. 15 ln. 8-12, p. 121.) She made an affirmative representation that it did look good. R. pp. p. 10 ln. 11-12, p. 15 ln. 8-12, p. 121.) This is more than the scintilla of evidence Owens needed to show to require the court to deny these motions for summary judgment. The lower court seemed to think that because Caldera's email *could* be interpreted as merely relaying what the HVAC inspector told her, that is how it must be interpreted. The lower court's analysis turned the summary judgment standard on its head. See, e.g., Nelson, 362 S.C. at 5.

There is no language in the release document nor any facts in the record that would support the determination that the rule noted in Gardner does not apply to this case, nor is there any language that even suggests that it was within either party's contemplation that the language apply prospectively or apply to the Respondents' direct representations about the condition of the property. The court's conclusion that it was clear the parties intended to release *any* claim – let alone prospective claims that were not in existence at the time the release was signed – arising from Respondents' misrepresentations was an inference drawn unreasonably and directly in favor of the Respondents, not Owens. This was impermissible. See, e.g., id.

II. Appellant's claims are beyond the scope of the language set out in the release and indemnification document.

The lower court found that "claims against [South Market] and [Caldera] stem from what [Owens] alleges was a negligent inspection performed by Defendant Mountain Heating and Air[.]" (R. p. 3.) First, this misstates Owens' claims. The claims against Caldera and South Market stem from false representations that Caldera made as an agent of South Market, independently and apart from Mountain Air's inspection and its findings. (R. p. 121.)

The release and indemnification language in the document states that it applies to the "recommendation of and selection of inspectors, contractors, and service providers[,]" to "the acts, claims, performance, and omissions of selected inspectors, contractors, and service providers" and to "the verification of property information." (R. p. 53.) Nothing in this language applies to representations or claims made by Caldera and South Market. Caldera is not a "selected inspector[], contractor[], [or] service provider[][,]" and her affirmative, false representation to Owens that "[t]he heating and air looks good" did not have anything to do with the "recommendation of and selection of inspectors, contractors, and service providers" or verification of property information." (R. pp. 53, 121.) Owens' causes of action against Caldera and South Market did not fall within the scope of the release and indemnification language.

Even if the language of the document did cover the misrepresentation, however, the attempt at creating an indemnification obligation would fail as a matter of law, and Owens would not be obligated to indemnify Caldera and South Market. "[U]nder South Carolina . . . law, a contract of indemnity will not operate to indemnify the indemnitee against losses for *its own negligence* unless the intention is expressed in 'clear and unequivocal terms.'" Hazel v. Blitz U.S.A., Inc., 425 S.C. 361, 372, 822 S.E.2d 338, 344 (Ct. App. 2018) (citing Fed. Pac.

Elec. v. Carolina Prod. Enters., 298 S.C. 23, 26, 378 S.E.2d 56, 57 (Ct. App. 1989)) (emphasis added). In Hazel, the court found that there was not "a clear and unequivocal expression of an intention to indemnify [the defendant] for its own negligence." Id. Rather, the indemnity agreement in that case "d[id] not mention negligence at all and [the court could not] otherwise discern an intent to indemnify [the defendant] for its own wrongdoing[.]" Id.

Here, there is no evidence in the record to support the idea that the parties intended the indemnity clause operate to indemnify Caldera and South Market for their own negligence. The release language makes no mention of representations, acts, claims, performance, or omissions on the part of Caldera or South Market. (R. p. 53.) Just as in Hazel, the document makes no mention of negligence on the part of Caldera or South Market. There are no "clear and unequivocal terms" that would warrant the conclusion that the parties intended to release Caldera or South Market from any claim arising from direct misrepresentation of the condition of the property. Hazel, 425 S.C. at 372.

Consistently with the summary judgment standard, the court *had* to construe the language of the release and indemnification document in the light most favorable to Owens, drawing every reasonable inference in her favor. Respectfully, the court did not do that. That is reversible error.

III. There was evidence in the record from which a factfinder could reasonably conclude that Caldera was an agent of South Market.

The court states in its order that "at all times material to the sale, Defendant Caldera was an independent contractor or Defendant South Market's 'licensee.'" (R. p. 3.) Viewing the record in the light most favorable to Owens, as is required, there is evidence in the record that this conclusion is incorrect. That precludes summary judgment on this point.

In South Carolina, "[a]n agent is one appointed by a principal as his representative and to whom the principal confides the management of some business to be transacted in the principal's name, or on his account, and who brings about or effects legal relationships between the principal and third parties." Peeples v. Orkin Exterminating Co., 244 S.C. 173, 180, 135 S.E.2d 845, 848 (1964). "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." Froneberger v. Smith, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006)).

Moreover, "[a]gency is a question of fact." Id. at 49 (quoting Gathers v. Harris Teeter Supermarket, Inc., 282 S.C. 220, 226, 317 S.E.2d 748, 752 (Ct. App. 1984)). "Usually, whether an agency relationship exists and the scope of the alleged agent's authority are questions of fact for the jury." Holmes v. McKay, 334 S.C. 433, 439, 513 S.E.2d 851, 854 (Ct. App. 1999) (citing American Fed. Bank v. Number One Main Joint Venture, 321 S.C. 169, 173-74, 467 S.E.2d 439, 442 (1996); Hiott v. Guaranty Nat'l Ins. Co., 329 S.C. 522, 530, 496 S.E.2d 417, 421 (Ct. App. 1997)). An agency relationship does not require "express appointment and acceptance" to be created; rather it "may be, and frequently is, implied from the words and conduct of the parties and the circumstances of the particular case." Id. (quoting City of Greenville v. Washington Am. Baseball Club, 205 S.C. 495, 504-05, 32 S.E.2d 777, 780-81 (1945); Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 83, 124 S.E.2d 602, 606 (1962)). "The agent must have assumed to represent the principal and to have performed the acts in his name and on his behalf." Id. at 440. Parties may have an agency relationship even where they

have expressly agreed to the contrary. Fernander v. Thigpen, 278 S.C. 140, 143, 293 S.E.2d 424, 426 (1982).

In Holmes, the plaintiff approached Seigler, an independent insurance provider, to procure farm liability insurance. 334 S.C. at 435. Seigler lacked access to that type of policy, so Seigler approached McKay, and insurance agent for broker USF & G, on Holmes' behalf, and USF & G eventually issued a Holmes a policy. Id. at 435-36. Following a civil action against Holmes for which USF & G denied coverage, Holmes brought suit against USF & G, Seigler, and McKay. Id. The circuit court granted USF & G's motion for summary judgment because "USF & G was not bound by either Seigler's or Mckay's representations in meeting with Holmes[.]" Id. at 436. The Court of Appeals agreed with USF & G's contention that Seigler was not their agent since Holmes was the one who initially approached Seigler, Seigler was an independent agent and not licensed to sell for USF & G, and there was "no evidence that Seigler was acting 'at the instance or request of' USF & G." Id. 442-43. This court found otherwise regarding McKay. Id. at 443. The court found that there was at least some evidence that "USF & G's issuing the Policy validated that McKay was its agent with authority to speak on its behalf, at least with respect to the Policy." Id. (citing Fuller, 240 S.C. at 85-87, 124 S.E.2d at 608). The court concluded that "[i]n construing all the facts and inferences in favor of Holmes . . . there is a question of fact as to whether McKay is USF & G's agent so that her representations regarding coverage . . . are binding on USF & G." Id.

The facts here warrant reversal of the lower court's grant of summary judgment. Similarly to Holmes and Seigler, Owens was the one who initially approached Caldera, and the fact that the release and indemnification document and Caldera's email signature bore South Market's name arguably validates that Caldera was South Market's agent with authority

to speak on its behalf, at least with respect to the document. (R. pp. 53, 121.) Although the release and indemnification document refers to Caldera as South Market's "licensee" and not as an agent, what the parties call themselves does not matter and has no real bearing on whether there is an agency relationship between them. Fernander, 278 S.C. at 143. At all times relevant to this case, Caldera transacted business in the name of South Market. South Market held Caldera out to be its agent. Given these facts, South Carolina's well-settled case law on the matter, and the summary judgment standard, this conduct is some evidence of an agency relationship between Caldera and South Market.

Even if the court were to somehow make the substantive determination that there was no agency here (which it should not have), there most certainly would have been evidence of apparent agency in viewing the circumstances in light most favorably to Owens. Apparent agency has the effect of agency even when agency may not actually exist. Froneberger, 406 S.C. at 47.

> Under South Carolina law, "[t]he elements which must be proven to establish apparent agency are: (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was a reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." Graves v. Serbin Farms, Inc., 306 S.C. 60, 63, 409 S.E.2d 769, 771 (1991). "Apparent authority to do an act is created as to a third person by written or spoken words or *any other conduct of the principal* which, reasonably interpreted, causes the third person to believe the principal consent to have the act done on his behalf by the person purporting to act for him." Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 244-45, 473 S.E.2d 865, 868 (Ct. App. 1996). "Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief." Id. at 245, 473 S.E.2d at 868.

Froneberger, 406 S.C. at 47 (emphasis in original).

Here, South Market consciously *and* impliedly represented Caldera to be its agent. Again, in all relevant email communications between Owens and Caldera, Caldera's signature stated her name along with "South Market Real Estate, LLC." (R. p. 121.) South Market held Caldera out to be its agent. (R. pp. 118-19, 124, 125.) Owens "signed up with South Market on a South Market form" after her initial meeting with Caldera. (R. p. 118.) The release and indemnification document bears South Market's letterhead. (R. p. 53.) Following her discovery of the issues with the heating and air system, Owens had multiple communications with Tonya Graves, another associate of South Market, who never disclaimed that Caldera was South Market's agent. (R. p. 123-25.) Under these circumstances and the summary judgment standard, the record supports a conclusion that South Market consented to have Caldera act on its behalf. Further, Owens relied on the representations that Caldera was an agent of South Market and that South Market was a "stable" real estate business, and this reliance led to Owens signing up. (R. pp. 118-19.) Additionally, Owens relied on Caldera's representation that the heating and air system were in good condition. (R. pp. 119, 123.) This reliance was to Owens' detriment, as she had to replace the system. (R. pp. 119-20.)

The facts, particularly when viewed most favorably to Owens, easily lead to the conclusion that there was apparent agency.

IV. Appellant is still entitled to the right to a jury trial, regardless of the outcome of this appeal on the liability issues.

The lower court further ordered that Owens "is to indemnify [Respondents] for their defense of this action," and "[i]f any dispute arises as to the amount of the indemnification, then the matter will be set for a damages hearing[.]" (R. p. 4.) Even if the court's substantive determinations stand (which they should not), Owens will still be entitled to a jury trial, not a damages hearing, on the claims against her. The process the order provides for arriving at the

amount of Caldera and South Market's judgment against Owens on those claims violates Owens' due process rights, as guaranteed under the Seventh Amendment of the United States Constitution and Article I, Section 3 [sic: 14][1] of the South Carolina Constitution, deprives her of the right to a jury trial, and impermissibly shifts the burden of proof, as the lower court shifted the burden to Owens to present evidence of a dispute concerning Caldera and South Market's ostensible damages. The lower court erred in this regard.

This would not be a default damages hearing. Even if the ruling on liability to Caldera and South Market were to be sustained, Owens is still entitled to a jury trial on the issue of damages. Rule 38, SCRCP.

> The rule as to the burden of proof is important and indispensable in the administration of justice, and constitutes a substantial right of the party upon whose adversary the burden rests. It should therefore be jealously guarded and rigidly enforced by the courts.

Jackson v. Frier, 146 S.C. 322, 144 S.E. 66, 67 (1928) (quoting 22 C.J. 69). Owens is entitled to have this court jealously guard and rigidly enforce her rights.

CONCLUSION

Respectfully, the lower court erred prejudicially in granting Caldera's and South Market's motions for summary judgment. The court should reverse these rulings and remand this case for a trial in which a jury will determine questions of material fact that are present here.

[1] Section 14 is the correct section. Owens' initial brief referenced Article I, Section 3 as the result of a scrivener's error.

Respectfully submitted,

/s/ Andrew S. Radeker
Andrew S. Radeker
S.C. Bar No. 73743
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellant

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CERTIFICATE OF COUNSEL
REGARDING COMPLIANCE WITH RULE 211(b), SCACR

I certify that the foregoing final brief complies with Rule 211(b), SCACR.

Respectfully submitted,

/s/ Andrew S. Radeker
Andrew S. Radeker
S.C. Bar No. 73743
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
drew@harrisonfirm.com
Attorney for Appellant

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