THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William E. Lawson, Special Referee

CASE NO. 2011-CP-26-4758

Monroe E. Cook and Lynn S. Cooke ....Appellants

vs.

Nealy Lynn Taylor.. Respondent

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. Did the Court abuse its discretion by allowing Defendant to add the defenses of lack of consideration, illegality and unclean hands at the close of the evidence?

II. Did the Special Referee err in finding that there was no unjust enrichment?

III. Did the Special Referee err in holding that this was an illegal contract?

IV. Did the Special Referee err in holding the Appellants assumed the risk?

V. Did the Special Referee err in holding that the Plaintiffs had unclean hands?

VI. Did the Special Referee err in finding no fiduciary relationship between the Plaintiffs and the Defendant?

VII. Did the Special Referee err in applying estoppel in this case?

STATEMENT OF THE CASE

This lawsuit was initiated by Monroe and Lynn Cook to require their daughter, Nealy Lynn Taylor, to reconvey 18.78 acres in Horry County to them, or in the alternative, to enter judgment against Nealy in the amount that the Plaintiffs purchased the property for in 2007. The matter was referred to the Special Referee by the Clerk of Court for Horry County by Order dated February 11, 2013.

The Plaintiffs, Monroe and Lynn Cook, deeded 18.78 acres to their daughter, Nealy Lynn Cook, so that they could continue to receive financial aid for their adopted/foster children from the Social Security Administration. The Cooks understood that the land would be reconveyed to them by their daughter at any time they chose to request it be deeded back to them. The basis of the deeding of the property in the first place was that employees of the Social Security Administration had informed the Plaintiffs that they had too much real property to qualify for SSI benefits for their adopted/disabled children.

There were two deeds recorded pursuant to the Cooks meetings with the Social Security Administration. The first deed was for 14.77 acres to Kenneth Cook, the son of the Cooks. The second deed was to Nealy Cook Taylor for the 18.78 acres.

Thereafter, the Cooks learned from the Social Security Administration that they would have to repay the Social Security Administration and that the deeding of the property was not sufficient for the Cooks to continue to obtain social security benefits for their children. The Cooks requested from Kenneth and Nealy that the property be reconveyed to them. Kenneth reconveyed the property but reserved a one-half interest for himself. Nealy refused to reconvey the property and the Cooks commenced this lawsuit.

The Special Referee found Nealy Taylor did not have to reconvey the property to the Plaintiffs. This appeal follows.

STANDARD OF REVIEW

It is well settled in South Carolina Appellate Courts that in an action at law on appeal of a case tried without a jury that the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. Further, in an action in equity tried by a Judge this Court may make findings in accordance with its own view of the preponderance or the greater weight of the evidence. *Townes Associates Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (S.C. 1976). Finally, it is the duty of this Court in equity cases to review challenged findings of fact as well as matters of law. Appellants assert this is an action at equity.

ARGUMENT

I. The Special Referee abused its discretion by allowing the Defendant to add the defenses of lack of consideration, illegality and unclean hands at the close of the trial.

At the close of all the evidence, defense counsel moved to amend his answer to conform to the evidence under Rule 15(b) and to include the defenses of lack of consideration, illegality and unclean hands. He argued those defenses, although not pled, had been tried without objection meaning that the parties had impliedly consented to those issues being tried. (Tr., p. 215, lines 14-25; p. 216, line 1).

Plaintiffs' counsel stated:

> My reply would be that this has been an ongoing case for almost two years now and we had ample opportunity to amend the answer up until this point, and I feel that if the answer is amended at this point and time, it would be prejudicial to my clients. (Tr., p. 216, lines 4-8).

The Court then noted:

> I am going to take that motion under advisement for now. I am concerned that it is post-testimony and that.... (Tr., p. 216, lines 9-11).

Later the Court noted:

> I agree with that's what the rule says, but I'm not sure at this point. I don't want to belabor it at this point, that the Defendant was actually aware that those defenses were being tried. (Tr., p. 216, lines 20-24).

It is against this backdrop that the Court in its final Order stated:

> I find and conclude that Defendant's Motion to amend the Complaint to conform to the evidence to allege the additional defenses of lack of consideration, illegality, and unclean hands is granted pursuant to Rule 15(b), SCRCP as those issues were tried without objection and by consent of the Parties. (Order of William E. Lawson, Special Referee, p. 14).[1]

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[1] This finding is directly contra to the trial record that Appellants' counsel vigorously objected to the amendment and violates SCRCP 15(b) because the Court did not state its reasons for allowing these defenses on the record or in writing. (Tr. p. 215, lines 14-25; p. 216, line 1)

Appellants believe this ruling of the Court was in error and in violation of the plain text of SCRCP 15 which states:

> Upon allowing any such amendment or evidence the Court shall state in the record the reason or reasons for allowing the amendment or evidence. In the event the Court shall try issues not raised by the pleadings, it shall state in the record all such issues tried and the reasons therefor. (SCRCP 15(b)).

The case law clearly provides that issues tried without objection and not raised in the pleadings can be considered. This only occurs when a party does not object to the issue and it is tried by consent. *Upchurch v. Upchurch*, 367 S.C. 16, 624 S.E. 2d 643 (2006). Further, when the Court noted the parties tried the case by "implied consent" it failed to take into consideration the objection of Plaintiff's counsel at the close of the evidence. (See Attorney Long's objection, Tr. p. 216, lines 4-8). Finally, the Court gave no reasons on the record for allowing these defenses to be tried (Order of Lawson, Special Referee, Tr. ____).

The rule in this state is that issues may be tried by implied consent when there is a failure to object. *Lee v. Thermal Engineering*, 352 S.C. 81, 572 S.E.2d 298 (2002). There have been many situations in our law where parties have not been allowed to amend at trial when wholly different issues were raised at the trial. See *Harvey v. Strickland*, 350 S.C. 303, 566 S.E.2d 529 (2002) (patient not entitled to amend complaint while jury was deliberating further amendments only allowed when there is no prejudice to the opposing party). (This case is similar in that the Special Referee was deliberating when he decided to allow the amendments and based his decision on those new defenses.)

The Courts of this state have also held that when a SCRCP 15(b) Motion to amend the pleadings to conform to the evidence is filed the party must object at that time. See *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 493 S.E. 2d 826 (SC 1997); *Woods v. Rabon*, 295 S.C. 343, 368 S.E.2d 471 (1988) (implied consent results if either party does not

timely object.) See also *Andrews v. Vonelten and Walker*, 315 S.C. 199, 432 S.E.2d 500 (S.C. App. 1993) (when plaintiff does not object the issue is tried by consent).

In this particular case, counsel for the Appellants clearly objected on the record and argued prejudice. (Tr. p. 216, lines 4-8). Also, there was a lack of notice in that the new issues tried, i.e., illegality, lack of consideration and unclean hands, were the core basis of the Court's ruling in dismissing the complaint. This ruling by the Court violates the Constitutional provision which requires notice prior to trying an issue. (Tr. _____) If Appellants' counsel had been given the opportunity to refute these new defenses along with notice that they were going to be tried, clearly the result could have been different. *Collins Entertainment v. White*, 363 S.C. 546, 611 S.E.2d 262 (2005).

Thus, based on the trial court's refusal to follow SCRCP 15(b) and state on the record the reasons for allowing the amendment, the decision of the Special Referee should be reversed.

II. <u>The trial court erred in failing to find that there was unjust enrichment to the Defendant in this case.</u>

The evidence is overwhelming that the real property which was the subject of this lawsuit was purchased by the Plaintiffs in 2007 for his adopted children's future. (Tr., p. 21, lines 10-13); that Cook borrowed $99,000 on his own home to buy it (Tr. p. 21, lines 10-25); that Cook tried to develop the property into a drag strip for his disabled children (Tr. p. 23, lines 5-7); that Cook bought the land for his sons (Tr. p. 23, lines 8-10); that Cook's sons had no means of making a living (Tr. p. 23, lines 11-15); that Cook bought the property for future income (Tr. p. 23, lines 17-20); that Cook and his wife were told that they had too much land in order to continue to get SSI benefits (Tr. p. 24, lines 10-12); that Social Security Administration employees said he needed to move some of the properties (Tr. p.

25, lines 9-19); that his daughter Nealy said she would sign the property back the same as her brother when requested (Tr. p. 26, lines 1-4); that the land was transferred to Kenneth and back to the Cooks when Social Security indicated that they would not make any further payments (Tr. p. 26, lines 1-12); that Nealy was told why they wanted to transfer the property into her name (Tr. p. 28, lines 1-8); that she knew why I bought the property (Tr. p. 28, line 7); and that she understood the reason it was being placed in her name (Tr. p. 28, line 8).

For her part, Nealy admitted that she did not pay anything for the land (Tr. p. 203, lines 1-5); that she asked no questions but just took it (Tr. p. 206, lines 12-13); that she knew her mother was trying to avoid a Social Security Administration penalty of $40,000 (Tr. p. 208, lines 10-15); that she knew her brother Kenneth had some property and she believed she deserved some too (Tr. p. 212, lines 10-13); that she only paid taxes on the property starting in 2009 (Tr. p. 194, lines 11-14); that she became worried that her mother would forge her name on the deed (Tr. p. 194, lines 1-15); that she deeded the property partially to her husband and used it to buy a new house (Tr. p. 210, lines 5-13); and that she had discovered the deed online and thought it was hers (Tr. p. 199, lines 1-7).

When confronted with these facts, the Court noted that Appellants could not prevail because of lack of valuable consideration (the same amendment which was allowed at the end of trial over Appellants' objection) that the contract was illegal (the same amendment allowed over objection at the end of the trial) and that Appellant had unclean hands (the same objection allowed at the end of the trial over objection). (Order of Special Referee ___).

The issue of unjust enrichment has been continuously addressed throughout South Carolina legal history and the Courts have noted "the law will never impute a promise to pay for a benefit conferred where it would be unjust to the party to whom it would be imputed and contrary to equity." *Webb v. First Federal Savings and Loan*, 300 S.C. 507, 388 S.E.2d 823 (S.C.App. 1989). See also *Barnes v. Johnson*, 402 S.C. 458, 742 S.E.2d 6 (S.C.App. 2013) ("This Court has recognized quantum meruit as an equitable doctrine to allow recovery for unjust enrichment. Absent an express contract, recovery under quantum meruit is based on quasi- contract, the elements which are: (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value.")

In fact, all the evidence had established the doctrine of unjust enrichment in favor of Appellants. This doctrine is a quasi contractual obligation and requires three elements. First, that a benefit is conferred upon the defendant by the plaintiff. (In this case the conveying of 18.78 acres to Defendant Nealy Taylor.) Second, the realization of that benefit by the Defendant. (Nealy knew of the property being conveyed to her and immediately conveyed half of that property to her husband as collateral to purchase a house.) Third, retention by the Defendant of the benefit under conditions that make it inequitable for her her to retain it without paying its value. (In this case, Appellants deeding the property to the Defendant at the direction of the Social Security Administration because of a penalty that might have been owed.)

Here, unjust enrichment/quantum meruit was proved by all the evidence and Appellants were entitled to a directed verdict. The Defendant admittedly was unjustly

enriched and used the property as collateral to buy herself a new home (Tr. p. 210, lines 1-25). Further, Defendant paid nothing for the property. Accordingly, this Court should find that the Special Referee was in error in refusing to find for Appellants on their unjust enrichment claim.

III. <u>The Special Referee erred in holding that the Appellants had made an illegal contract.</u>

The Special Referee, in his Order, found the Plaintiffs had been involved in a "illegal contract". The Court then cited the following for its position:

> The general rule, well established in South Carolina is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law or judicial decisions. (citing *White v. J.M. Brown Amusement Co.*, 360 S.C.366, 371, 601 S.E.2d 342, 345 (2004).)

Further, the Court noted:

> The Plaintiffs clearly and unequivocally testified that the only reason they conveyed the property to the Defendant was to circumvent Social Security regulations concerning their right to receive and keep Social Security benefits for two (2) of their adopted children.

(See Order of Special Referee dated March 20, 2013, pp. 7, 8.)

A review of the transcript reveals that this finding is not supported by the evidence. In fact, Cook testified that he went to the Social Security Administration and that they told him he had too much land and he should get the property out of his name ((Tr. p. 24, lines 10-12); that he was told by Social Security to deplete his assets (Tr. p. 25, lines 9-19); that he was concerned about a mistake and the government might take his land (Tr. p. 25, lines 22-25); that they went back to the Social Security Administration and were told they must pay back due benefits (Tr. p. 28, lines 19-20); that they paid back $40,000 (Tr. p. 28, lines 22-23); that no one intended to defraud the government and Appellants did as they were

asked (Tr. p. 36, lines 12-15); that the Social Security Administration had said get rid of the property (Tr. p. 67, lines 20-25; p. 68, lines 1-2).

This testimony was further supported by the testimony of Appellant's wife, Lynn Cook, who stated the Social Security Administration told us to sell it (Tr. p. 113, lines 1-25); the Social Security Administration gave me guidelines (Tr. p. 114, lines 11-18); that she was told to transfer property (Tr. p. 115, lines 1-15); that she reapplied to the Social Security Administration again and was told that she still had too much property (Tr. p. 117, lines 11-25); that she paid Social Security back approximately$20,000 per child (Tr. p. 142, lines 1-25); and that she tried to follow the Social Security guidelines on the real property (Tr. p. 143, lines 1-5).

This was the only testimony offered in regard to the Social Security Administration and the repayment of funds received for the adopted children. Nowhere in this testimony or in the record is there any indication that what was done by the Cooks was illegal. In fact, the Cooks were open and transparent and discussed this exact issue with the Social Security Administration and obtained their advice. Accordingly, the transfer of the real property by the Cooks does not equate to an illegal contract especially since the evidence shows the Appellants were repeatedly advised by employees of the Social Security Administration as to how to proceed. While this Court has declared illegal contracts unenforceable, this is not such a contract. The Special Referee's own Order cites *White v. J.M. Brown Amusement Co.*, 360 S.C.366, 601 S.E.2d 342 (2004) which involved a contract concerning outlawed poker machines under state law. Further, *Batchelor v. American Health Ins. Co.*, 234 S.C.103, 107 S.E.2d 36 (1959) discusses illegal wagering contracts; and *Ricks v. Ficken*, 280 S.C. 294, 312 S.E.2d 715 (S.C. 1984) involves illegal bingo contracts. The testimony in

this case does not reveal an illegal contract nor does it provide any evidence for the Court's finding that the Cooks attempted to circumvent the Social Security Administration (See Order of Special Referee dated March 20, 2 013, p. 8). In fact, the evidence shows quite the contrary in that the Appellants got advice from the Social Security Administration about the real property and thus the finding that this was an illegal contract is not supported by any evidence. Accordingly, this Court should reverse this ruling.

IV. **The Special Referee erred in holding that the Appellants assumed the risk.**

The Special Referee in his Order noted that Appellants assume the risk. However, assumption of the risk is not a defense to a claim for quantum meruit or unjust enrichment. It is only a defense to a negligence action. Further, the Courts of this state have all but done away with assumption of the risk as a matter of law. See *Davenport v. Cotton Hope Plantation*, 333 S.C. 71, 508 S.E.2d 565 (S.C. 1998). (A defense to negligence actions prior to the adoption of comparative negligence was assumption of the risk. It has now been subsumed into the comparative negligence doctrine.) See also, *Cisson Construction v. Reynolds & Assoc.*, 311 S.C. 499, 429 S.E.2d 847 (S.C.App. 1993).

Accordingly, for those reasons, the special referee's finding that the Appellants assumed the risk is inapplicable to an action for unjust enrichment or breach of contract.

V. **The Special Referee erred in holding the Cooks had unclean hands.**

As has been stated above, the defense of unclean hands was raised without notice after the testimony was closed at the end of the trial. Appellants have already detailed why this was an error. Further if the doctrine of unclean hands is allowed by the Court it has not been proven by the Defendant. The doctrine has been fully discussed in *Anderson v. Buonforte*, 365 S.C. 482, 617 S.E.2d 750 (S.C.App. 2005). In that case the Court noted

unclean hands was proven only if the plaintiff acted unfairly in a matter that is the subject of the litigation to the prejudice of a defendant. Also, a court in equity must consider the equities of both sides and balance the two prior to making a ruling. (The Special Referee did not balance the equities in reaching his decision.) Appellants suggest that this Court do just that and in doing so it will find that there was no evidence of bad faith or inequitableness by the Cooks. In fact, the transcript of record shows the Cooks were only trying to protect their adopted children in transferring the property to the Defendant. Further, the Cooks acted without malice and only with concern towards their adopted children in transferring the property to the Defendant. Also, there was no prejudice to the Defendant since she testified that she knew the property was in her name and thought for some reason that her mother would forge her name (Tr. p. 210, lines 1-25). Accordingly, she immediately deeded one-half of the property to her husband. In doing so, the Defendant decided to borrow against the property knowing full well that the Cooks wanted the property back and she had paid nothing for it. (See testimony of Nealy that she transferred one-half of her interest into her husband's name because she thought her mother might forge her name even though she had never forged it before.) (Tr. p. 210, lines 12-24).

In sum, the prejudice that was created was by the Defendant when she knew the Cooks wanted the property back and she knowingly and willfully transferred one-half of her interest in the property to her husband.

Finally, Appellants suggest that a constructive trust resulted over the real property when it became clear that the Cooks wanted the property returned (and Nealy had paid nothing for it). See *Macaulay v. Wachovia National Bank*, 351 S.C. 287, 569 S.E.2d 371

(Ct.App. 2002) (the circumstances under which the property was acquired made it inequitable that it be retained by the one holding legal title).

VI. The Special Referee erred in holding that there was no breach of fiduciary duty between the parties.

It is well settled in South Carolina that the trust and confidence by one person in the integrity of another creates a fiduciary duty. *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (S.C.App. 2004). Further, to impose trust in another you must have some foundation and belief that the one entrusted will act in the best interest of the other. *Birdwell v. S.C.N.*, 288 S.C. 34, 340 S.E.2d 786 (1986); see also *Moore v. Moore*, 360 S.C. 241, 599 S.E.2d 467 (S.C.App. 2004) (brothers have a fiduciary relationship to one another in a business deal).

In this case, the evidence establishes that the Defendant was the natural daughter of the Plaintiffs and that the property was entrusted to her by the Plaintiffs. (Tr. p. 71, lines 20-25); that the property was bought not for Nealy but for her handicapped siblings (Tr. p. 73, lines 5-12); that the Defendant and her husband took the property from the handicapped children and a disabled man to buy a home by using the property as a down payment on a new home when their income was over $200,000 (Tr. p. 74, lines 14-19); that the Cook's son gave one-half of the property back (Tr. p. 76, lines 20-25); that Nealy did not pay anything for the land (Tr. p. 203, lines 1-5); that she asked no questions, but just took it (Tr. p. 206, lines 12-16); that she thought her mother might try to forge her name and thus she put one-half interest in the property in her husband's name (Tr. p. 210, lines 1-25); that she used the property to borrow money to buy a house (Tr. p. 210, lines 1-25).

All of this evidence proved that the Defendant was aware that the property had been transferred to her to hold and that the Cooks wanted it back for their adopted children.

Based on those circumstances and the fact that the Defendant knowingly and willfully deeded one-half of the property in her husband's name established a breach of fiduciary duty and as a result, the Court erred in failing to find that there was a breach of fiduciary duty between the Cooks and Taylor.

VII. The Special Referee erred in finding that estoppel applied in this case.

The Special Referee in his Order found that estoppel applied under *Langdale v. Harris Carpets*, 395 S.C. 194, 717 S.E.2d 80 (S.C.App. 2011). In *Langdale*, the Supreme Court laid down the estoppel defense with the crucial caveat: the defendant must lack knowledge and the means of knowledge of the truth as to the facts in question. Here, Nealy learned the real property was in her name and also learned that the Cooks wanted it back. (Tr. p. 193, lines 1-25). She also knew that she had never paid taxes on the property prior to December 2009 (Tr. p. 194, lines 11-14); that she thought her mother was going to forge her name and thus placed one-half of the real property in her husband's name and then borrowed money on it and used that money to purchase their own home (Tr. p. 210, lines 1-25).

These facts alone prove that estoppel cannot lie in this action because the Defendant clearly knew of the issue regarding the real property and decided to borrow against it anyway. Further, the Defendant transferred one-half of the property from her name to her husband's name. Accordingly, neither lack of knowledge or reliance was proven at the trial.

Finally, there was no prejudicial change in position in that the Defendant Nealy Taylor voluntarily and willfully changed her own position with the full knowledge that the Cooks wanted the property back. In fact, Nealy admitted that she transferred the property and put a one-half interest in her husband's name after Lynn Cook requested the property be

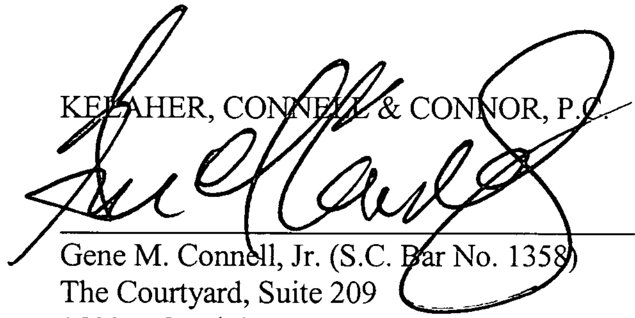
transferred back to her. (Tr. p. 210 lines 5-8). Further, Nealy never paid a dime for the propertty (Tr. p. 210, lines 9-13); and the Defendant then obtained a loan from the bank to build her own home through Anderson Brothers Bank using the property at issue as collateral (Tr. p. 200 lines 11-25).

Based on these circumstances, the Defendant was on actual notice that the Cooks wanted the property back and voluntarily and knowingly changed her position. Thus, the Defendant knew the truth about how the property had been obtained by her and she deeded one-half of the property to her husband and borrowed money on it. Accordingly, the defense of estoppel cannot lie in this case and these findings of the Special Referee should be reversed. If anything, the evidence in this case shows a constructive trust formed over the property after Defendant Nealy Taylor was aware that she had not paid for the property and that the Cooks wanted it back.

CONCLUSION

Accordingly, Appellants request the Court sitting in equity reverse the decision of the Special Referee and remand for other proceedings including the proper remedy in this case.

Respectfully submitted,



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September 11, 2013
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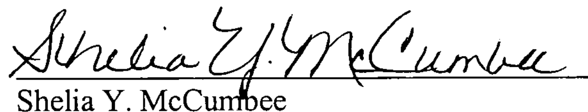
PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of KELAHER, CONNELL & CONNOR, P.C., Attorneys at Law, and that she has served **Initial Brief of Appellants** on the Respondent, through her attorneys of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

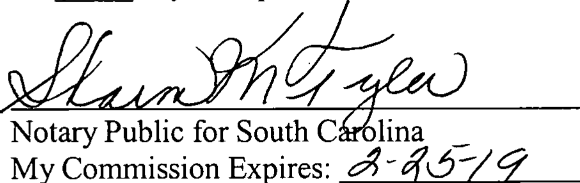
Phillip C. Thompson, Esq.
Thompson & Henry, P.A.
P. O. Box 1740
Conway, SC 29528

DATE OF MAILING: September 12, 2013



Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 12th day of September, 2013.



Notary Public for South Carolina
My Commission Expires: 2-25-19

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellants propose the following to be included in the Record on Appeal:

1. Order of Special Referee dated March 20, 2013
2. Order of Clerk of Court dated February 11, 2013
3. Transcript of Special Referee Hearing December 6, 2012
4. Summons and Complaint filed June 3, 2011
5. Answer of Defendant filed June 27, 2011

We certify that this designation contains no matter which is irrelevant to this appeal.

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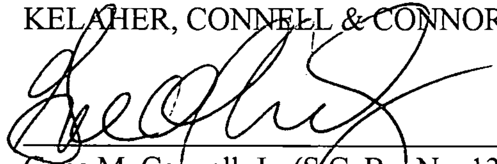
SEP 13 2013
SC Court of Appeals

KELAHER, CONNELL & CONNOR, P.C.



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Attorneys for Appellants

September 11, 2013
Surfside Beach, South Carolina.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William E. Lawson, Special Referee

CASE NO. 2011-CP-26-4758

Monroe E. Cook and Lynn S. Cooke ....Appellants

vs.

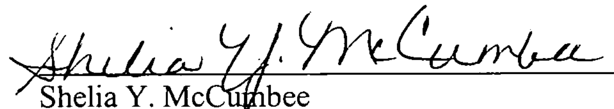
Nealy Lynn Taylor... Respondent

PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of KELAHER, CONNELL & CONNOR, P.C., Attorneys at Law, and that she has served Appellants **Designation of Matter to be Included in Record on Appeal** on the Respondent, through her attorneys of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

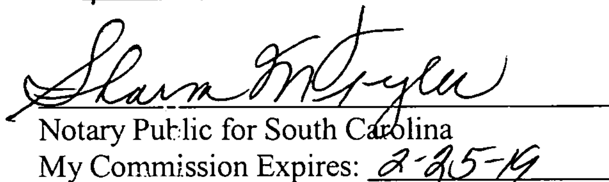
Phillip C. Thompson, Esq.
Thompson & Henry, P.A.
P. O. Box 1740
Conway, SC 29528

DATE OF MAILING: September 12, 2013



Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 12th day of September, 2013.



Notary Public for South Carolina
My Commission Expires: 2-25-19

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