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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHESTER COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Judge

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Appellate Case No. 2024-000372

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Wilmington Savings Fund Society FSB as Trustee of Stanwich Mortgage Loan Trust I,……………………………………………………………..……......…..Respondent,

v.

Ebonee D. Brown; Georgia M. Brown; South Carolina Department of Motor Vehicles,……………………...……………………………..……..………Defendants,

of whom Ebonee D. Brown and Georgia M. Brown are the ………………Appellants.

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# FINAL BRIEF OF APPELLANTS

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## STATEMENT OF ISSUES

**I. In the absence of evidence to the effect that the mobile home at issue has ever become part of the real estate, did the circuit court err in granting summary judgment that it is part of the real estate?**

**II. Where the Respondent's own showing indicates it is pursuing collection of debt barred by res judicata, did the circuit court err in granting summary judgment on Appellant's Fair Debt Collection Practices Act claim?**

**III. Where the Respondent failed to meet the procedural requirements to assert a claim for possession of the subject mobile home and failed to adduce substantive evidence of those requirements, did the circuit court err in granting summary judgment in Respondent's favor on that claim?**

**IV. Where the Respondent asserted an at-law claim in its complaint for possession of the mobile home, did the circuit court err in striking Appellants' jury demand and referring this case to a special referee?**

## STATEMENT OF THE CASE

This is an appeal of an order that a) granted summary judgment on liability to the plaintiff in a claim and delivery and mortgage foreclosure case and against the Appellants ("the Browns") on their counterclaims and b) struck the Browns' jury demand and referred the case to a special referee. (R. pp. 1-6.)

Before this case was brought, another case seeking to foreclose the mortgage at issue and get the mobile home was brought, in 2009. (R. pp. 54-67.) That case was pending for a very long time and resulted in an order rendering a judgment that denied foreclosure to the plaintiff, ruling that the plaintiff (the claimed predecessor to the Respondent ("Wilmington Savings") in this case) had breached a forbearance agreement with the Browns and had failed to prosecute at key points. (R. pp. 60-67.) That order was filed on December 31, 2019. (R. pp. 54-67.)

In September of 2022, Wilmington Savings, claiming to be the assignee of the subject mortgage, brought the instant claim and delivery and mortgage foreclosure action. (R. pp. 11-19.) The complaint pleads three causes of action: for a declaratory judgment that the mobile home involved in this case is subject to the lien of the mortgage, for possession of the mobile home, and for foreclosure of the mortgage. (R. pp. 15-18.) The Browns answered and asserted defenses of res judicata, dismissal under Rules 12(b)(4) and (6), SCRCP, and unclean hands and counterclaims of conversion, violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.*, and violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* (R. pp. 20-28.) In their answer and counterclaim, the Browns demanded a jury trial. (R. p. 20.) Wilmington Savings responded to the counterclaim. (R. pp. 29-31.)

In August of 2023, Wilmington Savings moved for summary judgment. (R. pp. 33-43.) In October of 2023, Wilmington Savings moved to strike the Browns' jury demand. (R. pp. 117-19.) Those motions were heard on November 15, 2023, and resulted in the main appealed order, which granted summary judgment on liability to Wilmington Savings on all three causes of action, struck the Browns' jury demand, and referred the case to a special referee. (R. pp. 1-6.) The Browns moved to reconsider under Rule 59(e), SCRCP. (R. pp. 120-22.) The lower court denied that motion. (R. pp. 7-10.)

This appeal followed.

## STANDARD OF REVIEW

**Summary judgment.** When the record demonstrates the absence of a genuine issue of material fact and that the movant is entitled to judgment as a matter of law, summary judgment may be appropriately granted. See Kitchen Planners, LLC v. Friedman, 440 S.C. 456, 459, 892 S.E.2d 297, 299 (2023). 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 from 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).

**Determination of right to trial by jury.** "Whether a party is entitled to a jury trial is a question of law." Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). "An appellate court may decide questions of law with no particular deference to the [lower] court." Id. at 15.

## ARGUMENT

**I. Wilmington Savings has never gotten out of the gate with its claim for possession of the mobile home, and the record does not establish it.**

The circuit court found and ruled as follows in its summary judgment order:

> The Mortgage included reference to a 2006 Clayton Oxford Mobile Home Serial Number OHCO17718NCAB, which mobile home is located and situate upon the Property. A Manufactured Home Rider to Security Instrument affixed to and part of the Mortgage specifically identified said mobile home. I find that the parties intended for the mobile home to be deemed a permanent improvement on the property and subject to the lien of the Mortgage. I further find that Plaintiff is entitled to proceeds from the sale of the mobile home together with the real property by the special referee.
>
> . . .
>
> I therefore find that Plaintiff is entitled to judgment of foreclosure of the aforesaid Mortgage as a matter of law, in an amount to be determined by hearing of the special referee. I further find that the mobile home identified as 2006 Clayton Oxford Mobile Home Serial Number OHCO17718NCAB, which mobile home is located and situate on the Property, is a permanent improvement to the Property, to be sold at foreclosure sale.

(R. pp. 3, 4.)

Other than the mention of the mobile home in the mortgage's property description and rider, the record contains no evidence about the mobile home. (R. pp. 80, 90-92.)

A mobile home is by definition personal, not real, property under South Carolina law. S.C. Code Ann. § 56-19-10(39). What the circuit court seems to have concluded is that the mobile home has become a fixture to the real estate.

A fixture is "an article which was a chattel, but by being physically annexed to the realty by one having an interest in the soil becomes a part and parcel of it." Carjow, LLC v.

Simmons, 349 S.C. 514, 519, 563 S.E.2d 359, 362 (Ct. App. 2002). The elements of a fixture are:

1) Actual or constructive annexation of the chattel to the realty;
2) The chattel's appropriation to the use or purpose of the part of the real estate to which it is attached; and
3) Intention of the party that made the annexation to make the chattel a permanent part of the freehold.

18 S.C. Jur. Fixtures § 4 (citing Planter's Bank v. Lummus Cotton Gin Co., 132 S.C. 16, 128 S.E. 876 (1925)). In Carjow, the Court of Appeals named the following factors as those courts should consider in determining whether an item is a fixture:

1) The mode of the item's attachment to the real estate;
2) The character of the structure or article;
3) The intent of the party or parties that made the annexation; and
4) The relationship of the parties.

349 S.C. at 519.

In the fixture context, evidence that South Carolina courts consider important with regard to the manner in which the purported fixture is attached to the realty includes the following:

1) Whether there is a permanent foundation;
2) Attachment to utility services and the extent of that attachment;
3) Whether and to what extent features of the realty would be damaged if the structure were destroyed or relocated; and
4) Whether additions have been attached to the structure.

See City of N. Charleston v. Claxton, 315 S.C. 56, 63 & n. 1, 431 S.E.2d 610, 614 & n. 1 (Ct. App. 1993), *cert. denied* (1994); Carson v. Living Word Outreach Ministries, 315 S.C. 64, 70, 431 S.E.2d 615, 618 (Ct. App. 1993) (discussing effect removal of item would have on real estate).

The only thing the record speaks to concerning whether the mobile home actually has become a fixture to the real property is intention: the parties stated their intention to affix the mobile home to the realty in the mortgage and rider to it. (R. pp. 80, 90-92.) Evidence of the other elements and factors used in evaluating them is absent here. Indeed, the record does not even speak to whether the mobile home ever was physically annexed to the soil.

The record does not contain enough information to establish the mobile home's character as a fixture. Under Rule 56, SCRCP, "the party seeking summary judgment has the initial responsibility of demonstrating the absence of any genuine issue of material fact." Baughman v. American Telephone & Telegraph Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545-46 (1991). "The party seeking summary judgment has the burden of clearly establishing by the record properly before the court the absence of a triable issue of fact." Owens v. Magill, 308 S.C. 556, 562, 419 S.E.2d 786, 790 (1992). "A party who fails to show the absence of genuine issue of material fact is not entitled to summary judgment even though his adversary does not come forward with opposing materials." Standard Fire v. Marine Contracting, 301 S.C. 418, 421, 392 S.E.2d 460, 462 (1990). That is the situation here with regard to whether the mobile home has become a part of the real estate in question.

Wilmington Savings sued for possession of the mobile home, thus asserting a claim and delivery action. Claim and delivery is an action to gain possession of specific, identifiable personal property. United Fabrics Corp. v. Delaney, 241 S.C. 268, 128 S.E.2d 111 (1962).

Claim and delivery is a statutorily created cause of action that combines aspects of the traditional common law forms of action called replevin and trover. Reynolds v. Phillips, 72 S.C. 32, 51 S.E. 523 (1905). Replevin was the common law claim for possession of an item of personal property. See id.

Mobile homes are personal property, vehicles under this state's law. S.C. Code Ann. § 56-19-10(39) (defining mobile home as "vehicle" with certain characteristics). Thus, Wilmington Savings' claim for possession of the mobile home sounds in claim and delivery. Claim and delivery cases require service, when they are commenced, of an affidavit that states the following:

> (1) That the plaintiff is the owner of the property claimed, particularly describing it, or is lawfully entitled to the possession thereof by virtue of a special property therein, the facts in respect to which shall be set forth;
>
> (2) That the property is wrongfully detained by the defendant;
>
> (3) The alleged cause of the detention thereof, according to the affiant's best knowledge, information and belief;
>
> (4) That the property has not been taken for a tax, assessment or fine pursuant to a statute or seized under an execution or attachment against the property of the plaintiff or, if so seized, that it is by statute exempt from such seizure; and
>
> (5) The actual value of the property.

S.C. Code Ann. §§ 15-69-30 & -50.

That was not done in this case. The Browns raised a defense about the sufficiency of process, specifically pointing out the failure to meet these requirements. (R. p. 24.) The circuit court glossed over the requirements and ignored that they were never met.

A plaintiff cannot pursue a claim and delivery cause of action without first meeting these requirements by affidavit, at the time of service of the complaint. S.C. Code Ann. §§ 15-

69-30 & -50. “A party who fails to show the absence of genuine issue of material fact is not entitled to summary judgment even though his adversary does not come forward with opposing materials.” Standard Fire, 301 S.C. at 421. Wilmington Savings was not entitled to summary judgment of any sort regarding the mobile home. Its showing never got the record there. Indeed, its claim and delivery claim has been fatally defective from the outset. (R. pp. 11-19.)

The circuit court erred reversibly in ruling that Wilmington Savings was entitled to summary judgment on the question of whether the mobile home has become a part of the real estate and in making any summary judgment rulings concerning the mobile home at all.

## II. Genuine issues of material fact about violation of the Fair Debt Collection Practices Act.

Let us get something out of the way first: The Browns concede that, on the record before the court, summary judgment on their conversion and unfair trade practices counterclaims was proper. On their claim for violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq*., though, summary judgment was not proper.

To have a claim under the Fair Debt Collection Practices Act, the claimant must show “that: (1) he or she was the object of collection activity arising from a consumer debt as defined by the Fair Debt Collection Practices Act; (2) the defendant is a debt collector as defined by the Fair Debt Collection Practices Act; and, (3) the defendant engaged in an act or omission prohibited by the Fair Debt Collection Practices Act, such as using a false, deceptive, or misleading representation or means in connection with the collection of any debt.” Hardnett v. M&T Bank, 204 F. Supp. 3d 851, 859 (E.D. Va. 2016). Although the Fair Debt Collection Practices Act prohibits a number of debt collection procedures, “[t]he FDCPA is a strict liability statute and a consumer only has to prove one violation to trigger liability.” Akalwadi v. Risk Mgt Alternatives, Inc., 336 F.Supp.2d 492, 500 (D. Md. 2004).

The Fair Debt Collection Practices Act is a remedial statute, and courts are required to construe its language broadly so as to effect its purposes. Brown v. Card Serv. Ctr., 464 F.3d 450, 453 (3d Cir.2006). Whether a communication is false or misleading under the Fair Debt Collection Practices Act is determined by how it is susceptible of being understood by the "least sophisticated consumer." Russell v. Absolute Collection Servs., Inc., 763 F.3d 385, 394 (4th Cir. 2014).

Section 1692e of the Fair Debt Collection Practices Act states that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." The statute's subsections provide a non-exhaustive list of prohibited debt collector conduct. Sterling v. Ourisman Chevrolet of Bowie Inc., 943 F. Supp. 2d 577, 585 (D. Md. 2013). § 1692e(2) bars "[t]he false representation of" either "(A) the character, amount, or legal status of any debt; or (B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt." Section 1692e(5) "prohibits a debt collector from making a 'threat to take any action that cannot legally be taken or that is not intended to be taken.'" Cooke v. Carrington Mortg. Servs., No. TDC-18-0205, 2019 WL 3241128, at *3 (D. Md. July 18, 2019) (quoting 15 U.S.C. § 1692e(5)). The Fourth Circuit has held that a "communication" under the Fair Debt Collection Practices Act need not be part of an express demand for payment or even part of action designed to induce the debtor to pay. Powell v. Palisades Acquisition XVI, LLC, 782 F.3d 119, 124 (4th Cir. 2014). To be actionable under the applicable provisions of the Fair Debt Collection Practices Act, a debt collector needs only to have used a prohibited practice **"in connection with the collection of any debt"** or in an **"attempt to collect any debt."** Id. (Emphasis in original.)

A "communication" is defined by the Fair Debt Collection Practices Act as the "conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C.A. § 1692a. Communication has a broad meaning under the Fair Debt Collection Practices Act, and "any" communication means exactly that: anything that conveys information about a debt to anyone by any means. Miljkovic v. Shafritz & Dinkin, P.A., 791 F.3d 1291, 1300 (11th Cir. 2015); Evory v. RJM Acquisitions Funding L.L.C., 505 F.3d 769, 773 (7th Cir.2007). Accordingly, § 1692e bars "any" prohibited representation, regardless of to whom it is directed, so long as it is made "in connection with the collection of any debt." Miljkovic, 791 F.3d at 1300. Communication in this context can include court filings and conduct toward a consumer's attorney. Id. Section 1692e(10) prohibits "the use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." Id. (quoting 15 U.S.C. § 1692e(10)).

To sustain a § 1692e claim, "evidence of actual deception is unnecessary[;]" rather, "the test is the **capacity** of the statement to mislead." National Fin., 98 F.3d at 139 (emphasis added). A plaintiff need not prove actual reliance on a false representation in order to assert a claim under § 1692e. Neild v. Wolpoff & Abramson, L.L.P., 453 F. Supp. 2d 918, 923 (E.D. Va. 2006). Further, the analysis is to be done from the point of view of the "least sophisticated consumer." National Fin., 98 F.3d at 139.

Here, Wilmington Savings represented that debt components barred by res judicata are a recoverable part of the debt at issue, thus misrepresenting the debt and violating the Fair Debt Collection Practices Act. The order in WVMF FUNDING, LLC v. Ebonee D. Brown, et al., Case No. 2009-CP-12-0237, adjudged what was owed for escrow items at that time. (R. pp.

65-66.) As Wilmington Savings' filings make clear, it is and has been trying to recover those amounts of money. (R. pp. 73, 77-78.) Having been the subject of a judgment in that previous case, Wilmington Savings cannot recover them now.

> "[R]es judicata precludes parties from subsequently relitigating issues actually litigated and those that might have been litigated in a prior action." Duckett v. Goforth, 374 S.C. 446, 464, 649 S.E.2d 72, 81 (Ct. App. 2007). "Res judicata is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privies." Id. at 464, 649 S.E.2d at 81-82 (quoting Nelson v. QHG of S.C. Inc., 354 S.C. 290, 304, 580 S.E.2d 171, 178 (Ct. App. 2003) ). In order for res judicata to apply, the parties—or their privies—and subject matter must be identical, and the prior suit adjudicated the issue. 7 S.C. Jur. *Estoppel and Waiver* § 27 (1991). "For purpose of res judicata, however, the concept of privity rests not on the relationship between the parties asserting it, but rather on each party's relationship to the subject matter of the litigation." Yelsen Land Co. v. State, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012). "The term 'privy,' when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right." Roberts v. Recovery Bureau, Inc., 316 S.C. 492, 496, 450 S.E.2d 616, 619 (Ct. App. 1994). "One in privity is one whose legal interests were litigated in the former proceeding." Id. "Privies are those who are so connected with the parties in estate, or in blood, or in law, as to be identified with them in interest . . . ." Bailey v. U.S. Fid. & Guar. Co., 185 S.C. 169, 193 S.E. 638, 641 (1937).

Equivest Fin., LLC v. Ravenel, 422 S.C. 499, 507, 812 S.E.2d 438, 442 (Ct. App. 2018).

Res judicata bars the parties to the first case – and their privies – "from raising any issues which were adjudicated in the former suit *and any issues which might have been raised in the former suit*." Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) (emphasis added). A litigant's claim is barred under res judicata even when he "is 'prepared in the second action (1) [t]o present evidence or *grounds or theories of the case* not presented in the first action or (2) [t]o seek remedies or forms of relief not demanded in the first action.'" S.C. Pub. Interest Foundation v. Greenville County, 401 S.C. 377, 386, 737

S.E.2d 502, 507 (Ct. App. 2013) (emphasis in original, quoting Restatement (Second) of Judgments § 25 (1982 & Supp. 2012)).

Res judicata applies to all rights and remedies "with respect to *all or part of the transaction, or series of connected transactions, out of which the action arose.*" Id. at 388 (emphasis in original; quoting Restatement (Second) of Judgments § 24). That includes the escrow items previously attempted to be recovered through foreclosure in the earlier case. As the claimed assignee of the plaintiff in the earlier case, Wilmington Savings is a privy of that plaintiff and is bound by the earlier judgment. Equivest, 422 S.C. at 507.

There is a genuine issue of material fact about whether Wilmington Savings or the Browns are entitled to prevail on the Fair Debt Collection Practices Act counterclaim. The circuit court erred reversibly in granting summary judgment.

## III. The Browns are entitled to a jury trial.

The circuit court treated the analysis of whether the Browns are entitled to a jury trial as moot, once it had decided to grant summary judgment on their counterclaims. That was an incorrect decision that the law requires this court reverse, regardless of whether reversal is had on the Fair Debt Collection Practices Act counterclaim.

Compulsory, at-law counterclaims made by a defendant in a case in which the plaintiff has asserted only causes of action that sound in equity must be tried by a jury if a jury demand has been made on the claim. Wachovia Bank, N.A. v. Blackburn, 407 S.C. 321, 330, 755 S.E.2d 437, 441 (2014); Johnson v. S.C. Nat. Bank, 292 S.C. 51, 54-56, 354 S.E.2d 895 (1987). Conversely, a defendant waives his right to a jury trial if he asserts a legal but permissive counterclaim *where the plaintiff's complaint pleads only equitable causes of action*. Blackburn, 407 S.C. at 330; Johnson, 292 S.C. at 54-56. Our Supreme Court has been clear

that, absent a valid waiver, ***if at-law causes of action are pled by both the plaintiff and the defendant, all those causes of action are triable by jury***, without regard to whether counterclaims pled by the defendant are legal or permissive. Blackburn, 407 S.C. at 330; Johnson, 292 S.C. at 54-56.

Wilmington Savings' mobile home claim and delivery cause of action is an action at law. "An action in claim and delivery is an action at law for the recovery of specific personal property. Absent a waiver, the issues are triable by a jury." Palmetto State Bank and Trust Co. v. Boyles, 302 S.C. 136, 138, 394 S.E.2d 313, 314 (1990) (internal citation omitted). Accordingly, the action Wilmington Savings has brought is not entirely an equitable action, only partially so. Blackburn, 407 S.C. at 330; N.C. Fed. Sav. & Loan Assn. v. DAV Corp., 298 S.C. 514, 519, 381 S.E.2d 903, 906 (1989); Johnson, 292 S.C. at 54-56. Accordingly, the Browns are entitled to a jury trial on the claim and delivery claim and on all at-law counterclaims. Blackburn, 407 S.C. at 330; N.C. Fed. Sav. & Loan Assn. v. DAV Corp., 298 S.C. 514, 519, 381 S.E.2d 903, 906 (1989); Johnson, 292 S.C. at 54-56.

## CONCLUSION

This court should reverse the grant of summary judgment in the particulars noted above, reverse the striking of the jury demand and reference to the special referee, and remand for further proceedings.

Respectfully submitted,

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APPEAL FROM CHESTER COUNTY
Court of Common Pleas

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Wilmington Savings Fund Society FSB as Trustee of Stanwich Mortgage Loan Trust I,……………………………………………………………..……......…..Respondent,

v.

Ebonee D. Brown; Georgia M. Brown; South Carolina Department of Motor Vehicles,……………………...……………………………..……..………Defendants,

of whom Ebonee D. Brown and Georgia M. Brown are the ………………Appellants.

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

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

Respectfully submitted,

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PROOF OF SERVICE

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I certify that I have served the final briefs in this case on the date given below by emailing it to other counsel of record at the address(es) noted below.

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