

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2013-0013816577

Centennial Casualty Co., Inc. Respondent

v.

Western Surety Co., d/b/a CNA Surety Appellant

Western Surety Co., d/b/a CNA Surety Defendant/Third-Party Plaintiff

v.

Charleston Auto Auction, A3 Auto Center, LLC, and
Wylie Mickle, Third-Party Defendants

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE LOWER COURT ERR BELOW AND IN DENYING THE RULE 59(e) SCRPC MOTION BY DETERMINING THAT THE INSURANCE CARRIER OF AN AUTOMOBILE AUCTIONEER IS A “LEGAL REPRESENTATIVE” AND SUFFERED AN “ACTUAL LOSS” AS CONTEMPLATED BY S.C. CODE §56-15-320.
 - A. When the auto auction is not the legal representative as contemplated by the statute.
 - B. When no buyer or seller suffered a loss and S.C. Code §56-15-510 and §56-15-520 directs that the auction company is not to be deemed an owner.
- II. DID THE LOWER COURT ERR BELOW AND IN DENYING THE RULE 59(e) MOTION BY FAILING TO FIND THAT THE FRAUDULENT TRANSACTION WAS IN THE PURCHASE NOT THE SALE OF A MOTOR VEHICLE PROHIBITING RECOVERY UNDER S.C. CODE §56-15-320.
- III. DID THE LOWER COURT ERR BELOW AND IN DENYING THE RULE 59(e) MOTION BY FAILING TO FIND THAT IF CENTENNIAL CASUALTY /CAA WERE THE LEGAL REPRESENTATIVES OF THE SELLER THEY WERE ALSO THE LEGAL REPRESENTATIVE OF THE BUYER CAUSING THE LOSS; THEREBY BARRING THE CLAIM.

STATEMENT OF THE CASE

This case was commenced by Respondent Centennial Casualty Co., Inc., (hereinafter “Centennial”) by the filing of a Summons and Complaint on October 19, 2009. (R. pp. 12-16). Western Surety Co., d/b/a CNA Surety (hereinafter “Western Surety”) filed its answer and filed a Third-Party Complaint against Charleston Auto Auction, A3 Auto Center, LLC, and Wylie Mickle. (R. pp. 22-26). A3 Auto Auction and Wylie Mickle never appeared.

Centennial alleged in its complaint that it was entitled to payment under a surety

bond issued by Western Surety for a loss suffered by its insured, Charleston Auto Auction (hereinafter CAA), for which Centennial provided coverage and reimbursed CAA pursuant to the terms of the insurance policy. CAA is an automobile auction house. A3 Auto Center bought three vehicles using CAA from different dealers. (R. p. 32, ¶3). CAA paid the seller dealers and delivered the cars to A3 Auto Center, the purchaser. In payment for those vehicles A3 Auto Center, the bonded dealer, issued three separate checks to CAA. (R. pp. 32-33, ¶3). Two of the checks were returned for insufficient funds (NSF) and A3 Auto Center stopped payment on the third check. (R. pp. 32-33, ¶3).

CAA carries insurance to cover bad checks. CAA made a claim under its insurance policy. Centennial paid CAA's claim in the amount of \$35,305.00. Centennial then instituted the underlying action seeking reimbursement as subrogee of CAA from A3 Auto Center's surety bond. (R. pp. 15-16). A3 Auto Center maintained a bond, as required by S.C. Code §56-15-320, the "Dealer Bond Statute," with Appellant Western Surety. §56-15-320(B). (R. pp. 17-18).

Centennial alleged in the complaint that it was subrogated to the rights of CAA and that CAA was "an owner or his legal representative who suffered a loss or damage" and was entitled to payment under the terms of the bond. (R. p. 15, ¶¶23-24).

In its Answer Western Surety admitted that it was the surety for the bond at issue in this case but denied that Centennial was the proper party to seek indemnification or that the loss was covered under S.C. Code Ann. §56-15-320. (R. pp. 23-24). Appellant filed a third-party complaint against CAA alleging that CAA was the real party in interest, but denying that CAA was entitled to seek reimbursement under the bond pursuant to the provisions of §56-15-320. (R. p. 25).

Centennial and CAA filed a motions for summary judgment against Western Surety on July 8, 2010. (R. pp. 34-40). Western Surety filed a cross motion for summary judgment against Centennial on September 22, 2010. (R. pp. 70-77). These motions were heard on February 17, 2011 by the Honorable Kristi L. Harrington. The Court entered an order dated March 28, 2011 denying both motions for summary judgment. Appellant filed a motion for reconsideration on April 12, 2011 which was denied by the Court in an order dated May 18, 2011.

Thereafter, Appellant and Respondent agreed to a joint stipulation of facts which was supplied to the Court. (R. pp. 32-33). Both Appellant and Respondent stipulated that pursuant to the statutory cap in §56-15-320 the maximum amount in controversy is \$30,000.00. (R. p. 33, ¶3). The parties submitted the stipulation, legal briefs, and proposed orders to the court in lieu of oral arguments.

The most recent brief filed by Centennial and CAA dated July 12, 2010 was supplied to the Court along with exhibits including checks and purchase agreements. (R. pp. 34-69). The checks issued to CAA were returned insufficient funds. (R. pp. 63-65). The motion of Respondent alleged that pursuant to these documents, it is the owner's "legal representative" for the purpose of satisfying the statute. (R. pp. 38-39).

Appellant's most recent motion for summary judgment dated September 22, 2010 was provided to the court. (R. pp. 70-77). In its brief, the Appellant noted that it was undisputed that the sellers of the vehicle were paid and the purchaser of the vehicle received the vehicles. (R. p. 71). The loss or damage was suffered by the auction house that Centennial Casualty Company is not the legal representative as contemplated by the statute such as a guardian, conservator, durable power of attorney holder. Appellant's

motion further alleged that S.C. Code Ann §56-15-510 and §56-15-520 prevented the auction from being deemed an owner, seller, transferor or assigner of title of a motor vehicle. (R. pp. 74-75). Finally, Appellant's motion that if Centennial/CAA were deemed to be a legal representative of the seller, then they also by the same paperwork are legal representative of the purchaser who did the wrongdoing, thereby barring their recovery and that the loss did not arise from the sale of the motor vehicle, but rather from the purchase. (R. pp. 76-77).

The Plaintiff filed a Supplemental Memorandum of Authorities alleging that Connecticut Indem. Co. v. Burdette Chrysler Dodge Corp., 317 S.C. 406, 453 S.E. 2d 902 (1994) had been overruled by Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). (R. p. 79). They further argued against Western Surety's use of §56-15-520. Defendant Western Surety filed their brief in opposition to Plaintiff's second brief dated May 29, 2012. The brief noted in part that Mid-State, *supra*, only overruled Burdette, *supra*, to the extent Burdette held that "any person" could recover under the bond.

The court's order, from which this appeal follows, was entered in favor of the Respondent on March 4, 2013 by the Honorable J.C. Nicholson, Jr. (R. pp. 3-10). In that order the court found that Charleston Auto Auction was the legal representative of the sellers of the vehicles and as such both Charleston Auto Auction and Centennial, as its subrogee, were entitled to reimbursement under the Dealer Bond Statute. (R. pp. 6-9).

On March 21, 2013, Western Surety timely served its Motion for Reconsideration including grounds that:

- (1) The court erred in finding that Charleston Auto Auction was entitled to recovery pursuant to the terms of the bond as Charleston Auto Auction was not a required “owner or his legal representative;”
- (2) The court erred in finding that the \$35,305.00 loss in this case was realized by the seller Dealership rather than the auction company; and
- (3) The court erred in finding that Connecticut Indem. Co. v. Burdette Chrysler Dodge Corp., 317 S.C. 406, 453 S.E.2d 902 (Ct. App. 1994), was entirely overruled by Mid-State Auto Auction v. Altman, 324 S.C. 65, 476 S.E.2d 690 (1996), and that Burdette was not controlling in this case as to this issue of this being a purchase not a sale, and CAA being the legal representative of the fraudulent dealer.

Appellant’s Motion for Reconsideration was denied by the Court without a hearing in an order dated May 8, 2013. (R. p. 2). Western Surety timely filed its Notice of Appeal.

ARGUMENT

I. DID THE LOWER COURT ERR IN DENYING THE RULE 59(e) SCRPC MOTIONS AND IN DETERMINING THAT THE INSURANCE CARRIER OF AN AUTOMOBILE AUCTIONEER IS A “LEGAL REPRESENTATIVE” AND SUFFERED AN “ACTUAL LOSS” AS CONTEMPLATED BY S.C. CODE §56-15-320

A. When the auto auction is not the legal representative as contemplated by the statute.

This action is controlled by S.C. Code of Laws §56-15-320(B) which provides:

Each applicant for licensure as a dealer or wholesaler shall furnish a surety bond in the penal amount of thirty thousand dollars on a form prescribed by the director of the department. The bond must be given to the department and executed by the applicant, as principal, and by a corporate surety company authorized to do business in this State, as surety. The bond must be conditioned upon the applicant or licensee complying with the statutes applicable to the license and as indemnification for loss or damage suffered by an owner of a motor vehicle, or his legal representative, by reason of fraud practiced or fraudulent representation made in connection with the sale or Transfer of a motor vehicle by a licensed dealer or wholesaler or the dealer's or wholesaler's agent acting for the dealer or wholesaler or within the scope of employment of the agent or loss or damage suffered by reason of the violation by the dealer or wholesaler or his agent of this chapter. *An owner or his legal representative* who suffers the loss or damage has a right of action against the dealer or wholesaler and against the dealer's or wholesaler's surety upon the bond and may recover damages as provided in this chapter. However, regardless of the number of years a bond remains in effect, the aggregate liability of the surety for claims is limited to thirty thousand and 00/100 (\$30,000.00) Dollars and to the amount of the **actual loss** incurred.

S.C. Code Ann. §56-15-320(B) (emphasis added). In this action, it is undisputed that two dealers sold vehicles using the auction to the bonded principle, A3 Auto Center. CAA paid the dealers and delivered the cars to A3 Auto Center. A3 Auto Center issued checks to CAA, two of which were returned for insufficient funds, one was stopped payment. It is undisputed that the issuance of these checks were fraudulent. CAA carries insurance

to protect it from, amongst other things, bad checks. Centennial paid CAA and instituted this action. It is undisputed that the buyers got their vehicles and the sellers received their funds. The loss in this action was suffered originally by CAA and subsequently its insurer. (R. p. 52, ¶10). In processing a transfer through the auto auction, the auto auction has the buyer and seller execute a purchase agreement (R. p. 51, ¶4). On the back of this agreement there appears language relied upon by the CAA to assert their claims in this action. (R. p. 57-58). The language states in part:

Seller and Buyer each appoint Auction Company as their agent and **legal representative for the purpose of processing this transaction through Auction Company, including transfer of title.** However, they agree auction is merely performing an auction service and Auction Company disclaims all express and implied warranties, including merchantability and fitness, except for the warranty of title described below.

Seller and Buyer indemnify and hold auction company harmless from any liability, loss, costs, damages or expenses, including attorney's fees which arise directly or indirectly from this transaction, including, but not limited to, all matters relating to odometer mileage, odometer mileage disclosure, and vehicle history even if Seller and Buyer are not at fault.

(R. p. 58) (emphasis added). This boilerplate language on the back of the agreement has no signature line or initials. It has no notary. The front of the agreement clearly sets forth that the seller is Automotive Retails, Inc. and the buyer is A3 Auto Center and that the seller is Priceless Automotive and the buyer is A3 Auto Center. (R. p. 56-57). That the buyer is A+ Auto Sales and the buyer is A3 Auto Center. (R. p. 54). Each party also executes a title clerk authorization which authorizes CAA and/or its employees to act as their agent to sign any and all papers and documents that may be necessary pertaining to

the sale and subsequent title Transfer of the vehicles owned by the consignor and consigned to CAA for sale, including without limitation, any title, transfer document, reassignment, odometer disclosure statements as required by federal or state law. The agreement thereafter requires the signor to personally indemnify the Auction house.

In Connecticut Indem. Co. v. Burdette Chrysler Dodge Corporation, 317 S.C. 406, 453 S.E.2d 902 (Ct.App. 1994), overruled in part by Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 476 S.E.2d 690 (Ct.App. 1996) the Court held that any person could recover under the dealer bond who had been injured by the acts of the bonded dealer in violation of the statute. In Mid-State the Court overruled Burdette:

...to the extent it recites that the latter part of §56-15-320 allows for recovery by anyone, not just motor vehicle owners, for loss or damage suffered as a result of the dealer violating any of the provisions in the Chapter 15 of Title 56.

324 S.C. 65, 476 S.E.2d 690, FN 4. That footnote makes no reference to legal representative as a separate entity. The statute does not state “owner and legal representative.” It is clear the term is used as the legal representative standing in the shoes of the owner and is designed to protect the owner from fraudulent acts by a dealer who sells him a vehicle. The Court noted that:

The primary rule of statutory construction is to ascertain and give effect of the intent of the legislature. Gilstrap v. South Carolina Budget and Control Board, 310 S.C. 210, 423 S.E.2d 101 (1992). In ascertaining the intentions of the legislature, a court should not focus on any single section or provision, but consider the language of the statute as a whole. Creech v. South Carolina Public Service Authority, 200 S.C. 127, 20 S.E.2d 545 (1942).

Mid-State, 324 S.C. at 69, 476 S.E.2d at 692. There are bonds in other states that allow any person to recover under a bond. In South Carolina these are limited bonds and the penal sum, regardless of the number of claims, is limited. It is logical that such a limited

bond be strictly construed to protect the target “owner.” Numerous jurisdictions have held under their statutes that financiers and others involved in sophisticated deals not be allowed to reach such funds. See Price v. Piotrowski, 632 So.2d 1 (La.Ct.App 1994); United Fire & Cas. Co. v. Acker, 541 N.W.2d 517 (Iowa 1995); Lawyer Surety Corp. v. Flowers, 66 S.W.3d 669 (Ark.Ct.App. 1996); Southwest Capital Investments, Inc. v. Pioneer General Ins. Co., 924 P.2d 1205 (Colo.Ct.App. 1996).

The statute at issue does not define legal representative. It is the position of Appellant that legal representatives would be one who truly stands in the shoes of the owner. While not defined by statute, the term “legal representative,” while occasionally used to mean counsel, within statutes is most frequently used to mean executor, conservator, or others who stand fully in the shoes of the person or entity being addressed. For example, South Carolina Code §17-25-530 provides that a victim may seek a civil action against an offender or the legal representative of the defender. Similarly, South Carolina Code §8-11-620(A)(1) provides that if an employee dies, the employee’s legal representative is entitled to a lump sum payment from the employee’s unused leave. American Jurisprudence states that the term “legal representatives” when used in an insurance policy generally means executor or administrator, but “may have other secondary meanings.” 44A Am. Jur. 2d, Insurance §1696. Couch on Insurance provides that “the term ‘legal representative’ must be given its primary legal meaning of executor or administrator.” Couch on Insurance 3d, §59:22. Other persons who have been deemed legal trustees are bankruptcy trustees. The Fourth Circuit Court of Appeals held that a bankruptcy trustee is a bankrupt estate’s “legal representative” for the purpose of a Rule 60(b) motion in under the Federal Rules of Civil Procedure. Heyman v. M.L.

Marketing Co., 116 F.3d 91, 95 (4th Cir. 1997). Conversely, an attorney does not have standing to move under Rule 60(b) as a “legal representative” as they are merely an agent. Id. citing Andrews & Kurth, L.L.P. v. Wright Killen & Co., 37 F.3d 230, 234 (5th Cir.1994); see also Western Steel Erection Co. v. U.S., 424 F.2d 737, 739 (10th Cir. 1970) (citing Mobay Chemical Co. v. Hudson Foam Plastics Corp., 277 F. Supp. 413, 416 (S.D.N.Y. 1967)). Moreover, under the Probate Code §62-3-730(c) the “legal representative” has standing to sue and be sued in the courts of this state and any courts or any other jurisdiction as his decedent had immediately prior to his death.

In this action, reviewing the documents, it is clear that the auction house did not stand in the shoes of the owner. The buyers and sellers of the vehicles maintain their status. The auction house only acted as their agent in processing the transactions through the auction. (R. p. 51, ¶3). Had the legislature meant to include auction houses, they would have done so. CAA was merely an agent or legal representative for facilitating the transactions; bringing the buyer and seller together. It did not stand in the shoes or receive the rights of the owner.

B. When no buyer or seller suffered a loss and S.C. Code §56-15-510 and §56-15-520 directs that the auction company is not to be deemed an owner.

Pursuant to statutory law, the actions of the auto auction do not give rise to converting CAA into an owner, seller, transferor or assigner of title of the motor vehicle. The lower court held that as a “legal representative,” CAA could recover for its own loss. (R. p. 89). It is clear the statute contemplates a loss by the owner or a legal representative who stands in the shoes of the owner, for the sale such as a conservator. CAA made a business decision to guarantee the

checks of purchasers and then insured itself against that business decision. The auction house could have required certified checks, could have required cash, or otherwise protected its interests in facilitating sales. It is undisputed that it was only CAA that lost funds. (R. p. 52, ¶8). The statutory law recognizes motor vehicle auctions and did not include them as persons entitled to recover under S.C. Code §56-15-320. The statute did not include “facilitators,” “financiers,” or “lienholders” as entities entitled to recover. The statutory law provides that the actions of CAA in facilitating the sales cannot be viewed as converting CAA into an owner, seller, transferor or assigner of title of a motor vehicle. S.C. Code §56-15-520 provides:

As used in this article:

- 1) “wholesale motor vehicle auction” is an entity in the business of providing auction services and wholesale transactions at its established place of business, and which does not buy, sell, or own the motor vehicles it auctions in the ordinary course of its business....

Further, §56-15-520 provides that:

when a transfer of title is made as a result of a transaction at a wholesale motor vehicle auction, the reassignment of title or bill of sale must note the name and address of the wholesale motor vehicle auction. **However, the wholesale motor vehicle auction is not deemed to be the owner, seller, transferor or assigner of title of the motor vehicle by reason of its name appearing on the reassignment of title or bill of sale or by reason of its payment or a guarantee of payment to the seller, receipt of payment from the purchaser, or the reservation of a lien or security interest for the purpose of securing payment from a purchaser.** (emphasis added).

In this action, it is undisputed that the buyer received the cars and sellers received their money. The only loss is based on a business decision of the auction house on how it conducts its business. The trial court in its order specifically held that there were

damages to the selling dealership. (Order on Page 3 of 8). However, this was a misstatement of fact as the Affidavit referenced and checks show the only entity that suffered a loss was CAA (R. p. 52, ¶8; R. p. 63; R. p. 65).

II. DID THE LOWER COURT ERR BELOW AND IN DENYING THE RULE 59(e) MOTION BY FAILING TO FIND THAT THE FRAUDULENT TRANSACTION WAS IN THE PURCHASE NOT THE SALE OF A MOTOR VEHICLE PROHIBITING RECOVERY UNDER S.C. CODE §56-15-320.

In Mid-State Auto Auction of Lexington, Inc. v. Altman the Court overruled Connecticut Indem. Co. v. Burdette Chrysler Dodge Corp., 317 S.C. 406, 453 S.E.2d 902 (Ct. App. 1994).

The Court held:

We now over rule Burdette to the extent it recites that the latter part of §56-15-320 allows recovery by anyone, not just motor vehicle owners, for loss or damage suffered as a result of the dealer violation of any provision in Chapter 15 of Title 56.

Mid-State, 324 S.C. 65, 467 S.E.2d 69 at FN 4. The limited overruling of Burdette highlights the Court's apparent view that legal representative and owner were synonymous. The Court did not overrule the remaining findings of Burdette. The statute specifically provides that the loss or damage suffered by the owner or his legal representative must be by reason of fraud practice or fraudulent representations made **"...in connection with the sale or transfer of a motor vehicle by a licensed dealer or wholesaler."** S.C. Code §56-15-320(B) (emphasis added). As in Burdette, in this action, A3 Auto Center, LLC, was not the seller nor the transferor of the vehicles, but was the purchaser. The Court erred in disregarding the case law and the language of the statute and extending claims to fraud by a purchaser. The statute clearly is designed to prevent fraud in the sale or transfer by its plain terms. As noted in Burdette:

Burdette suffered no loss or damage by reason of a "fraud practice... in

connection with the sale or transfer of a motor vehicle by a licensed dealer.” Here, as we indicated, Burdette, not Eagle Auto, sold or transferred the motor vehicles for which the worthless checks were given. Eagle Auto only purchased or received the Transfer of these motor vehicles.

Burdette, 317 S.C. at 409, 453 S.E.2d at 904.

Just as in Burdette, the bonded dealer in this case was the entity who received the vehicles for which the bad checks were given and was not the seller of the vehicles since A3 Auto Company, LLC, gave bad checks to purchase the vehicles.

III. DID THE LOWER COURT ERR BELOW AND IN DENYING THE RULE 59(e) MOTION BY FAILING TO FIND THAT IF CENTENNIAL CASUALTY /CAA WERE THE LEGAL REPRESENTATIVES OF THE SELLER THEY WERE ALSO THE LEGAL REPRESENTATIVE OF THE BUYER CAUSING THE LOSS THEREBY BARRING THE CLAIM.

The lower court found that by subrogation, Centennial was allowed to pursue this claim in the shoes of CAA as the legal representative of the seller. (R. p. 88-91). The court, however, failed to address in its order or on Appellant’s Motion for Reconsideration the fact that CAA was also the legal representative (to the extent it applies to the bond statute) for the purchasing dealer, the bonded principle A3 Auto Center, LLC. Therefore, in its act as legal representative, it provided the fraudulent checks for this transaction. In Connecticut Indem. Co. v. Burdette Chrysler Dodge Corp.

The Court held:

Burdette may not take advantage of its own conduct by taking assignments from one innocent purchaser and recovering against Eagle Auto on its bond in this action....

Burdette, 317 S.C. at 410, 453 S.E.2d at 905 (quoting Jackson v. Bi-Lo Stores, Inc., 437 S.E.2d 168, 170 (Ct.App.1993) (“it is a well-founded policy of law that no person may be permitted to

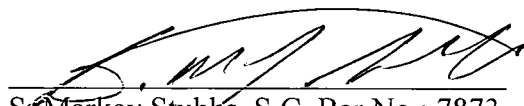
acquire the right of action from their own unlawful act and when it participates in an unlawful act, it cannot recover damages from the consequences of that act).

To the extent CAA is the legal representative, it is the legal representative on both sides of the transaction and therefore participated in the use of fraudulent checks in the transaction, thereby causing its own loss and therefore it cannot recover.

CONCLUSION

The bond provided by S.C. Code §56-15-320 was clearly designed to protect purchasers of vehicles when a bonded dealer commits fraud in the sale of the vehicle to the buyer. It is a limited bond designed to protect the buying public and allowing the owner of the vehicle to sue the dealer for fraud or other violations of the chapter arising out of the sale of the motor vehicle. The use of the term “legal representative” was merely to expand upon and recognize that the owner may be in a representative capacity, such as a conservator or personal representative. The bond was not designed to protect an auction house from its business decisions. The auction house was free to protect itself by requiring cash or requiring certified checks. The auction house protected itself by obtaining insurance. The auction house, however, does not stand in the shoes of the owner for the purpose of the sale. They are neither the buyer nor the seller. They are not an owner nor the owner’s “legal representative.” By statute and by the paperwork executed, CAA was merely acting as agent for facilitating the sale of the vehicle, not a party to the transaction. In this case, the only loss suffered was by the insurance company, a loss that it received a premium to cover. The insurance company is subrogated to the right of the auction house as against A3 Auto Center, LLC, but is not entitled to claim against this limited statutory bond.

Respectfully Submitted,



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CERTIFICATE OF COUNSEL

The undersigned counsel affirms that the final brief complies with SCRAP 211(b).


S. Markey Stubbs
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October 23, 2013

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CERTIFICATE OF SERVICE

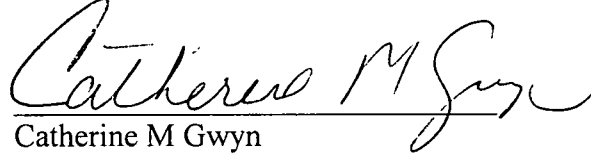
I, Catherine M. Gwyn, Legal Assistant to S. Markey Stubbs, an employee of Baker, Ravenel & Bender, L.L.P., hereby certify that I have, on the date indicated below, served counsel below with Appellant's Final Brief by mailing a copy of same via United States Mail, Postage Pre-paid and return address clearly indicated on said envelope, to counsel at the following address:

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OCT 23 2013

SC Court of Appeals

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