

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
DeAndrea Gist Benjamin, Circuit Court Judge

Case No. 2010-CP-40-5214

Demetrius Mack, ... Respondent,

v.

Leon Lott, in his Official Capacity
as Sheriff of Richland County, ... Appellant.

BRIEF OF APPELLANT

Andrew F. Lindemann
Robert D. Garfield
DAVIDSON & LINDEMANN, P.A.
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Appellant

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in finding that probable cause for the arrest of the Appellant Demetrius Mack was lacking?
- II. Did the trial court err in failing to apply applicable South Carolina precedent in determining the existence of probable cause and in failing to assess the prevailing facts and circumstances from the arresting officer's perspective?
- III. Did the trial court err in failing to rule as a matter of law that an objectively reasonable police officer in Deputy James Gore's position could have perceived and concluded that the Appellant Demetrius Mack committed an unwanted touching resulting in injuries sustained in the public roadway?
- IV. Did the trial court err in failing to make specific findings of fact and conclusions of law in violation of Rule 52(a), SCRPC?

STATEMENT OF THE CASE

This is an action for false arrest/imprisonment brought by the Appellant Demetrius Mack against the Respondent Leon Lott, in his official capacity as Sheriff of Richland County. This action arises out of the arrest of Mack on December 6, 2008,¹ in the vicinity of Club Essence, a nightclub located on Two Notch Road in Richland County, South Carolina. Mack was working at the time as a private security officer at Club Essence. Mack was arrested by Richland County sheriff's deputies on the charge of simple assault following his pursuit, apprehension, and handcuffing of the victim, McKenzie Williamson.

Demetrius Mack initiated this action by the filing of a complaint on August 4, 2010, wherein he alleged causes of action for false arrest/imprisonment, negligence, gross negligence, negligent training, assault and battery. (R. 10-17). All of the causes of action except for the false arrest/imprisonment claim were voluntarily dismissed prior to trial. (R. 7-8).

The case was scheduled for a jury trial to begin on April 4, 2012. The parties thereafter waived their right to a jury trial and consented to a bench trial before Circuit Court Judge DeAndrea G. Benjamin. The case was tried on April 4-

¹ In her order entered April 6, 2012, Judge DeAndrea Benjamin states that the events including the arrest occurred on December 8, 2008. That is a clerical error. The events and arrest occurred on December 6, 2008. (R. 1).

5, 2012. On April 5, 2012, Judge Benjamin issued a judgment in favor of the Appellant Mack and awarded \$7,500.00 in actual damages. (R. 9). That judgment was memorialized in an order filed April 6, 2012. (R. 1-3).

Sheriff Lott subsequently filed a motion to alter or amend judgment pursuant to Rule 52(b) and/or Rule 59(e), SCRCF. (R. 24-32). That motion was summarily denied in a form order filed May 11, 2012. (R. 4).

Sheriff Lott subsequently filed a timely appeal to this Court.

STATEMENT OF FACTS

On December 6, 2008, the Appellant Demetrius Mack was employed with DTH Protective Services and working at Club Essence, a nightclub on Two Notch Road in Richland County. On that date, a Club Essence patron named McKenzie Williamson had been creating some trouble at the nightclub. According to Mack, Williamson had been escorted off the property several times by members of DTH Protective Services. (R. 140-143).

At some point during the early morning hours, Williamson returned to the nightclub and was spotted by Mack. When Mack approached Williamson to arrest him, Williamson immediately began to flee on foot. (R. 143-144). Mack pursued Williamson and during the course of the pursuit in the direction of Weir Avenue,² Mack claims that Williamson tripped and fell under a white vehicle parked on the public roadway. (R. 143-144, 187). Mack testified that he then "grabbed" Williamson, "pulled" him from under the parked vehicle, and placed him in handcuffs. (R. 188, 191-192).

Richland County Sheriff's Deputies James Gore and Kenneth Proffitt were on duty in their assignment in Region Two at or near the 100 block of Weir

² The adjoining property to the Club Essence location is 109 Weir Avenue which is owned by the owner of Club Essence. That property was used as a parking lot for the nightclub and was within the scope of DTH Protective Services' contract. (R. 334).

Avenue. Specifically, they were in the process of placing some subjects in custody for narcotics violations. (R. 100). At that time, these deputies observed some type of commotion taking place at Club Essence, which was approximately forty yards from their location. (R. 100-101). In particular, they observed a subject running from the nightclub's parking lot out into the road with another subject chasing him. (R. 100). Deputy Gore observed the second subject tackle the first subject in the roadway. It then appeared that the second subject placed handcuffs on the first subject. (R. 102). Deputy Proffitt witnessed the same events. (R. 261-264).

Deputy Proffitt called for back-up units, and Deputy Stacy Parish, who was in the vicinity, responded. The location of Williamson and the parked vehicle are depicted on Deputy Parish's dashboard video. (R. 347).

Deputy Gore proceeded to the location and spoke with Demetrius Mack to ascertain the nature of the commotion. Mack identified himself as a security guard for Club Essence. Mack explained that the subject running off the property was asked several times to leave and would not do so. Mack then chased the subject off the property and into the roadway. (R. 105).

Deputy Gore asked Mack that, at the point the subject was off the property then why did he continue to chase him into the street. Mack replied that he was detaining him so that law enforcement could place him on trespass notice. Deputy Gore then asked Mack whether he intended to press charges against the subject, and Mack stated that he did not. Deputy Gore then advised Mack as to Section 40-

18-110, which provides that a person who is appropriately certified as a private security officer has the authority and arrest powers given to sheriff's deputies. However, such powers are specifically confined to the property on which he is employed. (R. 106-108).

Deputy Gore turned his questioning to McKenzie Williamson who had been handcuffed by Mack. Williamson informed him that he wished to press charges against Mack. (R. 110). Deputy Gore observed Williamson and noted that he sustained injuries to his hands and face and that he had blood "all over his shirt." (R. 109). Those injuries required ambulatory treatment, and Williamson was subsequently transported to the hospital via Richland County EMS. (R. 110). Deputy Gore (who was a Corporal at the time of these events) instructed Master Deputy Stacy Parish to effectuate an arrest of Mack for simple assault. Mack was arrested and transported to the Alvin S. Glenn Detention Center.

ARGUMENTS

- I. The trial court erred in finding that probable cause for the arrest of the Appellant Demetrius Mack was lacking and specifically erred by failing to apply applicable South Carolina precedent in determining the existence of probable cause and by failing to assess the prevailing facts and circumstances from the arresting officer's perspective.**

Judge DeAndrea Benjamin concluded in her order entered April 6, 2012, that the Richland County sheriff's deputies "did not have probable cause to arrest the Plaintiff for simple assault on December 8, 2008 [sic]." (R. 3). Judge Benjamin's ruling is not supported by the evidence and is further based on errors of law. A review of Judge Benjamin's order reflects that she did not apply South Carolina precedent in adjudicating the issue of probable cause.

The Respondent Demetrius Mack has alleged a false arrest claim arising from his warrantless arrest on December 6, 2008, for simple assault. In order to prevail on a false arrest claim, Mack must prove the following elements: (1) that the defendant restrained the plaintiff; (2) that the restraint was intentional; and (3) that the restraint was unlawful. *Andrews v. Piedmont Air Lines*, 297 S.C. 367, 377 S.E.2d 127, 130 (Ct. App. 1989). There is no dispute that Mack was arrested, and thus the first two elements are satisfied. However, Mack has the burden of proving that the arrest was unlawful.

"The dispositive question in determining whether a warrantless arrest is

lawful is whether there was probable cause to make the arrest." *State v. Cuevas*, 365 S.C. 198, 616 S.E.2d 718, 721 (Ct. App. 2005). In *Jackson v. City of Abbeville*, 366 S.C. 662, 623 S.E.2d 656 (Ct. App. 2005), this Court explained that "[p]robable cause turns not on the individual's actual guilt or innocence, but on whether facts within the officer's knowledge would lead a reasonable person to believe the individual arrested was guilty of a crime." 623 S.E.2d at 658, citing *State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996). "Probable cause is determined as of the time of the arrest, based on facts and circumstances -- objectively measured -- known to the arresting officer." *Jackson*, 623 S.E.2d at 659. Importantly, "[t]he determination of probable cause is not an academic exercise in hindsight." *Id.* "Whether probable cause exists depends upon the totality of the circumstances surrounding the information at the officers' disposal." *State v. George*, 323 S.C. 496, 476 S.E.2d 903, 911 (1996). See also, *State v. Moultrie*, 316 S.C. 547, 451 S.E.2d 34, 37, n.3 (Ct. App. 1994) ("[p]robable cause analysis includes a realistic assessment from a law enforcement officer's perspective"). "A probable cause analysis involves the use of a fact-based, objective perspective that requires more than reasonable suspicion of criminal activity." *State v. Morris*, 395 S.C. 600, 720 S.E.2d 468, 472 (Ct. App. 2011).

"The term 'probable cause' does not import absolute certainty." *Lapp v. South Carolina Department of Motor Vehicles*, 387 S.C. 500, 692 S.E.2d 565, 568 (Ct. App. 2010). In fact, "[a] finding of probable cause may be based upon less

evidence than would be necessary to support a conviction." *Id.* Thus, it is well settled that probable cause does not turn on an individual's actual guilt or innocence." *State v. Manning*, 400 S.C. 257, 734 S.E.2d 314, 319 (Ct. App. 2012).

This Court has further explained that "[i]n determining whether probable cause exists, all the evidence within the arresting officer's knowledge may be considered, including the details observed while responding to information received." *State v. Cuevas*, 365 S.C. 198, 616 S.E.2d 718, 721 (Ct. App. 2005). "In other words, a police officer has probable cause to arrest without a warrant where he in good faith believes that a person is guilty of a [crime], and his belief rests on such grounds as would induce an ordinary prudent and cautious man, under the circumstances to believe likewise." *Id.*

From a review of the findings of fact and conclusions of law in the present case, it is clear that that Judge Benjamin did not apply the correct legal principles in reaching her decision that probable cause was lacking. There is no indication in the order that Judge Benjamin considered an objective assessment of the facts *as known to the arresting officer*. The findings of fact make no attempt to set forth or evaluate the information known to Deputy Gore at the time of arrest or what an objectively reasonable police officer would have known. In fact, the findings of fact address only issues of damages and are woefully deficient in addressing the dispositive issue of probable cause. This deficiency was pointed out to Judge Benjamin in the Sheriff's motion to alter or amend; yet, that motion was summarily

denied with no attempt to provide any findings of fact on the question of probable cause. (R. 4).

Nonetheless, a fair reading of Judge Benjamin's order indicates that she was evaluating Mack's guilt or innocence rather than adjudicating the issue of probable cause. Judge Benjamin ruled that "a realistic assessment of the evidence in this case doesn't show that a crime had been committed by the Plaintiff on December 8, 2008 [sic] at the time of his arrest." (R. 2-3). The issue before the court, however, was not whether a crime had actually been committed – that is a question of guilt or innocence. Instead, the issue is one of probable cause. Furthermore, the "realistic assessment" that is required to be made is not to determine whether a crime was *actually* committed. Instead, the Court must determine whether there is an objectively reasonable basis for the arresting officer to believe that a crime was committed. As this Court noted in *State v. Moultrie*, 316 S.C. 547, 451 S.E.2d 34 (Ct. App. 1994), a "[p]robable cause analysis includes a realistic assessment *from a law enforcement officer's perspective*." 451 S.E.2d at 37, n.3. (Emphasis added). Judge Benjamin did not make a realistic assessment of what was reasonably known or perceived by an objectively reasonable officer in Deputy Gore's position.

On these bases, therefore, the Sheriff submits that the trial judge's finding of no probable cause was in error and should be reversed.

II. The trial court erred in failing to rule as a matter of law that an objectively reasonable police officer in Deputy James Gore's position could have perceived and concluded that the Appellant Demetrius Mack committed an unwanted touching resulting in injuries sustained in the public roadway.

Despite the deficiencies in the findings of fact and conclusions of law as well as the errors of law addressed above, the Sheriff submits that a remand is not necessary. The Sheriff contends, consistent with the motions for nonsuit made at the close of Mack's case-in-chief and again at the close of all the evidence, that the existence of probable cause may be determined as a matter of law. Judge Benjamin, it is submitted, committed error in failing to enter judgment for the Sheriff. In other words, even if the disputed evidence is viewed in a light most favorable to Mack, the Sheriff is still entitled to a judgment in his favor, and this Court is requested to so rule.

Without dispute, the Respondent Demetrius Mack was arrested by Deputy James Gore for simple assault. The Supreme Court has explained that simple assault is "an unlawful act of violent injury to another, unaccompanied by any circumstances of aggravation." *State v. White*, 361 S.C. 407, 605 S.E.2d 540, 543 (2004). Simple assault has also been defined as "any touching of the person of an individual in a rude or angry manner, without justification." *State v. LaCoste*, 347 S.C. 153, 553 S.E.2d 464, 471 (Ct. App. 2001).

The Sheriff submits that the undisputed evidence at trial establishes as a

matter of law that probable cause existed to believe that Mack committed a simple assault upon the victim, McKenzie Williamson, within the public roadway. As a private security officer, Mack enjoyed the arrest powers granted to a sheriff's deputy, but that power may only be exercised on the property on which he is employed. *See*, S.C. Code Ann. § 40-18-110.³ Thus, if Mack took action beyond the property that he was hired to protect, such as in the public roadway, then he was without jurisdiction and beyond the scope and protection of Section 40-18-110.⁴

At trial, Mack as well as the sheriff's deputies testified as to their respective versions of the facts and circumstances leading up to Mack's arrest. Most importantly, Mack conceded in sworn testimony that he was actively pursuing McKenzie Williamson on foot, that Williamson was under a parked vehicle, that

³ Section 40-18-110, which is part of the South Carolina Private Detective and Private Security Agency Act, provides as follows: "A person who is registered or licensed under this chapter and who is hired or employed to provide security services on specific property is granted the authority and arrest power given to sheriff's deputies. The security officer may arrest a person violating or charged with violating a criminal statute of this State *but possesses the powers of arrest only on the property on which he is employed.*" S.C. Code Ann. § 40-18-110. (Emphasis added).

⁴ Sheriff Lott testified that that South Carolina Private Detective and Private Security Agency Act does not include a provision for a security guard in hot pursuit. (R. 295). That testimony is consistent with case law and Attorney General Opinions on the issue. In *United States v. Mayes*, 2013 WL 267770 (D.S.C. 2013), U.S. District Judge David C. Norton explained that private security guards have no authority to pursue and/or arrest offenders outside the property on which the guards are employed. 2013 WL 267770, *5, n.8. Judge Norton further explained that "Opinions issued by the South Carolina Attorney General have advised that private security officers licensed by SLED do not have the power to engage in 'hot pursuit' of offenders away from the private property they are assigned to guard." 2013 WL 267770, *6, *citing* S.C. Op. Atty. Gen No. 87-73 (1987). *See also*, S.C. Op. Atty. Gen No. 77-203 (1977).

the vehicle had been partially situated in the public roadway, that Mack then proceeded to physically "grab" and "pull" Williamson out from under the vehicle, and that Mack then restrained Williamson by handcuffing him. (R. 143-144, 187-192). In contrasting testimony, both Deputy Gore and Deputy Proffitt asserted that they personally observed Mack "tackle" Williamson in the middle of the street. Deputy Gore further testified that he saw what appeared to be Mack handcuffing Williamson. (R. 100-102, 261-264). However, the concessions made by Mack are sufficient to demonstrate that, even if his version of the facts is credited, an objectively reasonable police officer on the scene could have believed there to be an unlawful touching by Mack in the public roadway and beyond his jurisdiction as a security officer. A finding that Mack's touching of Williamson occurred within the public roadway is further supported by the dashboard video from Deputy Parish's vehicle which shows Williamson's body at least partially in the public roadway. (R. 347).

It is important to note that whether the unwanted touching of Williamson by Mack *actually* occurred completely in the roadway, partially in the roadway, or completely on the side of roadway is not dispositive of the probable cause issue. That question would be critical on the issue of guilt or innocence. However, the existence of probable cause is based on an objective standard, that is, what an objectively reasonable officer may have reasonably observed or perceived to be the prevailing facts and circumstances. *See, State v. Morris*, 395 S.C. 600, 720 S.E.2d

468, 472 (Ct. App. 2011) (probable cause is based on facts "from the standpoint of an objectively reasonable police officer"). Here, giving credit to Mack's testimony, Williamson was unlawfully touched when he was grabbed and pulled from beneath a vehicle located at least partially in the roadway. (R. 188-189).

Nonetheless, this Court, like Judge Benjamin, also has the benefit of the dashboard video from Deputy Parish's vehicle.⁵ That video, which was admitted without objection, provides indisputable evidence that the vehicles were parked partially in the roadway, including the white vehicle from under which Mack claims to have pulled Williamson. (R. 228, 347). That video also provides indisputable evidence that Williamson was handcuffed and detained for police while he was lying partially in the roadway. (R. 229, 347).⁶ In short, as a matter of law, these facts would lead an objectively reasonable officer on the scene to believe Mack's actions occurred, at least in part, in the public roadway.

In addition, the undisputed evidence at trial established that McKenzie Williamson received physical injuries that had been committed within Deputy

⁵ Of note, Judge Benjamin makes no reference to the video evidence in her order.

⁶ The United States Supreme Court's decision in *Scott v. Harris*, 550 U.S. 372 (2007), is instructive on the controlling effect of video evidence over inconsistent witness testimony. In that case, the Supreme Court had the benefit of a videotape of the high-speed police pursuit at issue. The Court concluded that the videotape contradicted the version of events presented by the plaintiff. As a result, the Court held as follows: "Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape." 550 U.S. at 380-381. The same standard is equally applicable in the case at bar. This Court is urged to view the critical facts as they are depicted by the indisputable video evidence.

Gore's view. The wounds were visible and freshly committed and required treatment by on-the-scene paramedics followed by transport via EMS for further treatment at the emergency room. (R. 109-110). The officers' description of the wounds was consistent with "road rash." In other words, such injuries were consistent with contact with the asphalt pavement rather than the grass on the side of the roadway, which provides further information that would allow an objectively reasonable officer on the scene to conclude that the injuries were sustained in the public roadway which was outside of Mack's jurisdiction rather than on the grassy side of the road which was within his jurisdiction.

Finally, there is no dispute that the physical touching by Mack was non-consensual. This was further demonstrated by Williamson's request to Deputy Gore that he wished to pursue criminal charges against Mack. (R. 110).

In sum, an objectively reasonable police officer in Deputy Gore's position could have perceived and concluded that Mack committed an unwanted touching resulting in injuries sustained in the public roadway. The facts and totality of the circumstances within Deputy Gore's knowledge clearly yield only one reasonable conclusion, that is, that probable cause existed that Mack committed a simple assault.

III. The trial court erred in failing to make specific findings of fact and conclusions of law in violation of Rule 52(a), SCRCP.

Alternatively, if this Court does not rule as a matter of law in favor of the Sheriff by viewing any disputed evidence in a light most favorable to Mack, then this Court will need to consider whether Judge Benjamin committed error in failing to make specific findings of fact and conclusions of law in violation of Rule 52(a), SCRCP. The standard of appellate review for an action at law on appeal of a case tried without a jury, the appellate court will not disturb the judge's findings of fact unless found to be without evidence which reasonably supports the judge's findings. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773, 775 (1976). As a result, it is critical that the trial judge set forth his/her findings of fact and conclusions of law with sufficient specificity and detail to allow for proper appellate review. Rule 52(a), SCRCP, in fact, requires "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon." Rule 52(a), SCRCP. This Court has recognized that "meaningful appellate review is more readily obtained when we are presented with a clear presentation of the basis for the circuit court's findings." *In the Matter of the Care and Treatment of Corley*, 365 S.C. 252, 616 S.E.2d 441, 443 (Ct. App. 2005). The Supreme Court has similarly explained the critical necessity for adequate findings and conclusions of law:

Trial courts, sitting without juries in an action at law, write their findings specially and separately to allow a reviewing court to determine from the record whether the judgment -- and the legal conclusions which underlie it -- represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.

In the Matter of the Treatment and Care of Luckabaugh, 351 S.C. 122, 568 S.E.2d 338, 343 (2002).

While the Supreme Court "do[es] not require a lower court to set out findings on all the myriad factual questions arising in a particular case," it is required that the key factual questions of a case be stated with clarity and specificity. *Id.* In fact, in *Corley, supra*, this Court was critical that the trial judge failed to make detailed findings of fact as to the probable cause determination required by the Sexually Violent Predator Act. This Court observed that a finding of "no probable cause" under the Act, which is akin to the probable cause determination at the heart of the case at bar, is not "a mere evidentiary ruling or some peripheral determination" but is "indeed dispositive of the proceeding and provides the finding from which an appeal is taken." 616 S.E.2d at 443. This Court accordingly held that substantial compliance with Rule 52(a) was required when the court makes a probable cause determination. *Id.*

As the Supreme Court instructs, "the findings must be sufficient to allow [a]

Court, sitting in its appellate capacity, to ensure the law is faithfully executed below. The absence of factual findings makes our task of reviewing the court order impossible because the reasons underlying the decision are left to speculation." *Luckabaugh*, 568 S.E.2d at 343. Unfortunately, that is the situation in the present case. While Judge Benjamin concluded that the sheriff deputy did not have probable cause to arrest Mack, she does not provide any findings of fact to support that conclusion. She does not indicate whether she found facts consistent with Mack's version of events or the deputies' version of events or some mixture of the witnesses' accounts. She does not state whether she relied in any respect on the indisputable video evidence. She does not specify whether the admitted physical touching of Williamson by Mack occurred in the public roadway or not. Most importantly, she does address an objective assessment of the facts as known to the arresting officer, as she was required by law to adjudge. Just as this Court concluded in *Corley*, the determination of "no probable cause" requires substantial compliance with Rule 52(a) to allow for meaningful appellate review. Judge Benjamin's order regrettably does not provide sufficient findings of fact and conclusions of law for that purpose nor to give the litigants any reasonable assurance that the law was correctly applied to the facts as found. Sheriff Lott filed a motion pursuant to Rule 52(b) and/or Rule 59(e) requesting specific findings of fact and conclusions of law, but that motion was summarily denied. (R. 4, 27-29). Therefore, as an alternative, in the event this Court does not rule in

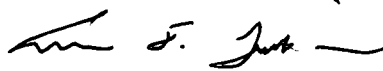
Sheriff Lott's favor as a matter of law, this Court is asked to vacate Judge Benjamin's order and to remand for an order that substantially complies with Rule 52(a).

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant Leon Lott respectfully requests that this Court reverse the orders of Circuit Court Judge DeAndrea G. Benjamin and remand with instructions that judgment be entered in favor of Sheriff Lott. In the alternative, Sheriff Lott requests that the Court remand with instructions that Judge Benjamin issue an order complying with Rule 52(a), SCRPC, that addresses all issues and defenses and provides sufficient findings of fact and conclusions of law that will allow for appropriate appellate review.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
ROBERT D. GARFIELD
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Appellant Leon Lott

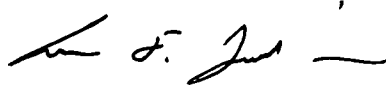
Columbia, South Carolina

October 28, 2013

CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant Leon Lott certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
ROBERT D. GARFIELD
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Appellant Leon Lott

Columbia, South Carolina

October 28, 2013

CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant Leon Lott certifies that the Final Brief of Appellant complies with the Supreme Court's Order of August 13, 2007, regarding personal identifiers and sensitive information.

DAVIDSON & LINDEMANN, P.A.

BY: 

ANDREW F. LINDEMANN
ROBERT D. GARFIELD
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Appellant Leon Lott

Columbia, South Carolina

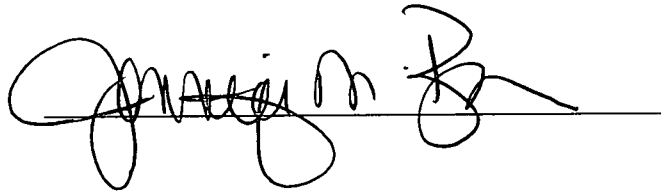
October 28, 2013

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Appellant, does hereby certify that service of the **Brief of Appellant** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 28th day of October 2013:

Neal M. Lourie, Esquire
Lourie Law Firm, LLC
Post Office Box 12089
Columbia, South Carolina 29211

Joshua S. Kendrick, Esquire
Kendrick & Leonard, P.C.
Post Office Box 886
Columbia, South Carolina 29202-0866

A handwritten signature in black ink, appearing to read "Joshua S. Kendrick", is written over a horizontal line.