

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2011-CP-27-00011

Jeffrey H. Anders and Maureen Anders, Michael K. Callahan and Amy Callahan, Melinda A. Cavicchia, Michael B. Ciulis, Stephen Kipa and Kimberly A.K. Kipa, Chad Kurtz, Spencer L. Morgan, Richard O'Reilly and Alicia F. O'Reilly, Daniel Ryan and Susan Ryan, Gennady Shmukler, Michael Schmuff and Joanne Schmuff, and Matthew Terry, Kathryn M. Tillman, Valerie A. Lowe, TACG Properties, LLC, Mackay Marsh, LLC,

Of Whom Spencer L. Morgan is the..... Appellant,

v.

The Settings of Mackay Point, LLC, The Settings Development Companies, LLC, Branch Banking & Trust Co., Wachovia Bank, N.A., Bond Safeguard Insurance Company, and Jasper County,

Of Which Wachovia Bank, N.A. is the Respondent.

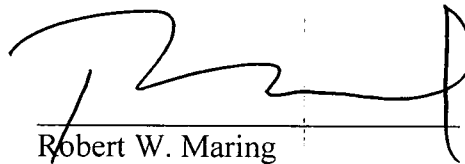
Appellate Case No. 2013-001629

REPLY BRIEF OF APPELLANT

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SC Court of Appeals



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Argument in Reply

Without restating the issues or making redundant arguments which have been thoroughly set forth in their opening brief, the Appellant offers the following point of clarification and rebuttal to the arguments raised by Respondent.

I. THE APPELLANT COMPLIED WITH RULE 40(i)(2) BY THE APPELLANT'S SUBMISSION OF HIS AFFIDAVIT AND ASSERTIONS OF TRIAL COUNSEL PRIOR TO THE CALL OF THE CASE.

The Respondent's claim that the Appellant failed to comply with South Carolina Rules of Civil Procedure Rule 40(i)(2) is misguided. This Rule governs when a party may obtain a continuance due to the absence of an essential witness. In the present matter, the Appellant, upon discovering a conflict with the trial schedule, immediately filed a Motion for a Continuance, which was supported by two affidavits demonstrating the reasons for the request. In looking at the facts and circumstances of this case, the record demonstrates that the Appellant notified the Court prior to the call of the case by way of a filed Motion for Continuance. In the Appellant's affidavit, he stated that he would not be able to attend the trial and failure to grant the motion would mean a dismissal of his claims. In addition, Appellant's counsel stated to the Court, that "the Plaintiff's testimony is critical and necessary for me to bring this action. I cannot proceed with trial without his testimony." (Tr. p. 6).

The Court, in its reasoning for denial of the Motion for Continuance, recognized that there were a number of Plaintiffs in the case (actually twenty (20) other Plaintiffs); the case was mediated a number of times; and that the Appellant was the last one standing that had not resolved his case with Wells Fargo. (Tr. p. 8). At the call of the case, the only remaining Plaintiff was the Appellant and the sole remaining Defendant was the Respondent. The original

purpose of the date certain was to ensure that twenty (20) Plaintiffs, who resided all over the country, would be available for trial on that particular date, a need that no longer existed with the case. In making its decision, the Court did not address any supposed deficiencies in the request for the continuance.

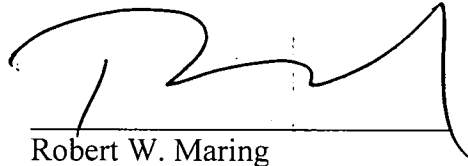
The Court was well aware that the Appellant's absence was going to amount to the dismissal of his claims without his material testimony. Additionally, the Court denied Respondent Wells Fargo's Motion for Summary Judgment on May 8, 2013, indicating that there were issues of material fact in dispute based upon facts contained in Appellant's deposition and facts alleged in the Complaint. The Trial Court was on notice of the facts to which the Plaintiff, if present, would have testified and the grounds for such relief. Unlike a non-party witness, the Court had access to the Complaint, which alleged all of the facts that the Appellant intended to prove. The Court was provided with ample evidence that the Appellant had some particular contribution to make to the trial, as a material witness or otherwise.

Even if the Appellant failed to meet the requirements, of Rule 40(i)(2), which the Appellant denies, it does not serve as a bar for the Appellant's claim that the Court abused its discretion that to continue the case pursuant to Rule 40(i)(1).

CONCLUSION

The Appellant's Motion for Continuance was properly made and met the intent of Rule 40(i)(2) SCRCF.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'R. Maring', written over a horizontal line.

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January 30, 2014

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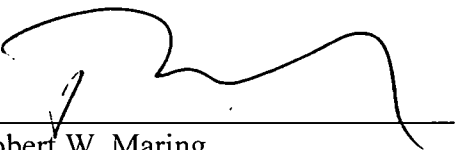
CERTIFICATE OF SERVICE

I, Robert W. Maring, attorney for the Appellant, Spencer L. Morgan, do hereby certify that on the 30th day of January, 2014, I served the Reply Brief of Appellant in the above-captioned action by depositing copies of same in the United States Mail, postage prepaid, in envelopes securely sealed, and addressed to:

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the same being their usual business addresses.



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