

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
No. 2014-001472

Appeal from Newberry County
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge
Civil Action No. 2009-CP-36-415

John S. Frick,

Appellant,

v.

Keith Fulmer, Eleanor F. Bush,
Benny A. Bush, Joseph R. Childers,
Justin Chadwick, Victoria Chadwick,
S.C. Electric & Gas, and Newberry County

Respondents.

APPELLANT'S INITIAL BRIEF

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Newberry, S.C.
September 5, 2014

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. **DID THE LOWER COURT ERR IN DENYING APPELLANT'S MOTION FOR RECONSIDERATION REGARDING THE STATUS OF THE ROADWAY AS A PUBLIC COUNTY ROAD?**

- II. **DID THE LOWER COURT ERR IN DENYING APPELLANT'S MOTION FOR RECONSIDERATION REGARDING THE RESPONDENTS UTILIZING A CLOSED, LOCKED GATE TO DENY THE APPELLANT AND HIS GUESTS ACCESS TO HIS PROPERTY?**

- III. **DID THE LOWER COURT ERR IN DENYING APPELLANT'S MOTION FOR RECONSIDERATION REGARDING THE WIDTH OF THE ROADWAY UTILIZED TO ACCESS HIS PROPERTY?**

STATEMENT OF THE CASE

Appellant John S. Frick (hereinafter Appellant or Frick) filed a Summons and Complaint seeking a preliminary injunction and declaratory judgment regarding the parties' rights and responsibilities in regards to the portion of Seibert Road in Newberry County, South Carolina that begins at Wheeland School Road and traverses across the defendants' properties until it reaches the Appellant's property identified as Newberry County TMS 645-8. A bench trial was held before the Honorable Frank R. Addy, Jr. in Laurens County on November 1, 2013. The Court issued its decision via way of Form Order on November 18, 2013 and requested a more formal order to be prepared by defense counsel. The Court issued its Order of Final Judgment dated February 20, 2014 and filed with the Newberry County Clerk of Court on February 24, 2014 (hereinafter Order of Final Judgment). The Order of Final Judgment found that the roadway was not a public road and that it was a simple private easement for the necessary property owners. The Order further allowed the defendants to utilize a locked gate across the roadway and found that the appellant has a 10 to 12 foot wide easement for egress and ingress to his property.

Appellant timely filed his Motion for Reconsideration and/or Motion to Alter and Amend on March 3, 2014. After further argument, the trial court issued its decision dated June 9, 2014 amending its Order to reflect that the Appellant has a fourteen foot easement in the roadway in question but denying all other relief sought in the Motion for Reconsideration.

Appellant timely filed his Notice of Intent to Appeal and this Initial Brief follows.

STATEMENT OF FACTS

Appellant purchased an approximately 84 acre parcel of land located in the Little Mountain area of Newberry County, S.C. in 2003. (Tr., p. 12, l. 3-7). Appellant visited the land prior to the purchase and accessed it by driving in his vehicle from Wheeland School Road to the property. (Tr., p. 13, l.2 – p. 14, l.1). The roadway was unimpeded and the only gate was unnoticed due to it being open and overgrown with weeds to the point that it was easily overlooked. (Tr., p. 14, ll.2-15). This road, which traverses through or on the border of each defendant's land until it ends upon Appellant's property, is the subject of this lawsuit and appeal. (Tr., p. 14, l.16 – p. 15, l.1).

Appellant was familiar with the property prior to purchasing same as he is a lifelong resident of the Little Mountain community. (Tr., p.11, l.20 – p.12, l.2). The road was originally a part of Seibert Road, which continues on the other side of what is now Lake Murray as shown on a 1938 General Highway Map. (Pl. Ex. 1). Other maps, including a Lake Murray map and 2006 road atlas, show the road as continuing to and hooking up with what is still Seibert Road on the opposite side of Lake Murray. (Pl. Ex. 2 and 3). It is clear that historically this road was in fact Seibert Road which travelled from Wheeland School Road and across what is now Lake Murray to Macedonia Church Road.

In addition to its historic use as a road traversing between two other public roads, the part of the road which connects Wheeland School Road to the Appellant's property has been used well after the construction of Lake Murray. The road was utilized by at least two home owners, one of which resided on the Appellant's property and the road was utilized by mail carriers and other services providers for these homes. (Tr., p. 22, l.20

– p.23, l. 8). Furthermore, the road was utilized by Boy Scouts and others as access to the lake and camping sites. (Tr., p. 21, l.25 – p. 23, l. 8). The road was able to be accessed with regular automobiles and was actually wider than some other county dirt roads. (Tr., p. 23, l.13 – p.24, l.3). Although there were no documents indicating that the County had recently maintained the road, this is not unusual as the County has not retained any maintenance records prior to the late 1980’s. (Tr., p. 24, ll. 4-8).

The Appellant’s property, when it was previously owned by Champion and the SCE&G property have also been a part of the South Carolina Wildlife Management Area program. (Tr., p. 9, ll. 6-16). Without utilizing this road, these WMA lands would have been landlocked and unusable by the public unless they were able to access it via water and this was also impossible at times due to low water levels. (Tr., p. 28, ll.4-17).

After the Appellant purchased the property, Defendant Fulmer’s father, his predecessor in title, approached the Appellant about closing and reutilizing a gate along the roadway. (Tr., p. 25, l. 17-23). Appellant protested against same but the gate was cleaned up and closed and locked over his protests. Although the Appellant was given a key, in the beginning the key would often not work and when some the defendants suggested the use of separate locks for each landowner, the Appellant would often find his lock out of sequence or arranged in such a manner that he was not able to access his property. (Tr., p. 25, l. 20 – p. 26, l. 20). The gate blocking Appellant’s unfettered and uninterrupted access to his property was erected only after he purchased the land to the chagrin of Defendant Fulmer’s family. (Tr., p. 14, ll. 12 – 15). Van Hoffman, a recently retired employee from Defendant SCE&G agreed that the gate would sometimes be locked incorrectly and that people would get locked out. (Tr., p. 111, l. 14 – p.112, l. 5).

Defendant Fulmer, who now spearheads the campaign to keep the gate closed and locked, argues that the gate is necessary to keep out trespassers and poachers. However, Defendant Fulmer testified that he was only able to remember one instance where he actually encountered a trespasser and one other incident via hearsay where Defendant Childers spotted a car near the gate. (Tr., p. 147, l. 15 – p. 148, l. 19). Defendant Fulmer further testified that between the institution of this litigation in 2009 and the time of the trial, over four years later, there were zero incidents of trespassing, littering or any other problems. (Tr., p. 165, l. 25 – p. 166, l. 18). In Defendant Fulmer’s own words, “that’s a thing of the past...” (Tr., p. 166, ll. 16-18).

The Defendants further argued that the roadway was only 10 to 12 feet wide. It is clear from the testimony that the roadway was at least 20 feet wide, and wider in other spots, and that it ran 25 feet or more from “ditch to ditch.” (Tr., p. 30, ll. 11-20). Even Defendant Fulmer’s testimony on direct examination by his own attorney shows the true width of the road:

Question: How wide is the road as it now goes through your property?

Answer: “...it’s nothing under 20 feet wide, except where the gate and stuff is...” (Tr., p. 156, ll. 11-18).

Mr. Fulmer further testified that log trucks can easily traverse the road and that the road was between 14 and 20 foot wide. (Tr., p. 156, ll. 11-21). Also, Defendant Fulmer indicated that the 14 foot wide gate does not cover the whole road bed and that the gate is at the most narrow part of the road. (Tr., p. 163, l. 18 – p.164, l. 10; Def. Ex. 12).

Photographs offered in evidence show a roadway, not including ditches, that is 20

feet or more wide as evidenced by the 20 foot wide pipes running underneath the roadway. (Tr., p. 30, ll. 15 – 20; Def. Ex. 11 and 12).

Appellant purchased a piece of property that had clear, unimpeded access from Wheland Road on a roadway that is no less than 20 feet wide. Only after the Defendants attempted to continually deny him access did this litigation ensue.

ARGUMENT

I. THE APPELLATE COURT SHOULD REVIEW THE LOWER COURT'S DECISION FOR ERRORS OF LAW AND FACTUAL FINDINGS THAT ARE WITHOUT EVIDENCE REASONABLY SUPPORTING SAID FINDINGS.

This is an appeal from a declaratory judgment action seeking a judicial determination as to whether or not a road was, and remains, a public road and the parties' respective rights in said road. Declaratory judgments in and of themselves are neither legal nor equitable. *Campbell v. Marion County Hosp. Dist.*, 354 S.C. 274, 580 S.E.2d 163 (2003). Actions regarding rights in a roadway or easement are actions at law. *S.C. Dept. of Transportation v. Horry County*, 391 S.C. 76, 705 S.E.2d 21 (2011). This Court should review the lower court's decisions for errors of law and should further review the trial court's factual findings and overturn same if they are without evidence reasonably supporting those findings. *Id.* at 81.

II. THE LOWER COURT ERRED IN FINDING THAT THE ROADWAY IN QUESTION IS NO LONGER A COUNTY ROAD DESPITE THE FACT THAT THE GOVERNMENTAL AUTHORITY TOOK NO AFFIRMATIVE STEPS TO CLOSE IT AND PART OF SAID ROAD REMAINS OPEN AND COUNTY MAINTAINED.

Newberry County has failed to take any action to close the portion of Seibert Road in question in this matter. Due to the County's inaction, it remains a county road to this very day. It is uncontested that the road in question was once a part of Seibert Road, a road which connected Wheeland School Road and Macedonia Church Road prior to the

flooding which created Lake Murray. (Pl. Ex. 1, 2 and 3). Part of Seibert Road still exists and is still maintained by Newberry County. (Tr. p. 93, l. 24 – p. 95, l. 22; Pl. Ex. 9). The evidence presented shows that the portion of the road accessing the Appellant's property was utilized as late as the 1950's for mail delivery and access to two homes. (Tr., p. 22, l.20 – p.23, l. 8). Furthermore, the road was more recently used by the public via the Boy Scouts and other groups utilizing it to access camping areas. The road, which still appears on current maps, is also the only land route to access Wildlife Management Area lands held by the South Carolina Department of Natural Resources for public use.

S.C. Code Ann. §57-9-10 *et seq.* lays out the procedures which must be followed for the State, or any of its political subdivisions, to abandon or close any street, road or highway “whether opened or not.” (emphasis added). Newberry County did not petition the court, publish their notice of intention to file in the newspaper, send certified mail to all abutting property owners, or post signage along the roadway in question as required by S.C. Code Ann. §57-9-10 (2012). If, and only if, the County followed proper procedures could the property be reverted back to the private landowners. S.C. Code Ann. §57-9-20 (2012).

The South Carolina Supreme Court and Court of Appeals have stated that “by creating a formal judicial procedure for terminating a public right of way over land, Section 57-9-10 removes the uncertainty attending the common law of dedication and abandonment.” *South Carolina Dept. of Transportation v. Hinson Family Holdings, LLC*, 361 S.C. 649, 606 S.E. 2d 781 (2004); *See also Hoogenboom v. City of Beaufort*, 315 S.C. 306, 433 S.E.2d 875 (Ct. App. 1992). In the *Hinson* case, the road in question had actually been rerouted and the portion subject to the lawsuit was no longer being

utilized by the general public or maintained by the County. Regardless, the Court found that the South Carolina Department of Transportation and/or Horry County were required to follow the statutory scheme for abandoning or closing a road. *South Carolina Dept. of Transportation v. Hinson Family Holdings, LLC*, 361 S.C. 649, 606 S.E. 2d 781 (2004).

The trial court misapprehended *City of Myrtle Beach v. Parker*, 260 S.C. 475, 197 S.E.2d 290 (1973). In that case, a road which was made unusable for its original purpose due to a bridge being destroyed was declared to still be dedicated to public use because there was no evidence the City ever considered the matter, "let alone having concluded in the exercise of sound official discretion that any portion of Spivey Beach Road was no longer required for public use or convenience." *Id.* at 296. In the present matter, there is no evidence of Newberry County officials discussing or utilizing any discretion in making a decision to close Seibert Road and abandon it, and certainly no evidence they followed the statutorily required procedures.

City of Myrtle Beach v. Parker actually supports Appellant's contention that Seibert Road is still a public road. A distinct difference was drawn between the abandonment of a public easement and a private easement. Mere non-use of a dedicated street for twenty years would not amount to abandonment as would destroy the right of the public to the street. Seibert Road was, and remains, a public road that was maintained by the County. Evidence of use by mail trucks and other vehicles for access to homes, public use for travel between two other public roadways, and use by organizations and groups to access other public areas all show continued public use and a lack of abandonment by the County.

The question is not whether the landowners have dedicated his/her land to the public, but rather has the County given up what was, and still is, a public roadway? The very cases cited by the Court support Appellant's contention. In *K & A Acquisition Group v. Island Pointe, LLC*, the Court found that the South Carolina Department of Transportation actually sold the tract of land that was formerly a toll road pursuant to the statutory scheme for abandoning former roads. Here, the County took NO action to abandon Seibert Road, a road that provided unencumbered access to Appellant's property and WMA lands. "The mere act of relocating the toll road did not have the effect of abolishing the public easement created in the original route." *K & A Acquisition Group v. Island Pointe, LLC*, 383 S.C. 563, 682 S.E.2d 252 (2009). Here, just because the original route was shortened by the introduction of water to create Lake Murray, does not equal a knowing abandonment of the road by Newberry County.

The lower court erred in finding that the portion of Seibert Road providing access to Appellant's property was abandoned and therefore no longer a public road. The County, as well as the adjoining landowners, continued to allow general public access via way of mail delivery, use by scout troops and at least potential use by hunters engaging in hunts on Wildlife Management Area lands. (Tr. p. 21, l. 25 – p. 23, l. 8). Seibert Road was, at the time of Appellant's purchase of the property, a public road which traversed, unimpeded, from Wheeland School Road to Appellant's property.

III. ASSUMING ARGUENDO THAT THE ROAD IN QUESTION IS NOT A COUNTY ROAD, THE LOWER COURT ERRED IN FINDING THAT LANDOWNERS WERE ENTITLED TO MAINTAIN A CLOSED AND LOCKED GATE ACROSS THE ROADWAY PROHIBITING THE APPELLANT FROM EXERCISING FREE AND UNFETTERED ACCESS TO THE PROPERTY.

The lower court based its finding on Defendant's arguments that a gate was necessary for preservation of their property and protecting it from trespassers and vandals. The Defendant's arguments were simply offered as a red herring to justify their actions in denying Appellant reasonable access to his property. There was no credible evidence to support the trial court's finding and said finding is an error of law.

The only evidence of any past history of trespassing was antidotal and occurred long ago. No proof whatsoever of vandalism was offered. There is no necessity or even slight need for the gate for the "preservation of the servient estate." *Brown v. Gaskins*, 284 S.C. 30, 324 S.E.2d 639 (Ct. App. 1984). If a gate or blockade is erected that is not necessary to protect the land, it is merely to restrict human traffic and is improper. *Id.* at 34.

A gate may be erected across an easement if they "(1) are so located, constructed, and maintained as not to unreasonably interfere with the right of passage of the dominant estate, (2) are necessary for the preservation of the servient estate, and (3) are necessary for use of the servient estate." *Brown v. Gaskins*, 284 S.C. 30, 33, 324 S.E.2d 639, 640 (Ct.App.1984). Here, the gate was erected and/or re-erected for the sole purpose of interfering with the Appellant's right of passage. There was no testimony that the gate was actually needed, as Defendant Fulmer testified that the only two instances of

trespassing and/or vandalism were a thing of the past. (Tr. p. 166, ll. 4-18). Defendants have other options, including gating the spurs that actually lead onto their property from the main road in question or fencing along the road such that those passing through to properties further along the roadway cannot unintentionally trespass. The fact that the gate was opened when this case was filed in 2009, and left open for over 4 years without incident of vandalism or trespassing, shows that the gate is not needed for the preservation of the defendants' properties. (Tr. p. 165, l. 25 – p. 166, l. 18).

Appellant's uncontroverted testimony shows that when Appellant purchased the property in question, he travelled unfettered between Wheeland School Road and his property, via his personal vehicle, and that any gate was open and seemingly permanently disabled via weeds and other growth. (Tr. p. 13, l. 2 - p. 14, l. 15). Even Van Hoffman, a former land manager for Defendant SCE&G who was responsible for the affected SCE&G tract, indicated the "...gate was always open..." (Tr. p. 114, ll. 11-16). The testimony that gates have been erected in the past shows no current need for the gate in question and is irrelevant. Appellant purchased his property with an open road between said property and the nearest public road - i.e Wheeland School Road.

Appellant further testified that after his purchase, the gate and locking mechanisms were utilized by Defendant Fulmer or his predecessor in title to intentionally deny him access. (Tr. p. 25, l. 17 – p. 26, l. 20). Even former SCE&G employee Van Hoffman indicated that the gate was always open when he visited the property. (Tr. p. 114, ll. 11-16). The use of the gate and locks, both in reality and in theory, unreasonably interferes with Appellant's use of his property and his rite of passage to his property. It would also be unreasonable, if at some point in the future, subsequent purchasers (which

could number 40+ landowners) all have to depart their vehicles each day to access their homes or land.¹ It would be extremely unreasonable and a burden of immense proportions if emergency vehicles could not reach a homeowner suffering from a stroke or heart attack, or if the gate locks were found to be improperly locked such that the landowner could not open them to take an injured child to the emergency room.

While landowners may protect their property, they may not do so when it creates an undue burden on other landowners. Landowners may not unreasonably burden other landowners with an interest in the property and the reasonableness of the impediment is to be determined on a case by case basis. *Judy v. Kennedy*, 398 S.C. 471, 728 S.E.2d 484 (2012); *Thomas v. Mitchell*, 287 S.C. 35, 336 S.E.2d 154 (1985). Here, the gate was re-erected or re-established after Appellant purchased his property in an effort to prohibit John Frick from developing his property. It was clear from the evidence that Defendant Fulmer, and his father before him, were not happy that Appellant was able to purchase the property in question and their plan was to limit Appellant's access, use and enjoyment of the property. (Tr. p. 107, l. 15 – p. 108, l. 8; Tr. p. 155, l. 11 – p. 156, l. 2; Tr. p. 168, ll. 1-12). The gate and the locks were part of that plan and are an unreasonable burden that should not be allowed. This Court should reverse the lower court's finding that the Defendants may maintain the gate across the road in question.

¹ The right of use in the road runs appurtenant to the land. There are no prohibitions on Appellant selling lots or parcels, regardless of their intended use, and other avenues exist for providing utilities, etc. If this were accomplished in the future, 40 homeowners would have to get out of their vehicle each morning and evening to unlock a gate to leave or reach their property. This would be an unreasonable burden.

IV. THE LOWER COURT ERRED IN FINDING THAT THE ROADWAY IN QUESTION WAS ONLY FOURTEEN FEET WIDE WHEN THE EVIDENCE CLEARLY SHOWS THE ROADWAY IS TWENTY FEET WIDE OR MORE.

Although Appellant asserts the roadway in question is a public road, if Appellant and any subsequent landowners are only entitled to an easement in the road, the roadway is much wider than determined by the Court. “In an action at law, on appeal of a case tried without a jury, 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.” *Townes Assoc. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976); *Rushing v. McKinney*, 370 S.C. 280, 633 S.E.2d 917 (Ct. App. 2006). In this instance, the trial court ignored the competent evidence, including Defendant Fulmer’s own admissions, and made a clearly erroneous finding.

While the trial court indicates it found the testimony of Van Hoffman, a former employee of Defendant SCE&G, to be the most valuable in determining the width of the road, the court ignored the unchallenged visual evidence and testimony of Defendant Fulmer. The trial court further ignored the additional testimony of Mr. Hoffman himself, whereby he indicated the road had to be a minimum of 12 feet wide in the straightaways for log trucks and that the roadbed was widened in 1970 and again in 1990 by SCE&G. (Tr. p. 102, l. 21 – p. 103, l. 19; p. 104, ll. 1-9; p. 119, ll. 2-23). While the trier of fact is entitled to great deference in his or her findings, the lower court is not at liberty to simply ignore the clear, concise evidence presented.

Appellant testified that the road was 20 to 30 feet wide and Van Hoffman testified that the road was "much improved" in or around 1990. (Tr. p. 30, ll. 11-20; p. 103, ll. 14-19). Most telling is Defendant Joe Fulmer's testimony regarding the road width as follows:

A. On direct examination by his own attorney, Defendant Fulmer testified as follows:

Q: How wide is the road now as it goes through your property?"

A: "...it's nothing under 20 feet wide, except where the gate and stuff is..." (Tr. p. 156, ll. 11-18).

B. Mr. Fulmer further testified that "Log trucks can get through there good" and that it was accurate to say the road was between 14 and 20 feet wide. (Tr. p. 156, ll. 19-21).

C. Mr. Fulmer indicated the 14 foot wide gate does not cover the whole road bed and that the gate is at the most narrow part of the road. (Tr. p. 163, l.18 -164, l. 10).

Photographs offered into evidence show a roadway, not including ditches, that is 20 feet or more wide. (Def. Ex. 11 and 12). Defendant Fulmer further testified that the road was wide enough for two cars to pass and that a fire truck could turn around. (Tr. p. 158, l. 10 – p. 159, l. 5). Evidence was also provided that 20 foot pipes run underneath the roadway, with the drivable surface extending the length of the pipes, and that SCE&G widened portions of the road when performing their logging operations. (Tr. p. 30, ll. 11-20; p. 102, l. 21 – p. 103, l. 19; p. 104, ll. 1-9; p. 119, ll. 2-23).

The Court's finding that the roadway is 14 feet wide is not based upon the evidence presented at trial. One witness indicated that at some point, the roadway was 12 feet wide because that was the minimum needed for log trucks, but further stated that SCE&G had improved and widened the road substantially. This Court should reverse the trial court's finding and substitute a finding that the road in question is, at a minimum, 20 feet wide based upon the evidence presented at trial.

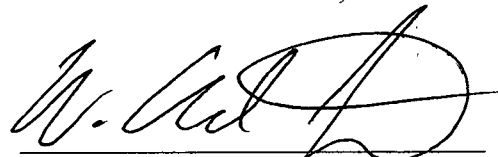
CONCLUSION

For the reasons set forth herein, this Court should reverse the trial court's denial of Respondent's Motion for Reconsideration and/or Motion to Alter and Amend. This Court should further grant the relief sought therein.

Respectfully Submitted

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Respondents.

PROOF OF SERVICE

I certify that I have served Appellant's Initial Brief, Appellant's Designation of Matter For Inclusion in the Record and Appellant's Rule 209(c) Certification on all Respondents by depositing a copy of same in the United States Mail, postage prepaid, on September 5, 2014, addressed to their attorneys of record, or them personally as follows:

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A handwritten signature in black ink, appearing to read 'Katherine Barnett', written over a horizontal line.

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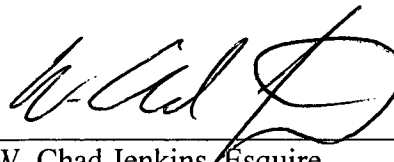
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S.C. Electric & Gas, and Newberry County

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RULE 209(c) CERTIFICATION

In accordance with the SCRAP, Rule 209(c), the undersigned does hereby certify that the material Appellant has designated for inclusion in the record on appeal contains no matter that is irrelevant to the appeal.

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SEP 05 2014

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SC Court of Appeals

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September 5, 2014

Via Hand Delivery

V. Claire Allen, Deputy Clerk
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211-1629

RE: John Frick, Appellant v. Keith Fulmer, et al., Respondents
Case Tracking No. 2014-001472
Civil Action No. 2009-CP-36-415

Dear Ms. Allen:

Enclosed herewith for filing please find Appellant's Initial Brief, Appellant's Designation of Matter For Inclusion in the Record and Appellant's Rule 209(c) Certification, as well as my Proof of Service of same.

Also enclosed is a copy of the these documents which I would appreciate your having clocked-in. Thank you for your assistance in this matter.

With kind regards.

Sincerely,

POPE AND HUDGENS, P.A.



W. Chad Jenkins

WCJ:kb

Enclosures

cc: Will Edwards, Esq. w/enc.
Rudy Barnes, Esq. w/enc.
Jay Tothacer, Jr., Esq. w/enc.
Jay Bressler, Esq. w/enc.
Defendants Bush w/enc.
Defendants Chadwick w/enc.
Defendant Childers w/enc.

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SC Court of Appeals