

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

Jerry M. Angelo, Special Referee

Case No. 2012-CP-17-062

Jammie Anderson-----Respondent,

v.

Jerry W. Page and James Page, individually,
and d/b/a/ James Page Farms-----Defendants,

Of Whom Jerry W. Page is-----Appellant.

INITIAL BRIEF OF RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. Whether any of the issues raised in Appellant's brief are preserved for this court's review.
- II. Whether the trial court erred in awarding lost wages and lost career opportunity damages because Respondent allegedly did not plead those elements of damages in his Complaint.
- III. Whether the trial court based the \$100,000 award to Respondent for lost career opportunity on competent evidence.
- IV. Whether this appellate court should remand the issue of punitive damages to the trial court for review of the punitive damages award by applying the standard set forth in *Mitchell v. Fortis Insurance Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009).
- V. Whether evidence in the record provides additional grounds to affirm the trial court's punitive damages award pursuant to Rule 220(c) of the South Carolina Appellate Court Rules.

STATEMENT OF THE FACTS

This matter arises from a hearing on damages after default was entered on April 11, 2012 against Appellant for failure to answer Respondent's Summons and Complaint. As a result of Appellant's default, the facts alleged in Respondent's Complaint are deemed admitted and incorporated by reference herein. (Summons and Complaint filed December 2, 2011) See *Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC*, 408 S.C. 87, 90, 757 S.E.2d 557 (Ct. App. 2014) ("A defendant in default admits liability but not the damages . . ."). (Citations omitted).

STANDARD OF REVIEW

“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. . . . The judge’s findings are equivalent to a jury’s findings in a law action.” *Townes Associates Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 774 (1976). Referral to a special referee does not change the scope of review. *Bodiford v. Spanish Oak Farms, Inc.*, 317 S.C. 539, 455 S.E.2d 194 (1995). “In an action at law, the appellate court will correct any error of law, but it will affirm the special referee’s factual findings unless there is no evidence that reasonably supports those findings.” *Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997).

“Questions regarding credibility and the weight of evidence are exclusively for the trial judge.” *Danley Williams v. M. Moore*, 400 S.C. 90, 102, 733 S.E.2d 224, 230 (Ct. App. 2012). “An abuse of discretion occurs when: (1) a judge’s ruling had no evidentiary support; or (2) the judge makes an error of law.” *Ransom v. S. C. Water Resources Commission*, 321 S.C. 211, 213, 467, S.E.2d 463, 465 (1996).

ARGUMENT

I. Appellant failed to preserve any of the issues raised in his brief when he made no objections to the issues at trial, nor did he file a post-trial motion to alter or amend the trial court's judgment.

“It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.” *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000).

“The losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.”

I'ON, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 723 (2000).

“Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. *Id.*

“If the losing party has raised an issue in the lower court, but the court fails to rule on it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.” *Id.* A motion to alter or amend must also be filed to raise issues that could not have been raised at trial or if there are errors in the trial court's final order.

Pelican Building Centers of Horry-Georgetown, Inc. v. Dutton, 311 S.C. 56, 427 S.E.2d 673 (1993); *Grant v. South Carolina Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (1995).

Objections to admission of evidence must be made when evidence is presented at trial to preserve error for appellate review. *Parr v. Gaines*, 309 S.C. 477, 424 S.E.2d 515 (1992)(holding that the failure to object to plaintiff's testimony that injuries he sustained

prevented him from managing sophisticated farming operation and the dollar value of that loss was fatal to review of the issue on appeal). A party cannot raise an issue for the first time in a motion to alter or amend judgment when the issue could have been raised before the trial court. *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 388 (1995).

Appellant raised the issue of the trial court's lost wages award for the first time on appeal. Respondent's counsel introduced lost wages as an issue along with his introduction of medical bills without objection from Appellant. (Tr., p. 6, lines 23-25; p. 31, lines 23-25) Respondent's testimony about his earnings prior to the accident and about the amount of time he missed from work due to the injuries he sustained in the accident was admitted without objection from Appellant. (Tr., p. 14, lines 5-18) The testimony and admission of the evidence of lost wages without objection brought the issue within the scope of damages that could be considered by the trial court. *See* Rule 15b, SCRCP. Appellant's challenge of the trial court's lost wages award is not preserved for this court's review.

Likewise, Appellant raised the issue of the trial court's award for lost career opportunity for the first time on appeal. Respondent's testimony about his plans for a future career as a firefighter was admitted without objection from Appellant. (Tr., p. 14, lines 21-24; p. 15, lines 4-25; p. 16, lines 1-9; p. 22, lines 1-25; p. 26, lines 13-25). Appellant's challenge of the trial court's lost career opportunity award is not preserved for this court's review.

Appellant contends the trial court violated his due process rights in awarding punitive damages because the trial court applied the incorrect standard in reaching its

decision. This issue could not have been raised to the trial court at the time of hearing, because the alleged error was not apparent until the judge issued his written order. Appellant should have filed a motion to alter or amend the trial court's judgment pursuant to Rule 59(e), SCRCPC to preserve the issue regarding punitive damages for appeal. No post-trial motion was filed and the punitive damages issue is not preserved for this court's review.

II. The trial court did not err in awarding \$1,360.00 in lost wages and \$100,00.00 for lost career opportunity because:

A. In his Complaint under the DAMAGES heading, Respondent alleged that his earning capacity has been and will be forever impaired; and

B. Evidence in the record shows the issue of wage loss and lost career opportunity was pleaded by implied consent.

A. Respondent contends he did, in fact, identify as elements under the Damages section of his Complaint that his earning capacity *has been* impaired and *will be* forever impaired. (Pl. Complaint, p. 5, ¶21i) The use of *has been* indicates Respondent's earning capacity in the past as lost wages and *will be* means his future earning capacity that arises from his lost career opportunity. In the last paragraph of Respondent's Complaint, he "prays for judgment against the Defendants, jointly and severally, in an amount to be determined by the trier of facts, actual and punitive damages, for his costs of this action and for such other and further relief as this Honorable Court deems just and proper." (Pl. Complaint, p. 5).

B. Even if the Complaint falls short of establishing a prayer for lost wages and lost career opportunity, a position Respondent neither contends nor concedes, the parties

tried both issues by implied consent. Rule 15(b) of South Carolina Rules of Civil Procedure provides that “[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” “If a party does not object to the evidence when presented at trial, the issue is considered tried by consent.” *Upchurch v. Upchurch*, 367 S.C.16, 27, 624 S.E.2d 643, 648 (2006), *disapproved of on other grounds in Miles v. Miles*, 393 S.C. 111, 711 S.E.2d 880 (2011); *McCurry v. Keith*, 325 S.C. 441, 481 S.E.2d 166 (Ct. App. 1997). “If neither party timely objects to evidence raising issues not pleaded, each is deemed impliedly to consent to trial of such issues.” *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004)(quoting *Woods v. Rabon*, 295 S.C. 343, 347, 368 S.E.2d 474, 474 (Ct. App.1998).

Respondent introduced lost wages along with his introduction of medical bills without objection from Appellant. (Tr., p. 6, lines 24-25; p. 31, lines 23-25) Respondent testified about his earnings prior to the accident and about the amount of time he missed from work due to the injuries he sustained in the accident. His testimony was admitted without objection from Appellant. (Tr., p. 14, lines 5-18) Thus, the parties tried the issue of lost wages by consent, and the trial court properly treated the issue as if it had been raised in the pleadings.

Respondent testified he was in training to become a firefighter before the April 12, 2009 accident, but the training was interrupted due injuries he sustained in the accident. (Tr., p. 15, lines 4-25, p. 16, lines 1-9). He developed severe anxiety about driving and traveling after the accident, which prevented him from being able to function

as a first responder. (Tr., p. 22, lines 2-25;) Respondent testified he was unable to conclude his training. (Tr., p. 14, lines 21-24). Prior to the accident he actually went to fires as part of his training and never had anxiety or concerns that would make him question his ability to be firefighter. (Tr., p. 26, lines 13-25). Respondent's entire testimony was admitted without objection from Appellant. Thus, the parties tried the issue of lost career opportunity by implied consent, and the trial court properly addressed these issues.

III. The record on appeal contains evidence which reasonably supports the trial court's award of \$100,000 for lost career opportunity.

Appellant contends no competent evidence exists to support the trial court's award of damages for lost career opportunity. Respondent testified at length that before the accident he planned to continue training to become a firefighter so he could move to a larger city and work in the fire department. The physical and mental problems he had after the accident prevented him from completing his training, and now he is unable to function as a first responder. (Tr., p. 15, lines 2-23; p. 22, lines 18-25). Respondent acknowledged that the anxiety issue has been his biggest problem since the accident, and that has affected his ability to move into the career for which he was training. (Tr., p. 30, lines 3-12).

Appellant did not object to Respondent's testimony regarding lost career opportunity. Testimony received without objection becomes competent and cannot be disregarded; its sufficiency must be left to the trier of fact. *Cantrell v. Carruth*, 250 S.C.415, 421 158 S.E.2d 208, 211 (1967); *see also Calcutt v. Calcutt*, 282 S.C. 565,

320 S.E.2d 55 (Ct. App. 1984). A trial judge's role in a bench trial is to admit all evidence and then evaluate it in a non-jury setting. *Brown v. Allstate Insurance Co.*, 344 S.C. 21, 542 S.E.2d 723 (2001). It is the duty of the trier of fact to weigh the evidence and judge the credibility of the witnesses. *Haltiwanger v. Barr*, 258 S.C. 27, 186 S.E.2d 819 (1972).

Lost career opportunity falls into the general category of future damages. Black's Law Dictionary defines future damages as "money awarded to an injured party for an injury's residual or projected effects that reduce the person's ability to function" – for example, lost earning capacity." "Future damages in personal injury cases need not be proved to a mathematical certainty. Oftentimes a verdict involving future damages must be approximated. A wide latitude is allowed the jury." *Haltiwanger*, 258 S.C. at 32, 186 S.E.2d at 821.

At the time of the accident in April of 2009 Respondent was working a forty (40) hour week in a feed store, earning \$8.50 per hour, or approximately \$17,680 per year. (Tr., p. 14, lines 11-14). The trial court found that Respondent's severe anxiety attacks caused by the accident prohibit him from becoming a full-time firefighter. There is competent testimony in the record to support that finding. The trial court also found Respondent's life expectancy is 32.26 years, indicating he approximated future damages for lost career opportunity over Respondent's life expectancy. *See Ray v. United States*, 277 F. Supp. 952 (D.S.C. 1968). The \$100,000.00 award represents only \$3099.81 per year in additional compensation for Respondent's loss of potential earnings as a fire fighter.

If there is some evidence which, if believed, supports the findings of the trial judge, then the appellate court is not at liberty to decide the case on its own view of the preponderance of the evidence. The findings of the trial court, being supported by the evidence, should be affirmed. *Townes*, 266 S.C. at 86, 221 S.E.2d at 774; *see also Daniels v. Bernard*, 270 S.C. 51, 56, 240 S.E.2d 518, 520 (1978) (holding trial court erred in ruling there was no evidence to support future damages award because the plaintiff's testimony alone was evidence of future pain and suffering); *Campbell v. Paschal*, 290 S.C. 1, 15, 347 S.E.2d 892, 901 (Ct. App. 1986)(holding evidence that the plaintiff suffered recurring pain and tenderness in his leg and that he was likely to suffer circulation problems in the future was sufficient to sustain an award involving future damages).

IV. Regardless of the standard used by the trial court in considering Appellant's due process rights, this court is mandated to conduct a *de novo* review of the trial court's punitive damages award.

In considering an award of punitive damages, the trial court examined the evidence in light of the *Gamble* factors: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) "other factors" deemed appropriate. *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991). Although the *Gamble* factors are still relevant, our appellate courts now look to three guideposts set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996)

to determine the constitutionality of a punitive damages award: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. *Atkinson v. Orkin Exterminating Co. Inc.*, 361 S.C. 156, 604 S.E.2d 385 (2004). Our appellate courts are now mandated to conduct a de novo review of punitive damages awards using the *Gore* guideposts. *Mitchell v. Fortis Insurance Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009). The trial court's use of the *Gamble* factors to determine whether punitive damages should be awarded, does not prevent this appellate court from conducting its *de novo* review of the evidence in the record to determine whether the trial court's punitive damages award violates Appellant's due process rights. Respondent maintains this *de novo* review should result in this court affirming trial court's punitive damages award.

Degree of Reprehensibility

“The most important indicum of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.” *State Farm Mutual Automobile Insurance Co. v Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (2003) (quoting *Gore*, 517 U.S. at 575, 116 S.Ct. At 1589). In determining the degree of reprehensibility the court should consider whether (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was

the result of intentional malice, trickery, or deceit, rather than mere accident. *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185. The *Mitchell* Court noted that this analysis encompasses four factors of the *Gamble* review—the defendant’s degree of culpability, the duration of the conduct, the defendant’s awareness or concealment, and the existence of similar past conduct.

Here, Respondent’s harm was primarily physical and emotional harm, which lead to economic losses as well. (Pl. Ex. 1, Medical Specials Sheet/Bills, DHEC Patient Care Form, Marion County Medical Center, Caresouth Carolina). Appellant repeated similar conduct in twenty-six (26) incidents over the course of two years. (Pl. Ex. 1, Dillon County Sheriff’s Incident Reports). Just a few months prior to Respondent’s accident, another victim was seriously injured when his vehicle hit one of Appellant’s cows that had roamed onto the highway at night. (Tr., p. 7, lines 8-14; p. 8, lines 1-7). Appellant’s causative violation of section 47-7-110 of the South Carolina Code, 1976, as amended, is evidence of reckless, willful, and wanton disregard for the health and safety of others warranting consideration of punitive damages. *Fairchild v. South Carolina Dept. of Transp.*, 727 S.E.2d 407, 398 S.C. 90, 97 (2012); (Complaint, p. 4, ¶19-b). Photographs of Respondent’s damaged vehicle illustrate the force and severity of the impact with the cow and resulting impact with trees, providing further evidence of Appellant’s indifference and reckless disregard for the health and safety of others. (Pl. Ex. 1, Photographs of Respondent’s van). The harm caused by Appellant’s obvious awareness that his livestock frequently escaped, and his deliberate indifference to his duty to keep his livestock contained on his property was not the result of a mere accident.

Disparity Between Actual or Potential Harm and Punitive Damages Award

The appropriateness of the ratio of punitive damages to actual damages can be evaluated in terms of “the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant’s ability to pay.” *Hollis v. Stonington Development, LLC*, 394 S.C. 383, 714 S.E.2d 904 (Ct. App. 2011) (quoting *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185).

In *Campbell*, the court indicated that “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” 538 U.S. at 424, 123 S.Ct. at 1513. The court suggested that “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” *Id.* at 425, 123 S.Ct. at 1524. In this instance, the punitive damages award of \$100,000 is a fraction (.591) of the \$169,060.00 in total actual damages. On its face, the punitive damages award appears to be within the suggested constitutional limits. Given the extent of the vehicle damage and the safety issues involved, there was a potential for Respondent to sustain even greater physical harm than he actually incurred.

It is not clear whether Appellant was held financially accountable for his numerous instances of similar past conduct. If Appellant paid any damages previously, the penalties imposed were apparently not effective in deterring his reckless, willful, and wanton behavior. In this instance the punitive damages award imposed is substantial enough to serve as a deterrent, while at the same taking into account

Appellant's status as farmer. The record contains some evidence of his ability to pay. Photographs of Appellant's property depict large pastures where a significant number of cows appear to be grazing. (Pl. Ex. 1, Photographs of Jerry Page's Property). In addition, Appellant received USDA subsidies from 1995 through 2010 totaling \$276,736.00. (Pl. Ex. 2).

Comparative Penalty Awards

Respondent is not aware of any cases with similar facts for comparison of punitive damages awards. However, section 47-7-110 of the South Carolina Code imposes a fine of not more than twenty-five dollars (\$25.00) per offense for the owner or manager of any domestic animal who wilfully or negligently permits an animal to run at large beyond the limits of his own land or the lands, leased, occupied or controlled by him. The statute also imposes an alternative penalty of imprisonment for not more than twenty-five days.

The record contains 26 documented offenses of Appellant's livestock running at large. If the statutory fines were assessed, Appellant would be charged approximately \$650.00. This amount does not bear a reasonable relationship to the actual or potential harm imposed by Appellant's willful, reckless and wanton indifference to the health and safety of others. Nor would it likely be effective in deterring his continued unlawful conduct. The comparable civil penalties that could be imposed in this instance are inadequate to serve "the state's legitimate interests in punishing unlawful conduct and deterring its repetition." *Mitchell*, 385 S.C. at 584, 686 S.E.2d at 183 (quoting *Gore*, 517 U.S. at 568, 116 S.Ct. at 1589).

V. Additional evidence in the record other than that the trial court

considered supports the punitive damages award.

Rule 220(c) of the South Carolina Appellate Court Rules authorizes an appellate court to affirm any judgment on any grounds appearing in the record on appeal.

Respondent maintains the record contains additional evidence that provides grounds to affirm the trial court's ruling on punitive damages. Specifically, additional evidence indicates the ratio of the punitive damages award to actual damages comports with due process. Photographs of Respondent's vehicle are suggestive of actual and potential harm, confirming Appellant's indifference to and reckless disregard for the health and safety of others. (P. Ex 1, Photographs of Respondent's van). The causative violation of section 47-7-110 is additional evidence of Appellant's reckless, willful, and wanton conduct. (Complaint, p. 4, ¶ 19b). And finally, photographs of Appellant's property provide some indication of his ability to pay. (Pl. Ex 1, Photographs of Jerry Page's Property).

CONCLUSION

The issues raised in Appellant's brief are not preserved for this court's review. The appeal should be dismissed on error preservation grounds. If the court considers the merits of Appellant's argument, it should affirm the trial court's judgment on damages in its entirety.

Respondent pleaded lost wages and future earnings loss in his Complaint, and the issues were raised at trial without objection from Appellant. Even if the Complaint's language falls short of adequate pleading, under applicable law, the parties impliedly consented to trying the issues, and the trial court properly treated the issues as if they had been raised in the Complaint.

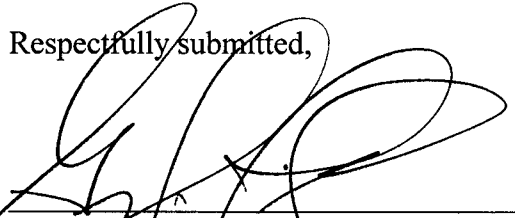
Appellant did not object to Respondent's testimony about his plans for a future

career as a firefighter and his inability to follow through with those plans due to the consequences of this accident. Under applicable law, the testimony was competent and provided evidence to support the trial court's ruling on future damages.

This court should conduct its own *de novo* review of the trial court's ruling on punitive damages rather than remanding the matter to the trial court. Respondent maintains *de novo* review will demonstrate the punitive damages award comports with due process and serves the state's legitimate interests in punishing unlawful conduct and in deterring repeated behavior.

In addition, this court should affirm the trial court's ruling on punitive damages pursuant to Rule 220(c) of the South Carolina Appellate Court Rules based on any evidence appearing in the record.

Respectfully submitted,



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September 24, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

Jerry M. Angelo, Special Referee

Case No. 2010-CP-17-062
Appellate Case No. 2014-001580

Jammie Anderson.....Respondent

v.

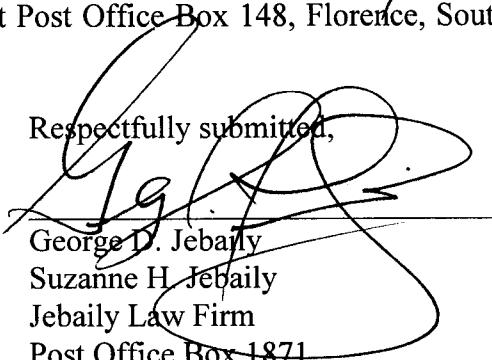
Jerry W. Page and James Page, individually, and d/b/a
James Page Farms.....Defendants,

Of whom Jerry W. Page is the Appellant.

PROOF OF SERVICE

I hereby certify that I have served the Initial Brief and Designation of Matter on Jerry Page by depositing a copy of same in the United States Mail, postage prepaid, on September 24, 2014, addressed to his attorney of record, Michael C. Abbott at Post Office Box 148, Florence, South Carolina 29503.

Respectfully submitted,



George D. Jebaily
Suzanne H. Jebaily
Jebaily Law Firm
Post Office Box 1871
Florence, South Carolina 29506
843-667-0400

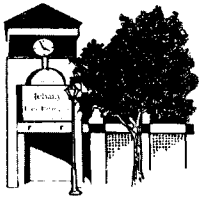
Attorneys for Respondent

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SEP 25 2014

SC Court of Appeals

September 24, 2014



Jebaily Law Firm, P.A.

Ronald J. Jebaily
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Cely Anne B. Brigman
Rangeley C. Bailey
Suzanne H. Jebaily
Brian S. Yost

September 24, 2014

Hon. Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Jammie Anderson vs. Jerry W. Page, individually, and d/b/a James Page Farms
Appellate Case No. 2014-001580
Case No. 2010-CP-17-062
Matter No.: 09-4292-GDJ/mhp

Dear Ms. Kitchings:

Enclosed please find Respondent's Initial Brief and Designation of Matter to be included in the Record on Appeal for use by the Court. Also enclosed is the Proof of Service reflecting service by mail of the aforementioned documents on counsel for the Appellant.

Please file the original Proof of Service and return a filed copy to our office in the self-addressed, stamped envelope provided.

Thank you for your cooperation and assistance in this matter. Should you have any questions, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,

JEBAILY LAW FIRM, P.A.


George D. Jebaily

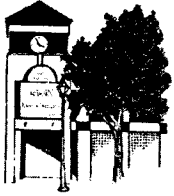
GDJ/mhp
Enclosures

cc: Jammie Anderson
Michael C. Abbott, Esquire, Attorney for Appellant

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Hon. Jenny Abbott Kitchings
South Carolina Court of Appeals
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Columbia, SC 29211

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08-3970-GDJ

