THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SALUDA COUNTY
Court of Common Pleas

RECEIVED
OCT 23 2014
SC Court of Appeals

The Honorable Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2014-001588

Carl Eugene Berry, ... Respondent,

v.

Jess T. Reichardt and Thomas H. Reichardt, ... Appellants.

APPELLANTS' REPLY TO INITIAL BRIEF OF RESPONDENT

Philip H. Woolhiser
SC Bar No.: 12466
112 Trafalgar Street, SW
Aiken, South Carolina 29801
Phone: 803-648-9994
Attorney for Appellants

Other Counsel of Record:
Austin & Rogers, P.A.
Attn: Richard L. Whitt, Esquire
Attn: Jefferson D. Griffith, III
PO Box 11716,
Columbia, South Carolina 29211

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1. **THE STATEMENT OF FACTS ON PAGE 2 OF THE RESPONDENT'S STATEMENT OF FACTS DOES NOT COMPLY WITH SCAC RULE 208 (B)(2), WHICH REQUIRES CONFORMANCE WITH RULE 208 (b)(1)(C).**

The Respondent's Statement of the Facts equates to the "Statement of the Case" of Rule 208. Rule 208 includes the requirement that the statement is not to contain contested matters.

In the first three paragraphs of Page 2 of the Respondent's Brief, the Respondent states the Appellants trespassed, cut timber, erected a fence, and received notice of the boundary line. The Appellants' argument of Issue 1 lists numerous deficiencies in the Respondent's evidence of trespass, timber cutting, fence erection and boundary line location. The first three paragraphs of Respondent's Statement of Facts certainly contains contested matters, as further discussed in the below Issue relating to Respondent's Brief pg. 5.

2. **THE FIRST PARAGRAPH ON PAGE 3 OF THE RESPONDENT'S STATEMENT OF FACTS IS NOT SUPPORTED BY CASE EVIDENCE AND CONTAINS CONTESTED MATTER.**

The said paragraph refers to a Consent Order filed August 5, 2013. The contents of the Consent Order do not support statements by the Respondent, and Appellants' denial of the contested matter follows:

A) Judge Russo did not indicate that he was issuing a "Rule to Vacate or Show Cause". The Respondent applied for the Rule, and the Court held a status conference. (Consent Order pg. 1).

B) The August 5, 2013 Consent Order does not refer to "Respondent's Property". Instead, the terminology of the Court throughout the Consent

Order is "Property claimed by the Plaintiff". In Finding #4 of the Consent Order, the Court distinguishes between "Property claimed by the Plaintiff" and "Property owned by the Plaintiff". (Consent Order Pg. 1).

C) The Appellants were not ordered to "remove the fence". The only factual applicable statement of the Consent Order is that the Appellants agreed to remove the fence. There were a number of issues discussed at the July 2, 2013 Hearing and the Court did not order fence removal. (Consent Order pg. 1).

3. THE DESCRIPTION OF ATTORNEY RAUTON'S AFFIDAVIT ON PAGE 4 OF THE RESPONDENT'S STATEMENT OF FACTS CONTAINS CONTESTED MATTER.

A reading of the Respondent's description gives the impression that the Court ruled the Appellants were on proper Record Notice of the location of the disputed boundary between the land of the Appellants and the Respondent. If the Respondent wishes to include a reference to Attorney Rauton's Affidavit in the Statement of the Facts, the following facts, concerning the Affidavit, were also required:

A) Attorney Rauton did not conduct a title search on Appellant Jess T. Reichardt's property. Neither a plat nor a deed of the said Appellant's property is in evidence (Affidavit of Kathryn Rauton, pg. 1).

B) Attorney Rauton's Affidavit is directed to a Motion for Summary Judgment which is not in evidence. (Affidavit of Attorney Kathryn Rauton, pg. 1).

C) Attorney Rauton's Affidavit contains Exhibits "B" through "E"; these four Exhibits only relate to land owned by the Respondent. (Affidavit of Attorney Kathryn Rauton, pgs. 3-6).

D) During her testimony, Attorney Rauton admitted she would not be able to physically locate the disputed boundary (Tr. p. 15 LL. 7-19)

E) During her testimony, Attorney Rauton admitted the disputed boundary is a creek that may have moved since the 1934 plat was drafted (Tr. p. 15 L. 19 - p. 16 L. 4).

4. RESPONDENT'S ARGUMENT DIRECTED TO ALL APPELLANT ISSUES IS NOT VALID.

The Respondent states that Appellants can not argue matters which are deemed admitted by Appellants' default (Respondent's Reply Brief, pg. 5). Respondent bases this position upon a wrongly, limited interpretation of the Court in *Austin v. Specialty Transp. Services, Inc.*, 358 S.C. 298, 594 SE2d 867 (S.C. Ct. of App. 2004) as follows: "It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and to have conceded liability." *Roche v. Young Bros. Inc.*, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998)."

The *Roche* Court cites, *Howard v. Holiday Inns, Inc.*, 246 S.E.2d 880, 271 S.C. 238 (S.C. 1978) which states: "Since the account sued upon was an unliquidated demand and an itemized statement thereof duly verified was not (271 S.C. 241) served upon the defendant, plaintiff was required to introduce testimony in proof of the account in order to obtain a valid default judgment. Such was not done and the judgment was improperly entered on the pleadings alone. The order awarding damages is hereby vacated".

Thus, even though the Appellants are deemed to have admitted the truth of the Respondent's allegations, there must be some evidence presented by the Respondent

that supports the allegations. On page 246 S.E.2d 882, the *Howard v. Holiday Inn*, Court decided the following approach was proper and approved for use in South Carolina Courts in cases wherein a defaulting defendant seeks the right to participate in proceedings relative to the question of assessing damages: "(3) allow damages to be ascertained with defense counsel's participation limited to cross-examination and objection to plaintiffs evidence."

Thus, the Respondent's attempt to prevent Appellants' argument concerning the validity of evidence being presented by the Respondent is not valid.

Finally, the Respondent's broad statement that numerous statements of the Appellants are *ipse dixit* statements, should be restricted to specific examples in the Appellants' Initial Brief – of which no such examples are provided.

5. THE RESPONDENT WRONGLY ARGUES THAT THE TRIAL COURT DID NOT ERR IN HOLDING THAT THE APPELLANTS INTENTIONALLY TRESPASSED AT THE TIME THE TREES WERE CUT, BECAUSE APPELLANTS WERE IN DEFAULT.

The Respondent's entire argument against the Appellants' position of an unintentional trespass is based upon deemed admissions by the Appellants (Reply Brief pages 5-7). The Initial Brief of the Appellants describes the importance of the Plaintiff in a Trespass Case being able to prove the entry of the Defendant was "knowing and willful".

The Appellants, in pages 4 and 5 of their Initial Brief, prove the absence of evidence that the Appellants were knowledgeable as to the actual boundary location between their land and land owned by the Respondent. Attorney Rauton's testimony does not rise to the status of actual evidence of an established boundary that can be known to a non-surveyor in the field. (Tr. p. 14 LL. 4-7).

The Appellants' Initial Brief on page 5 points out the error of the Order of Judgment in stating that the Appellants cut timber, after receiving notice of the boundary lines via a meeting with the Respondent. The Respondent has not been able to place documents into evidence to show actual notice, so the presumed meeting could not have presented actual boundary notice. However, the main difficulty of the lower Court's finding is that the meeting occurred prior to the cutting of trees. The Respondent testified otherwise (Tr. p. 20 LL. 16-19).

6. THE RESPONDENT WRONGLY ARGUES THAT THE TRIAL JUDGE DID NOT ERR IN GIVING EVIDENTIAL MERIT TO RESPONDENT'S CLAIM OF "RECORD NOTICE" BECAUSE OF THE EVIDENCE PROVIDED BY RESPONDENT AND RESPONDENT'S WITNESS' TESTIMONY.

Although the Respondent believes that there is confusion between "Actual Notice" and "Record Notice" on the part of the Appellants, the actual situation is that whereas the Respondent's witness, Attorney Rauton, attempted, unsuccessfully, to prove "Record Notice", it is "Actual Notice" that would provide the criteria for deciding if either Appellant actually knew the true, actual location of the disputed boundary at the time trees were cut.

The Respondent's use of *Gowdy v. Gibson*, 391 S.C. 374, 385, 706 S.E.2d 495, 501 (2011) on page 8 of Respondent's Reply Brief is not proper. Whether or not the lower court arrived at a finding of Record Notice, even if Record Notice did exist, that is not evidence that either Appellant was aware of the actual boundary.

The Respondent's reference to *Gowdy v. Gibson*, does not revise any arguments of the Appellants. The case is a drug case with no or little relation to the current trespass case. The "Standard of Review" set out in *Gowdy v. Gibson* is "The Circuit Judge's findings of fact will only be disturbed on appeal if the findings are

wholly unsupported by the evidence", this adds nothing new to this case. The Appellants' arguments provide numerous examples of unsupported findings.

7. THE RESPONDENT DID NOT PROVIDE SUFFICIENT EVIDENCE TO SUPPORT HIS ACTUAL DAMAGE CLAIM FOR THE APPELLANTS' TREE CUTTING BY HIS TESTIMONY IN COURT AND HIS EXHIBITS.

The Respondent, on Page 8 of his Reply, provides three extracts from the Respondent's testimony to provide documentary evidence of damages. However, the testimony does not apply to the damage caused by the tree cutting for the following reasons:

A) (Tr.p.20 LL.7-19) Here the Respondent states the tree cutting caused him to expend large sums of money for legal fees, which is not an allowed claim. Also, the tree cutting was said to cause soil erosion; no evidence of erosion was presented and there was no evidence of the cost, even if erosion did occur.

B) (Tr. p. 23 L.13 - p. 24 L.1) Here the Respondent suggests some of the cut trees were nut bearing, there was no evidence of the cost of the loss of the nuts. The Respondent claims an unspecified loss caused by an effect on a club that pays no dues. No evidence was presented as to the actual resultant cost of the tree cutting. The referenced testimony passage mentioned fencing delaying planting, which has no proven connection to tree cutting.

C) (Tr. p. 27 LL. 17-15) Here the Respondent claims a cost of $1,200.00 to replace 12 white oak trees. An Exhibit F was supposed to support this expenditure, but does not seem to be in the evidence. Under cross examination, the Respondent stated that 12 trees are purchased, but

not in place. No written evidence of the tree purchase was given. However, of greater importance, there is no evidence that the purchase of $100.00 trees is standard practice. (Tr.p.44 LL.1-22) The South Carolina Forestry report mentioned in the above transcript passage gives a value of $250.30 for the cut trees. (Report of Thomas E. Mills, Investigator (S.C. Forestry Commission) dated May 11, 2012) No special recognition is given to nut bearing trees and the Forester Report is presented as the entire cost of all cut trees.

Based upon the Respondent's testimony, which is refuted by the Appellants in 7.(A), (B), and (C) above, the Respondent cannot conclude that SC Code 16-11-615 does apply.

On page 9 of the Respondent's Reply, the Respondent lists 5 allegations from the Respondent's First Amended Complaint that are deemed to be admitted due to the default. The Appellants demonstrated, in the first full paragraph of page 4 above, that the Respondent must present some evidence to support the deemed admissions. The lack of sufficient evidence of the 5 admissions is shown as follows:

A) Concerning the statements that the 2 Appellants "knowingly and willfully cut forest products on Respondent's Property", the Respondent has not been able to prove the aspect of a knowing and willful cutting. The Respondent is unable to prove the location of the Respondent's Property is known; the 1934 plat does not come close to accurately describing the actual boundary between the property owned by the

Appellants and the Respondent's Property in the vicinity of the cut timber (Tr. p. 14 LL. 4-7).

(B) Concerning the statement that the Appellants did "intentionally come onto and trespass upon the Property of the Respondent", this deemed admission is not supported by the evidence. The Respondent is unable to prove that either Appellant knew the location of the disputed boundary, therefore, there is no evidence of intent. Pages 4 and 5 of the Appellant's Initial Brief prove that intent is an essential aspect of a trespass action. Neither of the Appellants possessed the necessary knowledge of the exact location of the disputed boundary. Therefore, an intentional trespass is not proven by the evidence of this Case.

C) Concerning the 2 statements that the 2 Appellants' actions damaged Respondent and he is "entitled to recover damages of three times the market value of the forest products", these deemed admissions must be supported by evidence. The evidence the Respondent attempts to present is contained in pages 10 and 11 of the Respondent's Reply. The Appellants' rejection of the Respondent's said attempt to evidence entitlement to three times market value is set forth next.

In the first full paragraph on page 10 of the Respondent's Reply Brief, the Respondent states that SC Code 16-11-615 does apply. The only arguments that have been presented "above" to evidence application of SC Code 16-11-615 are insufficient. The majority of Respondent's evidence of application is deemed admissions, the Appellants have shown that deemed admissions cannot stand without the support of some actual evidence. Pages 6 and 7 of the Appellants' Reply above

shows that the Respondent's testimony does not relate to SC Code 16-11-615. The final component of "above" proof of application, is the Respondent's mention of the *Austin v. Specialty Transp. Services, Inc.* 358 S.C. 298, 594 S.E.2d 867 (S.C. Ct. of App. 2004) Case at the bottom of page 8 of the Respondent's Reply Brief. The *Austin* Case centers on a transportation accident, with no mention of timber cutting.

Therefore the Respondent is left with his disagreement with the Appellants' reliance on *Wimberly v. Barr*, 597 S.E.2d 853, 359 S.C. 414 (S.C. App. 2004) on pages "7", "9", and "10" of the Appellants' Initial Brief.

The Respondent, in the second paragraph of page 10 of his Reply Brief, considers the Appellants' argument, relying upon *Wimberly v. Barr* to be inapposite. The Respondent is not reading *Wimberly v. Barr* correctly, and the Appellants' reliance on *Wimberly v. Barr* is right on point. The facts of *Wimberly v. Barr* include $4,163.63 in the fair market value of lumber and $35,299.00 in other costs. The Court agreed the damage claim was $49,000.00 and was not capped at 3 times $4,163.63. The Plaintiff, Wimberly, specifically decided not to proceed under SC Code 16-11-615, and he did not multiply $4,163.63 by "3" to arrive at his total actual damages.

Unlike the Case of *Wimberly v. Barr*, in the current Case, the Respondent has decided to use SC Code 16-11-615. When listing his damages, the Respondent replied; "The value, the triple value of the timber cut is $750.90" (Tr. p. 26 LL 9-10).

In the last paragraph of page 10 of the Respondent's Reply Brief, the Respondent states that *Wimberly v. Barr* does not support the position of the Appellants, i.e., "if the tree owner elects to use the triple value code, the total damages are capped." The Respondent has ignored the following statement of the

Court in *Wimberly v. Barr*: "Further, Wimberly specifically waived his action under the timber statute before the trial began and proceeded only on a claim for trespass. As in Stroud, the timber statute was not charged to the jury. Because we find the Legislature did not express an intent to make the timber statute the exclusive remedy to recover all types of damages associated with the loss of timber, we also find that we cannot bind a party to restrictions found therein if the case did not proceed under the statute."

The Appellants argue that the above statement is equivalent to the Court saying they could bind a party to the restrictions of the timber code, if the case did proceed under that statute. The Appellants disagree with the Respondent's statement in the second paragraph of page 11 of the Respondent's Reply, (that is, the statement that "*Wimberly v. Barr*, is on point and fully supports the Respondent's position, in this matter."). The Appellant states that yes, *Wimberly v. Barr* is on point; however, the Case fully supports the Appellants, not the Respondent.

8) THE TRIAL JUDGE DID ERR BY AWARDING ACTUAL DAMAGES OF $4,193.90 TO THE RESPONDENT, BASED ON THE EVIDENCE AND TESTIMONY BEFORE HER.

In the final partial paragraph of page 11 of the Respondent's Reply Brief, the Respondent refers to the cross-examination conducted by the Appellants' Counsel as set out in 15 pages of the Hearing Transcript. The attempt by the Appellants' Counsel to examine the Respondent's damage was severely limited by the lower Court's instruction that if a fact appears in the Respondent's Complaint it is admitted (Tr.p.34 LL. 21-23). As set forth in page 12 of the Appellants' Initial Brief, *Limehouse v. Hulsey*, 744 S.E.2d 566, 404 S.C. 93 (S.C. 2013) is clear that, at a

damage hearing a defaulting party has the right to cross-examine, so as to determine the sufficiency of the evidence supporting each damage claim.

The final partial paragraph, referenced above, states the Respondent's damages include a tripled value of cut timber. As set forth in Issue #7 above, if the Respondent triples the timber value, then the Respondent is not allowed to add all the additional claimed damages.

Page 12 of the Appellants' Initial Brief, in the paragraph labeled "I) $750.90 – Trebled value of timber cut" points out an additional problem with the Respondent's use of the Forester's estimate of a $250.30 market value, that is, the cut trees were not removed. The cut trees are still in place and available for either party to sell.

A reading of the costs accepted by the lower Court Judge shows the list of claims contained numerous instances where the Respondent only listed a payment he made, but never proved that his payment was a result of an action of an Appellant. The errors committed by accepting all claims presented by the Respondent are set forth in the Appellants' Initial Brief, pages 12 and 13.

In the first full paragraph on page 12 of the Respondent's Reply Brief, the Respondent feels that a "fair reading of the Trial Judge's Order" shows careful consideration of the issues related to Actual Damages. This careful consideration is not obvious, a more likely outcome of a reading is that the Judge simply accepted every claim presented by the Respondent without modification or question. The Respondent uses a sentence from page 32 of *Kuznik v. Bees Ferry Assoc.*, 538 S.E. 2d 15, 32 (S.C. Ct. of App. 2000), to prove the Trial Judge has considerable discretion when awarding Actual Damages. The same Court on page 20 stated, "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. "*Kuznik v. Bees Ferry Assoc.* is a Case of partnership law, with little similarity to the current Case. However, the need for supporting evidence has not been satisfied by the Respondent. The presentation of evidence, as described by page 12 of the Respondent's Reply Brief is essentially a list of expenses that were paid by the Respondent with no evidence that the listed expenses were actually related to actions of either Appellant.

The Respondent utilizes an allowance for the Appellant to make a closing argument as proof of "great latitude" and "appropriate participation" allowed the Appellants' legal counsel (first paragraph of page 13 of the Respondent's Reply Brief). Reading through the Order for Judgment, filed June 19, 2014, there is not a single indication that the points reiterated by the Appellants' Legal Counsel (Tr. p. 51 L. 12 p. 52 L.18) found their way into the Order for Judgment.

9. THE TRIAL JUDGE DID ERR IN HER CALCULATION OF PUNITIVE DAMAGES, BASED ON THE EVIDENCE AND TESTIMONY BEFORE HER.

On page 13 of the Respondent's Reply Brief, the Respondent's testimony contained in the Transcript, (Tr. p.13 – p. 29), is primarily a history of the Respondent's history and his presumption of the Appellants' action. Facts that are supported by actual evidence are absent.

In the last paragraph of page 13 of the Respondent's Reply Brief, the Respondent again states he is proceeding under SC Code 16-11-615, yet he improperly adds extra costs to the statutory trebled timber market value. As presented by the Appellants above, there was no evidence to support a statutory violation. The continued argument of statutory violation in the first paragraph of page 14 of the Respondent's Reply Brief is not correct, because the Respondent was

unable to present evidence of an unlawful trespass associated with the cutting of timber.

In the second paragraph of page 14 of the Respondent's Reply Brief, the Respondent again argues the Appellants should not be allowed to present evidence due to their default status. This point has been shown to be incorrect by the Appellants' arguments above.

Pages 14-19 of the Appellants' Initial Brief provide extensive legal argument for the presentation, by the Respondent, of evidence set forth in *Austin v. Specialty*, directed toward 10 specific factors.

The Respondent, in the 3 last full paragraphs of his Reply Brief told how the Respondent considered the Appellants' action to be reprehensible, however, the factors such as physical harm, disregard for health or safety, financial vulnerability repeated action and intentional malice were not in evidence. For example, there is no evidence of a fire hazard, nor excessive runoff. The stress and mental anguish reported in "Factor (ii)" on page 16 of the Respondent's Reply Brief has no medical authority support – only statements by the Respondent.

There is a reference to an opinion of a surveyor dated September 17, 2013 as being actual notice related to actions of the Appellants months before September 2013. The statement of Mark Mills is discussed on page 16 of the Respondent's Reply Brief under "Factor (iii)". The Mark Mills' letter is perhaps evidence of the continuing search by the Appellant, Jess T. Reichardt, for evidence of the true boundary location; however, the letter has no relation to earlier events.

The examples of repeated actions given by the Respondent in page 16 of his Initial Brief under "Factor (iv)" are not correct. The timber cutting, fence

construction and gate installation only occurred once. There was no evidence of sign installation. Repeated trespasses that were intentional and unlawful were not supported by the evidence.

The actions of the Appellants that the Respondent labels as "intentional, malicious, and deceitful" under "Factor (v)" on page 17 of the Respondent's Initial Brief, are labeled incorrectly. Neither Appellant knew the exact location of the disputed boundary. The Respondent presented no evidence to prove that either Appellant acted with intent, malice or deceit.

In his discussion of the amount of Punitive Damages on page 17 of his Initial Brief, the Respondent cites *Jenkins v. Few*, 705 S.E.2d 457 (S.C. Ct. of App. 2010). This Case involved the obvious sabotage of a truck by pouring sugar into the gasoline tank of the truck. The Court required a de novo review of the Punitive damage award and used a 3.6 to 1 ratio of punitive to actual damage. In the present Case, the Court awarded $20,969.00 in punitive damages based upon actual damages of $4,193.90, a ratio of 5. Considering that there was no evidence of similar post conduct, no proof of any likelihood of future like conduct, no proof of the harm that actually resulted from the action of either Appellant, and no consideration by the Court of the Appellants' ability to pay, the ratio of 5 is excessive.

The Respondent cites the case, *Collins Entertainment v. Coats*, 3596 (S.C. Ct. of App.) as an example of a punitive to actual ratio of 9.9 to 1. The case is a slot machine case, very different from the current case. The Court in *Collins Entertainment v. Coats*, stated: "The second factor is the ratio of punitive damages to actual damages. ABG contends a ratio of 10 to 1 is excessive. We disagree. In his order, the master stated the award was 'in part based upon [his] firm conviction that

American Bingo and others must not be allowed to profit from misconduct of the type established in this case.'" The current case does not involve the possibility that others will profit from actions similar to those of the Appellants. The Appellants did not profit from the tree cutting, nor the fence construction.

The Appellants devoted pages 14-19 of their Initial Brief to demonstration of the Courts' errors in calculating punitive damages. The Respondent did not directly refute any punitive related statements of the Appellants. Instead, the Respondent chose to present his own support of the punitive damage calculation – a presentation the Appellants have shown to be incorrect.

10. THE RESPONDENTS CONCLUSION IS INCORRECT.

The conclusion on page 18 of the Respondent's Initial Brief is primarily an emphasis on use of deemed admissions and neglect of the requirement for supporting evidence. The Appellants' Initial Brief provides numerous examples of the absence of needed support in the Respondent's Case. The Respondent's position that "Appellants' admissions are not subject to further argument" is shown to be erroneous by the Appellant's Initial Brief. The Respondent provided no examples of an Appellant argument that could be classified as "*ipse dixit*". The Trial Court's calculation of both actual and punitive damages is flawed and this Case should be remanded for a proper Hearing of Damages.

Philip H. Woolhiser
SC Bar No.: 12466
112 Trafalgar St. SW
Aiken, South Carolina 29801
(803) 648-9994 (O)
(803) 753-9018 (F)
Attorney for Appellants

October 20, 2014
Aiken, South Carolina

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PROOF OF SERVICE

I certify that I have served the Reply Brief of Appellants, the Appellants' Designation of Matter to be Included in the Record on Appeal and this Proof of Service on Carl Eugene Berry by depositing applicable copies in the United States Mail, postage prepaid, on October 20, 2014, addressed to his attorney of record: Austin & Rogers, P.A., Attn: Richard L. Whitt, Esquire, PO Box 11716, Columbia, South Carolina 29211.

Philip H. Woolhiser
SC Bar #12466
112 Trafalgar St., SW
Aiken, South Carolina 29801
(803) 648-9994
Attorney for Appellants

Aiken, South Carolina
October 20, 2014

Philip H. Woolhiser, Attorney at Law

112 Trafalgar St. SW
Aiken, SC 29801-3744

Phone: (803) 648-9994
FAX: (803) 753-9018

Email: woolhiser@bellsouth.net

October 20, 2014

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211-1629

Subject: Carl Eugene Berry, Jr., vs. Jess T. Reichardt and Thomas H. Reichardt
Case No.: 2014-001588

Dear Ms. Kitchings,

A copy of the Appellants' Reply To Initial Brief of Respondent, Appellants' Designation of Matter and the original Proof of Service are enclosed, in compliance with Rule 208 (a)(1).

An extra copy of the Reply's Caption is enclosed. Please stamp the extra copy "received" and return the stamped copy in the SASE.

Sincerely yours,

Philip H. Woolhiser
Attorney for Appellants

PW/mw
Enclosures

cc: Austin & Rogers, P.A.
Attn: Richard L. Whitt, Esquire