THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Op. No. 2014-UP-306 (S.C. Ct. App. filed July 30, 2014)

Yadkin Valley Bank & Trust, ... Respondent,

v.

Oaktree Homes, Inc., Dawne M. Ras and Thomas C. Ras, Daniel Simpson, Above All Services, Inc., Carter Lumber Company, Efficient Painting Contractors, Inc., Creative Concepts, and Solid As A Rock, Inc., ... Defendants,

Of whom

Oaktree Homes, Inc., is the ..... Petitioner.

PETITION FOR A WRIT OF CERTIORARI

Chad A. McGowan # 9943
William A. McKinnon # 69463
McGOWAN HOOD & FELDER
1539 Health Care Drive
Rock Hill, SC 29732
(803) 327-7800

Attorneys for Petitioner

Blake A. Hewitt # 73674
John S. Nichols # 4210
BLUESTEIN NICHOLS THOMPSON & DELGADO
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599

Attorneys for Petitioner

Other Counsel of Record:

Susan Elizabeth Driscoll
James W. Sheedy
DRISCOLL SHEEDY PA
(704) 341-2103

Attorneys for Respondent

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CERTIFICATE OF COUNSEL

The Court of Appeals issued its decision on July 30, 2014. See (App.p.1). The petitioner filed for rehearing on Monday, August 11, see (App.pp.4-11), and the Court of Appeals summarily denied rehearing in an order issued on September 18. See (App.p.25).

QUESTIONS PRESENTED

This case involves section 37-10-107 of the South Carolina Code, which is sometimes called the Lender Statute of Frauds. This statute provides that in order to maintain a lawsuit based on someone's promise to lend money, the complaining party must have received a writing that includes the material terms of the loan agreement.

Here, the complaining party claims to have received a sufficient writing and to have then given custody of that writing to the lender, who destroyed it. The circuit court held that a party cannot satisfy the statute through the use of oral testimony, but the Court of Appeals reasoned the case differently and held that *if* oral testimony *is* admissible, the petitioner failed to prove its claim with clear and convincing evidence. The three questions presented are:

I. Did the Court of Appeals err when it based its decision on a "sufficiency of the evidence" argument that was not presented below and that exceeds the scope of the summary judgment record?

II. Did the Court of Appeals err when it refused to acknowledge the argument that the respondent destroyed information during discovery and that the decision to deny sanctions for this destruction was based on circular analysis which amounts to an error of law?

III. Did the Court of Appeals err in failing to hold that the circuit court's reasoning was plainly wrong and that in accordance with Rule 1008 of the South Carolina Rules of Evidence, a dispute about whether a writing exists raises a question of fact for the fact-finder?

STATEMENT OF THE CASE

This case began in April of 2009 as an action to foreclose on four mortgages. American Community Bank was the original plaintiff. Yadkin Valley Bank & Trust purchased this bank and was substituted as the plaintiff in February of 2010.

The principal defendants are Oaktree Homes, which was a residential homebuilding company, and Dawne and Tom Ras, who were Oaktree's principals. Oaktree was the borrower on the loans in question. The other named defendants were included in the suit because they had judgments or liens against some of the properties.

The abbreviated version of this dispute is that Oaktree did not contest the foreclosures, but it brought several counterclaims alleging that the bank had committed to participate in *another* loan — a rather large development loan — only to impermissibly back out of that loan moments before the closing. Oaktree said that this led to the loss of roughly $2.5 million in profit and that it ultimately caused the failure of Oaktree's business.

The principal issue that the parties litigated to the circuit court involved the Lender Statute of Frauds.

The bank sought summary judgment on multiple grounds, one of which was that the Lender Statute of Frauds required Oaktree to physically produce a written loan commitment and that under the best evidence rule, any oral testimony about the writing's existence was inadmissible. See, e.g. (R.pp.119-121) (from the bank's summary judgment memo).

Oaktree opposed summary judgment with two main contentions.

First, Oaktree offered testimony from its principals; specifically, testimony that these individuals had executed a signed loan commitment with a vice president of the bank and

that although this representative had taken custody of the document after the parties executed it, the parties understood that the loan commitment was firm and binding. Oaktree argued that this satisfied the Lender Statute of Frauds because it was evidence that a signed contract had existed. See, e.g. (R.pp.154-55) (from Oaktree's memo) and (R.pp.257-58) (from the hearing transcript). The bank denied that any of this ever happened.

Second, Oaktree argued that the bank had not honored its obligation to preserve discoverable information during litigation. This argument involved the bank's alleged destruction of the written loan agreement, and it also involved the alleged destruction of electronic information and computer hardware that occurred after this lawsuit began. Oaktree proposed that this alleged misconduct counseled in favor of denying summary judgment. See, e.g. (R.p.154-58). Here again, the bank denied that anything inappropriate happened.

The circuit court heard all of the pending motions in May of 2011. At that point, the case involved the bank's claims for foreclosure plus six (6) counterclaims from Oaktree.

Oaktree did not oppose summary judgment on the foreclosures, see (R.p.173, lines 3-17), and Oaktree also did not oppose summary judgment on three of its six counterclaims. (R.p.3) (the order) and (R.p.262, lines 18-24) (from the hearing transcript). This meant that the only contested issues were Oaktree's request for sanctions, the bank's request for summary judgment on Oaktree's three remaining counterclaims, and the bank's request for an order denying Oaktree a jury trial on those three counterclaims.

The circuit court granted all of the bank's motions and it denied Oaktree's request for sanctions. This order was filed July 20, 2011. (R.pp.1-22).

The circuit court's order is unusual because it addresses several issues that were unnecessary in light of the way that the court construed the Lender Statute of Frauds.

For example, the order begins by addressing the issue of whether Oaktree waived its right to a jury trial on the counterclaims. (R.pp.5-8). Then, immediately after the order concludes that the trial would be to a judge and not the jury, the order proceeds to grant summary judgment against Oaktree and end the case, making any discussion about the mode of trial irrelevant. (R.pp.8-22).

The principal basis of the circuit court's summary judgment decision was that the Lender Statute of Frauds required Oaktree to physically produce a written agreement that satisfied the statute. (R.pp.12-14). Although the practical effect of this holding required the court to enter summary judgment in the bank's favor, the order nevertheless continued and additionally reasoned that summary judgment was appropriate because a later loan was intended to release the original loan, because the original loan was not a final and binding agreement, and because the bank did not owe Oaktree any duty of care. (R.pp.15-19).

The final section of the circuit court's order denied Oaktree's request for sanctions by reasoning that the court would not sanction the bank because Oaktree could not prove that the written loan commitment had ever existed. (R.p.20). The order also summarily stated that there was no evidence of the bank's willful disobedience. *Id.*

Oaktree served a timely appeal to the Court of Appeals. The appeal involved multiple issues because the circuit court's order covered so many alternative grounds.

Oaktree's general theory on appeal was that the central premise of the circuit court's ruling was incorrect: if the parties dispute whether a written agreement exists, oral evidence

is admissible and the question of who is telling the truth is a question of fact. Oaktree also argued that the circuit court's alternative grounds for summary judgment involved factual disputes and that the circuit court's analysis on sanctions was circular. Finally, Oaktree argued that the circuit court erred in denying its request for a jury trial.

The bank argued that the circuit court's decision was correct and error-free.

The Court of Appeals conducted oral argument in September of 2013. Ten months later, the court filed a memorandum opinion that affirmed the circuit court's decision.

The opinion is not lengthy. See (App.pp.1-3). It recites that other jurisdictions which allow a party to offer secondary evidence of a lost contract require that evidence to be clear and convincing. Then, the opinion holds that even if the court was to follow this approach, Oaktree has failed to provide evidence that meets this standard. (App.p.2). Next, the opinion states that the evidence Oaktree submitted was self-serving and contradictory. (App.p.3). The opinion concludes by reasoning that these holdings are dispositive. *Id.*

Oaktree filed a petition for rehearing that presented four issues. The first issue was that the bank had not raised the sufficiency of the evidence as a grounds for summary judgment. The second issue was that this case was not a "lost contract" case and that the authorities the court cited in its opinion actually counseled *against* the decision to affirm. The third issue was that the opinion was factually incorrect because the record contained more evidence of this writing than the testimony of the Oaktree's principals. The fourth and final issue was the fact that the opinion did not address the issue of sanctions. (App.pp.4-11).

The Court of Appeals summarily denied the petition for rehearing. (App.p.25). This petition follows.

ARGUMENTS

As the Court is aware, the decision to grant certiorari is a decision that the law entrusts to the Court's discretion. Oaktree respectfully submits that this case is an appropriate vehicle for certiorari because it involves two (2) novel issues.

The first novel issue is whether the Lender Statute of Frauds compels a party to physically produce a written agreement that satisfies the statute's requirements. As of the writing of this petition, the Lender Statute of Frauds has been discussed in only two of this State's published appellate court decisions — *Kerr v. Branch Banking and Trust Co.* and *Sea Cove Development v. Harbourside Community Bank.*. Neither of these decisions involved this question. *Kerr*, 408 S.C. 328, 759 S.E.2d 724 (2014); *Sea Cove Dev.*, 387 S.C. 95, 691 S.E.2d 158 (2010).

The second novel issue is whether a factual dispute exists if one person says that the parties signed a contract, but the opposing party says that it never happened. Although Rule 1008 of the South Carolina Rules of Evidence speaks directly to this point, there do not appear to be any cases examining the relevant part of the rule.

This petition examines both of these questions through the lens of the issues that Oaktree presented to the Court of Appeals in the petition for rehearing.

I. The Court of Appeals erred when it based its decision on a "sufficiency of the evidence" argument that was not presented below and that exceeds the scope of the summary judgment record.

The issue presented to the circuit court was whether a party may satisfy the Lender Statute of Frauds by offering oral testimony that a written contract exists. The Bank chose

to argue that the statute required Oaktree to physically produce a writing, and the Bank was successful in persuading the circuit court to agree. The circuit court's reasoning on this point was not equivocal. It derisively referred to the alleged agreement as "the phantom letter" and it held that there was no authority which would allow a party in Oaktree's circumstances to offer oral testimony that a writing existed. See (R.pp.12-13).

The Court of Appeals decided a different issue. It reasoned that *if* oral testimony *is* admissible, summary judgment was nevertheless appropriate because Oaktree did not present clear and convincing evidence of the writing's existence. (App.p.2). This reasoning is obviously different from the reasoning that the circuit court employed. This begs the question whether the difference in reasoning was fair or foul.

This shift was foul. Summary judgment is generally a dispute about the *existence* evidence, not its sufficiency. There was no discussion of a heightened standard below, and although there *is* one reference to this standard in one of the bank's summary judgment motions, see (R.p.112), the motion gives no authority for the reference. The standard of proof was not raised in any of the bank's memoranda, see (R.pp.115-128; pp.132-142), in the hearing transcript, (R.pp.169-271), or in the circuit court's order. (R.pp.1-22). The argument that the parties presented to the circuit court centered on the type of evidence that was admissible. The bank did not put the sufficiency of the evidence in play.

This distinction is important because if the sufficiency of the evidence had been the thrust of the bank's argument, the proceedings below would have gone differently. Oaktree would have built the record differently, and the parties would probably have argued about whether the clear and convincing evidence standard was even the standard that applied —

the "lost contract" rule is a feature of common law, but this case is controlled by the rules of evidence. None of this was fleshed out in the record or in the briefing, but the Court of Appeals chose to resolve the case on this issue anyway. There would be less of a problem if the point was a clear point of law, but the point is *not* clear and it is tied to the case's *facts*.

As this Court is aware, an appellate court has the power to affirm a decision based on any grounds that appear in the record. But this Court has instructed that an appellate court is "less likely" to rely on an alternative sustaining ground when the respondent failed to raise that ground to the lower court, see *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000), and even this principle has imperfect application because these alternative grounds do *not* appear in this record. The Court of Appeals raised the standard of proof on its own. Then, the court applied its view to a record built on different topics.

This approach was both erroneous and unfair. Rather than raise a new issue that is both fact-driven and novel, the Court of Appeals should have confined its analysis to deciding and explaining whether the circuit court's decision was correct.

II. The Court of Appeals erred when it refused to acknowledge the argument that the bank destroyed information during discovery.

Oaktree presented a two-part argument to the Court of Appeals on sanctions. The first was that the circuit court's reason for denying sanctions was both circular and erroneous.

a) It was inappropriate for the circuit court to tie the request for sanctions to Oaktree's ability to prove that a written contract had existed.

Precedent dictates that in deciding whether and what sanctions to impose, the circuit court should weigh the nature of the violation, the discovery posture of the case, willfulness,

and the degree of prejudice. *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 217 (Ct. App. 1997) (describing the test for discovery sanctions in the context of a party's failure to disclose evidence). The circuit court did not engage in this analysis. Instead, the circuit court reasoned that it would not sanction the bank because Oaktree could not prove that the written loan commitment had actually existed. (R.p.20).

This approach initially seems reasonable because in order to reach the question of sanctions, the party seeking sanctions must show that there has been some sort of a violation. Though the circuit court's analysis is not stated in these terms, it effectively reasons that it will not sanction the bank because Oaktree cannot demonstrate that the bank broke any rules.

But this view cannot bear the weight of meaningful scrutiny. The existence of a written loan agreement was the central issue of Oaktree's case. By hitching the request for sanctions to Oaktree's ability to prove that the contract existed, the circuit court was requiring Oaktree to prove its lawsuit on the merits. If Oaktree could prove that the contract existed, there would be no need to *seek* sanctions. The circuit court's reasoning collapses on itself.

b) By not going through the appropriate analysis, the circuit court's decision is controlled by an error of law.

The second part of Oaktree's argument on sanctions was tied to the alleged destruction of electronic information. This argument has to be qualified with the word "alleged" because the parties continue to dispute whether anything was indeed destroyed.

The factual background for this argument should be uncontested. Yadkin closed on the purchase of American Community Bank the day after the complaint in this lawsuit was

filed with the clerk of court. (R.pp.101-102). This was in April of 2009. Sometime after these events — a bank employee said it was the "middle" of 2009 — the bank replaced "a large number" of American Community Bank's computers and had the hard drives for the replaced computers physically destroyed. (Supp.R.p.2, line 3 - p.3, line 2).

The bank's information technology officer testified in a deposition that he was not notified of a "litigation hold" until the end of 2010. (R.p.312, lines 14-15). This was over a year after this suit began, and it was also several months after the parties went to court on Oaktree's motion to compel and received an order that (among other things) required the production of electronically stored information. See (R.p.27).

There is more to the factual background on this topic.

This same bank officer explained in a deposition that there were only eight employees whose e-mails were retained when the two banks merged. (Supp.R.p.5, lines 3-15). Derek Franklin, the bank vice president whose conduct is in question, was not one of those employees. (R.p.317). While the bank has the ability to retrieve e-mails between Mr. Franklin and any of the eight retained accounts, the bank *does not* have the ability to retrieve any of Mr. Franklin's e-mails that do not involve one of those accounts, such as e-mails with Oaktree's principals. The deposition testimony is that these sorts of e-mails are irretrievably gone. (Supp.R.p.6, line 24 - p.7, line 6). Again, this merger occurred after this suit began.

Oaktree raised these issues in a motion for sanctions that was filed in March of 2011. (R.p.105). Two months later — on the eve of the May 2011 hearing on the motion for sanctions *and* the motions for summary judgment — the bank produced a copy of Mr. Franklin's electronic calendar and argued that producing this calendar meant that no

information had been destroyed. See (R.p.109, ¶4) (from the bank's memo); see also (R.p.388) (the calendar).

This argument and this evidence raised a number of issues. First, the suggestion that nothing had been destroyed seems plainly contrary to the bank technology officer's testimony. See (Supp.R.p.6, line 24 - p.7, line 6). Second, the printout of Ms. Franklin's calendar seems to indicate that it was printed in March of 2011, but the bank did not produce it until just before the hearing two months later. See (R.p.388). Third, this hearing in May occurred several months after a scheduling order called for discovery in the case to end. The bank spoke of discovery being an obligation that it would continue to fulfill, but in very same hearing, the bank asked the circuit court to grant summary judgment on all of Oaktree's claims and end the case. (R.p.214, line 20 - p.215, line 5; p.218, lines 1-25).

The circuit court committed the same error that the circuit court committed in *Samples* — it did not go through the proper analysis. See 329 S.C. at 114, 495 S.E.2d at 218. The court never described that the bank was obligated to retain information as soon as litigation was reasonably foreseeable and the court paid no attention to the fact that two days before the summary judgment hearing, the bank produced information that had never been previously produced. The court might ultimately have decided *not* to sanction the bank, but the court was required to ask the right questions and go through the right examination.

c) The issues of discovery abuse and sanctions were not secondary issues that the Court of Appeals could avoid.

The Court of Appeals could not affirm the circuit court without addressing these issues. Precedent explains that one of the purposes of discovery is to promote out-of-court

settlements by having the parties "lay their cards on the table." *Moran v. Jones*, 281 S.C. 270, 275, 315 S.E.2d 136, 139 (Ct. App. 1984); *Martin v. Dunlap*, 266 S.C. 230, 239, 222 S.E.2d 8, 13 (1976). Because some cases do not settle, a closely-related purpose of discovery is that it allows parties to prepare for trial. See *Samples*, 329 S.C. at 113-14, 495 S.E.2d at 217 (recognizing this purpose). The rules are designed to create a climate of fair play. The product of this climate is that whenever the case comes to a head, the parties will have enjoyed a full and meaningful opportunity to prepare the merits of their claims and defenses.

If this purpose was not honored, summary judgment has to have been inappropriate. *Nobody* likes pressing an issue that deals with sanctions, but the record in this case seems clear, and the Court of Appeals never acknowledged the argument that the circuit court's analysis was incorrect and that summary judgment was either improper or premature.

III. The Court of Appeals erred in failing to hold that the circuit court's reasoning was plainly wrong and that a dispute about whether a writing exists raises a question of fact for the fact-finder.

The central feature of the circuit court's order is that the Lender Statute of Frauds required Oaktree to physically produce a written agreement that satisfied the statute. (R.pp.12-14). The Court of Appeals should have held that this reasoning was incorrect.

a) The language of Rule 1008 has plain application. The Lender of Statute of Frauds does not provide differently.

Rule 1008 of the South Carolina Rules of Evidence instructs that when an issue is raised about whether a writing existed, "the issue is for the trier of fact to determine as in the case of other issues of fact." There are no South Carolina cases interpreting this part of the

rule, but the language seems relatively clear. Not only is "other evidence" (meaning oral evidence) admissible, the rule specifically provides that the issue is for the fact-finder.

This is different than a dispute about a writing's *contents*. The current form of the "best evidence rule" is Rule 1002, and this rule provides that the original writing is required to prove the writing's contents. A different rule covers exceptions where a party can offer other evidence of a writing's contents. See Rule 1004, SCRE. This rule covers the situations where a writing has been lost or destroyed, where the original is not obtainable, and where the original was last in the possession of the opposing party.

Rule 1008 covers a different subject. It seems to provide — quite plainly — that if the parties are disputing whether a writing ever existed, the issue is for the fact-finder. This means that if one person says that the parties signed a contract, but the opposing party says that it never happened, that credibility dispute is a question of fact.

Nothing in the Lender Statute of Frauds suggests that Rule 1008 would not apply to disputes under that statute. The statute speaks of a writing that a party has "received." See § 37-10-107(1)(C). It does not specify that this writing must be "retained" or "produced at trial." This is not a trivial distinction. This statute restricts a plaintiff's common law right to bring a lawsuit, and because it changes common law rights, it is to be read narrowly. See, e.g., *Crosby v. Glasscock Trucking Co.*, 340 S.C. 626, 628, 532 S.E.2d 856, 857 (2000) (describing why the wrongful death statute is to be construed narrowly).

It may also be instructive to note that a broader interpretation of the statute would provide a safe harbor for fraud. Suppose that Oaktree's version of events is true. Suppose a bank representative gave someone an executed commitment letter and said that the deal

was done. Then suppose that the bank representative took custody of that commitment letter under some false pretense and destroyed it. This conduct would obviously be dishonest, but under the interpretation of the statute that the bank and the circuit court believe to be true, the defrauded party will always lose because there is no writing to put in evidence.

There is no textual support for that interpretation of the statute, and there is no reason to take a statute that was designed to prevent fraud and allow an unscrupulous party to use the statute as an instrument to *effect* fraud. Cf. *Aust v. Beard*, 230 S.C. 515, 522-23, 96 S.E.2d 558, 562 (1957) (giving this rationale while describing exceptions to the traditional statute of frauds). The circuit court's analysis was wrong. When the parties dispute a written contract's existence, oral evidence *is* admissible.

b) The cases that the Court of Appeals cited actually support Oaktree's argument and counsel *against* the decision to affirm.

The Court of Appeals did not reference Rule 1008. Instead, it referenced four (4) decisions from other jurisdictions as well as *American Jurisprudence*, a secondary authority.

Two of the cases cited in the Court's decision — *Weinsier v. Soffer* and *Zander v. Ogihara Corp.* — involved cases that had developed a full record through a trial. *Zander*, 540 N.W.2d 702, 703 (Mich. Ct. App. 1995) (noting that the appeal followed a jury trial); *Weinsier*, 358 So. 2d 61 (Fla. Dist. Ct. App. 1978) (noting that the appeal followed a bench trial). The present case was resolved on summary judgment. These cases are not comparable and do not support the conclusion that summary judgment was appropriate.

The third case cited by the Court of Appeals, *Mossman v. Hawaiian Trust Co.*, 361 P.2d 374 (Haw. 1961), actually affirmed an order that *denied* a motion for summary

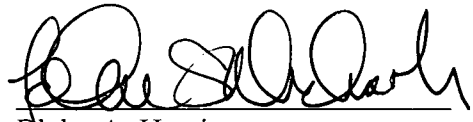
judgment based on the statue of frauds. Like Rule 1008, *Mossman* acknowledges that when the parties disagree on the existence of a writing, that disagreement creates a dispute of fact. 361 P.2d at 380.

The final foreign case that the Court of Appeals cited is *Chakur v. Zena*. See 233 S.W.2d 200 (Tex. Civ. App. 1950). *Chakur* reversed an order for following the same faulty reasoning that the circuit court followed here. Again, oral testimony *is* admissible. Though there is no South Carolina case that is on point, the circuit court's holding was plainly wrong.

CONCLUSION

This Court should grant certiorari and reverse the Court of Appeals. Though the decision below is unpublished, it *does* involve issues on which there seems to be no controlling precedent from an appellate court in this State. The proper result would include a remand with instructions that the Court of Appeals review the alternative grounds for circuit court's decision.

Respectfully submitted,



October 27, 2014

Blake A. Hewitt
John S. Nichols
BLUESTEIN NICHOLS
THOMPSON & DELGADO
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
jsnichols@bntdlaw.com

Attorneys for Petitioner

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Of whom

Oaktree Homes, Inc., is the ..... Petitioner.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Petition for Writ of Certiorari and Appendix* by mailing a copy of the same via United States Mail with first class postage prepaid to the following address:

James W. Sheedy, Esquire
Susan E. Driscoll, Esquire
DRISCOLL SHEEDY, P.A.
11520 North Community House Rd., Suite 200
Charlotte, North Carolina 28277

Erin Bridges

October 27, 2014
Columbia, South Carolina

Erin Bridges
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO, LLC

BNTD
BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
ATTORNEYS AT LAW

October 27, 2014

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VIA HAND DELIVERY
Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Yadkin Valley Bank & Trust v. Oaktree Homes, Inc.
Case Tracking No.: 2014-002182

Dear Mr. Shearouse:

Please find enclosed for filing the original and seven (7) copies of the Petition for a Writ of Certiorari in this case, together with three (3) copies of the Appendix. I have also enclosed a Proof of Service of the Petition on counsel for the Respondent and a check in the amount of $100.00 for filing the Petition. I have filed a copy of the Petition and Proof of Service with the South Carolina Court of Appeals. Please return the additional copies to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges

Erin Bridges
Paralegal to Blake A. Hewitt
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC

/emb
Enclosures
cc: William A. McKinnon, Esquire
Chad McGowan, Esquire

James Sheedy, Esquire
Susan E. Driscoll, Esquire
The Honorable Jenny A. Kitchings