

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2014-CP-10-1827
Appellate Case No. 2014-002079

Coastal Federal Credit Union. Appellant

v.

Angel Latoria Brown Respondent

INITIAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- 1. DID THE TRIAL COURT ERR, AS A MATTER OF LAW, IN DETERMINING THAT THE SOUTH CAROLINA CONSUMER PROTECTION CODE AND/OR THE FAIR DEBT COLLECTIONS PRACTICES ACT APPLY TO THIS CASE?**

- 2. DID THE TRIAL COURT ERR, AS A MATTER OF LAW, IN DETERMINING THAT THE APPLICABLE STATUTE OF LIMITATIONS IN THIS CASE WAS ONLY THREE YEARS AND GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BASED ON SAME?**

- 3. DID THE TRIAL COURT ERR, AS A MATTER OF LAW, IN DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT ON THE MERITS ?**

STATEMENT OF THE CASE

Appellant filed this action on October 21, 2013 in the Court of Common Pleas for Chesterfield County seeking judgment against Respondent for the balance of the sales price owed by Respondent under a retail installment sales contract for a 2008 Suzuki Forenza. Respondent answered, alleging among other things, that Appellant's action against Respondent was barred by the three (3) year statute of limitations contained in S.C. Code Ann. § 15-3-530 (2013) inasmuch as Respondent's last payment toward such vehicle's sales price was in July 2009. Respondent's Answer also requested a change of Venue to Charleston County, S.C. On or about January 7, 2014, a Consent Order To Change Venue was filed and the case was transferred to the Court of Common Pleas of Charleston County. Appellant and Respondent each thereafter filed a Motion For Summary Judgment, both of which were heard before the Hon. R. Markley Dennis, Jr. on August 1, 2014. Judge Dennis denied Appellant's Motion For Summary Judgment and granted Respondent's Motion For Summary Judgment pursuant to an Order filed September 16, 2014. On September 26, 2014, Appellant served its Notice of Appeal on Respondent's counsel of record.

FACTS

On or about May 4, 2008, Respondent entered into a retail installment sales contract (the "Sales Contract") with a South Carolina retail car dealership (the "Dealership") for the sale to Respondent of a certain 2008 Suzuki Forenza, VIN #KL5JD56Z38K748968 (the "Vehicle"). (Complaint p. 1, Ex. A.) Pursuant to the terms of the Sales Contract, Respondent agreed to a total sales price for the Vehicle of \$28,375.04, to be paid by Respondent with interest at the rate of 12.4% per annum via 72 monthly payments of \$366.32 each beginning June 18, 2008. (Complaint pp. 1-2, Ex A.) The Dealership immediately thereafter sold and assigned the Sales Contract to Appellant, and Appellant remains the sole owner and holder of the Sales Contract. (Complaint p. 1; CFCU Aff. pp. 1-2 and Ex. A to both.)

In July 2009, Respondent defaulted in making the monthly payments for the agreed-upon sale price of the Vehicle. (Complaint p. 2; CFCU Aff. p.2 and Ex. D.) As a result, Appellant peaceably repossessed the Vehicle and mailed Respondent, at her last known address, a notice of its intent to sell the Vehicle unless payment in full of then outstanding balance due for the Vehicle was tendered. (Complaint p. 2, CFCU Aff. p. 2 and Ex. E.) Respondent did not exercise her right to pay the outstanding balance due and obtain clean title to the Vehicle. (Complaint p. 2, CFCU Aff. p. 2.) The Vehicle was sold by Appellant as permitted by the Sales Contract and applicable law, following which the net sales proceeds were applied to balance still owed by Respondent on the sales price for the Vehicle. (Complaint p. 2, CFCU Aff. p. 2-3 and Ex.F, G, H.)

Following the sale of the Vehicle, Appellant mailed Respondent, at the same last known address, a post-sale accounting. (Complaint p.2, Ex B, CFCU Aff p. 3, Ex I.) The post-sale accounting detailed the application of the sale proceeds for the Vehicle and demanded payment for the then-remaining balance due on the sales price of the Vehicle. (Complaint p. 2; CFCU Aff. p.3 and Ex. I.) Respondent thereafter failed and/or refused to pay, and Respondent's account was referred to the undersigned counsel. (Complaint p. 2, CFCU Aff p.3.) The undersigned counsel also made demand upon Respondent to pay the then-remaining balance due on the sales price for the Vehicle, but Respondent continued to fail and/or refuse to pay the same. (Complaint p. 2 and Ex. D.) Accordingly, a civil action was filed on behalf of Appellant in the Court of Common Pleas for Chesterfield County on October 21, 2013, alleging a breach by Respondent of her obligation under the Sales Contract to fully pay the agreed sales price for the Vehicle, on the terms set forth therein. (Complaint p. 1-2.)

Respondent filed an Answer to that Complaint defensively alleging that she didn't recall receiving the pre-sale letter after Appellant's repossession of the Vehicle, and that she did not agree that Appellant had conducted the sale of the Vehicle in accordance with applicable law. (Answer pp 1-2.) Respondent also asserted that Appellant's action against her was barred by the three-year statute of limitations in South Carolina for filing suit to collect on a breach of contract claim. (Answer p. 2.) After the case was transferred by consent to Charleston County (Consent Order To Change Venue p. 1), Appellant filed a Motion For Summary Judgment asking that judgment be entered in Appellant's favor for the

relief requested in the Complaint. (CFCU MSJ.) The Affidavit of Sarah Senter, a Legal Specialist with Appellant, was filed in support of Appellant's Motion For Summary Judgment. (CFCU Aff.) Ms. Senter, as a qualified records custodian for Appellant, identified and authenticated various attached business records of Appellant from its files relative to Respondent's purchase and financing of the Vehicle, her default in making the agreed-upon payments toward the sales price of the Vehicle, and the remaining balance due to Appellant with respect to same. (CFCU Aff.) Respondent filed her own Motion For Summary Judgment (Brown MSJ), supported by the Affidavit of Respondent simply stating that she did not receive a copy of Appellant's pre-sale letter and claiming that the Vehicle was not sold "in a reasonable manner." (Brown Aff.)

The parties then each submitted a memorandum of law to the Trial Court on the issue of the applicable statute of limitations, agreeing that there was no dispute as to any material fact in the case and that the case was therefore appropriate for resolution by the Court as a matter of law. (CFCU Memo; Brown Memo.) However, Appellant challenged Respondent's assertion that the applicable statute of limitations in this case is the 3-year statute of limitations contained in S.C. Code Ann. §. 15-3-530 (2013) that applies to actions for breach of contract in general. (CFCU Memo.) Appellant asserted that the appropriate statute of limitations in the case is in fact the 6-year statute of limitations contained in S.C. Code Ann. § 36-2-725 (2013) specifically applicable to actions for breach of sales contracts. (CFCU Memo.)

A hearing was held on the parties' respective Motions For Summary

Judgment before the Hon. R. Markley Dennis, Jr. on August 1, 2014. Without hearing arguments of counsel, Judge Dennis summarily ruled that he would grant Respondent's Motion For Summary Judgment and deny Appellant's Motion For Summary Judgment. His written order to that effect was then filed in the case and served on the parties on September 16, 2014. (SJ Order.) Said order is the final order disposing of the case at the trial level which is on appeal herein. (SJ Order.)

On September 26, 2014, Appellant filed and served its Notice of Appeal of the September 16, 2014 Order (NOA.)

ARGUMENTS

I. THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN DETERMINING THAT THE SOUTH CAROLINA CONSUMER PROTECTION CODE AND/OR THE FAIR DEBT COLLECTIONS PRACTICES ACT APPLY TO THIS CASE.

Appellant is a federally chartered credit union, which was affirmatively pleaded in the Complaint and admitted by Respondent in her Answer. As such, it is exempt from all of the provisions of the South Carolina Consumer Protection Code in their entirety. See S.C. Code Ann. § 37-1-202(10) (2013). Further, the Fair Debt Collections Practices Act, 15 U.S.C.S. § 1692 ("FDCPA"), in its entirety, similarly does not apply to Appellant. Pursuant to § 1692a(6) of the FDCPA, there is an express exception from the definition of "debt collector" for any entity attempting to collect monies owed directly to it, as opposed to an entity attempting to collect monies on behalf of another entity. See 15 U.S.C.S. § 1692a(6). Accordingly, the Trial Court's finding that "[t]he South Carolina Consumer Protection Code and the Fair Debt Collection Practices Act apply to this case" is erroneous as a matter of law, and to the extent it was relied on by the

Trial Court in either granting Respondent's motion for summary judgment or denying Appellant's motion for summary judgment, must be reversed by this Court.

II. THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN DETERMINING THAT THE APPLICABLE STATUTE OF LIMITATIONS IN THIS CASE WAS ONLY THREE YEARS AND GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BASED ON SAME.

A. Standard of Review. On appeal, the Court reviews the granting of summary judgment "under the same standard as applied by the trial court under Rule 56(c)." Sea Cove Development, LLC v. Harbourside Community Bank, 387 S.C. 95, 691 S.E.2d 158 (2010). Accordingly, "[t]he judgment may be affirmed only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Singletary v. Aetna Casualty & Surety Co., 316 S.C. 199, 200, 447 S.E.2d 869, 870 (Ct. App. 1994); Rule 56(c), SCRPC. Further, in reviewing a grant of summary judgment, the reviewing court, like the trial court, must consider the facts and inferences in the light most favorable to the non-moving party. However, to defeat a motion for summary judgment, a party may not rest upon the mere allegations or denials of his pleading but must set forth specific facts showing that there is a genuine issue for trial. Rule 56(e) SCRPC.

B. The Subject Contract Is A Chapter 2 Sales Contract. Pursuant to S.C. Code Ann. § 36-2-101 *et seq.* (2013) (herein the "S.C. UCC"), the provisions of Chapter 2 – Sales, apply to all "transactions in goods" between a buyer and seller. For these purposes, "buyer" is defined as a person who buys or contracts to buy goods and "seller" is defined as a person who sells or contracts to sell goods.

See S.C. Code Ann. § 36-2-103 (2013). “Goods” is then defined as all things which are moveable at the time of identification to the contract for sale. See S.C. Code Ann. § 36-2-105(l) (2013). “Financing agency” is then defined as a bank, finance company or other person who in the ordinary course of its business makes advances against goods or documents of title. See S.C. Code Ann. § 36-2-104(2) (2013).

In the instant case, it is undisputed that Respondent (buyer) contracted with the Dealership (seller) to buy the Vehicle (goods) and Appellant (financing agency) provided the financing to Respondent in that buy-sell transaction. It is also undisputed that the Sales Contract in this case memorializes the buy-sell transaction. As such, the Sales Contract falls squarely within the express provisions of Chapter 2 of the S.C. UCC as a contract for a “transaction in goods” to which Chapter 2 is specifically directed.

C. This Action Is Solely A Suit For Breach Of That Chapter 2 Sales Contract. Although Respondent’s brief in support of her motion for summary judgment asserts that the S.C. UCC sets out protections intended only for buyers and sellers of “commercial” goods, both the South Carolina Court of Appeals and the South Carolina Supreme Court have previously had no issue with including motor vehicles as the type of goods covered by Chapter 2 of the S.C. UCC. *See e.g., Brewer v. Stokes Kia, Isuzu, Subaru, Inc.*, 364 S.C. 444, 613 S.E.2d 802 (S.C. App. 2005) and *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 595 S.E.2d 461 (S.C. 2004). In each of these cases, the reviewing Court looked directly to Chapter 2 of the S.C. UCC to analyze the buyer’s and seller’s respective

obligations in a breach of contract dispute involving the purchase and sale of a motor vehicle by a consumer from a retail motor vehicle dealership.¹

Further, Respondent asserts that the “special protection” of repossession is not provided to contracts covered by the S.C. UCC. (Brown Memo p.2.) This argument is not supported by the plain language of the S.C. UCC. It is indisputable that the S.C. UCC includes not only Chapter 2 relating to the sale of goods as discussed above, but also Chapter 9 relating to the rights of secured lenders involved in those sales transaction, specifically including a seller/creditor’s right to repossess and sell the goods in question in the event the buyer fails to pay the sales price for those goods as agreed between the parties.

Finally, the characterization of Appellant’s action as a “deficiency action” and/or an “action to collect a debt” has no legal effect with respect to the question of whether or not the Sales Contract is covered by Chapter 2 of the S.C. UCC, with its applicable 6-year statute of limitation. As set forth above, the relevant definitional provisions of Chapter 2 of the S.C. UCC clearly encompass the Sales Contract in this case. Both the Court of Appeals and the Supreme Court have treated motor vehicles as a category of “goods” subject to the provisions of Chapter 2 of the S.C. UCC. Further, § 36-2-301 of the S.C. UCC expressly sets forth the general obligations of the parties to a Chapter 2 contract, *i.e.*, the seller is

¹ Although not the original maker of the Sales Contract, Appellant steps into the shoes of the seller upon the purchase/assignment of the Sales Contract pursuant to the Notice at the bottom of Page 2 of the Sales Contract, which states, in pertinent part, **“ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF.”**

to transfer and deliver the purchased goods and the buyer is to accept and pay for those goods “*in accordance with the contract*” (*emphasis added*). There have been no reported cases in South Carolina to support Respondent’s bald assertion, tacitly approved by the Trial Court, that a Chapter 2 sales contract is somehow re-characterized or transformed into some other type of contract merely because the buyer pledged the goods sold as collateral for the sale price, the buyer failed to pay for the goods as agreed and the seller subsequently repossessed and sold those goods in accordance with its rights under Chapter 9 of the S.C. UCC.

In this case, the Complaint against Respondent clearly sets forth an alleged breach by Respondent of her specific payment obligations under the Sales Contract for the purchase and sale of the Vehicle. No other claim or cause of action against Respondent other than a breach of the Sales Contract is stated in the Complaint. Therefore, there can be no dispute that Appellant is simply trying to enforce its right to demand performance by Respondent of her contractual payment obligations under a contract for the purchase and sale of goods. Thus, this case falls squarely within the ambit of Chapter 2 of the S.C. UCC despite the terminology used by both Respondent and the Trial Court to otherwise describe the nature of Appellant’s claim against Respondent at the trial court level.

D. Established Rules Of Statutory Construction Dictate That A Specific Statute Prevails Over A More General One Dealing With The Same Subject Matter. In the case of Atlas Food Systems and Services, Inc. v. Crane National Vendors, et al., 319 S.C. 556, 462 S.E.2d 858 (1995), the South Carolina Supreme Court specifically discussed the interplay between the 3-year statute of

limitations generally applicable to actions for breach of contract and the 6-year statute of limitations in Chapter 2 of the S.C. UCC. In that case, the Court first reiterated the general rule of statutory construction holding that a specific statute prevails over a more general one. *Id.* at 558, 462 S.E.2d at 859. It also held that the enactment of a later general statute does not repeal an earlier more specific statute. *Id.* at 558, 462 S.E.2d at 859. As such, the Court declined to find that the 1988 amendment to the general contract statute of limitations (reducing it from 6 years to 3 years) impliedly repealed or reduced the 6-year statute of limitations covered by the S.C. UCC. *Id.* at 558, 462 S.E.2d at 859. As such, the 6-year statute of limitations found in Chapter 2 of the S.C. UCC still applies, and prevails, when the suit in question is a suit for breach of a Chapter 2 sales contract. Therefore, the 6-year statute of limitations applies to the instant case.

E. There Is No Inherent Conflict Between The Two Statutes of Limitation For Breach Of Contract. Perhaps more importantly, the *Atlas* Court also found there to be no inherent conflict between the general statute of limitations for breach of contract actions contained in S.C. Code Ann. § 15-3-530 (2013) and the more specific statute of limitations for breach of sales contracts contained in Chapter 2 of the S.C. UCC. *Id.* at 558, 462 S.E.2d at 859. “The U.C.C. statute of limitations applies to actions arising under that act, while § 15-3-530(1) applies to other types of general contract actions.” *Id.* at 558, 462 S.E.2d at 859. Accordingly, the fact that there may be two statutes of limitation applicable to this particular case does not create a situation in which the Trial Court is left to resolve competing dictates. As the South Carolina Supreme Court

has clearly stated, “[a]ctions arising under Article 2 of the U.C.C. are governed by § 36-2-725’s statute of limitations. “ Id. at 559, 462 S.E.2d at 860. Any implication otherwise in any prior decisions is no longer good law. Id. at 559, 462 S.E.2d at 860.

III. THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN DENYING APPELLANT’S MOTION FOR SUMMARY JUDGMENT ON THE MERITS.

There being no statute of limitations bar to Appellant filing this action against Respondent, the Trial Court further erred in denying Appellant’s Motion For Summary Judgment on the merits. By means of the CFCU Affidavit, Appellant’s authenticated business records attached thereto were properly in evidence before the Trial Court pursuant to Rule 803(6), SCRE. These included the following:

- a. The Sales Contract, setting forth Respondent’s payment obligations relative to her purchase of the Vehicle;
- b. The sale and assignment of the Sales Contract by the Dealership to Appellant;
- c. Respondent’s payment history, showing her default with respect to her payment obligations under the Sales Contract and the balance due with respect to same at the time of default;
- d. Appellant’s pre-sale letter to Respondent, addressed to and mailed to Respondent at her last known address;
- e. Appellant’s condition report for the Vehicle when it was repossessed, showing front end damage to the Vehicle;

- f. Appellant's bill of sale for the Vehicle showing it sold at auction for \$6,000; and
- g. Appellant's post-sale letter to Respondent, addressed to and mailed to Respondent at her last known address.

Also attached to the CFCU Affidavit, as Exhibit G, is a copy of the relevant pages from the November 2009 Carolina Edition of the Black Book Official Used Car Market Guide showing that, as of its sale date, the Vehicle had an average wholesale (auction) value of \$6,077.80. The value was based on sales of the same make and model vehicles at auction in the previous month. These pages were properly in evidence before the Trial Court pursuant to Rule 803(17) SCRE.

By her Answer, Respondent admitted her default in making the payments due under the Sales Contract, and presented the Trial Court with no evidence prior to the summary judgment hearing to refute the accuracy of the payment history attached to the CFCU Affidavit, including the balance due after her last payment.

Further, Respondent's simple statement that she did not receive Appellant's pre-sale letter to her provides no legal impediment to Appellant's right to recover judgment against Respondent for the balance due on the sales price for the Vehicle. S.C. Code Ann. § 36-9-611 (2013) requires a secured lender to notify a debtor before disposition of the collateral and S.C. Code Ann. § 36-9-616 (2013) requires a secured party to send the debtor an explanation of how the sales proceeds were applied to the debt owed. S.C. Code Ann. § 36-1-201(26) (2013) defines "giving notice" as the act of taking reasonable steps to inform another party but does not require actual receipt by the other party. Further, S.C.

Code Ann. § 36-1-201(38) (2013) lists a definition of “send” relative to any writing or notice as simply depositing same in the mail to a known address or an address reasonable under the circumstances. Thus, the mailing of the required notices by the creditor, not the receipt of the same by the debtor, is the required legal standard for compliance with the noticing requirements of S.C. Code Ann. §§ 36-9-611 (2013) and 36-9-616 (2013). The uncontroverted evidence before the Trial Court, via the CFCU Affidavit, was that Appellant mailed the pre-sale letter attached to the Affidavit to Respondent, and that the address on such pre-sale letter was the last-known address in Appellant’s file for Respondent. The uncontroverted evidence before the Trial Court also was that Appellant subsequently mailed the post-sale accounting letter relative to the Vehicle to Respondent at the same address, which Respondent did not deny receiving. As such, the uncontroverted evidence before the trial court was that Appellant fully complied with both applicable noticing statutes, regardless of whether Respondent did or did not receive both or either of said notices.

Respondent also presented no facts to the Trial Court to support her bald assertion that Appellant’s sale of the Vehicle at the Manheim Auto Auction in Darlington, South Carolina was not a reasonable means for Appellant to sell the Vehicle and/or is not in fact the means typically used in the industry by secured lenders such as Appellant to liquidate repossessed vehicles. Similarly, Respondent presented no facts to the Trial Court to show that the \$6,000 received by Appellant from the sale of the Vehicle was not in fact its reasonable fair market liquidation value at the time of sale. The only fact presented by Respondent in

support of her claim that that Appellant failed to sell the Vehicle in a reasonable manner was that the Vehicle sold for one-third of the amount Respondent had paid for the Vehicle. (Brown Aff. p. 1.) However, this fact, standing alone, altogether fails to address the predictable downward impact on the Vehicle's value occasioned by the front end damage to the Vehicle reported by the inspector following repossession and/or the fact that all vehicles continuously depreciate as time goes by due to on-going wear and tear.

As such, the uncontroverted evidence properly before the Trial Court at the summary judgment hearing showed (i) the existence of a valid enforceable sales contract between the parties,(ii) a clear breach by Respondent of her payment obligations to Respondent under that sales contract, (iii) a sale of the Vehicle in accordance with industry standards, (iv) the required pre- and post-sale notices mailed to Respondent's last known address regarding the repossession and sale of the Vehicle, and (v) the amount still owed by Respondent after all credits to which she was entitled had been applied to her account. Respondent's statement that she did not receive the pre-sale notice and/or her bare assertion that Appellant failed to sell the Vehicle in a reasonable manner were insufficient, as a matter of law, to overcome the undisputed evidence presented to the Trial Court by Appellant, and the Trial Court therefore committed reversible error in denying Appellant's motion for summary judgment on the merits.

CONCLUSION

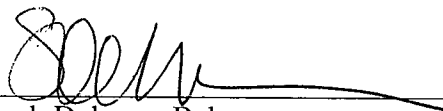
There is no dispute between the parties as to the material facts leading up to this case. There also can be no dispute, as a matter of law, that neither the SC Consumer Protection Code nor the Fair Debt Collections Practices Act has any lawful application to this case. Accordingly, the Trial Court's finding to the contrary is reversible error. To the extent the Trial Court relied on such a finding in granting Respondent's Motion For Summary Judgment, such Order should be reversed and Respondent's Motion For Summary Judgment denied.

Further, as evidenced by the undisputed facts of this case, Appellant's claim against Respondent herein is solely for breach of a sales contract covered by Chapter 2 of the S.C. UCC, and therefore the applicable statute of limitations in which Appellant could timely bring this action against Respondent had not expired as of the date this action was commenced. Accordingly, the Trial Court's finding to the contrary is reversible error. The Order granting Respondent's Motion For Summary Judgment should be reversed and Respondent's Motion For Summary Judgment denied.

Finally, Appellant presented sufficient undisputed evidence with respect to each element of its breach of contract claim against Respondent to support its assertion that it was entitled to judgment against Respondent for the relief requested in the Complaint as a matter of law. The defenses raised by Respondent in her Answer and Affidavit in support of her Motion For Summary Judgment were insufficient to create a true dispute with respect to any material fact and/or prevent judgment from being entered in favor of Appellant as a matter of law.

Accordingly, the Trial Court's refusal to grant summary judgment to Appellant in this case was further reversible error. The Order denying Appellant's Motion For Summary Judgment should be reversed and Appellant's Motion For Summary Judgment granted.

Respectfully submitted this the 24 day of October, 2014.



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THE STATE OF SOUTH CAROLINA
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Coastal Federal Credit Union. Appellant

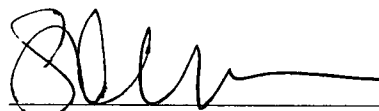
v. . .

Angel Latoria Brown Respondent

PROOF OF SERVICE

I certify that I have served Appellant's Initial Brief on Angel Latoria Brown by depositing a copy of it in the United States Mail, postage prepaid, on October 24, 2014, addressed to her attorney of record, Matthew M. Billingsley, 2803 Carner Avenue, North Charleston, SC 29405.

October 24, 2014



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