IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2014-002182
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 Which

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

BRIEF OF RESPONDENT

James W. Sheedy, S.C. Bar No. 5052
Susan E. Driscoll, S.C. Bar No. 71447
Driscoll Sheedy, P.A.
11520 N. Community House Road
Suite 200
Charlotte, N.C. 28277
(704) 341-2101 - Telephone
(704) 341-2015 - Facsimile
jimsheedy@driscollsheedy.com
sdriscoll@driscollsheedy.com

Attorneys for Respondent

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COUNTER-STATEMENT OF THE CASE

Respondent initiated a mortgage foreclosure on multiple loans made to Petitioner. Petitioner counterclaimed against Respondent based on an alleged loan commitment to buy residential lots. Because the counterclaims pertain to a different loan from the loans sought to be enforced by Respondent in its mortgage foreclosure, which Petitioner concedes in its brief as "another loan", the counterclaims were permissive, not compulsory, and not entitled to be heard by a jury. The evidence was considered by the trial court at summary judgment on Petitioner's permissive counterclaims.

While Petitioner is correct that S.C. Code Ann. § 37-7-107 (1991) (Lender SoF) requires a writing be received that contains the material terms and conditions of the promise to lend, Petitioner fails to mention that the writing must be *signed* by the party making the alleged promised to lend.

Respondent denies that there was ever any loan commitment at all. Both of the principals of Petitioner, Dawn and Tom Ras, testified that they were not in possession, nor had they ever received, a final, signed loan commitment from Respondent. (App. pp. 418-421, 430-431). Tom Ras testified the "terms were wrong, interest rate was wrong" in the draft document Petitioner claims it saw. (App. p. 420). He also testified that there was no agreement as to the interest rate, stating specifically that was a "point of contention", because he believed the rate was "[e]xtremely exorbitant." (App. p. 292). Tom Ras may have said *he* signed a loan commitment (App. pp. 418-19), but not that Respondent ever signed. His wife Dawne testified Respondent was the only one in possession of the alleged commitment letter, the letter was to be retyped and returned for signature. (App. pp. 430-431). There is no

evidence of delivery by Respondent and receipt by Petitioner of a final loan commitment signed by Respondent. The party to whom Petitioner alleges it gave a copy of the signed commitment refused to state under oath that he received such copy. (App. pp. 399-400). No signed, final loan commitment delivered by Respondent and received by Petitioner containing the material terms was ever produced by it or any witness.

Nor does the factual record contain any evidence that supports Petitioner's claim that Respondent destroyed the final, signed commitment letter that Petitioner had received and allegedly lost. Through counsel, Petitioner questioned Respondent's in-house information technology officer as to whether any data had been deleted.

> Q: Was there anything that you were able to do in the last couple of months since you were advised of the litigation hold to determine whether any data had been deleted?
>
> A: I haven't found any evidence to lead me to believe that any data had been deleted.

(App. p. 403). Petitioner has no evidence to show its receipt of a final commitment signed by Respondent containing all material terms that Respondent also received and then destroyed.

The Court of Appeals based its opinion (Opinion) on two grounds, both of which were argued to the trial court. Under South Carolina law, Petitioner was required to produce the written commitment to lend signed by Respondent that Petitioner had received. (App. p. 2). Petitioner did not produce a signed written loan commitment. Even if the lost memorandum exception were applied to the Lender SoF, Petitioner failed to produce clear and convincing evidence that the alleged signed written commitment received by it ever existed and was then lost or destroyed. (App. pp. 2-3).

ARGUMENTS

I. The Court of Appeals did not base its ruling on an argument that was not raised in the trial court or that exceeds the scope of the summary judgment record.

The first line of the Opinion states: "We find the trial court did not err in holding Oaktree's counterclaims against Yadkin Valley failed as a matter of law because it was unable to produce a written loan agreement." (App. p.2). The Opinion says, "The lender statute of frauds precludes certain actions regarding loans for money where there is no writing evidencing the alleged promise or agreement." (App. p.2). Petitioner's failure to produce a writing received by it, signed by Respondent is the basis upon which both the trial court and the Court of Appeals ruled.

The Court of Appeals also addressed Petitioner's argument that it did not have to produce a writing received by it, signed by Respondent. "Even if this court were to accept the lost memorandum exception to the general statute of frauds applied to the lender statute of frauds, [Petitioner] failed to provide the required clear and convincing evidence." (App. p.2). Despite Petitioner's briefing to the contrary, the Court of Appeals did not rule that the lost memorandum exception applicable to the *general* statute of frauds *in other jurisdictions* was applicable to the Lender SoF in South Carolina. The words "even if" do not evidence an adoption of this exception. Rather, the Court of Appeals reasoned, a writing had to be produced; but *even if* the writing requirement could be displaced, Petitioner failed to present the requisite level of evidence to fall within the advocated exception.

The issue of sufficiency of the evidence (including the submittal of parol or extrinsic evidence) *was* raised to and resulted in a ruling by the trial court. It was first raised in

Respondent's motion for summary judgment, when Respondent set forth the requisite evidentiary standard and its belief Petitioner could not meet that standard: "Nor can [Petitioner] show by clear and convincing evidence that such a commitment letter ever existed which was subsequently lost or destroyed." (App. p. 202). Petitioner calls this a "passing reference," which is an admission that it was raised. The motion put both the trial court and Petitioner on notice as to what Respondent believed was the governing evidentiary standard for Petitioner. Petitioner is correct that it did not object to or question whether that standard was the correct standard to be applied.

After Respondent raised the issue of sufficiency of the evidence, the trial court examined whether "the statutory requirement of a writing may be displaced by oral testimony that the writing has been lost." (App. p. 104.) In finding it could not be, the trial court relied upon the case of *Windham v. Lloyd*, 253 S.C. 568, 573, 172 S.E.2d 117, 119 (1970), which specifically states that the "preliminary inquiry as to whether there had been sufficient evidence tending to prove the loss, destruction or unavailability of an original document . . . is an inquiry, the answer to which, in large measure, is within the discretion of the trial judge."

Two of the cases cited by the Court of Appeals, *Chakur v. Zena*, 233 S.W.2d 200 (Tex. Civ. App. 1950), and *Mossman v. Hawaiian Trust Co.*, 45 Haw. 1, 361 P.2d 374 (1961), were also cited by counsel for Respondent at the hearing on the motion for summary judgment. (App. p. 351.) In citing *Chakur* and *Mossman*, counsel for Respondent stated, "there had to be uncontradicted, unimpeached evidence as to the existence of the writing . . ." (App. p. 351). Petitioner is incorrect that the question of the sufficiency of the evidence

was not raised to and set forth in a ruling by the trial court. As evidenced by the summary judgment motion, the transcript of the hearing and the trial court's order granting summary judgment, the question most certainly was raised. The Court of Appeals' discussion of sufficiency of the evidence was proper.

II. The Court of Appeals did not err in upholding the ruling of the trial court that Petitioner was required to produce a written loan commitment.

In *Windham*, this Court examined whether or not oral testimony as to the whereabouts of an original deed would allow the introduction of secondary evidence of the existence and validity of that deed. The party alleging the existence of the deed was questioned as follows.

> Q. Mr. Laffoday, do you know where the original deed is?
>
> A. No, I don't, I had this in my possession one time and turned it over to a lawyer and I don't know what he did with it.

Windham, 253 S.C. at 572, 172 S.E.2d at 119. The party never identified the lawyer to whom he supposedly gave the deed, nor did he "specify the time or circumstances, nor does he show that he has made any effort whatsoever to search for or ascertain the whereabouts of the original." *Id.* The court ruled that based upon the "very meager information offered by the appellant as to the whereabouts of the alleged original deed," it was proper for the trial court to exclude the proffered secondary evidence. *Id.* at 573.

Petitioner did not raise Rule 1008, SCRE, in the trial court and may not now for the first time on appeal.[1] But if the issue were properly preserved for appeal, as set forth in

[1] Rule 1008, SCRE, was not argued or raised by Petitioner in the trial court. Petitioner did not brief the issue in the trial court, nor did Petitioner argue Rule 1008 at summary judgment. The trial court did not enter a decision on Rule 1008. Petitioner made no Rule 59(e) motion. Under South Carolina law, an issue cannot be raised for the first time on appeal, but must have been raised to and decided by the trial judge to be preserved for appellate review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). *State v. Gamble*, 405 S.C. 409, 747 S.E.2d 784 (2013), does not help Petitioner. *Gamble*

Windham, 253 S.C. at 573, 172 S.E.2d at 119, whether to allow secondary evidence or to require the production of the written document "is an inquiry, the answer to which, in large measure, is within the discretion of the trial judge." This was not changed by Rule 1008, which is "identical to the federal rule". (Rule 1008, SCRE, Note.) The Notes of Advisory Committee on Proposed Rules state, "The decision is not one for uncontrolled discretion of the jury but is subject to the control exercised generally by the judge over jury determinations." (Fed. R. Evid. 1008, Notes of Advisory Committee on Proposed Rules.) The Notes then cite to Fed. R. Evid. 104(b) (identical to the corresponding South Carolina Rule), which grants *the court* control over what evidence is admissible. Rule 104(b) requires evidence that is "sufficient to support a finding that the fact does exist." The trial court can make the determination of whether to require the production of the actual written document, or allow oral testimony to prove the document was in fact lost.

In making this determination, the trial court set forth separate bases for its decision, which were upheld by the Court of Appeals. There are no South Carolina cases allowing circumvention of the requirement of a writing under the Lender SoF. (App. p. 2, 103). The intent behind the Lender SoF and the general statute of frauds in South Carolina is to prevent the use of parol evidence to evade the requirement of a written document.[2] *See Woodruff Oil*

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stands for the proposition that a party does not have "to use the exact name of a legal doctrine in order to preserve an issue for appellate review." *Id.* at 416, 747 S.E.2d at 787. While that may be true, the issue itself must actually be raised. Petitioner never raised Rule 1008, SCRE, in the trial court.

[2] Petitioner's unfounded assertion that a lender could draft a written loan commitment, sign it and then destroy it, to the detriment of an unwitting borrower, misses the mark. A borrower has to have the written commitment in order to be able to prove receipt, which is necessary to bring suit. Petitioner's characterization of the Lender SoF as a consumer protection statute is not correct, because the Lender SoF is inapplicable to consumer loans. It is only applicable to commercial loans in the amount of $50,000 or more. The statute "protects consumers seeking personal loans as well as small commercial borrowers by exempting these classes of borrowers from having to meet the statutory requirement." *Sea Cove*

& Fertilizer Co. v. Portsmouth Cotton Oil Refining Corp., 246 F. 375 (4th Cir. 1977) (App. p. 103).

It is this second basis, evasion of the requirement of a writing, that refutes Petitioner's claim that "received" does not mean the borrower must maintain possession of the writing. Petitioner is incorrect. Under the Statute, the language "received a writing" is a delivery requirement "intended to preclude lawsuits based on personal notes, confidential memoranda, or drafts, all of which have been signed by the party to be charged and which may come to light as a result of the discovery process." John L. Culhane, Jr., *Lender Liability Limitation Amendments to State Statutes of Frauds*, 45 Bus. Law 1779, 1795 (1990) cited with approval in *Sea Cove Development*, 387 S.C. at 105, 691 S.E.2d at 163. The use of the word "received" requires that the borrower retain possession of the commitment, which Petitioner admits it did not. Petitioner never met the receipt requirement. Petitioner wishes to transform the requirement of a writing in the lending arena into a swearing contest.

The trial court went further, however, by examining South Carolina decisional law on secondary evidence and determined oral testimony that the writing was lost could not displace the requirement of production of the writing. (App. p. 104). In the Opinion, the Court of

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Development, 387 S.C. 95, 105, 691 S.E.2d 158, 163 (2010). It is not the inexperienced consumer or small business owner impacted by the Lender SoF. Instead, the Statute is designed to prevent experienced commercial borrowers from taking advantage of oral negotiations with lenders and categorizing those negotiations as an agreement to lend.

The case cited by Petitioner in support of its evil lender theory, *Aust v. Beard*, 230 S.C. 515, 96 S.E.2d 558 (1957), is wholly inapplicable, because it involves the application of an exemption from the general statute of frauds (part performance), which was held not to even apply in that case due to the lack of clear and unequivocal evidence as to the part performance. Instead, as cited by the Court of Appeals, the cases on point are those like *Weinsier v. Soffer*, 358 So. 2d 61 (Fla. App. 1978), and *Zander v. Ogihara Corp.*, 213 Mich. App. 438, 540 N.W. 2d 702 (Ct. App. 1995), each of which found the purpose of the statute of frauds was to prevent the "self-serving" testimony of a party to defeat the requirement of a writing.

Appeals delved even deeper into the question, by analyzing the lost memorandum exception. (App. p.2). The Court of Appeals determined that the same standard applicable at trial (clear and convincing evidence) is applicable at summary judgment.[3]

Petitioner failed to submit clear and convincing evidence of the existence of a final, signed loan commitment received by it that was subsequently lost. As in *Windham*, Petitioner admitted that it was not in possession of the alleged final, signed commitment, nor did it have any idea where it was located. (App. pp. 418-423). Tom Ras testified the alleged commitment was not in final form, nor was it signed by Respondent. (App. p. 420). Petitioner said not only that the "terms were wrong, [the] interest rate was wrong" in the alleged draft commitment, but that the proposed interest rate was "[e]xtremely exorbitant." (App. p. 291-92). His wife Dawne testified Respondent was the only one in possession of the alleged commitment letter, the letter was to be retyped and returned for signature. (App. pp. 430-431). The seller of the 51 lots, who would have received the loan proceeds if a commitment had existed, refused to testify under oath that he had seen a final commitment letter, signed by Respondent, received by Petitioner. (App. pp. 399-400). Based upon the testimony of Petitioner's witnesses, there was no final commitment signed by Respondent, received by Petitioner that set forth the material terms upon which a loan would be made.

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[3] *See Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330-31, 673 S.E.2d 801, 803 (2009) ("[I]n cases requiring a heightened burden of proof . . . we hold that the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment."); *Turner v. Milliman*, 392 S.C. 116, 125, 708 S.E.2d 766, 770 (2011) (Upholding summary judgment on cause of action for fraud, because "the fraud claim requires proof by clear and convincing evidence; thus, more than a mere scintilla of evidence must be presented to withstand a motion for summary judgment.:); *Froneberger v. Smith*, 406 S.C. 37, 52, 748 S.E.2d 625, 632 n.8 (Ct. App. 2013) ("We recognize that one of the Fronebergers' causes of action is fraud, which requires a heightened standard of proof at the summary judgment stage.").

As ruled by the Court of Appeals, Petitioner did not present clear and convincing evidence of a final, signed loan commitment received by it that was lost. Instead, the evidence is meager, at best, as it was in *Windham*. Petitioner has only its principals' and lot seller's self-serving testimony, which is not clear and convincing. Petitioner also has alleged oral representations by Respondent (App. pp. 400, 410-411, 420-21, 430-31), which it denies (App. pp. 366, 369, 371, 382-383). This is the exact situation the Lender SoF was enacted to prevent and the reason why there is a requirement of a writing. The Court of Appeals was correct in upholding the ruling of the trial court, i.e., Petitioner failed to produce the final, signed loan commitment received by it; and the trial court, after considering the testimony, decided not to allow secondary evidence, including oral testimony, to establish the existence of the alleged signed commitment received by Petitioner.

Petitioner's attempt to distinguish cases from other jurisdictions cited by the Court of Appeals based on the status or results of those cases is equally unavailing. The cases are not distinguishable as "lost contract" cases; a signed, written loan commitment is a contract upon which Petitioner obviously believes suit may be brought. In *Mossman*, the party objecting to the use of oral testimony never took the deposition of the party seeking to introduce the oral testimony, nor did it propound any interrogatories on that party, so the court ruled that "Defendant did not seek to determine whether plaintiffs were able to prove the letter as a lost document." *Mossman*, 45 Haw. at 10-11, 361 P.2d at 379. Genuine issues of fact were present because the defendant in *Mossman* did nothing to uncover the facts.

Respondent engaged in extensive discovery, including depositions of both principals of Petitioner, which lasted multiple days. Respondent also propounded interrogatories on

Petitioner and took the deposition of every party involved in the transactions that were the subject of this action. Respondent undertook the work that the defendants failed to do in *Mossman.*

In *Chakur*, the party had to first prove the loss of the written document by clear and convincing evidence before oral testimony as to it contents would be allowed. *Chakur*, 233 S.W.2d at 202. The holding in *Chakur* is in line with that in *Windham*. More than a mere allegation of the document's existence is required to allow oral testimony to prove the contents thereof. Petitioner did not produce a writing signed by Respondent, as required by the Lender SoF, nor did it present clear and convincing evidence of a final, signed loan commitment from Respondent received by Petitioner that was later lost. Because Petitioner failed on both points, the Court of Appeals was correct that the trial court did not err in requiring Petitioner to produce the alleged loan commitment. Petitioner was required to have received it.

III. The Court of Appeals did not err in its decision to disregard Petitioner's argument that Respondent allegedly destroyed information during discovery.

"'The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court.'" *Davis v. Parkview Apartments*, 409 S.C. 266, 281-82, 762 S.E.2d 535, 543 (2014), *quoting Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987). "Therefore, an appellate court will not interfere with 'a trial court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters' unless the court abuses its discretion.'" *Id., quoting Karppi v. Greenville Terrazzo Co., Inc.,* 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997). "'An 'abuse of discretion' may be found by this

Court where the appellant shows that the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law.'" *Id.* at 282, 762 S.E.2d at 543, *quoting Dunn v. Dunn,* 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989). *See also Southeastern Site Prep, LLC v. Atlantic Coast Builders and Contractors, LLC*, 394 S.C. 97, 104, 713 S.E.2d 650, 654 (Ct. App. 2011) (Finding no abuse of discretion in trial court's refusal to award sanctions.) "The appealing party bears the burden of demonstrating that the lower court abused its discretion." *Davis*, 409 S.C. at 282, 762 S.E.2d at 543.

In reviewing the decision of the trial court under this elevated standard, the appellate courts must also look at the relief sought by the motion for sanctions. Petitioner sought "an Order striking all defenses to their counterclaims and arguments which rely on or presume that there is not a signed or executed loan commitment in this matter. . ." (App. pp. 196-97). A preclusion or exclusion of this type is "a sanction under Rule 37, SCRCP, which should never be lightly invoked. Furthermore, 'where the effect will be the same as granting judgment by default or dismissal, a preclusion order may be made only if there is some showing of wilful disobedience or gross indifference to the rights of the adverse party.'" *Orlando v. Boyd*, 320 S.C. 509, 466 S.E.2d 353 (1996), *quoting Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 109, 410 S.E.2d 537, 542 (1991).

Petitioner sought an evisceration of Respondent's defenses to all counterclaims based upon the unfounded allegation that Respondent *may have* destroyed the alleged loan commitment that Petitioner allegedly received and must have lost or destroyed itself. Petitioner failed to provide any evidence that Respondent destroyed the alleged loan

commitment. The testimony shows that employees of Respondent instructed the information technology department to look for "any dialogue or anything that pertained to . . . any e-mail traffic" or any other evidence of a commitment letter. (App. pp. 365-66). Respondent also reviewed the "physical files" of the loan officer in charge of the relationship with Petitioner, but they "couldn't find any formal commitment letter." (App. p. 366). After his review of the electronic files of Respondent, the IT director, Walter Joyce, testified that he had not found "***any evidence*** to lead me to believe that any data had been deleted." (App. p. 403). (Emphasis added.)

The evidence in the record is twofold. First, employees of Respondent made every effort to locate any possible copy of the alleged signed commitment letter, to no avail. Second, no data was deleted either during the destruction of Respondent's outdated computer equipment or through the merger between American Community Bank and Yadkin Valley Bank. Petitioner's attempts to skew Mr. Joyce's later testimony related to e-mail traffic among Respondent's employees, does not change the fact that the only testimony regarding the alleged destruction of data is that there was none. There was no evidence of any intentional wrongdoing by Respondent. Because Petitioner failed to show any willful disobedience or gross indifference on the part of Respondent, the trial court was correct in its denial of Petitioner's unfounded motion for sanctions.[4] There was no abuse of discretion on

[4] Petitioner's reliance on *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997), is misplaced. *Samples* involved the failure to disclose evidence that the party then attempted to introduce at trial, an important fact Petitioner omits in its citation of the test of whether to impose sanctions. *Samples* actually says, "In deciding what sanctions to impose *for failure to disclose evidence during the discovery process*, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness and the degree of prejudice." *Id.* at 112, 495 S.E.2d at 216 (Emphasis added.). Here, there is no attempt to use previously undisclosed evidence. Because the alleged commitment letter did not exist, there was nothing to disclose. *Samples* is inapposite to this case.

the part of the trial court. Further, the Lender SoF requires that Petitioner, not Respondent, receive the signed loan commitment.

CONCLUSION

Petitioner has no law that there is a lost memorandum exception to the Lender SoF. Thus, Petitioner has to prove receipt of a writing by producing the writing, which necessarily means it, not Respondent, has possession of the writing. Petitioner has no evidence to support its claim of willful disobedience or gross indifference by Respondent during discovery. Petitioner failed to present an actual, final, signed loan commitment received by it, or clear and convincing evidence that one ever existed which was received by it and then lost or destroyed. Because Petitioner has failed on these issues, the Opinion of the Court of Appeals should be affirmed.

Date: 4/22/15

Respectfully submitted,

James W. Sheedy, S.C. Bar No. 5052
Susan E. Driscoll, S.C. Bar No. 71447
Driscoll Sheedy, P.A.
11520 N. Community House Road, Suite 200
Charlotte, N.C. 28277
(704) 341-2101 - Telephone
(704) 341-2015 - Facsimile
jimsheedy@driscollsheedy.com
sdriscoll@driscollsheedy.com

Attorneys for Respondent

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel for Petitioner with the *Brief of Respondent* by mailing copies of the same via First Class, U.S. Mail, postage-paid to the addressees and on the date set forth below.

John S. Nichols, Esq.
Blake A. Hewitt, Esq.
Bluestein, Nichols, Thompson & Delgado, LLC
P.O. Box 7965
Columbia, SC 29202

William A. McKinnon, Esq.
Chad McGowan, Esq.
McGowan, Hood & Felder, LLC
1539 Health Care Drive
Rock Hill, SC 29732

Respectfully submitted,

Date: 4/22/15

James W. Sheedy, S.C. Bar No. 5052
Susan E. Driscoll, S.C. Bar No. 71447
Driscoll Sheedy, P.A.
11520 N. Community House Road
Suite 200
Charlotte, N.C. 28277
(704) 341-2101 - Telephone
(704) 341-2015 - Facsimile
jimsheedy@driscollsheedy.com
sdriscoll@driscollsheedy.com

Attorneys for Respondent