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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2013-CP-23-05891

RECEIVED  
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SC Court of Appeals

NAI Earle Furman, LLC, .....Respondent,

v.

Pleasant Grove Properties, Inc., .....Appellant.

**FINAL BRIEF OF RESPONDENT**

Paul S. Landis  
FAYSSOUX LAW FIRM, P.A.  
209 E. Washington Street  
Greenville, South Carolina 29601  
(864) 233-0445  
(864) 233-4781 (Fax)

Attorney for Respondent  
NAI Earle Furman, LLC

May 1, 2015

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## STATEMENT OF ISSUES ON APPEAL

- I. DID THE CIRCUIT COURT CLEARLY ABUSE ITS DISCRETION IN DENYING PLEASANT GROVE PROPERTIES, INC.'S MOTION TO SET ASIDE DEFAULT AND FOR RELIEF FROM DEFAULT JUDGMENT WHEN PLEASANT GROVE PROPERTIES WAS PROPERLY SERVED?
- II. DID THE CIRCUIT COURT CLEARLY ABUSE ITS DISCRETION IN DENYING PLEASANT GROVE PROPERTIES, INC.'S MOTION TO SET ASIDE DEFAULT AND FOR RELIEF FROM DEFAULT JUDGMENT WHEN PLEASANT GROVE PROPERTIES FAILED TO ESTABLISH MISTAKE, INADVERTENCE, SURPRISE, OR EXCUSABLE NEGLIGENCE?
- III. DID THE CIRCUIT COURT CLEARLY ABUSE ITS DISCRETION IN DENYING PLEASANT GROVE PROPERTIES, INC.'S MOTION TO SET ASIDE DEFAULT AND FOR RELIEF FROM DEFAULT JUDGMENT WHEN PLEASANT GROVE PROPERTIES FAILED TO ESTABLISH A MERITORIOUS DEFENSE?

## STATEMENT OF THE CASE

This case arises from a real estate lease commission due from Pleasant Grove Properties, Inc. Respondent NAI Earle Furman, LLC (“NAI”) filed a Summons and Complaint on November 1, 2013, seeking recovery of the same. NAI attempted service on Pleasant Grove Properties’ registered agent, David Peacock, as follows:

1. November 4, 2013: Hired process server to attempt personal service on Mr. Peacock at 4394 Wade Hampton Blvd., Taylors, SC, which was the address where Pleasant Grove Properties had received mail from NAI’s counsel and where Mr. Peacock was believed to conduct business.

2. November 13, 2013: Hired process server to attempt personal service on Mr. Peacock at 89 Shipwatch Lane, Miramar Beach, FL, which was a residence owned by Mr. Peacock. According to records available online, Mr. Peacock changed his residence to Florida in or around 2011, and this was the address located for him. Furthermore, when Pleasant Grove Properties filed its Motion to Set Aside Default and for Relief from Judgment, David Peacock confirmed in his affidavit that he had, in fact, become a citizen and resident of Florida.

3. December 17, 2013: Provided process server with alternate address of 289 River Falls Drive, Duncan, SC, which was a residence owned by Mr. Peacock.

4. January 15, 2014: Mailed a copy of the Summons and Complaint via Certified Mail, Return Receipt Requested, Restricted Delivery, to the addresses listed below. Following each address below, a brief explanation is provided for why NAI attempted to serve Pleasant Grove Properties at each particular address.

A. 4394 Wade Hampton Blvd.  
Taylors, SC 29687

At times relevant to this action, David Peacock was known to conduct business at this address. Pleasant Grove Properties admits that Teresa Fant signed for mail on its behalf at this address shortly before the commencement of NAI's action. Specifically, the mail was sent on September 17, 2013 addressed to "Pleasant Grove Properties, Inc. c/o David Peacock, President," and Ms. Fant signed for it. The mail consisted of a letter from NAI's counsel which informed Pleasant Grove Properties that NAI would pursue this matter through litigation if Pleasant Grove Properties failed to pay the commission due. Pleasant Grove Properties acknowledges that it did, in fact, receive that letter.<sup>1</sup> However, when NAI's counsel attempted to serve the Summons and Complaint via mail to the same address, it was unclaimed.

B. P.O. Box 2103  
Greer, SC 29652

Pleasant Grove Properties put this as its address in the lease extension that is the subject of this matter. Pleasant Grove Properties collects rent payments and any correspondence from its tenant at this address. It was unclaimed.

C. 1425B S. Buncombe Road  
Greer, SC 29651

Pleasant Grove Properties provided this address to the South Carolina Secretary of State as the proper address for its registered agent, David Peacock. In spite of the trial court's ruling, Pleasant Grove Properties still has failed or refused to update this address

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<sup>1</sup> Pleasant Grove Properties never responded to the letter.

with the Secretary of State's office as of the time this brief is submitted. It was marked "Return to Sender/No Such Street/Unable to Forward" and returned to counsel for NAI.<sup>2</sup>

5. January 21, 2014: A process server for NAI, Paul Silvaggio, went to 4394 Wade Hampton Boulevard in Taylors, South Carolina, where David Peacock was known to maintain an office. Mr. Silvaggio submitted an affidavit stating that he served the Summons and Complaint by delivery to "David Peacock, as Registered Agent, via Teresa Fant – Secretary and states authorized to accept service personally" and "David Peacock, as Registered Agent via Teresa Fant – Secretary and authorized to accept service, the Secretary of Pleasant Grove Properties, Inc. and leaving with her a copy at 4394 Wade Hampton Boulevard in Taylors, Greenville County, South Carolina, on January 21, 2014 at 12:51 PM."

(R. pp. 160-199; R. pp. 130-158) (Exhibit Filed with the Court at Motion Hearing which Establishes Pre-Suit Correspondence and Service Attempts; Hearing Transcript).

Defendant failed to answer or otherwise plead in a timely manner, and Plaintiff filed an Affidavit of Default on March 18, 2014. Plaintiff filed a Notice of Motion and Motion for Default Judgment (Sum Certain) on March 31, 2014, and the Court entered an Order granting a Default Judgment in Plaintiff's favor in the amount of \$12,930.00 on the same day. The judgment amount consisted of \$12,600.00 for commissions owed and

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<sup>2</sup> Mr. Peacock states in his affidavit that he is a citizen and resident of Walton County, Florida. However, Mr. Peacock is also listed with the South Carolina Secretary of State as the registered agent of Rental One, LLC, and he still provides a Greenville, South Carolina address for himself as registered agent for that company as well. The address that he provides for himself on behalf of Rental One is different than the address he provides for himself on behalf of Pleasant Grove Properties. Public records indicate that, at all relevant times, the property he lists for himself as registered agent of Rental One, LLC was an owner-occupied residence, but Mr. Peacock has never owned it. In summary, the Circuit Court's determination that Mr. Peacock has made no attempt to provide accurate contact information or update the same is well founded.

\$330.00 for costs associated with filing and service. No attorney's fees were sought within NAI's Motion for Default Judgment or awarded by the trial court.

On April 4, 2014, Pleasant Grove Properties filed a Motion to Set Aside Default and for Relief from Judgment. A hearing was held before the Honorable Alison Renee Lee, Circuit Court Judge, on May 23, 2014. The Circuit Court denied Pleasant Grove Properties' motions by Order dated July 24, 2014. Pleasant Grove Properties filed and served a Motion to Alter or Amend pursuant to Rule 59(e) on August 4, 2014, which was denied by Order dated September 19, 2014. This appeal followed.

### **STATEMENT OF FACTS**

On November 12, 2007, Defendant Pleasant Grove Properties, Inc. (as Lessor) entered into a binding Commission Agreement ("Commission Agreement") with Plaintiff NAI Earle Furman, LLC (as Agent) concerning real property located at 1425-C South Buncombe Road in Greer, South Carolina ("Subject Premises"). (R. p. 21).

Paragraph 1 of the Commission Agreement provides as follows:

LESSOR SHALL PAY TO AGENT A COMMISSION TO BE CALCULATED AS FOLLOWS: A CASHED-OUT AMOUNT EQUAL TO SIX PERCENT (6%) OF THE AGGREGATE RENTS TO ACCRUE DURING THE INITIAL TERM OF THE NEW LEASE AS WELL AS FOR ANY EXPANSION SPACE LEASED BY LESSEE. COMMISSION OWED TO AGENT WILL BE FOR ANY ADDITIONAL BUILT OUT SQAURE FOOTAGE AND ANY NEW LEASE TERM WHICH HAS NOT ALREADY BEEN PAID FOR ON THE EXISTING +/- 10,500 SF LESSEE CURRENTLY OCCUPIES AND AGENT HAS ALREADY BEEN PAID FOR. THE TOTAL OF SUCH COMMISSION TO BE PAID BY LESSOR TO AGENT UPON EXECUTION OF THE NEW LEASE AGREEMENT.

(R. pp. 21, 25).

Paragraph 2 of the Commission Agreement provides as follows:

IN THE EVENT THIS LEASE IS RENEWED OR EXTENDED OR A NEW LEASE IS ENTERED INTO BETWEEN THE LESSOR OR LESSEE, THEN IN EITHER

OR [SIC] SAID EVENTS LESSOR SHALL PAY TO AGENT, AS FURTHER COMPENSATION A CASHED-OUT [SIC] EQUAL TO THREE PERCENT (3%) OF ANY EXTENSIONS OR RENEWALS PAYABLE UPON EXECUTION OF SUCH.

(R. pp. 21, 25).

On February 9, 2008, Pleasant Grove Properties, Inc. and Schmolz and Bickenbach USA, Inc. entered into a Lease Agreement for the Subject Premises. (R. pp. 62-77). In Paragraph 36 of said Lease Agreement, Defendant agreed to pay a commission to NAI Earle Furman, LLC upon execution of the Lease Agreement and upon the execution of any extensions of the same. (R. pp. 21, 73). On May 31, 2013, Pleasant Grove Properties entered into a Lease Amendment with its tenant, Schmolz & Bickenbach. (R. pp. 21). Said Lease Amendment constituted an extension of the February 9, 2008 Lease Agreement and, pursuant to the Lease Agreement, Lease Amendment, and Commission Agreement, Defendant was obligated to pay a commission of Twelve Thousand and no/100 Dollars (\$12,600.00) to Plaintiff upon execution of the Lease Amendment. (R. pp. 21-22).

Plaintiff submitted Invoice No. 5750 to Defendant on June 18, 2013 in the amount of \$12,600.00 for the commission due. Said Invoice was payable upon receipt. (R. p. 22, 28). In breach of the parties' agreement, Defendant failed to pay the commission owed to Plaintiff. In violation of the parties' agreement, Defendant attempted to pay installments of \$210.00 (one sixtieth of the Lease Commission), but Plaintiff rightfully rejected the same. (R. p. 22).

By way of letter dated August 6, 2013, Plaintiff demanded payment of the full commission on or before August 21, 2013, but Defendant failed or refused to pay the same. (P. 22). By way of letter dated September 17, 2013, Plaintiff, through counsel,

again demanded payment in full on or before September 27, 2013. (R. p. 22, 32-33).

Defendant again failed or refused to pay the same. (R. p. 22).

Plaintiff filed and served a Summons and Complaint seeking to recover the commission due.

## ARGUMENT

I. THE CIRCUIT COURT PROPERLY DENIED PLEASANT GROVE PROPERTIES, INC'S MOTION TO SET ASIDE DEFAULT AND FOR RELIEF FROM DEFAULT JUDGMENT WHEN PLEASANT GROVE PROPERTIES WAS PROPERLY SERVED, WHEN PLEASANT GROVE PROPERTIES FAILED TO ESTABLISH MISTAKE, INADVERTENCE, SURPRISE, OR EXCUSABLE NEGLIGENCE, AND WHEN THERE IS NO MERITORIOUS DEFENSE

In its Orders that are the subject of this appeal, the trial judge thoroughly considered, analyzed, and rejected Pleasant Grove Properties' claim that the default should be set aside and that it should be relieved from judgment. In doing so, the trial court diligently considered the pleadings and evidence in the record, researched and cited precedent in addition to cases cited by counsel, and appropriately exercised its discretion in denying Pleasant Grove Properties' Motion to Set Aside Default and for Relief from Judgment.<sup>3</sup>

### A. Standard of Review

The standard of review is abuse of discretion. "The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial court. Roberson v. S. Fin. of South Carolina, Inc., 365 S.C. 6, 9, 615 S.E.2d 112, 114

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<sup>3</sup> The record in this case reveals that the trial court spent a considerable amount of time thoroughly and carefully reviewing and considering the evidence and exercising its discretion accordingly. At the hearing, the trial judge seemed to indicate initially that she was inclined to relieve Pleasant Grove Properties from its judgment, but she declined to do so after taking the matter under advisement and considering all of the evidence. The trial court drafted the detailed orders, and no proposed orders were submitted by counsel.

(2005). **The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion.** Id.” Richardson v. P.V., Inc., 383 S.C. 610, 682 S.E.2d 263, 265 (2009) (emphasis added).

B. Pleasant Grove Properties, Inc. was Properly Served

Pleasant Grove Properties, Inc.’s motions must be denied because it was properly served via Teresa Fant, who advised the process server that she was authorized to accept service of the Summons and Complaint on behalf of David Peacock, who was the registered agent, owner, and President of Pleasant Grove Properties. Interestingly, Pleasant Grove Properties acknowledges that it actually received the Summons and Complaint but argues that it did not review it until many weeks following Ms. Fant’s receipt of it. Pleasant Grove Properties was properly served, and therefore the Orders of the Circuit Court should be affirmed.

“Service upon a corporation may be made ‘by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process.’ Rule 4(d)(3), SCRC.” Richardson v. P.V., Inc., 682 S.E.2d 263, 265, 383 S.C. 610 (2009). “Exact compliance with the rules is not required to effect service of process.” Id. “Whether an employee may accept service on behalf of a corporation depends on the authority the corporation conferred upon the employee. In order to determine whether an employee is an authorized agent, the court must look to the circumstances surrounding the relationship and find authority which is either express or implied from the type of relationship between the defendant and the alleged agent. While actual authority is expressly conferred upon the agent by the principal, apparent authority is when the

principal knowingly permits the agent to exercise authority, or the principal holds the agent out as possessing such authority.” Id. (citations omitted).

Here, Teresa Fant was at a place where David Peacock was known to conduct business and where she had previously accepted mail on behalf of David Peacock in his capacity as President of Pleasant Grove Properties. Perhaps most importantly, Ms. Fant *told* the process server that she was authorized to accept service. The trial court found the process server’s affidavit that was filled out and signed the day of service was more credible than the affidavit of Teresa Fant, in which Ms. Fant denies making such statement. This Court has recognized that it is permissible for a trial judge to believe the affidavit of a process server over the affidavit of a defendant’s agent. See Wilder v. Blue Ribbon Taxicab Corp., 396 S.C. 139, 145, 719 S.E.2d 703, 706 (Ct. App. 2011).

The trial court properly found that service was proper, and its rulings should be affirmed.

C. Pleasant Grove Properties, Inc. Failed to Establish Mistake, Inadvertence, Surprise, or Excusable Neglect

Pleasant Grove Properties’ argument that NAI’s judgment should be set aside for mistake, surprise, or excusable neglect is without merit. More specifically, Pleasant Grove Properties does not claim mistake, fails to present any evidence of surprise, and fails to present a reasonable factual basis for a claim of excusable neglect.

With regard to excusable neglect, Pleasant Grove Properties argues that it should be granted relief from judgment because “it took time for the contents of the package, all of which were unknown to the Defendant as established by the affidavits, to be submitted to its attorney for review.” (Initial Brief of Pleasant Grove Properties, p. 26). Although Mr. Peacock swears in his affidavit that Ms. Fant did not tell him about the package until

approximately March 20, 2014, Ms. Fant testified in her affidavit that she called Mr. Peacock and told him about the package which was delivered by a private investigator/process server “several days” after it was delivered (the date of service was January 21, 2014). Even under the most liberal reading of the phrase “several days,” Pleasant Grove Properties would have had sufficient time to respond to the Summons and Complaint (and certainly sufficient time to have its lawyer call and request an extension of time to answer or otherwise plead).

It was well within the trial court’s discretion to reject Pleasant Grove Properties’ argument that it should be relieved from judgment on the basis of excusable neglect. Pleasant Grove Properties seems to suggest that opening a single envelope, reviewing its contents, sending the same to its attorney, and calling the attorney to ensure the matter was being handled is an extremely time-consuming or burdensome process. Those steps are routinely performed in every case that is filed, and Mr. Peacock specifically designated himself as the registered agent of Pleasant Grove Properties for the purpose of receiving process. Furthermore, Pleasant Grove Properties acknowledges that it received a letter from NAI’s counsel on September 18, 2013 in which counsel advised Pleasant Grove Properties that NAI would file suit if the commission was not paid on or before September 27, 2013. Accordingly, prior to NAI filing suit, Pleasant Grove Properties was notified in writing that (1) NAI was pursuing the matter, (2) NAI was represented by Fayssoux Law Firm, PA, and (3) NAI would file suit if Pleasant Grove Properties failed to pay the full commission due. The evidence in the record shows that Pleasant Grove Properties should have known, and probably did know, exactly what was contained in the envelope that it acknowledges receiving from a process server.

The trial court properly found that Mr. Peacock has made no attempt to fulfill his obligations as registered agent of Pleasant Grove Properties and has failed to establish a reasonable factual basis for its claim of excusable neglect. NAI is not aware of any precedent that suggests a registered agent can avoid or turn a blind eye to service after being given written notice that it is coming, and then have the court relieve a defendant from a judgment on the basis of excusable neglect. The trial court properly exercised its discretion in rejecting Pleasant Grove Properties' arguments, and its Orders should be affirmed.

D. Pleasant Grove Properties, Inc. Failed to Establish a Meritorious Defense

Pleasant Grove Properties is required to present evidence of a meritorious defense, and it has failed to do so. Furthermore, Pleasant Grove Properties did not preserve the issue for review. Assuming *arguendo* that service is somehow defective, the trial court should be affirmed on the basis that Pleasant Grove Properties has failed to present evidence of a meritorious defense and has failed to preserve the issue for appellate review.

The trial court found that Pleasant Grove Properties was properly served and that there is no basis for a claim of mistake, surprise, or excusable neglect. Accordingly, the trial court did not reach the issue in its Order denying Pleasant Grove Properties' Motion to Set Aside Default and for Relief from Judgment. If the trial court had reached the issue, it would have found that Pleasant Grove Properties failed to present evidence of a meritorious defense.

“It is clear . . . that a meritorious defense is more than merely a factor to consider under certain 60(b) grounds for setting aside default judgments. In particular, our courts

have held that in order to obtain relief from a default judgment under Rule 60(b)(1) or 60(b)(3), not only must the movant make a proper showing he is entitled to relief based upon one of the specified grounds, he must also make a prima facie showing of a meritorious defense.” McClurg v. Deaton, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008) (aff’d by McClurg v. Deaton, 395 S.C. 85, 716 S.E.2d 887 (2011)).

Furthermore, mere allegations of a meritorious defense are not sufficient. There must be **evidence** of a meritorious defense. “[I]t is well-settled that the moving party in a Rule 60(b) motion has the burden of presenting **evidence** entitling him to relief. Memorandum in support of a motion is not evidence.” McClurg v. Deaton, 395 S.C. at 99, 716 S.E.2d at 894 [FN 1] (citations omitted, emphasis in original). Here, Pleasant Grove Properties filed a proposed Answer and Counterclaim, but it was not verified. Pleasant Grove Properties has failed to present any **evidence**, by affidavit or otherwise, to establish a meritorious defense.

Furthermore, Pleasant Grove Properties failed to request a ruling from the trial court on that issue in its Motion to Reconsider, Alter or Amend, and therefore failed to preserve the same for appellate review.

Assuming, *arguendo*, that Pleasant Grove Properties’ proposed Answer and Counterclaim constituted evidence *and* assuming the issue is preserved for appeal, the substantive facts alleged by Pleasant Grove Properties do not establish a meritorious defense. The underlying action is for the collection of a lump sum commission that is unquestionably due to NAI as a result of a lease extension. Pleasant Grove Properties alleges, however, that it somehow has a defense to the same as a result of certain agents

within NAI showing other properties to its tenant prior to the tenant executing the lease extension.

Pleasant Grove Properties does not allege that Grice Hunt and Ford Borders (who were the NAI brokers representing Pleasant Grove Properties) were engaged in any conduct detrimental to Pleasant Grove Properties. All parties agree that such conduct never occurred. To the extent Pleasant Grove Properties is alleging that *other* agents within NAI represented the tenant and showed it other properties, that would be entirely permissible. The underlying facts of this case involve representation in the context of a commercial lease and not a listing for sale. Accordingly, the statutory requirements pertaining to dual agency disclosures and so forth do not apply.

Additionally, Pleasant Grove Properties' claim that it sustained damages offends notions of common sense. Plaintiff alleges in its proposed Answer and Counterclaim (but fails to submit **evidence**) that the tenant, Schmolz and Bickenbach, paid a lower rate of rent than it would have if an agent of NAI (other than Mr. Hunt or Mr. Borders) had not shown it other available properties. However, it is illogical to believe that a sophisticated, international company such as Schmolz and Bickenbach would have blindly entered into a new lease extension without consulting a broker or otherwise checking market conditions. Plaintiff's argument that it was somehow damaged is dependent upon an unreasonable assumption that Schmolz and Bickenbach would not have reached out to a broker on its own and that it would have paid rent higher than the market rate. There is no allegation (and certainly no evidence) that anyone within NAI shared confidential information to which the tenant would not have otherwise had access. Furthermore, again, there is absolutely no allegation or shred of evidence that the brokers

who represented Pleasant Grove Properties – Grice Hunt and Ford Borders – did anything wrong whatsoever. To the extent that Pleasant Grove Properties has a complaint, it should be with market forces and not with NAI.

Additionally, even assuming that Mr. Hunt and Mr. Borders engaged in inappropriate conduct (which, again, is not even alleged by Pleasant Grove Properties), its claims do not make sense because Mr. Hunt and Mr. Borders would have earned less of a commission than they would have by renewing Pleasant Grove Properties at a higher lease rate. Under the commission agreement, Mr. Hunt and Mr. Borders were motivated to have Schmolz and Bickenbach enter into the longest possible extension at the highest possible rate. In summary, the basis for Pleasant Grove Properties' claims does not make sense and is without merit. Furthermore, Pleasant Grove Properties has failed to offer any evidence beyond bare allegations and has therefore failed to meet its burden of showing that it has a meritorious defense to NAI's claims.

Finally, following the execution of the lease extension, Pleasant Grove Properties mailed a check to NAI for \$210.00, which represents one sixtieth (1/60) of the total commission due on the 60-month lease extension. NAI properly informed Pleasant Grove Properties, pre-suit, that the commission was due in a lump sum, and Pleasant Grove Properties would not be permitted to delay payment of its obligation as it attempted to do. Although Pleasant Grove Properties now argues that the payment of \$210.00 was somehow an attempt at compromise, there is no evidence whatsoever to suggest that this is true. There is no evidence to suggest that Pleasant Grove Properties was dissatisfied or that it did not owe the commission until a judgment was entered against it. Pleasant Grove Properties raised such an issue for the very first time after a

default judgment was entered. Pleasant Grove Properties' payment of \$210.00 was an admission that it owed the commission and was simply an attempt to slow pay the same. Its motion to re-open the case and its pursuit of this appeal are merely a further attempt to delay payment of the obligation.

In summary, Pleasant Grove Properties failed to present **evidence** supporting a meritorious defense and failed to preserve the issue for review. Even if its bare allegations were sufficient to constitute "evidence," the substance of the allegations does not give rise to a meritorious defense. This Court should therefore affirm the decision of the trial court.

### CONCLUSION

For the reasons set forth above and for any other reasons appearing in the record pursuant to Rule 220(c) of the South Carolina Appellate Court Rules, the Circuit Court's Orders denying Pleasant Grove Properties, Inc's Motion to Set Aside Default and For Relief from Default Judgment and denying the accompanying Motion to Alter or Amend should be AFFIRMED.



Paul S. Landis  
FAYSSOUX LAW FIRM, PA  
209 E. Washington Street  
Greenville, SC 29601  
(864) 233-0445  
(864) 233-4781 (Fax)

Attorney for Respondent  
NAI Earle Furman, LLC

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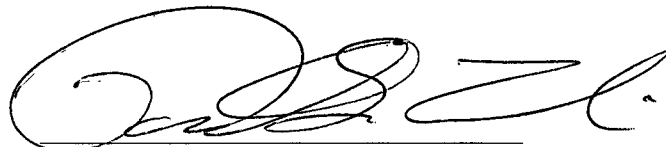
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**CERTIFICATE OF COUNSEL**

The undersigned hereby certifies that Respondent's Final Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.



Paul S. Landis  
FAYSSOUX LAW FIRM, P.A.  
209 E. Washington Street  
Greenville, South Carolina 29601  
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PROOF OF SERVICE

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I certify that I have, this 5th day of May, 2015, served the Final Brief of Respondent and Certificate of Counsel by depositing a copy of the same in the United States Mail, postage prepaid, and addressed as follows:

Jonathan P. Whitehead, Esq.  
Attorney at Law  
410 E. Butler Road, Suite E  
Mauldin, SC 29662



Paul S. Landis  
FAYSSOUX LAW FIRM, P.A.  
209 E. Washington Street  
Greenville, South Carolina 29601  
(864) 233-0445  
(864) 233-4781 (Fax)

Attorney for Respondents

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