

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE DORCHESTER COUNTY

RECEIVED

Court of Common Pleas

MAY 29 2015

Perry M. Buckner, Circuit Court Judge

SC Court of Appeals

Case No. 2012-CP-18-1647

Diane S. Goodstein, Respondent,

v.

Seal-O-Flex, Inc. and Latitude Construction Services, LLC, Defendants,

Of Whom Seal-O-Flex, Inc. is the Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

DID THE CIRCUIT COURT ERR IN DENYING SEALOFLEX, INC.'S MOTION TO SET ASIDE THE DEFAULT JUDGMENT ON THE GROUND THAT THE SUMMONS AND COMPLAINT WERE NOT PROPERLY SERVED?

STATEMENT OF THE CASE

On July 3, 2012, Diane S. Goodstein (hereafter "Goodstein") brought the underlying action against Sealoflex, Inc. (hereafter "Sealoflex") and Latitude Construction Services, LLC alleging breach of contract, breach of express warranties, and violations of the Unfair Trade Practices Act. See Summons, Complaint, & Civil Action Cover Sheet at Exhibit A to Sealoflex, Inc.'s Motion to Set Aside Default Judgment ("Motion") (R. pp. 17-22). Goodstein alleged that she paid \$25,000 to someone to install a Sealoflex product on her roof and that the product and installation were defective. See id. Sealoflex did not answer the Complaint.

On June 11, 2013, Goodstein signed an Affidavit for an order of default against Sealoflex. See Affidavit at Exhibit F to Motion (R. p. 35). On August 26, 2013, the Honorable Perry M. Buckner signed the Order Granting Plaintiff's Motion for Order of Default as to Defendant Sealoflex, Inc. See Order Granting Plaintiff's Motion for Order of Default as to Defendant Seal-O-Flex, Inc. (R. pp. 1-3). This Order was entered on August 30, 2013. See id.

Judge Buckner then held a damages hearing on December 6, 2013. Neither Sealoflex nor Sealoflex's counsel were present at the damages hearing. Thereafter, Judge Buckner signed an Order for Judgment against Sealoflex in the amount of \$130,000 for breach of contract. See Order for Judgment (R. pp. 4-7). Judge Buckner followed up that Order with a Form 4 Order, which he signed on December 23, 2013. See id. That Order was entered on January 7, 2014. See id.

Shortly thereafter, on January 15, 2014, Sealoflex filed a Motion to Set Aside Default Judgment. See Motion (R. pp. 11-40). The Motion was heard by Judge Buckner on July 9, 2014. On July 23, 2014, Judge Buckner denied Sealoflex's Motion to Set Aside Default Judgment. See Order Denying Defendant Seal-O-Flex's Motion to Set Aside Default Judgment ("Order") (R. pp. 8-10). That Order was entered on July 31, 2014. See id.

Sealoflex received written notice of the entry of that Order on August 4, 2014. Thereafter, on September 2, 2014, Sealoflex served and filed a Notice of Appeal. See Notice of Appeal (R. pp. 53-58).

ARGUMENT

BECAUSE SEALOFLEX WAS NOT PROPERLY SERVED WITH PROCESS, THE CIRCUIT COURT NEVER OBTAINED PERSONAL JURISDICTION OVER SEALOFLEX, THE DEFAULT JUDGMENT IS VOID, AND THE DEFAULT JUDGMENT MUST BE SET ASIDE.

Standard of Review

"The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the circuit court." Regions Bank v. Owens, 402 S.C. 642, 647, 741 S.E.2d 51, 54 (Ct.App. 2013) citing Harbor Island Owners' Ass'n v. Preferred Island Props., Inc., 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006). "The circuit court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion." Id. citing Mitchell Supply Co. v. Gaffney, 297 S.C. 160, 163, 375 S.E.2d 321, 322 (Ct.App. 1988). "An abuse of discretion occurs when the judgment is controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." Id. citing In re Estate of Weeks, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct.App. 1997).

Argument

1. Return Receipt was Signed by an Unauthorized Person

Because a default judgment was entered, the standard to set aside the default judgment is set forth in South Carolina Rule of Civil Procedure 60(b). That provision provides that a court may set aside a default judgment if that “judgment is void.” Rule 60(b)(4), S.C.R.C.P. “A judgment is void if a court acts without personal jurisdiction.” BB&T v. Taylor, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006) citing Thomas & Howard Co. v. T.W. Graham & Co., 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). “A court usually obtains personal jurisdiction by the service of the summons and complaint.” Stearns Bank Nat’l Ass’n v. Glenwood Falls, LP, 373 S.C. 331, 337, 644 S.E.2d 793, 796 (Ct.App. 2007).

To effect service of process on Sealoflex, Goodstein had to either deliver 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 and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant,” Rule 4(d)(3), S.C.R.C.P., or send it by “registered or certified mail, return receipt requested and delivery restricted to the addressee,” Rule 4(d)(8), S.C.R.C.P. Goodstein attempted to effect service of process via the latter means, as set forth in Rule 4(d)(8). However, such service was ineffective because the return receipt was signed by an unauthorized person.

“It is undisputed that Plaintiff sent the Summons and Complaint via certified mail, with return receipt requested and delivery restricted to Kauffmann, the registered agent of

Seal-O-Flex.” Order at 2 (R. p. 9); see also Return Receipt at Exhibit B to Motion (R. p. 23). Goodstein’s counsel mailed the Summons and Complaint, on July 10, 2012, to:

Sealoflex, Inc.
C/O Registered Agent
Robert K. Kauffmann
2516 Oscar Johnson Road
Charleston SC
29405

See Return Receipt (R. p. 23).

“It is also undisputed that Wanda Gumbs, the receptionist for Seal-O-Flex, signed the return receipt.” Order at 2 (R. p. 9); see also Return Receipt (R. p. 23); Affidavit of Robert Kauffmann (“Kauffmann Affidavit”) ¶ 9 at Exhibit C to Motion (R. p. 25, ¶ 9); Affidavit of Anne Ellington (“Ellington Affidavit”) ¶ 8 at Exhibit D to Motion (R. p. 27, ¶ 8); Affidavit of Wanda Gumbs (“Gumbs Affidavit”) ¶ 10 at Exhibit E to Motion (R. p. 31, ¶ 10). “Because Plaintiff has demonstrated compliance with the Rules, the burden shifts to Defendant Seal-O-Flex to show that the return receipt was signed by an unauthorized person.” Order at 3 (R. p. 10); see also *Roberson v. S. Fin. of S.C., Inc.*, 365 S.C. 6, 10, 615 S.E.2d 112, 115 (2005). Sealoflex has met this burden.

Ms. Gumbs, the person who signed the return receipt, was not an authorized person. Ms. Gumbs is a receptionist at Sealoflex. See Kauffmann Affidavit ¶ 9 (R. p. 25, ¶ 9); Ellington Affidavit ¶ 9 (R. p. 27, ¶ 9); Gumbs Affidavit ¶ 2 (R. p. 30, ¶ 2). She is not an officer or general agent for Sealoflex. See Gumbs Affidavit ¶ 4 (R. p. 30, ¶ 4). She is not an office manager. See Transcript of Record of July 9, 2014 Hearing on Motion to Set Aside Default Judgment (“Tr.”) 6:12 (R. p. 64, line 12). She does not manage or supervise employees. See Tr. 6:12-13 (R. p. 64, lines 12-13). She does not

hire or fire employees. See Tr. 6:13-14 (R. p. 64, lines 13-14). In fact, Ms. Gumbs has no managerial responsibilities. See Gumbs Affidavit ¶ 5 (R. p. 30, ¶ 5).

In addition, Ms. Gumbs' work responsibilities do not include accepting service of process. See Kauffmann Affidavit ¶ 11 (R. p. 25, ¶ 11); Ellington Affidavit ¶ 11 (R. p. 27, ¶ 11); Gumbs Affidavit ¶ 6 (R. p. 30, ¶ 6). She also has not been granted specific authority by Sealoflex to accept service of process on behalf of it. See Kauffmann Affidavit ¶¶ 10-11 (R. p. 25, ¶¶ 10-11); Ellington Affidavit ¶¶ 10-11 (R. p. 27, ¶¶ 10-11); Gumbs Affidavit ¶¶ 6, 13 (R. p. 30, ¶ 6, p. 31, ¶ 13). And she has not been granted specific authority by Robert Kauffmann to accept service of process on behalf of him. See Tr. 8:5-16 (R. p. 66, lines 5-16). Ms. Gumbs has never knowingly accepted service of process of a summons and complaint on behalf of Sealoflex or Mr. Kauffmann. See Gumbs Affidavit ¶ 8 (R. p. 31, ¶ 8). To the contrary, the only people authorized to accept service of process for Sealoflex are Mr. Kauffmann, Sealoflex's registered agent and President, and Anne Ellington, Sealoflex's Vice President and General Manager. See Kauffmann Affidavit ¶¶ 2-5 (R. p. 24, ¶¶ 2-5); Ellington Affidavit ¶¶ 2-4 (R. p. 26, ¶¶ 2-4). Further, when Ms. Gumbs signed the return receipt for the Summons and Complaint, she did not know that she was signing to acknowledge receipt of a summons and complaint. See Gumbs Affidavit ¶ 11 (R. p. 31, ¶ 11).

Because Ms. Gumbs was not a person authorized to accept service of process on behalf of Sealoflex or Mr. Kauffmann, Sealoflex was not properly served with the Summons and Complaint, the Circuit Court did not obtain personal jurisdiction

over Sealoflex, and the default judgment should be void.¹ The Rules of Civil Procedure make clear that service under Rule 4(d) “shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing the acceptance by the defendant. Any such default or judgment by default shall be set aside pursuant to Rule 55(c) or 60(b) if the defendant demonstrates to the court that the return receipt was signed by an unauthorized person.” Rule 4(d)(8), S.C.R.C.P. (emphasis added). South Carolina Rule of Civil Procedure 4(d)(8) does not state that the circuit court “may” set aside the default judgment. Rather, the Rule makes clear that if the defendant demonstrates that the return receipt was signed by an unauthorized person, it “shall” set aside the default judgment. Rule 4(d)(8), S.C.R.C.P. Sealoflex has met this burden and the default judgment should have been set aside.

For this reason, the Circuit Court’s decision should be overturned as its “judgment is controlled by some error of law” that demonstrates “an abuse of [its] discretion.” Regions Bank, 402 S.C. at 647, 741 S.E.2d at 54. The Circuit Court’s decision was not based on whether Sealoflex demonstrated that the return receipt was signed by an unauthorized person, but rather on the general notion of whether Sealoflex was aware of the pending proceedings. See Order at 3 (R. p. 10). More specifically, the Circuit Court stated that it was “most persuaded by Defendant’s admission at the hearing of this motion

¹ In addition, Ms. Gumbs is not a person on whom Goodstein could otherwise have served to obtain personal jurisdiction over Sealoflex. South Carolina Rule of Civil Procedure 4(d)(3) defines those individuals upon whom personal service can be made to effect personal jurisdiction over a corporate defendant. Ms. Gumbs was not, nor has she ever been, “an officer, a managing or general agent,” Rule 4(d)(3), S.C.R.C.P., of Sealoflex. Gumbs Affidavit ¶¶ 3-5 (R. p. 30, ¶¶ 3-5). Also, Ms. Gumbs has never been “authorized by appointment or by law,” Rule 4(d)(3), S.C.R.C.P., to serve as an agent of Sealoflex. Kauffmann Affidavit ¶¶ 10-11 (R. p. 25, ¶¶ 10-11); Ellington Affidavit ¶¶ 10-11 (R. p. 27, ¶¶ 10-11); Gumbs Affidavit ¶¶ 6, 13 (R. p. 30, ¶ 6, p. 31, ¶ 13).

that Defendant was aware of the pending proceedings and intentionally chose not to respond. Based upon Plaintiff's compliance with Rule 4, SCRCP, and Defendant's admission that it had notice of the action, the Court can find no reason why it should hold that service of process was not proper."² Order at 3 (R. p. 10).

But that is not the standard by which Sealoflex's Motion should be decided. Rather, the standard, as set forth by the Circuit Court in its Order, is whether Sealoflex met its burden to "show that the return receipt was signed by an unauthorized person." Order at 3 (R. p. 10); see also Rule 4(d)(8), S.C.R.C.P. Whether or not Sealoflex "was aware of the pending proceedings" is not relevant. If the return receipt was signed by an unauthorized person—which it was—service of process was not proper and the default judgment is void.

Sealoflex's position is supported by South Carolina case law. "Not every employee of a corporation is an agent of the corporation for the purposes of service of process." Richardson v. P.V., Inc., 383 S.C. 610, 615, 682 S.E.2d 263, 265 (2009).³

² When it came to Sealoflex's attention that a summons and complaint was in its office, Anne Ellington forwarded it to Sealoflex's insurance agent. The agent never responded to Ms. Ellington's email communication and never contacted her about the suit. See Ellington Affidavit ¶¶ 12-13 (R. p. 27, ¶¶ 12-13); see also Tr. 22:23-23:6 (R. p. 80, line 23-p. 81, line 6).

³ The present case is factually dissimilar to Richardson, 383 S.C. 610, 682 S.E.2d 263. In that case, the Court found that the employee had apparent authority to accept service on behalf of the hotel. Id. at 610, 682 S.E.2d at 265-66. The employee was the only one in the hotel when the process server came to deliver the summons and complaint, which represented to third parties that she was in charge. Id. Also, the process server spoke to the manager of the hotel who stated that the process server could leave the papers with the employee or not. Id. The Court concluded that the defendant "knowingly permitted [the employee] to exercise authority to accept service of process and further f[ound] that his manifestations to [the process server] indicated that [the employee] had such authority." Id.

“Whether an employee may accept service on behalf of a corporation depends on the authority the corporation conferred upon the employee.” Id.

Actual appointment for the specific purpose of receiving process normally is expected and the mere fact a person may be considered to act as defendant’s agent for some purpose does not necessarily mean that the person has authority to receive process. The courts 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. Claims by one to possess authority to receive process or actual acceptance of process by an alleged agent will not necessarily bind the defendant. Rather, there must be evidence the defendant intended to confer such authority.

Moore v. Simpson, 322 S.C. 518, 523, 473 S.E.2d 64, 67 (Ct.App. 1996) citing Hamilton v. Davis, 300 S.C. 411, 389 S.E.2d 297 (Ct.App. 1990). As is demonstrated in the affidavits Sealoflex submitted, there is no evidence that Sealoflex “intended to confer” actual authority on Ms. Gumbs. Id. In addition, although there is no evidence that Ms. Gumbs accepted service, if she had, “actual acceptance of process by an alleged agent will not necessarily bind the defendant.” Id. Rather, there must be evidence that Sealoflex “intended to confer such authority” on Ms. Gumbs, which there is not.

The South Carolina Court of Appeals, in Moore v. Simpson, further explained that “[w]ithout specific authorization to receive process, service is not effective when made upon an employee of the defendant, such as a secretary.” Id. at 523-24, 473 S.E.2d at 67. In that case, the process server handed a folded document to the receptionist at the defendant law firm. Id. at 521, 473 S.E.2d at 65. The receptionist admitted that she “routinely receives hand delivered documents for employees of the firm which she then places in the employee’s ‘mail box.’” Id. The receptionist further stated that she was not given the document “in a manner to indicate it was being served . . . or that it was a summons and complaint” and that she did not sign for the document. Id. The process

server claims that he told the receptionist what the documents were and that she said she would accept service. Id. at 521-22, 473 S.E.2d at 66. Additionally, the registered agent for the law firm did get a copy of the summons and complaint, but after inquiring around the office, concluded that they had not been served with the summons and complaint. Id. at 521, 473 S.E.2d at 65-66. Therefore, the defendant did not answer. Id.

On those facts, the Court of Appeals affirmed the trial court's decision to quash service of the summons and complaint as there was no evidence that the law firm "intended to confer authority, either express or implied, upon the receptionist to accept service of process." Moore, 322 S.C. at 524, 473 S.E.2d at 67. The plaintiff failed to produce any evidence that the receptionist had express authority and the trial court apparently resolved the issue of whether the receptionist was aware that the document was a summons and complaint in favor of the law firm. Id.

Although not identical to the present case, the similarities in the fact patterns are such that Moore's holding should control the present case. Ms. Gumbs, like the employee in Moore, was a receptionist, did not have specific authority to accept service of process for the company, did not know what the document was that she was signing for, and did regularly receive mail and distribute it around the office. Further, Ms. Ellington, like the registered agent in Moore, received a copy of the Summons and Complaint, but did not answer.

The United States Postal Service Domestic Mail Manual provides further support for the position that Ms. Gumbs could not accept service of process on behalf of Mr. Kauffmann or Sealoflex. See Tr. 8:5-16 (R. p. 66, lines 5-16). The United States Postal Service requires that, for restricted mail, the restricted addressee must fill out a form or

send a letter to the Postal Service specifically identifying, by name, an agent that is authorized to accept restricted mail for that person. See Mailing Standards of the United States Postal Service, Domestic Mail Manual §§ 503.7.4.3, 503.7.4 (May 7, 2012) (“Mail marked ‘restricted delivery’ is delivered only to the addressee or to the person authorized in writing as the addressee’s agent to receive the mail. . . .”); Tr. 8:5-16 (R. p. 66, lines 5-16). There is no evidence that Sealoflex or Robert Kauffmann submitted such a form or letter to the United States Postal Service. See Tr. 8:5-16 (R. p. 66, lines 5-16). Accordingly, Ms. Gumbs could not accept service of restricted mail for Mr. Kauffmann or Sealoflex.

In addition to not having actual authority, Ms. Gumbs did not have apparent authority to accept service of process on behalf of Mr. Kauffmann or Sealoflex. While it is unsettled in South Carolina whether apparent authority is sufficient to show authorization to accept service of process, if it is sufficient, apparent authority exists only “when the principal knowingly permits the agent to exercise authority, or the principal holds the agent out as possessing such authority.” Roberson, 365 S.C. at 11, 615 S.E.2d at 115. It is the manifestations of the principal, and not the agent, which establish apparent authority. See id. “An apparent agency may not be established solely by the declarations and conduct of an alleged agent.” Id.

In a factually similar case, the South Carolina Supreme Court, pursuant to Rule 60(b)(4), reversed the special referee’s determination that service was proper, and declared the default judgment void. Roberson, 365 S.C. at 12, 615 S.E.2d at 115. In that case, the summons and complaint were mailed to the company’s registered agent, by certified mail, with return receipt requested. Id. at 8, 615 S.E.2d at 113. A clerical

employee signed the return receipt, and the registered agent testified that he never received a copy of the summons and complaint. Id. Despite the fact that the clerical employee signed the return receipt and had accepted service of process for the defendant in several other cases, the Court found that “[t]here [was] no evidence in the record that [the defendant] manifested [the clerical employee] [as] its apparent agent in any way.” Id. at 11, 615 S.E.2d at 115. There was no evidence in the record that established a legal relationship between the clerical employee and the company sufficient to have effectuated proper service. Id. at 12, 615 S.E.2d at 115.

Similarly, there is no evidence that Sealoflex—or, for that matter, Ms. Gumbs—made any representations, consciously or impliedly, that Ms. Gumbs could accept service of process on behalf of Mr. Kauffmann or Sealoflex. In fact, as evidenced by Mr. Kauffmann’s and Ms. Ellington’s affidavits, they have never given Ms. Gumbs authority to accept service of any summons and complaint and Ms. Gumbs’ work responsibilities do not include accepting service of process. See Kauffmann Affidavit ¶¶ 10-11 (R. p. 25, ¶¶ 10-11), Ellington Affidavit ¶¶ 10-11 (R. p. 27, ¶¶ 10-11).

Furthermore, as was addressed in Roberson, the fact that Ms. Gumbs signed for a certified letter a year earlier does not mean that she had apparent authority to sign for the Summons and Complaint. That action does not establish apparent, or implied, authority because it is the past behavior of the company—and not the employee—that is relevant. Roberson, 365 S.C. at 11-12, 615 S.E.2d at 115.

Finally, there is no evidence that Ms. Gumbs had implied authority to accept service of process on behalf of Mr. Kauffmann or Sealoflex. One cannot be found to have implied authority if one does not believe that she has such authority. Id. at 11, 615

S.E.2d at 115. Ms. Gumbs, like the clerical employee in Roberson, did not believe that she had authority to accept service of process and signed an affidavit so stating. Id.; see Gumbs Affidavit ¶¶ 6, 13 (R. p. 30, ¶ 6, p. 31, ¶ 13). The South Carolina Supreme Court found that when the employee did not believe she had authority to accept service of process and the company did not authorize her to accept service of process, the employee did not have implied authority. Id. at 11, 615 S.E.2d at 115. The same should be true for the relationship between Ms. Gumbs and Sealoflex.

2. Sealoflex Filed its Motion within a Reasonable Time

Pursuant to South Carolina Rule of Civil Procedure 60(b), one must make a motion to be relieved from a judgment or order “within a reasonable time.” Rule 60(b), S.C.R.C.P. The Circuit Court entered the default judgment on January 7, 2014. See Order for Judgment (R. pp. 4-7). Sealoflex received notice of the judgment on January 9, 2014, and filed its Motion to Set Aside Default Judgment on January 15, 2014. See Motion (R. pp. 11-40). Therefore, Sealoflex filed its motion to be relieved “within a reasonable time.”

3. Sealoflex has Meritorious Defenses

Although not required in a South Carolina Rule of Civil Procedure 60(b)(4) motion to set aside a default judgment, Sealoflex does have meritorious defenses to this action. BB&T, 369 S.C. at 552 n.1, 633 S.E.2d at 503 n.1. First, Sealoflex denies that it breached any contract with Goodstein. In fact, Sealoflex did not contract with Goodstein to install its product on her roof. See Ellington Affidavit ¶ 15 (R. p. 27, ¶ 15). Second, Sealoflex denies that it breached any warranty. The warranty that comes with the Sealoflex product that was installed on Goodstein’s roof does not cover installation. See

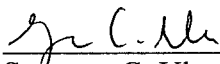
Ellington Affidavit ¶ 16 (R. p. 28, ¶ 16). Third, Sealoflex investigated Goodstein's complaints about the roof and determined that the cause of the blistering was the substrate to which the product was applied and that the product did not cause the blistering. See Ellington Affidavit ¶ 18 (R. p. 28, ¶ 18). Fourth, Sealoflex determined that the blistering was not causing damage to any other component of Goodstein's buildings. See Ellington Affidavit ¶ 18 (R. p. 28, ¶ 18). Finally, the scope of the dollar value of the damage is nowhere near the amount that Goodstein alleges. See Ellington Affidavit ¶ 19 (R. p. 28, ¶ 19).

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Circuit Court and set aside the default judgment.

Respectfully submitted,

May 28, 2015



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APPEAL FROM DORCHESTER COUNTY

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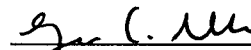
Seal-O-Flex, Inc. and Latitude Construction Services, LLC, Defendants,

Of Whom Seal-O-Flex, Inc. is the Appellant.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 28, 2015 she served a copy of **Final Brief of Appellant and Final Reply Brief of Appellant** by depositing the same in the U.S. Mail, First Class postage prepaid, and addressed to the following:

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Appellant and Final Reply Brief of Appellant comply with Rule 211(b), SCACR.

May 28, 2015



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