THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2015-000553

Meridian Films, Inc., Video Group, LLC, Bodylab, LLC, Firm Direct, LLC and Firm Media, LLC.....Appellants

v.

Everrett C. Davis, Barbara J. Mooneyhan, Carl S. Copeland and James L. Leslie, Jr.....Respondents

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[INITIAL] BRIEF OF APPELLANT

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Columbia, SC
August 31, 2015

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STATEMENT OF ISSUE ON APPEAL

I. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT TO DAVIS AND MOONEYHAN WHEN THE FIRM PRESENTED AT LEAST A SCINTILLA OF EVIDENCE ON EVERY ESSENTIAL ELEMENT OF ITS MALICIOUS PROSECUTION CAUSE OF ACTION AGAINST DAVIS AND MOONEYHAN?

STATEMENT OF THE CASE

This is a malicious prosecution case brought by Meridian Films, Inc., VideoGroup, LLC, Bobylab, LLC, Firm Direct, LLC and Firm Media, LLC (collectively The FIRM) against, inter alia, Everett C. Davis (Davis) and Barbara J. Mooneyhan (Mooneyhan). The FIRM filed the Verified Complaint in this case on October 27, 2006. (Verified Complaint) As of January 27, 2015, all defendants in this case except for Carl Copeland (Copeland), James L. Leslie, Jr. (Leslie), Davis, and Mooneyhan had received dismissals of all claims made against them in the Verified Complaint as a result of successful summary judgment motions.

Copeland, Leslie, Davis, and Mooneyhan filed a Motion for Summary Judgment on January 13, 2014. (Summary Judgment Motion) The trial court held a hearing on this Motion on March 3, 2014. (Transcript March 3, 2014 hearing) The trial court granted summary judgment to Copeland, Davis, Mooneyhan, and Leslie by Order filed on January 27, 2015 (Summary Judgment Order). On March 2, 2015, The Firm timely served and filed its Notice of Appeal from the Summary Judgment Order.[1] (Notice of Appeal)

[1] The Firm appeals only so much of the summary judgment Order as grants summary judgment to Davis and Mooneyhan. The Firm abandons its appeal of the grants of summary judgment to Copeland and Leslie.

STATEMENT OF THE FACTS[2]

In the early 1970s, Anna L.M. Benson (Anna), Cynthia Benson (Cynthia), and Mark Henriksen (Mark) opened "The FIRM" exercise studios in Columbia and Charleston, South Carolina. The exercise routines at The FIRM employed eight then-unique combinations of aerobic exercise and weight training. In the late 1970s, Anna, Cynthia and Mark decided to create exercise videos based upon the The FIRM routines. They formed Meridian Films, Inc. (Meridian) and created a brochure to attract investors to the project. Anna, Cynthia and Mark intended to create lavish video productions that would stand out from ordinary exercise videos, which then were usually filmed against a plain background with a single stationary camera. To this end, they planned to use a decorated set with unique choreography and music composed especially for the video; multiple cameras would capture the action while providing clear views of the exercises in order to aid the viewers understanding of the proper form.

In 1985, Meridian engaged Davis to provide videography services for the first video, which was titled "The FIRM Aerobic Workout with Weights – Volume 1." Davis ultimately performed videography services on 17 of The FIRM's videos. In connection with his services, Davis signed nine contracts and corresponding royalty agreements, all of which were substantially similar. Each of the contracts provided that Davis would be paid a specified amount for his services as production manager or director of photography. The relevant language of the royalty agreements is as follows:

> In exchange for the services rendered ..., Meridian Films, Inc., (Producer) agrees to pay to Everett Davis (Production Manager) the following:
>
> a) a contract payment the receipt of which is hereby acknowledged;

[2] This STATEMENT OF FACTS relies heavily on the rendition of the facts by the United States Court of Appeals for the Fourth Circuit in its opinion in the underlying cases that was issued on October 28, 2003.

> b) at such time [as] the completed videotape is marketed and thirty (30) days after any royalty payments are made to Meridian, a royalty (percentage of sales) of .015% of the wholesale sales price of each video cassette sold by the owner or its assigns. (contracts and royalty agreements)

Davis and Mooneyhan had roles in the production of 17 of The FIRM's videos: six "total body" workouts (The FIRM volumes 1-6); seven "FIRM parts" videos (focusing on particular areas of the body such as abdominal muscles or legs); and four "variety" videos. Davis is identified in the credits of each video as production manager, director of photography or lighting director. Each video is prominently marked in three places – the cassette jacket, the face of the cassette, and the film itself – with a copyright notice that identifies Meridian as the sole copyright holder, *e.g.*, "© 1986 MERIDIAN FILMS, INC." Meridian also obtained copyright registrations for each video as a work for hire based upon the contributions of Anna, Cynthia, and Mark as employees of Meridian.

In the early to mid 1990s, Meridian produced four additional "FIRM parts" videos (the Group B videos) without Davis' help. The Group B videos were composed of excerpts from the previous 17 videos that were linked together with new footage. In late 1995, having learned of the production and distribution of the Group B videos, Davis made a demand on Meridian for over $145,000 in past-due royalty payments. Davis asserted that he was entitled to royalty payments for the portions of the original 17 videos used in the Group B videos; he also claimed that the royalty rate specified in the agreements for The FIRM Volume 2 and The FIRM Volume 3 had been altered to his detriment sometime after he signed the agreements. Meridian paid Davis an additional $1,261, but it refused to pay him any royalties for the Group B videos, maintaining that Davis had no copyrightable interest in the original 17 videos.

Davis and Mooneyhan registered copyrights on the 17 FIRM videos on which they had performed work. On June 29, 1998, Davis and Mooneyhan then brought suit against Meridian

and others in U.S. District Court for the District of South Carolina (District Court) (Davis/ Mooneyhan copyright case).[3] The Amended Complaint filed in the Davis/Mooneyhan copyright case states three claims. First, Davis and Mooneyhan alleged that they were the sole authors of the original 17 videos and that Meridian's preparation of derivative works (the Group B videos) constituted copyright infringement. In the alternative, Davis and Mooneyhan maintained that they were co-authors with Meridian of the original videos and that they were, therefore, entitled to an accounting of profits. The third cause of action of Mooneyhan and Davis stated state law claims for breach of contract.

In their Amended Complaint in the Davis/Mooneyhan, Davis and Mooneyhan did not claim copyright merely in what they contributed, but rather they claimed copyright on the whole work, as either sole author or co-author of the videos. The Amended Complaint in the Davis/Mooneyhan copyright case asked that the District Court "declare plaintiff Davis the author of all the videotapes where defendant Meridian's claimed copyright is canceled," or "declare that plaintiff Davis is a co-author of all other videotapes."

On June 2, 1999, District Court entered an Order dismissing the copyright claims of Davis and Mooneyhan in the Davis/Mooneyhan copyright case on videos 1 through 15 on the grounds that their claims of authorship were time-barred. The District Court followed with an Order entered on February 11, 2000 that dismissed the copyright claims on videos 16 and 17 based on transfer of copyrights. Davis and Mooneyhan filed Notices of Appeal to the United States Court of Appeals for the Fourth Circuit (Fourth Circuit) on March 14, 2000. Mooneyhan failed to perfect her appeal. In Davis' appeal, the Fourth Circuit affirmed the dismissal of Davis' co-authorship (royalty) claims on videos 1 through 15, reversed the dismissal of Davis' claims of

[3] Complete captions of the Davis/Mooneyhan copyright case and the Davis copyright case appear on Appendix A along with detailed procedural history notes for both cases.

infringement on videos 1 through 15, reversed the dismissal of the co-authorship and infringement claims on videos 16 and 17, and remanded.

On August 14, 2002, the District Court entered an Order granting all defendants' in the Davis/Mooneyhan copyright case summary judgment on all claims remanded by the Fourth Circuit on March 14, 2000. Davis filed a Notice of Appeal on January 2, 2003. In Davis' second appeal, the Fourth Circuit affirmed summary judgment on all of the previously remanded claims on October 28, 2003.

On November 28, 2001, Davis filed yet another federal copyright case against Video Group, LLC, Bodylab, LLC and Athena, LLC. (Davis copyright case) The Complaint in the Davis copyright case alleges co-authorship of the 17 videos and copyright infringement based on Davis' claim that he is the sole author of the 17 videos. On February 28, 2003, the District Court dismissed the Complaint in the Davis copyright case on the grounds that the Order granting summary judgment to The FIRM in the Davis/Mooneyham case precluded Davis from establishing elements essential to his claims in the Davis copyright case under principles of collateral estoppel. Davis filed a Notice of Appeal to the Fourth Circuit on March 22, 2003. On appeal, the Fourth Circuit affirmed the District Court's dismissal of the Complaint in the Davis copyright case on collateral estoppel grounds on October 28, 2003.

STANDARD OF REVIEW

In reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56 SCRCP. Boyd v Bellsouth Telephone and Telegraph Co., Inc., 369 S.C. 410, 633 S.E.2d 136 (2006). Summary judgment is appropriate only when it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Calvert v. House Beautiful Paint and Decorating Center,

Inc., 313 S.C. 494, 443 S.E.2d 398 (1994); Rule 56(c) SCRCP. In deciding whether there are any genuine issues of material fact, the court must construe all inferences arising from the evidence against the moving party. Vermeer Carolinas, Inc. v. Wood/Chuck Chipper Corporation, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999).

To defeat a motion for summary judgment, the non-moving party need only show that there is a genuine issue of material fact on each "essential element of his case with respect to which he has the burden of proof." Baughman v American Telephone and Telegraph Company, 306 S.C. 101, 116, 410 S.E.2d 537, 546 (1991) (quoting Celotex Corp. v Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 273 (1986)). On issues on which the burden of proof is the preponderance of the evidence, "the non-moving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment." Hancock v Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). The scintilla of evidence standard is met "if there is any evidence at all in a case ... tending to support a material issue ...." Henry C. Black Black's Law Dictionary 1207 (5th ed. 1979) (emphasis added).

Even when there is no dispute as to evidentiary facts, but only as to the conclusions to be drawn from them, summary judgment should be denied. Redwend Limited Partnership v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003). Moreover, summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Middleborough Horizontal Property Regime Council of Co-owners v. Montedison, S.p.A., 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995). Summary judgment is a drastic remedy. Cunningham v. Helping Hands, Inc., 352 S.C. 485, 575 S.E.2d 549 (2003). Summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues. 352 S.C. at 391, 575 S.E.2d at 552.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING THE MOTION FOR SUMMARY JUDGMENT OF DAVIS AND MOONEYHAN BECAUSE THE FIRM PRESENTED AT LEAST A SCINTILLA OF EVIDENCE ON EACH ESSENTIAL ELEMENT OF ITS MALICIOUS PROSECUTION CAUSE OF ACTION AGAINST DAVIS AND MOONEYHAN.

A. The essential elements of The Firm's malicious prosecution cause of action.

The FIRM's malicious prosecution cause of action has the following essential elements –

> (1) the institution or continuation of original proceedings; (2) by, or at the instance of, the defendant; (3) termination of such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) want of probable cause; and (6) resulting injury or damage.

Jordan v. Deese, 317 S.C. 260, 262, 452 S.E.2d 838, 879 (1995) (quoting Gaar v. N. Myrtle Beach Realty Co., 287 S.C. 525, 528, 339 S.E.2d 887, 889 (Ct. App. 1986).

The remainder of this argument establishes the case that, through the record made before the trial court, The FIRM presented at least a scintilla of evidence on each of the above elements of their malicious prosecution cause of action against Davis and Mooneyhan.

B The FIRM presented evidence that Davis and Mooneyhan instituted original proceedings against The FIRM.

Davis was a party plaintiff in both the Davis/Mooneyhan copyright case and the Davis copyright case, and Mooneyhan was a party plaintiff in the Davis/Mooneyhan copyright case. Because they participated as parties plaintiff in these cases, Davis and Mooneyhan instituted original legal proceedings against The FIRM.[4]

[4] Of the FIRM Appellants, only Meridian, Video Group, LLC, and Bodylab, LLC were defendants in the Davis/Mooneyham and the Davis copyright cases. The FIRM abandons the appeals of Firm Direct, LLC and Firm Media, LLC because they were not defendants in either the Davis/Mooneyhan copyright case or the Davis copyright case.

C The FIRM presented evidence that the original proceedings instituted by Davis and Mooneyham against The FIRM terminated in The FIRM's favor.

The District Court granted summary judgment to The FIRM on all copyright claims of both Davis and Mooneyhan in both the Davis/Mooneyhan and the Davis copyright cases. The Fourth Circuit affirmed these summary judgments. Both the Davis/Mooneyhan and the Davis copyright cases terminated in The FIRM's favor.

D The FIRM presented evidence that Davis and Mooneyhan instituted the original proceedings against The Firm without probable cause and with malice.

1. Probable cause and malice

The South Carolina Supreme Court has defined probable cause as "the extent of such facts and circumstances as would excite the belief in a reasonable mind acting on the facts within the knowledge of the prosecutor that the person charged was guilty of a crime for which he has been charged, and only those facts and circumstances which were or should have been known to the prosecutor at the time he instituted the prosecution should be considered." Elletson v. Dixie Home Stores, 231 S.C. 565, 572, 99 S.E.2d 384, 387 (1957). Based on this definition, want of probable cause, for purposes of malicious prosecution, means the absence of reasonable cause to believe that the malicious prosecution plaintiff committed the wrongful acts alleged by the malicious prosecution defendant in the underlying action. Deaton v. Leath, 279 S.C. 82, 302 S.E.2d 335 (1983). The determination of probable cause is ordinarily a jury matter. Parrot v. Plowden Motor Co., 246 S.C. 318, 143 S.E.2d 607 (1965).

Although the cases suggest that malice is a separate element of malicious prosecution, proof of lack of probable cause is sufficient to prove malice. This is because malice "may be inferred from a want of probable cause." Law v. S.C. Dep't of Corr., 368 S.C. 424, 437, 629

S.E.2d 414, 416 (2006). Malice is also, in most circumstances, a factual matter properly resolved only by a jury. Patterson v. Bogan, 261 S.C. 87, 198 S.E.2d 586 (1973).

2. Davis and Mooneyhan had no probable cause to support their copyright infringement claims because they knew that there was no evidence that they were the sole authors of the 17 videos.

The Copyright Act of 1976 provides that copyright ownership "vests initially in the author or authors of the work." 17 USC § 201(a). "To qualify for copyright protection a work must be original to the author." Feist Publications, Inc. v. Rural Telephone Serv. Co., 499 U.S. 340, 345 (1991). The term "original" means that the author independently created the work with a minimal degree of creativity. The author of a work is the person "who actually creates the work, that is, the person who translates an idea into a fixed tangible expression entitled to copyright protection." Community for Creative Non-Violence v. Reid, 490 U.S. 730, 737 (1989). In the medium of film or videotape, an author may claim sole authorship of a work if the author exercises "such a high degree of control over a film operation ... such that the final product duplicates his conceptions and visions of what the film should look like." Lindsay v. R.M.S. Titanic, 52 U.S.P.Q.2d 1609, 1611 (1999).

Before filing the Complaints in the Davis/Mooneyham case and the Davis case, both Davis and Mooneyhan had no reasonable cause to believe that they were sole authors of the 17 videotapes with infringement claims based on copyrights in those videos. Davis and Mooneyhan knew that Mark and Anna directed portions of the 17 videos and actually directed one of the two cameras used in taping those videos. (Verified Complaint) Based on their own knowledge, Davis and Mooneyhan had no reasonable cause to believe that they had copyright infringement claims because they knew that they were not the sole authors of The FIRM's 17 videos. Davis and

Mooneyhan had no probable cause to support their copyright infringement claims alleged in the Davis/Mooneyhan copyright case and the Davis copyright case.

3. Davis and Mooneyhan had no probable cause to support their copyright royalty claims because they had no evidence that they were co-authors of the 17 videos.

The Copyright Act of 1976 defines a "joint work" as a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole. 17 U.S.C. § 101. Joint authorship entitles co-authors to equal undivided interests in the work. 17 U.S.C. § 201(a). Joint authorship requires two things: (1) the contribution of each joint creator must be copyrightable and (2) the parties must have intended to be joint creators. There is not now nor has there ever been any evidence that The Firm intended to ever recognize Mooneyhan or Davis as joint creators with The FIRM of the 17 videos. The FIRM took great care to see that all of the copies of the 17 videos were marked with copyright notices asserting The FIRM's claim to sole ownership in the copyrights to the 17 videos. Mooneyhan and Davis had no probable cause to support their copyright royalty claims alleged against The FIRM in the Mooneyhan/Davis copyright case and in the Davis copyright case because they had no evidence that The FIRM intended to recognize either of them as joint creators with The FIRM of the 17 videotapes.

E. The FIRM presented evidence that the original proceedings instituted by Davis and Mooneyhan against The FIRM proximately caused damages to The FIRM.

1. Damages

The Firm's Verified Complaint in this case is verified by Mark. Mark swore under oath that he had read the Verified Complaint and that the contents of the Verified Complaint "are true of his own knowledge, except for matters therein state to be alleged on information and belief;

and as to those matters, he believes them to be true." (Verified Complaint, Verification) For purposes of summary judgment, a verified complaint serves the same purpose as an opposing affidavit if: (1) it is based upon personal knowledge (2) it sets forth facts admissible in evidence and (3) it shows that the verifying party is competent to testify to the matters stated in the verified complaint. Dawkins v. Fields, 345 S.C. 23, 30, 545 S.E.2d 515, 519 (2001). The Verified Complaint meets all of the requirements to be considered an opposing affidavit that are set forth in Dawkins.

The Verified Complaint states that "[a]s a direct and proximate result of the Defendants' maintaining Davis' meritless claims of infringement, the Plaintiffs have suffered needless and significant pecuniary loss." (Verified Complaint, ¶ 85) As a sworn statement of fact, this statement supplies at least a scintilla of evidence that The FIRM suffered damages as a result of the spurious claims of copyright infringement and copyright royalties made by Davis and Mooneyhan in the Davis/Mooneyhan copyright case and by Davis in the Davis copyright case.

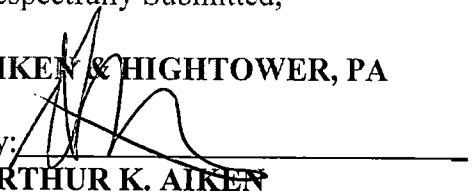
2. Proximate Cause

"The touchstone of proximate cause in South Carolina is foreseeability" Young v. Tide Craft, Inc., 270 S.C. 453, 462, 242 S.E.2d 671, 675 (1978). "If the actors conduct is a substantial factor in the harm to another, the fact that he neither foresaw nor should have foreseen the extent of harm or the manner in which it occurred does not negative his liability." Childers v Gas Lines, Inc., 248 S.C. 316, 325, 149 S.E.2d 761, 765 (1966). Without question, damages are a foreseeable result of malicious prosecution. There is record evidence of proximate cause in this case.

CONCLUSION

The record evidence establishes genuine issues of material fact on every essential element of The FIRM's malicious prosecution cause of action against Davis and Mooneyhan. On this record, the trial court erred in granting the Motion for Summary Judgment made by Davis and Mooneyhan. This Court should reverse the trial court's grant of summary judgment to Davis and Mooneyhan on The FIRM's malicious prosecution cause of action against them and remand this case to the trial court for a trial on the merits of the FIRM's malicious prosecution cause of action against Davis and Mooneyhan.

Respectfully Submitted,



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Columbia, South Carolina
Dated: August 31, 2015

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PROOF OF SERVICE

I certify that I have served the Appellants' Initial Brief and Designation of Matter on counsel for the Respondents on August 31, 2015 by mailing a copy of the Motion to S. Jahue Moore, Moore Taylor Law Firm, PA, PO Box 5709, West Columbia, SC 29171.

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August 31, 2015

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
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RE: Meridian Films et al v. Everrett C. Davis et al
Appellate Case No.: 2015-000553

Dear Ms. Kitchings:

Enclosed for filing, please find an original and one copy each of Appellants' Initial Brief and Appellants' Designation of Matter in the above-referenced matter. Please return date-stamped copies of the enclosed to our office in the self-addressed, stamped envelope, which is also enclosed.

By enclosure with a copy of this letter, I have served the enclosed on the Respondents' counsel, S. Jahue Moore. Please call me if you have any questions or need any clarification regarding these enclosures.

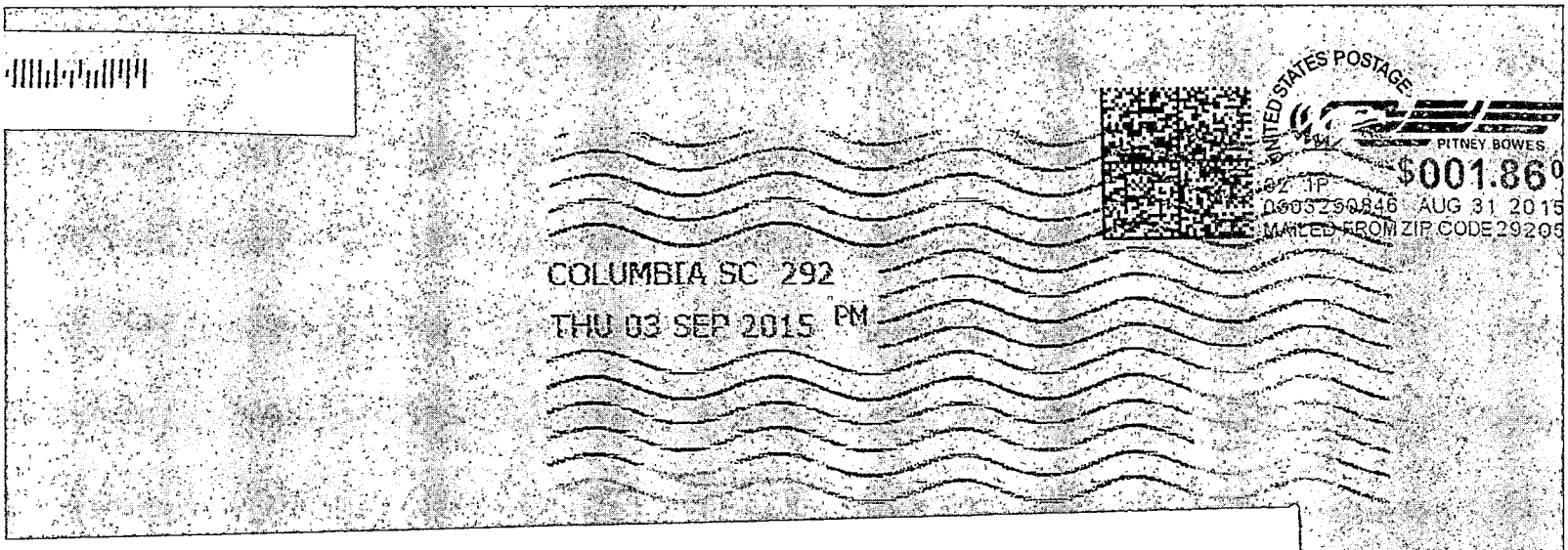
Thank you for your help.

Sincerely,

Arthur K. Aiken
art@aikenandhightower.com

Enclosures as stated

cc: S. Jahue Moore (w/enclosure)
Mark Henriksen (w/enclosure)



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