

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

SC Court of Appeals

Joseph M. Strickland, Master-in-Equity

Appellate Case No. 2014-002627  
Common Pleas Case No. 2011-CP-40-7187

South Carolina Community Bank.....Respondent,

v.

Salon Proz, LLC, Columbia Empowerment Zone, Inc. d/b/a The Columbia  
Empowerment Zone, and Frank Mitchell, Defendants,

Of which Salon Proz, LLC is the.....Appellant.

FINAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES

- I. Did the master-in-equity err in denying Appellant's motion to transfer the case to the general docket for jury cases where the clerk of court had signed and filed an order referring both a foreclosure claim and compulsory, at-law counterclaims to the master-in-equity and no waiver of Appellant's jury demand had occurred?**
  
- II. Did the master-in-equity err in denying Appellant's motion to transfer the case to the general docket for jury cases where the Appellant's amendment of its answer and counterclaim, which was granted after the order referring the case had been entered, demanded a jury trial and created new issues of fact in addition to those posed by the original answer and counterclaim?**

## STATEMENT OF THE CASE

Respondent South Carolina Community Bank (hereinafter “SCCB”) brought this foreclosure action against the Appellant, Salon Proz, LLC (hereinafter “Salon Proz”), and others having or claiming a lien in Salon Proz’s property subject of the foreclosure claim. (R. pp. 7-33.) Attached to the summons and complaint was an unsigned document that the complaint alleged was the note subject of the foreclosure action. (R. pp. 10, 20.) Salon Proz answered the complaint and also asserted counterclaims, on which it demanded a jury trial. (R. pp. 34-42.) The counterclaims asserted in the answer and counterclaim were styled as follows:

1. Breach of contract through breach of the covenant of good faith and fair dealing;
2. Slander of title;
3. Usury law; and
4. Predatory lending.

(R. pp. 39-41.)

Two months afterward, SCCB sent the clerk of court a motion to refer the case to the master-in-equity. (R. pp. 54-57, 143.) Along with the motion, SCCB sent a proposed order of reference. (R. p. 143.) Neither the motion, the proposed order of reference, nor the accompanying cover letter mentioned Salon Proz’s counterclaims or jury demand. (R. pp. 5-6, 54-57, 143.) Instead, the proposed order of reference only stated that “[i]t appears from the pleadings that the within action has been brought for the foreclosure of a mortgage and lies within the equity jurisdiction of this Court.” (R. p. 5.)

The letter accompanying the motion and proposed order of reference did not ask the clerk of court to sign the proposed order, and the proposed order did not contain the words “clerk of court” under the signature line or any similar words that would indicate that SCCB sought for it to be signed by the clerk of court. (R. pp. 5-6, 143.)

The motion to refer states that SCCB

will move before the Presiding Judge for the Court of Common Pleas for Richland County, or his designee, in the Richland County Judicial Center, on the tenth (10<sup>th</sup>) day after service hereof, at 10:00 a.m., or at such other time and place as the Court may instruct, for an Order referring this case to the Honorable Joseph M. Strickland, as Master In Equity for Richland County[.]

(R. p. 55.)

Nonetheless, and despite Salon Proz’s jury demand and counterclaims being in the clerk of court’s file for the case, the clerk of court signed and filed the order of reference. (R. pp. 5, 34-42.)

Later that year, Salon Proz hired another attorney to take over its representation in this case. (R. pp. 58-61, p. 91 ln. 18-21, p. 94 ln. 15-17.) That attorney got a copy of the clerk of court’s file and discovered the order of reference had been signed and filed. (R. p. 94 ln. 15-17.) Salon Proz’s attorney then consulted with SCCB’s attorney and made a motion to transfer the case back to the general docket for jury cases. (R. pp. 58-61.)

Shortly thereafter, Salon Proz moved to amend its answer and counterclaim, attaching its proposed amended answer and counterclaim, demanding a jury trial, to its motion. (R. pp. 62-75.) The motion to amend sought to make Salon Proz’s counterclaims as follows:

1. Violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*;
2. Breach of contract (including, but not limited to, through breach of the covenant of good faith and fair dealing);
3. Breach of contract accompanied by fraudulent act;
4. Slander of title;
5. Libel; and
6. Negligent misrepresentation.

(R. pp. 69-73.)

After a hearing on a number of motions in the case, the master granted Salon Proz's motion to amend but denied the motion to return the case to the jury docket.<sup>1</sup> (R. p. 1.) Neither the order nor the master's spoken words at the hearing state the master's reasoning behind denying the motion. (R. pp. 1-2, p. 100 ln. 20.)

Salon Proz made a timely motion to reconsider. (R. pp. 76-87.) After a hearing on that motion, the master denied it. (R. p. 3.) This appeal followed.

### **STATEMENT OF FACTS**

Salon Proz's predecessor counsel never knew of, much less received written notice of, the entry of the order of reference, and the record does not show the contrary. (R. p. 97 ln. 2-6, p. 118 ln. 6-11.) He certainly never consented to the reference of this case to the master-in-equity. (R. p. 118 ln. 6-11.) Given Salon Proz's filed jury demand

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<sup>1</sup> The master-in-equity also granted SCCB's motion to appoint a receiver, but SCCB later withdrew that motion and consented to the vacation of the order appointing a receiver as part of the master's ruling on Salon Proz's motion to reconsider. (R. pp. 1-3.)

on its at-law counterclaims, its counsel was entitled to believe that a hearing would be held on the motion to refer this case – a hearing that has never been had.

### **STANDARD OF REVIEW**

“Whether a party is entitled to a jury trial is a question of law.” Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). “An appellate court may decide questions of law with no particular deference to the [lower] court.” Id. at 15.

### **ARGUMENT**

#### **I. No waiver of Salon Proz’s jury demand occurred.**

Because of the sparse nature of the master’s orders and words at the hearings in this case, we do not know why the master denied Salon Proz’s motion to transfer this case to the jury docket. (R. pp. 1-2, p. 100 ln. 20.) SCCB’s counsel argued that former counsel for Salon Proz had tacitly consented to reference to the master-in-equity. (R. p. 96 ln. 3-8, p. 120 ln. 4-18.)

The right to a jury trial is a substantial right, and any contended waiver of the right to trial by jury is strictly construed. Broome v. Watts, 319 S.C. 337, 340, 461 S.E.2d 46 (1995); North Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc., 307 S.C. 533, 535, 416 S.E.2d 637 (1992); Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863 (Ct. App. 2002). “Waiver is the voluntary and intentional relinquishment of a known right.” Provident Life and Accident Ins. Co. v. Driver, 317 S.C. 471, 451 S.E.2d 924, 928 (Ct. App. 1994).

Here, nothing in the record demonstrates that Salon Proz’s predecessor counsel was ever aware of the entry of the order of reference. (R. p. 94 ln. 13-15.) In light of Salon Proz’s filed jury demand on its at-law counterclaims and the language in SCCB’s

motion to refer that stated a hearing would be held on the motion, it was reasonable for Salon Proz's attorney to assume that a hearing would be held on the motion to refer, at which time a circuit judge would decide whether to sign SCCB's proposed order. (R. pp. 34-41, 54-57.) Neither SCCB's motion nor the cover letter submitting the motion and proposed order asked the clerk of court to sign the proposed order of reference. (R. pp. 54-57, 143.)

This record does not show that Salon Proz – through its previous counsel or anyone else – did anything that was a “voluntary and intentional relinquishment” of its right to a jury trial on its counterclaims. *Id.* Salon Proz's predecessor counsel never did anything that indicated consent to the order of reference. He did not participate in any hearing before the master-in-equity, as no hearings were held in the case while he was Salon Proz's lawyer. Especially since a purported waiver of the right to a jury trial is strictly construed, the absence of evidence of any action or omission on the part of Salon Proz or its lawyer indicating such waiver supports the only reasonable conclusion – no such waiver occurred. (R. p. 97 ln. 2-6, p. 118 ln. 6-11.)

**II. The clerk of court lacked the power to refer this case, which ceased to be simply “an action for foreclosure” once Salon Proz asserted other claims, to the master-in-equity.**

Rule 53(b), SCRCP, provides as follows:

In an action where the parties consent, in a default case, or an action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge or the clerk of court. In all other actions, the circuit court may, upon application of any party or upon its own motion, direct a reference of some or all of the causes of action in a case. Any party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and, upon the filing of a

jury demand, the matter shall be returned to the circuit court.

Salon Proz answered and counterclaimed in this case, making a timely jury demand on at-law counterclaims. (R. pp. 34-43.) At that time, this case ceased to be just “an action for foreclosure” and became an action for foreclosure, breach of contract, slander of title, and violation of usury and predatory lending laws. (R. pp. 7-43, p. 94 ln. 20 through p. 95 ln. 10, p. 98 ln. 9-11.) That made this a case that is beyond the scope of the clerk of court’s power and authority under Rule 53(b), SCRCP, to issue orders of reference. (R. pp. 7-43, p. 94 ln. 17 through p. 96 ln. 1, p. 98 ln. 9 through p. 99 ln. 9.)

The order of reference is void. (R. p. 95 ln. 23). The clerk of court lacks the power to refer anything to a master-in-equity other than by consent, in a default case, or in an action for foreclosure – not an action for foreclosure *and other claims*. Rule 53(b), SCRCP. The clerk of court’s reference authority under Rule 53(b) is essentially subject matter jurisdiction on a small scale, since subject matter jurisdiction is the power to hear and determine a certain type of case, e.g., City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 100, 674 S.E.2d 524, 529 (Ct. App. 2009), and Rule 53(b) vests the clerk of court with the power to determine whether to issue orders of reference only in certain types of cases. The clerk’s reference power is limited to those specific situations, as it should be. Were it otherwise, clerks of court, not judges, would be empowered to determine the merits of whether a case may be properly referred.

An order issued without subject matter jurisdiction is a complete nullity and is without legal effect. E.g., Universal Benefits, Inc. v. McKinney, 349 S.C. 179, 183, 561 S.E.2d 659 (Ct. App. 2002). The issuance of the order of reference by the clerk of

court in this case was beyond the scope of the clerk's power to issue orders of reference. Rule 53(b), SCRCP. The clerk of court had no authority to refer this case, in which claims other than what Rule 53(b) provides a clerk can refer, were pending. Accordingly, the order of reference is void, and it must be vacated.

**III. Even if the clerk of court had had the power to refer Salon Proz's counterclaims to the master-in-equity, the clerk of court was still wrong to do so, and return to the general circuit court docket would still be required under Rule 53(b), SCRCP.**

**a. The plain terms of Rule 53(b) provide that this case must be returned to the general docket for jury cases.**

Rule 53(b), SCRCP, provides that when a case has been referred to a master-in-equity, "[a]ny party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and, upon the filing of a jury demand, the matter shall be returned to the circuit court." (R. p. 59.) Under this Rule, the return of this case to the circuit court's general docket for jury cases is required, as a jury demand was made in Salon Proz's pleadings, including in an amended pleading made after the filing of the order of reference. (R. pp. 34, 64, 84-85.) The "return to the circuit court" described in Rule 53(b) is automatic, per the language of the Rule. (R. pp. 84-85.) It is not discretionary. (R. p. 85.) If a decision is to be made concerning whether Salon Proz's legal counterclaims are compulsory (thus entitling Salon Proz to a jury trial on them), that decision will need to be made by the circuit court after this action is returned to the circuit court's general docket for jury cases per the mandatory language of Rule 53(b). (R. p. 85, p. 95 ln. 10-15.)

**b. As Salon Proz's at-law counterclaims are compulsory, the master prejudicially erred in denying the motion to transfer this case to the jury docket.**

The master's decision to deny the motion to transfer this case to the general docket for jury cases was prejudicial error because Salon Proz is entitled to a jury trial in this case. In both its original answer and counterclaim and its amended answer and counterclaim, Salon Proz asserted compulsory at-law counterclaims. Rule 13(a), SCRCP; (R. pp. 39-41, 69-73.) Alternatively, at least the counterclaims asserted in the amended answer and counterclaim are compulsory. (R. pp. 69-73.)

A counterclaim is compulsory if it arises out of the same transaction or occurrence that is the subject of the plaintiff's claim and it does not require that third parties be added as parties to the case. Rule 13(a), SCRCP. An examination of the counterclaims subject of the answer and counterclaim and the amended answer and counterclaim shows that they mostly involve whether the facts are as SCCB claims they are and as they must be in order for SCCB to prevail on its foreclosure claim, whether SCCB is entitled to prevail in this action, and the events concerning SCCB's representations to Salon Proz about the terms of the loan during the loan origination process. (R. pp. 34-41, 64-73.) For example, the original answer and counterclaim alleged "[t]hat Plaintiff committed and engaged in predatory lending by representing that the interest rate would be lower than it was in actuality." (R. p. 41.)

The amended answer and counterclaim makes the compulsory nature of the counterclaims it asserts even more plain. (R. pp. 64-73.) Some excerpts from the amended answer and counterclaim follow:

The Plaintiff unequivocally agreed to settle this matter through a modification of the loan subject of this action.

The Defendant is and has been ready, willing, and able to make monthly payments going forward at the monthly payment amount under the modification.

The Plaintiff cannot maintain this foreclosure action, having settled the foreclosure claim.

...

As shown by the exhibits to the Complaint, the purported note subject of this case is not signed.

As shown by the allegations of the Complaint, the Plaintiff's claim is dependent upon the existence of the purported note subject of this case.

The purported note subject of this case does not exist.

...

The Plaintiff has engaged in a pattern of renegeing upon promises to modify or otherwise restructure loans, including, but limited to, the loan subject of this case.

...

Before the loan subject of this action was made, the Plaintiff promised the Defendant that it would modify or otherwise restructure the loan on terms more favorable to the Defendant.

This promise was part of the consideration for the Defendant's entry into the loan subject of this case.

This promise is part of the terms of the loan subject of this case.

The Plaintiff has refused to honor this promise.

...

The Plaintiff slandered the Defendant's title by recording in the public land records a mortgage document and assignment of rents document, both of which are by their

terms dependent upon the existence of the purported note subject of this case.

The purported note subject of this case does not exist.

The mortgage and assignment of rents contain false statements.

...

The Plaintiff has published statements concerning the Defendant in writing.

Such statements include statements to the effect that the Defendant is currently delinquent in its payments with regard to the loan subject of this action and is in default thereof.

...

The Plaintiff falsely represented to the Defendant that the Plaintiff would modify or otherwise restructure the terms of the loan more favorably to the Defendant.

(R. pp. 68-72.)

An examination of the affidavit of Yvonne Jones, member and operator of Salon Proz, supplies details further showing that the factual happenings that underlie Salon Proz's claims are the same ones that underlie SCCB's claims. (R. pp. 127-130.)

Compulsory, at-law counterclaims made by a defendant in a case in which the plaintiff has asserted only causes of action that sound in equity must be tried by a jury if a jury demand has been made on the claim. Wachovia Bank, N.A. v. Blackburn, 407 S.C. 321, 755 S.E.2d 437 (2014); Johnson v. S.C. Nat. Bank, 292 S.C. 51, 54-56, 354 S.E.2d 895 (1987). What is more difficult in many cases than it seems in the abstract is determining whether a counterclaim is compulsory or permissive.

By order of April 9, 2015, the Supreme Court of South Carolina granted rehearing in Carolina First Bank v. BADD, L.L.C., Op. No. 27486 (S.C. Sup. Ct. filed

Jan. 28, 2015) (Shearouse Adv. Sh. No. 4 at 21), undoing what was arguably the most restrictive reading of what constitutes a compulsory counterclaim in a mortgage foreclosure action handed down by the Supreme Court since the adoption of the South Carolina Rules of Civil Procedure. Carolina First Bank v. BADD, L.L.C., App. Case No. 2013-00107 (S.C. Sup. Ct. Order dated April 9, 2015). In BADD, the Court held that a guarantor who was sued on a cause of action to collect on his guaranty brought in the same case as a foreclosure claim had not asserted compulsory counterclaims, stating as follows:

Here, the execution of the guaranty agreements was the “transaction or occurrence” that gave rise to McKown [the guarantor]’s inclusion in the Bank’s foreclosure complaint. McKown’s civil conspiracy counterclaim does not arise out of that transaction or occurrence because it bears no logical relationship to either the execution or enforceability of the guaranty agreements.

BADD, Op. No. 27486 (Shearouse Adv. Sh. No. 4 at 26).

This represented a radical departure from the Court’s previous jurisprudence in this area. Never before had our Supreme Court limited what the “transaction or occurrence” giving rise to a claim for debt collection to the *execution* of the contract documents. Up to that point, the Supreme Court’s jurisprudence in this area embraced a far wider set of matters relating to the parties’ relationship as being what arises out of the same transaction or occurrence as the opposing party’s claim.

In N.C. Fed. Sav. & Loan Ass’n v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989), the bedrock case of modern South Carolina jurisprudence in this area, the Supreme Court adopted the “logical relationship” test (still our test today) for determining whether a counterclaim is compulsory and held DAV’s counterclaim was

compulsory because “there [was] a logical relationship between the enforceability of the note which [was] the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided default on the note by the joint venture.” The Court made clear the reason for doing so: of the four tests considered by the Court for whether a counterclaim is compulsory, the Court settled on the “logical relationship test,” which is “by far the most widely accepted *because of its flexibility*.” Id. (emphasis added). What that “flexibility” means is shown by what the Court did in the DAV case, a case in which the plaintiff’s claim was for foreclosure of a mortgage.

The Court’s description of DAV’s counterclaims follows:

- 1) breach of a subsequent oral contract to arrange additional financing for interest payments and construction costs;
- 2) breach of the joint venture agreement as parent company of joint venturer NCF by bringing the foreclosure action;
- 3) breach of fiduciary duty to co-joint venturers;
- 4) wrongful dissolution of the joint venture by failing to voluntarily refrain from foreclosure as agreed;
- 5) violation of the Unfair Trade Practices Act by breaching the oral agreement;
- 6) breach of two subsequent oral contracts to purchase DAV’s interest in the joint venture.

Id. at 517.

The Court, in a decision that has never been overruled, held that all but the sixth counterclaim on this list was compulsory. Id. at 518. *All* of those compulsory counterclaims were based on events that occurred after the execution of the loan

documents. Id. The logical relationship that each of those counterclaims had to the plaintiff's foreclosure claim was that each counterclaim arose out of the parties' relationship that was the subject of the foreclosure claim, dealt with the manner in which the loan was administered, or both. Id.

The Court in DAV noted the following:

Clearly, there is a logical relationship between the enforceability of the note which is the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided default on the note by the joint venture.

DAV, 298 S.C. at 518. If DAV's counterclaims were compulsory, Salon Proz's definitely are. Salon Proz's counterclaims arise out of the very making of the subject loan.

The touchstone of the logical relationship test of whether a counterclaim is compulsory or permissive is its *breadth* – flexible breadth, but breadth nonetheless. Among the reasons for this breadth and flexibility is the concern the Supreme Court expressed in cases where both legal and equitable claims were present that “caution should be taken to assure that, under the circumstances of the case, a joint trial will not deprive a party of his right to a full jury trial of legal issues.” Johnson, 292 S.C. at 55.

Further, a broad but flexible conception of the compulsory/permissive counterclaim distinction, geared toward preserving the jury trial right, especially in a case of doubt, dovetails neatly with the purpose behind the requirement of Rule 13(a), SCRPC, that compulsory counterclaims a defendant has against a plaintiff must be asserted in the same suit. Rule 13(a)'s purpose is “to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common

matters.” Beach Co. v. Twillman, Ltd., 351 S.C. 56, 62, 566 S.E.2d 863 (Ct. App. 2002). The idea is to have everything about a given matter between the same parties decided in the same case.

A counterclaim is compulsory “if it arises out of the same transaction or occurrence as the opposing party’s claim[,]” which is ascertained by determining whether there is “*any* logical relationship between the claim and the counterclaim[.]” DAV, 298 S.C. at 517, 518 (emphasis added). Too narrow a construction of the logical relationship test has the effect of doing away with the very flexibility that was the reason for the Supreme Court’s choice of the logical relationship test. Id. at 518.

BADD was indeed a bad decision. If the Court reaches the same result after rehearing, the BADD decision should be overruled. But here, Salon Proz’s counterclaims, or at least its counterclaims for breach of contract, breach of contract accompanied by fraudulent act, slander of title, and negligent misrepresentation, even meet the BADD standard of arising out the origination of the loan. (R. pp. 69-73.)

The counterclaims here bear a logical relation to SCCB’s foreclosure claim and arise out of the origination and administration of the same mortgage loan SCCB seeks foreclosure of in this action. (R. pp. 64-73, 85.) One of the things they concern is whether SCCB has any note and mortgage to enforce and arise from the making of the loan that is the subject of SCCB’s foreclosure claim. (R. pp. 34-41, 64-73, 85.)

**IV. In any event, Salon Proz’s amended answer and counterclaim demanded a jury trial and created new issues of fact in addition to those posed by the original answer and counterclaim. Accordingly, return to the general docket was also required for that reason.**

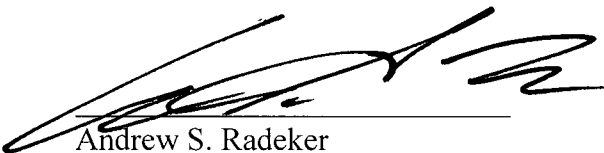
Salon Proz’s amended answer and counterclaim asserted new claims based on matters not addressed by its pre-amendment claims. Salon Proz’s right to a jury trial

could not have been waived as to those claims. This court has noted that “a litigant’s entitlement to a jury trial on the issues presented by an amended pleading, when no prior demand for a jury trial has been made, turns on whether the amended pleadings created new issues of fact.” King v. Shorter, 291 S.C. 501, 503, 354 S.E.2d 402, 403 (Ct. App. 1987). The amendment here put into issue SCCB’s statements about the loan (the libel claim) and whether SCCB promised to modify the loan. (R. pp. 68-73.) These issues were not presented by the original answer and counterclaim. Accordingly, even if Salon Proz *had* waived its right to a jury trial on what was pled in its original answer and counterclaim, it would still be entitled to one based on its amended answer and counterclaim. Id.

### **CONCLUSION**

The master erred in denying Salon Proz’s motion to transfer this case to the general jury docket. This court should reverse the master and remand this case to the general docket for jury cases.

Respectfully submitted,



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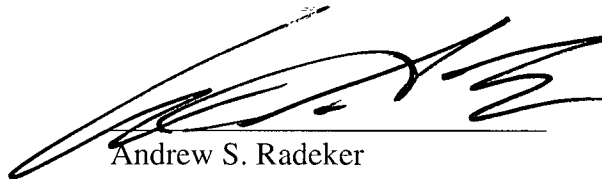
Salon Proz, LLC, Columbia Empowerment Zone, Inc. d/b/a The Columbia  
Empowerment Zone, and Frank Mitchell, Defendants,

Of which Salon Proz, LLC is the.....Appellant.

CERTIFICATE OF COUNSEL

I certify that the foregoing brief complies with Rule 211(b), SCACR.

Respectfully submitted,



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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Joseph M. Strickland, Master-in-Equity

Appellate Case No. 2014-002627  
Common Pleas Case No. 2011-CP-40-7187

South Carolina Community Bank,.....Respondent,

v.

Salon Proz, LLC, Columbia Empowerment Zone, Inc. d/b/a The Columbia  
Empowerment Zone, and Frank Mitchell, Defendants,

Of which Salon Proz, LLC is the.....Appellant.

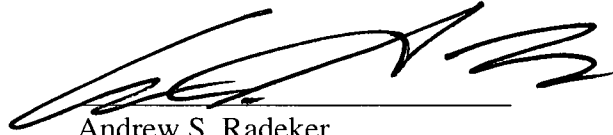
PROOF OF SERVICE

I certify that I served the appellant's final briefs by depositing a copy of them  
on the date shown below in the United States Mail, postage prepaid, addressed as  
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October 13, 2015

A handwritten signature in black ink, appearing to read 'A. S. Radeker', written over a horizontal line.

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