THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS
HON. ALEXANDER S. MACAULAY

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APPELLATE CASE NO.. 2014-000220

PLANTATION FEDERAL BANK as successor in interest to
FIRST SAVERS BANK . . . RESPONDENT

VS

J. CHARLES GRAY and WATERFORD RIDGE
OWNERS ASSOCIATION, INC., DEFENDANTS,
Of whom J. CHARLES GRAY is an APPELLANT

PLANTATION FEDERAL BANK as successor in interest to
FIRST SAVERS BANK . . . RESPONDENT

VS

PEGGY B. GRAY and WATERFORD RIDGE
OWNERS ASSOCIATION, INC., DEFENDANTS,
Of whom PEGGY B. GRAY is an APPELLANT


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of Appeals


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# FINAL BRIEF OF APPELLANTS

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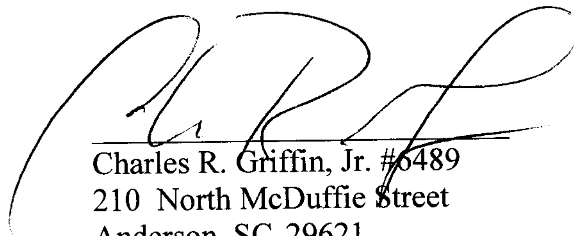


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January 25, 2015

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## STATEMENT OF ISSUES ON APPEAL

I. Did the Court err in granting Summary Judgment in favor of the Respondent?

## STATEMENT OF THE CASE

These two consolidated actions from the Appellants' purchase and financing of Lots 27 and 29 Waterford Ridge (hereinafter "the Lots") which were being sold pursuant to a real estate auction. Record 230, ll. 8 – 24.

Appellants had purchased such properties before at such auctions. Charles Gray Record 230, l. Record 231, ll. 1 – 25, Record 232, ll. 1 – 25, Record 233, ll. 1 – 25, Record 234, ll. 1 – 12, Record 235, ll. 2 – 17.

At the time, Appellants were in the business of purchasing and improving real estate for resale. Record 233, ll. 18 – 25, Record 239, ll. 1 – 3.

At these auction, there were a number of employees of different lending institutions, along with their appraisers, present soliciting business to finance the sales from the auctions. Record 237, ll. 24 – 25, Record 238, ll. 1 – 25, Record 239, ll. 1 – 20, Record 263, ll. 13 – 25, Record 264, ll. 1 – 5.

Further, all of the purchases Appellants made at these auctions were financed pursuant to "Interest Only" short term financing loans which were generally renewed at the time the loan became due. Record 249, ll. 5 – 22.

Appellant Charles Gray handled the financing transactions, although the Lots were titled separately in his name and Appellant Peggy Gray's name. Charles Gray Record 259, ll. 6 – 25.

When Appellants initially purchased the lots in question Respondent's employee Shane Smith (hereinafter "Smith") was employed with another financial institution, Community First. Record 239, ll. 13 – 20.

Further, prior to Appellants contact with Respondent, Appellants had developed a business relationship with Smith who subsequently became employed with Respondent. Record 239, ll. 16 – 25, Record 240, ll. 1 – 6, Record 305, ll. 5 – 8. Record 261, ll. 8 – 25, Record 262, ll. 1 – 14, Record 272, ll. 4 – 9.

The initial purchase of the Lots was financed by Community First. Charles Record 249, ll. 23 – 25, Record 250, ll. 1 – 25, Record 251, ll. 1 – 14, Record 260, ll. 15 – 25. Record 353, ll. 1 – 4.

Pursuant to Smith's solicitations and while Smith was employed with Community First, Appellants financed the purchase of the Lots. Record 227, ll. 3 – 5, Record 240, ll. 10 – 13.

24 Q. All right. And Mr. Smith was employed by?
25 A. Community First, and he was on that site that day. He
Record 239

1 was under that tent that day. And he walked over that
2 lot with me that day. And he knew that it was an
3 interior lot, and he knew that I had to pay 10 percent
4 down. Record 239 & 240

5 like that. But that's about the extent of it. And
6 from there he went to First -- Community First as a
7 V.P. And I -- and he was at the auction representing
8 Community First. So he went -- he helped me walk over
9 the lot, like I indicated before, and we agreed to
10 -- with all the other banks, **I agreed to go to**
11 **Community First on those two lots, 27 and 29, with**
12 **him, since I sort of knew him and interest only. And**
13 **all the banks standing there was interest only, so**
14 **might as well go with him.**
Record 262 (Bold Added)

When the loans matured, Community First renewed the loans Record 253, ll. 14 – 22. Record 354 ll. 1 – 8. Record 354, Record 353, ll. 1 – 4.

A course of dealing regarding renewing these short term "Interest Only" loans had developed among Appellants and the banks with whom Appellants did business including Community First while Smith was employed with Community First and Respondent after Smith became Employed with Respondent. Record 304, ll. 6 – 25, Record 262, ll. 5 – 14.

> 10 Q. Do we agree that First Savers could have called that
> 11 loan and not refinanced it?
> 12 A. Yeah, you could have, I guess. Based on what I know
> 13 now, you could have called it any time other than the
> 14 one-year time. But the other bank, we've been doing
> 15 that for three or four, five years. **So there was a**
> 16 **pattern.**
> 17 Q. But this was the first time you had done business with
> 18 First Savers.
> 19 A. But you make decisions based on your experience level.
> 20 **My experience was I'd been getting interest only on**
> 21 **lots for four or five years from different banks,**
> 22 **including First Savers Bank.** Record 304
> (Bold Added)

In 2008 while the loans were with Community First, Appellants were informed by Smith that Community First would no longer finance "Interest Only" loans on the Lots. Record 255, ll. 20 – 25, Record 256, ll 1 – 24, Record 258, ll. 8 – 23.

When the loans came up for renewal for the last time with Community Firs, Smith introduced Appellants to Respondent. Record 255, ll. 7 – 8, Record 260, ll. 1 – 8. Record 359, ll. 9 – 19.

> 9 Q. Thank you, ma'am. When the loan came up for renewal
> 10 with Community First, did you contact any other banks
> 11 to see about financing options?
> 12 A. No.
> 13 Q. And why is that?
> 14 A. They said they'd go interest -- the second time they
> 15 said they'd go interest only, the second time around.
> 16 We did contact -- **well, we really didn't contact First**
> 17 **Savers. They really came to us. Shane Smith said,**

18 **"Come on. I'm going to go over to First Savers, and**
19 **you can come with me."**
20 Q. But did you talk to any other banks --
21 A. No. Record 359 (Bold Added)

Thus, based on Smith's solicitations and representations that the loans would be interest only, Appellants engaged Respondent and Smith and refinanced the Lots with Respondent. Record 239, ll. 16 – 25, Record 305, ll. 2 – 11. Record 359, ll. 9 – 19.

Further, at the time Appellants engaged Respondent to refinance the loans, Smith never informed Appellants that the loans would not be "Interest Only." Charles Gray Record 304, 1 – 5.

2 First Savers. **I was never told by First Savers, Shane**
3 **Smith, at one time, that that loan would ever go to a**
4 **permanent loan** until they -- till the banks got in
5 trouble. Record 304. (Bold Added)

To Appellants surprise, when Respondent subsequently refinanced the Lots, Appellants were required to bring approximately $10,684.to the closing. Record 275, ll. 1 – 6, Record 272, ll. 13 – 17.

Community First had not required Appellants to pay any such sum of money to refinance the loans. Record 271, ll. 12 – 19.

Thereafter the loans matured in 2009 and Appellants renewed the loans. Record 277, ll. 9 – 12.

Again, to Appellants surprise, in order to renew the loans as "Interest Only" at the time Appellants renewed the loan on Lot 27, Appellants had to pay $6,218.75 as a principal payment on the loan on that lot and another similar amount as a principal payment on the other loan on the other lot. Record 280, ll. 15 – 24, Record 285, ll. 20 – 25, Record 286, ll. 1 – 10.

21 suppose. I don't know what the deal was. And they
22 informed me at that time they would not do an interest
23 only unless I paid them that money and paid some
24 principal down. Record 280

Further, Appellants were informed that the next time the notes matured, Respondent would not finance "Interest Only" again, and Appellants would have finance the loans pursuant to a Fifteen Year fixed mortgage at approximately Eight and a half to Nine Percent. Record 281, ll. 3 – 5, Record 283, ll. 1 – 25.

Appellants informed Smith that they could not afford a 15 year mortgage at a fixed rate on the Lots rather than the short term "Interest Only" loans. Record 285, ll. 9 – 19.

Appellants had continued to do business with Respondent due to the business relationship that Appellants had established with Smith, and Appellants had relied upon the course of dealings of "Interest Only" short term loans that Appellants had developed with Smith. Record 286, ll. 24 – 25, Record 287, ll. 1 – 6, Record 296, ll. 16 – 25.

22 question by saying I thought my better chances of
23 getting any type of an interest only, that I could
24 afford the payments on, was to deal with the people
25 I'd been dealing with. Record 296.

11 Q. Did you anticipate they would renew this loan,
12 interest only, forever?
13 A. I had no reason not to believe that.
14 Q. Did anyone ever tell you that?
15 A. Probably not and I never did ask**. I had five years of**
16 **experience with interest only.** So I didn't know --
17 Q. No one at First Savers ever told you, we'll renew this
18 thing forever, if you need us to?
19 A. I never asked them. I just -- up until that point, I
20 guess the banks were satisfied with the interest only.
Record 306 (Bold Added).

Thereafter, Appellants ceased making payments in December 2009 since Appellants were then out of money due to Respondent's actions, and the loans were not going to be renewed again as short term "Interest Only" loans. Record 297, ll. 2 – 8 Record 302, ll. 23 – 25, Record 304, ll. 1 – 25.

Appellants estimated that they could have continued with the loans had the loans remained "Interest Only." Record 301, 13 – 25, Record 302, ll. 1 – 25, Record 303, ll. 1 – 22.

Further, Respondent's demands for additional upfront money to refinance the loans with Respondent resulted in undue financial hardship for Appellants. Charles Record 302, ll. 23 – 25, Record 303, ll. 1 – 25.

Thereafter Respondent initiated this Foreclosure action.

## ARGUMENTS

### I. The Court erred in Granting Summary Judgment in favor of the Respondent.

When reviewing an order granting summary judgment, an appellate court employs "the same standard applied by the trial court under Rule 56, SCRCP." *Wachovia Bank, N.A. v. Coffey, 404 S.C. 421, 425, 746 S.E.2d 35, 37 (2013) (citation omitted).* Rule 56 provides the trial court shall grant summary judgment if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. Cnty. of Richland, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citation omitted).* "However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013). Johnson v. Alexander, 408 S.C. 58, 61 (S.C. Ct. App. 2014)* Rehearing denied by *Johnson v. Alexander, 2014 S.C. App. LEXIS 103 (S.C. Ct. App., May 16, 2014).*

### II. Breach of Contract Accompanied by a Fraudulent Act and/or Fraudulent Intent and Fraud

**A.** The Order granting Summary Judgment states:

> "The Grays have counterclaimed alleging breach of contract accompanied by a fraudulent act and/or with fraudulent intent. The Grays have also filed a separate counterclaim alleging fraud. **In order to maintain either cause of action the Grays must establish that all of the elements of fraud are present.**" Record 4. Bold added.

Breach of Contract Accompanied by a Fraudulent Act and/or Fraudulent Intent and Fraud are two (2) clearly distinct causes of action, each with different elements.

A contract is an obligation which arises from actual agreement of the parties manifested by words, oral or written, or by conduct." *Roberts v. Gaskins, 327 S.C. 478, 486 S.E.2d 771 (Ct. App. 1997).* With certain exceptions, a contract need not be in writing to be enforceable. *Gaskins v. Firemen's Ins. Co. of Newark, N.J., 206 S.C. 213, 216, 33 S.E.2d 498, 499 (1945).* If an agreement is manifested by words, the contract is said to be express. An oral contract is enforceable according to its terms. *Hendrix v. Eastern Distribution, Inc., 320 S.C. 218, 464 S.E. (2d) 112 (1995).*

Breach of Contract Accompanied by a Fraudulent Act and/or Fraudulent Intent does not require proof of all of the elements of Fraud.

To establish a claim for breach of contract accompanied by a fraudulent act, a party must show: (1) a breach of contract; (2) **fraudulent intent relating to the breaching of the contract and not merely to its making;** and (3) a fraudulent act accompanying the breach. *Conner v. City of Forest Acres, 348 S.C. 454, 465-66, 560 S.E.2d 606, 612 (2002).* "Fraudulent act" is broadly defined as "any act characterized by dishonesty in fact or unfair dealing." *Id. at 466, 560 S.E.2d at 612.* "'Fraud,' in this sense, 'assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence.'" *Id. (quoting Sullivan v. Calhoun, 117 S.C. 137, 139, 108 S.E. 189, 189 (1921)).* Breach of contract accompanied by a fraudulent act requires proof of fraudulent intent relating to the breaching of the contract and not merely to its making, and such proof may or may not involve false representations. *Ball v. Canadian Am. Exp. Co., 314 S.C. 272, 276, 442 S.E.2d 620, 623*

*(Ct. App. 1994).* "Fraudulent intent is normally proved by circumstances surrounding the breach." *Floyd v. Country Squire Mobile Homes, Inc., 287 S.C. 51, 54, 336 S.E.2d 502, 503-04 (Ct. App. 1985).* "The fraudulent act may be prior to, contemporaneous with, or subsequent to the breach of contract, but it must be connected with the breach itself and cannot be too remote in either time or character." *Id. at 54, 336 S.E.2d at 504. D.R. Horton, Inc. v. Wescott Land Co., LLC, 398 S.C. 528, 555-556 (S.C. Ct. App. 2012).* (Bold Added).

To prevail on a cause of action for fraud, a Plaintiff must prove by clear, cogent and convincing evidence the following elements: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *Moseley v. All Things Possible, Inc., 388 S.C. 31, 35-36 (S.C. Ct. App. 2010).*

Breach of contract accompanied by a fraudulent act is not simply a combination of a claim for breach of contract and a claim for fraud. **The action for breach of contract accompanied by a fraudulent act is not based on the same elements as an action for fraud (deceit).** *Harper v. Ethridge, 290 S.C. 112, 348 S.E.2d 374 (Ct. App. 1986).* A claim of fraud goes to the making of the contract. *See, e.g., Darby v. Waterboggan of Myrtle Beach, Inc., 288 S.C. 579, 344 S.E.2d 153 (Ct. App. 1986).* It is based on the theory that the innocent party was induced to enter a contract he would not otherwise have made because he relied on a false representation by the fraudulent party. *Id.* In other words, a claim for fraud relates to the making of the contract. Breach of

contract accompanied by a fraudulent act is different. It requires proof of fraudulent intent relating to the breaching of the contract and not merely to its making. *Harper v. Ethridge, supra*. Such proof may or may not involve false representations. *See id.* (the fraudulent act is any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design). *Ball v. Canadian Am. Express Co., 314 S.C. 272, 276 (S.C. Ct. App. 1994).* (Bold Added).

In granting the Respondent's motion for Summary Judgment the Order states:

> "In order to maintain either cause of action the Grays must establish that all of the elements of fraud are present." Record 4.

With all due respect this is clearly this an error of law.

**B. Appellants have set forth facts stating a claim for Fraud.**

At the Summary Judgment stage, the Appellants have satisfied the elements of Fraud.

Smith induced the Appellants to refinance the loans with Respondent pursuant to the representation that the Loans would be refinanced "Interest Only." This was false, and was made knowing it to be false or it was made with reckless disregard for its truth or falsity. The representation was material. Appellants did not know at the time it was false. The representation was made with the intent that Appellants rely upon said Representation. The Appellants had a right to rely on the representation and in fact did rely upon the representation. Further, Appellants have been damaged as a result of the Representation.

**C. Appellants have set forth facts stating a claim for Breach of Contract Accompanied by a Fraudulent Act and/or Fraudulent Intent**

At the Summary Judgment stage, the Appellants have satisfied the elements of Breach of Contract Accompanied by a Fraudulent Act and/or Fraudulent Intent.

The loans at issue here are contracts. A course of dealing or usage of trade had developed between Smith and the Appellants while he was with Community First which course of dealing carried over to Respondent when Smith went to work with Respondent and solicited Appellants 'business.

S.C. Code Ann. § 36-1-205(3) states:

> A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

See also *Burden v. Woodside Cotton Mills 104 S.C. 435, 89 S.E. 474 (1916)* (usages of a trade or business are presumed to form part of contract unless excluded by agreement). *Weisz Graphics Div. of Fred B. Johnson Co. v. Peck Indus., 304 S.C. 101, 107 (S.C. Ct. App. 1991).*

Clearly the implied term that the loans would be renewed on an "Interest Only" basis became a part of the loans by operation of law.

The Respondent repudiated the agreement and breached the contracts by informing Appellants that Respondent was not going to honor its agreement to finance the loans on an "Interest Only" basis.

Further, the breach was accompanied by fraudulent act and with fraudulent intent since by demanding and receiving sums of money to pay down the principal on the loans, the Respondent had placed the Appellants in a vicarious financial position.

Further, Smith never informed Appellants when he solicited Appellants business with Respondent that the loans would cease to be refinanced on an "Interest Only" basis.

The Respondent by engaging in the actions, conduct and/or omissions described herein breached the covenant of good faith and fair dealing that is implied in every contract. There exists in every contract an implied covenant of good faith and fair dealing. *Williams v. Riedman, 339 S.C. 251, 273 (S.C. Ct. App. 2000).*

## III. Breach of Fiduciary Duty

South Carolina holds the normal relationship between a bank and its customer is one of creditor-debtor and not fiduciary in nature. ... However, a bank may be held to a fiduciary duty if it undertakes to advise a depositor as part of services the bank offers. ... Such a relationship charges the bank with a duty to disclose material facts that may affect its customer's interests. *Regions Bank v. Schmauch, 354 S.C. 648, 671 (S.C. Ct. App. 2003).*

Clearly the facts bear out the Smith advised the Appellants if they refinanced the lots with Respondent that Respondent would refiance the loans on an "Interest Only" basis as Smith had been while he was employed with Community First.

A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another. ... A fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence. ... To establish the existence of a fiduciary relationship, the facts and circumstances must indicate the party reposing trust in another has some foundation for believing the one so entrusted will act not in his own behalf but in the interest of the party so reposing. ... The evidence must show the entrusted party actually accepted or induced the confidence placed in him. ... Parties in a fiduciary relationship must fully disclose to

each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud. ...*Moore v. Moore, 360 S.C. 241, 250-251 (S.C. Ct. App. 2004).*

It is clear Appellants placed a special trust in their relationship with Smith, Respondent's employee, and continued to business with Respondent.

Further, Smith induced Appellants to do business with his employer and failed to disclose that Respondent was going to later refuse refinance the loans on an "Interest Only" basis.

Appellants have established a breach of fiduciary claim at the Summary Judgment stage of this proceeding.

**IV. South Carolina Unfair Trade Practices Act**

To recover in an action under the UTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s). S.C. Code Ann. §§ 39-5-10 to -560. *Wright v. Craft, 372 S.C. 1, 23 (S.C. Ct. App. 2006).*

A deceptive act is any act which has a tendency to deceive. ... "Even a truthful statement may be deceptive if it has a capacity or tendency to deceive." ... Whether an act or practice is unfair or deceptive within the meaning of the UTPA depends on the surrounding facts and the impact of the transaction on the marketplace.... "An act is 'unfair' when it is offensive to public policy or when it is immoral, unethical, or oppressive." *Wright v. Craft, 372 S.C. 1, 26 (S.C. Ct. App. 2006).*

Clearly Smith's representations that Respondent would refinance at "Interest Only" had a tendency to deceive, especially when coupled with the sums of money Appellants had to pay to obtain "Interest Only" refinancing from Respondent when such was not required of Appellants when Smith was employed by Community First.

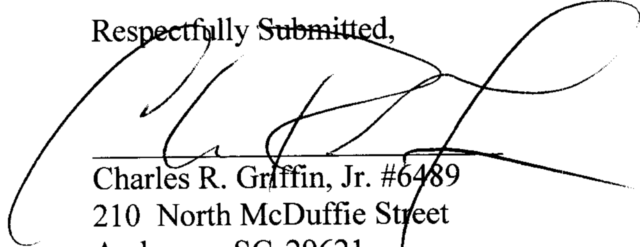
The potential for repetition may be demonstrated in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts… These two ways are not the only means for showing the potential for repetition or public impact, and each case must be evaluated on its own merits to determine what a plaintiff must show to satisfy the potential for repetition/public impact prong of the UTPA… Nevertheless, a plaintiff proves an adverse effect on public interests if he proves facts that demonstrate the potential for repetition. The plaintiff need not allege or prove anything further in relation to the public interest requirement. *Wright v. Craft, 372 S.C. 1, 30 (S.C. Ct. App. 2006).*

The fact that both Appellants on separate loans have been affected by Respondent's conduct clearly satisfies the potential for repetition since the actions, conduct and/or omissions affected both Appellants in who brought separate actions but the cases were consolidated.

**CONCLUSION**

For the reasons stated above, the Appellants ask that the Order of the Court appealed from be reversed.

Respectfully Submitted,



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CERTIFICATION

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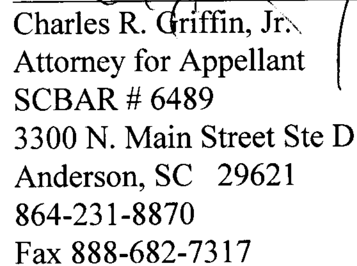
Certificate of Counsel. I certify that the Final Brief complies complies with Rule 211(b). SCACR



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CERTIFICATE OF SERVICE

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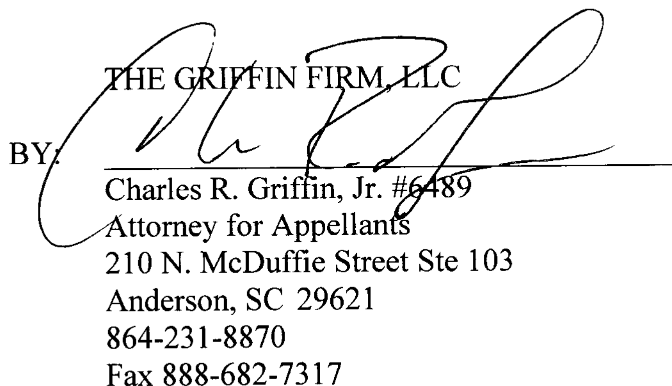
The undersigned does hereby certify that on January 28, 2015 he served the Appellants' Final Brief on the Respondent by depositing with the U.S. Mail with postage prepaid a copy of same to the office Bradley Richardson, 133 Straight Drive Anderson, SC 29625



THE GRIFFIN FIRM, LLC

BY: ______________________

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