THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Carmen T. Mullen, Circuit Court Judge

Civil Action No. 2009-CP-27-000639
Appellate Case No. 2013-002645

Tonia D. Williams, Marion B. Smalls, T. W., by his Guardians ad Litem, Tonia D. Williams and Charles Williams, and S.S., by her Guardian ad Litems, Rita Shaw ..... Appellants.

v.

GEICO Casualty Company, GEICO Indemnity Company, Government Employees Insurance Company, GEICO General Insurance Company ..... Respondents.

RESPONDENTS' AMENDED FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court properly determine that the Appellant's causes of action against the Respondents form a general claim of negligent third-party spoliation of evidence, which is not a viable cause of action in South Carolina?

II. Was the issue of deliberate and intentional spoliation of evidence properly preserved for appeal?

III. Is there evidence on the record to support a cause of action for deliberate and intentional spoliation of evidence?

IV. Did the circuit court properly determine that, as an additional sustaining ground, no valid contract existed between the parties pertaining to the retention of the automobile?

STATEMENT OF THE CASE

On September 29, 2009, Tonia D. Williams; Marion B. Smalls, T.W., by his Guardians ad Litem Tonia D. Williams and Charles Williams, and S.S., by her Guardian ad Litem Rita Shaw ("Appellants"), each filed individual actions in the Court of Common Pleas for Jasper County, asserting causes of action against GEICO Casualty Company, GEICO Indemnity Company, Government Employees Insurance Company, and GEICO General Insurance Company ("GEICO" or "Respondents") for breach of contract, unfair trade practices, negligence and gross negligence, all regarding GEICO's sale and repurchase of an Explorer vehicle involved in a motor vehicle accident. (R. p. 24-29).[1]

On November 16, 2011, GEICO filed a Motion for Summary Judgment as to each cause of action, and this was granted by the Honorable Carmen T. Mullen on March 12, 2012. (R. p. 11-20). In doing so, the Court held that the Appellants' claims amounted to a general claim of negligent third-party spoliation of evidence, which is not a cause of action in South Carolina. (R.

[1] The purported at-fault driver, Earl Martin, was also named as a defendant in each action, but the cases were ultimately severed.

p. 10). As additional grounds for granting the motion, the Court held that there was no enforceable contract between the parties regarding the retention of the Explorer.[2] (R. p. 10).

On March 28, 2012, the Appellants filed a Rule 59(e) Motion for Reconsideration. Following a hearing on April 24, 2012, the Court granted leave to conduct additional discovery with the intention of setting another hearing before ruling. Following a subsequent hearing on Plaintiffs' Rule 59(e) Motion to Reconsider Summary Judgment, conducted in Beaufort County on November 12, 2013, the Motion to Reconsider was denied. (R. p. 22). An Order to that effect was filed on November 18, 2013. (R. p. 22). The Appellants therefore filed a Notice of Appeal on December 12, 2013.

STATEMENT OF THE FACTS

On October 2, 2006, the Appellants were traveling in Tonia D. Williams' 1998 Ford Explorer in Jasper County, South Carolina, when they were involved in an accident with Earl Martin ("Martin"). (R. p. 12). Betty Mitchell Clark ("Clark") was also a passenger in the Explorer. (R. p. 12). The Explorer was insured by GEICO. (R. p. 12).

On October 6, 2006, the Plaintiffs' attorney wrote a letter to GEICO demanding that they retain possession of the Explorer for a potential products liability suit against Ford. (R. p. 281). The Plaintiffs did not provide any consideration for this demand.

The Explorer was a total loss, so on or about October 18, 2006, Williams conveyed the title to GEICO and accepted the collision coverage, and GEICO took possession of the Explorer. (R. p. 12). GEICO retained possession of the Explorer for several months, but the vehicle was

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[2] The Court also held that the South Carolina Unfair Trade Practices Act does not apply to trade practices in the business of insurance. As to the negligence and gross negligence causes of action, the Court held that GEICO did not owe the Appellants a legal duty of care regarding the retention of the Explorer and the Appellants had not demonstrated that they suffered any damages from its temporary sale. However, these causes of action appear to have been abandoned by the Appellants and therefore are not addressed in this brief.

then sold to a salvage yard in January 2007. (R. p. 12). By March 2007, GEICO had repurchased the Explorer. (R. p. 12). It was in the same condition as it was before it was sold to the salvage yard, with the exception of three tires and wheels that had been removed, and, according to the Appellants, the rear window. (R. p. 12). GEICO is still in possession of the Explorer, even though the accident happened more than 8 years ago and the Appellants have not had an expert inspect or request to inspect the Explorer. (R. p. 12).

Despite the Explorer being in the salvage yard for a brief period, Clark, the other passenger in the Explorer, brought a products liability action, Civil Action No. 2006-CP-27-00442, against Ford regarding alleged defects in the Explorer. (R. p. 12). Darrell Thomas Johnson represented her in that matter. (R. p. 12). The parties completed discovery and the case settled shortly before trial. (R. p. 12).

ARGUMENT

The appellate court reviews the grant of a summary judgment motion under the same standard as the trial court, pursuant to Rule 56(c): "[A] motion for summary judgment shall be granted 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that 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.'" Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue, 388 S.C. 138, 144, 694 S.E.2d 525, 527 (2010) (quoting 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. County of Richland, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citation omitted).

I. THE CIRCUIT COURT PROPERLY DETERMINED THAT THE APPELLANT'S CAUSES OF ACTION AGAINST THE RESPONDENTS FORM

A GENERAL CLAIM OF NEGLIGENT THIRD-PARTY SPOILATION OF EVIDENCE, WHICH IS NOT A VIABLE CAUSE OF ACTION IN SOUTH CAROLINA.

This is a spoliation case. Although the Appellants attempt to re-characterize their claims as a contract case, the Circuit Court properly determined that the Appellants' causes of action against GEICO form a general claim of negligent third-party spoliation of evidence, which is not a viable cause of action in South Carolina. See Cole Vision Corp. v. Hobbs, 394 S.C. 144, 151, 714 S.E.2d 537, 541 (2011). The Appellants now appear to abandon their argument for negligent spoliation on appeal, and acknowledge in their brief that negligent spoliation does not exist under South Carolina law.

In Cole Vision, Hobbs, an optometrist, leased space from Cole Vision. Id. at 146, 714 S.E.2d at 538. In the parties' lease, they agreed that Hobbs would indemnify Cole Vision for any liability arising from events at the office or regarding Hobbs' treatment of patients, and Cole Vision would be required to retain copies of the medical records of Hobbs' patients. See id. One of Hobbs' patients sued him and Cole Vision for malpractice, and after Hobbs refused to defend Cole Vision in the lawsuit, Cole Vision filed a declaratory judgment action. See id. Hobbs asserted a counterclaim for negligent spoliation of evidence based on Cole Vision allegedly losing the patient's medical records. See id. at 147, 714 S.E.2d at 539. There was some dispute about whether the counterclaim was for general negligence, rather than spoliation, but the court held that "regardless of how his counterclaim is labeled, we analyze it under the same rubric as a claim based on spoliation of evidence." See id. at 149, 714 S.E.2d at 540.

The court recognized that the case presented an unusual situation because it was between co-defendants, and thus was neither a pure third-party spoliation case (where the spoliation claim is against a party that was not involved in the underlying litigation) nor a pure first-party spoliation case (where the spoliation claim is against an opposing party). See id. However, the

court held that "South Carolina does not recognize an independent tort for the negligent spoliation of evidence, third-party or otherwise." Id. at 151, 714 S.E.2d at 541.

The Appellants point out in their brief that the Court distinguished Cole Vision from Austin v. Beaufort County Sheriff's Department, 377 S.C. 31, 659 S.E.2d 122 (2008). Austin involved a third party spoliation claim. In Austin, the adult son of the appellant was found dead in his neighbor's garage. Id. at 146, 714 S.E.2d at 538. The sheriff's office began an investigation into his death, and collected evidence from the scene. See id. The cause of death was determined to be an illegal drug overdose, and the sheriff's office subsequently destroyed the evidence, as well as the related reports. See id. The appellant then filed an action against the sheriff's office claiming that she was entitled to damages because the destruction of evidence impaired her ability to bring a wrongful death action. See id. The trial court granted summary judgment to the sheriff's office, and the appellant urged the Supreme Court to recognize the torts of negligent spoliation and intentional spoliation as outlined by West Virginia in Hannah v. Heeter, 213 W. Va. 704, 584 S.E.2d 560 (W. Va. 2003). The Court declined to adopt either tort, and simply held that no claim for third party spoliation of evidence had been alleged, and therefore summary judgment was proper. However, the distinction of third party spoliation versus first party spoliation is a distinction without a difference; neither negligent first party spoliation nor negligent third party spoliation claims are recognized in this state after the Court's decision in Cole Vision. Nevertheless, the Appellants now appear to use this distinction to argue that the Court left the door open to third party intentional spoliation cases, which is discussed in further detail in the next section of this brief.

The Appellant's claims against GEICO in this case present a pure third-party spoliation case. The claims are against GEICO, a third-party that was not involved in the underlying

litigation (other than as an insurer), and all of the Appellants' causes of action against GEICO involve GEICO's transfer of the Explorer to the salvage yard for a brief period of time, which allegedly resulted in spoliation of evidence from the Explorer. Despite couching their claim as a breach of contract, the case is at bottom, a claim for third-party spoliation of evidence. See Cole Vision at 149 n.3, 714 S.E.2d at 540 n.3 ("'What's in a name? That which we call a rose by any other name would smell as sweet.'" (quoting William Shakespeare, Romeo and Juliet, II, 11, 1-2)). The Appellants even appear to agree, as they referred to the "spoliation case" in their motion to reconsider filed July 2, 2010. (R. p. 42). Judge Perry Buckner also referred to the "spoliation case" in his order denying the Plaintiffs' motion to reconsider filed September 23, 2010. (R. p. 9).

Because South Carolina does not recognize the tort of negligent spoliation of evidence, the Circuit Court properly concluded that GEICO was entitled to summary judgment.

II. THE ARGUMENT FOR A THIRD PARTY ACTION FOR DELIBERATE AND INTENTIONAL SPOLIATION OF EVIDENCE WAS NOT RAISED AT THE TRIAL LEVEL AND THEREFORE WAS NOT PRESERVED FOR APPEAL.

As noted above, the Appellants appear to have abandoned their claim for negligent spoliation. They now argue, for the first time on appeal, that a valid cause of action for deliberate and intentional spoliation could exist after the holdings in Cole Vision v. Hobbs, supra, and Austin v. Beaufort County Sheriff's Department, supra. In other words, they appear to argue that a cause of action for intentional spoliation is not specifically precluded under South Carolina case law, and therefore the cause of action exists.

The key step of preserving an issue for appellate review is to actually raise it to the trial court. It is well settled law in South Carolina that an issue that is not raised to the trial court will not be considered by the appellate court. Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998); Butler v. Town of Edgefield, 328 S.C. 238, 493 S.E.2d 838 (1997). The idea is to give

the trial court a chance to resolve the issue before it is presented to the appellate court. Such an approach promotes judicial economy and engenders fairness within the system. In this case, though, the Appellants never raised the issue of intentional spoliation in the lower court, even though they had ample opportunity to do so. Intentional spoliation was never plead, never briefed, and never argued at any hearings. As a result, the issue was not properly preserved for appeal.

III. EVEN IF THE ISSUE OF DELIBERATE AND INTENTIONAL SPOLIATION OF EVIDENCE WAS PROPERLY PRESERVED, IT WAS NOT SPECIFICALLY PLEAD AND THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT IT.

The Supreme Court declined to adopt the tort of intentional spoliation in Austin, and did not address it in Cole Vision. Nevertheless, the Appellants argue it should be the law of this case. In Hannah, supra, the West Virginia Supreme Court of Appeals adopted the tort of intentional spoliation, and set forth the following elements:

(1) A pending or potential civil action;

(2) Knowledge of the spoliator of the pending or potential civil action;

(3) Willful destruction of evidence;

(4) The spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action;

(5) The intent of the spoliator to defeat a party's ability to prevail in the pending or potential civil action;

(6) The party's inability to prevail in the civil action; and

(7) Damages.

See id at 735, 573. Notably, the Appellants never plead these elements in their Complaints. More importantly, they do not even raise them in their brief. While the Appellants allege a willful destruction of evidence in their brief, they neglect to discuss the remaining elements set forth in Hannah. The Appellants point out that another attorney representing another passenger

filed a products liability case against Ford Motor Company involving the same vehicle and the same accident, and that case was settled for an undisclosed amount. Although they argue that GEICO knew of a potential products liability case because it had been sent a "non-spoliation" letter, the Appellants have never stated which product on the vehicle supposedly failed. This means they have never stated specifically what evidence was destroyed as a result of GEICO's alleged conduct. Therefore, it is impossible for this Court, or any court, to determine whether the spoliated evidence was vital to the Appellants' ability to prevail in the potential products liability action. In fact, they point out how another claimant was successful in bringing such a claim, despite the alleged conduct by GEICO.

Perhaps most importantly, there is no evidence of any intent on the part of GEICO to defeat the Appellants' ability to prevail in the potential products liability case. The West Virginia Supreme Court of Appeals cautioned:

> "...The party injured by spoliation must show more than the fact that potential evidence was intentionally destroyed. The gravamen of the tort of intentional spoliation *is the intent to defeat a person's ability to prevail in a civil action.* Therefore, it must be shown that the evidence was destroyed with the specific intent to defeat a pending or potential lawsuit."

See id at 717, 572. [Emphasis in original]. This intent to defeat the product's liability case has not actually been argued by Appellants, and they have presented no evidence to that effect. Instead, they argue that GEICO's intent was to stop storage charges (although GEICO has continued to pay storage charges for the past 8 years), and to avoid "payment of further adjustment fees and commissions and all other costs attended to the examination and settlement of an automobile collision claim" (although GEICO paid all available coverage under the UIM policy). There is simply no rational argument supporting the contention GEICO had the intent to defeat a products liability case against Ford, and no evidence on the record to support such a

contention. In fact, the evidence in the record supports the opposite conclusion: GEICO got the vehicle back.

Lastly, the Appellants have not demonstrated any damages. Although they claim that the condition of the vehicle precluded their ability to bring a products liability case, there is no evidence that the Appellants would have made a recovery on the products liability claim but for the condition of the vehicle. Therefore, even assuming South Carolina recognizes a cause of action for intentional spoliation, it was not plead properly in this case, and there is no evidence to support it.

IV. THE CIRCUIT COURT PROPERLY DETERMINED THAT, AS AN ADDITIONAL SUSTAINING GROUND, NO VALID CONTRACT EXISTED BETWEEN THE PARTIES PERTAINING TO THE RETENTION OF THE AUTOMOBILE.

A. There was no breach of the insurance contract.

In order for GEICO to be liable for breach of contract under the policy of insurance, GEICO must have breached a particular contract provision. The Appellants erroneously state in their brief that "part and parcel" of the insurance contract was an agreement to preserve the vehicle. There is no provision in the insurance contract that requires GEICO to indefinitely retain possession of a wrecked vehicle after paying its owner the value of the vehicle and receiving the signed title.[3] Therefore, the Appellants appear to argue that the "non-spoliation letter" and subsequent conversations with the adjusters, taken out of context, constitute a modification to the contract of insurance.

B. The Non-Spoliation Letter and subsequent conversations with GEICO did not create a valid enforceable contract.

The trial court properly concluded that the letter from the Appellants' attorney to GEICO

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[3] Although the Appellants now claim that the title was forged, they accepted the check for the salvage amount.

requesting the preservation of the vehicle, and the subsequent conversations with GEICO adjusters, do not constitute a valid contract. The "well-settled principles" of contract formation in South Carolina require "an offer and acceptance accompanied by valuable consideration." Carolina Amusement Co. v. Conn. Nat'l Life Ins. Co., 313 S.C. 215, 220, 437 S.E.2d 122, 125 (Ct. App. 1993) (citation omitted). "Any conduct from which a reasonable person in the offeree's position would be justified in inferring a promise in return for a requested act or a requested promise by the offeree, amounts to an offer." Id. (citation omitted). "[I]n order for a contract to be valid and enforceable, the parties must have a meeting of the minds as to all essential and material terms of the agreement." Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 308, 698 S.E.2d 773, 778 (2010) (citation omitted). Additionally, in order for a contract to be enforceable, all parties must be obligated under it. Alana v. Peachtree Plantations, Inc., 292 S.C. 160, 167, 355 S.E.2d 286, 290 (Ct. App. 1987) (citations omitted). This also applies to contract modifications. See, e.g., Layman v. State, 368 S.C. 631, 640, 630 S.E.2d 265, 269 (2006) ("Once the bargain is formed, and the obligations set, a contract may only be altered by mutual agreement and for further consideration."); Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 405, 581 S.E.2d 161, 166 (2003) ("It is well established that a written contract may be modified by a subsequent agreement of the parties, provided the subsequent agreement contains all the requisites of a valid contract.").

Here, there was nothing more than the Appellants' unilateral demand, made after Williams accepted the collision coverage and signed over the title, that GEICO indefinitely retain possession of the Explorer. (R. p. 281). The Appellants did not offer or provide any consideration for this demand, and the Appellants were not obligated to GEICO in any way. In reviewing the Appellants' demand, GEICO would not have been "justified in inferring a promise

[from the Appellants] in return for a requested act or a requested promise by [GEICO]." Carolina Amusement, 313 S.C. at 220, 437 S.E.2d at 125. Because there was no consideration for this demand and because GEICO was not obligated under it, there was not an enforceable contract between the Appellants and GEICO.

Nevertheless, the Appellants rely on excerpts from the deposition of Kelly Stone, taken out of context, to argue that GEICO "realized" it had an affirmative duty to secure the vehicle and that it had breached this duty by selling the vehicle.[4] However, Kelly Stone did not have anything to do with the property damage aspect of the claim; rather, she merely assisted in reacquiring the vehicle after the request was made by counsel for the Appellants.

By way of background, Kelly Stone was a continuing unit examiner at the time of the Williams claim, and she worked in the Macon, Georgia office. (Deposition of K. Stone (R. p. 112, lines 19-21; p. 120, lines 4-5). However, Buck Abele was the local auto damage adjuster assigned to the claim (R. p. 161, lines 3-4; p. 165, lines 10-15). Mr. Abele testified that he was the only adjuster assigned to go out and inspect the vehicle. (R. p. 166, lines 1-5). He took photographs of the vehicle from all angles, and determined the vehicle was a total loss. (R. p. 173, lines 18-23; p. 208, lines 1-2). The policyholder, Charles Williams, was there when Mr. Abele looked at the vehicle. (R. p. 174, lines 12-24). During the inspection of the vehicle at the tow yard, there was also an attorney there for Mr. Williams. (R. p. 179, lines 9-24). The inspection took place on October 5, 2006. (R. p. 179, lines 9-18). On October 6, 2006, attorney Harry Brown faxed a letter to Mr. Abele, confirming his representation of Mr. and Mrs. Williams and requesting that the vehicle not be moved from the tow yard until October 9, 2006. (R. p. 281). The vehicle was then picked up and taken to International Auto Auction ("IAA") in

[4] It was actually International Auto Auction ("IAA") that sold the vehicle.

Ravenel, South Carolina. (R. p. 182, lines 9-18). Mr. Abele instructed IAA to secure the vehicle, which is to wrap it in plastic. (R. p. 182, line 21–p. 183, line 3). He then noted this in the GEICO file, which is a computer system. (R. p. 186, lines 11-22; p. 187, lines 2-6).

Ms. Stone did not see the letter from Mr. Brown until February or March of 2007. (R. p. 121, line 3-p. 122, line 3). Ms. Stone does not typically handle the salvage of vehicles or anything to do with the property damage component of a claim. (R. p. 157, lines 6-8). However, she was contacted by Darrell Thomas Johnson, the attorney representing the passenger Clark in her products liability case, about purchasing the salvage for the vehicle. (R. p. 142, lines 6-18). She then spoke to Mr. Abele, who told her about the letter from Mr. Brown. (R. p. 142, lines 6-18). He also told her that the vehicle was no longer at IAA and they were trying to figure out where it was and relocate it. (R. p. 148, lines 3-8). Ms. Stone then called Mr. Brown, and started the process of getting the vehicle returned. (R. p. 142, lines 6-18). Mr. Brown was upset in that conservation, so Ms. Stone discussed the situation with her superiors to determine what needed to be done next. (R. p. 151, lines 5-8). Ultimately, GEICO repurchased the vehicle, and it was returned to Ravenel. (R. p. 147, lines 1-16; p. 150, lines 1-14). This was done because Mr. Brown had requested it. (R. p. 145, lines 4-11).

Appellants have taken the testimony of Ms. Stone out of context to allege misconduct on the part of GEICO. Despite possessing the salvage title, GEICO still instructed IAA to shrink wrap the vehicle to protect it in accordance with Mr. Brown's request. However, there is no evidence that GEICO agree to undertake a duty to preserve the vehicle indefinitely. Even assuming it did, there still must have been some additional consideration provided for this to be a valid enforceable contract or contract modification. The Appellants have not alleged, much less proven by affidavits or otherwise, that they provided any consideration in exchange for this new

contract or contract modification. Accordingly, the trial court properly determined that GEICO was entitled to summary judgment on the breach of contract cause of action.

V. CONCLUSION

For the reasons stated, the circuit court properly granted GEICO's motion for summary judgment. Accordingly, GEICO asks the Court to affirm the circuit court's order granting GEICO's motion for summary judgment as to all causes of action. Pursuant to Rule 220(c), SCACR, GEICO asks the Court to affirm on any ground appearing in the Record on Appeal.

DATED this 14 day of May 2015, at Beaufort, South Carolina, and

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
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GEICO Casualty Company, GEICO Indemnity Company, Government Employees Insurance Company, GEICO General Insurance Company ..... Respondents.

CERTIFICATE OF COUNSEL

I certify that the Respondents' Amended Final Brief complies with Rule 211(b), SCACR and the South Carolina Supreme Court's Order dated April 15, 2014, regarding personal data identifiers and other sensitive information in appellate court filings.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Carmen T. Mullen, Circuit Court Judge

Civil Action No. 2009-CP-27-00063
Appellate Case No. 2013-002645

Tonia D. Williams, Marion B. Smalls,
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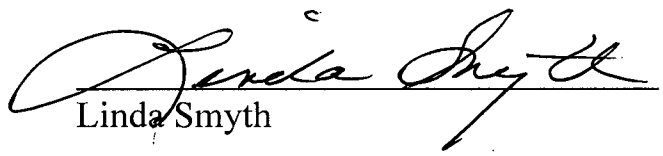

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Jenny Abbott Kitchings
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

RE: Williams, et al. v. GEICO
Appellate Case No.: 2013-002645
GS&L File No: 1002-061

Dear Madam Clerk:

Enclosed for filing in the above-captioned matter are the original and fifteen (15) copies of *Respondents' Amended Final Brief.* Also enclosed is the original and one copy each of the *Certificate of Counsel* and *Certificate of Service.* I have also enclosed one copy of each document for clocking and returning in the envelope provided.

If you have any questions regarding this matter, please do not hesitate to contact me.

With kindest regards, I remain,

Very truly yours,

Kelly D. Dean

KDD/lds
Enclosures
cc: Clifford Bush III
R. Thayer Rivers Jr.
Harry C. Brown, Sr.

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The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
1205 Pendleton Street
Columbia, SC 29201