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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals
Appellate Case No: 2014-001799

APPEAL FROM RICHLAND COUNTY
Civil Action No. 2011-CP-40-4111

G. Thomas Cooper, Jr., Circuit Court Judge
Alison Renee Lee, Circuit Court Judge

Coastal Pi, LLC d/b/a Primarily Pi and James Bigby.....Respondents,

vs.

Danville Business Advisors, LLC and Marion D. Tubeville.....Defendants,

Of Whom Marion D. Turbeville is.....Appellant.

FINAL BRIEF OF APPELLANT

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1. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION TO DISMISS CLAIMS AGAINST HIM INDIVIUDALLY ARISING FROM ACTIONS TAKEN BY APPELLANT IN FURTHERANCE OF THE BUSINESS OF AN LLC IN WHICH HE IS A MEMBER?

2. DID THE TRIAL COURT ERR BY GRANTING THE RESPONDENTS' MOTION FOR ATTORNEYS' FEES AND TREBLE DAMAGES UNDER THE SOUTH CAROLINA UNFAIR TRADES PRACTICES ACT?

STATEMENT OF THE CASE

On June 23, 2011, Coastal Pi, LLC d/b/a Primarily Pi and James Bigby (hereinafter collectively referred to as "Respondents") filed the Complaint in this action seeking a judgment in their favor and an award of damages against C.G.I. Development, Inc. ("C.G.I."). (Complaint, R. pp. 25-32). The Complaint alleges, among other things, that C.G.I. negligently constructed a restaurant upfit which caused loss of profits to Respondents. (Complaint, R. pp. 29). Respondents later filed an Amended Complaint and a Second Amended Complaint, adding claims against Danville Business Advisors, LLC ("Danville"), Marion D. Turbeville, who is a member of Danville, ("Appellant") and FRS, Inc. (Amended Complaint, R. pp. 33-47; Second Amended Complaint, R. pp. 57-77). Respondents settled their claims with all defendants with the exception of Danville and Appellant.

On April 23, 2014, Judge Cooper heard Appellant's Motion to Dismiss all claims asserted against him individually pursuant to Rule 12(b)(6), SCRCP. On May 14, 2014 Judge Cooper issued an Order denying Appellant's Motion to Dismiss. (May 14, 2014 Order, R. pp. 9-13).

Respondents tried their case before a jury between May 27, 2014 and May 29, 2014. (Tr. Cover p., R. p. 236). The jury returned a verdict for the Respondents on all causes of action against Danville and Appellant. (May 29, 2014 Verdict Forms, R. pp. 19-24). Against Danville, the jury awarded the Respondents actual damages in the amount of $521,000.00 for breach of contract, breach of fiduciary duty and for violating

the South Carolina Unfair Trade Practices Act. (May 29, 2014 Verdict Forms, R. pp. 22-23). Against Appellant, the jury awarded the Respondents actual damages in the amount of $39,200.00 for breach of fiduciary duty and for violating the South Carolina Unfair Trade Practices Act. (May 29, 2014 Verdict Forms, R. p. 21).

At the close of trial, a post trial motion for election of remedies was requested by Danville and Appellant. (Tr. p. 397, R. p. 337). On June 6, 2014, the parties submitted a consent Order of Judgment in which Respondents elected that judgment be entered against Danville on the breach of fiduciary duty claim in the amount of $521,000.00, plus taxable costs. (June 6, 2014 Order, R. pp. 14-15). The parties also consented to Respondents' election that judgment be entered against Appellant on the South Carolina Unfair Trade Practices Act claim in the amount of $39,200.00. (June 6, 2014 Order, R p. 15). Pursuant to the consent order on the motion for election of remedies, the judgment against Turbeville was subject only to the trial court's ruling on Respondents' motion for attorney's fees and treble damages.

On July 25, 2014, the Trial Court signed the consent Order of Judgment. (July 25, 2014 Order, R p. 14-15). On August 4, 2014, the trial court issued an Order granting Respondents' Motion for Attorney's Fees and Treble Damages, resulting in a total judgment against Appellant in the amount of $202,507.85 (August 4, 2014 Order, R pp. 16-18). On August 5, 2014 the Order was entered by the clerk of court. (August 4, 2014 Order, R p. 16-18). On August 21, 2014, Appellant timely served and filed his Notice of Appeal.

FACTS

Coastal Pi, LLC "Coastal" is a limited liability company formed by James Bigby. (Complaint, R. p. 28). Coastal was formed for the express purpose to plan and operate a pizza restaurant in Lexington, South Carolina.[1] (Complaint, R. p. 28).

In 2008, Danville agreed to assist Coastal with respect to Coastal's plans to renovate and upfit a commercial restaurant space located at 2805 Sunset Boulevard, Suite D, Lexington, SC. (Tr. p. 163 , R. p. 299). The agreement between the parties was an oral agreement that was not reduced to writing. (Tr. p. 211, R. p. 315). Pursuant to the parties' arrangement, Coastal agreed to pay Danville $1,500.00 per month.[2] (Tr. p. 44. , R. p. 241)

While negotiating the lease on Coastal's behalf, Danville negotiated with NAI Avant to receive $23,067.58 in leasing commissions. (Tr. p. 46 and 181, R. pp. 243 and 312) Respondents claim that they did not know about the leasing commissions negotiated by Danville even though Coastal's contract with NAI Avant signed by its principal, Mr. Bigby, expressly disclosed that the commissions would be paid to Danville. (Pl. Ex. 13, R. pp. 153-235, Tr. p. 180, line 9 – p. 181, line 25, R. pp. 311-312).

Mr. Bigby testified that he signed the lease with Saluda Ridge, LLC for the restaurant space, that he personally guaranteed the bank financing with the bank, and that he signed the contract with C.G.I. to upfit the space into a pizza restaurant. (Tr. p.

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[1] The restaurant's name was Primarily Pi.

[2] Danville and Bigby had a prior business relationship as Danville managed the renovation, leasing negotiations and franchise negotiations for several of Bigby's Za's Pizza Restaurants.

163, line 9 – 164, line 9, R. pp. 299-300; Tr. p. 166, line 24 – 167, line 5, R. pp. 302-303; Tr. p. 167, line 23 – 168, line 4, R. pp. 301-302). Mr. Bigby testified that he read the lease between Coastal and Saluda Ridge, LLC before signing it. (Tr. p. 180, R. p. 311). Mr. Bigby testified that he usually hires attorneys to review leases for him and that an attorney "glanced at" this lease before he signed it. (Tr. p. 181, R. p. 312). Mr. Bigby did not ask his attorney nor did he ask Danville about section 15.15 of the lease that stated, "Commissions to be paid by landlord by separate agreement with NAI Avant." (Tr. p. 181, R. p. 312).[3]

Danville interviewed several general contractors and procured bids for the restaurant upfit. (Tr. p. 43, R. p. 240). Danville then presented Mr. Bigby with its recommendations. (Tr. p. 188, R. p. 313). C.G.I. submitted the low bid, and Danville recommended C.G.I. to Coastal.

On January 13, 2009, Coastal entered into a construction contract with C.G.I. under the terms of which C.G.I. agreed to upfit the restaurant space for $302,566.30.[4] (Pl. Ex. 4, R. pp. 136-145, Tr. p. 57, R. p. 254). Danville acted as a conduit between Respondents and the architect, vendors, subcontractors, and general contractor involved in the project. (Tr. p. 44, R. p. 241).

Mr. Bigby complained that the restaurant smelled like a sewer at different times during the day. (Tr. p. 173, R. p. 307). Mr. Bigby also complained that the temperature

[3] Mr. Bigby also admitted that he held a real estate license in the past. (Tr. p. 181-182, R. p. 312-313).

[4] Appellants' partner, Bill Danielson, signed the agreement with C.G.I. as the "development manager and disbursement agent." (Tr. p. 192, Supp. R. p. 2).

in the kitchen area of the restaurant was extremely high, making working temperatures intolerable. (Tr. p. 173, R. p. 307).

After hearing Mr. Bigby's complaints, Appellant, acting in his capacity as a member of Danville, coordinated several meetings between C.G.I., FRS, Inc. ("FRS")[5], and the plumbing and HVAC subcontractors in an effort to resolve the complaints. (Tr. p. 267, R. p. 326). The parties were unable to determine where the sewer smell originated or its cause. (Tr. p. 267, R. p. 326). With respect to the complaint related to excessive heat in the kitchen, it was determined that the heat issue was caused by the installation of the pizza oven approximately eighteen inches away from the exhaust hood. (Tr. p. 96, line 7 – 97, line 24, R. pp. 288-289) The installation or the pizza oven in this manner was performed by FRS at Mr. Bigby's specific request despite the fact that it was contrary to the manufacturer's installation instructions. (Tr. p. 96-97, R. pp. 288-289). Mr. Bigby claimed that the excessive heat in the kitchen occurred because the wrong HVAC units were installed. (Tr. p. 171 , R. p. 305).

Appellant testified that he was a member of Danville and that he assisted Coastal with procuring a lease for the restaurant. (Tr. p. 41-42, R. p. 238-239). He testified that Danville was engaged to assist Coastal by participating in lease negotiations, helping Coastal obtain financing from a bank, and pulling together a development team of architects, engineers, and contractors to perform the upfit. (Tr. p. 44, R. p. 241). Appellant testified that Danville was not a construction manager. (Tr. p. 89, R. p. 285).

[5] FRS is a restaurant equipment supplier and initially was a defendant in this action.

Appellant testified that Danville was paid $1,500.00 per month by Respondents for its services. (Tr. p. 44, R. p. 241). Appellant testified that Danville received a fee from C.G.I. in the amount of $16,500.00 for bringing them to the job and that Danville received $23,067.58 in leasing commissions from the landlord, Saluda Ridge, LLC. (Tr. p. 46-47, R. p. 243-244).

Appellant testified that he worked with Mr. Bigby on at least four prior occasions. (Tr. p. 86, R. p. 283). On at least one of those occasions, Appellant received real estate leasing commissions for procuring leasing space for Mr. Bigby. (Tr. p. 86-87, R. pp. 283-284). Appellant testified that receiving leasing commissions is normal in the industry, a fact Mr. Bigby should have been aware of based on the prior dealings between the parties and Mr. Bigby's experience as a real estate agent. (Tr. p. 87, R. p. 284).

Appellant testified that, during the construction process, the HVAC subcontractor recommended changing out the HVAC units that were orginally specified in order to save Respondents money. (Tr. p. 92, R. p. 286). Believing this to be in the best interest of Danville's client, Appellant testified recommended to David Grey, the owner of C.G.I., that he obtain engineering approval for the change. (Tr. p. 94, R. p. 287).

Mr. Bigby testified the restaurant opened on June 3, 2009 and closed on November 3, 2009. (Tr. p. 171-174, R. pp. 305-308). Respondents blamed the closing on the smell of sewage and the alleged heat problems. (Tr. p. 172-173, R. p. 306-307). Ultimately, Respondents were forced to close the restaurant because the landlord changed the locks for failure to pay rent. (Tr. p. 177, R. p. 309).

STANDARD OF REVIEW

"Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. In considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint. If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper." Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999). In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. Gentry v. Yonce, 337 S.C. 1, 522 S.E.2d 137 (1999).

The general rule is that attorney's fees are not recoverable unless authorized by contract or statute. Blumberg v. Nealco, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993). The award of attorney's fees is left to the discretion of the trial judge and will not be distrubed unless an abuse of discretion is shown. Smith v. Smith, 264 S.C. 624, 216 S.E.2d 541 (1975).

ARGUMENT

A. The trial court erred by denying Appellant's motion to dismiss the claims asserted against him arising from actions taken on behalf of the LLC

The trial court erred by denying Appellant's motion to dismiss the claims asserted against him in his individual capacity based upon the holding of the South Carolina Supreme Court in 16 Jade St., LLC v. R. Design Constr. Co., LLC, 398 S.C. 338, 728 S.E.2d 448 (2012) (hereinafter "Jade Street I"). The trial court committed an error law

by relying on the holding in Jade Street I despite the fact that the opinion was withdrawn by the South Carolina Supreme Court in 16 Jade St., LLC v. R. Design Constr. Co., LLC, 405 S.C. 384, 386, 747 S.E.2d 770, 771 (2013) (hereinafter "Jade Street II") and therefore has no precedential value. As set foth herein, the trial court should have relied upon the plain, unambiguous langauge of S.C. Code Ann. § 33-44-303(a) and dismissed the claims asserted against Appellant in his individual capacity.

Appellant's motion to dismiss is based upon S.C. Code Ann. § 33-44-303,entitled "Liability of members and managers," which reads:

> (a) Except as otherwise provided in subsection (c), the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager.
>
> (b) The failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability on the members and managers for liabilities of the company.
>
> (c) All or specified members of a limited liability company are liable in their capacity as members for all or specified debts, obligations, or liabilities of the company if:
>
> (1) a provision to that effect is contained in the articles of organization; and
>
> (2) a member so liable has consented in writing to the adoption of the provision or to be bound by the provision.

Where a statute's language is plain and unambiguous and conveys a plain and definite meaning, the rules of statutory construction are not needed, and the court has

no power to impose a different meaning. State v. Jacobs, 393 S.C. 584, 713 S.E.2d 621 (2011). The language of the statute clearly and unambiguously shields a member of an LLC acting in furtherance of the company's business from individual liability for the tortious conduct of the LLC except under the circumstances set forth in subsection (c), which do not exist here.[6] The legislature's intention to insulate individual members from liablity for actions taken on behalf of an LLC is further supported by the plain meaning of other statutes within the LLC Act that suggest the LLC is responsible for torts committed by its members in furtherance of its business. See, e.g., S.C. Code Ann. § 33-44-301(a)(2) (stating that an act of a member outside the scope of the company's business "binds the company only if the act was authorized by the company's members"). Based on the plain language of S.C. Code Ann. § 33-44-303 and the intention of the legislature, Appellant is not liable in his individual capacity for actions taken in furtherance of Danville's business.

Judge Cooper rejected Appellant's argument based on the holding in Jade Street I despite the fact that the opinion was later withdrawn by the South Carolina Supreme Court. In Jade Street I, the court held that the appellant, a member of an LLC engaged in the construction business, could be held personally liable for negligent acts he committed in furtherance of the business of his LLC. Jade Street I, 398 S.C. at 349, 728 S.E.2d at 454.

After noting in the Jade Street opinion that "it is highly questionable whether the General Assembly intended to limit a member's personal liability for his torts," the

[6] There was no evidence presented at trial that Appellant consented in writing to the adoption of a provision making him personally liable for the tortious conduct of Danville.

South Carolina Supreme Court withdrew the opinion. Jade Street I, 398 S.C. at 349, 728 S.E. 2d at 453. In Jade Street II, the court opined that the appellant, an individual member of an LLC, did not owe a duty of care to the respondent. Jade Street II, 405 S.C. at 390, 747 S.E.2d at 773. The court therefore found it unecessary to reach the "novel issue of whether the LLC Act absolves an LLC member of personal liability for negligence committed while acting in furtherance of the company business." Id., 747 S.E.2d at 773.[7]

In light of the withdrawal of the Jade Street I opinion, the trial court should have relied upon the plain language of S.C. Code Ann. § 33-44-303(a) and dismissed the claims asserted against Appellant in his individucal capacity. Section 33-44-303(a) clearly and unambiguously insulates individual members of an LLC from liabilty for actions taken on behalf of the LLC. Thus, the common law must yield to the intention of the legislature. The Court should reverse Judge Cooper's Order holding that Appellant is personally responsible for torts or unfair trade practices committed within the course and scope of his authority and in furtherance of Danville's business.

B. The trial court erred by granting Respondents' motion for attorneys' fees and treble damages.

[7] After the holding in Jade Street I and before the South Carolina Supreme Court withdrew its holding in Jade Street II, a joint resolution was introduced in the legislature to clarify its intention to shield a member of an LLC from personal liability for actions taken on behalf of the LLC. See S.J. Res 1416, 119th Gen. Assemb., 2d Reg. Sess. (S.C. 2012), available at http://www.scstatehouse.gov/sess119_2011-2012/bills/1416.htm; H.R.J. Res 5150, 119th Gen. Assemb., 2d Reg. Sess. (S.C. 2012), available at http://www.scstatehouse.gov/sess119_2011-2012/bills/5150.htm. The bill was introduced in the House, where it received three readings before being sent to the Senate on April 27, 2012. Id. The bill received two readings in the Senate, the last of which occurred on June 6, 2012, less than three months prior to the withdrawal of Jade Street I by the South Carolina Supreme Court.

Since the trial court committed clear error by submitting the causes of action against Appellant in his individual capacity to the jury, it was an error for the trial judge to award attorneys' fees and treble damages. Even if this Court concludes that it was proper to send the allegations against Appellant to the jury, it was not proper for the trial court to award treble damages and attorney's fees, because Appellant did not commit a willful violation of the South Carolina Unfair Trades Practices Act.

1. Appellant's conduct in his representation of Respondents does not rise to a willful or knowing violation of the South Carolina Unfair Trades Practives Act.

The South Carolina Unfair Trades Practices Act (SCUTPA) prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C. Code Ann. § 39-5-20. "If the court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of Section 39-5-20, the court shall award three times the actual damages sustained and may provide such other relief as it deems necessary or proper. Upon the finding by the court of a violation of this article, the court shall award to the person bringing such action under this section reasonable attorney's fees and costs." S.C. Code Ann. § 39-5-140(a).

"Willful violation is defined by statute as occurring "when the party committing the violation knew or should have known that his conduct was a violation of [the UTPA]." S.C. Code Ann. § 39-5-140(d), citing Haley Nursery Co. v. Forrest, 298 S.C. 520, 381 S.E.2d 906 (1989). The statutory definition of willful has been to mean: "if, in the exercise of due diligence, a person of ordinary prudence engaged in trade or commerce

could have ascertained that his conduct violates the Act, then such conduct is willful." State v. Nest Egg Society Today, Inc., 290 S.C. 124, 348 S.E.2d 381 (Ct. App. 1986). In Nest Egg the willful conduct was creation of a pyramid scheme, which is expressly prohibited by statute. *See* S.C. Code Ann. § 39-5-30 (1985).

There is no evidence in the record that Appellant knowingly violated the Unfair Trade Practices Act. Appellant's alleged unfair and deceptive conduct was not expressly prohibited by statute. Furthermore, with respect to the leasing commissions, those commissions were part of the lease agreement reviewed by Mr. Bigby's attorney and signed by Mr. Bigby. The landlord testified that such commissions were routine and that they were paid in the normal course of a real estate transaction. (Tr. p. 279, Supp. R. p. 3). The leasing commission disclosed in the contract reviewed by Mr. Bigby's lawyer and signed by Mr. Bigby were not willfully concealed by Appellant. Accordingly, the fact that Danville received the leasing commissions does not constitute an unfair trade practice by Appellant.

Appellant's conduct, as a whole, cannot be deemed a willful violation of the Unfair Trade Practices Act. Since there was no willful violation of the Unfair Trade Practices Act, the Court should reverse the trial court's order trebling Respondents' damages and awarding Respondents attorney's fees and costs.

2. The trial court erred in awarding attorney's fees pursuant to the Unfair Trades Practices Act claim.

The Unfair Trades Practices Act provides that, "[u]pon the finding by the court of a violation of this article, the court shall award to the person bringing such action under this section reasonable attorney's fees and costs." S.C. Code Ann. § 39-5-140. After

briefs were submitted by both parties, the trial judge granted Respondents Motion for Attorney's Fees in the amount of $84,907.63. The trial judge committed reverseable error in granting Respondents' motion for attorney's fees.

Respondents originally filed this action against C.G.I. on June 27, 2011. (Compliant, R. p. 25-32) Marion Turbeville was added to this lawsuit on May 7, 2012, along with FRS. (See Amended Complaint, R. p. 33-47). As such, it is inappropriate to charge Appellant for any time and expenses incurred in prosecuting this case against C.G.I or FRS.

Secondly, Plaintiffs' Affidavit of Attorneys' Fees and Costs makes it impossible to ascertain the amount of time spent on each task for which Respondents seek reimbursement. (Affidavit, R. pp. 345-346). The affidavit lists individuals and their hourly rate along with the number of hours billed to the file. Appellant requested that the attorney's fee request be limited to the time billed by Respondents' counsel related to the Unfair Trade Practices Act claim against Appellant and the other claims against Appellant. The trial court committed reversible error in charging Appellant for fees and costs related to Respondents' prosecution of claims against C.G.I., FRS, and Danville that were wholly unrelated to its claims againts Appellant under the Unfair Trade Practices Act. Accordingly, the Court should reverse the trial court's entry of judgment in Respondents' favor for Respondents' attorney's fees. .

CONCLUSION

For the foregoing reasons, the Court should reverse the Order of Judge Cooper denying Appellant's motion to dismiss and reverse the Order of Judge Lee trebling Respondents' damages and awarding attorney's fees.

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June 22, 2015

Columbia, SC

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas

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APPELLATE CASE NO.: 2014-001799

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vs.

Danville Business Advisors, LLC and Marion D. Turbeville.....Defendants,

Of Whom Marion D. Turbeville is.....Appellant.

CERTIFICATION OF COUNSEL

I, Robert M. Peele, III, an attorney of Dougall & Collins, attorney for Appellant, Marion D. Turbeville do hereby certify that the Appellant's Final Brief complies with Rule 211(b) SCACR.

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June 22, 2015

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
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vs.

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Of Whom Marion D. Turbeville is.....Appellant.

PROOF OF SERVICE

I, Robert M. Peele, III, an attorney of Dougall & Collins, attorney for Appellant, Marion D. Turbeville do hereby certify that on the 22nd day of June 2015, I served the **Final Brief of Appellant** upon counsel of record by depositing copy of the same in the U.S. Mail, postage prepaid, and addressed as follows:

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June 22, 2015

Columbia, South Carolina

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June 22, 2015

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: *Coastal PI, LLC d/b/a Primarily PI and James Bigby v. C.G.I. Development, Inc., Danville Business Advisors, LLC, Marion D. Turbeville, and FRS, INC.*;
Case Number: 2011-CP-40-4111
Appellate Case Number: 2014-001799

Dear Madame Clerk:

Please find enclosed 15 copies of the Appellant's Final Brief, together with a Proof of Service. Please file the originals and return the clocked in copies to me.

If you have any questions please do not hesitate to contact me.

With kind regards,

Sincerely,

DOUGALL & COLLINS

Robert M. Peele, III

RMP/mdh

Enclosures

cc: Benjamin C. Bruner, Esq.
Robert G. Rikard, Esq.
Marion D. Turbeville

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