

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No.: 2014-CP-23-5266
Appellate Case No.: 2015-001667

RECEIVED

JAN 25 2016

SC Court of Appeals

Blanche G. Creswell.....Appellant.

v.

Robin Culbertson, Chip Culbertson d/b/a Asheville Cotton Company, and
Asheville Cotton Company.....Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE ISSUES ON APPEAL

- I. Did the trial court properly dismiss all claims against Robin Culbertson and Chip Culbertson for lack of personal jurisdiction where the evidence shows they are merely officers of Culbertson Enterprises, Inc. d/b/a Asheville Cotton Company, are North Carolina residents, and engaged in no conduct in their individual capacities connecting them to South Carolina.

- II. Did the trial court properly dismiss all claims against Culbertson Enterprises, Inc. d/b/a Asheville Cotton Company, incorrectly identified in the Complaint, where the evidence shows it operates a brick-and-mortar retail store in Asheville, North Carolina, does not solicit or conduct business in South Carolina, does not conduct sales on its web-site, and the Appellant's alleged fall and injury occurred in North Carolina.

STATEMENT OF THE CASE

This case arises out of an alleged trip and fall at the retail store of the Asheville Cotton Company, a business that sells sewing machines and bulk fabric at 1378 Hendersonville Road in Asheville, North Carolina. R. __ (Complaint; Robin Culbertson depo., p. 7). On September 24, 2014, the Appellant, Blanche Creswell (Ms. Creswell”), filed a Complaint against Respondents, Robin Culbertson, Chip Culbertson d/b/a Asheville Cotton Company, and Asheville Cotton Company. R. __ (Complaint). Ms. Creswell is a South Carolina resident domiciled in Greenville County. Id. On October 1, 2011, she was allegedly a customer inside the store of the Asheville Cotton Company. Id. According to her Complaint, “as she was going to the cutting area with a bolt of fabric, plaintiff’s foot was caught by [a] basket [o]n [a] floor display, and plaintiff fell seriously injuring her foot.” Id. She alleges that the “floor display was set up in a picnic basket turned on its side, with the handle(s) sticking out from the basket.” Id. She further alleges that she “did not see the floor display due to the bolt of fabric she was carrying, as well as due to the low level nature of the floor display.” Id. She claims the Respondents were negligent by setting up the display in such a way that it “could not be easily seen due to the height” and placing it “in a known traffic area.” Id. She also claims the Respondents were negligent “in failing to maintain clear and safe aisles of travel for customers who are required to carry large bolts of fabric to the cutting area.” Id.

On October 24, 2014, the Respondents filed a Motion to Dismiss all claims in this matter based on the lack of personal jurisdiction by the trial court over the Respondents. R. __ (Defendant’s Motion to Dismiss). A Memorandum in Support of the Defendant’s

Motion to Dismiss was filed on December 12, 2014. R. __ (Memorandum in Support of Defendants' Motion to Dismiss). Respondents noted that the Asheville Cotton Company was incorrectly identified because the business at issue is owned and operated by Culbertson Enterprises, Inc. d/b/a Asheville Cotton Company. Id.

After discovery was completed regarding the issue of jurisdiction, a hearing on Respondents' motion took place on May 26, 2015. R. __ (Hearing Transcript dated May 26, 2015). At the hearing, Appellant's counsel consented to the substitution of Culbertson Enterprises, Inc. d/b/a Asheville Cotton Company in place of the incorrectly identified Asheville Cotton Company. Id. at 11.

On June 1, 2015, the trial court issued a short form Order stating:

This matter came before the Court for a hearing on Defendants' Motion to Dismiss pursuant to Rule 12(b)(2), SCRCPP. The Defendants argued that the Circuit Court for Greenville County is unable to exercise personal jurisdiction over any of the named Defendants. This Court finds that the Defendants are citizens or residents of North Carolina who lack the minimum contacts with the State of South Carolina which would permit an exercise of personal jurisdiction by this Court. Therefore, Defendants' Motion to Dismiss is GRANTED.

R. __ (Order dated June 1, 2015).

Ms. Creswell filed a Motion to Alter or Amend Judgment regarding the trial court's dismissal of her claims. R. __ (Plaintiff's Rule 59(e) Motion to Reconsider). On June 22, 2015, the trial court issued a short form Order stating: "This matter came before the Court on Plaintiff's Motion to Alter or Amend Judgment. Plaintiff's Motion is respectfully DENIED." R. __ (Order dated June 22, 2015). Ms. Creswell filed a Notice of Appeal from the trial court's decisions on July 21, 2015.

STATEMENT OF FACTS

Culbertson Enterprises, LLC operates the Asheville Cotton Company retail store. R. ___ (William's depo., pp. 4-5). William "Chip" Culbertson and his wife Robin Culbertson have equal ownership interests in the North Carolina company. Id. The Culbertsons are residents of North Carolina. R. ___ (Robin Culbertson's depo. pp. 4-5). The company has been doing business as Asheville Cotton Company since 1997. R. ___ (William Culbertson's depo., p. 5). For numerous years the retail store has been located at 1378 Hendersonville Road in Asheville, North Carolina. R. ___ (Robin Culbertson's depo. p. 7). The store sells and services sewing machines and also sells fabrics and sewing supplies. Id. at 13-14.

Robin Culbertson created a website for the business shortly after the business began 17 years ago. Id. at 11-12). The website lists the general types of products for sale at the retail store. Id. at 13-16. The Asheville Cotton Company has never had any orders for the sale of goods completed through the use of its website. Id. at 14, 58.

The Asheville Cotton Company asks customers who purchase items at its retail store if they want to be on the company's mailing list. Id. at 28-29, 50. If a customer wishes to be on the list, they will be asked whether they prefer to be contacted by physical mail, email, or both. Id. at 29. The customer's information is then entered into a point-of-sale computer system. Most customers who chose to be on the list choose to be contacted by email. Id. at 32. The company sends advertisements to customers on the list approximately every three weeks. Id. at 44. However, Asheville Cotton Company only sends these advertisements to customers who have previously entered the store and

provided their contact information. R. ___ (Robin Culbertson's depo., pp. 28-29). It does not solicit email or mailing addresses through its website. Id.

Customers occasionally call the Asheville Cotton Company and purchase products over the telephone. Id. at 17-18. In 2011 the company started maintaining a handwritten shipping log, consisting of a physical notebook, to record credit card information from customers making purchases over the telephone. Id. at 19. A summary of information compiled from the log indicates that between 2011 and 2015 the Asheville Cotton Company shipped 336 orders to customers. R. ___ (Robin Culbertson's depo. pp. 21-23; Exhibit 1). The overwhelming majority, 146 orders, were shipped to customers in North Carolina. Id. In contrast, over the same five year period, the company had only 47 orders shipped to South Carolina. Id.

The Asheville Cotton Company does not regularly attend trade shows. Id. at 47. The company organizes a customer quilt show but it takes place inside the retail store. Id. at 48. The company occasionally attends the Asheville quilt show but it has never been to any quilt shows in South Carolina. Id. In 2012 Robin Culbertson spoke on a single occasion to a sewing group at a church in Landrum, South Carolina, regarding the creation of quilted jackets. Id. at 49-51. However, she has never been to any other events or functions in South Carolina related to quilting or sewing. Id. at 48.

William Culbertson handles the print advertising for the Asheville Cotton Company. R. ___ (William Culbertson's depo., p 5). The company places a weekly advertisement in the "IWANNA" shopping magazine circulated in Asheville. Id. at 5-6. For the past six years it has also advertised in "Sophie" magazine which is geared toward women in the Asheville area. Id. at 6. The company also advertises in the magazine

“Capital At Play” published by the Asheville Tribune. R. __ (William Culbertson’s depo., pp. 6-7. For many years the company advertised in the Asheville Citizen Times but it no longer does so. Id. at 7-8. Between 1998 and 2004, years before the alleged incident, the Asheville Cotton Company placed television advertisements quarterly on WLOS, which is a local ABC Asheville channel. Id. at 8-9. Asheville Cotton Company’s dealer agreements with sewing machine companies prohibit the store from advertising outside its market area or in South Carolina. Id. at 10-12.

ARGUMENT

I. The Trial Court Properly Dismissed All Claims Against Robin Culbertson And Chip Culbertson For Lack Of Personal Jurisdiction

That portion of the trial court’s orders dismissing Ms. Creswell’s claims against Robin Culbertson and William Culbertson in their individual capacities should be affirmed because it is undisputed that they have not engaged in any conduct sufficient to give rise to the exercise of personal jurisdiction over them in South Carolina. The Culbertsons are North Carolina residents. R. __ (Robin Culbertson’s depo. pp. 4-5); (William Culbertson’s depo., p. 4). William Culbertson is the president of Culbertson Enterprises, LLC, and Robin Culbertson is the vice president. R. __ (William Culbertson’s depo., pp. 4-5). There is no allegation that either individual engaged in any business activity in South Carolina or committed any act or omission giving rise to the plaintiff’s injuries. Rather, the evidence indicates that at all times they were merely acting as officers of Culbertson Enterprises, LLC d/b/a the Asheville Cotton Company.

At the hearing on the Respondents’ motion to dismiss, Ms. Creswell’s counsel effectively conceded that the Robin Culbertson and William Culbertson are not proper defendants. He stated to the trial court: “As I understood it, Your Honor, at the time we

started the suite, we thought it was a DBA the Cotton Company. If we substitute a corporate defendant, I don't object." R. __ (Hearing Transcript dated May 26, 2015, p. 11). Accordingly, because Culbertson Enterprises, LLC d/b/a Asheville Cotton Company is the only proper defendant in this action and, because there is no evidence supporting the trial court's exercise of personal jurisdiction over Robin Culbertson and William Culbertson, the trial court's dismissal of the plaintiff's claims against them should be affirmed.

II. The Trial Court Properly Found That Culbertson Enterprises, LLC d/b/a The Asheville Cotton Company Lacked Sufficient Minimum Contacts With South Carolina Such That Maintenance Of The Plaintiff's Suit Offends Traditional Notions of Fair Play And Substantial Justice.

A party seeking to invoke personal jurisdiction over a nonresident defendant bears the burden of proving the existence of personal jurisdiction. Moosally v. W.W. Norton & Co., 358 S.C. 320, 327, 594 S.E.2d 878, 882 (Ct.App.2004). "The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of each particular case." Id.

"Personal' jurisdiction is exercised as 'general jurisdiction' or 'specific jurisdiction.'" Coggeshall v. Reprod. Endocrine Assocs. of Charlotte, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007). S.C. Code Ann. § 36-2-802 (2003) governs general jurisdiction and states: "A court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, doing business, or maintaining his or its principal place of business in, this State as to any cause of action." "A court may assert general jurisdiction if the defendant has an 'enduring relationship' with the forum state." Cribb v. Spatholt, 382 S.C. 475, 482, 676 S.E.2d 706, 710 (Ct.App. 2009)(citing Cockrell

v. Hillerich & Bradsby Company, 363 S.C. 485, 495, 611 S.E.2d 505, 510 (2005). “To satisfy the ‘enduring relationship’ requirement of general jurisdiction, the defendants’ contacts must be ‘continuous and systematic,’ as well as ‘so substantial and of such a nature as to justify suit against the defendant on causes of action arising from dealings entirely different from those activities.’” Id.

Specific jurisdiction over a cause of action arising from a defendant’s contacts with South Carolina is granted pursuant to South Carolina’s long-arm statute. Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 611 S.E.2d 505 (2005) (citing State v. NV Sumatra Tobacco Trading, Co., 379 S.C. 81, 88, 666 S.E.2d 218, 222 (2008)). South Carolina’s long-arm statute states in pertinent part:

- (A) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's:
 - (1) transacting any business in this State;
 - (4) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;
 - (8) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.

S.C.Code Ann. § 36-2-803 (2003).

South Carolina's long-arm statute has been construed to extend to the outer limits of the due process clause. Cockrell, 363 S.C. at 491, 611 S.E.2d at 508. Accordingly, the sole question becomes whether the exercise of personal jurisdiction would violate due process. Id.

The South Carolina Supreme Court has set forth the test for whether the exercise of personal jurisdiction violates due process:

Due process requires that there exist minimum contacts between the defendant and the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. Further, due process mandates that the defendant possess sufficient minimum contacts with the forum state, so that he could reasonably anticipate being haled into court there. Without minimum contacts, the court does not have the “power” to adjudicate the action. The court must also find that the exercise of jurisdiction is “reasonable” or “fair.” If either prong fails, the exercise of personal jurisdiction over the defendant fails to comport with the requirements of due process.

NV Sumatra Tobacco Trading, Co., 379 S.C. at 89, 666 S.E.2d at 222 (citations omitted).

The foreseeability that is critical to due process analysis is whether the defendants’ conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there. NV Sumatra Tobacco Trading, Co., 379 S.C. at 89, 666 S.E.2d at 222. “Under the fairness prong, the court must consider: (1) the duration of the activity of the nonresident within the state; (2) the character and circumstances of the commission of the nonresident’s acts; (3) the inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the State’s interest in exercising jurisdiction.” Cockrell, 363 S.C. at 492, 611 S.E.2d at 508 (citing Clark v. Key, 304 S.C. 497, 405 S.E.2d 599 (1991)). “The due process requirements must be met as to each defendant and thus the Court is to assess individually each defendant’s contacts with South Carolina. Id. (citing Rush v. Savchuk, 444 U.S. 320, 100 S.Ct. 571, 62 L.Ed.2d 516 (1980)).

Numerous cases have addressed the question of whether a business’ website and activities have sufficiently reached other states to subject it to personal jurisdiction in those states. In Mink v. AAAA Development LLC, 190 F.3d 333 (5th Cir. 1999), the

court addressed the type of minimum contacts necessary to give rise to personal jurisdiction. In that case, Mink filed a copyright lawsuit against the defendants arising out of the alleged improper use of his software. Id. at 334-35. Mink was a resident of Texas and AAAA was a company in Vermont. Id. AAAA maintained a web site but affirmed that it did not make any sales in Texas. Id. The district court dismissed Mink's lawsuit for lack of personal jurisdiction. Id. In addressing the applicable law, the court stated:

Courts addressing the issue of whether personal jurisdiction can be constitutionally exercised over a defendant look to the "nature and quality of commercial activity that an entity conducts over the Internet." Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119, 1124 (W.D.Pa.1997). The Zippo decision categorized Internet use into a spectrum of three areas. At the one end of the spectrum, there are situations where a defendant clearly does business over the Internet by entering into contracts with residents of other states which "involve the knowing and repeated transmission of computer files over the Internet..." Zippo, 952 F.Supp. at 1124. In this situation, personal jurisdiction is proper. See Id. (citing CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir.1996)). At the other end of the spectrum, there are situations where a defendant merely establishes a passive website that does nothing more than advertise on the Internet. With passive websites, personal jurisdiction is not appropriate. See Id. (citing Bensusan Restaurant Corp., v. King, 937 F.Supp. 295 (S.D.N.Y.1996), aff'd, 126 F.3d 25 (2d Cir.1997)). In the middle of the spectrum, there are situations where a defendant has a website that allows a user to exchange information with a host computer. In this middle ground, "the exercise of jurisdiction is determined by the level of interactivity and commercial nature of the exchange of information that occurs on the Website." Id. (citing Maritz, Inc. v. Cybergold, Inc., 947 F.Supp. 1328 (E.D.Mo.1996)). We find that the reasoning of Zippo is persuasive and adopt it in this Circuit.

Applying these principles to this case, we conclude that AAAA's website is insufficient to subject it to personal jurisdiction. Essentially, AAAA maintains a website that posts information about its products and services. While the website provides users with a printable mail-in order form, AAAA's toll-free telephone number, a mailing address and an electronic mail ("e-mail") address, orders are not taken through AAAA's website. This does not classify the website as anything more than passive

advertisement which is not grounds for the exercise of personal jurisdiction. See Zippo, 952 F.Supp. at 1124.

Mink, 190 F.3d at 345.

In Brown v. Geha-Werke GmbH, 69 F.Supp.2d 770 (D.S.C. 1999), the court cited heavily to Mink and Zippo in concluding that a web site did not confer personal jurisdiction over the defendant. In that case the court stated:

According to Plaintiff, Defendant Geha-Werke's web site advertises its product and provides its Internet e-mail address. Consequently, the web site appears to fall into the "passive" web site category of cases, which would preclude the assertion of personal jurisdiction based on its web site. Indeed, "no court has ever held that an Internet advertisement alone is sufficient to subject the advertiser to jurisdiction in the plaintiff's home state."

Nevertheless, despite the neat categorizations of "passive" and "interactive," ... "the critical issue for the court to analyze is the nature and quality of commercial activity conducted by an entity over the Internet in the forum state." The record before this court does not reflect that Defendant Geha-Werke conducted any commercial activity over the Internet in South Carolina. Plaintiff submitted no evidence that any South Carolina resident visited Defendant Geha-Werke's web site, other than the staff of Plaintiff's counsel's law firm. Moreover, no evidence was presented that any South Carolina resident purchased Geha-Werke products over the Internet or purchased such products based on any web site advertisement. Finally, Plaintiff produced no evidence that Defendant Geha-Werke has done anything to encourage South Carolina residents to visit the web site or that this web site was directed at South Carolina any more than any other place in the world. Consequently, this court finds that Geha-Werke's web site cannot provide the basis for an assertion of personal jurisdiction over Defendant Geha-Werke.

Brown, 69 F.Supp.2d at 777.

The case of Coggeshall v. Reproductive Endocrine Associates of Charlotte, 376 S.C. 12, 655 S.E.2d 476 (S.C. 2007), is directly analogous to this case. In Coggeshall, the plaintiff sued a non-resident doctor in regard to issues related to in vitro fertilization performed at Reproductive Endocrine Associates of Charlotte ("REACH"). Id. at 478.

REACH maintained an informational website which was accessible by residents of South Carolina. Id. at 479. The website allowed prospective patients to email REACH for information. Id. The plaintiff alleged the following: (1) that the doctor's office performed services for nearly three thousand South Carolina residents between 2000 and 2004 and sent bills to South Carolina; (2) earned over \$2 million from South Carolina patients during that period which represented less than 1% of income; (3) received referrals from at least twelve South Carolina healthcare providers; (4) was a member of the IntegraMed Network of Infertility which had one member in South Carolina; (5) had referred South Carolina patients to two other medical practices in South Carolina, for the patients' convenience; and (6) had 55 vendors with whom it did business, five of which were located in South Carolina. Id. In finding that insufficient contacts existed to confer personal jurisdiction, the court stated:

Although REACH has served a fair number of South Carolina patients, REACH does not target its advertising to South Carolina residents nor does it systematically search out patients here. REACH maintains a website accessible by South Carolina residents but it is simply an informational website that allows prospective patients to email for information. This type of "passive" website does not direct business activities to a particular forum. See Holland America Line, Inc. v. Wartsila North Amer., Inc., 485 F.3d 450 (9th Cir.2007); Jennings v. AC Hydraulic A/S, 383 F.3d 546 (7th Cir.2004) (distinguishing between interactive and passive websites for purposes of personal jurisdiction); see also McBee v. Delica Co., 417 F.3d 107 (1st Cir.2005) (noting that given omnipresence of internet websites, allowing personal jurisdiction to be premised on such a contact alone would eviscerate limits on a state's jurisdiction).

We decline to hold that REACH or Dr. Crain is doing business in South Carolina based on their unsolicited patient contacts or tangential business dealings with vendors here.

Coggeshall, 376 S.C. at 18, 655 S.E.2d at 479-80.

Like the Brown and Coggeshall cases, in the instant case there is insufficient contact by the Asheville Cotton Company with South Carolina such that it could expect

to be haled into court there and the trial court's exercise of jurisdiction would not be fair or reasonable. The Asheville Cotton Company does not direct its advertising to South Carolina residents. While it maintains a website, the website is passive and only provides general information concerning the store's products and services. Further, no sales have been completed or products purchased using the website. Significantly, the website does not solicit or collect the email or mailing addresses of customers.

While the Asheville Cotton Company does maintain a mailing list, customers must physically enter the store in North Carolina and then voluntarily chose to be added to the store's mailing list. The company does not use billboards or solicit customers through general mailers distributed to a given geographic area. R. __ (Memorandum in Support of Motion to Dismiss; Affidavit of William Culbertson, p. 1). There is no way for the Asheville Cotton Company to determine from a customer's email address whether the customer is a non-resident. In other words, this activity does not directly solicit customers from South Carolina. Notably, there is no allegation or evidence in this case indicating that the plaintiff visited the Asheville Cotton Company because of any solicitation by the company.

It is undisputed that the Asheville Cotton Company's principal place of business, and its only place of business, is in North Carolina where it operates a brick-and-mortar retail store. (Memorandum in Support of Motion to Dismiss; Affidavit of William Culbertson, p. 1). It does not have an office in South Carolina and it has never obtained a business license in South Carolina. Id. No goods were produced or services rendered by the company in South Carolina. Id. The company has not advertised on television since 2004 and, even when it did, such advertisements were on the local ABC Asheville

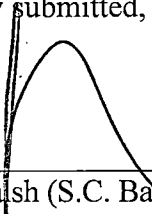
channel. Id. Because of dealership agreements with certain sewing machine manufacturers, the company is prohibited from advertising for the sale of sewing machines in South Carolina. Id. The company's print advertisements are limited to placements in women's magazines distributed in Asheville, North Carolina.

In summary, the plaintiff has not offered evidence of continuous, systematic, or substantial contact by the Asheville Cotton Company with South Carolina. Accordingly, the trial court properly dismissed all claims against the company because the exercise or personal jurisdiction over it would offend traditional notions of fair play and substantial justice.

CONCLUSION

For all of the reasons discussed above, the Respondents respectfully request that the Court affirm the trial court's decisions granting the Respondents' motion to dismiss.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
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APPEAL FROM GREENVILLE COUNTY
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Letitia H. Verdin, Circuit Court Judge

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Blanche G. Creswell.....Appellant.

v.

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Asheville Cotton Company.....Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent and Respondents' Designation of Matter to be Included in the Record on Appeal on Blanche G. Creswell, by depositing copies in the United States Mail, postage prepaid, on January 20, 2016, to her attorney of record, Gregory A. Morton, 4 Arborland Way, Greenville, SC 29615.

January 20, 2016.

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January 20, 2016

JAN 25 2016

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Blanche G. Creswell, Appellant v. Robin Culbertson, Chip Culbertson d/b/a Asheville Cotton Company, and Asheville Cotton Company, Respondents
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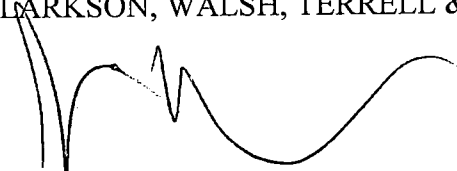
Dear Ms. Kitchings:

Enclosed for filing are an original and one (1) copy of the Initial Brief of Respondents and Respondents' Designation of Matter to be Included in the Record on Appeal along with a Proof of Service. We would ask that you to return clocked copies of these documents to us in the enclosed envelope.

By copy of this letter we are serving Appellant with copies of the same. Thank you for your kind consideration and assistance. Please feel free to call if you should have any questions or comments regarding this matter.

Yours very truly,

CLARKSON, WALSH, TERRELL & COULTER, P.A.



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