

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

**RECEIVED**

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

JUL 25 2016

Mikell Scarborough, Master-in-Equity

**SC Court of Appeals**

Appellate Case No.: 2015-001709

Margaret Moore,

Appellant,

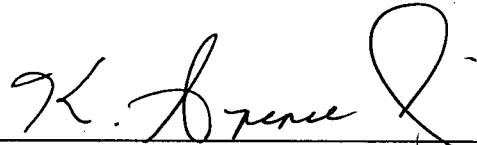
v.

Annabel Pougner and Jean Pougner,

Respondents.

**RESPONDENTS' INITIAL BRIEF**

**HALL BOOTH SMITH, P.C.**



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July 22, 2016  
Charleston, South Carolina

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STATEMENT OF ISSUES ON APPEAL

- I. APPELLANT FAILED TO OFFER PROOF OF THE EXCLUDED TESTIMONY OF GERALD MOORE AND, THEREFORE, WHETHER THE TESTIMONY WAS PROPERLY EXCLUDED WAS NOT PRESERVED FOR APPELLATE REVIEW.
  
- II. ASSUMING, *ARGUENDO*, THAT THE TRIAL COURT'S EXCLUSION OF TESTIMONY WAS PRESERVED FOR REVIEW BY THIS COURT, IT IS CLEAR THAT THE TRIAL COURT PROPERLY APPLIED THE DEAD MAN'S STATUTE TO EXCLUDE THE TESTIMONY REGARDING THE DECEASED PRIOR OWNER'S ALLEGED AGREEMENT WITH APPELLANT AS TO THE LOCATION OF THE BOUNDARY LINE.
  
- III. THE TRIAL COURT'S DECISION REGARDING APPELLANT'S CLAIM OF ACQUIESCENCE WAS FACTUALLY BASED AND, GIVEN THIS COURT'S STANDARD OF REVIEW, THE TRIAL COURT'S ORDER SHOULD BE AFFIRMED.

## STATEMENT OF THE CASE

Appellant Margaret Moore commenced this case with the filing of a Complaint against Respondents Annabel Pougner and Jean Pougner in the Court of Common Pleas for Charleston County on March 16, 2012.<sup>1</sup> The Complaint alleged that Appellant is the record owner of Lot 37 in the residential subdivision commonly referred to as Bayview Acres, and that Respondents trespassed upon a portion thereof. Appellant's claims against Respondents included adverse possession, acquiescence, trespass, injunction, and a declaratory judgment to determine the boundary line between the parties' respective properties.<sup>2</sup>

Respondents filed an Answer and, subsequently, an Amended Answer and Counterclaim was filed on September 18, 2014. Respondents denied any wrongdoing or liability to Appellant on the basis that Respondents owned the disputed property. Respondents also alleged a counterclaim against Appellant for a declaratory judgment, seeking a judicial determination as to the location of the boundary line between the two properties.

The case was tried before the Honorable Mikell R. Scarborough on May 4, 2015. Judge Scarborough issued his Final Order on July 7, 2015, in which he denied all relief to Appellant and granted the Respondents' counterclaim for declaratory judgment and set the boundary line.

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<sup>1</sup> On November 18, 2013, Respondents' Motion to Join an Indispensable Party pursuant to SCRCP 19 and 20 was granted. Specifically, it was ordered that Alex Elizabeth Cleary be added as a party to the case. Following her addition to the case, Alex Cleary transferred her interest in the subject property to her mother Sandra Moore, who, in turn, transferred the interest to Margaret Moore. At the time of trial, Margaret Moore owned 100% of the title. Consequently, Alex Cleary was removed as a party to this action.

<sup>2</sup> On April 17, 2015, the Court executed a Consent Order dismissing Appellant's cause of action for adverse possession, with prejudice.

Appellant filed a timely Notice of Appeal.

**STATEMENT OF FACTS**

Appellant is the owner of approximately 0.48 acres of real property located within Charleston County, bearing TMS No. 517-06-00-037, shown as Lot 37 on a plat entitled, "Block A of Bayview Acres Subdivision," which was prepared by the John McCrady Company dated February 1948 and filed on April 17, 1948 ("Moore Property"). Respondents are Appellant's adjacent neighbors and owners of approximately 0.55 acres of real property located within Charleston County, bearing TMS No. 517-06-00-035, shown as Lot 36 on a plat entitled, "Block A of Bayview Acres Subdivision," which was prepared by the John McCrady Company dated February 1948 and filed on April 17, 1948 ("Pougner Property"). The subject dispute involves the location of the western boundary line of the Moore Property and the eastern boundary line of the Pougner Property.

The earliest record of the boundary line, and the senior plat of record, was admitted into evidence as Respondents' Exhibit 1, John McCrady Plat, a 1948 plat showing a survey of Bayview Acres Subdivision.<sup>3</sup> The John McCrady Plat describes the boundary line by course and distance; specifically, a line that starts at a point nearest Bay View Drive and then running at a course and direction of south 14 degrees 30 minutes east (S. 14° 30' E) for two hundred fifty-one feet (251'). The location of the starting point nearest Bay View Drive was not disputed at trial.

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<sup>3</sup> Recorded April 17, 1948, in the RMC Office for Charleston County, South Carolina, in Plat Book G, at Page 48-A.

The John McCrady Plat is identified and specifically referenced in each deed in Appellant's chain of title.<sup>4</sup> Appellant presented no evidence to the contrary and made no attempt to challenge this contention on cross-examination, or through competing expert testimony. Similarly, the John McCrady Plat is identified and specifically referenced in each deed in Respondents' chain of title.<sup>5</sup> Respondents presented evidence to establish that the true boundary line between the properties is as shown on the John McCrady Plat, and as described in all of the relevant deeds.

On December 7, 2010, the month following the Respondents' purchase of their property, Appellant completed an application for a dock permit which was submitted to the South Carolina Department of Health and Environmental Control's Office of Coastal Resource Management ("SCDHEC-OCRM"). This permit application was received by SCDHEC-OCRM on December 15, 2010.<sup>6</sup> Appellant engaged E.M. Seabrook Jr., Inc., to assist her with the dock permit application process. As an integral part of that engagement, Lewis Seabrook prepared a survey of the Moore Property to demonstrate the boundary lines. The "Seabrook" survey established the boundary lines in conformity with the lines declared in the John McCrady Plat.<sup>7</sup>

The next most senior plat drawing the boundary line in question is a February 2011 Plat, Resurvey of Lot 37 Block A, by Lewis E. Seabrook. The resurvey established

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<sup>4</sup> The five prior deeds in Appellant's claim of title conveyed certain property, known as Lot 37, Block A, Bay View Acres Subdivision, and were entered into evidence as Respondents' Exhibits 2-8.

<sup>5</sup> The three prior deeds in Respondents' chain of title conveyed certain property, known as Lot 36, Block A, Bay View Acres, and were entered into evidence as Respondents' Exhibits 9-11.

<sup>6</sup> The permit application was entered into evidence as part of Respondents' Exhibit 12.

<sup>7</sup> This survey was entered into evidence as part of Respondents' Exhibit 15.

the boundary line in conformity with the line declared in the John McCrady Plat.<sup>8</sup> The Seabrook Plat was created as part of the dock permit application process.

At trial, Appellant's husband Gerald Moore, Jr., testified that he maintained the Moore Property up to a hedgerow. More specifically, he claimed he removed shrubs, mowed grass, and trimmed and planted trees. Moore also testified that the southwest corner of the Moore Property was marked by a pipe on the edge of the marsh. However, Appellant offered no evidence to establish the location of the pipe on the edge of the marsh. Moreover, Appellant submitted no photographic or graphic evidence of the purported marsh pipe, the purported hedgerow, or any other objective indication of the boundary line.

Importantly, Appellant testified that she owned only that property which was purchased by her father and subsequently conveyed to her by deed. Specifically, Appellant testified:

Q. And as I understand it you agree that whatever your father purchased that's what you have now?

A. I agree that whatever he purchased I have now. (Tr. 59:8-10)

Q. So I guess my question simply is, do you have any more property than what your father purchased in 1966?

A. I hope not. (Tr. 61:24-25; 62: 1-2).

Appellant further testified that she did not intend to move or alter the boundary line described in her deeds by reference to the John McCrady Plat. Specifically, Appellant testified:

Q. You don't believe in moving property lines, do you?

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<sup>8</sup> The February 2011 Plat was entered into evidence as part of Respondents' Exhibit 14.

A. Most definitely not. I have never moved nor do I know of any property line that has ever been moved. (Tr. 60:4-7, May 4, 2014).

Q. As we sit here today your property is, it is that which is described by deed. It is that which was established by plat in 1948 because you don't move property lines?

A. I do not move property lines. (Tr. 61: 10-14).

Q. That is your intent, right?

A. That is my intent. (Tr. 61:15-16).

Lewis Seabrook, a registered land surveyor and civil engineer, testified at trial as an expert witness for the Respondents. Mr. Seabrook was qualified as an expert land surveyor, and was the only witness to offer expert testimony in the case. Mr. Seabrook confirmed that as part of his prior retainment by Appellant for her dock permit application, he established both the length and dimensions of the boundary lines in the 2010 survey and 2011 plat by utilizing information from the John McCrady Plat. Mr. Seabrook testified that he was able to establish the existence and location of the disputed southwest corner by using the property description from the John McCrady Plat. Finally, he testified he reset an iron rebar in the southwest corner, consistent with where Mr. McCrady had set that same line in 1948. His testimony was un-contradicted.

Appellant presented no evidence to challenge Mr. Seabrook's testimony on cross-examination, or through competing expert testimony. In fact, Appellant did not present any objective evidence to establish either the location of the disputed southwest corner or the location of the boundary line other than that described in the John McCrady Plat.

## LAW AND ARGUMENT

### STANDARD OF REVIEW

The parties' dispute concerns the location of the boundary line between their respective properties. "A boundary dispute is an action at law and the location of a disputed boundary line is a question of fact." Bodiford v Spanish Oak Farms, Inc., 317 S.C. 539, 544, 455 S.E.2d 194, 197 (Ct. App. 1995) (citation omitted). The question of whether the parties acquiesced in a boundary line is also a question of fact. Judy v. Judy, 413 S.C. 341, 350, 776 S.E.2d 96, 101 (Ct. App. 2015). While this Court may correct errors of law, the Court is significantly constrained with regard to the trial court's findings of fact. Linda Mc Co. v. Shore, 390 S.C. 543, 555, 703 S.E.2d 499, 503 (2010). Since the subject law case was tried without a jury, the trial judge's findings of fact will not be disturbed unless no evidence reasonably supports the findings. Townes Assocs. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). Consequentially, this Court "must look at the evidence in the light most favorable to the respondents and eliminate from consideration all evidence to the contrary." Sheek v Crimestoppers Alarm Sys., 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct. App. 1989).

Appellant also argues that the trial court improperly excluded certain evidence that, presumably, warrants reversal of the trial court's decision. In reviewing the admission or exclusion of evidence, the trial court's ruling will not be disturbed on appeal absent a clear abuse of discretion. Hofer v. St. Clair, 298 S.C. 503, 513, 381 S.E.2d 736, 742 (1989). "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice . . .". Conner v. City of Forest Acres, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005).

**I. APPELLANT FAILED TO OFFER PROOF OF THE EXCLUDED TESTIMONY OF GERALD MOORE AND, THEREFORE, WHETHER THE TESTIMONY WAS PROPERLY EXCLUDED WAS NOT PRESERVED FOR APPELLATE REVIEW**

Appellant's first assignment of error concerns the trial court's decision to exclude certain testimony of Gerald Moore based on the application of the Dead Man's Statute. S.C. Code Ann. § 19-11-20 (2015). However, once the trial court decided to exclude the evidence, Appellant failed to proffer the testimony of Gerald Moore.<sup>9</sup> In fact, the record is devoid of any direct testimony of Gerald Moore upon which this Court can make any determination as to whether the testimony would be, or would not be, violative of the Dead Man's Statute. Accordingly, this issue has not been properly preserved for appellate review. Greenville Mem'l Auditorium v Martin, 301 S.C. 242, 244, 391 S.E.2d 546, 547 (1990) ("An alleged erroneous exclusion of evidence is not a basis for establishing prejudice on appeal in absence of an adequate proffer of evidence in the court below." (Citation omitted)).

**II. ASSUMING, ARGUENDO, THAT THE TRIAL COURT'S EXCLUSION OF TESTIMONY WAS PRESERVED FOR REVIEW BY THIS COURT, IT IS CLEAR THAT THE TRIAL COURT PROPERLY APPLIED THE DEAD MAN'S STATUTE TO EXCLUDE THE TESTIMONY REGARDING THE DECEASED PRIOR OWNER'S ALLEGED AGREEMENT WITH APPELLANT AS TO THE LOCATION OF THE BOUNDARY LINE**

Respondents' predecessor-in-interest, the Nelsons, are deceased and were deceased at the time the property was purchased by the Respondents in November 2010. At trial, Appellant sought to elicit testimony from Gerald Moore regarding an alleged agreement between Moore and former owner Lars Rhame Nelson as to the location of the

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<sup>9</sup> The trial court decided to exclude the evidence based on the arguments of counsel, not on the basis of any actual testimony offered by the witness. [Tr. 21-28].

boundary line between their properties. Importantly, Appellant sought to establish acquiescence during the period of time when the Nelsons owned the property and sought to introduce evidence of an "agreement" and/or "understanding" with the Nelsons through the testimony of Gerald Moore.<sup>10</sup> The trial court properly excluded this testimony pursuant to the Dead Man's Statute.

It is well established that the Dead Man's Statute "prohibits any interested person from testifying concerning conversations or transactions with the decedent if the testimony could affect his or her interest." Hanahan v Simpson, 326 S.C. 140, 151, 485 S.E.2d 903, 909 (1997). In the subject case, it was readily demonstrated that Gerald Moore had been the title owner of Appellant's property and that he and his wife moved the title around between them whenever it suited their purposes. Clearly, any testimony that Gerald Moore might have offered concerning any agreement/understanding (*i.e.* transaction) with the deceased Nelsons as to the boundary line directly affected "the interest of such witness [Gerald Moore] or the interest previously owned or represented by him" and was, therefore, properly excluded by the trial court pursuant to the Dead Man's Statute. S.C. Code Ann. § 19-11-20 (2015).

Perhaps a more significant concern is the Appellant's failure to identify the prejudice from the exclusion of the evidence. In fact, in her brief, Appellant appears to argue that the testimony that was excluded by the trial court was cumulative to that which was received into evidence.<sup>11</sup> As discussed hereinabove, Appellant failed to proffer the

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<sup>10</sup> As described in Section II, Appellant failed to proffer the testimony of Gerald Moore on this issue and, therefore, the issue was not preserved for appellate review.

<sup>11</sup> In her brief, Appellant states, "Given that there was extensive testimony regarding the existence of the hedgerow and the long-standing practice of the neighbors with respect to the maintenance of their properties up to that line, the testimony regarding their discussions about the line [which was excluded pursuant to the Dead Man's Statute] were no more than cumulative." See Appellant's Brief at p. 5.

testimony of Gerald Moore as to the alleged agreement/understanding with the Nelsons. Therefore, it is impossible for this Court to determine whether the excluded evidence would have been sufficiently prejudicial to warrant reversal of the trial court's decision solely on the basis of the exclusion of the specific evidence.

Accordingly, the trial court's decision must be affirmed.

**III. THE TRIAL COURT'S DECISION REGARDING APPELLANT'S CLAIM OF ACQUIESCENCE WAS FACTUALLY BASED AND, GIVEN THIS COURT'S STANDARD OF REVIEW, THE TRIAL COURT'S ORDER SHOULD BE AFFIRMED**

While a boundary dispute is an action at law, the location of a disputed boundary line is a question of fact. Bodiford v Spanish Oak Farms, Inc., 317 S.C. 539, 544, 455 S.E.2d 194, 197 (Ct. App. 1995) (citation omitted). In the subject case, Appellant attempted to establish the boundary line through acquiescence. The question of whether the parties acquiesced in a boundary line is also a question of fact. Judy v. Judy, 413 S.C. 341, 350, 776 S.E.2d 96, 101 (Ct. App. 2015).

Generally, "acquiescence is a question of fact determined by the intent of the parties." Kirkland v Gross, 286 S.C. 193, 198, 332 S.E.2d 546, 549 (Ct. App. 1985). "[I]f adjoining landowners occupy their respective premises up to a certain line which they mutually recognize and acquiesce in for a long period of time, they are precluded from claiming in the boundary line thus recognized and acquiesced in is not the true one." Croft v. Sanders, 323 S.E.2d 791, 792, 283 S.C. 507 (Ct. App. 1984) (citing Klapman v. Hook, 206 S.C. 51, 57, 32 S.E.2d 882, 884 (1945)). For a new boundary to be established by acquiescence, both parties must recognize and accept a particular line

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Additionally, Appellant argues that [e]ven without the improperly excluded testimony about the history of the relationship between Appellant and Respondent's predecessor, there was more than sufficient evidence of acquiescence to a property line other than that reflected on the original plat." Id.

constituted the true boundary line. See Croft v. Sanders, 283 S.C. 507, 510, 323 S.E.2d 791, 793 (Ct. App. 1984); see also Knox v. Bogan, 322 S.C. 64, 71-73, 472 S.E.2d 43, 48-49 (Ct. App. 1996) (holding adjoining property owners' mutual acquiescence in and recognition of a clearly defined boundary line for a long period of time is proof of acquiescence).

To support a finding of acquiescence, all parties (and/or their predecessors in interest) must have recognized and accepted the modified boundary line as the true line. However, in this case, there is no evidence that the parties mutually recognized any clearly defined line (other than that described by the John McCrady Plat) nor evidence to support a finding they mutually acquiesced in the modified boundary line. The Nelsons are deceased, and there was no evidence offered at trial that they recognized and/or accepted a clearly defined boundary other than the line established by the John McCrady Plat. Absent evidence of the parties' acknowledgment of a clearly defined boundary, there can be no acquiescence. Knox, 322 S.C. at 71-73, 472 S.E.2d at 48-49; see also Croft v. Sanders, 323 S.E.2d 791, 283 S.C. 507 (Ct. App. 1984) ("Absent mutual recognition by both parties that a particular line was the true property line, a new boundary line cannot be established by acquiescence.").

Moreover, there has been no evidence of any intent to establish a boundary line that is different from the boundary line as set forth in the John McCrady Plat. Most importantly, Appellant specifically testified that she owned only that property which was purchased by her father and subsequently conveyed to her by deed. She conceded that her deed describes the property with express reference to the John McCrady Plat. Finally, Appellant affirmatively testified it was not her intent to move property lines. These facts

are fatal to her acquiescence claim and provide more than ample evidence to support the trial court's decision. See Kirkland v. Gross, 286 S.C. 193, 332 S.E.2d 564 (Ct. App. 1985) ("[t]he mere existence of a fence between properties is not sufficient to establish a boundary line by acquiescence absent intent."); see also Harrison v. Lanoway, 214 S.C. 294, 52 S.E.2d 264 (1949) ("defendant failed to establish title by acquiescence . . . where there was no showing that the hedge was intended to mark the boundary line").

Aside from Appellant's own testimony, the most compelling evidence against the acquiescence claim was Appellant's application for a dock permit submitted to SCDHEC-OCRM which was submitted to SCDHEC-OCRM in December 2010, less than one month following Respondents' purchase of Lot 36. Appellant engaged E.M. Seabrook, Jr. Inc., to assist her with the dock permit application process. As part of that engagement, Lewis Seabrook prepared a survey of the Moore Property to establish the boundary lines, which in turn would determine the dock corridor. The survey established the boundary lines in conformity with the lines described in the John McCrady Plat and was submitted to SCDHEC-OCRM as part of the application drawings. In short, Appellant, through her appointed agent, affirmatively represented to the State of South Carolina in 2010 that the boundary line between her property and that of Respondents was exactly as represented in the parties' deeds and the 1948 John McCrady Plat – the same line Respondents' claim as the correct boundary line.

Subsequently, SCDHEC-OCRM requested Appellant provide a new plat showing the current critical line. The February 2011 Plat, Resurvey of Lot 37 Block A, was approved and submitted to SCDHEC-OCRM. This plat also established the boundary lines in conformity with the lines described in the John McCrady Plat. Mr. Seabrook

testified that his crew did not initially find an iron rebar at the disputed southwest corner; however, they were able to reset an iron rebar in the southwest corner by utilizing the information from the John McCrady Plat. Mr. Seabrook's testimony concerning the results of his survey was un-contradicted.

Finally, Appellant completely failed in her burden of proof to establish that the boundary line was other than that contained in the John McCrady Plat. While Appellant has argued that a hedgerow constituted a new boundary that defeated the description contained in the parties' deeds, Appellant failed to offer any guidance/evidence to the trial court as to where the new line should be located and how it should be legally described in the public domain. There is absolutely no evidence to answer the simplest questions as to where the acquiesced boundary line should be located and how it should be legally described. The only evidence of such to divine from the record is that the acquiesced line should coincide with a hedgerow. When compared with the superior expert testimony of Lewis Seabrook, Appellant's evidence simply fell short and failed to convince the trial court that the boundary line should be moved from the location it has held since 1948.

With more than ample evidence to support the trial court's findings of fact, Respondents respectfully submit that the trial court's Final Order must be affirmed.

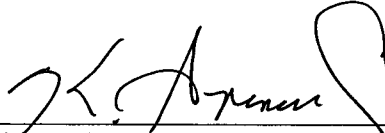
### **CONCLUSION**

Based on the foregoing, there is more than ample evidence to support the trial court's factual findings and legal analysis and, therefore, Respondents respectfully submit that the trial court's Final Order must be affirmed.

*(Signature appears on the succeeding page)*

Respectfully submitted,

**HALL BOOTH SMITH, P.C.**



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*Attorneys for Respondents*

July 22, 2016  
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Mikell Scarborough, Master-in-Equity

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Appellate Case No.: 2015-001709

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Margaret Moore,

Appellant,

v.

Annabel Pougner and Jean Pougner,

Respondents.

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**PROOF OF SERVICE**

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I certify that I have served the **Respondents' Initial Brief** upon Appellant by depositing a copy of same in the United States Mail, First Class postage prepaid, on July 22, 2016, addressed to Appellant's attorneys of record, addressed as follows:

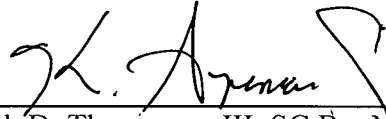
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July 22, 2016

**VIA FEDERAL EXPRESS**

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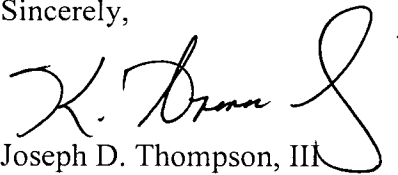
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JUL 25 2016  
SC Court of Appeals

Re: Margaret B. Moore v. Annabel Pougner and Jean Pougner  
Appellate Case No.: 2015-001709  
HBS File No.: 6765.0001

Dear Ms. Kitchings:

Enclosed please find an original and seven copies each of Respondents' Designation of Matter to be Included in the Record on Appeal and Respondents' Initial Brief in the above case. Please file the documents and return clocked copies to me in the enclosed self-addressed, stamped envelope. By copy of this correspondence to Appellant's counsel, I am serving them with a copy of same. Thank you for your assistance in this matter.

Sincerely,

  
*for* Joseph D. Thompson, III

JDT,III/vr

Enclosures

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SOUTH CAROLINA COURT OF APPEALS  
1220 SENATE STREET

COLUMBIA SC 29201

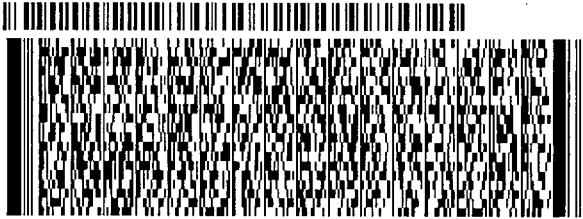
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