

IN THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

**RECEIVED**

JAN 24 2017

**SC Court of Appeals**

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Case No. 2015-CP-26-8179  
Appellate Case No. 2016-002175

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Robert DeCiero, a resident of Long Bay Estates Subdivision,  
Myrtle Beach, South Carolina.....Appellant,

v.

Horry County, State of South Carolina.....Respondent.

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INITIAL BRIEF OF APPELLANT

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Thomas C. Brittain, Esquire  
Mary Madison Brittain Langway, Esquire  
The Brittain Law Firm  
4614 Oleander Drive  
Myrtle Beach, SC 29577  
Telephone: (843) 449-8562

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**STATEMENT OF ISSUES ON APPEAL**

- 1. DID THE CIRCUIT COURT ERR IN RULING THAT APPELLANT'S COMPLAINT WAS DEFICIENT IN ACCORDANCE WITH RULE 8(A) AND THAT, AS A RESULT OF THESE DEFICIENCIES, RESPONDENT WAS ENTITLED TO RELIEF UNDER RULE 12(B)(6)?**
  
- 2. DID THE CIRCUIT COURT ERR IN RULING THAT THE HORRY COUNTY ZONING ORDINANCES CITED IN APPELLANT'S COMPLAINT DO NOT RESTRICT THE NUMBER OF OCCUPANTS ALLOWED IN THE HOMES LOCATED IN LONG BAY ESTATES?**
  
- 3. DID THE CIRCUIT COURT ERR IN RULING THAT APPELLANT LACKS STANDING TO BRING AN ACTION AGAINST RESPONDENT FOR ZONING VIOLATIONS WITHIN LONG BAY ESTATES BECAUSE HE DID NOT SUSTAIN AN INJURY-IN-FACT?**

## STATEMENT OF THE FACTS

On June 2, 2015, counsel for Appellant, Thomas C. Brittain, sent to representatives for the Respondent, Janet Carter and County attorney Arrigo Carotti, a correspondence advising that, on behalf of certain Long Bay Estates residents, he was filing a formal complaint regarding violations of specific Horry County Codes by several homeowners within that subdivision. At that time, Mr. Brittain requested that the County immediately investigate the matter and enforce the provisions of the ordinances of Horry County in order to assure compliance. This was not the first time the County was made aware of these violations by Appellant. Appellant had appealed to the County on many occasions regarding these violations and had repeatedly requested that the County enforce their own ordinances, all to no avail.

By correspondence dated June 12, 2015, Ms. Carter responded that Horry County had no specific ordinance prohibiting short-term rentals in established neighborhoods. She further stated that the matter had been discussed previously but that no ordinances were brought forward due to concerns such as the County's inability to police and enforce such an ordinance.

On July 13, 2015, Appellant and his counsel, Mr. Brittain, met with representatives of Respondent including Zoning Administrator Rennie Mincey to discuss the multiple property owners located within Long Bay Estates Subdivision that were violating Article IV Section 431 of the Horry County Zoning Ordinance by allowing large groups of people, many unrelated, to rent these homes on a weekly basis. Further, that these violations created a public nuisance for the residents of this subdivision including, but not limited to, traffic nightmares, late-night parties, congestion and excessive noise levels. During this meeting, Appellant and Mr. Brittain requested that Respondent enforce their zoning ordinances, as they are required to do in accordance with Article XIII Section 1300 of the Horry County Zoning Ordinance.

In follow up to this meeting, on August 18, 2015, counsel for Appellant emailed to Mr. Mincey and Mr. Carrotti, a Memorandum further outlining Appellant's position on the matter and on September 17, 2015, mailed a letter to Ms. Carter and Mr. Mincey following up on the matter. On September 21, 2015, Mr. Brittain received a written response to his Memorandum from Ms. Carter stating there was no ordinance in Horry County prohibiting short term rentals; however, she failed to address the Horry County Ordinance that restricts the number of persons allowed to reside in a single family home or the County's failure to enforce that Ordinance.

On November 13, 2015, Appellant filed with the Horry County Court of Common Pleas (with Civil Action No. 2015-CP-26-8179) an action against Respondent for their failure to enforce the applicable zoning ordinances within Long Bay Estates. On December 16, 2015, Respondent filed its Answer.

On April 14, 2016, Respondent filed a Motion to Dismiss under Rule 12(b)(6) and for Summary Judgment Under Rule 56 together with a Memorandum in Support. Appellant filed his Memorandum in Opposition to Motion to Dismiss/Motion for Summary Judgment on May 20, 2016.

Respondent's Motion was heard before The Honorable Benjamin H. Culbertson on June 1, 2016. On June 2, 2016, Judge Culbertson provided to the parties, by correspondence, notice that he dismissed the action on Respondent's Motion to Dismiss (thereby making the Motion for Summary Judgment "moot") and requested that counsel for Respondent prepare a formal Order for his signature.

On June 17, 2016, counsel for Respondent, Elise Crosby, submitted to The Honorable Benjamin H. Culbertson two proposed orders. That same day, by emailed correspondence to Ms.

Crosby and Judge Culbertson, Mr. Brittain outlined his objections to the premise and the findings contained in the proposed orders.

On July 19, 2016, the signed Order of Dismissal pursuant to Rule 12(b)(6), SCRCF was filed with the court wherein Judge Culbertson found that the Complaint's deficiencies under Rule 8(a) South Carolina Rules of Civil Procedure (no short and plain statement of the grounds or facts showing Appellant entitled to relief, no causes of action and no prayer for relief) entitled Respondent to relief under Rule 12(b)(6) of the South Carolina Rules of Civil Procedures. He further concluded that the zoning ordinance in question would not prohibit heavy duty density in the area (all in violation of the legislative history of and the wording of the zoning ordinance). Additionally, the determination was made that Appellant lacked standing to bring this action as he had suffered no injury in fact, all of which was plead with great particularity as set forth in Appellant's Complaint.

On July 27, 2016, Appellant filed his Motion to Reconsider Order of Dismissal arguing Respondent's arguments were inaccurate and that there were no Rule 8(a) S.C.R.C.P. violations in Appellant's Complaint. Further, counsel for Appellant argued that the Motion was premature in that this case had not been fully litigated. On September 22, 2016, a Form 4 Order Denying Appellant's Motion to Reconsider was filed with the court and counsel for Appellant received a copy of this Order by mail on October 14, 2016. This appeal followed.

## STATEMENT OF THE CASE

Long Bay Estates is just south of Myrtle Beach, South Carolina. It is one of the oldest residential neighborhoods east of the Intracoastal Waterway in Horry County.

This sleepy little community was designed by the Ward family and others and the great Franklin Burroughs, as attorney, set forth deed restrictions and covenants ensuring for all time a sleepy little community of residential living.

As an interesting twist to the times, duplexes were allowed under certain circumstances but the tenor of residential deed restrictions are set forth to ensure a residential experience and not a tourist driven multi-family property zone environment.

Furthermore, this subdivision has been under constant assault from those who have attempted to skirt, ignore and avoid the deed restrictions that are in place and to that end residents of Long Bay Estates succeeded in the case of John Musick v. Thomas L. Dicks and Robert E. Dicks, Jr. (Case No. 2004-CP-26-2075/Appellate Case No. 2012-212773) where the Court of Appeals determined the deed restrictions were in fact valid, they had been properly set forth and were binding on all parties associated with ownership in the subdivision.

One of the troubling issues in coastal communities, Horry County, South Carolina included, is the encroachment and abuse of zoning regulations and deed restrictions to facilitate financial gain by those who build inordinate sized dwellings within the restricted zoning area and lease to numerous families, six, seven or more at a time.

Horry County has zoning ordinances and has placed upon herself the obligation to enforce them (see Article IV Section 431 and Article XIII Section 1300 of the Horry County Zoning Ordinance and its language which is set forth in Appellant's Initial Brief) and to that end the Appellant in this action and others has sought to have Horry County enforce its Zoning Ordinances in the Long Bay residential area.

There are huge numbers of cars, heavy traffic, litter problems, behavior problems, noise problems of a constant nature based on the density that is associated with the violation of the zoning regulations and the deed restrictions.

To that end, Appellant set forth in an action against Respondent seeking specific performance requiring Respondent to enforce its own zoning regulations under the law.

## STANDARD OF REVIEW

As cited in *Doe v. Marion*, 645 S.E. 2d 245 (S.C. Sup. Ct.2007), in reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCF, the appellate court applies the same standard of review as the trial court. *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001). In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995). "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999). The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987).

## ARGUMENT

### I. DID THE CIRCUIT COURT ERR IN RULING THAT APPELLANT'S COMPLAINT WAS DEFICIENT IN ACCORDANCE WITH RULE 8(A) AND THAT, AS A RESULT OF THESE DEFICIENCIES, RESPONDENT WAS ENTITLED TO RELIEF UNDER RULE 12(B)(6)?

A ruling on a motion to dismiss a claim must be based solely on the allegations set forth on the face of the Complaint. The motion cannot be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct.App.1995). The question is whether in the light most favorable to the plaintiff, and with every reasonable doubt resolved in his behalf, the Complaint states any valid claim for relief. The cause of action should not be struck merely because the court doubts the plaintiff will prevail in the action. *Id.* at 68, 463 S.E.2d at 99.

In its Motion and supporting Memorandum, Respondent alleges Appellant's Complaint fails "to state facts sufficient to constitute a cause of action" and, further, that the Complaint makes "numerous allegations but no prayer for relief". This is inaccurate.

Rule 8(a) of the South Carolina Rules of Civil Procedure states as follows:

A pleading which sets forth a cause of action, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds including facts and statutes upon which the court's jurisdiction depends, unless the court already has jurisdiction to support it, (2) a short and plain statement of the facts showing that the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

In his Complaint Appellant, a resident of Long Bay Estates, sets forth a brief background of the subdivision in question and jurisdiction of the parties and further states that Long Bay Estates

is currently zoned as an S6 residential district and is therefore comprised of single family and duplex family dwellings.

Appellant's Complaint then provides the specific Horry County Zoning Ordinance that he alleges is being violated by some of the property owners located within the subdivision. Article IV Section 431 of the Horry County Zoning Ordinance provides the definition for family as "an individual or two or more persons related by blood, marriage or adoption living together as a single household unit, or, a group of not more than 5 persons not related by blood, marriage, or adoption, living together as a single family household unit". The Complaint alleges that, currently in Long Bay Estates, there are homes being rented on a weekly basis to large groups of people, many unrelated, well in excess of the number of occupants allowed by the Horry County Ordinance and that these large groups bring with them to this residential subdivision excessive noise, trash and traffic.

Appellant's Complaint then makes a prayer for relief through demanding that the Respondent enforce Article IV Section 431 of the Horry County Zoning Ordinance, as it is required to do in accordance with Article XIII Section 1300 of the Horry County Zoning Ordinance which states that, "The Horry County Council shall fund sufficient personnel to administer and enforce the provisions of this ordinance. If the Zoning Administrator shall find that any of the provisions of this ordinance are being violated, he shall notify in writing the person responsible for such violations, indicating the nature of the violation and ordering the action necessary to correct it. He shall order discontinuance of illegal use of land, buildings or structures; removal of illegal buildings or structures or of illegal additions, alter alterations, or structural changes, discontinuance of any illegal work being done: or shall take any other action authorized by this

ordinance to ensure compliance with or to prevent violation of its provision.” Appellant’s Complaint, as described above, clearly complies with Rule 8(a) S.C.R.C.P.

Further, Respondent’s Motion to Dismiss/Motion for Summary Judgment was filed before adequate time had been allowed for discovery in this action. The Supreme Court of South Carolina has consistently favored discovery in cases that come before the Court and, in fact, have ruled that on motion for summary judgment if there is a scintilla of evidence to support the position of the Plaintiff the case should go forward to a jury. *Hancock v. Mid-South Management Co., Inc.*, 673 S.E. 2d 801 (S.C. 2009).

**II. DID THE CIRCUIT COURT ERR IN RULING THAT THE HORRY COUNTY ZONING ORDINANCES CITED IN APPELLANT'S COMPLAINT DO NOT RESTRICT THE NUMBER OF OCCUPANTS ALLOWED IN THE HOMES LOCATED IN LONG BAY ESTATES?**

The Circuit Court's Order of Dismissal dated June 22, 2016, states, "I conclude as a matter of law the zoning ordinance upon which the plaintiff relies restricts construction in Long Bay Estates to single-family homes or duplex dwellings, neither of which restrict short-term rental or the number of occupants."

This statement by the Court is not supported by the allegations contained in the Appellant's Complaint. As alleged in paragraph 9 of the Complaint, in accordance with Article IV Section 431 of the Horry County Zoning Ordinance family is defined as "an individual or two or more persons related by blood, marriage or adoption living together as a single household unit, or, a group of not more than 5 persons not related by blood, marriage, or adoption, living together as a single family household unit". This definition, contained in the Horry County Zoning Ordinance clearly provides a limit on the number of occupants per dwelling.

Respondent has raised no argument or defense that Long Bay Estates is not governed by the Horry County Zoning Ordinances contained in Appellant's Complaint. Nor have they argued that Respondent does not have the capacity or authority to enforce said ordinances.

A ruling on a 12(b)(6) S.C.R.C.P. motion to dismiss must be based solely upon the allegations set forth on the face of the complaint. The motion cannot be sustained if facts alleged and inferences reasonably deductible therefrom would entitle the plaintiff to any relief on any theory on the case. *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct.App.1995).

In this case, the Court relied upon arguments made by counsel for the Respondent contrary to the Complaint in rendering its ruling. Had the Court relied upon the allegations set forth in the Complaint, as is required by law, the definition of family contained therein would be sufficient to

withstand such a ruling. Under *Dye*, a cause of action should not be struck merely because the Court doubts the plaintiff will prevail in the action.

**III. DID THE CIRCUIT COURT ERR IN RULING THAT APPELLANT LACKS STANDING TO BRING AN ACTION AGAINST RESPONDENT FOR ZONING VIOLATIONS WITHIN LONG BAY ESTATES BECAUSE HE DID NOT SUSTAIN AN INJURY-IN-FACT?**

The Order of Dismissal, citing *Sea Pines Ass'n for the Prot. Of Wildlife v. S.C. Dep't of Natural Res.*, 345 S.C. 594 (2001) states that Appellant lacks standing to bring this action against Respondent because Appellant has not suffered an injury-in-fact. However, *Sea Pines* is referring to a plaintiff that is an association, not an individual home owner. In this case the Appellant, Robert DeCiero, is a resident of Long Bay Estates and, in that capacity, has brought this action.

Section 6-29-950 of the South Carolina Code, states in part:

In case a building, structure, or land is or is proposed to be used in violation of any ordinance adopted pursuant to this chapter, the zoning administrator or other appropriate administrative officer, municipal or county attorney, or other appropriate authority of the municipality or county *or an adjacent or neighboring property owner who would be specially damaged by the violation* may in addition to other remedies, institute injunction, mandamus, or other appropriate action or proceeding to prevent the unlawful erection, construction, reconstruction, alteration, conversion, maintenance, or use, or to correct or abate the violation, or to prevent the occupancy of the building, structure, or land.

Here, the Appellant is a neighboring property owner to those properties located within Long Bay Estates that are in violation of the specific Horry County Zoning Ordinances cited in Appellant's Complaint and, therefore, has standing to bring this action in order to correct the alleged violations.

Further, in order for an injury to be particularized, it must affect the plaintiff in a personal and individual way. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Here, Appellant has

alleged personal injuries as a direct result of these violations including, but not limited to, traffic nightmares, late-night parties, congestion and excessive noise levels.

When a plaintiff alleges only general grievances suffered by the public as a whole and fails to allege any particularized harm, as was the case in *Carnival Corp. v. Historic Ansonborough Ass'n*, 407 S.C. 67, 753 S.E.2d 846 (S.C. 2014), then the plaintiff lacks standing. However, in this case the Appellant is not simply making a generalized grievance suffered; he has pled in his Complaint damages particular to the residents of Long Bay Estates that do affect the public as a whole. Therefore, the Court erred in ruling Appellant lacked standing to bring this action.

## CONCLUSION

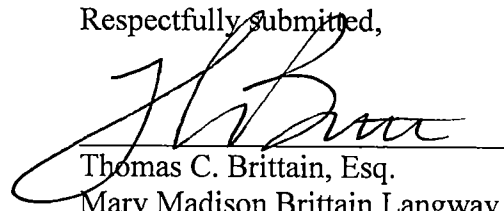
This case was dismissed prematurely and, further, was dismissed improperly. The Supreme Court of South Carolina has consistently favored discovery in cases that come before the Court and, in fact, have ruled that on motion for summary judgment if there is a scintilla of evidence to support the position of the Plaintiff the case should go forward to a jury. *Hancock v. Mid-South Management Co., Inc.*, 673 S.E. 2d 801 (S.C. 2009).

In this case, the Court dismissed the action based on a Rule 12(b)(6) S.C.R.C.P. Motion to Dismiss, which holds an even higher threshold than that for summary judgment.

A ruling on a motion to dismiss a claim must be based solely on the allegations set forth on the face of the Complaint. The motion cannot be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct.App.1995). The question is whether in the light most favorable to the plaintiff, and with every reasonable doubt resolved in his behalf, the Complaint states any valid claim for relief. The cause of action should not be struck merely because the court doubts the plaintiff will prevail in the action. *Id.* at 68, 463 S.E.2d at 99.

Here, the Appellant's Complaint meets all requirements of Rule 8(a) S.C.R.C.P. and provides a valid claim for relief as stated herein above. Further, the Appellant, as a neighboring property owner to those in violation of the Horry County Zoning Ordinance, has proper standing to bring this action. For the foregoing reasons, Appellant requests this Court reverse the granting of dismissal pursuant to Rule 12(b)(6) S.C.R.C.P. and remand for discovery to proceed and for a trial on the merits of the case.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read 'T. Brittain', written over a horizontal line.

Thomas C. Brittain, Esq.

Mary Madison Brittain Langway, Esq.

The Brittain Law Firm

4614 Oleander Drive

Myrtle Beach, SC 29577

Telephone: (843) 449-8562

Dated: January 23, 2017

IN THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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SC Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

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v.

Horry County, State of South Carolina.....Respondent.

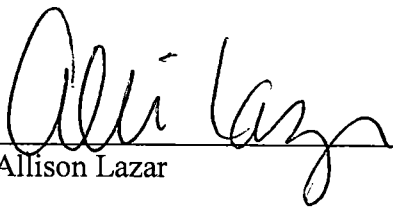
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PROOF OF SERVICE


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I, Allison Lazar, do hereby certify that I am an employee of THE BRITAIN LAW FIRM, P.A., attorneys for the Appellant in the above-entitled action, and that I have this 23<sup>rd</sup> day of January 2017, caused to be served upon the following parties the **Initial Brief of Appellant and Designation of Matter to Be Included in the Record on Appeal** by depositing a copy of same in the United States Mail, with sufficient first class postage affixed thereto, addressed as follows:

Elise F. Crosby, Esquire  
Crosby Law Firm, LLC  
405 Dozier Street  
Georgetown, SC 29440

  
Allison Lazar

**SWORN AND SUBSCRIBED** before me  
this 23<sup>rd</sup> day of January, 2017.

  
**NOTARY PUBLIC FOR SOUTH CAROLINA**  
My Commission Expires: 5/2/2021

THE BRITTAIN LAW FIRM, P.A.

ATTORNEYS AT LAW  
4614 OLEANDER DRIVE  
MYRTLE BEACH, SOUTH CAROLINA 29577

THOMAS C. BRITAIN  
MARY MADISON BRITAIN LANGWAY  
A. PRESTON BRITAIN  
T. CASE BRITAIN, JR.

843-449-8562  
FAX 843-497-6124  
www.brittainlawfirm.com

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SC Court of Appeals

Via FedEx

The Honorable Jenny Abbot Kitchings  
Clerk of Court  
SC Court of Appeals  
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Columbia, South Carolina 29201

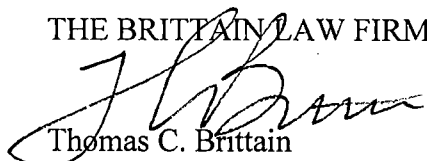
Re: Robert DeCiero, a resident of Long Bay Estates Subdivision, Myrtle Beach, South Carolina v. Horry County, State of South Carolina  
Appellate Case No. 2016-002175

Dear Ms. Kitchings:

Enclosed please find the original and one (1) copy of Appellant's Initial Brief, Designation of Matter to be Included in the Record on Appeal and Proof of Service in the above-referenced matter.

With warm regards, I am  
Yours truly,

THE BRITTAIN LAW FIRM, P.A.



Thomas C. Brittain  
Mary Madison Brittain Langway  
TCB/MMBL/all

cc: Elise F. Crosby, Esq.

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Company THE BRITAIN LAW FIRM PA

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JAN 24 2017

SC Court of Appeals

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Earliest next business morning delivery to select locations. Friday shipments will be delivered on Monday unless SATURDAY Delivery is selected.

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FedEx 2Day A.M.  
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FedEx 2Day  
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5 Packaging \*Declared value limit \$500.

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6 Special Handling and Delivery Signature Options

SATURDAY Delivery  
NOT available for FedEx Standard Overnight, FedEx 2Day A.M., or FedEx Express Saver.

No Signature Required  
Package may be left without obtaining a signature for delivery.

Direct Signature  
Someone at recipient's address may sign for delivery. Fee applies.

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If no one is available at recipient's address, someone at a neighboring address may sign for delivery. For residential deliveries only. Fee applies.

Does this shipment contain dangerous goods?  
One box must be checked.

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Dangerous goods (including dry ice) cannot be shipped in FedEx packaging or placed in a FedEx Express Drop Box.  Cargo Aircraft Only

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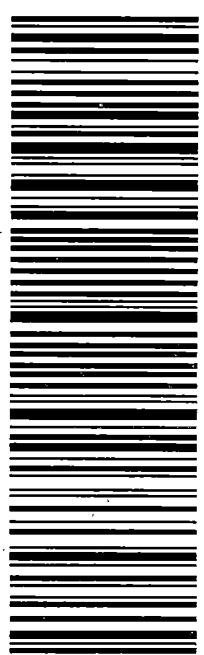
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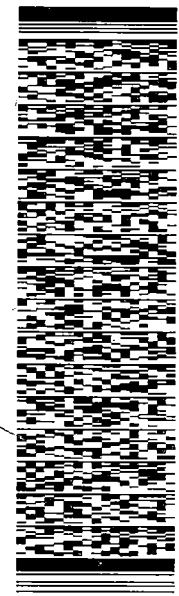
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UNITED STATES US

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ACTUWT: 0.60 LB  
CAD: /OFFC1722  
DIMS: 0X0X0 IN  
BILL SENDER



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