

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

**RECEIVED**

APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

JUL 01 2016

SC Court of Appeals

Maité D. Murphy, Circuit Court Judge

Case No. 2015-002024

Innovative Waste Management Inc., Crest Energy Partners,  
LP, Edward Girardeau, Plaintiffs, Of Whom,

Innovative Waste Management, Inc. is the Appellant,

v.

Crest Energy Partners, GP, LLC, Dunhill Products GP,  
LLC, Henry Wuertz, Innovative Waste Management, Inc.,  
Crest Energy Partners LP, Dunhill Products LP, Edward H.  
Girardeau, C. Russ Lloyd, Defendants, Of Whom,

Crest Energy Partners GP, LLC, Crest Energy Partners LP,  
Dunhill Products, LP, Henry Wuertz, and Edward H.  
Girardeau are the Respondents.

FINAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

- I. **Did the Trial Court abuse its discretion in denying Appellant's Motion to Vacate Settlement Agreement, Restore to Active Docket, and Set for Trial and refusing to set aside the April 20, 2015 Judgment?**
- II. **Did the Trial Court abuse its discretion in denying Appellant's Motion to Reconsider and refusing to set aside the April 20, 2015 Judgment?**

## STATEMENT OF THE CASE

This matter was filed on May 11, 2012 with the Dorchester County Court of Common Pleas wherein Appellant pled various causes of action, including but not limited to breach of contract, constructive fraud, conversion, and tortious interference with contractual relationships. The case was assigned to The Honorable Maité D. Murphy.

On April 8, 2015, the parties conducted court-ordered mediation and were able to reach a settlement agreement. The settlement agreement stipulated that the Respondents would make a payment of \$450,000.00 within thirty (30) days of the execution of the settlement agreement, and that dismissal of the action was conditioned upon Respondents' payment under the agreement. (R. pp. 35-37). Only two communications were made to the Trial Court regarding the settlement agreement following the execution of the agreement. The first was an e-mail from Mr. David Marvel, counsel for Respondents, advising the Trial Court of the settlement and stating "I am working on releases now, and we will file a stipulation of dismissal once the settlement is consummated." (R. pp. 41-42). The second communication was the Proof of ADR or Exemption filed by the mediator, Mr. Angus Lawton, which indicated that the case was "(X) Fully Settled . . . (X) Voluntary Dismissal to be filed by Atty. Marvel." (R. pp. 38-40).

On April 20, 2015, a Form 4 Judgment was entered, referred to hereinafter as the “Judgment.” The Judgment was signed by the Dorchester County Clerk of Court, Ms. Cheryl Graham, and did not include the signature of Judge Murphy. The entry of the Judgment was unsolicited, and none of parties to this action executed or filed a stipulation of dismissal. The Judgment directs the reader to “[X] See attached order; (formal order to follow)” and states “[t]his order [X] ends . . . the case.” These were the only two boxes that were checked and completed within the entirety of the Judgment, and other boxes, most notably the box which sets forth “[ ] ACTION DISMISSED: CHECK REASON,” were left incomplete. (R. pp. 1-3). The formal order alluded to within the body of the Judgment was never attached and no such formal order has ever been executed by the Trial Court. The only attachment to the Judgment was Mr. Lawton’s Proof of ADR or Exemption. (R. pp. 38-40). No further reasoning was provided within the Judgment. (R. pp. 1-3).

On May 8, 2015, thirty (30) days elapsed from the execution of the settlement agreement with no payment received. Due to Respondents’ breach of the settlement agreement, Appellant sought to have the action restored to the active trial docket. On May 20, 2015, Appellant contacted the Trial Court and requested the first available date certain trial date. It was on that date that Appellant was notified for the first time of the Judgment.

Upon discovering that the Clerk of Court had dismissed the case, Appellant contacted Judge Murphy’s law clerk and requested a conference to bring to the Trial Court’s attention what appeared to be a clear clerical mistake. Plaintiff was advised by the Trial Court to file a motion and that no conference with Judge Murphy would occur.

On May 27, 2015, Appellant filed its Motion to Vacate Settlement Agreement, Restore to Active Docket, and Set for Trial pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure. The Respondents filed no opposition to this motion. On June 24, 2015, the Trial Court heard arguments from counsel where Appellant sought for the Trial Court to vacate both the settlement agreement and the Judgment, thereby restoring this matter to the active trial docket. (R. pp. 10-19). Appellant also sought for the Judgment to be set aside pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, and stated “[t]o the extent that a dismissal was entered in error or otherwise, we’d ask that that be vacated . . . .” (R. p. 13, lines 21-23). On July 22, 2015, the Trial Court entered an order denying Appellant’s motion. The Trial Court’s July 22, 2015 order was a form order and contained no reasoning supporting the Trial Court’s ruling. (R. pp. 4-6). Furthermore, the transcript of the June 24, 2015 hearing reveals the Trial Court never provided any rationale to support the denial of Plaintiff’s Motion. (R. pp. 10-19).

On July 31, 2015, Appellant filed its Motion to Reconsider pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure and asked the Trial Court to reevaluate its ruling on Appellant’s Motion to Vacate Settlement Agreement, Restore to Active Docket, and Set for Trial. Of note, the Motion contained two new pieces of evidence for the Trial Court to consider, namely the affidavits of Angus Lawton, the mediator for this case, and C. Russ Lloyd, the owner and president of Appellant. (R. pp. 43-45; R. pp. 46-48). On August 18, 2015, the Trial Court denied Appellant’s Motion to Reconsider without hearing oral arguments and entered another form order that contained no reasoning supporting the Trial Court’s ruling. Notably, this order also did not address the issues raised in the new affidavits. (R. pp. 7-9).

On September 17, 2015, Appellant filed its notice of appeal regarding the Trial Court's aforementioned rulings with the Dorchester County Clerk of Court and the South Carolina Court of Appeals. On October 21, 2015, Appellant received delivery of the transcript of the June 24, 2015 arguments. (R. pp. 10-19). Appellant now files its initial brief in a timely manner within thirty (30) days of receipt of the relevant transcript in accordance with Rule 208 of the South Carolina Appellate Court Rules.

### ARGUMENT

**I. The Court abused its discretion in denying Appellant's Motion to Vacate Settlement Agreement, Restore to Active Docket, and Set for Trial and refusing to set aside the Judgment, and such actions constitute reversible error.**

The decision whether to grant or deny a motion requesting relief under Rule 60(b) of the South Carolina Rules of Civil Procedure lies within the sound discretion of the trial court. Raby Const., L.L.P. v. Orr, 358 S.C. 10, 18, 594 S.E.2d 478, 482 (2004). The standard of review upon appeal is limited to determining whether there was an abuse of discretion. Id. An abuse of discretion occurs when the decision of the trial judge is unsupported by the evidence or controlled by an error of law. Ledford v. Pa. Life Ins. Co., 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976). Furthermore, “. . . Rule 59(e), SCRCPP, provides for a motion to alter or amend judgment and preserve the record for appeal.” Pelican Build Centers v. Dutton, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993). “The purpose of Rule 59(e), SCRCPP, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits.” Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992).

Appellant contends that the trial court abused its discretion in denying Appellant's Motion to Vacate Settlement Agreement, Restore to Active Docket, and Set for Trial and

refusing to set aside the Judgment. Appellant sets forth four (4) arguments to support its position, presented in the alternative and in the order of importance. First and foremost, Appellant contends that the Judgment did not comply with the requirements set forth in Rules 41 and 79(f) of the South Carolina Rules of Civil Procedure, and as such the judgment itself was inherently flawed and its entry was procedurally improper. Second and should the Court determine that the Judgment was properly entered, Appellant contends in the alternative that the Judgment is ambiguous on its face and it was not the Trial Court's intent to dismiss this action; therefore the Judgment is unenforceable and the Trial Court's decision to deny Appellant's Motion to Vacate Settlement Agreement, Restore to Active Docket, and Set for Trial was based upon clear factual and legal error. Third, Appellant contends that the Trial Court's ruling was contrary to the written terms of the settlement agreement and completely disregarded the plainly stated intent of all interested parties as forth within the language of the settlement agreement. Fourth and finally, Appellant contends that Respondents breached a material term of the settlement agreement between the parties, and the Trial Court abused its discretion by preventing Appellant from rescinding the agreement due to Respondents' non-performance. As such, the Trial Court has committed an abuse of discretion that constitutes reversible error, and the Trial Court's ruling should be overturned.

- a. Appellant's Motion to Vacate Settlement Agreement, Restore to Active Docket, and Set for Trial should have been granted and the Judgment should have been set aside as the Judgment did not comply with the requirements set forth in Rules 41 and 79(f) of the South Carolina Rules of Civil Procedure, and as such the Judgment itself was inherently flawed and its entry was procedurally improper.**

Rule 41 of the South Carolina Rules of Civil Procedure governs the dismissal of actions and provides the methodology by which courts may dismiss a lawsuit. Rule

41(a)(1) provides for voluntary dismissal by stipulation of the parties and states that after the adverse party in an action has filed an answer or motion for summary judgment, a case may only be dismissed “. . . by filing a stipulation of dismissal signed by all parties who have appeared in the action . . . .” Rule 41(b) provides for involuntary dismissal of a case for various grounds such as a plaintiff’s failure to prosecute or comply with the South Carolina Rules of Civil Procedure or any order of court, or for a plaintiff’s failure to show a right to relief. Notably absent from the provisions contained within Rule 41(b), however, is any provision setting forth a situation where the trial judge or clerk of court may unilaterally dismiss a case absent a motion or affirmative action made by one of the parties. Furthermore, Rule 41 does not allude to any situation where the actions of a third party mediator may dismiss a case absent a signed stipulation of dismissal executed by the parties.

In the instant case, there has been no stipulation of dismissal executed or filed by either the Appellant or Respondents. In fact, the record is replete with references to the future execution of a stipulation of dismissal once payment was made to Appellant as set forth within the settlement agreement. In the settlement agreement, the parties explicitly agree that “[t]he Parties hereby authorize and direct their attorneys to execute and file a stipulation of dismissal with prejudice in exchange for the \$450,000 payment, once payment is made.” (R. p. 36, paragraph 5) (emphasis added). Mr. Lawton’s Proof of ADR or Exemption sets forth that there would be a “Voluntary Dismissal to be filed by Atty. Marvel.” (R. p. 40). Finally, Mr. Marvel’s April 14, 2015 e-mail correspondence with the Court regarding the settlement agreement states that “. . . we will file a stipulation of dismissal once the settlement is consummated.” (R. p. 42).

As there is no evidence within the record that any party to this action solicited the dismissal of the case, the only logical conclusion is that the Dorchester County Clerk of Court unilaterally entered the Judgment dismissing this case upon the filing of Mr. Lawton's Proof of ADR or Exemption. This conclusion is further supported by the fact that the lone document attached to the Judgment is Mr. Lawton's Proof of ADR or Exemption. (R. pp. 38-40). Rule 79(f) of the South Carolina Rules of Civil Procedure which governs records kept by the clerk states that "[n]o action listed in the file book . . . shall be . . . stricken . . . unless and until: (1) plaintiff shall file and serve a notice . . . or stipulation of dismissal . . . ; or (2) counsel . . . have prepared and filed an order . . . bearing the written consent of all interested parties . . . ; or (3) dismissal is ordered by the court." See generally Goodwin v. Landquest Dev., LLC, No. 2013-001644, 2015 WL 4747156 (Ct. App. Aug. 12, 2015) (a South Carolina Appellate Court decision overturning the Circuit Court's denial of Plaintiffs' Motion to Restore in a case dismissed through the unilateral acts of the court with no consent of the parties). Mr. Lawton's Proof of ADR or Exemption does not satisfy any of the three requirements set forth in Rule 79(f), and as such the Clerk of Court should not have stricken this case from the file book. (R. pp. 38-40). The Clerk does not possess the authority to unilaterally dismiss a case, and as such the Judgment is inherently flawed and its entry was procedurally improper. Based upon the foregoing, the Trial Court's denial of Appellant's Motion to Vacate Settlement Agreement, Restore to Active Docket, and Set for Trial was unsupported by the evidence and was based upon clear legal error, and the Judgment should be set aside, thereby restoring this matter to the active docket.

- b. The Trial Court's denial of Appellant's Motion to Vacate Settlement Agreement, Restore to Active Docket, and Set for Trial was based upon clear factual and legal error as the Judgment is ambiguous on its face and it was not the Trial Court's intent to dismiss this action, thereby rendering the Judgment unenforceable.**

Appellant contends that the Judgment is ambiguous on its face and it was not the Trial Court's intent to dismiss this action, thereby rendering the Judgment unenforceable. South Carolina courts have analyzed the issue of incomplete judgments and orders in the past, and in so doing the courts have determined that incomplete orders may be construed to be ambiguous. See generally Widewater Square Assoc. v. Opening Break of America, Inc., 314 S.C. 149, 442 S.E.2d 185 (Ct. App. 1994) (wherein the South Carolina Court of Appeals determined that a Form 4 Judgment was ambiguous as the judgment only indicated on its face that the case at hand was "settled" but not dismissed). When the Appellate Court is presented with an ambiguous judgment or order for purposes of review, ". . . the determinative factor is to ascertain the intent of the judge who wrote the order." Eddins v. Eddins, 304 S.C. 133, 135, 403 S.E.2d 164, 166 (Ct. App. 1991).

In the instant case, the Judgment was filled out incompletely and is ambiguous on its face. As set forth above, the Judgment directs the reader to "[X] See attached order; (formal order to follow)" and states "[t]his order [X] ends . . . the case." These were the only two boxes that were checked and completed within the entirety of the Judgment, and others boxes, most notably the box which sets forth "[ ] ACTION DISMISSED: CHECK REASON," were left incomplete. (R. p. 2). Furthermore, the formal order alluded to within the body of the Judgment was never attached and no further reasoning was provided. (R. p. 2). As such, the Judgment is ambiguous on its face and the intent of the judge who wrote the order is dispositive.

An analysis of Judge Murphy's intent is impossible, however, as there is no evidence within the record that Judge Murphy wrote, reviewed, or was even aware of the entry of the Judgment prior to Appellant's motions. As set forth above, Ms. Cheryl Graham, the Dorchester County Clerk of Court, signed the Judgment and no formal order that might indicate any involvement by the Trial Court was attached. The only logical conclusion is that the Clerk of Court entered the Judgment unilaterally in response to Mr. Lawton's Proof of ADR or Exemption. As such, there is no evidence, and it is in fact factually and legally impossible, that the Trial Court or Judge Murphy possessed any intent to dismiss this case.

Furthermore, the remainder of the record fails to provide any further evidence of the Trial Court or Judge Murphy's intent. The Trial Court heard sparse oral arguments regarding Appellant's Motion to Vacate Settlement Agreement, Restore to Active Docket, and Set for Trial on June 24, 2015, and Judge Murphy declined to make any ruling or issue any opinion on the merits of the issue during this hearing. (R. pp. 16-17, lines 23-5). The Trial Court later denied Appellant's motion on July 22, 2015 by issuing of a form order that contained no reasoning. (R. pp. 4-6). On August 18, 2015, the Trial Court denied Appellant's Motion to Reconsider without hearing any oral arguments, and again issued a form order containing no reasoning. (R. pp. 7-9). As such, there is no evidence setting forth the Trial Court or Judge Murphy's intent to dismiss this case, and the Judgment is therefore unenforceable. Based upon the foregoing, the Trial Court's denial of Appellant's Motion to Vacate Settlement Agreement, Restore to Active Docket, and Set for Trial was unsupported by the evidence and was based upon clear legal error, and the Judgment should be set aside, thereby restoring this matter to the active docket.

**c. Appellant's Motion to Vacate Settlement Agreement, Restore to Active Docket, and Set for Trial should have been granted and the Judgment should have been set aside as dismissal of this case is contrary to the intent of all interested parties.**

Appellant contends that dismissal of this case is improper as it is contrary to the intent of all interested parties as plainly stated within the settlement agreement. In South Carolina jurisprudence, settlement agreements are viewed as contracts. Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009) (citing Pruitt v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001) (enforcement of the terms of a settlement agreement is a matter of contract law)). The primary concern of the court interpreting a contract is to give effect to the intent of the parties. N. Am. Rescue Products, Inc. v. Richardson, 411 S.C. 371, 378, 769 S.E.2d 237, 240 (2015), reh'g denied (Mar. 19, 2015) (citing Lee v. Univ. of S.C., 407 S.C. 512, 517, 757 S.E.2d 394, 397 (2014)). "The parties' intention must, in the first instance, be derived from the language of the contract." Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). "If the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect". Superior Auto. Ins. Co. v. Maners, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973).

The language included in the settlement agreement is clear and unambiguous, and its plain reading sets forth the parties' express intent to file a stipulation of dismissal only if the settlement was consummated. As set forth above, the settlement agreement explicitly states that "[t]he Parties hereby authorize and direct their attorneys to execute and file a stipulation of dismissal with prejudice in exchange for the \$450,000 payment, once payment is made." (R. p. 36, paragraph 5) (emphasis added). The plain language

contained within the settlement agreement clearly indicates that the parties did not intend for the case to be dismissed until payment was made.

Furthermore, there are numerous other examples within the record that reaffirm and support this clear expression of the parties' intent, including Mr. Marvel's April 14, 2015 e-mail correspondence with the Trial Court, Mr. Lawton's Proof of ADR or Exemption, and Mr. Lawton's affidavit. In his April 14, 2015 e-mail correspondence, Mr. Marvel informed the Trial Court that a stipulation of dismissal would be submitted when the settlement was consummated. (R. pp. 41-42). Mr. Lawton's Proof of ADR or Exemption indicated that that the case was "(X) Fully Settled . . . (X) Voluntary Dismissal to be filed by Atty. Marvel." (R. p. 40). Furthermore, Mr. Lawton clearly stated in his sworn affidavit that he did not intend for the Proof of ADR or Exemption to serve as the basis for a dismissal. In fact, it is his understanding that such a document may not be used as the grounds for the entrance of a judgment under Rule 41 of the South Carolina Rules of Civil Procedure. (R. p. 45, paragraph 7). As such, the Trial Court disregarded the clearly expressed intent of the parties, and in so doing abused its discretion.

Based upon the foregoing, the Trial Court's denial of Appellant's Motion to Vacate Settlement Agreement, Restore to Active Docket, and Set for Trial was unsupported by the evidence and was based upon clear legal error, and the Judgment should be set aside, thereby restoring this matter to the active docket.

**d. Appellant's Motion to Vacate Settlement Agreement, Restore to Active Docket, and Set for Trial should have been granted and the Judgment should have been set aside as Respondent breached the terms of the settlement agreement and Appellant elected to rescind the agreement due to non-performance.**

As set forth above, settlement agreements are viewed as contracts under South Carolina law. (Supra Argument at 1b). In situations where a breach of a contract is "... so substantial and fundamental as to defeat the purpose of the contract," rescission of that contract may be warranted. Brazell v. Windsor, 384 S.C. 512, 516-17, 682 S.E.2d 824, 826 (2009). Rescission "... is an equitable remedy that attempts to undo a contract from the beginning as if the contract had never existed." ZAN, LLC v. Ripley Cove, LLC, 406 S.C. 404, 413, 751 S.E.2d 664, 669 (Ct. App. 2013). The failure to make payment as specifically outlined in a contract constitutes a substantial breach of contract. Silver v. Aabstract Pools & Spas, Inc., 376 S.C. 585, 593, 658 S.E.2d 539, 543 (Ct. App. 2008).

In this case, Appellant agreed to settle its multi-million dollar claim for \$450,000.00 based upon the representations and assurances of the Respondents and their counsel, Mr. Marvel, that the settlement proceeds would be paid within the thirty (30) day time period. (R. p. 47, paragraph 6). Absent these promises, Appellant would not have executed the settlement agreement and would have proceeded to a jury trial. The time period for payment was a significant and material term of the settlement agreement, and the Respondents failure to comply with this provision not only constitutes a breach of the Settlement Agreement, but also has defeated Appellant's entire purpose for entering into the settlement agreement in the first place. (R. p. 47, paragraph 6).

The Respondents have yet to pay any money to Appellant and are clearly in breach of the settlement agreement. As such, it was an improper abuse of discretion for

the Trial Court to shackle Appellant to the irreparably breached settlement agreement which represented a significant discount of Appellant's claim. The only equitable and proper course of action for the Trial Court to undertake would have been to vacate the settlement agreement, return this case to the active docket and set it for trial. Based upon the foregoing, the Trial Court's denial of Appellant's Motion to Vacate Settlement Agreement, Restore to Active Docket, and Set for Trial was unsupported by the evidence and was based upon clear legal error, and the Judgment should be set aside, thereby restoring this matter to the active docket.

**II. The Court abused its discretion in denying Appellant's Motion to Reconsider and refusing to set aside the Judgment, and such actions constitute reversible error.**

" . . . Rule 59(e), SCRCF, provides for a motion to alter or amend judgment and preserve the record for appeal." Pelican Build Centers, 311 S.C. at 60, 427 S.E.2d at 675 (1993). "The purpose of Rule 59(e), SCRCF, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." Arnold, 309 S.C. at 172, 420 S.E.2d at 842 (1992). A party may file a motion to reconsider under Rule 59(e) when it " . . . believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." Elam v. SCDOT, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (citing Arnold, 309 S.C. 157, 420 S.E.2d 834 (1992)).

Appellant filed its Motion to Reconsider seeking relief under Rule 59(e) of the South Carolina Rules of Civil Procedure requesting the court to reconsider its prior ruling on Appellant's Motion to Vacate Settlement Agreement, Restore to Active Docket, and Set for Trial. Based on the foregoing arguments. As noted above, the Appellant submitted

additional pieces of newly obtained evidence to the Trial Court with its Motion to Reconsider. (R. pp. 43-45; R. pp. 46-48). The Trial Court did not allow for oral argument on the motion and it issued a Form 4 Order denying Appellant's motion with no rationale. The lack of any rationale does not allow for this Court to determine if the denial was based on erroneous factual conclusions or if the Trial Court considered the new evidence at all. Based upon the foregoing, the Trial Court's denial of Appellant's Motion to Reconsider was unsupported by the evidence and was based upon clear legal error, and the Judgment should be set aside, thereby restoring this matter to the active docket.

### CONCLUSION

Based upon the foregoing, Appellant respectfully requests this Court to reverse the Trial Court's denial of Appellant's Motion to Vacate Settlement Agreement, Restore to Active Docket, and Set for Trial, vacate the Judgment, and remand this action back to the Dorchester County Court of Common Pleas thereby restoring it to the active docket.

Respectfully Submitted  
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Date: July 1, 2016  
Charleston, South Carolina

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of **Final Brief of Appellant** in the above-referenced matter was served on the below named parties and/or their respective counsel and/or agents by depositing true and accurate copies of the same in the U.S. mail, first class, properly addressed, with sufficient postage affixed, on the date below.

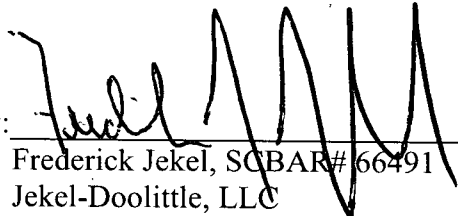
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