

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

M. Anderson Griffith, Master in Equity

Case No. 2016-CP-02-02033

RECEIVED
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SC Court of Appeals

CitiMortgage, Inc.,

Respondent,

v.

Mary L. Moxley a/k/a Mary Moxley n/k/a Mary Richardson;
Hudson & Keyse LLC; First Manufactured Housing Credit
Corporation who acquired First Carolina Financial Corporation;
and the South Carolina Department of Motor Vehicles,

Defendants,

Of whom Mary L. Moxley is the

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

- I. WAS THERE SUFFICIENT EVIDENCE FOR THE TRIAL COURT TO DETERMINE THAT APPELLANT SIGNED THE MORTGAGE?

STATEMENT OF THE CASE

Respondent (“CitiMortgage”) initiated this action by filing a Summons and Complaint on February 4, 2014 requesting the reformation and foreclosure of a mortgage given to ABN AMRO Mortgage Group, Inc, by William C. Moxley, Jr. and Appellant Mary L. Moxley (“Mary Moxley”) dated September 29, 2000 and recorded in the Office of the Register of Deeds for Aiken County on October 6, 2000 in Book 2463 at page 105 (the “Mortgage”). (Complaint, ¶¶ 7, 8, and paragraph 8 of the Prayer). CitiMortgage is the owner and holder of the Mortgage by virtue of a merger with ABN AMRO Mortgage Group, Inc. (Complaint, ¶ 10).

On March 6, 2014, Mary Moxley filed her Answer and Counterclaim that set out a series of defenses to the requested foreclosure and several counterclaims against CitiMortgage. The only allegations relevant to this appeal are Mary Moxley’s denials that she signed the Mortgage, because she lacked sufficient information to admit or deny that she signed the Mortgage. (Answer and Counterclaim, pp. 2 and 5).

On May 21, 2014, Mary Moxley responded to CitiMortgage’s Admission Requests as follows: “Admit that you signed the Mortgage. RESPONSE: Does not have sufficient information to admit or deny, therefore denies.” (Defendant Mary L. Moxley’s Response to Plaintiff’s First Set of Request (sic) to Admit dated May 21, 2014).

On July 30, 2014, Mary Moxley submitted an affidavit to the trial court as part of her effort to defeat CitiMortgage’s request for Summary Judgment in which she stated “[i]t does appear my name has been added to the mortgage to ABN AMRO Mortgage Group, Inc., and it also appears to have

my signature on the mortgage; however, I have no recollection of ever signing a mortgage, nor of ever going to any attorney's office in Columbia, South Carolina, in the year 2000, to sign any documents relating to the land." (Affidavit of Mary Moxley, July 30, 2014, ¶ 5).

The parties tried the case on March 20, 2017 and the trial court issued its Order on June 30, 2017. (Order filed June 30, 2017). In its Order, the trial court held that CitiMortgage had established by a preponderance of the evidence that Mary Moxley signed the Mortgage.

On July 10, 2017, Mary Moxley filed her Motion to Reconsider the Order dated June 30, 2017. The trial court conducted a hearing on the Motion to Reconsider on August 22, 2107 and it entered its Order Denying Motion to Reconsider on August 31, 2017.

On October 2, 2017, Mary Moxley served her Notice of Appeal.

ARGUMENT

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity." *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437,440 (2014), quoting *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997). "In an appeal from an action in equity tried by a judge, appellate courts may find facts in accordance with their own views of the preponderance of the evidence. *Wachovia Bank, Nat. Ass'n*, 407 S.C. at 328, 755 S.E.2d at 441, citing *Townes Assoc., Ltd v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775-776 (1976). The opinion in *Townes Assoc, Ltd.* cites *Crowder v. Crowder*, 246 S.C. 299, 143 S.E.2d 580 (1965) as authority for the standard of review for an appellate court considering an appeal of a decision entered in an action in equity tried by a judge. *Townes Assoc., Ltd.*, 266 S.C. at 86, 221 S.E.2d at 775-776. The *Crowder* decision makes an obvious point clear. Before the appellate court can make findings of fact in

accordance with its own view of the preponderance of the evidence, it must find that the lower court's findings are against the preponderance of the evidence. *Crowder*, 246 S.C. at 301, 143 S.E.2d at 581, citing *Forester v. Forester*, 226 S.C. 311, 85 S.E.2d 187 (1954).

This standard of review does not require the appellate court to disregard the findings of the trial court. Appellate courts should recognize that the trial judge who saw and heard the testimony of witnesses is in a superior position to make determinations on credibility. *Lewis v. Lewis*, 392 S.C. 381, 385, 709 S.E.2d 650, 652 (2011), citing *Inabinet v. Inabinet*, 236 S.C. 52, 55-56, 113 S.E.2d 66, 67 (1960), citing *Twitty v. Harrison*, 230 S.C. 174, 94 S.E.2d 879 (1956).

I. There is sufficient evidence to support the trial court's finding that Mary Moxley signed the Mortgage.

This appeal focuses on one issue – did Mary Moxley sign the Mortgage? After thoroughly considering all of the testimony offered at the trial of this matter, the trial court made the determination that the preponderance of the evidence supported the conclusion that Mary Moxley signed the Mortgage. Mary Moxley disputes that decision. Her challenge to the trial court's decision misrepresents her testimony concerning her execution of the Mortgage and ignores critical evidence considered by the trial court in reaching its decision.

A. Mary Moxley does not deny signing the Mortgage; she simply cannot remember if she did so.

In her argument to this court on appeal, Mary Moxley states that she has consistently maintained that she did not sign the Mortgage. That is not accurate. Her defense to the foreclosure of the Mortgage was that she could not remember it.

In her Answer and Counterclaim, Mary Moxley did not make an unqualified denial of the allegation that she signed the Mortgage. Instead, she responded to the allegation by stating that she

lacked sufficient information to admit or deny it and, therefore, denied it. (Complaint, ¶ 7; Answer and Counterclaim, ¶ 9). Her response to Admission Requests was consistent with the allegations in her Answer and Counterclaim. When asked to admit that she signed the Mortgage, Mary Moxley stated that she did not have sufficient information to admit or deny the fact and therefore denied it. (Defendant Mary L. Moxley's Response to Plaintiff's First Set of Request (sic) to Admit, May 21, 2014).

Mary Moxley offered some clarification to her position in her affidavit offered to challenge CitiMortgage's Motion for Summary Judgment. In that affidavit she explained that she has no recollection of ever signing the Mortgage. (Affidavit of Mary Moxley, July 30, 2014, ¶ 5). She also testified to that lack of recollection at trial. (Transcript, p. 174, ll. 13-16 and p. 178, ll.12-16).

However it was not until she testified at her deposition and at the trial of this case that she fully explained her position. In that testimony she explained that traumatic events in her life and the medications that she has taken to address those traumatic events have affected her memory. Consequently, she cannot remember if she signed the Mortgage.

The Mortgage is dated September 29, 2000. (Plaintiff's Exhibit 2 and 21). In the year 2000, Mary Moxley's husband took care of the family finances. (Transcript, p. 189, l. 21 to p. 190, l. 3). Mary Moxley does not recall anything about her finances in the year 2000 and attributes that lack of memory to "five surgeries within 18 months" (Transcript, p. 178, ll. 7-11 and p. 189, l. 21 to p. 190, l. 3) and her father's death in November 2000. (Transcript, p. 186, ll. 6-13 and p. 189, l. 21 to p. 190, l. 3).

Mary Moxley's memory was also affected by having witnessed her husband's suicide on February 21, 2013. (Transcript, p. 171, l. 8 to p. 174, l. 5). When she appeared for her deposition,

she stated that she had memory problems. (Transcript, p. 176, ll. 1-7). She has been under the care of a psychiatrist and attributes her current long term and short term memory loss to the medicines that have been prescribed to her – Ambien, Xanax, Seroquel, and Prozac. (Transcript, p. 176, l. 1 to p. 178, l. 6.).

Affirmatively denying the execution of the Mortgage is significantly different from denying because she lacked the ability to recall whether she executed it or not. The record is clear. Mary Moxley did not deny signing the Mortgage as she suggests on appeal. Rather, she alleged and testified that she does not remember..

B. The preponderance of the evidence supports the trial court’s decision that Mary Moxley signed the Mortgage.

Mary Moxley correctly recounts that the trial court focused on the following factors in its determination that the Plaintiff established, by a preponderance of the evidence, that Mary Moxley signed the Mortgage:

- Mortgage payments made by Mary Moxley following her husband’s death;
- the Mortgage closing procedure described by John Ballentine;
- Mary Moxley’s testimony concerning her memory;
- Mary Moxley’s testimony concerning her changing signature; and
- the inconsistency between Mary Moxley’s deposition testimony and her trial testimony.

(Order filed June 30, 2017, p. 11). But in her effort to convince this Court to brush aside the trial court’s findings, Mary Moxley skips key testimony and key findings that support the trial court’s weighing of the evidence. Instead, she focuses on inflammatory statements not supported by the

record in an attempt to shock this court into a reversal of the trial court.

1. Mary Moxley made payments on the Mortgage following her husband's death.

In her argument on appeal, Mary Moxley challenges the trial court's finding concerning the payments she made after her husband's death by simply announcing, without reference to the record, that she testified that she made one payment after her husband's death and that the payment was made after she had been badgered by CitiMortgage for payment. Neither of these "facts" is supported by the record.

Mary Moxley's counsel specifically asked her about Mortgage payments made following her husband's death. Mary Moxley did not recall making these payments because of medication that she was taking to help her cope with her husband's death. (Transcript, p. 171, ll. 8-16). She confirmed that she could not recall the circumstances surrounding payments on cross examination. (Transcript, p. 196, ll. 11-17).

Mary Moxley's inability to recall payments made on the Mortgage after Mr. Moxley's death undermines her argument that CitiMortgage badgered her for payments. It would be odd that Mary Moxley could not recall any payments, but could recall badgering that led to a payment. There is no testimony or other evidence in the record that supports Mary Moxley's suggestion that she was badgered for payment.

The record does reflect that CitiMortgage's representative at trial, Patsy Judd, testified that CitiMortgage and Mary Moxley spoke immediately prior to June 6, 2013 concerning the Mortgage loan. CitiMortgage collection notes document that phone call. (Plaintiff's Exhibit 6). Following that conversation, Mary Moxley made four (4) payments on the Mortgage loan to reinstate it.

(Transcript, p. 68, l. 10 to p. 69, l. 20; Plaintiff's Exhibit 6).

2. John Ballentine witnessed Mary Moxley's execution of the Mortgage.

The most compelling evidence that Mary Moxley signed the Mortgage is the testimony offered by John Keith Ballentine that he witnessed her do so. In the year 2000, Mr. Ballentine worked as a loan closer and paralegal for the law firm of Ratchford and May. (Transcript, p. 115, l. 17 to p. 116, l. 2.). In that capacity, he traveled around the state of South Carolina and closed mortgage loan refinance transactions. (Transcript, p. 116, ll. 4-17). He also closed mortgage loan refinance transactions in the law firm's office. (Transcript, p. 161, ll. 6-9). The transactions were closed under the direction and supervision of the law firm, but an attorney was not present for the loan closing. (Transcript, p.138, l. 8 to p. 139, l. 24). Mr. Ballentine both witnessed and notarized mortgage loan documentation. (Transcript, p. 116, l. 9 to p.188, l. 4). On occasion, a second witness was not available to witness the execution of a mortgage. In that instance, he would return to the law firm's office and have someone at the office witness the mortgage. (Transcript, p. 150, l. 14 to p. 151, l. 10).

Mr. Ballentine did not recall closing this specific mortgage loan transaction. (Transcript, p. 120, ll. 12-21 and p. 152, ll. 2-4). However, he identified his signature as a witness and as the notary public on the Mortgage. (Transcript, p. 116, l. 18 to p. 118, l.4; Plaintiff's Exhibit 2 and 21). Mr. Ballentine testified that his procedure for closing mortgage loan transactions included confirming the identity of those executing the mortgage loan documentation. (Transcript, p. 118, l. 5 to p. 120, l. 11). In this situation he confirmed Mary Moxley's identity by reviewing and securing a copy of her South Carolina Driver's License. (*Id.*) A copy of Mary Moxley's driver's license obtained at the closing appears within CitiMortgage's file on the Mortgage (Transcript, p. 53, l. 9 to p. 54, l. 16;

Plaintiff's Exhibit 19) and was confirmed by Mary Moxley as being her driver's license. (Deposition of Mary Moxley, May 26, 2016, p. 52; Exhibit 11 to Deposition). After his review of the Mortgage and the copy of Mary Moxley's driver's license from CitiMortgage's file, Mr. Ballentine testified that "[b]ased on what I know and my procedure around this and what I see in my hand I would not have any doubt that Mary Moxley would have signed this mortgage." (Transcript, p. 121, ll. 3-6).

Mr. Ballentine also identified his signature as the notary public on two other documents executed by Mary Moxley at the closing of the Mortgage loan transaction – the Seller/Borrower's Affidavit and Indemnity Agreement and the Affidavit and Agreement. (Transcript, p. 121, l. 7 to p. 122, l. 20; Plaintiff's Exhibits 14 and 15). He testified that he confirmed Mary Moxley's identity before she signed each of these documents (Transcript, p. 122, l. 21 to p. 123, l. 5). After reviewing these two documents at trial, Mr. Ballentine testified that he had "no doubt" that he and Mary Moxley were present for the closing. (Transcript, p. 126, ll. 11-22).

Mary Moxley does not challenge Mr. Ballentine's recollection of his practices and his testimony that he is certain that Ms. Moxley signed the Mortgage. Instead, she attacks Mr. Ballentine's credibility by suggesting that he was engaged in a conspiracy involving the unauthorized practice of law and the fraudulent and illegal witnessing of mortgages. The terms "conspiracy" and "fraud" invoke legal theories for which there is no support in the record.

"In order to prove fraud the following elements must be shown: 1) a misrepresentation; 2) its falsity; 3) its materiality; 4) knowledge of its falsity or a reckless disregard of its truth or falsity; 5) intent that the representation be acted upon; 6) the hearer's ignorance of its falsity; 7) the hearer's reliance on its truth; 8) the hearer's right to rely thereon; and 9) the hearer's consequent and proximate injury." *Florentine Corp v. Peda I, Inc.*, 287 S.C. 382, 385-386, 339 S.E.2d 112, 113-114

(1985). A criminal conspiracy requires proof of “a combination between two or more persons for the purpose of accomplishing an unlawful object or a lawful object by unlawful means.” S.C. Code Ann. § 16-17-410 (2003). A “combination” in the context of a criminal conspiracy requires an objective determination of an agreement or mutual understanding. *State v. Cope*, 385 S.C. 274, 684 S.E.2d 177 (Ct. App. 2009). Proof of a civil conspiracy requires a showing of “(1) a combination of two or more people; (2) for the purpose of injuring the plaintiff; (3) causing special damages.” *Moore v. Weinberg*, 373 S.C. 209, 228, 644 S.E.2d 740, 750 (Ct. App. 2007), citing *Pye v. Estate of Fox*, 369 S.C. 555, 566-567, 633 S.E.2d 505, 511 (2006).

Mary Moxley’s challenges based on the unauthorized practice of law were dismissed prior to trial on CitiMortgage’s Motion for Summary Judgment. (Order filed September 26, 2014, pp. 3, 4). As the trial court noted in its Order after trial: “The Plaintiff’s motion for summary judgment was granted as to the affirmative defenses of unclean hands and claim of equitable unenforceability, to the extent that those affirmative defenses were based on the loan not being closed under supervision of an attorney. (Order filed June 30, 2017, pp. 1, 2). Mary Moxley does not challenge the trial court’s dismissal of these claims on appeal.

The trial court made no determinations addressing fraud, criminal conspiracy, or civil conspiracy. These claims were not raised by Mary Moxley at trial. The bald suggestion of these wrongs in Mary Moxley’s argument to this Court is not appropriate. More importantly, while these claims may call into question the ability to record the Mortgage, they do not cast doubt on the question at the heart of this appeal – whether or not Mary Moxley signed the Mortgage.

By assigning the badges of fraud and conspiracy to the transaction surrounding the Mortgage, Mary Moxley hopes to cast shadows over her having signed it. She focuses attention on the fact that

an attorney was not present for the closing of the mortgage loan transaction and the absence of proof that both witnesses saw Mary Moxley sign the Mortgage.¹ However, the absence of witnesses to a Mortgage only affects the ability to record and provide notice to third parties. *Smith v. Hawkins*, 254 S.C. 423, 175 S.E.2d 824 (1970). A mortgage without sufficient witnesses is valid and enforceable between the parties. *Id.* The circumstances of the closing do not change Mr. Ballentine’s testimony that he is certain Mary Moxley signed the Mortgage.

The trial judge saw and heard John Ballentine’s testimony and made the determination that it was reliable. The trial judge sits in a superior position to make determinations on credibility, and Mary Moxley has not provided any valid reason to set aside that determination.

3. Mary Moxley lacks the memory to testify concerning the execution of the Mortgage.

Mary Moxley testified at trial, “I don’t remember yesterday. I can walk in one room and forget what I went in there for.” (Transcript, p. 197, ll. 6-8). She also could not remember giving testimony under oath at her deposition on May 26, 2016 (Transcript p. 188, l. 13 to p. 189, l. 4).

Mary Moxley’s argument on appeal is that her memory loss was justified. CitiMortgage does not challenge her claim of memory loss. It concedes that point and believes that her memory loss actually supports the trial court’s finding. Mary Moxley’s undisputed testimony that she lacks the ability to remember if she signed the Mortgage disqualifies her as a witness with regard to the only

¹ Mr. Ballentine testified that, if the Mortgage was executed in Aiken County, the other witness listed on the Mortgage was not present. However, there is no conclusive testimony as to the location where Mary Moxley executed the Mortgage. It is possible that Mary Moxley executed the Mortgage in Aiken County and it is possible that she executed the Mortgage in Richland County. (Transcript, p. 160, l. 20 to p. 161, l. 24). If she executed the Mortgage in Richland County, there is the further possibility that the other witness was present and witnessed Mary Moxley’s execution of the Mortgage in that the only testimony at trial is that Mr. Ballentine was alone only at closings outside of the law firm’s office in Richland County. (Transcript, p. 139, ll. 21-24).

issue on appeal – whether or not she signed the Mortgage. *See* Rule 602, SCRE.

4. Mary Moxley is unable to identify her signature.

In reaching its determination that Mary Moxley signed the Mortgage, the Court relied on her testimony that her signature has changed over time. (Order filed June 30, 2017, pp. 6, 10, and 11). She plainly stated that her “handwriting has changed a lot over the years back and forth.” (Transcript, p. 183, l. 25 to p. 184). When asked to identify her signature at trial, Mary Moxley replied, “I don’t know. I really don’t know to be honest with you. My signature has changed so many times. And my psychiatrist asked me that.” (Transcript, p. 186, ll. 6-8).

The fact that Mary Moxley’s signature changed over time provided convenient cover for her inconsistent testimony at deposition and at trial. That inconsistency is addressed below.

Mary Moxley does not specifically challenge the trial court’s finding on the changing nature of her signature. Rather, she uses the trial court’s findings as an opportunity to argue that CitiMortgage failed to provide testimony from a handwriting expert. CitiMortgage submits that the absence of testimony from a handwriting expert is immaterial to the validity of the trial court’s conclusions, which are adequately supported by testimony from a reliable witness who actually witnessed Mary Moxley’s execution of the Mortgage.

5. Mary Moxley testified inconsistently at deposition and at trial when asked to identify her signature.

The final factor in the trial court’s determination that the preponderance of the evidence establishes that Mary Moxley signed the Mortgage was the reliability of her testimony. (Order filed June 30, 2017, p. 11). As the trial court noted, Mary Moxley identified her handwriting on the Mortgage and other mortgage loan documentation at deposition, but she changed her testimony at trial to indicate that none of the writing on the Mortgage and mortgage loan documentation was hers.

(Transcript, p. 179, l. 1 to p. 189, l. 20 and p. 208, l. 25 to p. 212, l. 22; Deposition of Mary Moxley, May 26, 2016, pp. 30-37, 47-60; Plaintiff's Exhibits 2, 9, 11, 12, 13, 14, 15, 16 and 21). During her examination at trial, Mary Moxley could not identify the copy of her driver's license that was part of CitiMortgage's file. At her deposition, she had no hesitation identifying the same copy as a copy of her driver's license. (Transcript, p. 163, l. 14 to p. 168, l. 2; Deposition of Mary Moxley, May 26, 2016, p. 52). This conflicting testimony led the trial court to discount Mary Moxley's trial testimony as unreliable.

On appeal, Mary Moxley does not address or offer an explanation for her inconsistent testimony.

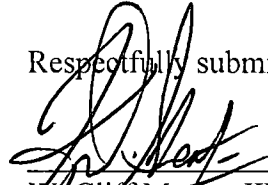
After observing Mary Moxley's conflicting testimony, the trial court was in the best position to consider its credibility. It found the testimony unreliable. (Order filed June 30, 2017, pp. 6, 10). Despite her testimony that the handwriting on the Mortgage and the mortgage loan documentation was not hers, the trial court reasonably concluded that Mary Moxley signed the Mortgage.

CONCLUSION

Mary Moxley only challenges the lower court's determination that she signed the Mortgage. She does not recall signing the Mortgage and points to irregularities in its execution that affect the ability to record it in the public records. Mary Moxley explained her recollection issue by testifying to her memory loss. Precedent holds that the inability to record the Mortgage does not affect its enforcement against Mary Moxley. The preponderance of the evidence supports the trial court's findings, and those findings should not be disturbed.

January 10, 2018.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

M. Anderson Griffith, Master in Equity

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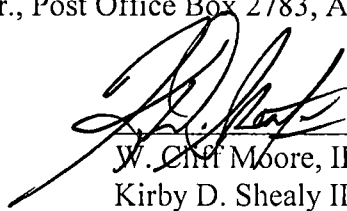
Of whom Mary L. Moxley is the

Appellant.

PROOF OF SERVICE

I certify that I have caused the Respondent's Initial Brief to be served on Mary L. Moxley by depositing a copy of it in the United States Mail, postage prepaid, on January 10, 2018, addressed to her attorney of record, Tom G. Woodruff, Jr., Post Office Box 2783, Aiken, S.C. 29802.

January 10, 2018.



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January 10, 2018

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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JAN 10 2018

SC Court of Appeals

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RE: CitiMortgage, Respondent, v. Mary L. Moxley a/k/a Mary Moxley n/k/a Mary Richardson; Hudson & Keyse, LLC; First Manufactured Housing Credit Corporation who acquired First Carolina Financial Corporation; and the South Carolina Department of Motor Vehicles, Defendants, of which Mary L. Moxley is the Appellant.
Aiken Co. Case No. 2016-CP-02-02033
Appellate Case No. 2017-002060

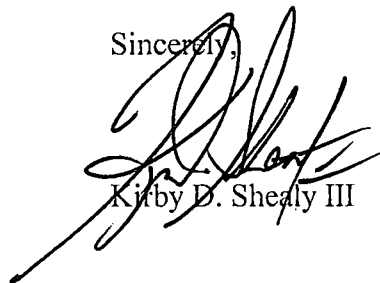
Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter are the original and one copy of the Respondent's Initial Brief, Respondent's Designation of Matter to Be Included in the Record on Appeal, and Proofs of Service. Please file the originals and return the clocked-in copies to me via our courier.

By copy of this letter, I am serving Mr. Woodruff with the brief and designation as set forth in the enclosed Proofs of Service.

Thank you for your attention to this matter.

Sincerely,



Kirby D. Shealy III

KDS/jas

Enclosure(s)

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