

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Tanya A. Gee, Circuit Court Judge

Civil Action No. 2014-CP-40-3104
Appellate Case No. 2015-002485

RECEIVED
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SC Court of Appeals

Deborah S. Dubose.....Appellant

vs.

Ashley C. Cone and Branch Banking & Trust Company.....Respondents

APPELLANT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. THE TRIAL JUDGE ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF ASHLEY ON GROUNDS THAT THE TERMS OF THE BB&T ACCOUNT GOVERNED, NOT SECTION 62-6-202.....(5)
- II. THE TRIAL JUDGE ERRED IN FINDING THAT THE DISCOVERY PROPOSED BY DEBORAH COULD NOT BE USED TO AVOID GRANTING SUMMARY JUDGMENT TO ASHLEY.....(8)
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- IV. THE TRIAL JUDGE ERRED IN GRANTING SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM FOR CONVERSION AND CONSTRUCTIVE TRUST WHERE ASHLEY USED THE FUNDS FOR ESTATE AND OTHER PURPOSES.....(10)

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STATEMENT OF THE CASE

This action was commenced on May 14, 2014 by Deborah S. Dubose (“Deborah”), the widow of G. Hollis Cone (“Deceased”) to resolve a dispute over the ownership of a joint bank account at Branch Banking & Trust Company (“BB&T”) which was funded by the Deceased with a deposit of \$255,000.00. (R. p. 16, lines 27-30-p. 20, lines 33-39). According to the Complaint, Ashley C. Cone (“Ashley”), the Deceased’s son, wrongfully removed \$130,000.00 and has refused to return it (R. p. 17, lines 19-21).

Deborah’s Complaint alleges causes of action for declaratory judgment, conversion, and constructive trust. (R. pp. 16-19). Ashley filed an Answer asserting a general denial, failure to state a cause of action, waiver, estoppel, and an accord and satisfaction. (R. pp. 20-22).

On January 6, 2015, Deborah moved for summary judgment (R. pp. 71-73) and said motion provided as follows:

“The Plaintiff hereby moves for summary judgment that she was entitled to the entire amount in Branch Banking & Trust Account No. 0005128065344 upon the death of her husband. The motion is made upon the following grounds:

1. It is undisputed that Branch Banking & Trust Company Account No. 0005128065344 was held as joint with right of survivorship, that G. Hollis Cone contributed all funds or amounts to such account during his life, and that G. Hollis Cone was married to the Plaintiff.
2. It is undisputed that G. Hollis Cone entered into a Waiver of Spousal Rights Agreement with the Plaintiff which the Plaintiff and G. Hollis Cone agreed as follows regarding jointly held property:

“D. Jointly Held Property. Upon Hollis’s death, any property held or acquired in the form of ownership known as joint tenants with rights of survivorship, or treated as joint tenants with rights of survivorship under the laws of South Carolina, as between Hollis and Deborah, shall be distributed to Deborah.”

3. In addition thereto, S.C. Code Ann. Section 62-6-202(a) provides that the funds in the aforesaid BB&T account, at the death of G. Hollis Cone, belongs to the Plaintiff, which section states as follows:

“Section 62-6-202. Right of Survivorship.

(a) Except as otherwise provided in this subpart, on death of a party sums on deposit in a multiple party account belong to the surviving party or parties. If two or more parties survive and one is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was beneficially entitled under Section 62-6-201 belongs to the surviving spouse. If two or more parties survive and none is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was beneficially entitled under Section 62-6-201 belongs to the surviving parties in equal shares, and augments the proportion to which each survivor, immediately before the decedent’s death, was beneficially entitled under Section 62-6-201, and the right of survivorship continues between the surviving parties.”

4. There is no genuine issue of material fact and the Plaintiff is entitled to summary judgment as a matter of law.

The affidavit of the Plaintiff is submitted in support of this motion. (R. pp. 71-73)

On March 17, 2015, Ashley moved for summary judgment (R. pp. 75-109) and said motion provided as follows:

“Defendant Ashley C. Cone (“Defendant” or “Cone”) hereby moves pursuant to Rule 56 of the South Carolina Rules of Civil Procedure for an order granting summary judgment in his favor in the above referenced matter. There are no genuine issues of material fact, and Cone is entitled to judgment as a matter of law. The grounds for this motion are as follows:

1. In July of 1982, G. Hollis Cone opened an individual bank account with First Palmetto State Bank and Trust Company, which subsequently became Branch Banking & Trust Company (“BB&T”). A computer printout of the signature card and Depositor Agreement for this account is attached hereto as Exhibit A.
2. On or about January 17, 2014, G. Hollis Cone changed the account to a joint account with right of survivorship (“Joint Account”) and added Plaintiff Deborah Dubose and Ashley Cone to the Joint Account.
3. When the account became joint, G. Hollis Cone, Ashley Cone and Deborah Dubose agreed to the following: We understand that BB&T may pay any or all of the funds in the account on the order of any one person named on the account. Upon the death of a party to the account, the deceased party’s ownership in the account passes to the surviving party or parties in the account. (BB&T signature card, dated January 17, 2014, a copy of which is attached hereto as Exhibit B).
4. G. Hollis Cone, Ashley Cone, and Deborah Dubose indicated their agreement with this term, among others, by signing directly underneath the term.

5. The BB&T Account also stated the following:

The co-owners of a joint account are those persons who have signed the signature card as joint owners. Each joint owner appoints the other as his or her agent to deposit, withdraw, and conduct any business on the joint account; including, but not limited to, pledging or encumbering the account. Any joint owner may appoint an attorney-in-fact for the account, but [BB&T] reserve[s] the right to require the consent of all joint owners. Acting as agent, any joint owner can endorse for deposit a check, draft, or other payment order made payable to any other joint owner. You agree that each joint owner may withdraw or transfer, by any means the Bank makes available, any or all of the funds on deposit, close the account, place or remove a stop payment order, or create an overdraft in the account (which the Bank may collect from any joint owner). . . .

An excerpt of the BB&T Bank Services Agreement, dated Dec. 16, 2013 is attached hereto as **Exhibit C**. Pursuant to the terms of the BB&T Bank Services Agreement and G. Hollis Cone's instructions, Ashley C. Cone served as G. Hollis Cone's agent.

6. G. Hollis Cone died on January 26, 2014.
7. Pursuant to the express terms of the Joint Account, G. Hollis Cone's ownership in the Joint Account passed to Ashley Cone and Deborah Dubose, upon his death.
8. Section 62-6-203(a) of the South Carolina Code provides that "[r]ights at death of a party under Section 62-6-202 are determined by the terms of the account at the death of the party."
9. Therefore, the terms of the Joint Account trump Section 62-6-202 of the South Carolina Code which provides as follows:

Except as otherwise provided in this subpart, on death of a party sums on deposit in a multiple-party account belong to the surviving party or parties. If two or more parties survive and one is the surviving spouse of the decedent, the amount to which the decedent, immediately before death, was beneficially entitled under Section 62-6-201 belongs to the surviving spouse. . .

10. Additionally, the Waiver of Spousal Rights Agreement ("Waiver"), which is attached hereto as **Exhibit D**, does not affect Ashley Cone's rights or have any applicability to the Joint Account because the pertinent paragraph of the Waiver states that it only applies to "property held or acquired in the form of ownership known as joint tenants with rights of survivorship . . . *as between Hollis and Deborah . . .*" (Waiver, ¶ D (emphasis added).) The Joint Account was not held solely by G. Hollis Cone and Deborah Dubose. Rather, it was held jointly among G. Hollis Cone, Deborah Dubose, and Ashley Cone. Consequently, the Waiver does not control this matter and has no impact on Ashley Cone's rights.

11. By the express terms of the Joint Account, G. Hollis Cone's ownership in the Joint Account passed to Ashley Cone and Deborah Dubose, upon his death. Consequently, Deborah Dubose is not the sole owner of the funds related to the Joint Account. Each of Deborah Dubose's claims – (1) a declaratory judgment that funds in the Joint Account belong to her and must be returned to her, (2) conversion, and (3) constructive trust – is premised on the supposition that only Deborah Dubose is entitled to the funds. However, the controlling terms of the Joint Account provide otherwise. Therefore, Deborah Dubose's claims fail as a matter of law, and this Court should grant summary judgment in favor of Ashley Cone with respect to all claims.
12. Additionally, Deborah Dubose's conversion claim fails as a matter of law because Ashley Cone's actions were authorized and because he did not convert the property to his own use. First, Ashley Cone was authorized to issue checks and make any withdrawals pursuant to the terms of the BB&T Account, along with the instructions of G. Hollis Cone. Second, the funds were used to pay G. Hollis Cone's funeral, medical, and other personal expenses and Deborah Dubose's personal expenses. No funds were used to benefit Ashley Cone. At all times, Ashley Cone acted in good faith and pursuant to the terms of the BB&T Account when he disbursed funds from the BB&T Account. Therefore, Dubose's claim for conversion fails as a matter of law, and this Court should grant summary judgment in favor of Ashley Cone with respect to the conversion claim.

This motion is based upon the pleadings in this case, as well as case law, statutory law, rules of this Court, and any documents, affidavits, deposition testimony, discovery responses, or memorandum of law which may be submitted prior to the hearing on this matter.” (R. pp. 75-109).

These cross motions for summary judgment were heard by the Honorable Tanya A. Gee on April 16, 2015. (R. p. 1). By an Order dated April 24, 2015, Judge Gee denied Deborah's motion and granted Ashley's motion. (R. pp. 1-13). Judge Gee granted summary judgment in favor of Ashley finding:

1. the terms of the BB&T account governed, not Section 62-6-202 (R. p. 6, lines 18 - p. 7, lines 32);
2. Deborah had waived all spousal rights in the waiver (R. p. 7, lines 33 - p. 8, lines 9);
3. discovery sought by Deborah cannot avoid granting summary judgment (R. p. 7, lines 11 - p. 10, lines 35);
4. Section 62-6-202(a) does not apply (R. p. 11, lines 7-24); and

5. the waiver provision concerning jointly held property does not address the BB&T account. (R. p. 11, line 26-p. 12, line 29).

Deborah made a timely motion to reconsider the Court's ruling on Ashley's motion which Judge Gee summarily denied by an Order dated October 23, 2015. (R. p. 14-p. 245, line 1-254, line 1). Deborah filed a timely Notice of Appeal.

SCOPE OF REVIEW

"In reviewing the grant of a summary judgment motion, this Court applies the same standard which governs the trial court under Rule 56(c), SCRPC; summary judgment is proper when ['] there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law[']" *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991).

In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party.

Sumner v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.

Williams v. Chesterfield Lumber Co., 267 S.C. 607, S.E.2d 447 (1976)." *Osborne v. Adams*, 346 S.C. 4, 550 S.E.2d 319 (2001).

I.

DID THE TRIAL JUDGE ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF ASHLEY ON GROUNDS THAT THE TERMS OF THE BB&T ACCOUNT GOVERNED, NOT SECTION 62-6-202?

The Trial Judge erred in granting summary judgment in favor of Ashley based upon the grounds that the terms of the BB&T account governed, not Section 62-6-202. (R. p. 6, line 18-p. 7, line 32-p. 246). Section 62-6-202(a) states that on the death of a party sums on deposit in a

multi-party account belongs to the surviving party or parties. (R. p. 246, lines 1-18). However, if two or more parties survive and one is the surviving spouse of the decedent, the amount to which the decedent immediately before death was beneficially entitled under Section 62-6-201 belongs to the surviving spouse. (R. pp. 245-246-p. 249, line 40-p. 250, line 28). Here, Deborah was the surviving spouse. (R. p. 1, line 41-p. 17, lines 1-17-p. 74). Here, the deceased, who had funded the joint account, was beneficially entitled to the entire account amount pursuant to Section 62-6-201. (R. p. 54, lines 10-21-p. 249, line 40-p. 250, line 28). Therefore, if Section 62-6-202(a) governs, then the entire amount in the account would belong to Deborah. (R. p. 54, lines 15-21-p. 252, lines 7-16).

S.C. Code Ann. Section 62-6-203(a) provides for a different outcome. S.C. Code Ann. Section 62-6-203(a) provides as follows:

“Rights at death of a party under Section 62-6-202 are determined by the terms of the account at the death of the party. A party may alter the terms of the account by a notice signed by the party and given to the financial institution to change the terms of the account or to stop or vary payment under the terms of the account. To be effective the notice must be received by the financial institution during the party’s lifetime.”

Rights at the death of a party under Section 62-6-203(a) are determined by the terms of the account at the death of the party.

Since Section 62-6-202(a) and Section 62-6-203(a) are in conflict. Thus, the Trial Judge was obligated to reconcile the two statutes pursuant to the rules of statutory construction. (R. p. 52-p. 246).

“The goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd. *Ray Bell Constr. Co. v. School Dist. of Greenville Co.*, 331 S.C. 19, 501 S.E.2d 725 (1998).

However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when the accept it would lead to a

result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention. If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.

Id. (citing *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 440 S.E.2d 364 (1994).”

The general rule of statutory construction is that a specific statute controls over a more general one. *Mims v. Alston* 312 S.C. 311, 440 S.E.2d 357 (1994). Moreover, “it is well settled that statutes dealing with the same subject matter are in *pari material* and must be construed together, if possible, to produce a single, harmonious result.” *Beaufort County v. S.C. State Election Comm’n*, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011). All statutes covering the same subject must be given effect, if it can be done by any reasonable construction. *Hodges v. Rainey*, 341 S.C. 79, 88-89, 533 S.E.2d 578, 583 (2000). (R. p. 246).

Here, Section 62-6-202 is the more specific statute. (R. p. 246). The two statutes can only be reconciled by finding that Section 62-6-203(a) applies generally and only if no spouse is involved but if there is a spouse, then Section 62-6-202 controls. (R. p. 246). This Court should analyze and reconcile the statutes involved and find that Section 62-6-202(a) controls since it is the more specific statute. (R. p. 52, lines 7-8-p. 246). Summary judgment in favor of Ashley should be reversed.

Furthermore, the intent of Section 62-6-202 is to protect a surviving spouse when such spouse is a joint account holder with their now deceased spouse and another third party. (R. p. 52, lines 13-18-p. 252, lines 18-25). To find that Section 62-6-203(a) controls over Section 62-6-202 defeats and completely negates the statutory intent of Section 62-6-202 and renders said statute silent in the exact situation, like the one here, where Section 62-6-202 is explicitly to apply to protect a widow/widower. (R. p. 52, lines 13-18-p. 54, lines 15-21-p. 252, lines 18-25).

II.
DID THE TRIAL JUDGE ERR IN FINDING THAT THE DISCOVERY PROPOSED BY DEBORAH COULD NOT BE USED TO AVOID GRANTING SUMMARY JUDGMENT TO ASHLEY?

Deborah argued that summary judgment should be denied Ashley because discovery was not complete. (R. p. 57, lines 16-25–p. 58, lines 1-4 and lines 14-21). Deborah supported her argument with affidavits by W. Steven Johnson and Pope D. Johnson, III. (R. pp. 41-45–pp. 57-58). These affidavits set forth why discovery was not complete and forecasted the matters to be covered. The Trial Judge, without hearing any of the testimony that Deborah sought to take, found that some testimony could nevertheless be admissible. (R. p. 9–p. 10, lines 1-18). The dead man’s statute, which could bar certain testimony, is subject to numerous exceptions. The dead man’s statute, S.C. Ann. Section 19-11-20, does not prohibit a discovery deposition of conversation with the deceased. The Trial Judge found that the attorney-client privilege would prevent Attorney Sojourner from testifying.¹ (R. p. 9, lines 22-23–p. 10, lines 1-12). However, there is no basis for this determination. First, the attorney/client privilege must be asserted by the party which owns the privilege. (R. p. 248, lines 15-22). The privilege can be waived if non-clients participate in the conversations. (R. p. 248, lines 15-22). Unless a full inquiry is permitted there is no way to determine whether the dead man’s statute or the attorney-client privilege applies. (R. p. 248, lines 15-22).

The Court should allow additional discovery. At a minimum, the plaintiff should be permitted to depose Ashley who claims to have used much of the money he took from the joint account to pay the plaintiff’s expenses and estate expenses. (R. p. 247, lines 29-36). Ashley

¹ Attorney David Sojourner was the scrivener and estate planning attorney used by Hollis Cone (the “Decedent” or “Deceased”) who drafted the premarital agreement and various other estate planning documents for the Decedent.

claims not to have used any of the funds for himself. Whether Ashley made some deal with his father to induce his father to include him on the account is unknown but his use of the money is more than unusual (for someone claiming to own the funds) and additional discovery is needed. (R. p. 61, lines 13-24).

III. DID THE TRIAL JUDGE ERR IN FAILING TO FIND THAT DECEASED MADE A VOLUNTARY TRANSFER?

The Trial Judge found that the plaintiff waived all spousal rights, including specific rights she received from the decedent under the waiver, and thus had no right to the funds in the BB&T account. (R. p. 7, lines 20-26–p. 8, lines 1-5). The Trial Judge relied on paragraph C of the Waiver of Spousal Rights. (R. p. 8, line 1). Paragraph C provides:

“C. Waiver of Spousal Rights. As consideration for Hollis’s agreement to provide for Deborah as set forth in Paragraph A and Paragraph B, Deborah hereby irrevocably renounces, releases and forever waives any and all rights to claim any other assets of Hollis’s estate (including assets now owned and assets that are hereinafter acquired), including but not limited to, the right to take an elective share of Hollis’s estate in accordance with South Carolina Code Section 62-2-201 (et. seq.), any benefits which would otherwise pass to Deborah by intestate succession, and any right to make an omitted spouse election in accordance with South Carolina Section 62-2-301.” (R. p. 256).

However, paragraph F allows for voluntary transfers. (R. p. 256).

“F. Voluntary Transfers. Nothing herein shall be construed as preventing Hollis from voluntarily giving additional assets to Deborah by deed, gift, will, beneficiary designation, or otherwise.”

The deceased did exactly what he reserved the right to do in paragraph F and he made a voluntary transfer to Deborah. (R. p. 58, line 25–p. 59, lines 1-9-p. 256). This Court should find that the deceased made a voluntary transfer to Deborah.

Moreover, Deborah entered into a contract with the Decedent and part of the

consideration she received in doing so was all rights in and to joint accounts with the Decedent pursuant to “D” of the agreement the Circuit Court relied upon.² (R. p. 59, lines 4-9-p. 247, lines 1-23-p. 252; lines 32-44-p. 253, lines 1-5-pp. 255-258). The Circuit Court completely ignored this provision of the premarital agreement and therefore it also ignored the fact that Deborah was entitled to funds held in the joint account. Deborah received such right to the funds held in the joint account as consideration for her entering into the premarital agreement with the Decedent. (R. p. 252, lines 32-44-p. 253, lines 1-5).

To that end, the trial court erred in relying upon paragraph C of the premarital agreement and failed to give effect to later, controlling paragraphs of the premarital agreement, specifically paragraphs D and F.

IV.

DID THE TRIAL JUDGE ERR IN GRANTING SUMMARY JUDGMENT ON PLAINTIFF’S CLAIM FOR CONVERSION AND CONSTRUCTIVE TRUST WHERE ASHLEY USED THE FUNDS FOR ESTATE AND OTHER PURPOSES?

Deborah alleged a cause of action for conversion and constructive trust. (R. p. 18). The Trial Judge granted summary judgment in favor of Ashley on these claims finding that the funds pass to Deborah and Ashley. (R. p. 12, line 19). However, if Deborah is entitled to the funds under Section 62-6-202(a), the order granting summary judgment on these claims must be reversed.

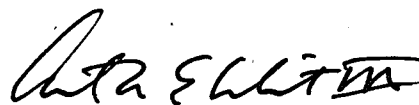
CONCLUSION

S.C. Code Section 62-6-202 controls the present situation as there is a joint account with multiple joint account holders, which include a surviving spouse, decedent spouse and other third

² “D. Jointly Held Property. Upon Hollis’s death, any property held or acquired in the form of ownership known as joint tenants with rights of survivorship, or treated as joint tenants with rights of survivorship under the laws of South Carolina, as between Hollis and Deborah, shall be distributed to Deborah.”

party and the decedent spouse contributed the funds to said joint account. Section 62-6-202 is the more specific statute and is intended to protect a widowed joint account holder in situations exactly like the one being presented to the Court. This Court should find that S.C. Code Section 62-6-202 controls over S.C. Code Section 62-6-203(a) and that Deborah is/was the rightful beneficial owner of the full amount held in the BB&T joint account. The Order dated April 24, 2015 of Judge Gee granting summary judgment in favor of Ashley should be reversed.

Moreover, the contractual arrangement between the Decedent and Deborah clearly provides that Deborah is entitled to any property held between the two as joint tenants with right of survivorship and that the Decedent can make voluntary transfers to Deborah. These provisions were completely ignored by the Trial Judge. Summary Judgment in favor of Ashley should be reversed.



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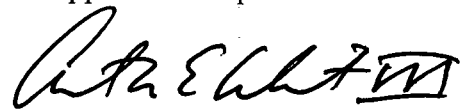
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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Appellant complies with SCACR 211 (b).



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PROOF OF SERVICE

I, Nicole Chapman, paralegal for Todd and Johnson, L.L.P., hereby certify that I have served Thornwell F. Sowell and Bess Jones Durant, attorneys for the Respondent, Ashley C. Cone, with the foregoing pleading by hand delivery a copy of the same to them at the following address on the 29th day of August, 2016.

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Final Brief of Appellant

Nicole Chapman
Nicole Chapman

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Appellant complies with SCACR 211 (b).



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IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Tanya A. Gee, Circuit Court Judge

Civil Action No. 2014-CP-40-3104
Appellate Case No. 2015-002485

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SC Court of Appeals

Deborah S. Dubose.....Appellant

vs.

Ashley C. Cone and Branch Banking & Trust Company.....Respondents

PROOF OF SERVICE

I, Nicole Chapman, paralegal for Todd and Johnson, L.L.P., hereby certify that I have served Thornwell F. Sowell and Bess Jones Durant, attorneys for the Respondent, Ashley C. Cone, with the foregoing pleading by hand delivery a copy of the same to them at the following address on the 29th day of August, 2016.

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