THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-In-Equity

Appellate Case No.: 2018-000260

Seabrook Island Property Owners Association,.....Respondent,

v.

Charles Kelley a/k/a Charles E. Kelley; Deborah Kelley a/k/a Deborah L. Kelley; Mortgage Electronic Registration Systems, Inc., its successors and assigns as nominee for Chase Mortgage Company, its successors and assigns, a Delaware Corporation; and Spinnaker Beach House Owners Association,.....Defendants,

Of whom Charles Kelley a/k/a Charles E. Kelley and Deborah Kelley a/k/a Deborah L. Kelley are the.....Appellants,

And of which Mortgage Electronic Registration Systems, Inc., its successors and assigns as nominee for Chase Mortgage Company, its successors and assigns, a Delaware Corporation; and Spinnaker Beach House Owners Association are also.....Respondents.

INITIAL BRIEF OF RESPONDENT SEABROOK ISLAND PROPERTY OWNERS ASSOCIATION

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II. SHOULD THE APPEAL BE DISMISSED AS UNTIMELY, WHERE THE KELLEYS FILED THEIR NOTICE OF APPEAL MORE THAN THIRTY DAYS AFTER NOTICE OF THE ENTRY OF THE ORDER ON APPEAL?

STATEMENT OF THE CASE[1]

The Respondent Seabrook Island Property Owners Association ("Seabrook") held a lien on property located at 749 Spinnaker Beachhouse VI, Johns Island, SC, which was owned by Appellants Charles and Deborah Kelley ("the Kelleys"). [Order, p. 1.] This appeal arises from Seabrook's successful action to foreclose that lien.

On August 24, 2016, an attorney for Seabrook sent the Kelleys a letter informing them that they owed a sum of money to Seabrook and that a lien would be asserted and enforced against the property if the Kelleys did not pay that debt within an allotted time. [Order, p. 2; Letter.] The attorney sent that letter, which was addressed to the Kelleys at their permanent address in Pennsylvania, by both regular and certified mail. [Order, p. 2.] The Kelleys did not respond to the letter and made no efforts to cure the arrearage. [Order, p. 2.]

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[1] Because the relevant facts for the issues on appeal are all procedural in nature, Seabrook's Statement of the Case will also serve as a statement of the pertinent facts.

After receiving no response to the letter, Seabrook filed a Lis Pendens and a Summons and Complaint for foreclosure in Charleston County on December 19, 2016. [Order, p. 1-2.] A process server delivered copies of those pleadings to Charles Kelley at the Kelleys' place of residence in Pennsylvania on December 22, 2016. [Affidavits of Process Server.] Although Deborah Kelley was not home at the time of the service, Charles Kelley accepted the pleadings on her behalf. [Affidavits of Process Server.] Seabrook filed affidavits of service on January 5, 2017. [Affidavits of Process Server.]

Due to an oversight by the process server, the original affidavits mistakenly omitted the Complaint from the list of pleadings served on the Kelleys. [Affidavits of Process Server.] When that error later came to light, the process server signed an Amended Affidavit of Service, in which he confirmed that the Complaint was served on the Kelleys on December 22, 2016. [Amended Affidavit of Service.] Seabrook submitted that corrected affidavit to the trial court prior to the hearing on the Kelleys' motion that led to the Order currently on appeal.

After being served on December 22, 2016, the Kelleys made no response. As a result, the trial court filed an entry of default on March 9, 2017. [Order, p. 2.] The court also filed an Order of Reference on that date, which referred the case to the Honorable Mikell R. Scarborough, the Master-in-Equity for Charleston County. [Order of Reference.]

The Master scheduled a foreclosure hearing for April 19, 2017. On March 21, 2017, Seabrook's attorney mailed a copy of the Notice of Hearing to the Kelleys at their Pennsylvania address. [Order, p. 2.] The attorney filed a Certificate of Service for that

mailing two days later. There is no evidence suggesting the Notice of Hearing did not arrive at the Kelleys' normal residence well before the scheduled hearing.

The Kelleys failed to appear at the foreclosure hearing on April 19, 2017. That hearing resulted in a Judgment of Foreclosure and Sale, which was filed on May 5, 2017. [Judgment.] Seabrook's attorney served a copy of the Judgment of Foreclosure and Sale on the Kelleys by mail on May 10, 2017, and filed a Certificate of Service on May 12, 2017. [Order, p. 2.]

The property subject to the judgment was advertised for sale in *The Post & Courier* newspaper on May 30, 2017; June 6, 2017; and June 13, 2017; and an affidavit of publication was filed on June 21, 2017. [Order, p. 2.] The sale of the property took place on July 20, 2017. [Order, pp. 2-3.] The Master filed an Order of Sale and Disbursement on August 23, 2017. [Order, p. 3.]

Only then did the Kelleys make an appearance in the case, filing a Motion to Set Aside Entry of Default and Vacate Judgment of Sale and Master's Foreclosure Deed on September 18, 2017. [Motion.] The Kelleys filed affidavits in support of their motion on November 21, 2017. [Affidavits of Kelleys.]

The Master conducted a hearing on November 27, 2017, and filed an Order denying the Kelleys' motion on December 15, 2017. [Order.] The Kelleys did not file any motion challenging that decision until January 8, 2018, when they filed a motion to reconsider under Rule 59(e), SCRCP. [Motion to Reconsider.] Seabrook filed a memorandum arguing that the motion to reconsider was untimely, and the Kelleys submitted an affidavit from their attorney in response. The master filed a form order

denying the motion on February 12, 2018. [Return to Motion to Reconsider; Order.] The Kelleys then filed a Notice of Appeal on February 20, 2018.

STANDARD OF REVIEW

"Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge." *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502 (2006) (*citing Coleman v. Dunlap*, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992)). "[The appellate court's] standard of review, therefore, is limited to determining whether there was an abuse of discretion. An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." *Taylor*, 369 at 551, 633 S.E.2d at 502-503 (*citing Tri-County Ice & Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990)).

ARGUMENT

I. THE RECORD SUPPORTS THE MASTER'S CONCLUSION THAT THE KELLEYS WERE SERVED WITH THE NECESSARY PLEADINGS.

The Master acted well within his discretion in denying the motion to vacate the judgment.[2] The Master concluded that the Kelleys were served with the Complaint and that the lack of a reference to the Complaint in the original service affidavit was merely an omission by mistake. This finding was not any kind of legal error, and it finds ample support in the record. Therefore, the decision was not an abuse of discretion, and this Court should affirm it.

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[2] Although the Kelleys styled their filing as a "Motion to Set Aside Entry of Default and Vacate Judgment of Sale and Master's Foreclosure Deed," it was too late at the time of filing to pursue a motion to set aside the entry of default under Rule 55, SCRCP. Thus, the motion was solely one for relief from the judgment under Rule 60(b). Indeed, that is the manner in which the Kelleys have always argued the motion.

The original affidavits from the process server did not include the word "Complaint" in the list of documents served, although the Complaint certainly was part of the packet that the process server was hired to deliver. As the Master concluded, the omission of the word "Complaint" in the affidavits was merely a mistake. It was not, as the Kelleys suggest in their brief, some kind of admission or affirmative representation that the Complaint was not served with the pleadings. Any question as to whether the omission was intentional was resolved when the process server submitted an amended or corrected service affidavit that included "Complaint" in the list of pleadings served. That revised affidavit constituted evidence to support the Master's finding that the Kelleys received the Summons and Complaint. Because that finding has record support, it is not an abuse of discretion as South Carolina defines that term.

The finding was also not "controlled by an error of law" because the Kelleys' motion did not ask the Master to determine whether the method of service complied with the law, which would be a legal issue. The Kelleys could not, and cannot, seriously dispute that if the process server delivered the Complaint to them along with the other documents, it constituted proper service. Rather, the motion asked the Master to conclude that service of the Complaint never occurred at all. That was not a legal question, and it only required the Master to consider the record evidence relating to that issue. Thus, although the Kelleys contend the Master's decision was "wrong," they cannot claim it was a legal error.

In addition, even though the Master did not make this specific ruling in his Order, the facts leading up to the entry of default and subsequent judgment demonstrate no violation of the Kelleys' due process rights. To the contrary, those facts reveal that the

Kelleys received ample notice of Seabrook's foreclosure action and had every opportunity to present any substantive defenses they might have had.[3]

Three months before commencing the foreclosure action, Seabrook sent the Kelleys a letter notifying them of the debt and demanding that it be paid within a set time period. Seabrook's attorney sent that letter by regular and certified mail, and there is no evidence the certified mailing was returned undelivered. This means that by the end of August 2016, the Kelleys knew – or were at least on notice – that Seabrook planned to file a foreclosure action against them if they failed to satisfy the debt.

After filing the Lis Pendens and Summons and Complaint in December 2016, Seabrook sent copies of those pleadings to a process server in the Kelleys' home state of Pennsylvania for personal service. Although they claim not to remember being served with any pleadings, the Kelleys admit in their affidavits that a search found copies of at least some of those pleadings in their home. [Affidavits of Kelleys.] Those pleadings included, at a minimum, the Lis Pendens and the Summons for the foreclosure action. [Affidavits of Kelleys.] This corroborates the process server's affidavit showing that service occurred in December 2016. Even if one believes the Complaint was not served, the Kelleys undeniably still received notice of the legal action against them. Coupled with the previous demand letter, this notice was more than sufficient to require some responsive action by the Kelleys.

As the South Carolina Supreme Court has noted, "[e]xacting compliance with the rules is not required to effect service of process." *BB&T v. Taylor*, 368 S.C. 548, 552,

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[3] The record from the proceedings below does not demonstrate any meritorious defenses to the foreclosure action, and the Appellant's Brief does not argue that any such defenses existed.

633 S.E.2d 501, 503 (2006). "'Rather, [the Court must] inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings.'" *Id.* (quoting *Roche v. Young Bros., Inc. of Florence*, 318 S.C. 207, 211, 456 S.E.2d 897, 900 (1995)). "A court generally obtains personal jurisdiction by the service of a summons." *Id.* at 551, 633 S.E.2d at 503.

It is undisputed that the Kelleys were at least served with the Summons shortly after Seabrook filed the foreclosure action. Seabrook asserts, and the Master correctly found, that the Kelleys were also served with the Complaint. But even if they were not, the Kelleys had received a previous demand letter and they were certainly served with copies of the Lis Pendens. Those materials alerted the Kelleys to the subject matter of the legal action that Seabrook had filed against them. And yet, the Kelleys did nothing in response to service of those documents, just as they had failed to respond to the demand letter.

Again, though, it is unnecessary for the Court to reach or consider the preceding point because the record supports the Master's conclusion that the Kelleys did receive service of the Complaint. The amended or corrected affidavit of the process server, if accepted as true, firmly establishes that fact. The Master was entitled to accept and rely upon that affidavit, and that is precisely what he did. Therefore, the Master's decision was not an abuse of discretion, and this Court should affirm the decision below.

Perhaps because they cannot genuinely deny the existence of record evidence to support the Master's decision, the Kelleys rely on semantics in the arguments presented in their Appellants' Brief. Those arguments attempt to divert the Court's attention from

the real issue (*i.e.* whether the record supports the Master's decision), and in any event they do not have the force or significance the Kelleys attribute to them.

First, the Kelleys take issue with the use of the word "undisputed," which appears several times in the Order. The Kelleys contend that word was improper in connection to the issue on appeal because they challenged whether there was proper service of the Summons and Complaint. Yet, the word "undisputed" in the Order does not apply to the dispositive issue of whether service occurred. Rather, the Order uses "undisputed" to describe facts about the service affidavits, as the following passage illustrates:

> It is undisputed that the Affidavits of Service for the Kelley Defendants, which were filed on January 5, 2017, contained a scrivener's error in that the affiant failed to indicate that the Complaint was served along with the Certificate of Exemption from ADR, Lis Pendens, and Summons. It is also undisputed that upon discovery of the scrivener's error, the process server submitted Amended Affidavits of Service, wherein he explained the scrivener's error and verified that the Complaint was properly served on Kelley Defendants in compliance with Rule 4 SCRCP.

[Order, p. 3.] Although the Kelleys apparently disagree with the first statement that the original affidavit contained a "scrivener's error," there is, in fact, no dispute that the process server claimed it did and that he submitted an amended affidavit to that effect. Thus, this passage does not say that the issue of service was undisputed. It merely states facts regarding the process server's affidavits.

The Kelleys also contend the Order erroneously states that they admitted to being served "with all documents" in their affidavits. [Appellants' Brief, p. 5.] This assertion is incorrect. The Order contains the following sentence regarding the affidavits: "The Kelley Defendants have failed to provide any evidence contradicting the service of process other than affidavits where they admit being served with all documents, but

'believe' that the Complaint was omitted." [Order, p. 4 (emphasis added).] The record shows everything in this sentence is true. The Kelleys submitted no evidence other than their own affidavits; they admitted in those affidavits that they had received of copies of most of the documents; and they denied receiving the Complaint. The challenged sentence serves no purpose other than to state those basic facts, and it does not constitute any error at all, let alone a reversible one.

The Kelleys next argue that the omission of the word "Complaint" in the original service affidavits does not qualify as a "scrivener's error." Although Seabrook disagrees with this assertion, it would serve no purpose to debate the specific definition of the term "scrivener's error." As the corrected service affidavit demonstrates, the absence of the word "Complaint" from the original affidavit was an inadvertent omission. There is no record evidence that it was anything else. The Order could have used the phrase "inadvertent omission" instead of "scrivener's error," and it would not have changed the substance of the ruling because those phrases are interchangeable in this context. What the Order conveys is a finding that the process server mistakenly left out the word "Complaint" in the original affidavit, even though he did serve that pleading with the other documents. The record contains evidence to support that finding. Thus, the question of whether or not that omission falls within the dictionary definition of a "scrivener's error" is a red herring.

Finally, the Kelleys cite and rely upon *Belle Hall Plantation Homeowners Ass'n v. Murray*, 419 S.C. 605, 799 S.E.2d 310 (Ct. App. 2017). In *Belle Hall*, this Court affirmed the Master-in-Equity's decision to vacate a foreclosure sale based on a finding that the defendant was not properly served. *Belle Hall* is distinguishable, however,

because it involved very different facts. The plaintiff in *Belle Hall* made unsuccessful efforts to serve the defendant and then sought an order for service by publication of the defendant, John A. Murray. In support of that request, the plaintiff submitted an affidavit that was facially defective. The affidavit stated that the plaintiff had made efforts to locate "John A. Murray," but the attached documents in support revealed the plaintiff had actually been trying to locate and serve "John E. Murray," who was John A. Murray's father. Consequently, the plaintiff had not satisfied the statutory requirements for service by publication, and the court should not have allowed such service. This meant there was no valid service on the defendant, and under those circumstances the Court found the Master's decision to vacate the resulting foreclosure was proper.

Two important facts distinguish the present case from *Belle Hall*. First, the plaintiff in *Belle Hall* did not argue the error in the affidavit for service by publication was inadvertent, and it never submitted a corrected or amended affidavit. Here, Seabrook filed a second affidavit from the process server that corrected the unintentional omission of the word "Complaint." As a result, the Master in this case had a basis for concluding that proper service occurred, whereas the Master in *Belle Hall* did not.

The second distinguishing factor is perhaps more subtle, but equally as important. The Court's thorough summary of the facts in *Belle Hall* makes it clear that the defendant had no notice whatsoever of the lien or the resulting foreclosure action until after the foreclosure sale had taken place. At that point, the defendant acted as quickly as possible to seek relief. Here, on the other hand, the Kelleys undeniably knew about the lien and the foreclosure action before any entry of default. Seabrook sent the Kelleys a demand letter about the lien three months before filing suit, and the process server delivered

pleadings in the foreclosure action to the Kelleys nearly two-and-a-half months before the court entered a default.[4] In short, the Kelleys had notice of the lien and foreclosure action, and the defendant in *Belle Hall* did not. This is a significant difference.

By focusing solely on perceived technical flaws in some of the Order's phrasing, the Kelleys miss the proverbial forest for the trees. A review of the Order as a whole, and the record which supports it, demonstrates that the Master properly analyzed the dispositive issue. There is no indication that the Master failed to consider the Kelleys' affidavits in which they claimed not to have received the Complaint. Indeed, the Order specifically references those affidavits, which means the Master read them and took them into account. However, the Kelleys' affidavits were not the only ones in the record. The Master also considered the amended affidavit of the process server who delivered pleadings to the Kelleys. Based on a review of all those affidavits, and everything else in the record, the Master concluded proper service of all necessary pleadings had occurred. The Kelleys obviously disagree with that conclusion, but the record supports it. The Master had the discretion to determine which evidence to credit on the issue of service, and the ultimate decision was well within that discretion. Therefore, the resulting judgment was not void, and the Master properly denied the Kelleys' Rule 60(b)(4) motion.[5]

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[4] Although the Kelleys deny they received the Complaint, they admit in their affidavits that they were served with the other initial pleadings, which included the Summons and Lis Pendens.

[5] The Kelleys have not sought relief based on any other subsections of Rule 60(b), and the Master never ruled on any such arguments. Therefore, any arguments based on those other subsections are waived, and the only remaining focus of this case is subsection (b)(4).

The Kelleys had every opportunity to respond to the foreclosure action and prevent a judgment by default. They were on notice of the lien, and of Seabrook's intention to seek legal remedies if the Kelleys did not pay it, some three months before the foreclosure action began. The Kelleys then received all necessary pleadings in plenty of time to submit an Answer. Yet, in both instances, the Kelleys did nothing. That inaction led to negative consequences, and the Master properly declined to relieve the Kelleys from them. The Master acknowledged the Kelleys' argument that they had not been served with the Complaint, but the record fully supports his finding to the contrary. Accordingly, there is no legal error or abuse of discretion in this case, and the Court should affirm the Master's Order.

II. THE KELLEYS' APPEAL IS UNTIMELY AND SHOULD BE DISMISSED.

Rule 203 of the South Carolina Appellate Court Rules governs the time for appealing an order from the circuit court. In relevant part, the applicable rule states:

> A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rul3 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry or the order granting or denying such motion. ...

Rule 203(b)(1), SCACR (emphasis added).[6] Here, Master filed the Order denying the Kelley's motion to vacate the judgment on December 15, 2017. The Kelleys did not file their Notice of Appeal until February 20, 2018, more than two months later. Thus, the

[6] Rule 203(b)(1) applies to "Appeals From the Court of Common Pleas," but the standards set forth in that subsection also apply to "Appeals From Masters and Special Referees." *See* Rule 203(b)(4), SCACR.

Notice of Appeal did not comply with the requirements of Rule 203(b)(1), and the appeal was not timely.

The Kelleys did not address this issue in their Appellant's Brief, but presumably they rely on the filing of their motion to reconsider under Rule 59(e), SCRCP. The Master denied that motion in a form order filed on February 12, 2018. If that order triggered Rule 203(b)(1)'s thirty-day time period, the appeal would timely, as it was filed eight days later. However, the record and the applicable law suggest that the order on February 12, 2018, was a nullity, and the triggering order was the Master's original one filed on December 15, 2017.

Under Rule 59(e), SCRCP, a motion to alter or amend a judgment (commonly referred to as a "motion to reconsider") "shall be served not later than 10 days after receipt of written notice of the entry of the order." The Supreme Court has held that this ten-day limit for serving a Rule 59(e) motion "is an absolute deadline" that cannot be extended. *Overland, Inc. v. Nance*, ___ S.C. ___, ___ S.E.2d ___ (2018), Op. No. 27800 (filed May 23, 2018) (citing *Leviner v. Sonoco Prods. Co.*, 339 S.C. 492, 530 S.E.2d 127 (2000)). Therefore, a motion under Rule 59(e) cannot possibly be timely unless it is served within that ten-day time period.

The Kelleys did not file their Rule 59(e) motion in a timely manner. The original Order was filed on December 15, 2017, and the Kelleys did not file and serve their motion until January 8, 2018, which was twenty-four days later. Granted, December 15th fell on a Friday, and it is possible written notice of the Order was not sent until early the next week. Even if that scenario is assumed to be true, however, it does not aid the Kelleys. This is not a situation in which a brief delay in the court sending notice of the

Order would have made a difference. The Kelleys did not miss the deadline by just a day or two. This fact is significant for purposes of this issue.

When Seabrook opposed the Rule 59(e) motion as untimely, the Kelleys' attorney filed an affidavit stating that the Kelleys did not receive notice of the order until December 28, 2017. However, the Master did not cite that affidavit in its order denying the motion, and the record does not indicate when the court first sent out written notice of the order or why the long claimed delay in providing notice would have occurred. Accordingly, Seabrook respectfully asserts the Kelleys have not carried their burden of establishing that their Rule 59(e) motion was timely, and as a result, this Court lacks jurisdiction to consider the appeal. *See Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004) ("The requirement of service of the notice of appeal is jurisdictional, *i.e.,* if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice.") Therefore, the Court should dismiss the appeal.

CONCLUSION

Although the Kelleys deny receiving the Complaint along with the Summons and other initial pleadings, the record contains evidence that they did. The process server's corrected affidavit states that he served the Complaint along with those other documents. The Master credited that amended affidavit, as it was within his discretion to do, and the contents of that affidavit fully support the Master's conclusion on the issue of service. Accordingly, the Master's decision is proper and untainted by any legal error, and this Court should affirm.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-In-Equity

Appellate Case No.: 2018-000260

Seabrook Island Property Owners Association,.....Respondent,

v.

Charles Kelley a/k/a Charles E. Kelley; Deborah Kelley a/k/a Deborah L. Kelley; Mortgage Electronic Registration Systems, Inc., its successors and assigns as nominee for Chase Mortgage Company, its successors and assigns, a Delaware Corporation; and Spinnaker Beach House Owners Association,.....Defendants,

Of whom Charles Kelley a/k/a Charles E. Kelley and Deborah Kelley a/k/a Deborah L. Kelley are the.....Appellants,

And of which Mortgage Electronic Registration Systems, Inc., its successors and assigns as nominee for Chase Mortgage Company, its successors and assigns, a Delaware Corporation; and Spinnaker Beach House Owners Association are also.....Respondents.

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Respondent Seabrook Island Property Owners Association ("Seabrook"), certifies that I have this **7th day of June, 2018,** served copies of Seabrook's **Initial Respondent's Brief** and **Designation of Matter to be Included in**

Record on Appeal upon all other counsel of record by causing them to be deposited in the United States mail with sufficient postage attached, addressed to:

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June 7, 2018

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June 7, 2018

Via Hand Delivery

The Hon. Jenny Abbott Kitchings
Clerk of Court
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1220 Senate Street
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Re: Seabrook Island v. Charles Kelley
Appellate Case No. 2018-00260
Our File No. 7941.167

Dear Ms. Kitchings:

Enclosed are the originals and one copy each of the following materials from the Respondent Seabrook Island Property Owners Association: (1) Initial Respondent's Brief, (2) Designation of Matter to be Included in Record on Appeal; and (3) Proof of Service. Please file the originals and return the stamped copies to our courier. Thank you for your kind assistance.

Sincerely,

TURNER PADGET GRAHAM & LANEY P.A.

R. Hawthorne Barrett

RHB
Enclosures

cc: Jonathan Scott Altman, Esq.
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