IN THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Opinion No. 2018-UP-150 (S.C. Ct. App. filed April 11, 2018)

Cedric E. Young ..... Petitioner,

v.

Valerie Poole ..... Respondent.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. **Whether the Court of Appeals correctly affirmed the Circuit Court's grant of summary judgment to Respondent because Petitioner's Complaint alleged only a statutory negligence claim under the South Carolina Residential Landlord Tenant Act and Petitioner failed to give the notice required by the Act.**

II. **Whether the Court of Appeals correctly affirmed the Circuit Court's grant of summary judgment to Respondent because the South Carolina Residential Landlord Tenant Act creates the only non-contractual duties that are owed by a residential landlord to a tenant.**

III. **Whether the Court of Appeals correctly affirmed the Circuit Court's grant of summary judgment to Respondent because the unfinished attic at issue was not a latent defect but an open and obvious condition.**

STATEMENT OF THE CASE

This Petition follows Orders of the Circuit Court and the Court of Appeals granting and affirming, respectively, summary judgment in favor of Respondent Landlord on Petitioner Tenant's sole negligence claim against her. Petitioner's Complaint alleges a single cause of action entitled "Negligence SC Code Ann. § 27-40-440 SC Landlord Tenant Act." (R. p. 4). The Circuit Court and Court of Appeals both held that Petitioner's negligence claim failed as a matter of law because a landlord's duties under the South Carolina Residential Landlord Tenant Act (the "Act") arise only after the landlord is given notice, which Petitioner failed to give. (R. pp. 268-70); (App. 318-19). Petitioner concedes that his claim fails under the Act but now contends that his Complaint alleged a common law negligence cause of action rather than a statutory negligence cause of action. (App. p. 321); (Petition for Writ of Certiorari, p. 5). The Petition for Certiorari asks this Court to find: (1) that Petitioner's Complaint alleged a common law negligence action rather than a statutory negligence action under the Act; (2) that there is a common law duty for a residential landlord to warn tenants of latent defects and that such proposed duty has not been abrogated by the Act; and (3) that an unfinished attic is a latent defect. All three of these findings are necessary for Petitioner's claim to survive summary judgment. Given the Complaint itself, the history of

landlord immunity under South Carolina common law prior to the Act, and the facts of this case, the Circuit Court and Court of Appeals properly refused to make any of these findings.

The material facts are undisputed. Petitioner Cedric E. Young ("Young" or "Petitioner") lived as a tenant in a residential rental home in Richland County, which he leased from owner and Respondent Valerie Poole ("Poole" or "Respondent"). (R. p. 23, lines 9-25). On August 12, 2012, Petitioner, weighing approximately two hundred and twenty pounds, elected to walk directly on the insulation of the unfinished attic of the rental home wearing steel toed boots and carrying garden equipment and a rolled up extension cord. (R. p. 48, line 15-p. 49, line 21; p. 54, lines 10-14; p. 56, lines 15-20; p. 58, lines 8-12; p. 90B, lines 20-22). Petitioner testified that his boot pushed through the sheetrock of the second-floor ceiling and that he suffered a foot injury. (R. p. 59, lines 3-9; p. 68, lines 14-17). As a result, Petitioner filed a complaint in the Richland County Court of Common Pleas against Ms. Poole on June 1, 2015.

Discovery revealed the following additional undisputed facts: (1) Petitioner tenant lived in the rental home for over two months before the date of his alleged injury; (2) during that time, Petitioner tenant walked directly on the insulation of the attic more than ten times, rather than on the wooden joists; and (3) at no time prior to the alleged injury did Petitioner tenant request that Respondent landlord modify or repair the attic space in any way. (R. pp. 101-104; p. 41, line 12-p. 42, line 21). Relying on application of the Landlord-Tenant Act to these facts, Ms. Poole moved for summary judgment on August 19, 2016. (R. p. 13; pp. 207-211). Petitioner filed an opposing memorandum on August 22, 2016. (R. pp. 255-264).

The Honorable Judge Clifton Newman held a hearing on Ms. Poole's motion on August 22, 2016. After considering the arguments of both parties, Judge Newman granted Ms. Poole's Motion for Summary Judgment in a written Order dated October 24, 2016. (R. p. 272). In its Order,

the Circuit Court held that: (1) Petitioner's action was barred under the Landlord-Tenant Act because he failed to give the landlord written notice of the alleged dangerous condition and a reasonable time to repair, as required by the Act; (2) no common law premises liability cause of action for negligence exists between a residential landlord and a tenant; (3) even if Petitioner's action was not barred by the Act, the landlord had no duty to warn Petitioner not to walk between the joists that the attic was unfinished, a condition that is "open, obvious and generally known and recognized." (R. pp. 268-72).

Petitioner filed his Motion to Alter or Amend Judgment on November 18, 2016, which was denied on January 18, 2017. Petitioner filed his Notice of Appeal on January 26, 2017.

By Order filed April 11, 2018, the Court of Appeals affirmed the Circuit Court's grant of summary judgment to the Respondent. (App. pp. 318-19). The Court of Appeals decision appears to affirm on the following grounds: (1) the Petitioner failed to raise a genuine issue of material fact on the duty element of his negligence claim because a landlord's duties under the South Carolina Residential Landlord Tenant Act (the "Act") arise only after notice to the landlord; and (2) Petitioner's Complaint alleged only a statutory negligence claim under the Act. (App. pp. 318-19).

Petitioner filed his Petition for Rehearing on April 26, 2018. (App. pp. 320-22). Therein, despite the language in his Complaint, Petitioner argued that his Complaint gave the Respondent notice that his claim was one for negligence under the common law and not under the Residential Landlord Tenant Act. (App. pp. 321-22). In his Petition for Rehearing, Petitioner also limited the scope of appellate review to common law negligence, if any. (App. pp. 320-21 ("The opinion filed by this court analyzes the landlord's duty under the SC Residential Landlord Tenant Act but this analysis is erroneous because common law negligence applies in this case and was the basis of

Appellant's claim.")). By Order dated May 24, 2018, the Court of Appeals denied Petitioner's Petition for Rehearing. (App. p. 323).

STATEMENT OF FACTS

A. Events Prior to August 17, 2012

Petitioner moved into the rental home on June 8, 2012 and testified that he first accessed the attic space on that date. (R. p. 41, lines 2-8). Petitioner testified that thereafter he accessed the attic space "more than ten times" before the alleged injury on August 17, 2012. (R. p. 41, lines 19-22). It is undisputed the attic was unfinished, and Petitioner testified that every time he accessed the attic, he walked directly on the insulation and not on the wooden joists. (R. p. 63, lines 1-3). Petitioner also testified that he found nothing different about Respondent's attic than any other attic he had ever been in, that he found nothing wrong with his practice of walking directly on the insulation rather than on the wooden joists, and that he would do it again today. (R. p. 55, lines 4-6; p. 82, lines 5-10; p. 84, lines 11-21). In contrast, Respondent landlord testified that she had never stepped inside the unfinished attic. (R. p. 129, lines 16-18). Petitioner testified that despite regular access between June 8 and August 17, he did request that Respondent landlord modify or repair the attic space in any way prior to the alleged injury. (R. p. 42, lines 1-21; p. 151, lines 1-3).

B. Events of August 17, 2012

On the date of the alleged injury, Petitioner accessed the attic by ladder. (R. p. 38, lines 13-18). Once inside the attic, Petitioner – weighing approximately two hundred and twenty pounds, wearing steel toe boots, and carrying garden equipment – elected to walk directly on the insulation of the unfinished attic rather than the wooden joists. (R. p. 90B, lines 20-22; p. 49, lines 6-14; p. 54, lines 10-14). After Petitioner picked up two hedge clippers and one rolled up extension cord, Petitioner walked directly on the insulation towards the attic hatch door with the lawn equipment

in hand. (R. p. 56, lines 5-20). Petitioner began to throw the equipment down to the second-floor carpet through the attic hatch door, and as he continued to walk on the insulation, Petitioner testified that his boot pushed through the sheetrock of the second-floor ceiling and that he suffered a foot injury. (R. p. 56, line 23-p. 57, line 2; p. 59, lines 3-9; p. 68, lines 14-17).

C. Petitioner's Lease with Respondent

Petitioner executed a Lease prior to moving in to the rental property. (R. pp. 101-104). By the terms of the Lease, Petitioner agreed to "properly use the premises." (R. p. 102, ¶ 14(i)). Petitioner testified that he believed walking directly on the insulation was "properly using the premises." (R. p. 84, lines 11-18). Under the terms of the Lease, Petitioner also agreed to "notify the landlord in writing upon discovery of any dangerous condition on the premises." (R. p. 102, ¶ 14(iv)). Petitioner admitted that he failed to provide notice of any "dangerous condition" to the landlord any time before the alleged injury. (R. p. 41, line 12-p. 42, line 21). Further, Petitioner testified that he inspected the "entire interior and exterior of the premises" prior to moving in, and that he found the premises to be in "good, safe, and clean condition and repair." (R. p. 86, line 8-p. 87, line 11).

STANDARD OF REVIEW

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242, SCACR. Although not controlling, the Supreme Court considers the following items when determining whether to grant certiorari:

(1) Whether there are novel questions of law.
(2) Whether there is a dissent in the decision of the Court of Appeals.
(3) Whether the decisions of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
(4) Whether substantial constitutional issues are directly involved.
(5) Whether a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242(b), SCACR. In this case, no judge in the Court of Appeals dissented, no constitutional issues are involved, there are no novel questions of law, and no federal question is involved. The only prong of Rule 242(b) considerations Petitioner bases his Petition upon is that the decision of the Court of Appeals is in conflict with this Court's prior decision in *Timmons v. Williams Wood Prod. Corp.*, 164 S.C. 361, 162 S.E. 329 (1932). (Petition for Writ of Certiorari, p. 2). As discussed below, it is not.

ARGUMENT

Petitioner's Complaint alleged a statutory negligence claim under the South Carolina Residential Landlord Tenant Act, not a common law negligence claim. Thus, his question presented to this Court is improper. Even if the Petitioner had pled a common law negligence action, South Carolina common law does not create any duties between a residential landlord and a tenant. The only non-contractual duties between a residential landlord and tenant are those created by the Residential Landlord Tenant Act. In addition, an unfinished attic is a common, open and obvious condition, not a "latent hazardous defect" as required to support Petitioner's common law negligence theory. The Petitioner has not identified any prior, conflicting South Carolina Supreme Court case law with regard to these issues. Therefore, this Court should deny Petitioner's Petition for a Writ of Certiorari.

I. Petitioner's Complaint alleged a statutory negligence cause of action under the Act, not a common law cause of action.

Petitioner did not plead common law negligence, but rather a single cause of action under the Residential Landlord Tenant Act. The Petitioner labeled his only cause of action in his Complaint as "Negligence SC Code Ann. § 27-40-440 SC Landlord Tenant Act." (R. p. 4). In its order, the South Carolina Court of Appeals cited Rule 8(f), SCRCP, which states: "All pleadings shall be so construed as to do substantial justice to all parties." (emphasis added). The commentary

to Rule 8(f) states: "This Rule does not allow 'jumbling' of two or more causes of action in one count." Rule 8(f), SCRCP. The Court of Appeals' Order also cited *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 743 S.E.2d 778 (2013) for the proposition that "the principal purpose of pleadings is to inform the pleader's adversary of legal and factual positions which he will be required to meet on trial." The Petitioner is the master of his Complaint and could have written the Complaint in a way that made clear to the Respondent and the various courts that he was pleading either a second cause of action for common law negligence or only a common law negligence cause of action. However, Petitioner failed to do so. There is no reference to common law in the Complaint. (R. pp. 3-5).

Rather, after it became clear that the Circuit Court was granting Respondent's Motion for Summary Judgment, Petitioner attempted at the hearing to amend his Complaint. When Petitioner's counsel orally moved to amend his complaint during the middle of the hearing, the Circuit Court instructed Petitioner that it would need to hear a different motion on that matter, i.e. one not in the middle of a hearing on Respondent's Motion for Summary Judgment. (R. p. 201, lines 3-14). Petitioner never filed a motion to amend his Complaint, much less obtained a ruling on a motion to amend. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge." (emphasis added)). Therefore, the Court of Appeals properly held that the only cause of action Petitioner alleged was a statutory negligence cause of action under the Act, thereby making Petitioner's question presented to this Court improper.

II. Petitioner's attempt to rely on a common law landlord-tenant duty to create a genuine issue of material fact on his negligence claim fails because the common law does not recognize Petitioner's proposed landlord-tenant duty.

Under the common law, a landlord had no duty to turn over a rental property in a safe condition or to maintain the property. *See e.g.*, *Williams v. Salmond*, 79 S.C. 459, 61 S.E. 79, 79 (1908) ("The lessor turns over the property, and the lessee takes it as it is turned over to him."). Prior to the enactment of the Act, "the courts of this state have held that the relationship of landlord and tenant, by itself, imposes no legal duty on the part of the landlord to keep in repair leased residential premises under the control of the tenant." *Watson v. Sellers*, 299 S.C. 426, 433, 385 S.E.2d 369, 372 (Ct. App. 1989). As the Court of Appeals recognized in *Watson*, "This has been the long-standing law of this state." *Id.*

Under South Carolina law, a plaintiff must prove four elements to recover under a negligence theory: "(1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; (3) resulting in damages to the plaintiff; and (4) damages proximately resulted from the breach of duty." *Thomasko v. Poole*, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002) (emphasis added). "An essential element of the cause of action for negligence is the existence of a legal duty of care owed by the plaintiff to the defendant." *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 502 S.E.2d 78, 81 (1998).

Prior to the enactment of the Act, South Carolina did not recognize a common law cause of action against a landlord for conditions of the rental dwelling. **"Traditionally, under the law of South Carolina, a landlord owes no duty to maintain leased premises in a safe condition."** *Young v. Morrisey*, 285 S.C. 236, 329 S.E.2d 426, 428 (1985) (emphasis added). In his Petition, Petitioner cites a single case handed down in 1932 for the proposition that at common law in South Carolina a landlord has a duty to discover and warn of dangerous latent conditions on its premises,

but in that case this Court did not hold there was such a duty.[1] *See Timmons v. Williams Wood Products Corp.*, 164 S.C. 361, 162 S.E. 329 (1932). Petitioner misinterprets that case.

In *Timmons*, the landlord and tenant contracted under the lease for the landlord to make repairs to the premises. 164 S.C. 361, 162 S.E. at 330. Even though the tenants twice requested for the landlord to repair the defective condition of a door hinge on the premises pursuant to the landlord's lease agreement, the landlord did not do so. *Id.* When the door eventually injured one of the tenants, the tenants brought suit for personal injuries. *Id.* The court held that tenants could not recover personal injury damages and could only recover contractual damages because the landlord's duty to repair arose only under the lease contract. 164 S.C. 361, 162 S.E. at 333. With regards to a landlord's duties at common law, the Court stated:

> [I]n the absence of a contract to repair, the tenant takes leased premises for better or for worse, with no positive, legal duty on the part of the lessor to make repairs; that such an obligation or duty must be imposed by some contract apart from the mere lease of the land for a given term... While not directly in point here, these decisions firmly establish the principle that **there is no legal duty imposed upon a landlord merely by reason of the creation of the relationship of landlord and tenant**...

164 S.C. 361, 162 S.E. at 331-332 (citations omitted) (emphasis added).

Here, Petitioner's attempt to reach back to the common law as it existed before the Landlord-Tenant Act is without merit because the common law rule before the Act was landlord immunity. *Watson*, 299 S.C. at 435, 385 S.E.2d at 374; *see also Thompson v. CDL Partners LLC*,

[1] Further demonstrating the absence of support under South Carolina law for Petitioner's common law duty argument, Petitioner's only other citations in support of his primary argument, that there is a residential landlord duty to discover and warn of latent conditions, are: (1) a Corpus Juris section from an edition that is out of print and that does not state there is such a duty; and (2) a treatise that incorrectly cites the case of *Timmons v. Williams Wood Products Corp.*, 164 S.C. 361, 162 S.E. 329 (1932) (discussed in greater detail below). (*See* Petition for Writ of Certiorari, p. 6 (citing 36 C.J. 204 § 874 and F.P. Hubbard & R.L. Felix, THE SOUTH CAROLINA LAW OF TORTS (4th Ed. 2011)).

378 F. App'x 288, 293 (4th Cir. 2010) (affirming summary judgment against tenant on common-law negligence claim "because [tenant] cannot establish a duty on the part of [landlord]" apart from the Act). That is, there was no common law cause of action under which the Respondent here could be liable. Accordingly, any attempt to reach back to the common law as it existed is futile and without merit, and this Court should deny Petitioner's Petition for a Writ of Certiorari.

III. The only non-contractual duties that a residential landlord owes to a tenant are those created by the South Carolina Residential Landlord Tenant Act.

The only non-contractual duties that a residential landlord owes to a tenant are those created by the South Carolina Residential Landlord Tenant Act. The Act, enacted in 1986, "abrogate[d] the well-defined and established [Landlord-Tenant] common law" and was passed "to simplify, clarify, modernize, and revise the law governing rental of dwelling units and the rights and obligations of landlords and tenants." *Watson*, 299 S.C. at 433, 385 S.E.2d at 373; S.C. Code Ann. § 27-40–20(b)(1) (2007). The Act "requires a landlord to comply with applicable housing codes materially affecting health and safety," and it creates, as a matter of statute, particular duties and obligations owed by tenants and landlords in the residential rental context.[2] S.C. Code Ann. § 27–40–440(a)(1)–(2) (2007). However, the Act balances the landlord's obligations as the owner of the rental dwelling with the fact that the tenant is in possession of the property and is in the best position to discover any defective conditions. Therefore, the Act does not create any liability on the part of the landlord unless the tenant has provided written notice of the alleged defect and a reasonable opportunity for the landlord to repair the condition. S.C. Code Ann. §§ 27-40-630(d) and 27-40-610(a); *Thompson*, 378 F. App'x at 292; *Robinson v. Code*, 384 S.C. 582, 586, 682 S.E.2d 495, 497 (Ct. App. 2009).

[2] Petitioner did not contend to the Circuit Court that an unfinished attic violates any housing codes materially affecting safety.

There are strong policy considerations that support the Act's notice requirement: a tenant in possession and control of the premises has the best opportunity to discover and inform the landlord of any dangerous conditions on the property. *See Dunbar v. Charleston & W.C. Ry. Co.*, 211 S.C. 209, 44 S.E.2d 314 (1947) ("[W]hen land is occupied by the lessee, as in this case, the law of property regards the lease as equivalent to a sale of the premises for the term of the lease... the lessor surrenders possession and control of the land to the lessee."). These policy considerations are buttressed by the facts here, where Respondent landlord had never set foot in the attic, but Petitioner tenant had walked in the attic "more than ten times" including "many times the same way" that he walked on the date of the alleged injury. (R. p. 41, lines 19-22; p. 63, lines 1-6; p. 136, lines 2-5). Thus, the Court of Appeals correctly affirmed the Circuit Court's grant of summary judgment to the Respondent Landlord as there are no common law duties owed by a residential landlord to a tenant.

IV. Respondent Landlord breached no duty by failing to warn of the unfinished nature of the attic, an open and obvious condition.

Under his theory of negligence, in order to avoid summary judgment, Petitioner must raise a genuine issue of material fact on the separate issue of whether an unfinished attic is a latent hazardous defect, such that Respondent breached Petitioner's proposed duty. Here, even if Petitioner did have an actionable claim under the common law (which he does not), the danger of walking directly on insulation in an unfinished attic is a danger that is "generally known and recognized."[3] As in *Pryor v. Nw. Apartments, Ltd.*, an unfinished attic is an ordinary, open, and

[3] *See Meyer v. Tyner*, 709 N.Y.S. 2d 618, 620, 273 A.D.2d 364 (N.Y.A.D. 2 Dept. 2000) (holding, on summary judgment, that "[p]oor illumination and similarity of color between the insulation and the attic floor were insufficient to raise a triable issue of fact as to whether the unfinished nature of an attic floor was a dangerous condition" because the "unfinished floor was readily observable, in plain view, and easily discoverable by those employing the reasonable use of their senses"); *Scott v. Norman*, 391 S.W.2d 890, 895–96 (Mo. 1965) (finding that an attic with unfinished

obvious condition. 321 S.C. 524, 529, 469 S.E.2d 630, 633 (Ct. App. 1996) (affirming a landlord's grant of summary judgement because "mud was open and obvious natural condition and owners could not foresee tenant would choose to walk on mud rather than taking other routes"). Landlords cannot foresee that a tenant would choose to walk directly on the insulation – much less at two hundred and twenty pounds with steel toed boots and lawn equipment – rather than taking the safer route of walking on the joists.

Further, Petitioner admitted to accessing the attic "more than ten times" prior to the date of the alleged injury, demonstrating Petitioner's full knowledge that the attic was unfinished. Moreover, Petitioner could not articulate any dangerous condition in the attic, but rather he testified that it appeared no different from any other attic he had ever been in. (R. p. 85, lines 11-13; p. 55, lines 4-6). Accordingly, even if Petitioner's claim was actionable under the common law, Respondent was entitled to judgement as a matter of law because the Respondent landlord owed no duty to warn the Petitioner that the attic was unfinished. Therefore, the Court of Appeals properly affirmed the Circuit Court's grant of summary judgment to the Respondent landlord.

CONCLUSION

The Circuit Court and Court of Appeals properly held that Respondent was entitled to summary judgment on Petitioner's negligence action because Petitioner failed to satisfy the notice requirement of the Residential Landlord Tenant Act, such statutory negligence cause of action being the only cause of action alleged in Petitioner's Complaint. In addition, the Act establishes

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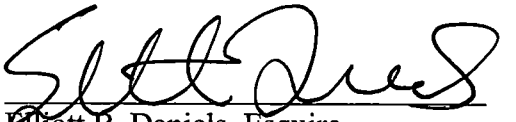
flooring and joists spaced twenty-four inches apart was an "open and obvious" condition and that "[t]he risk involved in going upon them was that a person would slip therefrom and fall through the thin plasterboard ceiling"); *Tracy v. Petrenas*, 2005 WL 1812671, p. *2 (Mich. Ct. App. 2005) (unpub.) (holding "the potential danger of walking in a darkened garage attic without a load-bearing floor should be apparent to an average person of ordinary intelligence").

the only non-contractual duties a residential landlord owes to her tenant. Prior to the Act, South Carolina common law recognized landlord immunity and did not create any duties owed by a residential landlord and a tenant. Now, South Carolina's residential landlord-tenant law has been modernized with the enactment of the Act to provide certain duties owed by a residential landlord to a tenant after written notice. Moreover, the unfinished attic at issue is an open and obvious condition, not a "latent hazardous defect" as required for Petitioner's negligence theory. The Respondent landlord was properly granted summary judgment for each of the foregoing reasons individually. Because Petitioner has not identified any prior, conflicting South Carolina Supreme Court case law with regard to these issues, his Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.



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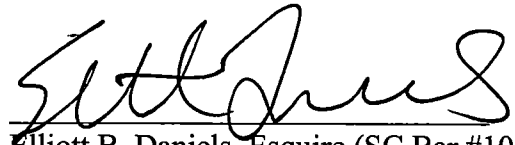
PROOF OF SERVICE

I, Elliot B. Daniels, Esquire, attorney for Respondent Valerie Poole, certify that I have served Respondent Valerie Poole's Return to Petition for a Writ of Certiorari on Petitioner Cedric E. Young by depositing a copy of it in the United States Mail, postage prepaid, on July 25, 2018, addressed to his attorney of record, John D. Clark, Esquire, at P.O. Drawer 880, Sumter, South Carolina 29151-0880.



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