

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

J. C. Nicholson, Circuit Court Judge

Appellate Case No. 2016-002130

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SC Court of Appeals

ROBIN S. FORMAN, AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF BURTON J. APAT, Respondent,

v.

NATIONAL DENTAL SYSTEMS, LLC, D/B/A DENTALSMART Appellant.

APPELLANT'S FINAL BRIEF

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I. STATEMENT OF ISSUES ON APPEAL

- A. Whether National Dental Submitted Admissible Evidence Which Contested The Amount Of Money Allegedly Owed To Complete Building Corporation For Construction Work?
- B. Whether National Dental's Evidence Created Genuine Issues Of Material Fact Regarding Breach Of The Loan Agreement's CBC Provision And/Or The Correct Amount Of Money Allegedly Owed To Complete Building Corporation For Construction Work?
- C. Whether The Circuit Court Prematurely Granted Partial Summary Judgment To Mr. Apat When National Dental Had Not Been Afforded A Full And Fair Opportunity To Conduct Discovery?

II. STATEMENT OF THE CASE

This case involves a business loan agreement between the Appellant, National Dental Systems, LLC d/b/a DentalSmart, ("National Dental") and the Respondent, Burton J. Apat ("Mr. Apat"), for the sum of \$100,000.00. (*R. pp. 2, 8, 19-20*). On 2 March 2016, Mr. Apat sued National Dental alleging it had breached two of the Loan Agreement's provisions: one requiring National Dental to repay the loan (the "Loan Claim") and the other requiring National Dental to pay for construction work performed by Complete Building Corporation ("CBC") on its premises (the "CBC Claim"). (*R. pp. 3-5*). Mr. Apat sought declaratory and injunctive relief, as well as actual damages and attorney's fees. (*R. pp. 5-6*). National Dental admitted the \$100,000.00 loan had not been fully repaid, (*R. p. 10*), but disputed the amounts owed, stated determination of the proper amount needed further inquiry, and asserted several affirmative defenses. (*R. pp. 10-12*).

On 9 June 2016, prior to any discovery being undertaken, Mr. Apat moved for summary judgment on all claims or, in the alternative, for partial summary judgment as to

his claims for actual damages. (*R. pp. 14-15, 21-23*).¹ In the alternative, Mr. Apat asked the Circuit Court to hold a damages hearing if it denied summary judgment on the CBC Claim. (*R. p. 15*). National Dental opposed summary judgment asserting the Loan Agreement's terms were ambiguous and the trier of fact needed to determine the parties' intent. (*R. pp. 28-30*). Additionally, National Dental submitted an opposing affidavit from Brian Schleifer. (*R. pp. 33-35*).² Mr. Apat submitted a supporting memorandum for his motion. (*Supp. Memo., pp.1-7*).

The Circuit Court heard Mr. Apat's motion on 3 August, 2016. (*R. p. 33*). By written order, dated 17 August 2016, the Circuit Court granted Mr. Apat partial summary judgment in the amount of \$56,654.12 on the CBC Claim. (*R. pp. 38 and 41*). On 8 September 2016, National Dental moved for reconsideration (*R. pp. 42-43*) which the Circuit Court denied by form order dated and filed 19 September 2016. (*R. p. 46*). This appeal followed.

III STATEMENT OF FACTS

National Dental, a South Carolina limited liability company, entered into the Loan Agreement with Mr. Apat for a business loan around 5 January 2013. (*R. pp. 1-2, 26*). Mr. Schleifer, also then National Dental's President and CEO, negotiated and executed the Loan Agreement. (*R. p. 33*). Although Mr. Schleifer was the scrivener, he and Mr. Apat jointly drafted the Loan Agreement and were the only parties to participate in its negotiation. (*R. p. 34*).

¹ As to the CBC Claim, Mr. Apat sought recovery in an amount different from the sums sought in the Complaint. (*R. pp. 14-15*).

² Mr. Schleifer, National Dental's President and Chief Executive Officer, personally negotiated the Loan agreement's terms and conditions. (*R. pp. 33-35*).

After the Loan Agreement was signed, National Dental received \$100,000.00 in loan proceeds. (*R. pp. 2, 9, 21, and 34*). The Loan Agreement included a total interest sum of \$15,000.00, which would double to \$30,000.00 if National Dental failed to repay the loan within 30 days. (*R. pp. 2, 10, 20, and 34*). The Loan Agreement did not contain any other provisions specifying either a certain amount and/or rate of interest, as the parties did not intend for any additional interest to accrue beyond the amounts expressly set forth in the Loan Agreement. (*R. pp. 8 and 34*). The Loan Agreement expressly provided that if National Dental defaulted the only remedy would be a 6% no-liability, equity-only interest in National Dental. (*R. pp. 8 and 34*).

National Dental made the initial \$15,000.00 interest payment and the second \$15,000.00 interest payment as the loan remained unpaid after 30 days. (*R. pp. 2-3, 10, 20-22, and 34*). National Dental did not, however, make loan principal payments. (*R. pp. 2-3, 10, 20-22, and 34*) but instead tendered to Mr. Apat the 6% no-liability, equity-only interest in National Dental, which he refused. (*R. p. 34*).

In addition, the Loan Agreement also contained a single sentence indicating National Dental was to pay CBC for construction work performed on its premises. (*R. p. 8*). CBC was not a party to the Loan Agreement and the "CBC provision" did not contain a description of the work CBC was to perform or the amounts due or terms of payment for such construction work. (*R. p. 8*).

The Circuit Court denied summary judgment on the Loan Claim, but granted it on the CBC Claim. (*R. pp. 39-41*). The Circuit Court found a genuine issue of material fact respecting the Loan Claim and whether interest continued to accrue after a default on the Loan Agreement(*R. pp. 39-40*). Conversely, the Circuit Court found, albeit incorrectly,

that “[National Dental] did not dispute, by way of the submission of admissible evidence, that it owed CBC the sum of \$56,654.12 as alleged in [Mr. Apat’s] motion and supported by an affidavit.” (*R. p. 40*). The Circuit Court then held, as a matter of law, that (a) the CBC provision was a separate and independent covenant distinct from the covenant to repay the \$100,000.00 loan, (b) the CBC provision was unambiguous, and (c) no genuine issue of material fact existed as to National Dental’s “breach of the CBC covenant, or as to the amount owed CBC.” (*R. pp. 40-41*).

IV ARGUMENT AND CITATION OF AUTHORITY

Summary of the Argument

National Dental and Mr. Apat were the only two parties to the Loan Agreement. While the Circuit Court properly denied Mr. Apat summary judgment as to the Loan Claim, it incorrectly granted him summary judgment on the CBC Claim. As with the Loan Claim, there were numerous genuine issues of material fact surrounding the CBC Claim. Mr. Apat’s sole remedy for any default of the Loan Agreement was a 6% interest in National Dental. CBC was not a party to the Loan Agreement and any obligation National Dental had to *Mr. Apat* regarding the CBC Claim was governed by the Loan Agreement’s sole remedy provision.

The Circuit Court’s grant of partial summary judgment on the CBC Claim is not supported by either the record or by the law. The Schleifer Affidavit directly refuted Mr. Apat’s claim and referenced the Loan Agreement’s undisputed terms in which Mr. Apat unequivocally agreed his sole remedy in the event of the Loan Agreement’s default was

a 6% no-liability, equity-only interest in National Dental. The Circuit Court failed to acknowledge the affidavit and disregarded the plain language of the parties' agreement.³

The Circuit Court incorrectly granted Mr. Apat partial summary judgment on the CBC Claim as there are genuine issues of material fact evidenced by National Dental's affidavit and the Loan Agreement's plain language. At a minimum, the Schleifer Affidavit established the terms of the Loan Agreement were, at best, ambiguous and that the parties' intent had to be determined by a trier of fact, and not simply presumed.

Standard of Review

Summary judgment is proper only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.⁴ Mr. Apat had the burden of clearly establishing the absence of a genuine issue of material fact. Moreover, "[i]n determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to [National Dental]."⁵ "At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact."⁶ Importantly, "in cases applying the preponderance of the evidence burden of proof,

³ The Circuit Court's determination that National Dental *failed* to submit any "admissible evidence" disputing the sums Mr. Apat alleged he was owed under the terms of the Loan Agreement clearly shows the Circuit Court completely ignored both National Dental's affidavit, as well as the Loan Agreement's undisputed terms.

⁴ See Rule 56(c), SCRCivP. See also Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 25, 630 S.E.2d 474, 477 (*citing* Jones v. State Farm Mut. Auto. Inc. Co., 364 S.C. 222, 228, 612 S.E.2d 719, 722 (Ct.App. 2005)).

⁵ Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 329-330, 673 S.E.2d 801, 802 (2009).

⁶ South Carolina Prop. & Cas. Guaranty Ass'n v. Yensen, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct.App. 2001).

[National Dental] [was] only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.”⁷ Additionally, even in situations where “there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn there from, summary judgment should be denied.”⁸ Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues.⁹

A. National Dental Clearly Presented Admissible Evidence To The Circuit Court Disputing The Amount Of Money National Dental Allegedly Owed CBC.

The Circuit Court incorrectly ruled for Mr. Apat on the CBC Claim as the Schleifer Affidavit presented genuine issues of material fact precluding summary judgment.¹⁰ The Circuit Court’s Order should and, indeed, must be reversed on that basis alone.

This case, and the record evidence before the Circuit Court when it granted Mr. Apat summary judgment, involved only the Loan Agreement. National Dental and Mr. Apat were the only parties to the contract. (*R. pp. 8, 18 and 37*). CBC was not a party to the Loan Agreement and the “CBC provision” which addressed payment to CBC for its construction work was a contractual promise made by National Dental to *Mr. Apat*, not to

⁷ Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803.

⁸ USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008) (*quoting Nelson v. Charleston County Parks & Recreation Comm’n*, 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct.App. 2004)).

⁹ Murphy v. Tyndall, 384 S.C. 50, 54, 681 S.E.2d 28, 30 (Ct.App. 2009); Helena Chemical Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004); Wogan v. Kunze, 366 S.C. 583, 592, 623 S.E.2d 107, 112 (Ct.App. 2005); B & B Liquors, Inc. v. O’Neil, 361 S.C. 267, 270, 603 S.E.2d 629, 631 (Ct.App. 2004).

¹⁰ The record contained National Dental’s affidavit when the motion was heard and the Circuit Court’s apparent complete failure to consider the affidavit was improper. See Higgins v. Medical University of South Carolina, 326 S.C. 592, 599, 486 S.E.2d 269, 272 (Ct.App. 1997) (holding that, when ruling on a motion for summary judgment, the trial judge must consider all of the documents and evidence within the record, including affidavits).

CBC. (*R. pp. 8, 18 and 37*). Consequently, Mr. Apat's CBC Claim was immaterial because any of CBC's rights under the terms of the Loan Agreement were, in turn, solely derivative of Mr. Apat's rights.

In response to the CBC Claim, National Dental alleged that, under the Loan Agreement's specific terms, Mr. Apat expressly limited his right of recovery after default to a 6% no-liability, equity-only interest in National Dental. (*R. pp. 34 and 43*). The Loan Agreement did not provide any different and/or additional rights to Mr. Apat upon National Dental's default of the CBC provision. (*R. pp. 8, 34-35*). National Dental's assertion, supported by the Schleifer Affidavit, that Mr. Apat had only one remedy under the Loan Agreement (*R. pp. 8, 34-35*), directly negated and contradicted Mr. Apat's claim of a separate remedy for enforcement of the Loan Agreement's CBC provision.

The Circuit Court's conclusion that National Dental "did not dispute, by way of the submission of admissible evidence" Mr. Apat's CBC Claim was factually unsupported. National Dental, via the Schleifer Affidavit, clearly disputed the inferences and/or conclusions which could reasonably be drawn from the Loan Agreement's terms regarding the CBC Claim. (*R. pp. 33-35*). Additionally, the Circuit Court was required to consider the Schleifer Affidavit in ruling on summary judgment although it was apparently ignored. The Circuit Court's grant of summary judgment regarding the CBC Claim was improper as a matter of law and must be reversed in all respects.

B. The Schleifer Affidavit Created Genuine Issues Of Material Fact Regarding The Parties' Intent Concerning The Loan Agreement's CBC Provision Which Precluded Partial Summary Judgment To Mr. Apat On The CBC Claim.

The Circuit Court incorrectly granted Mr. Apat partial summary judgment on the CBC Claim as there were genuine issues of material fact at play.¹¹ At a minimum, the Schleifer Affidavit established that the terms of the Loan Agreement were, at best, ambiguous and that the trier-of-fact needed to determine the parties' intent.¹²

The Circuit Court improperly concluded that the terms of the CBC provision were "plain and unambiguous" because the parties' intent as to the CBC provisions' legal effect was not able to be gathered solely from the four corners of the Loan Agreement.¹³ Indeed, the Circuit Court's ostensibly "unambiguous" CBC provision expressly referenced two other agreements which were not in the record before the Circuit Court; specifically, the CBC provision refers to "the Realty Link LOI and subsequent agreement". (*R. p. 8, 18 and 37*). The Circuit Court held the CBC provision was unambiguous without even knowing the terms of the two admittedly absent incorporated agreements. Where one agreement expressly incorporates other agreements, a court should not and, indeed, cannot determine the meaning of the one agreement without reference to the other agreements (however many the number). Consequently, the "four corners" of the Loan Agreement's CBC provision necessarily includes the two incorporated agreements (*i.e.*; "the Realty Link LOI and subsequent agreement" (*R. p. 8, 18 and 37*)), neither of which Mr. Apat presented to the Circuit Court.

¹¹ See, e.g., Grooms v. Marlboro County School Dist., 307 S.C. 310, 312 414 S.E.2d 802, 803 (Ct.App. 1992) ("Summary judgment should not be granted except where it is perfectly clear that no genuine issue of material fact exists. . . .").

¹² See Holcombe v. Orkin Exterminating Co. Inc., 282 S.C. 104, 105, 317 S.E.2d 458, 459 (Ct.App. 1984) (holding that "where the terms [of a contract] are ambiguous, the question of the parties' intent must be submitted to the jury").

¹³ See Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009) ("Summary judgment is improper when . . .the contract is ambiguous because the intent of the parties cannot be gathered from the four corners of the instrument").

Moreover, the CBC provision is utterly void of any essential terms and, most importantly, the CBC provision does not specify its relationship to the other provisions of the Loan Agreement.¹⁴ Whether the parties intended for the CBC provision to be subject to the other terms of the Loan Agreement cannot, in and of itself, be determined from the “four corners” of the Loan Agreement and the Schleifer Affidavit, (*R. pp. 33-35*), presented more than sufficient evidence to create a genuine issue of material fact as to whether the parties intended the CBC provision to be subject to the same remedy limitation as that governing the remainder of the Loan Agreement. (*R. pp. 33-35*). Under these circumstances, further inquiry into the facts was sorely warranted.

Furthermore, while the Circuit Court correctly denied summary judgment on the Loan Claim as there were genuine issues of material fact, the Circuit Court inexplicably did the opposite with the CBC Claim. The Circuit Court’s inconsistent conclusions were incorrect since the very ambiguity which created a genuine issue of material fact for the Loan Claim applied equally to the CBC Claim and, in turn, necessitated consideration of the very same factual and evidentiary issues. Specifically, the Circuit Court stated a genuine issue of material fact existed as to “whether interest continued to accrue at the rate of \$15,000[.00] per month following default on the Loan Agreement, as claimed in the [Loan Claim]”. (*R. pp. 39-40*). National Dental created a genuine issue of material fact by presenting evidence that the parties intended the sole remedy available for Mr. Apat under the Loan Agreement upon National Dental’s default was Mr. Apat’s receipt of a 6% percent no-liability, equity-only interest in National Dental. (*R. p. 34*).

¹⁴ See W.E. Gilbert & Associates v. South Carolina Nat’l Bank, 285 S.C. 421, 423, 330 S.E.2d 307, 309 (Ct. App. 1985) (holding that “[i]n a contract for services two essential terms are the scope of the work to be performed and the amount of compensation”).

Interestingly, however, the Circuit Court concluded, as a matter of law, that same limitation of remedy did not apply to the Loan Agreement's CBC provision. This determination is contrary to the well-established rule of contract interpretation providing that a contract is ambiguous when the terms are reasonably susceptible of more than one interpretation viewed in the context of the entire integrated agreement.¹⁵ In reaching its conclusion, the Circuit Court improperly resolved an ambiguity on summary judgment.¹⁶

In fact, at the hearing on Mr. Apat's summary judgment motion, the Circuit Court Judge unequivocally stated that the *Loan Agreement was ambiguous*. (*R. p. 56, lines 5-6; p. 58, lines 18-25; p. 59, lines 1-3; p. 62, lines 2-10*). Moreover, the Circuit Court did not qualify and/or otherwise restrict its conclusion of ambiguity as pertaining only to specific provisions of the Loan Agreement, but, instead, found that "[t]he whole note [didn't] make a whole lot of sense." (*R. p. 56, lines 5-6*) (Emphasis added). The Circuit Court reiterated its sentiment when specifically discussing the contractual provisions addressing the 6% no-liability, equity-only interest, stating that "[i]t's about as clear as mud", (*R. p. 58, line 21*), and that the parties did "not [know] what they were doing" in drawing the agreement. (*R. p. 62, lines 8-10*). The Circuit Court's subsequent holding that, as a matter of law, the CBC provision was a separate and independent covenant that employed plain and unambiguous terms (*R. p. 40*), is wholly unsupported by, and in direct conflict with, the Circuit Court's own previous findings. ¹⁷

¹⁵ See 17A Am.Jur.2d, Contracts, §338, at 345 (West Group 1991); 17A Am.Jur.2d, Contracts, § 339, at 346 (West Group 1991).

¹⁶ See HK New Plan Exchange Property Owner I, LLC v. Coker, 375 S.C. 18, 23, 649 S.E.2d 181, 184 (Ct. App. 2007) (holding that interpretation of an ambiguous contract is for the jury).

¹⁷ The Circuit Court seemingly ignored the Supreme Court's admonition that a court's "duty is limited to the interpretation of the contract made by the parties themselves ' . . . regardless of its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully.' " See C.A.N.

A genuine issue of material fact then existed and still exists today regarding whether, pursuant to the Loan Agreement's terms and conditions and the intent of the parties, the 6% equity stake limitation of remedy alleged by National Dental to govern the terms of the Loan Agreement applied also to the CBC provision. The Circuit Court's grant of summary judgment on this issue was improper as a matter of law and, in turn, must be reversed.

C. The Circuit Court Prematurely Granted Mr. Apat Partial Summary Judgment Since National Dental Did Not Have A Full And Fair Opportunity To Engage In And Complete Discovery.

Even assuming, *arguendo*, Mr. Apat was entitled to a grant of summary judgment on its CBC Claim, which National Dental denies, the Circuit Court's partial summary judgment grant was premature because National Dental had not been afforded the opportunity to conduct discovery before the Circuit Court heard the motion. In South Carolina, summary judgment "must not be granted until the opposing party has had a full and fair opportunity to complete discovery."¹⁸ Furthermore, a summary judgment motion may be deemed premature if: (1) the nonmoving party can demonstrate "a likelihood that further discovery will uncover additional evidence relevant to the issue" and (2) the nonmoving party was "not dilatory in seeking discovery."¹⁹ At a minimum, National Dental clearly demonstrated the parties' intent cannot be clearly interpreted from the Loan Agreement alone. (*R. pp. 34 and 43*). Therefore, any extrinsic evidence bearing on the

Enterprises, Inc. v. South Carolina Health and Human Services Finance Com'n, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988) (*quoting Gilstrap v. Culpepper*, 283 S.C. 83, 320 S.E.2d 445 (1984)).

¹⁸ *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

¹⁹ *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112-113, 410 S.E.2d 537, 544.

parties' intent will be relevant to this issue and should be considered and determined by a jury.²⁰ Specifically, National Dental stressed the necessity of taking Mr. Apat's deposition and conducting further discovery into whether there are additional documents reflective of the parties' intent. (*R. p. 57, lines 4-14*).

Furthermore, notwithstanding the Circuit Court's determination that the terms of the CBC provision were unambiguous, the Circuit Court nonetheless had to look outside of the four corners of the Loan Agreement to supply its terms. (*R. p. 40*). Specifically, the Circuit Court supplemented the missing price term by reference to Mr. Apat's summary judgment motion and his supporting affidavit. (*R. p. 40*). Consequently, since the provision which Mr. Apat seeks to enforce against National Dental was silent as to particular terms of the transaction, an ambiguity arose and extrinsic evidence may be admitted to "supply the deficiency and establish the true intent."²¹ National Dental was entitled to a full and fair opportunity to conduct discovery and develop the record on the issue. The Circuit Court's summary judgment grant precluded that opportunity.

Finally, hardly three months had passed since Mr. Apat filed this action before he moved for summary judgment. (*R. pp. 2 and 15*). In Baughman, the Supreme Court found that a three-year delay in seeking discovery was not dilatory.²² Given the foregoing, there can be no doubt but that National Dental did not receive any opportunity,

²⁰ See Waters v. Southern Farm Bureau Life Ins. Co., 365 S.C. 519, 524, 617 S.E.2d 385, 388 (Ct.App. 2005) (explaining that a jury is to resolve ambiguities after consideration of the extrinsic evidence).

²¹ See Frewil, LLC v. Price, 411 S.C. 525, 530, 769 S.E.2d 250, 253 (Ct. App. 2015) ("where a contract is silent as to a particular matter, and ambiguity thereby arises, parole evidence may be admitted to supply the deficiency and establish the true intent") (*citing* Columbia East Associates v. Bi-Lo, Inc., 299 S.C. 515, 519, 386 S.E.2d 259, 261 (Ct.App. 1989)).

²² Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 113-114, 410 S.E.2d 537, 544-545.

must less a full and fair one, to conduct *any* discovery. Accordingly, the Circuit Court's grant of partial summary judgment was improper as a matter of law and must be reversed.

V. CONCLUSION

Based upon the foregoing arguments and citation of authority, the Appellant, National Dental Systems, LLC d/b/a DentalSmart, respectfully requests this Court of Appeals to reverse the Circuit Court's grant of partial summary judgment and remand this matter back for a trial on the merits.

Respectfully submitted:

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM CHARLESTON COUNTY

J. C. Nicholson, Circuit Court Judge

Appellate Case No. 2016-002130

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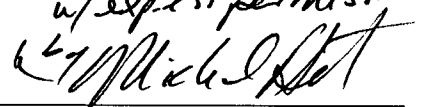
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The undersigned certifies that this **Appellant's Final Brief and Appellant's Final Reply**
Brief complies with Rule 211(b) of South Carolina Appeal Court Rules.

w/ express permission
 

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