THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Case No.: 2010-CP-40-007333

Shelby King, Appellant,

v.

Amy Bennett, The Amy D. Bennett Trust, and Amy Bennett Trustee, Respondents.

FINAL BRIEF OF APPELLANT

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March 4, 2013.

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STATEMENT OF ISSUES ON APPEAL

1. **Did the Circuit Court err as a matter of law in granting summary judgment to the Respondents where there was evidence of a verbal contract between the parties to compensate Appellant for assisting Respondents in finding a suitable home in Columbia?**

2. **Did the Circuit Court err as a matter of law in finding that S.C. Code §40-57-135(D)(4) applied where there was no evidence that Appellant acted as a "buyer's agent" for Respondents but rather treated Respondents as mere customers?**

3. **Did the Circuit Court err as a matter of law in granting summary judgment to the Respondents where section 40-57-137(O)(1) of the South Carolina Code clearly provides that a real estate licensee is allowed to provide services to customers who do not establish an agency relationship with the licensee?**

3. **Did the Circuit Court err as a matter of law in ignoring the plain language of section 40-57-137(O)(1) of the South Carolina Code of Laws when it refused to allow Appellant's claims to go to the jury?**

STATEMENT OF THE CASE

Appellant filed this action on October 25, 2010 after Respondents refused to pay her for services rendered in connection with Appellant providing real estate expertise, market analysis, and property research to Respondents as they sought to relocate to the Columbia area from Chicago, Illinois. Appellant undertook these efforts at the request of the Respondents in or around November 2009 and acted as a real estate professional, rendering services to the Respondents but never acting as a "buyer's agent" within the South Carolina Real Estate Code, S.C. Code Ann. §40-57-5, et seq. Appellant, a licensed Real Estate professional in South Carolina, worked diligently on behalf of the Respondents, locating potential properties for them to the visit, picking them up from and/or driving them to the airport, analyzing school districts and neighborhoods, showing homes, and generally providing them with expertise and knowledge of the Columbia metro real estate market. Respondent gave Appellant every indication that she would be paid a reasonable fee for her services. While Respondents did not wish to have Appellant act as their "agent" within the meaning of S.C. Code Ann. §40-57-135(D)(4), Respondents did use Appellant's services in locating and previewing homes for them and generally provide them with professional services during their search. Despite the parties' agreement, Respondents, after benefiting from over 125 hours of Appellant's time including Appellant identifying and previewing the home Respondent's purchased located at 14 Ashworth Lane, have refused to pay Appellant. As a result, Appellant was forced to file suit, asserting claims for *Quantum Meruit* and Unjustment Enrichment;

Constructive Trust; Fraud; and Conversion by False Pretenses.[1] (R. pp. 9-17). Respondents thereafter filed a Motion for Summary Judgment, on the grounds that (1) Appellant's equitable claims were barred since there was no signed "buyer's agency" agreement as required under South Carolina law; (2) Appellant's claims were barred by the Statute of Frauds; (3) Appellant's equitable claims were barred by the doctrine of estoppel; and (4) Appellant lacked standing to bring the lawsuit. (R. p. 94). The Motion for Summary Judgment was heard by the Honorable DeAndrea G. Benjamin on April 17, 2012, whereupon the Court granted Respondents' Motion for Summary Judgment by Form 4 Order dated April 26, 2012 with a written Order following dated June 18, 2012. (R. pp. 3-5). Appellant filed a timely Motion to Reconsider which was denied in a Form 4 Order dated May 9, 2012. (R. p. 1). Appellant filed and served her Notice of Appeal June 6, 2012.

STATEMENT OF THE FACTS

Respondents on behalf of themselves and as agents of Respondents Amy Bennett Trust (collectively "the Respondents") engaged the services of Appellant in November 2009 to locate a house for purchase in Columbia, as they were moving to Columbia from Chicago. (R. p. 184). Appellant is a realtor in Columbia, South Carolina and is licensed under the South Carolina Real Estate Commission as a "licensee" under the S.C. Code Ann. 40-57-5, et seq. Respondent Amy Bennett is a licensed attorney (not in South Carolina) (R. p. 163) and a multiple home owner well versed in the manner in which real estate professionals get paid. (R. p. 154, l.11-15). Appellant spent approximately 125 hours of her time researching homes, market values and trends, previewing homes,

[1] A claim for civil conspiracy was dismissed by the Appellant voluntarily once Appellant voluntarily dismissed Respondent's husband from the suit.

communicating with the Respondents about homes, school districts, and other desired features, showing Respondents homes, driving them to the airport and performing other activities real estate professionals regularly perform. (R. p. 184).

On multiple occasions, Appellant asked Amy Bennett to execute a buyer's agency agreement, appointing Appellant as Respondent's agent, which Bennett declined to do. Nevertheless, the undisputed testimony is that Respondents gave Appellant every indication that she would be fairly compensated for the work they had asked her to do for them in researching and finding them a home in Columbia. (R. pp. 184-185). On July 5, 2010, a home located at 14 Ashworth Court, Columbia, South Carolina (the "Home") went on the market. Recognizing that the Home met Respondent's specifications, Appellant sent two e-mails dated July 9, 2010 and another email July 12, 2010 bringing this home to the attention of Amy Bennett. (R. p. 185). Amy Bennett responded to these emails by indicating in an email dated July 13, 2010 that she was interested in viewing the Home and wanted Appellant to show her the Home over the upcoming weekend. (R. p. 197). In response to Amy Bennett's request, Appellant previewed the Home and sent Amy Bennett an email dated July 14, 2010 with the information she gained from the preview. (R. p. 199). On that same day, Amy Bennett responded to Appellant's email and informed her that they were no longer interested in purchasing a home at this time and would contact Appellant when they became interested again. (R. p. 200).

Unbeknownst to Appellant, Respondents then proceeded to contact the listing agent for the Home directly and proceeded to view the Home and negotiate a purchase contract. Respondents signed a contract on the Home July 20, 2010 – six days after telling Appellant that she was not in any hurry to buy. (R. pp. 187-191). In the process of

these negotiations, Respondents requested that the listing agent reduce her sales commission in exchange for a proportionate reduction in the purchase price of the Home. This amount was based in part on the real estate commission the Appellant would have been entitled to had Respondents executed the buyer's agency agreement. Despite numerous requests, Respondents have refused to compensate Appellant for the services she provided to them, at their request, nor have the Respondents offered to reimburse Appellant for the out of pocket expenses she incurred in working for them.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: 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. *White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 601 S.E.2d 342 (2004); *B & B Liquors, Inc. v. O'Neil*, 361 S.C. 267, 603 S.E.2d 629 (Ct. App. 2004); *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003). In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Medical Univ. of South Carolina v. Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (2004); *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998). If triable issues exist, those issues must go to the jury. *Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2002); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999).

ARGUMENT

1. **The trial court erred as a matter of law in ruling that S.C. Code §40-57-135(D)(4) barred Appellant from seeking to recover for services rendered to Respondents.**

It is important to first note that while there is ample case law on what constitutes a valid claim for Appellant's claims of quantum meruit, fraud, conversion by false pretenses, and constructive trust, there is little case law on these types of claims in the context of a real estate transaction. What little case law there is can easily be distinguished from this case in that the existing cases all deal with the situation where a real estate professional is seeking a commission from a seller or seller's agent and for unsuccessful efforts. See Webb v. First Federal Savings and Loan of Anderson, 300 S.C. 507, 388 S.E.2d 823 (S.C. App. 1989). The Appellant in this case is not seeking a commission and did not bring an action against the seller or seller's agent. As a result, Appellant believes that this is a case of first impression for this Court.

Appellant is a licensed real estate professional who has brought causes of action against Respondents under theories of quantum meruit, fraud, conversion by false pretenses, and constructive trust. (R. p. 6) It is undisputed that for a certain period of time, Appellant was retained by the Respondents to provide them with traditional "realtor-type" services in the Columbia area during their relocation from Chicago – i.e., scouting properties, reviewing school and neighborhood information, previewing homes, etc. There was no signed "buyer's agency" agreement, as the Respondents did not wish to sign one. Accordingly, the Respondents were "customers" of Appellant, under S.C. Code **§40-57-30(7), which defines a "customer" as "a person with whom a licensee has not established an agency relationship."** Respondents did not argue, and the Court

did not rule, that there is not sufficient evidence in the record to support each of the claims Appellant has raised. Rather, the Court ruled that §40-57-135(D)(4) sets forth the exclusive method for a real estate professional to be paid; specifically that a real estate professional providing certain services to a prospective buyer must have a signed buyer's agency agreement in order to successfully bring a claim for failure to pay. (R. pp. 3-5). In short, the Court held that the Appellant could only recover for services rendered if the Respondents had signed a buyer's agency agreement. This holding is in clear conflict with South Carolina law, which clearly and unambiguously addresses the situation present in the instant case, to wit, when a prospective buyer secures the help of a realtor in "scouting homes" but doesn't want the realtor to be their agent:

> (O)(1) **Prospective buyers and sellers of unlisted real estate who do not choose to establish an agency relationship with a licensee but who use the services of the licensee are considered customers. A licensee may offer the following services to a customer including, but not limited to:**
>
> **(a) identify and show property for sale, lease, or exchange;**
>
> **(b) provide real estate statistics and information on property;**
>
> **(c) provide pre-printed real estate form contracts, leases, and related exhibits and addenda;**
>
> **(d) act as a scribe in the preparation of real estate form contracts, leases, and related exhibits and addenda;**
>
> **(e) locate a list of architects, engineers, surveyors, inspectors, lenders, insurance agents, attorneys, and other professionals; and**
>
> **(f) identify schools, shopping facilities, places of worship, and other similar facilities on behalf of any of the parties in a real estate transaction.**
>
> (2) A licensee offering services to a customer shall:
>
> (a) timely present all offers to and from the parties involving the sale, lease, and exchange of property;
>
> (b) timely account for all money and property received by the broker on behalf of a party in a real estate transaction;
>
> (c) provide a meaningful explanation of agency relationships in real estate transactions;
>
> **(d) provide an explanation of the scope of services to be provided by the licensee; and**
>
> **(e) be fair and honest and provide accurate information in all dealings.**

(3) Nothing in this section limits the seller's and buyer's responsibility to conduct an inspection of the property.

S.C. Code Ann. §40-57-135(O) (emphasis added).

Instead of recognizing that Appellant's verbal agreement with the Respondents arose from providing a legitimate service to a customer under S.C. Code Ann. §40-57-135(O) (separate and apart from an agency relationship), the lower Court relied upon S.C. Code §40-57-135(D)(4), which states in relevant part that a "buyer's representation agreement must be in writing and must set forth all material terms of the parties agency relationship including... (b) the amount of compensation to be paid or the method to be used in calculating the amount of compensation to be paid." Appellant would show that the requirement of a signed buyers agency agreement that specifies how the agent is to be paid is predicated on the real estate professional actually *becoming* the buyer's agent. If the buyer does not want the real estate professional to be his or her agent, the requirement under S.C. Code §40-57-135(D)(4) is not applicable and, instead, the parties have a contractual relationship (professional rendering services to customer) under section 40-57-135(O). There is also nothing in the Real Estate Code that prohibits a real estate professional from bringing claims against a "customer" under the theories *quantum meruit*, fraud, conversion by false pretenses, and constructive trust. The two statutory provisions are not inconsistent; rather they are complementary. See, e.g., Joiner v. Rivas, 342 S.C. 102, 536 S.E.2d 372 (2000) (holding that statutes dealing with the same subject matter must be construed together, if possible, to produce a single, harmonious result.)

A real estate licensee can act either as an agent or as a professional rendering services to a customer. Until a real estate professional becomes the buyer's agent, she is no different than any other service provider who is free to bring a claim under any of the

theories raised in the complaint, after providing a valuable service to a customer. To hold otherwise would ignore the plain meaning of the statute, and would bar real estate professionals from providing expertise and service to members of the public outside the realm of an agency relationship. Such a result would undoubtedly curtail the ability of real estate professionals to maximize their earning potential and grow their business. "If a statute's language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Key Corporate Capital, Inc. v. County of Beaufort, 644 S.E.2d 675, 677, 373 S.C. 55 (2006) (internal citations omitted). "A statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute." Hay v. S.C. Tax Comm'n., 255 S.E.2d 837, 840, 273 S.C. 269 (1979) (internal citations omitted). It would simply make no sense for the real estate statutes to illustrate a way for licensees to provide professional services to customers (without an agency relationship), and then for such services to not be compensable because the real estate professional did not obtain a signed agency agreement. Like other professionals, realtors must have the right to offer a smorgasbord of services to members of the public, and the public must be able to utilize the services of a realtor without necessarily having to sign an agency agreement. For the above reasons, the Circuit Court erred in ruling that S.C. Code §40-57-135(D)(4) bars Appellant from compensation and this Court should reverse and remand this case for trial on the causes of action raised in Appellant's Complaint.

B. There were sufficient questions of fact for the jury on each and every one of Appellant's claims such that it was error for the Court to enter summary judgment.

Through their words, intentional omissions and deeds, Respondents agreed to pay Appellant for the work she performed for them and it is inequitable for Respondents to retain the benefits Appellant conferred upon them. Appellant is not making a contractual claim for a real estate commission from the seller or seller's agent, but rather has brought claims in equity, fraud and constructive trust based on Respondents' intentional misrepresentations and intentional omission of material information relating to Respondents' responses to inquiries by Appellant as to how she would be paid for the work she performed at their behest.

Chapter 57 of Title 40 is full of requirements and duties of real estate professionals requiring them to be fair and honest in their dealings with customers and clients. Just because there are no explicit requirements in the statutes that the customer be honest and fair doesn't mean that common law equitable concepts of *quantum meruit* and fraud do not apply. Anyone in any business relationship in South Carolina has a duty of fair dealing and honesty. Just because you are the consumer and the law considers you to be the vulnerable party doesn't give you the right to behave unethically, dishonestly or in a fraudulent manner. Nowhere in the law is unethical and immoral behavior condoned. Nowhere in the law is lying for financial gain encouraged. The South Carolina Supreme Court has defined bad faith as "[t]he opposite of good faith, generally implying or involving actual or constructive fraud, or a design to deceive or mislead another, or a neglect or refusal to fulfill some duty or some contractual obligation, **not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive**." deBondt v. Carlton Motorcars, Inc.,

536 S.E.2d 399, 342 S.C. 254 (Ct. App. 2000) (internal citations omitted) (emphasis added).

The elements of *quantum meruit* are: 1) a benefit was conferred upon the defendant by the Appellant; 2) realization of that benefit by the defendant; and 3) retention by the defendant of the benefit under condition that make it inequitable for him to retain it without paying its value. See Ellis v. Smith Grading and Paving, Inc., 294 S.C. 470, 366 S.E.2d 12 (1988); See also Myrtle Beach Hospital v. City of Myrtle Beach, 341 S.C. 1, 532 S.E.2d 868 (2000).

In this case, Appellant conferred the benefit of over 125 hours of her service to Respondents researching homes, market values and trends, previewing homes, communicating with the Respondents about homes, school districts, and other desired features, showing Respondents homes, driving Respondents to the airport and performing other activities in response to Respondents requests for her services including ultimately introducing Respondents to the home she purchased. (R. pp.184-186, 201-205). Respondents realized the benefit of these services by becoming more knowledgeable on the Columbia, South Carolina real estate market, by being introduced to many potential homes, by being able to view these homes more easily, by having someone else drive her to these homes and to the airport, and by being introduced to the home that Respondents purchased and live in now.

This testimony and evidence was before the lower Court at the summary judgment hearing by way of the Appellant's affidavit and interrogatory responses, and was sufficient to create a question of fact for the jury. Respondents failed to submit any sworn testimony or authenticated documents in support of their motion for summary

judgment. It is inequitable for Respondents to retain these benefits for free because Respondents intentionally misled Appellant into believing that she would be paid for her services and gave her every indication that she would be paid all in an effort to induce Appellant into continuing to work for Respondents without having to pay an up-front fee.

Respondents relied upon the case of Webb v. First Federal Savings and Loan of Anderson, 300 S.C. 507, 388 S.E.2d 823 (S.C. App. 1989), in support of their argument that an agent isn't entitled to a commission for unsuccessful efforts. Appellant would make two points in response to this argument. First, the evidence shows that Appellant's efforts were not unsuccessful. Appellant introduced Respondents to the sellers of 14 Ashworth Lane. (R. p. 185). Six days later, Respondents enter into a purchase and sale contract with contracted with the sellers. (R. pp. 187-191). Respondents intentionally misled Appellant into believing that they were no longer in the market so she would be unaware that Respondents were working behind her back to get a contract on 14 Ashworth. (R. p. 200). Second, Appellant is not seeking an "agent's commission". Appellant is seeking fair compensation for the time she spent performing services that she was asked to perform for Respondents. What distinguishes this case from *Webb* and the other real estate commission cases relied upon by Respondents is that in each of those cases, an agent is seeking a commission and there are no allegations that the buyers behaved unethically, made intentional misrepresentations, or intentionally omitted material information as to how the agent was to be compensated.

The unjust enrichment/quantum meruit claim is clearly a viable claim. There can be little dispute that the first two (2) elements are met under Ellis, 366 S.E.2d 12. Appellant clearly conferred a benefit on the Respondents, and Respondents clearly

accepted and retained the benefit. While there could be some difference of opinion about whether it is inequitable for the Respondents to retain the benefit *gratis*, there is enough evidence to find that it is a question of fact for the jury.

Appellant would submit that the instant scenario is no different than an attorney taking a contingent case without a written fee agreement and the client firing him/her immediately after closing arguments of the trial, and the client then receives a favorable jury award but refuses to pay the attorney. The attorney is unquestionably owed at least a reasonable rate for the time he worked on the case under an unjust enrichment/*quantum meruit* theory.

Appellant would show that the elements of a fraud claim can be met and is a question for the jury to decide. "In order to establish a claim for fraud, a plaintiff must establish the following elements: "a representation; its falsity; its materiality; knowledge of its falsity or a reckless disregard of its truth or falsity; intent that the representation be acted upon; hearer's ignorance of its falsity; hearer's reliance on its truth; hearer's right to rely; and hearer's consequent and proximate injury. Each and every one of these elements must be proven by clear, cogent, and convincing evidence." Cowburn v. Leventis, 619 S.E.2d 437, 446, 366 S.C. 20 (Ct. App. 2005) (internal citations omitted). See also deBondt v. Carlton Motorcars, Inc., 536 S.E.2d 399, 342 S.C. 254 (Ct. App. 2000). In deBondt, a customer sued a car dealership, alleging fraud and stating that the dealership falsely represented to her that she would be sold a specific Mercedes automobile and be provided with certain specialty customer items. The customer presented evidence that she entered into a contract for the purchase and delivery of a new Mercedes in approximately 18 months, as well as a special customer incentive program,

while paying a $1,000 deposit. Over the course of several months, the dealership continued to tell the customer that she was going to receive her vehicle; however, approximately 9 months later, the dealership attempted to cancel its contract and represented that it would be receiving none of the new Mercedes vehicles (despite actually receiving four (4) on its lot). Id. at 402-403. The dealership moved for summary judgment on the fraud claim, which the trial court granted. The Court of Appeals reversed the granting of summary judgment on the customer's fraud claim, holding that the pleadings, discovery responses, and affidavits showed that the customer showed that the dealership made false representations to her; and that it knew or should have known that she would not receive the vehicle or promotion material as promised; and that such representation were material to the customer, and that she had a right to rely upon the dealership. Id. at 405-406.

The testimony before the Court was that Respondents gave Appellant every indication that she would be paid (R. pp. 184-186). This representation was false as Appellant has not been paid for her work. The representation was material in that being paid for services rendered is the most material portion of a request for services. Appellant would never have worked with the Respondents for free; such is not the nature of the rendering of professional services. Respondents' actions in intentionally misleading Appellant into thinking they were not interested in the home – only to put a contract on it six (6) days later- is evidence to show that Respondents planned from the beginning to never pay Appellant. Respondents certainly intended for Appellant to rely upon these representations in order to have her continue to provide services. Appellant clearly did not know the representations were false as evidenced by her willingness to

continue to work in anticipation of being paid. Appellant had a right to rely on Respondents representations and no reason not to rely on them. In short, because Appellant relied on the misrepresentations, she performed work and was ultimately never compensated for it. Accordingly, there is sufficient evidence to create a fact question for the jury to decide and summary judgment was therefore improper.

With respect to Appellant's claim for conversion, this claim is supported by Appellant's Affidavit and her responses to interrogatories as well as the deposition testimony of Amy Bennett.

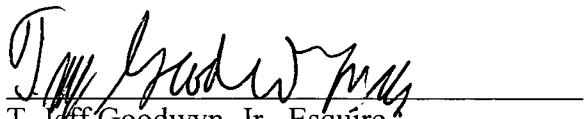
In conclusion, there is ample evidence in the record to support Appellant's claims for unjust enrichment/quantum meruit and fraud as outlined in detail above. It was an error of law for the trial court to grant summary judgment and to deny Appellant's motion to reconsider in reliance on S.C. Code Ann. §40-57-135(D)(4) and this Court should reverse and remand the case for trial on the causes of action raised in Appellant's Complaint.

CONCLUSION

If a buyer wishes a real estate professional to become their agent in a real estate transaction, S.C. Code Ann. §40-57-135(D)(4) requires a signed agency agreement for a real estate professional to compel a listing agent to pay them a commission. If a buyer does not wish a real estate professional to become their agent in a real estate transaction, but simply wants the realtor to perform other real estate services such as showing homes and educating them on the schools, etc., S.C. Code Ann. §40-57-135(O) and §40-57-30(7) specifically allow this relationship to exist and there is no requirement of a written agreement specifying the terms of compensation.

There is nothing in the code or the case law that prohibits real estate professionals from bringing the causes of action Appellant has against a buyer designated as a "customer" under S.C. Code Ann. §40-57-135(O) and §40-57-30(7) who refuses to pay for services after agreeing by words, intentional omissions and deeds to pay for the services of a real estate professional. As a result, the trial judge made an error as a matter of law granting summary judgment and denying Appellant's motion to reconsider on the grounds that S.C. Code Ann. §40-57-135(D)(4) acted as a bar to the claims Appellant has made and this Court should reverse and remand this case for a trial on the merits.

Respectfully Submitted,



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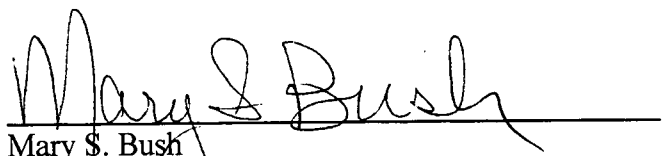
PROOF OF SERVICE

I certify that I have served the Final Brief and the Final Reply Brief of the Appellant, Shelby King, by depositing a copy of same in the United States Mail, postage prepaid, on **March 4, 2013**, addressed to counsel for Respondents, Todd Ellis, at the Law Firm of Todd Ellis, P.A. to 7911 Broad River Road, Suite 100, Irmo, SC 29063.



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CORRECTED CERTIFICATE OF COUNSEL

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

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