

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

Jerry M. Angelo, Special Referee

Case No. 2011-CP-17-460
Appellate Case No. 2014-001585

Teri N. Jacobs, Jr.----- Respondent,

vs.

Jerry W. Page and James Page, individually,
d/b/a James Page Farm----- Defendants,

Of whom Jerry Page is----- Appellant.

FINAL BRIEF OF RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. Whether any of the issues raised in Appellant's brief are preserved for this court's review.
- II. Whether the trial court erred in awarding lost wages because Respondent allegedly did not plead that element of damages in his Complaint.
- III. Whether the trial court based the \$30,000 award to Respondent for future medical expenses on competent evidence.
- IV. Whether this appellate court should remand the issue of punitive damages to the trial court for review of the punitive damages award by applying the standard set forth in *Mitchell v. Fortis Insurance Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009).
- V. Whether evidence in the record provides additional grounds to affirm the trial court's future damages and punitive damages awards pursuant to Rule 220(c) of the South Carolina Appellate Court Rules.

STATEMENT OF THE FACTS

This matter arises from a hearing on damages after default was entered on April 11, 2012 against Appellant for failure to answer Respondent's Summons and Complaint. As a result of Appellant's default, the facts alleged in Respondent's Complaint are deemed admitted and incorporated by reference herein. (R. pp. 10-14). *See Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC*, 408 S.C. 87, 90, 757 S.E.2d 557 (Ct. App. 2014) ("A defendant in default admits liability but not the damages")(Citations omitted).

STANDARD OF REVIEW

“In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge’s findings. . . . The judge’s findings are equivalent to a jury’s findings in a law action.” *Townes Associates Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 774 (1976). Referral to a special referee does not change the scope of review. *Bodiford v. Spanish Oak Farms, Inc.*, 317 S.C. 539, 455 S.E.2d 194 (1995). “In an action at law, the appellate court will correct any error of law, but it will affirm the special referee’s factual findings unless there is no evidence that reasonably supports those findings.” *Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997).

“Questions regarding credibility and the weight of evidence are exclusively for the trial judge.” *Danley Williams v. M. Moore*, 400 S.C. 90, 102, 733 S.E.2d 224, 230 (Ct. App. 2012). “An abuse of discretion occurs when: (1) a judge’s ruling has no evidentiary support; or (2) the judge makes an error of law.” *Ransom v. S. C. Water Resources Commission*, 321 S.C. 211, 213, 467, S.E.2d 463, 465 (1996).

ARGUMENT

I. Appellant failed to preserve any of the issues raised in his brief when he made no objections to the issues at trial, nor did he file a post-trial motion to alter or amend the trial court's judgment.

"It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review." *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000).

"The losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments."

I'ON, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 723 (2000).

"Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. *Id.*

"If the losing party has raised an issue in the lower court, but the court fails to rule on it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." *Id.* A motion to alter or amend must also be filed to raise issues that could not have been raised at trial or if there are errors in the trial court's final order.

Pelican Building Centers of Horry-Georgetown, Inc. v. Dutton, 311 S.C. 56, 427 S.E.2d 673 (1993); *Grant v. South Carolina Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (1995).

Objections to admission of evidence must be made when evidence is presented at trial to preserve error for appellate review. *Parr v. Gaines*, 309 S.C. 477, 424 S.E.2d 515 (1992)(holding that the failure to object to plaintiff's testimony that injuries he sustained prevented him from managing sophisticated farming operation and the dollar value of

that loss was fatal to review of the issue on appeal). A party cannot raise an issue for the first time in a motion to alter or amend judgment when the issue could have been raised before the trial court. *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 388 (1995).

Appellant raised the issue of the trial court's lost wages award for the first time on appeal. Respondent's testimony as to his hourly earnings (R. p. 23, lines 17-20), how many hours he worked per week (R. p. 23, lines 21-22), and his inability to return to manual labor since his injury in 2008 (R. p. 24, lines 11-22) was admitted without objection from Appellant. The testimony and admission of the evidence of lost wages without objection brought the issue within the scope of damages that could be considered by the trial court. *See* Rule 15b, SCRPC. Appellant's challenge of the trial court's lost wages award, raised for the first time in this appeal, is not preserved for this court's review.

Likewise, Appellant raised the issue of the trial court's award for future medical expenses for the first time on appeal. Medical evidence (R. pp. 31-49; p. 17, line 18) was admitted without objection from Appellant. (R. p. 18, lines 5-9; p. 19, lines 6-23; p. 20, lines 5-9). Respondent's testimony concerning his medical condition (R. p. 21, lines 8-25), his need for surgery (R. p. 22, lines 1-5; lines 14-17), and the cost of the needed surgery (R. p. 22, lines 18-23) was admitted without objection from Appellant. Appellant's complaint that the future medical award was based on inadmissible hearsay and incompetent evidence, raised for the first time in this appeal, is not preserved for this court's review.

Appellant contends the trial court violated his due process rights in awarding

punitive damages because the trial court considered evidence allegedly not in the record, and the trial court applied the incorrect standard for awarding punitive damages. These issues could not have been raised to the trial court at the time of hearing, because the alleged errors were not apparent until the judge issued his written order. Under those circumstances Appellant should have filed a motion to alter or amend the trial court's judgment pursuant to Rule 59(e), SCRCP to preserve these issues for appeal.

He did not, and these issues are not preserved for this court's review.

II. The trial court did not err in awarding \$115,200.00 in lost wages because:

A. In his Complaint under the DAMAGES heading, Respondent stated that his earning capacity has been and will be forever impaired; and

B. Evidence in the record shows the issue of wage loss was pleaded by implied consent.

A. Respondent contends he did, in fact, identify as an element under the Damages section of his Complaint that his earning capacity *has been* impaired and *will be* forever impaired. (R. p. 13, paragraph 21i). The use of *has been* indicates Respondent's earning capacity in the past as lost wages and *will be* obviously means his future earning capacity. In the last paragraph of Respondent's Complaint, he "prays for judgment against the Defendants, jointly and severally, in an amount to be determined by the trier of facts, actual and punitive damages, for his costs of this action and for such other and further relief as this Honorable Court deems just and proper." (R. p. 13, paragraph 4).

B. Even if the Complaint falls short of establishing a prayer for lost wages, a position Respondent neither contends nor concedes, the parties tried the issue of lost wages by implied consent. Rule 15(b) of South Carolina Rules of Civil Procedure provides that “[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” “If a party does not object to the evidence when presented at trial, the issue is considered tried by consent.” *Upchurch v. Upchurch*, 367 S.C.16, 27, 624 S.E.2d 643, 648 (2006), *disapproved of on other grounds in Miles v. Miles*, 393 S.C. 111, 711 S.E.2d 880 (2011); *McCurry v. Keith*, 325 S.C. 441, 481 S.E.2d 166 (Ct. App. 1997). “If neither party timely objects to evidence raising issues not pleaded, each is deemed impliedly to consent to trial of such issues.” *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004)(quoting *Woods v. Rabon*, 295S.C. 343, 347, 368 S.E.2d 474, 474 (Ct. App.1998).

Respondent’s entire testimony about his lost wages was admitted into evidence without objection from Appellant. (R. p. 23, lines 17-25, p. 24, lines 11-22). On cross-examination Appellant questioned Respondent about his work status. (R. p. 27, lines 6-25). Neither party objected to the admission of Respondent’s testimony concerning his how much he earned prior to his injury and his inability to return to work after his injury. Thus, the parties tried the issue of lost wages by implied consent, and the trial court properly addressed the issue of lost wages.

III. The record on appeal contains evidence which reasonably supports the trial court’s award of \$30,000 in future medical expenses

Appellant contends the trial court improperly considered Respondent’s

testimony regarding his need for and cost of future surgery because it was inadmissible hearsay and incompetent as a basis for awarding Respondent \$30,000.00 in future medicals. However, Appellant did not object to Respondent's testimony regarding future medical damages. Testimony received without objection becomes competent and cannot be disregarded; its sufficiency must be left to the trier of fact. *Cantrell v. Carruth*, 250 S.C.415, 421 158 S.E.2d 208, 211 (1967); *see also Calcutt v. Calcutt*, 282 S.C. 565, 320 S.E.2d 55 (Ct. App. 1984).

Appellant's contention that the trial court relied *solely* on the alleged inadmissible hearsay is misleading, as is his summary of the relevant medical evidence in the record. Respondent's MRI results reveal more than only degenerative changes. At C4-5 there is a broad bulge of annulus and a more focal right paracentral disc protrusion, which slightly compresses the ventral aspect of the spinal cord to the right of midline. Small uncinat process osteophytes are present and there is bilateral foraminal stenosis, right greater than left. The disc creates a mild spinal stenosis. At C5-6 the disc bulges bilaterally into the proximal right and left foramen. (R. p. 34). Dr. Chokshi diagnosed "[d]egenerative disease and cervical spondylosis C4-5. Neck pain with left upper extremity radicular symptoms." In the same medical report Dr. Chokshi noted he discussed surgical as well as conservative treatment options with Respondent. (R. p. 43). Dr. Stanton of Physician's Healthcare indicated that Respondent will most probably need surgical intervention as time progresses. (R. p. 39).

On the MRI of Respondent's left shoulder "no internal derangements or significant abnormalities of the left shoulder are noted *except* for a lateral downsloping

acromial process which may predispose to impingement syndrome.” (R. p. 47).

Respondent did not return to see Dr. Choskshi after his MRI. He testified he did not have the financial means to pursue further treatment. (R. p. 22, lines 6-12).

As Appellant points out, a trial judge’s role in a bench trial is to admit all evidence and then evaluate it in a non-jury setting. *Brown v. Allstate Insurance Co.*, 344 S.C. 21, 542 S.E.2d 723 (2001). It is the duty of the trier of fact to weigh the evidence and judge the credibility of the witnesses. *Haltiwanger v. Barr*, 258 S.C. 27, 186 S.E.2d 819 (1972). There is no abuse of discretion when the trial court’s ruling has evidentiary support. *Ransom*, 321 S.C. at 213, 467, S.E.2d at 465 (1996).

In this case, in addition to Respondent’s testimony, the medical record contains evidence that Respondent has a serious cervical spine injury compressing the spinal cord and a condition in his left shoulder that predisposes him to impingement syndrome. Dr. Stanton believed Respondent would probably need surgery as time progresses, and Dr. Chokshi noted in both of his reports that surgical treatment options were discussed.

If there is some evidence which, if believed, supports the findings of the trial judge, then the appellate court is not at liberty to decide the case on its own view of the preponderance of the evidence. The findings of the trial court, being supported by the evidence, should be affirmed. *Townes*, 266 S.C. at 86, 221 S.E.2d at 774; *see also Daniels v. Bernard*, 270 S.C. 51, 56, 240 S.E.2d 518, 520 (1978) (holding trial court erred in ruling there was no evidence to support future damages award because the plaintiff’s testimony alone was evidence of future pain and suffering); *Campbell v. Paschal*, 290 S.C. 1, 15, 347 S.E.2d 892, 901 (Ct. App. 1986)(holding evidence that the

plaintiff suffered recurring pain and tenderness in his leg and that he was likely to suffer circulation problems in the future was sufficient to sustain an award involving future damages).

IV. Regardless of the standard used by the trial court in considering Appellant's due process rights, the appellate court is mandated to conduct a *de novo* review of the trial court's punitive damages award.

In considering an award of punitive damages, the trial court examined the evidence in light of the *Gamble* factors: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) "other factors" deemed appropriate. *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991). (R. pp. 5-8). Although the *Gamble* factors are still relevant, our appellate courts now look to three guideposts set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996) to determine the constitutionality of a punitive damages award: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. *Atkinson v. Orkin Exterminating Co. Inc.*, 361 S.C. 156, 604 S.E.2d 385 (2004). Our appellate courts are now mandated to conduct a *de novo* review of punitive damages awards using the *Gore* guideposts. *Mitchell v. Fortis Insurance Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009). The trial court's use of the

Gamble factors to determine whether punitive damages should be awarded does not prevent this appellate court from conducting its *de novo* review of the evidence in the record to determine whether the trial court's punitive damages award violates Appellant's due process rights. Respondent maintains a *de novo* review should result this court affirming the trial court's punitive damages award.

Degree of Reprehensibility

"The most important indicum of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *State Farm Mutual Automobile Insurance Co. v Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (2003) (quoting *Gore*, 517 U.S. at 575, 116 S.Ct. At 1589). In determining the degree of reprehensibility the court should consider whether (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident. *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185. The *Mitchell* Court noted that this analysis encompasses four factors of the *Gamble* review—the defendant's degree of culpability, the duration of the conduct, the defendant's awareness or concealment, and the existence of similar past conduct.

Here, Respondent's harm was primarily physical, but led to emotional harm and economic losses as well. (R. pp. 58-59; p. 23, lines 17-25; p. 25, lines 14-18; p. 26, lines 1-6, lines 11-25; p. 28, lines 1-11). Appellant repeated similar conduct

in twenty-six (26) incidents over the course of two years. (R. pp. 82-133). Appellant's causative violation of section 47-7-110 of the South Carolina Code, 1976, as amended, is evidence of reckless, willful, and wanton disregard for the health and safety of others warranting consideration of punitive damages. *Fairchild v. South Carolina Dept. of Transp.*, 727 S.E.2d 407, 398 S.C. 90, 97 (2012); (R. p. 12. paragraph 19b). Photographs of Respondent's damaged vehicle illustrate the force and severity of the impact with Appellant's cow, providing further evidence of Appellant's indifference and reckless disregard for the health and safety of others. (R. pp. 134-139). The harm caused by Appellant's obvious awareness that his livestock frequently escaped and his deliberate indifference to his duty to keep his livestock contained on his property was not the result of a mere accident.

Disparity Between Actual or Potential Harm and Punitive Damages Award

The appropriateness of the ratio of punitive damages to actual damages can be evaluated in terms of "the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay." *Hollis v. Stonington Development, LLC*, 394 S.C. 383, 714 S.E.2d 904 (Ct. App. 2011) (quoting *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185).

In *Campbell*, the court indicated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 538 U.S. at 424, 123 S.Ct. at 1513. The court suggested that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to

compensatory damages, can reach the outermost limit of the due process guarantee.” *Id.* at 425, 123 S.Ct. at 1524. In this instance, the punitive damages award of \$100,000 is a fraction (.388) of the \$257,700.00 in total actual damages. On its face, the punitive damages award appears to be within the suggested constitutional limits. Given the extent of the vehicle damage and the safety issues involved, there was a potential for Respondent and his passengers to sustain even greater physical harm than was actually incurred.

It is not clear whether Appellant was held financially accountable for his numerous past instances of similar conduct. If Appellant paid any damages previously, the penalties imposed were not effective in deterring his reckless, willful, and wanton behavior. In this instance the punitive damages award imposed is substantial enough to serve as a deterrent, while at the same taking into account Appellant’s status as farmer. The record contains some evidence of his ability to pay. Photographs of Appellant’s property depict his residence, farm land, out buildings, silos, farm equipment, vehicles, and livestock. (R. pp. 140-147).

Comparative Penalty Awards

Respondent is not aware of any cases with similar facts for comparison of punitive damages awards. However, section 47-7-110 of the South Carolina Code imposes a fine of not more than twenty-five dollars (\$25.00) per offense for the owner or manager of any domestic animal who wilfully or negligently permits an animal to run at large beyond the limits of his own land or the lands, leased, occupied, or controlled by him. The statute also imposes an alternative penalty of imprisonment for not more than twenty-five days.

The record contains 26 documented offenses of Appellant's livestock running at large. If the statutory fines were assessed, Appellant would be charged approximately \$650.00. This amount does not bear a reasonable relationship to the actual or potential harm imposed by Appellant's willful, reckless and wanton indifference to the health and safety of others. Nor would it likely be effective in deterring his continued unlawful conduct. The comparable civil penalties that could be imposed in this instance are inadequate to serve "the state's legitimate interests in punishing unlawful conduct and deterring its repetition." *Mitchell*, 385 S.C. at 584, 686 S.E.2d at 183 (quoting *Gore*, 517 U.S. at 568, 116 S.Ct. at 1589).

V. Additional evidence in the record other than that considered by the trial court supports the award of future medical and punitive damages.

Rule 220(c) of the South Carolina Appellate Court Rules authorizes an appellate court to affirm any judgment on any grounds appearing in the record on appeal. Respondent maintains the record contains additional evidence that provides grounds to affirm the trial court. Specifically, there is medical evidence, in addition to Respondent's testimony, that supports the future medical damages award. (R. pp. 34-35, pp. 37-40, pp. 41-47). In support of punitive damages, additional evidence indicates the ratio of punitive damages to actual damages comports with due process. Photographs of Respondent's vehicle are suggestive of actual and potential harm, confirming Appellant's indifference to and reckless disregard for the health and safety of others. (R. pp. 134-39). The causative violation of section 47-7-110 is additional evidence of Appellant's reckless, willful, and wanton conduct. (R. p. 12, paragraph 19b). And finally, photographs of Appellant's property provide some indication of his ability to pay. (R. pp. 140-47).

CONCLUSION

The issues raised in Appellant's brief are not preserved for this court's review. The appeal should be dismissed on error preservation grounds. If the court considers the merits of Appellant's argument, it should affirm the trial court's judgment on damages in its entirety.

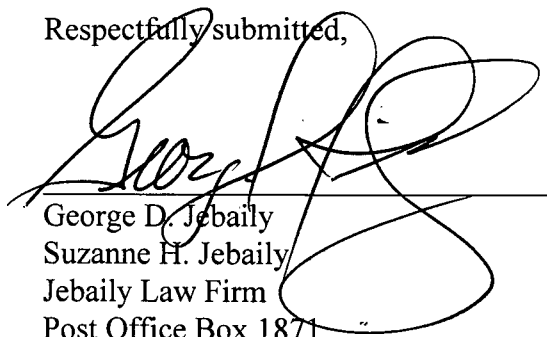
Respondent pleaded lost wages in his Complaint, and the issue was raised at trial without objection from Appellant. Even if the Complaint's language falls short of adequate pleading, under applicable law, the parties impliedly consented to trying the issue, and the trial court properly treated the issue as if it had been raised in the Complaint.

Appellant did not object to Respondent's testimony on his need for and cost of future surgery. Under applicable law, the testimony was competent and provided evidence sufficient to affirm the trial court's ruling.

This court should conduct its own *de novo* review of the trial court's ruling on punitive damages rather than remanding the matter to the trial court. Respondent maintains *de novo* review will demonstrate the punitive damages award comports with due process and serves the state's legitimate interests in punishing unlawful conduct and in deterring repeated behavior.

In addition, this court should affirm the trial court's ruling on future medical and punitive damages pursuant to Rule 220(c) of the South Carolina Appellate Court Rules based on any evidence appearing in the record.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'George D. Jebaily', is written over a horizontal line.

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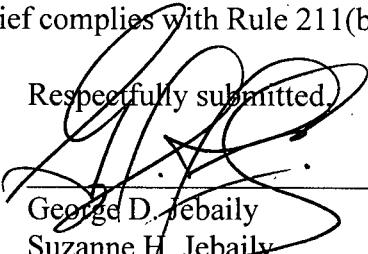
Jerry W. Page and James Page, individually, and d/b/a
James Page Farms.....Defendants,

Of whom Jerry W. Page is the Appellant.

CERTIFICATE OF COUNSEL

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

Respectfully submitted,



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Teri N. Jacobs, Jr.....Respondent

v.

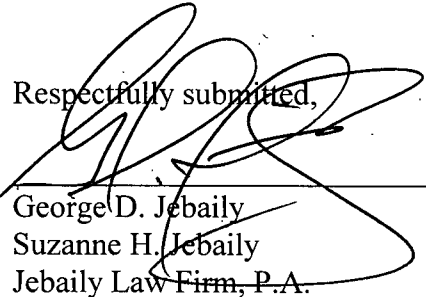
Jerry W. Page and James Page, individually, and d/b/a
James Page Farms.....Defendants,

Of whom Jerry W. Page is the Appellant.

PROOF OF SERVICE

I hereby certify that I have served the Final Brief of Respondent on Jerry Page by depositing a copy of same in the United States Mail, postage prepaid, on November 5, 2014, addressed to his attorney of record, Michael C. Abbott at Post Office Box 148, Florence, South Carolina 29503.

Respectfully submitted,



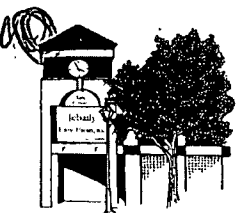
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November 5, 2014

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SC Court of Appeals



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Cely Anne B. Brigman
Rangeley C. Bailey
Suzanne H. Jebaily
Brian S. Yost

November 5, 2014

Hon. Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Teri N. Jacobs, Jr. vs. Jerry W. Page, individually, and d/b/a James Page Farms
Appellate Case No. 2014-001585
Case No. 2011-CP-17-460
Matter No.: 08-3970-GDJ/mhp

Dear Ms. Kitchings:

Enclosed please find an original unbound and fourteen (14) bound copies of Respondent's Final Brief for filing in the above-referenced matter. Also enclosed is the Proof of Service reflecting service by mail of the aforementioned documents on counsel for the Appellant.

Please file the original Proof of Service and return a filed copy to our office in the self-addressed, stamped envelope provided.

Thank you for your cooperation and assistance in this matter. Should you have any questions, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,

JEBAILY LAW FIRM, P.A.

George D. Jebaily

GDJ/mhp

Enclosures

cc: Teri Nelson Jacobs
Michael C. Abbott, Esquire, Attorney for Appellant

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SC Court of Appeals