

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Alison Renee Lee, Circuit Court Judge

Case No.: 2011-CP-40-1022
(Appeal Tracking No.:2013-000821)

Robin E. Otterbacher,

Appellant,

v.

Jeremy and Tamara Snyder, individually and as guardians and parents of Blaze Kendall Snyder, Blaze Kendall Snyder individually, and Selective Insurance Company of America and Auto Owners Insurance Company,

Respondents.

APPELLANT'S FINAL BRIEF

MIKE KELLY LAW GROUP, LLC
Brad D. Hewett
Post Office Box 8113
Columbia, South Carolina 29202
(803) 726-0123
Attorney for Appellant

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SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities3

Statement of Issues on Appeal.....5

Statement of the Case.....5

Statement of the Facts.....6

Standard of Review.....9

Arguments.....10

I. SELECTIVE INSURANCE COMPANY OF AMERICA IS LIABLE FOR COVERAGE UNDER A PERSONAL AUTOMOBILE INSURANCE POLICY AS A RESULT OF AN ACCIDENT WHERE ITS INSURED WAS OPERATING A NON-OWNED VEHICLE THAT WAS NOT FURNISHED OR MADE AVAILABLE FOR THE REGULAR USE OF A FAMILY MEMBER.....9

Conclusion.....21

TABLE OF AUTHORITIES

CASES

<u>Buddin v. Nationwide Mut. Ins. Co.</u> , 250 S.C. 332, 157 S.E.2d 633 (1967)	3, 10
<u>David v. McLeod Reg'l Med. Ctr.</u> , 367 S.C. 242, 626 S.E.2d 1 (2006)	9
<u>Edens v. S. Carolina Farm Bureau Mut. Ins. Co.</u> , 279 S.C. 377, 308 S.E.2d 670 (1983)	3, 18
<u>Fleming v. Rose</u> , 350 S.C. 488, 567 S.E.2d 857 (2002)	9
<u>Gaskins v. Blue Cross-Blue Shield of S. Carolina</u> , 271 S.C. 101, 245 S.E.2d 598 (1978)	3, 10
<u>Hann v. Carolina Cas. Ins. Co.</u> , 252 S.C. 518, 167 S.E.2d 420 (1969)	3, 19
<u>M & M Corp. of S. Carolina v. Auto-Owners Ins. Co.</u> , 390 S.C. 255, 701 S.E.2d 33 (2010)	3, 10
<u>Oblachinski v. Reynolds</u> , 391 S.C. 557, 706 S.E.2d 844 (2011)	3, 9
<u>Osborne v. Adams</u> , 346 S.C. 4, 550 S.E.2d 319 (2001)	9
<u>Stevenson v. Connecticut Gen. Life Ins. Co.</u> , 265 S.C. 348, 218 S.E.2d 427 (1975)	3, 18
<u>Williams v. Chesterfield Lumber Co.</u> , 267 S.C. 607, 230 S.E.2d 447 (1976)	9

RULES

Rule 201, SCACR	3
Rule 56(c), SCRCPC	3, 9

DICTIONARY

<u>Webster's II New Riverside University Dictionary</u> , The Riverside Publishing Company (1988).....	19
Merriam-Webster Online: Dictionary and Thesaurus, http://www.merriam-webster.com/dictionary/regular	19

STATEMENT OF ISSUE ON APPEAL

- I. **IS SELECTIVE INSURANCE COMPANY OF AMERICA LIABLE FOR COVERAGE UNDER A PERSONAL AUTOMOBILE INSURANCE POLICY AS A RESULT OF AN ACCIDENT WHERE ITS INSURED WAS OPERATING A NON-OWNED VEHICLE THAT WAS NOT FURNISHED OR MADE AVAILABLE FOR THE REGULAR USE OF A FAMILY MEMBER?**

STATEMENT OF THE CASE

This case arose from an automobile accident that occurred on November 13, 2010, in Richland County, South Carolina. [R. pp. 11-14.]. On February 10, 2012, Otterbacher filed her Amended Complaint against Selective Insurance, the at-fault driver Blaze Snyder, and the parents of Blaze Snyder, Jeremy and Tamara Snyder. Respondent Selective Insurance Company of America filed and served a timely Answer which contained a denial of insurance coverage. [R. pp. 15-18.].

The vehicle was directly insured by Auto-Owners Insurance Company and Respondent Jeremy Snyder maintained a personal policy with Selective Insurance at the time of the accident. [R. p. 12]. Auto Owners was dismissed from the case on the basis that Blaze Snyder was not operating the vehicle at the time of the accident with the permission of its owner, Lugoff Tire/Danny Lyell [R. p. 171]. Danny Lyell is the owner of the vehicle as well as the boss of Jeremy Snyder. Though Appellant initially briefed this issue, it became abundantly clear in depositions that Blaze Snyder was not using the vehicle with the permission of its owner, Danny Lyell/Lugoff Tire. Both Jeremy Snyder and Danny Lyell testified that Blaze Snyder was not authorized to use the vehicle at the time of the accident

[R. p. 171]. The trial court granted summary judgment to Auto Owners, and this decision was not contested by Appellant.

Appellant filed her Motion for Summary Judgment on December 3, 2012. Respondent Selective Insurance Company filed its Motion for Summary Judgment on December 12, 2012. The Honorable Alison Lee heard both motions on December 13, 2012. After hearing the arguments, Judge Lee granted Defendant Selective Insurance Company's Motion for Summary Judgment on the basis that the vehicle involved in this accident was furnished or available for regular use by Jeremy Snyder or Blaze Snyder. [R. p. 4]. Appellant filed a timely Notice of Appeal on April 8, 2013 pursuant to Rule 201 of the South Carolina Rules of Appellate Practice. [R. pp. 25-26].

STATEMENT OF THE FACTS

On November 13, 2010, Robin Otterbacher was driving her automobile on Interstate 77 in Richland County, South Carolina when she was struck in the rear by a vehicle driven by Blaze Snyder. The vehicle was a 2000 Chevrolet truck, VIN 1GCGC34R9YR194762 and was owned by Lugoff Tire Company. Appellant sustained serious bodily injuries and property damage to her vehicle as a result of this accident. [R. p. 12].

Blaze Snyder is the minor child of Jeremy Snyder and was operating the vehicle with a learner's permit. Jeremy Snyder was employed by Lugoff Tire Company and was riding in the vehicle with his son at the time of the accident. [R. pp. 162-163, 168]. Jeremy Snyder maintained a personal policy with Respondent Selective Insurance at the time of the accident. The Snyders were

driving to the Lugoff Tire office in Columbia, South Carolina when the accident occurred.

Respondent Selective Insurance Company issued a Personal Auto Policy to the named insureds, Jeremy Snyder and Tamara Snyder, bearing Policy Number F-5127609, which was in effect at the time of the November 13, 2010 motor vehicle accident. The 2000 Chevrolet truck was not listed as a "covered auto" on the declarations of the Policy issued by Respondent Selective Insurance. The pertinent provisions of the policy issued by Selective are outlined below:

PART A – LIABILITY COVERAGE

INSURING AGREEMENT

- A.** We will pay damages for "bodily injury" or "property damage" for which any "insured" becomes legally responsible because of an auto accident. Damages include prejudgment interest awarded against the "insured."...
- B.** "Insured" as used in this Part means:
1. You or any "family member" for the ownership, maintenance or use of any auto or "trailer".
 2. Any person using "your covered auto."
 3. For "your covered auto", any person or organization but only with respect to legal responsibility for acts or omissions of a person for whom coverage is afforded under this Part.
 4. For any auto or "trailer", other than "your covered auto", any other person or organization but only with respect to legal responsibility for acts or omissions of your or any "family member" for whom coverage is afforded under this Part. This Provision

(B.4.) applies only if the person or organization does not own or hire the auto or “trailer”.

* * * *

EXCLUSIONS

B. We do not provide Liability Coverage for the ownership, maintenance or use of:

2. Any vehicle, other than “your covered auto”, which is:
 - a. Owned by you; or
 - b. Furnished or made available for your regular use.

3. Any vehicle, other than “your covered auto”, which is:
 - a. Owned by any “family member”; or
 - b. Furnished or available for the regular use of any “family member”.

However, this Exclusion (B.3.) does not apply to you while you are maintaining or “occupying” any vehicle which is:

- a. Owned by a “family member”; or
- b. Furnished or available for the regular use of a “family member”.

[R. pp. 123, 125].

Prior to filing suit, Appellant filed a claim with Respondent Selective Insurance for damages arising out of this accident. In a letter dated December 30, 2010, Respondent Selective Insurance denied coverage for this loss on the basis that it did not insure the subject vehicle. Appellant filed an Amended Complaint seeking declaratory relief on February 10, 2012.

STANDARD OF REVIEW

This is an appeal from a judgment against Appellant in the trial court, pursuant to Rule 201 of the South Carolina Rules of Appellate Practice, based on the trial judge's grant of Respondent Selective Insurance Company's motion for summary judgment. "When reviewing the trial court's decision to grant summary judgment, an appellate court applies the same standard applied by the circuit court." Oblachinski, 391 S.C., 560(citing Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002)). "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party is entitled to prevail as a matter of law." Id. (citing Rule 56(c), SCRCPP; Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002)). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001); accord Williams v. Chesterfield Lumber Co., 267 S.C. 607, 610, 230 S.E.2d 447, 448 (1976).

ARGUMENT

I. THERE IS COVERAGE FOR THIS ACCIDENT UNDER THE POLICY ISSUED BY SELECTIVE INSURANCE BECAUSE BLAZE SNYDER WAS AN INSURED UNDER THE POLICY AND THE VEHICLE WAS NOT OWNED BY BLAZE OR JEREMY SNYDER NOR FURNISHED OR MADE AVAILABLE FOR BLAZE OR JEREMY SNYDER'S REGULAR USE.

There is coverage under the Policy issued by Respondent because the vehicle was not owned by Blaze or Jeremy Snyder nor furnished or made available for Blaze or Jeremy Snyder's regular use. "Where a clause is one of inclusion, it should be broadly construed for the benefit of the insured while in exclusion cases the same clause is given a more restricted interpretation." Buddin v. Nationwide Mut. Ins. Co., 250 S.C. 332, 338, 157 S.E.2d 633, 635 (1967). "This is necessary because in both situations the courts favor an interpretation in favor of coverage." Id.

"When an insurance policy such as this one is susceptible to more than one reasonable interpretation, one of which would provide coverage, the court must hold as a matter of law in favor of coverage." Gaskins v. Blue Cross-Blue Shield of South Carolina, 271 S.C. 101, 108, 245 S.E.2d 598, 602 (1978). "Insurance policies are construed in favor of coverage, and exclusions in an insurance policy are construed against the insurer." M&M Corp. v. Auto-Owners Ins. Co., 390 S.C. 255, 259, 701 S.E.2d 33 (2010). There is contradicting testimony in this case about how frequently Jeremy Snyder actually used the vehicle which would warrant an interpretation of the Policy in favor of coverage.

As gleaned from the deposition of Danny Lyell, the owner of Lugoff Tire and the subject vehicle, the truck was not permanently assigned to Jeremy Snyder and was being used on a temporary basis:

Q: And who owned that vehicle back in November of 2010?

Lyell: That truck was owned by Lugoff Tire, Incorporated.

Q: And was that vehicle actually assigned to anyone?

Lyell: **I don't think that vehicle was permanently assigned to him** [Jeremy Snyder]. That vehicle was used just to make deliveries, typically to – just – just to carry tires. It was not a service vehicle, and we did not actually use that vehicle to go out and fix trucks. It was just a pickup truck. We sometimes pulled a trailer, you know, hauling some tires around, and we just used it mainly for deliveries. **That's not a truck that Jeremy normally drove.** I don't really remember why he was driving it that day. It could have been that he needed it to make a delivery. I'm not sure. I just don't remember.

[R. pp. 179-180 (emphasis supplied)].

Q: Well, you have just testified that thought that that was not a vehicle that was assigned to him. What did you base that on?

Lyell: I don't – I don't think so. He typically would drive a truck that – that carried an air compressor, because he – he still

actually went out and worked on trucks, did truck repair. He was kind of a backup guy. If he couldn't get one of his men to go out and fix a truck, he would typically go out and do it, and – you know, in an emergency situation. So he typically would drive a truck with an air compressor and tools. That truck was just a stripped down truck with no tools on it, no compressor. And I don't really recall – **if he was driving it, it would have – it would have been a temporary – on – on a temporary basis. That's – that's not a truck – the type truck that he would, you know, drive full time in my – you know.**

Q: Well, again, what do you base that on? Let me ask you that. Just what do you base that on?

Lyell: I just base that on what he's done, you know, the whole time he's been here. He's always driven a – a truck. Just kinda – **there was no specific truck assigned to him.** He started out driving his own truck to work, and then he – then he – we put him on the road, and he ran some service calls. And I don't really recall what happened to it. I really don't remember.

[R. pp. 172-174 (emphasis supplied)].

Lyell: And I don't recall exactly what happened to – to his – to his vehicle that he was using for service. **I don't know if it broke down or what.**

[R. p. 181, (emphasis supplied)].

Q: Just so I'm clear. You have no records that would reflect to whom that 2000 Chevrolet pickup was assigned in November 2010; is that correct?

Lyell: That is correct. **I don't believe it was assigned to anybody.** It was a vehicle that several people used, and it was used for tire deliveries only. And I use that truck a lot myself. It's a heavy truck. I use it for pulling trailers. I actually make a lot of – made a lot of deliveries in that truck myself back in those days. So it – I mean, it – **I don't see how it could be permanently assigned to him when other people have driven it.**

[R. pp. 183-184, (emphasis supplied)].

Q: Did you specifically use that vehicle in the latter half of 2010?

Lyell: Yes.

Q: And how do you know that?

Lyell: I used it all the time. I use it – it was just a spare vehicle that we used. It was a heavy vehicle, and I used it a lot.

[R. pp. 184].

Q: Where was that truck in 2010 principally garaged?

Lyell: It was principally garaged in Lugoff, at the shop in Lugoff.

[R. pp. 186].

Q: And I think you mentioned this was a stripped down truck that did not have any equipment such as an air compressor on it; is that correct?

Lyell: Correct, yes.

Q: And did Mr. Snyder usually drive a vehicle that came equipped with an air compressor or other pieces of equipment.

Lyell: Normally he would, yes.

Q: Would it be fair to say that this truck – I think you refer to it as a route truck.

Lyell: That – they nicknamed it the route truck, because we use it on a little delivery route to deliver tires and parts.

Q: Would it be fair to say that this route truck, as it's been coined by your employees, was used totally on an occasional basis by Mr. Snyder?

Lyell: When you say, "occasional," I'm not sure what you mean.

Q: Was he [Jeremy Snyder] driving it every day?

Lyell: He didn't normally drive it every day.

[R. pp. 187-188].

Q: Would the route truck have been assigned to any one employee in particular to take home and –

Lyell: Typically it was not, but I – you know, **that's typically not a vehicle that we would assign to – to someone permanently**, because it's normally used during the day for deliveries.

Q: So it's your testimony Mr. Snyder would not have been using that vehicle on a regular basis to go back and forth from his home to work?

Lyell: If he were using it, it would have been on a temporary basis I do believe.

[R. pp. 189-190].

Q: Is there any other independent recollection you have of a particular vehicle that Jeremy was driving, other than the route truck, at the time of the accident?

Lyell: I believe that he was using a – a regular service truck with a compressor, and I – I'm – I believe either one of two things happened to that truck. Number one, it may have broken down. Number two, we may have needed it. Sometimes one of our trucks will break down in the field, and we'll have to get a truck to the primary service guy. So we may have taken his truck and given it to another service guy, leaving him without a vehicle temporarily.

Q: And so would he have been using the route truck as a temporary substitute for his regular vehicle?

Lyell: He could have been. He could have been, or he could have had a second vehicle sitting in his yard and been using the route truck, you know, to make deliveries or something, the previous week. It's hard to say. I really don't know exactly why he was driving that particular truck.

[R. pp. 191-192].

Q: In the regular and ordinary course of business it's your experience that drivers would use that route truck maybe once a week or so for deliveries; is that correct?

Lyell: That truck sat a lot. It sat still a lot. It didn't – it normally did not get used every day. It sat in our parking lot a lot.

[R. p. 198].

While Jeremy Snyder testified in his deposition that the vehicle was furnished for his regular use, he also made it clear that the vehicle was to be used only for company purposes:

Q: So am I correct then, Mr. Snyder, that that 2000 Chevrolet vehicle was furnished to you by the company for your regular use?

Snyder: Yes, sir.

Q: That's a correct statement?

Snyder: Yes, sir, for company use.

Q: For company use?

Snyder: Right.

Q: But whenever you –

Snyder: Not to go to the grocery store, not to go to the mall, not to go to the movies, for business use.

Q: But you used it on a regular basis for your business purposes?

Snyder: Yes, sir.

Q: And that included going home at night from the office?

Snyder: Yes, sir.

Q: And going to work?

Snyder: Yes, sir.

Q: Now did you pay taxes or insurance on the vehicle?

Snyder: No, sir.

Q: Did you make any monthly payments on the car?

Snyder: No, sir.

Q: Had you ever paid for or made any repairs yourself to the truck?

Snyder: No, sir.

Q: And you wouldn't claim to be the owner of the vehicle?

Snyder: No, sir.

[R. pp. 172-173]. Jeremy Snyder also testified that he was not sure how long he had been driving the subject vehicle. [R. p. 170].

It is without dispute that certain testimony offered by Jeremy Snyder and Danny Lyell is incompatible. Danny Lyell testified that the vehicle was not permanently assigned to Jeremy Snyder and that the vehicle was not a truck that Mr. Snyder normally drove. [R. pp. 178-179]. Lyell testified that Jeremy Snyder would not have been provided with a set of keys if the vehicle was not permanently assigned to an employee. [R. pp. 178, 196]. Lyell also testified he personally used the vehicle all of the time, that several other employees used the vehicle, that Jeremy Snyder typically drove a truck with an air compressor on it, and that the truck would have been garaged at the company's shop in Lugoff. Concomitantly, this dispute in testimony surrounding the use of the car validates why the trial court improperly granted summary judgment for Respondent Selective Insurance.

Respondent Selective Insurance fails to define the phrase "furnished or available for your regular use" within the Policy. Respondent Selective Insurance also neglects to define the word "regular" within the context of this phrase. Where language used in an insurance contract is ambiguous, or is capable of two reasonable interpretations, that construction which is most favorable to the insured will be adopted. Edens v. S.C. Farm Bureau Mut. Ins. Co., 279 S.C. 377, 379, 308 S.E.2d 670, 671 (S.C. 1983). In Stevenson v. Connecticut General Life Ins. Co., 265 S.C. 348, 351, 218 S.E.2d 427, 428 (quoting Hann v. Carolina

Casualty Insurance Company, 252 S.C. 518, 167 S.E.2d 420 (1969)), the court provided that:

It is well settled beyond cavil in this jurisdiction that the terms of an insurance policy should be construed most liberally in favor of the insured, and that in case of conflict or ambiguity, a construction will not be adopted that defeats recovery if the policy is reasonably susceptible of a meaning that will permit recovery. We uniformly give the insured the benefit of any doubt in the construction of the terms used in an insurance policy.

The first three definitions found in Webster's II New Riverside Dictionary for "regular" are as follows:

1. Customary, usual, or normal.
2. Orderly or symmetric.
3. Conforming to set procedure, principle, or discipline.

A look at Merriam-Webster's online dictionary details that the third and fourth definitions of the word "regular" are:

3(a). Orderly, Methodical

3(b). recurring, attending, or functioning at fixed, uniform, or normal intervals

4(a). constituted, conducted, scheduled, or done in conformity with established or prescribed usages, rules or discipline.

Based on the above definitions as applied to the testimony of Danny Lyell, it is difficult to unambiguously label Jeremy Snyder's use of the vehicle as regular. The inconsistencies embedded in the testimony of Lyell and Snyder concerning how regularly Snyder actually used the vehicle warrant a finding of coverage in this matter. The phrase "furnished or available for the regular use" is

susceptible to more than one reasonable interpretation given the conflicting testimony over how often Jeremy Snyder actually used the vehicle. A reading of Lyell's testimony spawns confusion about how often Jeremy Snyder actually used the vehicle and whether he only operated it on a temporary basis.

Respondent Selective Insurance opted not to define "regular" in Exclusion B(2) of the Policy thereby leaving the term open for an interpretation which may warrant coverage for this accident. Examples of such "regular" use of an item as derived from the above definitions would capture such activities as using a toothbrush to brush your teeth every day, checking email each day on a personal laptop, using the same leash to walk your dog each morning, or riding in your personal automobile to the office for work each day. These are examples in which items are used methodically and at fixed or normal intervals. Danny Lyell's testimony as to Jeremy Snyder's use of the subject vehicle coupled with the above definitions of regular indicate that Jeremy Snyder's use of the vehicle was not regular but could be construed as sporadic.

The inconsistent testimony in this case between Danny Lyell and Jeremy Snyder concerning the regularity in which the vehicle was used militates a construction of the Policy in favor of coverage. The testimony from Danny Lyell is enough to create a genuine issue of material fact in this matter concerning whether the vehicle was furnished to Jeremy Snyder for regular use. Accordingly, the fact finder could draw more than one inference regarding whether Jeremy Snyder's use of the vehicle was in fact "regular" based on a common understanding of the term.

Therefore, the trial court erred by granting summary judgment for Respondent Selective Insurance.


CONCLUSION

Because of the dispute in testimony between witnesses in this matter concerning how often Jeremy Snyder used the subject vehicle, the Court should find that the Policy is susceptible to more than one reasonable interpretation concerning the regular use of the vehicle by Mr. Snyder and hold as a matter of law in favor of coverage. For the reasons stated herein and construing the exclusion against Respondent Selective Insurance, the Court should reverse the trial court's ruling granting summary judgment in favor of Respondent Selective Insurance.

Respectfully Submitted,

MIKE KELLY LAW GROUP, LLC

By:



Brad D. Hewett
500 Taylor Street
Post Office Box 8113
Columbia, South Carolina 29202
(803) 726-0123
(803) 252-7145
Attorney for Appellant

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Respondents.

RULE 211 (b) CERTIFICATION

The undersigned, an attorney in this matter for the Appellant, certifies that this Final Appellant's Brief and Final Appellant's Reply Brief are identical to the Initial Appellant's Brief and Initial Appellant's Reply Brief, except for inclusion of references to the Record and correction of typographical errors and/or misspellings, and it otherwise conforms to the requirements of Rule 211(b), SCACR.

Respectfully Submitted,

By:



Brad Hewett
Mike Kelly Law Group, LLC
Post Office Box 8113
Columbia, South Carolina 29202
(803) 726-0123
Attorney for Appellant

April 4, 2014

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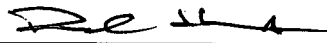
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PROOF OF SERVICE

The undersigned, an attorney in this matter for the Appellant, certifies that I have this 4th day of April, 2014, served copies of the Appellant's Final Brief and Appellant's Final Reply Brief upon counsel of record for the Respondent by causing them to be deposited in the United States mail, first class postage paid, addressed to Andrew F. Lindemann, Esq. Davidson & Lindemann, PA, P.O. Box 8568, Columbia, SC 29202-8568 and Jeremy and Tamara Snyder, 609 Chesnut Street, Camden, SC 29020.

BY: 
MIKE KELLY LAW GROUP, LLC
Brad D. Hewett
500 Taylor Street
Post Office Box 8113
Columbia, South Carolina 29202
(803) 726-0123
Attorney for Appellant

April 4, 2014