IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Civil Action No. 2015-CP-23-00973

Appellate Case No. 2019-000701

O'Neal Constructors, LLC.....Respondent,

v.

GE Betz, Inc. d/b/a GE Betz & Process Technologies..... Appellant.

INITIAL BRIEF OF RESPONDENT, O'NEAL CONSTRUCTORS, LLC

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1. Whether O'Neal presented any evidence such that a reasonable juror could conclude that GE Betz negligently misrepresented that it provided chemical treatment services for the Cooling Water System.

2. Whether O'Neal presented any evidence such that a reasonable juror could conclude that O'Neal justifiably relied on GE Betz's representation that it provided chemical treatment for the Cooling Water System.

STANDARD OF REVIEW

On appeal from a jury verdict, the Court of Appeals' review "is limited to determining if there is any evidence to support the verdict." Madden v. Cox, 284 S.C. 574, 577, 328 S.E.2d 108, 111 (Ct. App. 1985). The Court must affirm a jury verdict on appeal "if there is any evidence to sustain the factual findings implicit in the jury's verdict." Vacation Time of Hilton Head Island, Inc. v. Lighthouse Realty, Inc., 286 S.C. 261, 267, 332 S.E.2d 781, 785 (Ct. App. 1985). "On appeal from a jury verdict, the evidence and any inferences to be drawn therefrom must be viewed in the light most favorable to the respondent." Elders v. Parker, 286 S.C. 228, 230, 332 S.E.2d 563, 565 (Ct. App. 1985).

STATEMENT OF FACTS

I. The LNG Project

O'Neal Constructors, LLC ("O'Neal") is a contractor in the business of designing and constructing industrial projects. (Trial Tr. 55:24-56:10). In 2011, O'Neal entered into a contract with GE Power & Water (the "Owner") for the design and construction of a project known as the "LNG Peak Shaver Project" (the "LNG Project") at the GE manufacturing facility on Garlington Road in Greenville, South Carolina (the "GE Facility"). (Id. at 54:04-25; 56:11-59:02) The Owner's business at the GE Facility includes manufacturing extremely large gas turbines such as those used for power generation. (Id. at 56:11-58:17; 62:01-15). The LNG Project was designed to provide the Owner a means of testing gas turbines that were manufactured at the GE Facility on

site. (Id. at 57:03-58:17). The testing of gas turbines requires a high concentration of natural gas that far exceeds the supply the Owner could receive from a typical utility pipeline. (Id. at 56:11-58:06) The LNG Project was designed to achieve the high concentration of natural gas required for tests in the following three phases: (1) conversion natural gas from the utility pipeline into a liquid form called liquified natural gas or "LNG"; (2) storage of the LNG in tanks; and (3) vaporization of LNG for the testing. (Id. at 56:11-58:17).

One critical metal component of the LNG Project is known as a "heat exchanger." (Id. at 60:20-61:25). Heat exchangers are large pieces of equipment comprised of numerous carbon steel tubes inside of a larger metal shell. Cooling water flows through the heat exchangers around the carbon steel tubes to cool the liquid flowing through the tubes. (Id.). The underlying dispute arises out of the corrosion of several heat exchangers on the LNG Project.

Understanding the corrosion giving rise to this dispute first requires an understanding of the LNG Project's cooling water system (the "Cooling Water System") in general. Generally speaking, cooling water systems are a common component of industrial processes. (Id. at 59:03-60:08). Much like a car radiator, the cooling water system prevents process equipment from overheating by circulating cool water through metal piping and equipment. (Id. at 59:03-61:01; 62:16-63:20). The cooling water then is returned to a cooling tower where the water is exposed to the atmosphere and cooled back down before recirculating through the process. (Id.).

Because much of the piping and equipment exposed to cooling water is made of metal, the cooling water must be chemically treated to prevent corrosion. (Id. at 64:14-65:22). Chemical treatment of cooling water system involves the balanced use of two chemicals: a corrosion inhibitor and a biocide. (Id. at 331:05-332:25; 336:14-339:02). The biocide kills microorganisms in the cooling water and the corrosion inhibitor acts as a coating on the piping and other equipment

exposed to the cooling water to prevent the metal components from corroding. (Id.). Proper chemical treatment of cooling water systems requires initially dosing the cooling water system with chemicals and monitoring to the cooling water system at regular intervals to ensure that the level of chemicals in the cooling water remains in a range that is effective to combat corrosion. (Id.).

O'Neal is not in the business of the chemical treatment of cooling water systems. Furthermore, O'Neal never enters into contracts for chemical treatment services with a water treatment contractor. (Id. at 199:22-200:06). Accordingly, when O'Neal was preparing to introduce water into the Cooling Water System on the LNG Project, O'Neal contacted the Owner to find out who the Owner planned to use to provide chemical treatment for the Cooling Water System. (Id. at 188:25-189:24; 191:25-192:11; Pl's Ex. 1). The Owner directed O'Neal to contact its vendor, GE Betz, Inc. d/b/a GE Betz and Process Technologies ("GE Betz"). (Id.). O'Neal contacted GE Betz as directed in May 2012 to begin arranging for chemical treatment of the Cooling Water System. (Id. at 189:08-190:25). At that time, GE Betz was responsible for providing chemical treatment for several other cooling water systems at the GE Facility. (Trial Tr. 110:04-08). O'Neal did not receive and would not have expected to receive a copy of any contract between GE Betz and the Owner relating to the chemical treatment of the Cooling Water System. (Id. at 214:14-215:17). Instead, O'Neal relied on GE Betz's actions and representations that it intended to provide chemical treatment as directed by the Owner.

II. Pre-Commissioning Activities Between O'Neal and GE Betz: May 2012 Through March 2014.

O'Neal first contacted GE Betz about the chemical treatment of the Cooling Water System in May 2012. (Id. at 189:08-190:25). Over the following 22 months, O'Neal and GE Betz communicated regularly about the chemical treatment of the cooling water system. (Id at 189:08-

191:10; 214:09-22). Based on its communications with GE Betz and the Owner, O'Neal understood that GE Betz would provide chemical treatment to the Cooling Water System pursuant to its existing arrangements with the Owner. (Id. at 191:11-24). In one such communication on June 17, 2013, O'Neal's designer, Phil McCollum stated in response to a question from GE Betz regarding a quote for chemical treatment: "[t]he costs (sic) was not going to be billed to O'Neal but was to be charged against the standing contract GE Betz [GE Betz] has with GE Energy [Owner] since it is an extension of the existing program GE Betz provides for them." (Id. at 195:23-197:23; Pl.'s Ex. 5). No representative of GE Betz contradicted Mr. McCollum's stated understanding of the relationship between GE Betz and the Owner. (Id.)

In fact, internal communications at GE Betz demonstrate that GE Betz representatives shared O'Neal's understanding that it was going to handle chemical treatment of the LNG Project under a contract with the Owner. (See Id. at 467:05-470:08). In an GE Betz internal email dated September 6, 2013, GE Betz's account manager, Scott Rutledge, communicated to his boss, David Kirkland, "[a]fter commissioning the [cooling] tower, we can then contract the rest under GE Turbine [Owner] based on our previous discussion." (Pl.'s Ex. 6)

Subsequent communications confirm this understanding. In one such email dated October 8, 2013, Phil McCollum again communicated with Scott Rutledge of GE Betz in response to a question about certain equipment relating to GE Betz's chemical treatment, "I was originally informed that the cost to provide the components of this [cooling water] system would be borne by GE Energy Systems [Owner] as an addition to the current contract with GE Betz Systems [GE Betz] for the treatment for the other cooling towers on the site." (Trial Tr. 197:24-199:16; Pl.'s Ex. 7). Again, GE Betz offered no objection to O'Neal's statement that it was going to be the party

responsible for the chemical treatment of the Cooling Water System. (Trial Tr. 456:06-467:04; Pl.'s Ex. 7).

At the direction of the Owner, O'Neal ultimately entered into a purchase order with GE Betz for approximately $10,000 worth of chemicals, pumps and a controller used in connection with the chemical treatment of the Cooling Water System. (Trial Tr. 77:09-79:10; Pl.'s Ex. 8). O'Neal asserted no claim in this action regarding the quality of the items purchased under the Purchase Order. (Trial Tr. 78:03-79:10). GE Betz did not provide a proposal to O'Neal to provide chemical treatment services associated with the Cooling Water System. (426:22-428:20) Based on the parties' prior discussions, O'Neal continued to understand that GE Betz was providing chemical treatment services under an existing arrangement with the Owner. (Trial Tr. 199:17-21; 214:23-215:03)

The process of the initial introduction of water and chemicals into the Cooling Water System is referred to as "commissioning." (Id. at 475:21-476:12). To ensure that O'Neal was making the necessary arrangements for GE Betz to provide chemical treatment of the Cooling Water System, O'Neal continued to communicate with GE Betz as the date of commissioning approached. (Id. at 213:16-214:13; Pl.'s Ex. 9 and 10). On January 10, 2014, Scott Rutledge offered recommendations to O'Neal's project manager, Lonni Blanton, regarding the location of chemicals and equipment relating to chemical treatment of the Cooling Water System. (Trial Tr. 207:08-11; Pl.'s Ex. 10). Specifically, GE Betz instructed O'Neal to "[p]lease make sure to install a sample point so we can do on-going testing on chemical residuals for system and emulate piping as discussed like other systems that have (sic) same controller throughout plant." Id.

Ultimately, commissioning of the Cooling Water System was scheduled for March 3, 2014. (Trial Tr. 215:18-216:12) In the final week leading up to commissioning, O'Neal again contacted

GE Betz to ensure that GE Betz could begin chemical treatment of the Cooling Water System at the time of commissioning. (Pl.'s Ex. 12; Trial Tr. 564:21-565:21). O'Neal's construction manager, Jim Sweatt, emailed Scott Rutledge and asked whether Mr. Rutledge could be on site on March 3 "to start up the chemical feed system for us as we are going to introduce the cooling water into the piping." Pl.'s Ex. 12. Mr. Rutledge agreed that he would be on site at 9:30 on Monday March 3 to commission the cooling water system as requested. Id. Importantly, not one time between May 2012 and March 2014 did GE Betz tell O'Neal that it was not going to provide chemical treatment for the Cooling Water System without a contract with O'Neal nor did it refuse to provide assistance when requested by O'Neal. (Trial Tr. 214:14-215:17).

III. Commissioning and Corrosion: March Through August 2014.

As expected, Mr. Rutledge arrived at the LNG Project on March 3, 2014 ostensibly to begin chemical treatment of the Cooling Water System. (Trial Tr. 475:21-477:15). Mr. Rutledge testified he injected the proper amount of chemicals to get the water into the "bell shaped curve," meaning to get the water appropriately dosed chemically to combat corrosion. (Id.) O'Neal's Project Manager testified to seeing Mr. Rutledge on site on the morning of March 3, 2014 to chemically treat the Cooling Water System. (Id. at 207:08-11; 215:18-216:17).

On March 4, 2014, the day following GE Betz's commissioning of the Cooling Water System, O'Neal's Construction Manager, Jim Sweatt, emailed Mr. Rutledge requesting a written report documenting his commissioning activities on March 3. (Pl.'s Ex. 13). Mr. Rutledge responded as follows:

> Typically these reports will be returned within 24-48 hours. Additionally with the information provided that the LNG tower will be drained and cleaned one more time we will need to recharge system and come back and test residuals at that time. At that time, we will provide a full report so please just let me know when this will be done. ***Of course, corrosion coupons were placed yesterday and control was calibrated. Chemistry to include biocide and corrosion inhibitor fed to system as pumps were primed and dialed in for proper feed.***

Id. (emphasis added). The "corrosion coupons" described by Mr. Rutledge are a means of measuring the chemical properties of the water and are used in connection with ongoing chemical treatment of a cooling water system. (Trial Tr. 219:13-220:05). In short, Mr. Rutledge represented that he had performed initial chemical treatment of the Cooling Water System and installed the necessary coupons from him to monitor and perform ongoing chemical treatment. (See id.). Mr. Rutledge never provided the commissioning report as promised. (Id. at 106:05-14).

Between March and July 2014, Mr. Rutledge testified that he made regular visits to the LNG Project. (Id. at 486:22-488:06). O'Neal's project manager confirmed that he observed Mr. Rutledge on site on occasion and communicated with him over the ensuing months about the Cooling Water System. (Id. at 226:24-227:10).

A critical milestone for the completion of the LNG Project was the successful execution of a 72-hour test of the compressors that are used in converting natural gas to a liquid form. (Id. at 229:13-230:16). Over the July 4, 2014 holiday weekend, O'Neal unsuccessfully attempted the 72-hour test. (Id. at 85:23-87:05). After running for several hours, the test failed because the oil in the compressors was overheating causing the compressors, as a safety measure, to shut down. (Id. at 272:10-273:19). O'Neal's project team convened a meeting on Monday, July 7, 2014 to determine the cause of the high oil temperature shut downs. (Id. at 87:21-88:05). O'Neal asked GE Betz to attend the meeting. (Id. at 87:19-89:10).

O'Neal's Director of Field Services, Phillip Honea, arrived at the LNG Project on Monday July 7, 2014 around 8:00 a.m. to investigate the high oil temperature issue. (Id. at 270:07-13; 273:10-274:04). Heat exchangers used during the 72-hour test had been opened up to reveal substantial corrosion in portions of the heat exchangers exposed to the cooling water. (Id. at 88:11-21). The existence of such substantial corrosion caused the tubes in the heat exchangers to become

completely or partially blocked which, in turn, caused the high oil temperature issue due to low and/or no flow of cooling water in the heat exchangers. (Id. at 287:10-288:11). Additionally, as Mr. Honea inspected the LNG Project to determine the source of the excessive corrosion, he noticed that the chemical treatment system that Mr. Rutledge represented as having been commissioned on March 3, 2014 was improperly set up. (Id. at 273:10-283:06). Typically, a pump for each chemical (biocide and corrosion inhibitor) should have been plugged into GE Betz's controller in order to ensure the chemicals were being introduced at proper levels depending on the chemical properties of the cooling water. (Id.) Instead, Mr. Honea saw the pump for the biocide plugged directly into a wall outlet and the pump for the corrosion inhibitor sitting on top of the drum, appearing as it had never been used. (Id.) Mr. Honea inspected the levels of chemicals in the 55-gallon drums and noted that the biocide drum was about half empty while the corrosion inhibitor drum appeared full. (Id.) Importantly, these observations by Mr. Honea indicated that, contrary to Mr. Rutledge's representations in his March 4, 2014 email, GE Betz never fed corrosion inhibitor into the Cooling Water System, never primed the corrosion inhibitor pump and the chemical treatment system was never calibrated.

In an effort to determine the cause of the corrosion, O'Neal retained an expert, Dr. Michael Haselkorn, to perform testing and analysis on a piece of the corroded heat exchanger. Dr. Haselkorn's analysis found "a strong indication that a corrosion inhibitor was not used." (Pl.'s Ex. 22, p. 14). He further concluded that the reason for the corroded equipment was "***no corrosion inhibitor was added to the water.***" Id. (emphasis added). Furthermore, O'Neal's corrosion engineering expert witness, Dr. Ockert Van Der Schijff concurred with Dr. Haselkorn's analysis and testified that the chemical properties of the corroded equipment showed that the cooling water was never treated with corrosion inhibitor. (Trial Tr. 330:03-331:04; 333:01-334:10). The analysis

performed by Dr. Haselkorn and Dr. Van Der Schijff scientifically established that Mr. Rutledge's statement on March 4, 2014 that he placed corrosion inhibitor into the Cooling Water System and his statement that monitoring and treatment of the Cooling Water System had been ongoing since that time were false. (Id. at 333:01-334:10).

Despite O'Neal's best efforts to clean the system, the heat exchangers exposed to the cooling water had to be completely retubed as a result of the corrosion. (Id. at 287:10-293:02). All parties involved quickly determined that the improper chemical treatment of the Cooling Water System by GE Betz caused the excessive corrosion observed throughout the LNG Project. O'Neal and GE Betz held a meeting on August 5, 2014 at O'Neal's offices to discuss the corrosion issues. (Id. at 104:06-105:18; Pl.'s Ex. 21). At that meeting, GE Betz asserted, for the first time, that GE Betz was under no obligation to provide chemical treatment because it did not have a contract with the Owner to do so. (Trial Tr. 106:21-108:14; Pl.'s Ex. 21). Stated differently, despite GE Betz's representations that it commissioned the Cooling Water System and thereafter was monitoring and treating that system, GE Betz contended it had no responsibility for the corrosion it caused because it was not providing such services pursuant to a contract with the Owner. Notwithstanding GE Betz's assertion that it had no contractual obligation to do so, Mr. Rutledge reported at the meeting "that monitoring and treatment has been taking place periodically since the initial startup of the system." (Trial Tr. 108:15-109:06; Pl.'s Ex. 21). Given the extensive involvement of GE Betz over the prior two years, O'Neal was surprised by GE Betz's disingenuous assertion that since it had failed to get a contract in place with the Owner relating to the LNG Project, it had no obligation to provide chemical treatment for the Cooling Water System. (Trial Tr. 107:10-108:14; Pl.'s Ex. 21). At trial, David Kirkland, Mr. Rutledge's supervisor, acknowledged on behalf of GE Betz that GE Betz did not claim that they did not have a contract to perform chemical treatment services until

O'Neal demanded that GE Betz contribute financially to the repair of the equipment damaged by the corrosion. (Trial Tr. 566:07-13)

O'Neal spent approximately $880,000 addressing the corrosion observed in 2014. (Pl.'s Ex. 41). GE Betz refused to contribute to the repair of the corroded equipment insisting that, despite more than 2 years of communications with O'Neal to the contrary, it had no obligation to provide chemical treatment of the Cooling Water System. (Trial Tr. 106:21-108:14)

IV. 2015 Corrosion: August 2014 Through August 2015.

Following the corrosion discovered in July 2014, the Owner directed GE Betz to immediately provide chemical treatment services for the Cooling Water System at the LNG Project under an existing contract relating to other cooling water systems at the GE Facility. (Pl.'s Ex. 25). In August 2014, GE Betz entered into a formal agreement with the Owner to provide chemical treatment of the Cooling Water System. (Id.) By email dated August 21, 2014, David Kirkland on behalf of GE Betz stated in an email to the Owner, to which O'Neal was a copy recipient:

> Per our conversation yesterday, GE Betz will be site (sic) for the start-up of the LNG system to initially charge the system and confirm the chemical residuals in the tower. Additionally we will continue regular service and monitoring as we would with systems that we have an agreement to treat which includes monitoring, corrective actions (if necessary) and reporting of our findings and actions.

(Pl.'s Ex. 25). Notably, this was precisely the arrangement that O'Neal believed to be the case from the beginning and had represented as such to GE Betz without contradiction. (Trial Tr. 482:19-483:12). There is no dispute that GE Betz was contractually responsible for providing chemical treatment of the Cooling Water System after August 2014. (Id. 457:17-458:25). Incredibly, approximately one year later, corrosion was again discovered in the LNG Project in equipment exposed to cooling water being treated by GE Betz. (Id. at 241:24-243:01). There is no dispute that between August 2014 and August 2015, GE Betz was the only entity responsible for chemical treatment of the LNG Cooling Water System. (Id. at 500:12-17). The 2015 corrosion

was, once again, the responsibility of poor chemical treatment of the cooling water system by GE Betz. (Id. at 349:23-350:09). O'Neal spent approximately $135,000 addressing the 2015 corrosion. (Pl.'s Ex. 41).

At trial, the jury awarded O'Neal $648,698.32 against GE Betz representing sixty percent[1] of the damages attributed to the corrosion in 2014 and 2015 under the theory of negligent misrepresentation. The trial court denied GE Betz's motion for Judgment Notwithstanding the Verdict, a New Trial, and/or an Order Altering or Amending the Judgment and denied its similar Motion to Reconsider. GE Betz now appeals the jury's verdict as affirmed by the trial court wrongfully claiming (1) that there was no representation made by GE Betz and (2) that O'Neal was not justified in relying on GE Betz's representations concerning chemical treatment of the Cooling Water System. Substantial evidence exists in the record supporting the jury's verdict under a theory of negligent misrepresentation. Therefore, the judgment of the trial court should be affirmed.

ARGUMENTS

The elements of a claim for negligent misrepresentation are as follows:

> (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation.

AMA Management Corp. v. Strasburger, 309 S.C. 213, 222, 420 S.E.2d 868, 874 (Ct. App. 1992). On appeal, GE Betz only challenges the first and fifth elements regrading the defendant's false representation and the plaintiff's justifiable reliance. As set forth more fully hereinbelow, O'Neal

[1] The jury's verdict was adjusted based upon its finding of comparative negligence.

presented sufficient evidence to satisfy both of these elements and the Court of Appeals should affirm the jury's verdict.

I. O'NEAL PRESENTED SUFFICIENT EVIDENCE FOR THE JURY TO FIND THAT GE BETZ REPRESENTED THAT IT PROVIDED CHEMICAL TREATMENT FOR THE COOLING WATER SYSTEM.

GE Betz's contention that O'Neal did not submit any evidence upon which the jury could find that GE Betz made an actionable representation to O'Neal concerning chemical treatment is meritless. "Ordinarily, to be actionable, a statement must relate to a present or preexisting fact, and cannot be predicated on unfulfilled promises or statements as to future events. Turner v. Milliman, 392 S.C. 116, 123, 708 S.E.2d 766, 769 (2011). "To be actionable, the representation must relate to a present or pre-existing fact and be false when made." Fields Melrose Ltd. P'ship, 312 S.C. 102, 105, 439 S.E.2d 283, 285 (Ct. App. 1993).

In this action, O'Neal's damages for misrepresentation arise out of corrosion events that were discovered in July 2014 and August 2015. Regarding the July 2014 corrosion, at a minimum, GE Betz's statements regarding the initial chemical treatment of the Cooling Water System at commissioning and its subsequent statements in meeting minutes that it had provided chemical treatment of the Cooling Water System are sufficient to support the jury's verdict. Moreover, regarding the August 2015 corrosion, there is no dispute that between August 2014 and August 2015, GE Betz was the entity contractually responsible for the chemical treatment of the Cooling Water System pursuant to a contract with Owner.

A. GE Betz Falsely Represented That It Provided Chemical Treatment Beginning on March 3, 2014.

1. GE Betz Mischaracterizes the Evidence Concerning its Representations.

As a preliminary matter, GE Betz mischaracterizes the representation that it seeks to refute. In its Initial Brief, GE Betz claims that O'Neal relied on statements between GE Betz and O'Neal

in 2012 as grounds for its negligent misrepresentation claim and that those statements are not actionable because they are prospective statements rather than statements of pre-existing fact. As set forth more fully herein, O'Neal put forth an abundance of evidence of other representations made after March 3, 2014 demonstrating GE Betz's representations that it performed chemical treatment on March 3, 2014. Accordingly, GE Betz's arguments set forth in its brief regarding statements "unfulfilled future promises" are invalid.[2]

Additionally, GE Betz contends that O'Neal failed to present evidence "GE Betz negligently misrepresented it was Servicing the Water Treatment System *Pursuant to a Contract with Owner*." (Def.'s Initial Brief, p. 8). It is true that O'Neal presented evidence at trial that GE Betz did make such a representation. O'Neal employees testified that O'Neal "was told... by GE Betz" that it was providing chemical treatment to the Cooling Water System pursuant to an existing contract. (Trial Tr. 148:15-149:05; 214:09-215:17). However, this representation is not the crux of O'Neal's argument at trial as to GE Betz's primary misrepresentation. Whether GE Betz did or did not have a contract with the Owner relating to the LNG Project prior to August 2014 is immaterial to the jury finding GE Betz liable under a theory of negligent misrepresentation. Instead, as set forth more fully below, whether under a contract, marketing, or some other arrangement, GE Betz's actionable representations, at a minimum, arise out of its false representation to O'Neal that it introduced corrosion inhibitor into the Cooling Water System on March 3, 2014 and subsequent statements that it had provided chemical treatment of the Cooling Water System.

[2] While statements may not give rise to the type of representation required for a negligent misrepresentation claim, such statements certainly speak to the reasonableness of O'Neal's reliance on GE Betz's representations.

2. *GE Betz Negligently Misrepresented Its Actions Regarding the Chemical Treatment of the Cooling Water System on March 3, 2014.*

GE Betz's first made the representation that it introduced corrosion inhibitor into the Cooling Water System in an email dated March 4, 2014 from Scott Rutledge to Jim Sweatt, Construction Manager for O'Neal, in response to an O'Neal request for a report where he stated as follows:

> Typically these reports will be returned within 24-48 hours. Additionally with the information that the LNG tower will be drained and cleaned one more time we will need to recharge system (sic) and come back and test residuals at that time. At that time, we will provide a full report so please just let me know when this will be done. ***Of course, corrosion coupons were placed yesterday and controller was calibrated. Chemistry to include biocide and corrosion inhibitor fed to the system as pumps were primed and dialed in for proper feed.***

(Pl.'s Ex. 13) (emphasis added). O'Neal's Project Manager, Lonni Blanton, testified at trial that based on Mr. Rutledge's email and communications, he understood that GE Betz "set up the system, calibrated the system, and he's [Mr. Rutledge] coming back to continue ongoing testing." (Trial Tr. 215:18-220:05). At trial, Mr. Rutledge testified consistent with his email that on March 4, 2014, he came to the LNG site and injected chemicals, including a corrosion inhibitor, into the Cooling Water System. (Id. at 431:05-432:03; 435:17-437:10; 438:24-439:20). When asked about his email on March 4, Mr. Rutledge testified as follows:

> Q – At the bottom, Mr. Sweatt's asking for a report?
>
> A – Yeah.
>
> Q – And you responded to him and said typically these reports will be returned within 24 to 48 hours. Now, did you ever provide him with the report?
>
> A – I don't think that I did, *but I did show them where I had done some residual testing and the blank that we use with the testing equipment, it will get, like, a yellow color. So you're basically kind of saying, "Okay. There's chemical in the system."*

(Id. at 439:10-20) (emphasis added). On cross-examination, Mr. Rutledge further confirmed his testimony that he injected corrosion inhibitor into the Cooling Water System on March 3 when he testified as follows:

> Q – So when you came out there for your part of this project on March 3 ---when you came out there on March 3, I think your testimony was you plugged the pumps into the pigtails on the controller; right?
>
> A – Correct.
>
> Q- You plugged in the controller –
>
> A- Correct.
>
> Q—Right? You got the controller calibrated and up and running –
>
> A – Correct.
>
> Q- --Right? And then you got – you fed chemicals?
>
> A- Correct.
>
> Q – --Right? And I think you told me in your deposition that you got everything in terms of the chemicals in the bell-shaped curve; right?
>
> A – Got it started. Yeah. Yes.
>
> Q - I think your testimony in your deposition—and we can look at it – was that you got all – I mean, whatever the readings were, whether it was pH or oxygen content or corrosion inhibitor or biocide, you got all of those—I think the words you kept using in your deposition was "in the bell-shaped curve." You got them in the acceptable range. That's what you did on March 3 according to your—that your testimony that you did on March 3; right?
>
> A – Agreed.

(Id. at 476:15-477:15).

Furthermore, after corrosion was discovered in the Cooling Water System in July 2014, Mr. Rutledge stated in a meeting on August 5, 2014 that "monitoring and treatment has been taking place periodically since the initial startup of the system." (Pl.'s Ex. 21). The jury did not believe him.

Analysis by O'Neal's experts established that the foregoing representations were objectively false. O'Neal's corrosion engineering expert, Dr. Van Der Schijff, testified with regarding to the July 2014 corrosion: "I came to the conclusion that there was no inhibitor in the water to slow down and control the rate of corrosion." (Trial Tr. 330:18-20). Dr. Van Der Schijff further confirmed that chemical testing on metal heat exchanger tubes following the discovery of corrosion would have detected corrosion inhibitor had it been actually installed on March 3, 2014 as Mr. Rutledge claimed. (Id. at 333:11-334:10; Pl.'s Ex. 22). More simply put, Mr. Rutledge never introduced corrosion inhibitor into the Cooling Water System contrary to his representations confirmed in writing by email on March 4, 2014 and in meeting minutes with O'Neal on August 5, 2014.

GE Betz's argument as to its representations therefore undermines the testimony of its main witness. Taking the testimony of Mr. Rutledge together with GE Betz's arguments on appeal requires that the court believe all of the following: (1) that Mr. Rutledge performed chemical treatment on March 3; (2) that he properly performed chemical treatment on March 3, 2014; and (3) that no person on behalf of GE Betz ever made any representations of those actions. If GE Betz in fact provided competent chemical treatment on March 3, 2014, as its witness testified, then there would be no reason for GE Betz to disavow making any such representation to that effect.

B. Regarding the Corrosion Discovered in August 2015, GE Betz Represented that It Was Responsible for Chemical Treatment of the Cooling Water System Between August 2014 and August 2015.

After the corrosion was discovered in July 2014 and GE Betz, for the first time, claimed that it had no obligation to provide chemical treatment of the Cooling Water System because it did not have a contract, the Owner's representative ordered GE Betz to begin providing chemical treatment of the Cooling Water System from that point forward. (Trial Tr. 409:11-411:12; Def.'s Ex. 18). Following July 2014, there is no dispute that GE Betz was actually under a contract with

the Owner to perform chemical treatment of the Cooling Water System. (Trial Tr. 457:17-462:03; 500:12-17). By email dated August 21, 2014, GE Betz stated in an email to O'Neal and Owner:

> Per our conversations yesterday, GE Betz will be [on] site for the start-up of the LNG system to initially charge the system and confirm the chemical residuals in the tower. Additionally we will continue regular service and monitoring as we would with systems that we have an agreement to treat which includes monitoring, corrective actions (if necessary) and reporting of our findings and actions.

(Pl.'s Ex. 25).

GE Betz's argument on appeal entirely ignores the 2015 corrosion. No party disputes that GE Betz had a contract to provide chemical treatment for the Cooling Water System after August 2014. This well-established fact clearly gives rise to an actionable representation under a negligent misrepresentation theory.

II. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THAT O'NEAL JUSTIFIABLY RELIED ON GE BETZ'S REPRESENTATIONS

A. Jury Verdicts as to Reasonableness Should Be Afforded Considerable Deference on Appeal.

GE Betz wrongfully argues that O'Neal failed to provide sufficient evidence that O'Neal's reliance on the representations made by GE Betz concerning the chemical treatment of the Cooling Water System were not reasonable. The term "reasonable" in and of itself implies a question of fact that should be left to the sound discretion of the jury. See Unlimited Servs., Inc. v. Macklen Enters., Inc., 303 S.C. 384, 387, 401 S.E.2d 153, 155 (1991) (stating "[t]he general rule is that questions concerning reliance and its reasonableness are factual questions for the jury.") The Supreme Court of South Carolina has repeatedly emphasized the fact-dependent nature of a "reasonableness" determination in the context of misrepresentation, stating as follows:

> Our jurisprudence reflects a preference for a case by case approach to the question of whether a hearer's reliance on misrepresentations...is reasonable. That is so because 'fraud...assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and all the facts and circumstances peculiar to each case to bear heavily

upon the conscience and judgment of the court or jury in determining its presence of absence.'

Moseley v. All Things Possible, Inc., 395 S.C. 492, 498, 719 S.E.2d 656, 659 (2011) (quoting Conner v. City of Forest Acres, 348 S.C. 454, 466, 560 S.E.2d 606, 612 (2002). Accordingly, in this case where the jury awarded a verdict that presumes that O'Neal's reliance is reasonable, the jury's decision should be afforded considerable deference.

B. Aside from the Deference Afforded to the Jury as to a Reasonableness Determination, O'Neal Presented a Substantial Amount of Evidence for the Jury to Conclude that O'Neal's Reliance on GE Betz's Representations That It Performed Chemical Treatment of the Cooling Water System Was Reasonable.

Courts considering the element of justifiable reliance have relied on the relative access to truthful information between the parties. See Hit Prods Corp. v. Anchor Fin. Corp., 111 F. Supp.2d 723, 727 (D.S.C. 1999). In Hit Products, the Court explained that reliance is justifiable "only if the relationship of the parties is such that the defendant occupies a superior position to the plaintiff with respect to the knowledge of the truth of the statement made." Id. at 727 (quoting Harrington v. Mikell, 321 S.C. 518, 469 S.E.2d 627, 629 (Ct. App. 1996). In that case, the court ultimately concluded that plaintiff's reliance on a defendant-bank's statement of the financial viability of a joint venturer was not justifiable where the manufacturer had been doing business with the joint venturer for much longer than the bank, knew about large unreported outstanding debts of the joint venturer and had previously entered into another joint venture with the company. Id. at 727–28. Based on those factors, the Court determined that the plaintiff had access to information concerning the financial viability of the joint venturer that was superior to the bank, who only had access to the joint venturer's reported financial records. Id.

In this case, for nearly two years leading up to commissioning the chemical treatment for the Cooling Water System, O'Neal made known its understanding that GE Betz was providing

such services pursuant to some arrangement with the Owner. GE Betz often affirmed O'Neal's understanding and never corrected O'Neal.

As early as May 2012, after O'Neal was directed to contact GE Betz for water treatment, Phil McCollum, O'Neal's lead designer, testified as follows about a conversation between him and Jason Howell, a GE Betz employee, in May 2012:

> Q – What discussions did y'all have about GE Betz's involvement at the GE facility, the GE campus generally?
>
> A- That he currently was doing all of the treatment for all of the cooling towers on that [LNG Project] site. They had existing contracts in place to do all of that. They had a prearranged program that they agreed upon with GE Turbine [Owner] to—as far as the equipment they used for treating their cooling towers.
>
> Q – So what did he tell you specifically about how they planned to handle this LNG Project?
>
> A – That this would just be an extension of their existing contract.

(Trial Tr. 186:23-187:11; 191:11-24).

Mr. McCollum repeated this understanding numerous times, in writing, to various representatives of GE Betz without ever being corrected. On June 5, 2012, GE Betz characterized its intentions with respect to chemical treatment for the LNG Project as follows: "I plan on mirroring the current GTTL chemical feed system and will recommend for the new LNG Site." (Pl.'s Ex. 3). Accordingly, over the following several months, Mr. McCollum forwarded technical information about the Cooling Water System design to GE Betz for purposes of giving them the opportunity to plan for their chemical treatment system. (Trial Tr. 192:16-193:06; Pl.'s Ex. 3; Pl.'s Ex. 4). No GE Betz employee objected to receiving this information or told O'Neal that they needed to have a contract in place prior to chemically treating the Cooling Water System.

In June 2013, Mr. McCollum forwarded Scott Rutledge the contact information for O'Neal's Construction Manager on the LNG Project "so you two can discuss when they will be

ready for installation of the chemical treatment equipment and/or the need for items you will be providing that will need to be installed." (Pl.'s Ex. 5). Mr. Rutledge responded by specifically asking whether GE Betz had previously provided a quote. (Id.). In response, Mr. McCollum stated in part "[t]he costs (sic) was not to be billed to O'Neal but was to be charged against the standing contract GE Betz has with GE Energy since it is an extension of the existing program GE Betz provides for them." (Id.) Mr. Rutledge offered no objection. (Trial Tr. 195:23-197:23). Several months later, Mr. McCollum again stated "I was originally informed that the cost to provide the components of this [chemical treatment] system would be borne by GE Energy Systems as an addition to the current contract with GE Betz Systems for the treatment for the other cooling towers on the site." (Pl.'s Ex. 7). Mr. McCollum received no objection to his stated understanding. (Trial Tr. 197:24-199:21).

In October 2013, O'Neal entered into a purchase order with GE Betz for certain chemicals, pumps and equipment for the chemical treatment of the Cooling Water System. GE Betz offered no quote for services or made any effort to disavow O'Neal's stated understanding that GE Betz was responsible for providing chemical treatment of the Cooling Water System.

As O'Neal approached planned commissioning of the Cooling Water System in 2014, GE Betz continue to behave as if it intended to provide chemical treatment for the Cooling Water System by regularly participating in discussions about chemical treatment. (Trial Tr. 214:09-215:17). Mr. Rutledge willingly came to the site on March 3, 2014 and unequivocally represented that he started the chemical treatment of the Cooling Water System. (Pl.'s Ex. 13). South Carolina courts have held that where a plaintiff specifically inquires about a matter to the defendant, the plaintiff is justified in relying on the defendant's reply. Kelly v. South Carolina Farm Bureau Mut. Ins. Co., 316 S.C. 319, 325, 450 S.E.2d 59, 63 (Ct. App. 1994).

Furthermore, after the Cooling Water System was commissioned in early March, Mr. Rutledge continued to communicate with O'Neal about the chemical treatment of the Cooling Water System. (Pl.'s Ex. 14). Mr. Blanton testified that Mr. Rutledge directed O'Neal several times to flush the Cooling Water System out and O'Neal followed those recommendations. (Id. at 223:12-224:07). Mr. Rutledge also made regular visits to the site. (Trial Tr. 226:24-227:10).

When corrosion was discovered on July 7, O'Neal's witnesses reported that Mr. Rutledge "seemed a bit nervous" and was making every effort to assuage the fears of the O'Neal employees on site. (Id. at 89:10-17; 283:07-25). Not once did Mr. Rutledge tell anyone on site that GE Betz had not been responsible for the chemical treatment of the Cooling Water System. (Id. at 89:18-90:08). It was not until August 2014, when O'Neal demanded that GE Betz become financially responsible for the corrosion that GE Betz first claimed that it had no obligation to provide chemical treatment because it had no contract. (Id. at 566:07-13). O'Neal's Engineering Project Manager summed it up best when he testified regarding GE Betz's involvement in the chemical treatment of the Cooling Water System prior to July 2014: "[i]f they didn't have a contract they acted like they had one. They certainly performed the services as if they had a contract." (Id. at 108:12-14).

GE Betz's failure to object to O'Neal's stated understanding and participation in the chemical treatment process becomes even more reasonable when the context of GE Betz's business interests comes to light. Mr. Rutledge confirmed that GE Betz serviced numerous other cooling water systems at the GE Facility and did not want to give another water treatment contractor the opportunity to come in and interfere with their business. (Id. at 474:14-475:20). It is reasonable to then conclude that, even without a contract, GE Betz would be motivated to provide chemical treatment services in the hopes of securing the water treatment contract in the future.

Aside from GE Betz's repeated statements and actions that would reasonably lead O'Neal to conclude that it was assuming responsibility for the chemical treatment for the Cooling Water System, O'Neal's witnesses testified that in their extensive experience in industrial construction, a contractor like O'Neal would not typically enter into a contract for water treatment, and instead, that arrangement would be made by the owner. Phil McCollum testified that based on his 35 years' experience in the industrial construction industry: "when we go onto a site where there is an existing service contract like that, I've never known it to be handled any other way." (Id. at 191:21-192:11). Mr. McCollum further testified that he has "never" seen an industrial contractor contract for chemical treatment services with a water treatment contractor. (Id. at 199:22-200:05). Mr. Blanton, O'Neal's Project Manager similarly testified that O'Neal "never" sees copies of contracts between owners and their vendors. (Id. at 215:04-06). Under these circumstances, O'Neal's ultimately reliance on GE Betz's express statements and conduct regarding its chemical treatment of the Cooling Water System is easily justified.

C. GE Betz's Arguments in Its Brief Concerning Reasonableness Do Not Undermine the Jury's Verdict.

GE Betz wrongfully contends that O'Neal's stated unfamiliarity with chemical treatment of Cooling Water Systems undercuts the reasonableness of its reliance on GE Betz. On the contrary, O'Neal testified that it routinely relies on others to provide chemical treatment and typically would not expect to be a party to contracts between the owner and its vendors for chemical treatment. Such reliance, particularly in the face of such considerable statements and actions to the contrary, can hardly be considered a lack of diligence by O'Neal.

In addition, GE Betz points to a communication between the Owner and O'Neal's then-project manager, Jay Hendrix, where the Owner directed GE Betz to contact O'Neal for a contract regarding chemical treatment as definitely establishing lack of reasonableness on the part of

O'Neal. (Def.'s Ex. 5). This email alone does not remove the more than two years of communication and actions between GE Betz and O'Neal referenced above where GE Betz assumed the role of chemical treatment contractor. Furthermore, after this email, O'Neal did enter into a purchase order with GE Betz for approximately $10,000 of chemicals, pumps and a controller for the chemical treatment system. (Trial Tr.78:03-80:12). GE Betz did not quote chemical treatment services separately or at any point prior to O'Neal's demand that GE Betz become financially responsible for the repairs state that it would not provide services without a contract with O'Neal. (Id. at 107:10-109:06). O'Neal could have reasonably concluded, therefore, that it had followed the Owner's directive by purchasing the chemicals and equipment necessary for GE Betz to provide chemical treatment for the Cooling Water System. If any party demonstrated a lack of diligence, it was GE Betz.

Moreover, all of GE Betz's arguments on appeal overlook the objective fact that GE Betz *did provide* chemical treatment for the LNG Project under a contract with the Owner after August 2014. When corrosion was found again in 2015, the parties did not have any dispute about who was responsible for the chemical treatment of the Cooling Water System. GE Betz failed to offer any theory as to why it should not be held responsible for the 2015 corrosion.

The cases cited by GE Betz in support of its lack of justifiable reliance are meaningfully different than the facts of present case. The cases cited by the Appellant involve representations of value in heavily negotiated sales transactions. GE Betz first cites King v. Oxford, where the court held that the seller of a business was not entitled to rely on alleged statements made by the buyer concerning the value of the seller's business because the seller was clearly in the best position to assess the value of his business and the parties were engaged in a negotiated arms' length business transaction. 282 S.C. 307, 311, 318 S.E.2d 125, 127–28 (Ct. App. 1984). Similarly, the alleged

misrepresentation in AMA Management v. Strasburger arose out of statements of opinion in a heavily negotiated sales transaction between sophisticated parties. Id. at 224–25, 420 S.E.2d 868, 874–75. The present case cannot be reduced to a simple case of "buyer beware" in a negotiated transaction. Moreover, O'Neal and GE Betz's status as sophisticated business entities does not relieve GE Betz from explicit untruthful representations. In the present case, O'Neal was not the party in the best position to know whether GE Betz actually performed the proper chemical treatment for the cooling water system. GE Betz, the experts in chemical treatment of cooling water, explicitly represented to O'Neal that they had performed the necessary treatment of the Cooling Water System. It was not unreasonable for O'Neal to rely on GE Betz under the facts of the case.

CONCLUSION

For the reasons stated herein, this Court should affirm the judgment of the circuit court.

December 27th, 2019

Respectfully submitted,

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Civil Action No. 2015-CP-23-00973

Appellate Case No. 2019-000701

O'Neal Constructors, LLC.....Respondent,

v.

GE Betz, Inc. d/b/a GE Water & Process Technologies ..... Appellant.

PROOF OF SERVICE

I, the undersigned employee of Harper Lambert, P.A. do hereby certify that I have caused the below referenced to be served via U.S. mail, postage prepaid, to all parties of record at the address(es) shown below:

1. Initial Brief of Respondent, O'Neal Constructors, LLC;
2. Respondent O'Neal Constructors, LLC's Designation of Matter to be Included in the Record on Appeal; and
3. Respondent, O'Neal Constructors, LLC's Certification as to Designation of Matter to be Included in the Record on Appeal.

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December 27, 2019

VIA FEDEX
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29211

RE: ***O'Neal Constructors, LLC, Respondent v. GE Betz, Inc. d/b/a GE Water & Process Technologies, Appellant***
Greenville County Case No. 2015-CP-23-00973
Appellate Case No. 2019-00701

Dear Ms. Kitchings:

In connection with the above-referenced matter, enclosed please find the original and one copy of the following:

(1) Initial Brief of Respondent, O'Neal Constructors, LLC;

(2) Respondent O'Neal Constructors, LLC's Designation of Matter to be Included in the Record on Appeal;

(3) Respondent, O'Neal Constructors, LLC's Certification as to Designation of Matter to be Included in the Record on Appeal; and

(4) Proof of Service.

We appreciate you filing the enclosed originals and returning the filed-stamped copies to our office via the enclosed return envelope. If you have any questions regarding the enclosed filing, please do not hesitate to contact me.

Thank you for your consideration in this matter.

Sincerely,

HARPER LAMBERT, P.A.

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NWL/ljh
Enclosures

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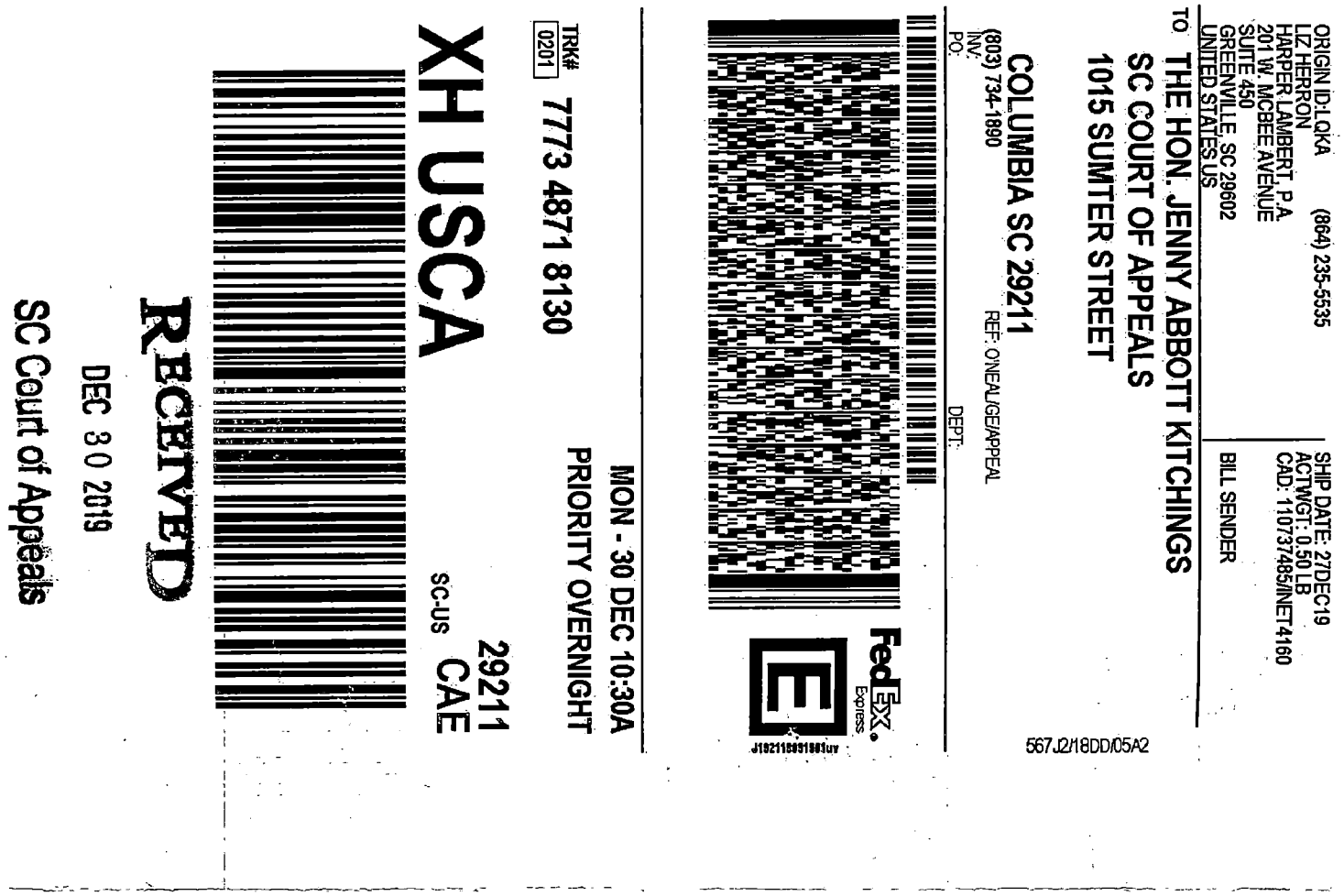
Ashley B. Stratton, Esq. (via e-mail, w/enc.)
Wesley B. Lambert, Esq. (via e-mail, w/enc.)



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