

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Order (S.C. Ct. App. Filed Feb. 5, 2020)

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SC Court of Appeals

The Clubs at Cherokee Valley Property Owners' Association.....Petitioner,

v.

SK Builders, Inc.; Devoro Homes, LLC; Westchester Jordan's
Pass, LLC; Westchester Ochlockonee, LLC; and RMDC, Inc. Respondents.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made to the Court of Appeals on October 25, 2019, and denied by an Order filed on February 5, 2020.

QUESTIONS PRESENTED

- I. **Did the Court of Appeals err in dismissing Petitioner's appeal on the grounds that the lower court's Order, from which the appeal was being taken, was subject to the appellate limitations set forth in S.C. Code § 15-48-200(a), where the claims being appealed were contractually exempted from arbitration?**

- II. **Did the lower court err in disregarding the unambiguous contractual rights of Petitioner in ordering binding arbitration of claims expressly exempted by the parties from arbitration under the guise of judicial economy?**

STATEMENT OF THE CASE

Respondents are investors, developers and/or residential builders, undertaking development, construction and sales activities related to various lots within a real estate development known as "The Clubs at Cherokee Valley" or "The Summit at Cherokee Valley" (hereinafter "Cherokee Valley"). In the underlying action, The Clubs at Cherokee Valley Property Owners' Association ("Petitioner") sought to enforce against Respondents certain of the terms and provisions set forth in the Declaration of Covenants, Conditions, and Restrictions for Cherokee Valley Phase IV, The Summit Section I and Section II (the "Covenants"), recorded with the Greenville County Register of Deeds in Deed Book 2210, at page 287. (See relevant portions at App. pp. 27-33). Petitioner's claims can be readily delineated into three distinct categories: *First*, Petitioner's Complaint stated breach of contract and nuisance claims deriving from Respondents' violations of design guidelines set forth in the Covenants (the "Construction Claims"). *Second*, Petitioner's Complaint stated a breach of contract claim for other violations of the Covenants including, without limitation, failure to pay assessments, late fees, interest and

collection costs (the “Assessment Claims”). Collectively, Respondents own 37 lots in the Cherokee Valley subdivision (the “Subdivision”), and Respondents’ regular assessment debt exceeds \$15,000.¹ The Assessment Claims constitute lien claims pursuant to the Covenants (See Covenants Section 11.2, App. pp. 28-29), and Petitioner’s remedy is to seek foreclosure of the lien assessments in the same fashion as a mortgage foreclosure. (See Covenants Section 11.10, App. pp. 30-31). *Third*, Petitioner’s Complaint sought injunctive relief (the “Injunction Claims”) to preserve the status quo and to prevent escalation of damages from the Covenant violations during the pendency of litigation.

In response to the Complaint, Respondents moved on or about February 22, 2019, to stay the litigation and to compel binding arbitration pursuant to the South Carolina Uniform Arbitration Act, S.C. Code Ann. §15-48-10 (1976), and Article 13, section 13.1 of the Covenants (see App. p. 32), which provides for preliminary negotiations and arbitration of *non-exempt* claims relating to the Covenants. Importantly, however, section 13.2 of the Covenants specifically delineates certain claims that are exempt from the South Carolina Uniform Arbitration Act and the arbitration provisions and procedures of Sections 13.1 and 13.3. Among those exempted claims are:

- (a) any suit by the Association against a Bound Party to enforce any Assessments or other charges hereunder, and
- (b) any suit by the Association to obtain a temporary restraining order (or equivalent equitable relief) and other relief the court may deem necessary in order to maintain the status quo and preserve any enforcement power of the Association hereunder until the matter may be resolved on the merits . . .

(See Covenants, Article 13, Section 13.2(a) and (b), App. p. 32).

¹ This amount reflects a balance in default since January of 2019.

A hearing was held on Respondents' motion to stay and to compel binding arbitration on April 25, 2019, before The Honorable Robin B. Stilwell. Respondents contended during the hearing that all claims set forth in Petitioner's Complaint were subject to the binding arbitration provisions of the Covenants, while Petitioner argued that both its Assessment and Injunction Claims clearly fall under the exempt claim provisions of section 13.2 and are not subject to arbitration. After considering competing Orders submitted by Petitioner and Respondents, the lower court *conceded* the clarity of section 13.2 in exempting the claims listed thereunder from arbitration, stating "I have read you [sic] respective orders. I agree that those claims that are exempt under 13.2 are exempted from arbitration" (E-mail from Judge Stilwell, App. p. 35). Further, the Order adopted by the lower court also expressly stated that the lower court recognized that section 13.2 contemplated "certain exemptions, including the collection of assessments and suits 'to obtain a Temporary Restraining Order.'" (See Order Staying C.A. No. 2018-CP-23-05074 and Compelling Binding Arbitration, App. pp. 5-9.). Yet, the lower court, in granting Respondents' motion to stay and compel arbitration, decreed that the claims even it recognized as exempt *also* be subject to binding arbitration, based on the court's own views of economy, essentially rewriting a contract for the parties unsupported by consideration and contradicting the will and interests of Petitioner and its constituent members.² (App. p. 7 ("As a matter of economy, it simply makes sense to vet these issues in one proceeding."))

Petitioner timely filed a Motion for Reconsideration/to Alter or Amend Judgment, pursuant to Rule 59(e). (See App. pp. 10-16). After consideration, the motion was denied by Order entered on September 17, 2019. (See App. pp. 17-18). Two days later, Petitioner served a notice of appeal to the Court of Appeals, received on September 23, 2019. (See App. pp. 1-4).

² The only exception made by the lower court was to allow Petitioner to move the court for a Temporary Restraining Order, as specifically allowed under the Covenants.

Prior to briefing, the Court of Appeals issued an Order, filed October 16, 2019, dismissing the appeal on the grounds that S.C. Code Ann. §15-48-200 (2005), which sets forth types of arbitration orders that are appealable, does not include an order compelling arbitration. (See App. p. 19). A Petition for Rehearing, filed on October 25, 2020, was denied by Order filed on February 5, 2020. (See App. p. 41).

ARGUMENTS

The decision to review a final decision of the Court of Appeals is a matter for this Court to consider in its discretion, and although the appellate court rules give examples of the circumstances or character of reasons that will be considered in exercising that discretion, those examples do not fully control or limit the Court's discretion or its power to grant review. See Rule 242(a) and (b), SCACR. Even if constrained, however, to consider only those character of reasons set forth in Rule 242(b), SCACR, the present case implicates issues touching on multiple of the expressly enumerated reasons, thereby justifying this Court's use of its discretion to grant certiorari, to consider the arguments presented to the lower court and Court of Appeals on the merits, and to reverse the decision of the lower court.

As an initial matter, the circumstances in which Petitioner presently finds itself present the novel issue of the lower court's ability to acknowledge and yet ignore contractually agreed rights and remedies in the name of judicial economy. That the lower court had no legal basis or authority to do so should be obvious. That problem was then further compounded when the Court of Appeals accepted the lower court's order compelling arbitration as a whole without acknowledging or considering that certain of the Petitioner's claims were contractually exempt from arbitration and therefore immune from the limitations on appealability set forth in §15-48-200 of the South Carolina Uniform Arbitration Act. The Court's refusal to carve out and

independently consider Petitioner's Assessment and Injunction Claims, as Petitioner had done by way of unambiguous contractual agreement, leaves Petitioner without a remedy to seek redress for the prejudice that it will suffer from the denial of access to the legal procedures, processes and remedies for which it had contractually bargained.

Most significantly, however, there can be no other conclusion but that the decision rendered by the lower court, and dismissal of Petitioner's appeal from that Order, have run roughshod over basic and constitutional freedoms of contract. The right to freedom of contract is no small part of a citizen's liberty, and courts must enforce and maintain a contract between two experienced parties. *See Craig v. U.S. Health & Acc. Ins. Co.*, 80 S.C. 151, 61 S.E. 423, 424 (1908) (freedom of contract should be preserved inviolate; it concerns not only constitutional rights but, in the highest degree, the business prosperity of the people). While Petitioner appreciates the lower court's stated desire to serve economy and to avoid the perceived difficulty of claims segregation, the Order goes much too far by modifying private contract rights, which the lower court completely lacked the power and authority to do. *See Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987) ("A restrictive covenant will be enforced if the covenant expresses the party's intent or purpose.... Courts shall enforce such covenants unless they are indefinite or contravene public policy." (emphasis added)); *McPherson v. J.E. Surrine & Co.*, 206 S.C. 183, 206, 33 S.E.2d 501, 510 (1945) ("It is not the province of the court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves, and, in the absence of any ground for denying enforcement, to enforcing or giving effect to the contract as made.") (quoting 17 C.J.S., Contracts, § 296, pp. 702-707); *Stonhard, Inc. v. Carolina Flooring Spec., Inc.*, 366 S.C. 156, 160, 621 S.E.2d 352, 354 (2005) (holding that it is beyond the authority of the court to

craft contract terms inconsistent with original intentions of the parties). Indeed, the lower court's Order even acknowledges that the Assessment Claims are exempt and not subject to arbitration (Order p. 3, citing Article 13 of the Covenants), and yet, the Order compels binding arbitration in spite of such plain and unambiguous contract language under the misdirected guise of judicial economy.

Based on the foregoing, Petitioner submits that there are special and important reasons for the Court to grant review and to further consider the arguments of Petitioner as set forth more fully below.

I. Petitioner's actions for foreclosure of its assessment liens and for injunctive relief claims are contractually exempt from arbitration and thus also from the appeal constraints imposed by section 15-48-200(a) of the South Carolina Uniform Arbitration Act.

Petitioner's actions for foreclosure of its assessment liens and injunctive relief claims were contractually agreed by the parties to be exempt from arbitration, thereby taking such claims *outside of* the ambit South Carolina Uniform Arbitration Act and any limitations imposed by the Act regarding the types of arbitration orders subject to appeal. South Carolina Code Ann. §15-48-10(b) provides that the Act shall not apply to "(1) Any agreement or provision to arbitrate in which it is stipulated that this Chapter shall not apply...." Here, the matters Petitioner seeks to exclude from arbitration are expressly exempted from arbitration by the plain and unambiguous language contained in the Covenants, a matter *conceded* by the lower court in extraneous statements made to counsel, as well as in its Order compelling binding arbitration. As the Act does not apply to the exempted claims, neither do the specific provisions of S.C. Code Ann. §15-48-200, restricting appealability of orders relating to arbitration.

Rather, it is manifest that the Court has appellate jurisdiction of the matters at issue given the lower court's blatant disregard of the bounds of its authority in compelling arbitration of

claims expressly exempted by an unambiguous contract and, in doing so, impermissibly stripping Petitioner of its significant and important contractual rights. Pursuant to the Covenants, Petitioner was entitled to particular remedies and procedures as a matter of right, and the lower court's refusal of the remedies and procedures to which Petitioner was entitled constitutes the denial of a substantial right that is immediately appealable under S.C. Code Ann. §14-3-330. *See Blakely & Copeland v. Frazier*, 11 S.C. 122, 135 (1878) (it may be concluded that whenever a substantial right of the party to an action, material to obtaining a judgment in such action, is denied, a right of appeal lies to the Supreme Court). In essence, the lower court's actions are akin to having deprived Petitioner of the legal mode of trial to which it was entitled. South Carolina's appellate decisions are replete with cases holding that an order depriving a party of a legal mode of trial affects a substantial right, making the order denying those rights immediately appealable. *See, e.g., Creed v. Stokes*, 285 S.C. 542, 543, 331 S.E.2d 351, 352 (1985) (order referring boundary dispute to master was not interlocutory and was immediately appealable as it affected the mode of trial, a substantial right); *Pelfry v. Bank of Greer*, 270 S.C. 691, 244 S.E. 2d 315 (1978) (order of lower court denying compulsory reference of issues affected mode of trial and was appealable); *McLaurin v. Hodges*, 43 S.C. 187, 20 S.E. 991 (1894) (an order of reference that deprives a party of a mode of trial which the law allows him is an order which involves the merits and is appealable).

There were well-informed and important reasons for Petitioner to have carved out actions for collection of assessments and for injunctive relief from arbitration requirements. Actions on assessments are lien actions that require specialized support and process to ultimately manage the public sale of private assets. Indeed, even Rule 3 of the South Carolina Supreme Court's Alternative Dispute Resolution (ADR) Rules exempts foreclosure from its mandatory arbitration

requirements. Forcing the Petitioner to engage in a non-contractual and involuntary arbitration results in the delay and dilution of Petitioner's Assessment Claims, which are rather beyond debate or evidentiary contest³, causing an entire community to suffer Respondents' recalcitrance. There is a reason that subdivision covenants and restrictions uniformly elevate assessment claims by assigning to them lien security. Assessment claims are special; they are essential to the fiscal viability of a home owners association ("HOA").

Further, deferring the Assessment Claims deprives Petitioner of a measure of lien priority. Specifically, while Petitioner is being forced to proceed through the arbitration process, Respondents are free to continue conducting their business in a manner characterized by habitual and purposeful disregard for creditor's rights. As a consequence, other secured and unsecured creditors⁴ have opportunity to enlarge their liens, which take priority over the Assessment Claims. In other words, legal ascertainment of the Assessment Claims through the statutory foreclosure process is essential to protection of Petitioner's lien priority. Moreover, realization on Petitioner's Assessment Claims through foreclosure sale requires access to the Court or, by referral, to the Master in Equity, not an arbitrator. *See* Rule 71(a) SCRCF (providing that actions to foreclose liens be tried by the court and shall ordinarily be referred to a master, pursuant to Rule 53). It is only through statutory foreclosure that Petitioner is able to eliminate the equity of redemption.

Finally, and while not diminishing other potential adverse effects from taking away from Petitioner the rights to the judicial procedures and remedies to which it is entitled, an additional

³ The assessment rate of \$363.00 per year, per Lot, is the regular assessment amount. This amount is based on the Association budget presented and approved at the Association annual meeting, without objection. Not only is this amount small and in line with market rates, it is subject to the business judgment of the Association Board of Directors.

⁴ See Section 11.2 of the Covenants, which provides that the Assessment Claims are subordinate to the lien of unpaid taxes and Institutional Mortgage holders. Petitioner loathes to ponder the priority dispute that would be confronted were an intervening judgment creditor to appear. (See App. pp. 28-29).

prominent consequence is the adverse precedent it sets. HOA claims are commonplace, as evident by the volume of reported decisions involving HOAs. Nominal exposure to such decisions discloses that HOA claims are often met by estoppel and waiver defenses. Essentially, the Order of the lower court opens the door for a future covenant defalcator to urge that the HOA's prior failure to have protected its rights constitutes a waiver and entitles all subsequent owners a similar reprieve. *See Frampton v. South Carolina Dept. of Transp.*, 406 S.C. 377, 385-86, 752 S.E.2d 269, 274 (Ct. App. 2013) (failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue).

The lower court's Order similarly creates legal uncertainty and process questions as it relates to Petitioner's Injunction Claims, which were contractually agreed to be exempt from arbitration. Section 13.2(b) of the Covenants expressly provides that "any suit by the Association to obtain a temporary restraining order (or equivalent emergency equitable relief) and **any other relief the court may deem necessary in order to maintain the status quo and preserve any enforcement power of the Association** hereunder until the matter may be resolved on the merits pursuant to Section 13.3 below" is expressly and unequivocally exempted from arbitration. (See App. p. 32). Notwithstanding the foregoing contract language, the lower court's Order exempted from arbitration only motions for a Temporary Restraining Order. (See App. p. 7). The lower court offered the following explanation in its transmittal email of August 30, 2019: "I have read you [sic] respective orders. I agree that those claims that are exempt under 13.2 are exempted from arbitration. For instance, suits to obtain a 'Temporary Restraining Order' are specifically exempted; suits on *Injunction Relief* are not. There is a very practical distinction." (See App. p. 35) (Emphasis in original.) Petitioner submits that a Temporary Restraining Order ("TRO") is but a brand of injunction, one that endures for a short period,

following which the moving party must generally proceed to obtain a temporary or permanent injunction. While distinctions there may be, those distinctions are insignificant in comparison to the legal uncertainties Petitioner will confront on account of the Order.

Rule 65, SCRCF, allows for a TRO granted without notice to be followed by a hearing for temporary injunction not less than ten days after the TRO issues. Is the TRO hearing to be before the court, while the Temporary Injunction hearing goes to arbitration? Or perhaps the lower court intended that references to temporary restraint include temporary injunction, leaving only final orders for permanent injunctive relief to arbitration? In either scenario, uncertainties still persist. In the case of any injunction relief as might be awarded by an arbitrator, Petitioner would be required to enter the arbitrator's award as a judgment before contempt or other due process or enforcement powers would be available, further delaying relief otherwise available to Petitioner.

Further, Rule 65(c), SCRCF, allocates injunction bond setting to the discretion of the Court. There is no provision in Rule 65 for delegation of the Court's bond setting authority to an arbitrator. This naturally leaves the question of whether bond-setting is reserved to proceedings before the Court or not. If yes, then the parties are forced to present evidence and arguments in duplicate on the singular issue of bond amounts. The interests of economy and efficiency, touted by the lower court as grounds for discounting Petitioner's contractual rights, are simply not served by removing to arbitration any aspect of the processes and procedures of Rule 65, SCRCF.

In sum, because (1) Petitioner had carved out actions for collection of assessments and injunction claims from the ambit of the South Carolina Uniform Arbitration Act, and hence from any limitations contained therein on appeals that may be taken from orders relating to arbitration,

by way of unambiguous contract and (2) the lower court's Order has removed rights of the Petitioner material to obtaining a judgment in such actions, Petitioner has been denied a substantial right and is entitled to an immediate appeal.

II. The lower court grossly exceeded the bounds of its authority in expressly acknowledging, yet blatantly dispensing with, the contractual rights of Petitioner in ordering, under the guise of judicial economy, the binding arbitration of claims exempted from arbitration by the parties' agreement.

Petitioner does not seek to circumvent the bulk of the lower court's directive to the parties to engage in arbitration of claims for covenant compliance and adherence to construction standards (*i.e.*, its Construction Claims). Further, and contrary to the lower court's implications otherwise, the Assessment and Injunction Claims are in no way difficult to segregate from the Construction Claims. Assessments are noticed annually based on a time-tested budget for common area maintenance and Association administration expenses, and the obligation to pay assessments is independent of all other Covenant compliance obligations.⁵ Simply put, the asserted inter-connected relationship of the Assessment Claims and Construction Claims implied by the lower court does not exist.

Not only are Petitioner's claims easily severable, but more importantly, Petitioner's actions for foreclosure of its assessment liens and injunctive relief claims were contractually agreed by the parties to be exempt from arbitration. "Arbitration rests on the agreement of the parties, and the range of issues that can be arbitrated is restricted by the terms of the agreement." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596-97, 553 S.E.2d 110, 118 (2001); *see also Simmons v. Lucas & Stubbs Assocs., Ltd.*, 283 S.C. 326, 332-33, 322 S.E.2d 467, 470 (Ct.App. 1984). "Arbitration is a matter of contract, and a party cannot be required to submit to arbitration

⁵ See Section 11.10 of the Covenants: "No Owner may waive or otherwise escape liability for the Assessments provided for herein, including by way of illustration but not limitation, non-use of Common Areas or abandonment of his Lot..." (See App. pp. 30-31).

any dispute which he has not agreed to submit.” *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118; *see also New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 627, 667 S.E.2d 1, 4 (Ct. App. 2008); *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002) (arbitration under the FAA is a matter of consent and not coercion); *Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir. 1997) (“Even though arbitration has a favored place, there still must be an underlying agreement between the parties to arbitrate.”); *First Citizens Municipal Corp. v. Pershing Division, Donaldson, Lufkin & Jenrette Securities Corp.*, 546 F.Supp. 884 (N.D. Ga. 1982) (notwithstanding overriding federal policy favoring arbitration, scope of arbitration remains restricted to clear terms of submission agreement). To decide whether an arbitration agreement covers a particular dispute, the court must determine whether the factual allegations underlying the claim fall within the scope of the agreement, *irrespective* of the label given to the cause of action. *See Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118.

Here, the lower court actually acknowledged and agreed that the Assessment claims are exempt from arbitration provisions, but nonetheless ordered arbitration on the basis of perceived judicial economy. It was not the job of the lower court to determine whether arbitration of all claims at issue in the Complaint filed by Petitioner was more desirable, more efficient or more consistent with the policy of encouraging arbitration. Rather, it was the job of the lower court to have interpreted and to have enforced the contract as written, which the lower court failed to do.

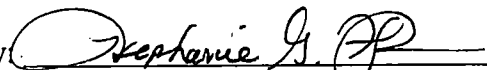
Moreover, the lower court’s Order serves to modify Petitioner’s contractual rights under the Covenants in other ways that are unduly detrimental to it and that strip away protections for which Petitioner had specifically bargained. Specifically, the Order detrimentally shifts the dispute cost allocations upon which the parties had contractually agreed. Section 11.10 of the Covenants taxes a non-paying lot owner to pay all costs of an action for collection of

assessments. (See App. pp. 30-31). Here, however, the lower court has ordered that the arbitration costs be split between the parties, shifting some of the burden to Petitioner for which it had not specifically bargained. In short, despite that courts are not permitted to alter a contract by construction or make a new contract for the parties, the lower court has defeated the clearly expressed intentions of the parties without justification permitted under any legal principles. Such a blatant disregard for Petitioner's constitutional freedoms of contract cannot be permitted to stand.

CONCLUSION

Because the decisions of the lower court and Court of Appeals have eviscerated Petitioner's fundamental constitutional right to freedom of contract by virtue of nothing more than perceived judicial economy, there are special and important reasons for this Court to exercise its discretion and grant relief to Petitioner. The Clubs at Cherokee Valley Property Owners' Association respectfully requests that this Court grant certiorari, reverse the decisions of the Court of Appeals and lower court, and restore the contract rights of the parties in accordance with the Covenants.

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In The Supreme Court

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Robin B. Stilwell, Circuit Court Judge

Order (S.C. Ct. App. Filed Feb. 5, 2020)

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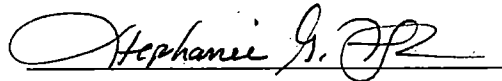
PROOF OF SERVICE

The undersigned employee of the law offices of Fox Rothschild LLP, attorneys for Petitioner, does hereby certify that service of the foregoing *Petition for a Writ of Certiorari* was made on all counsel of record, specified below, by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

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This the 5th day of March, 2020.





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March 5, 2020

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MAR 06 2020

SC Court of Appeals

VIA FEDERAL EXPRESS

Honorable Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: The Clubs at Cherokee Valley Property Owners' Association - Appellants
vs. SK Builders, Inc.; Devoro Homes, LLC; Westchester Jordan's Pass, LLC;
Westchester Ochlochkonee, LLC and RMDC, Inc. - Respondents
Appellate Case No. 2019-001622

Dear Ms. Kitchings:

Enclosed for filing is an original and one copy of a Petition for a Writ of Certiorari and Proof of Service in the above case, which we are also filing with the South Carolina Supreme Court. We would greatly appreciate your returning a date-stamped copy of this filing to us in the envelope provided. Thank you for your assistance.

Very truly yours,

Stephanie G. Flynn
FOX ROTHSCHILD, LLP

Enclosures

cc w/encl.:

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MAR 06 2020

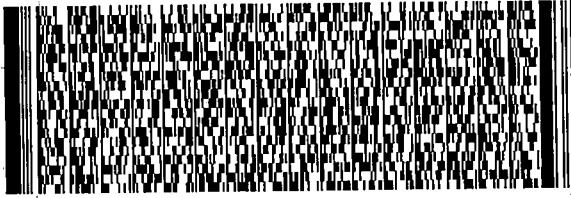
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