THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master-In-Equity and Special Circuit Court Judge

Case No. 2016-CP-07-02274

Stephanie M. McDew a/k/a Stephanie McDew Schoumacher, ... Appellant,

V.

Frieda P. McDew a/k/a Frieda McDew Shorter, ... Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This case involves a property dispute between two sisters- Stephanie McDew Schoumacher ("Ms. Schoumacher" or "Appellant") and Frieda McDew Shorter ("Ms. Shorter" or "Respondent")- concerning commonly-owned real property and improvements located at 17 Bradley Beach Road, Hilton Head Island, Beaufort County, South Carolina (the "Property"). The Property consists of three adjacent lots with a beach house (the "House") located on the middle lot. On October 21, 2016, Appellant brought this case alleging causes of action for ...(See Camplaint .) Respondent timely filed an Answer and counterclaim for adverse possession, and to recover property's expenses. (Answer & Countercl., ¶,¶ 12-19.) (R.p.25) Before trial, Appellant filed an Amended Complaint setting out an additional claim for ouster damages. (Amend. Compl. ,r,r 26-31.) (R.p. 35). Respondent filed an Amended Answer and Counterclaim reiterating her counterclaim for adverse possession and adding a claim for quantum meruit. (Amend. Answer & Countercl. ¶,¶ 14-21.) (R.p.p. 47-48)

On March 18, 2019, the Master-In-Equity held a bench trial and, thereafter, entered an Order on September 19, 2019 ("Order") denying Appellant's claim for ouster damages, denying Respondent's counterclaim for adverse possession, declaring the parties are tenants in common, and requiring Appellant to pay certain expenses related to the Property. (See Order, Sept. 19, 2019.) (R.p.p. 5-13) Appellant filed a Motion for New Trial and Reconsideration. (See Mot. for New Trial.) (R.p.p. 312-325) The Master-In-Equity, however, entered an order denying Appellant's motion on November 25, 2019. Appellant then timely served her Notice of Appeal on December 18, 2019, and the Notice was filed by the Court of Appeals the same date.

STANDARD OF REVIEW

A claim for ouster is one in equity. See Parker v. Shecut, 359 S.C. 143, 597 S.E.2d 793 (2004) (hereinafter "Parker If'); Parker v. Shecut, 340 S.C. 460, 478, 531 S.E.2d 546,556 (Ct. App. 2000) *rev'd on other grounds*,,, 349 S.C. 226, 562 S.E.2d 620 (2002); *Laughon v. O'Braitis*, 360 S.C. 520, 524, 602 S.E.2d 108, 110 (Ct. App. 2004) (all three cases applying the equitable standard of review to similar claims involving ouster). In an appeal from an equitable action, this Court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. Id. Factual findings and legal conclusions in an equitable action are reviewed de novo. Lewis v. Lewis, 392 S.C. 381,386, 709 S.E.2d 650,652 (2011). "De nova review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings." Id., 392 S.C. at 390, 709 S.E.2d at 654-55 (2011).

FACTS

This case involves a dispute over property located Bradley Beach Road on Hilton Head Island, South Carolina, which consists of three lots and a House located on the middle lot. (R.p. 61, line19-p.62, line 1, R.p. 113lines 21-23) Appellant and Respondent are sisters, (R.p.60 lines 10-15), who were deeded, (R.p.62, lines 5-6) the House and Property as tenants in common in 1979, (Cf Amend. Campi. ¶,¶ 3-5; Amend. Answer ¶,¶ 2-3), by their parents Dr. Stephen and :Mrs. Mary McDew, (R. p. 59 lines 23-24, R. p. 113, lines 22-25)Pl.'s Ex. 1 (the "Deed").) The Deed granted the Property to Appellant and Respondent subject to "a Life Estate" in their parents. (Pl.'s Ex. 1.) Dr. McDew died on October 31, 1981, (R.p. 60 lines 2-7), and :Mrs. Mary McDew died on March 17, 2007, (R.p. 60 lines 2-7) The Parties' parents took care of the House and paid the expenses of the Property until their respective deaths. (R.p.64 lines3-13)

Respondent has paid all expenses of the Property after the death of Mrs. McDew. (R.p. 103, lines 1-6.) Appellant has not paid any expenses or made any financial contribution towards the maintenance and upkeep of the property, real estate taxes and insurance. (R.p. 64 lines 13-15, 20-21).

Appellant initiated this action by filing her Complaint on October 21, 2016 alleging that Respondent "denied [Appellant] the current set of keys and security code to the aforementioned House. [Appellant]." (Compl. ,i 6.) Respondent filed an answer and counterclaim alleging a cause of action for adverse possession. (Answer & Contercl.) On October 16, 2017 the parties entered into a Consent Order whereby the Appellant and Respondent agreed to equal access to the property alternating months. See Order, Oct. 16, 2017.) Pursuant to the Consent Order, Respondent provided Appellant with a set of keys to the house and provided the code for the security system. Respondent testified that she never had the locks changed or changed the security code both of which had been the same since the parties' parents were alive. (R.p. 117, lines11-12, R.p. 120 lines 14-16). The following summer Appellant, or her relatives, accessed the house using the keys provided by the Respondent. (R.p. 77, lines 9-15)

Appellant filed an Amended Complaint on March 13, 2019. (See Amend. Compl.) In response to the Amended Complaint, Respondent denied excluding Appellant from the Property. (Cf. Answer & Contercl. ¶ 2; Answer & Amend. Countercl. ¶,¶ 2, 5.) Respondent's Amended Counterclaim, however, realleged Respondent was entitled to adverse possession because she "exercised exclusive control over the subject property ... in a manner that is continuous, open, notorious, adverse and hostile." (Amend. Answer & Countercl. ¶,¶ 19, 20.)

In the spring of 2009, Appellant called Respondent to tell her of her intent to stay at the

House during her 40th high school reunion. (R.p. 66, lines 2-11) On that call, Appellant claimed that Respondent told her she could not stay at the house because Respondent had changed the code and the locks on the house and Appellant "would not be able to get into the house until [Respondent] was paid what she claimed [Appellant] owed her." (R.p.66 lines 3-12) In June 2009, while Appellant was in Savannah for her reunion, she went to the Property to see if her keys to the House (which she had received from her mother prior to her death) worked, which they did not. (R.p. 66, lines 13-20) Appellant assumed she couldn't get in because the locks were changed. Appellant was unaware that the lock on the home often stuck due salt air and the home's proximity to the ocean. The 2009 attempt to gain entry into the subject property is critical because it is the only time Appellant alleges she had difficulty getting into the subject residence. (R.p. 87 lines 11-13).

Respondent recalled the 2009 telephone conversation differently than the Appellant. Respondent testified that the 2009 call turned into an ugly argument (Appendix I p. 13). Respondent further recalls that Appellant wanted Respondent to drive to Hilton Head and let her into the house. (R.p. 126, lines 9-16) At that time Respondent's husband was seriously ill and she was not in a position to leave him. (R.p. 115, lines 1-6). Respondent further testified that she may have said "I'm going to change the lock" and "that was out of anger" (R.p. 125, lines 7-12). Respondent claimed that she did not make good on her promise to Appellant that she would change the locks. (R.p. 104, lines 13-24) Respondent further claimed that she did not change the security code to the house. (R.p. 105, lines 14-16, R.p. 117, lines 11-12) Instead, Respondent attempted to explain Appellant's difficulties with the lock on the House by testifying that, because of the salt air, the lock rusted and had a history of being difficult to open such that her husband had to routinely spray WD-40 into the lock to get it to open. (R.p. 107, lines 10-14, R.p.123, line9 - p.124, line 1) Respondent further testified that the lock became more difficult

after the Parties' mother passed away in 2007 because they used the House less often. (R.p. 124, lines 16-21)

Prior to Mrs. Mary McDew's death, all expenses relating to the property were paid by the parties' her. After Mrs. McDew's death Respondent took on the responsibility of paying all the bills related to the property. Despite repeated requests Appellant refused to contribute anything financial or otherwise to maintain the property. Since 2007 until the trial of this matter in March of 2019 Respondent has personally paid all expenses related to the property. The Appellant believed she was justified in not paying half the expenses because she was cut out of her mother's will. The Appellant testified that "one of the things that concerned me had to do with my mom's will and the fact that my daughter and I were excluded from my mother's will within month of her passing." (R.p. 83, lines 9-12).

Finally, Respondent agreed that the amounts she has claimed for payment of property taxes should be reduced by the amount of her corresponding tax benefit from claiming the taxes as a deduction. (R.p. 122, lines 2-6) The Parties stipulated at trial that Respondent's income fell within the 15% federal income tax bracket from 2007 until the time of trial and that Respondent either claimed-or could have claimed- the taxes paid on the Property as deductions on her federal income taxes. (R.p. 110 line 10- p. 111, line 8) Respondent claimed a deduction on the property tax she paid on the subject property only for 2017. (R.p. 111, lines 1-24)

ARGUMENT

The Master-In-Equity's Order should be affirmed. The facts and evidence in this case established Appellant's failed to prove her claim of ouster. The Master- In-Equity did not err in its calculation of the Respondent's damages by failing to account for the tax benefit from the possible property tax deduction.

I. The Master-In-Equity did not Err in Denying Appellant's Claim of Ouster.

"Ouster is the actual turning out or keeping excluded a party entitled to possession of any real property. Grant v. Grant, 228 S.C. 86, 340 S.E.2d 791. (Ct. App. 1986...Actual Ouster of a tenant in common by a cotenant in possession occurs when the possession is attended with such circumstances as to evidence a claim of exclusive right and title and a denial of the right of the other tenants to participate in the profits. Woods v. Bivens, 229 S.C. 76, 354 S.E.2d 909 (1987) Brevard v. Fortune, 221 S.C. 117, 69 S.E. 2d355 (1952). The acts relied upon to establish an ouster must be of an unequivocal nature, and so distinctly hostile to the rights of the other cotenants that the intention to desseize is clear and unmistakable. Felder v. Fleming, 278 S.C. 327 at 330, 297 S.E.2d [640] at 642 (1982)] Only in rare, extreme cases will the ouster by one cotenant of the other cotenants be implied from exclusive possession and dealings with the property, such as collection of rents and improvement of the property Id., 278 S.C. at 331, 295 S.E.2d at 642

In the present case the Appellant claims she was ousted by Respondent. Appellant lived in Washington, DC (R.p. 61, lines 17-18) and only attempted to visit the home one time in 2009. (R.p. 84, lines 6-7) (R.p. 87, lines 4-13). Respondent lives in Savannah, Georgia and no evidence was presented that the Respondent ever barred the Appellant from entry to the property which would have been difficult in any case as Respondent lived over an hour away in Savannah. (R. p. 112, lines 9-16). The Appellant presented no evidence of any attempts by the Respondent to bar her from the property let alone evidence of any acts of an unequivocal nature, and so distinctly hostile to the rights of the Appellant as to constitute ouster.

Aside from her one attempt to visit the home, Appellant testified that Respondent informed her she had changed the locks R.p. 66, lines 8-9. Respondent testified that she threatened to change the locks but never did. (R.p. 125, lines 7-12). Further respondent testified that the locks and security code were the same as they were when the parties' parents controlled the property. (R.p. 117, lines 11-12, R.p. 120, lines 14-16) Appellant testified that, in 2009 she

attempted to use keys she thought were ones her mother had given her and was unable to access the property and she could not gain access presumably because the locks were changed. (R.p. 66, lines 14-19. Appellant claims she hadn't experienced trouble with the locks before but admits she was at the house once between 2007 and 2017. This was the only effort that the Appellant made to enter the home. (R. p. 87, lines 4-18). She further testified that she did not call a locksmith, the security company or make any other effort to gain access to the home (R. p. 80, lines 3-6) Both respondent and Carla Nettles testified that the locks were old and often stuck due to the proximity to the ocean ands the salt air environment. Respondent testified that her late husband would carry WD 40 to loosen the locks when they visited the home because the locks often stick (R. p. 124, lines 22-25). Carla Nettles, a witness for the Respondent, testified at deposition and her deposition was admitted into evidence admitted into evidence at trial.(Trial Exhibit 5) Nettles, a professional cleaning person, testified as a witness for the Respondent that she cleans many homes on Hilton Head and often uses a lubricant to unstick locks. Moreover, Nettles testified that she was hired to clean the subject residence and in fact had to spray the locks in order to gain entry into the house. (Nettles Deposition R. p. 244, lines 1-25, p. 245, lines 1-12, p. 246, lines 4-25, p.247, lines 1-10) Respondent testified that her mother had given her keys prior to her death and that she tried the keys she had when she went to the property in June 2009 (R. p. 72, lines 13-19) Simply because the Appellant was unable to work the lock does not confirm the locks were changed. There is ample evidence that the lock stuck. (R. p. 124 lines 22-25) The testimony reveals that the lock rusted and had a history of being difficult to open such that Respondent's late husband had to routinely spray WD-40 into the lock to get it to open. (R.p. 107, lines 2-19) Respondent further testified that the lock became more difficult after the Parties' mother passed away in 2007 because they used the House less often. (R. p. 123, lines 9-24)

Additionally, Appellant presented no other evidence of overt acts to support her claim for ouster. Respondent testified that the property was never rented and thus no rents were collected by anyone. (Appendix I p. 14). The sum total of evidence of ouster was a threat from the respondent that she would change the locks but, as she testified, she never did. (R. p. 107, lines 20-25, R. p. 108, lines 1-3)

Appellant's claim for ouster was correctly denied by the Master-In_Equity. The evidence Appellant presented to support her claim for ouster was sparse at best. Appellant attempted to enter the home one time (in 2009) between 2007 and 2017. The Respondent was not at the subject residence at the time and thus could impede Appellant in no way. Appellant attempted to use keys she claimed she had for the house but they did not work. When she failed to gain entry, Appellant demanded the Respondent deliver a set of keys to her on Hilton Head. Respondent declined as she was attending to her seriously ill husband in Savannah. Since Appellant did not gain entry into the house she was not aware if the security code had been changed and Respondent denied she changed it. Respondent admitted threatening to change the lock and code but testified she never did either. Both the Respondent and Carla Nettles testified that the lock was difficult and often required lubricant to function. Therefore, it is reasonable for one to conclude that the lock was simply stuck. Further, Appellant testified she never called a locksmith or made any other efforts to enter the subject premises. No evidence was presented that the Respondent barred the Appellant form entry to the subject residence. This was the sum total of evidence presented to support Appellant's claim for ouster was Appelant's testimony that keys she thought was to the subject home didn't work when she attempted to enter the home in 2209. As such the Master-In-Equity's denial of Appellant's claim for ouster was proper and should be affirmed.

Respondent did not admit to ouster of Appellant merely by asserting a claim for adverse possession

Appellant argues in her brief that "adverse possession requires ouster of co-tenants for

the statutorily prescribed period." The claims of ouster and adverse possession are mutually exclusive. "Ouster is the actual turning out or keeping excluded a party entitled to possession of any real property. Grant v. Grant, 288 S.C. 86, 340 S.E.2d 791 (Ct.App. 1986)... The party asserting adverse possession must show continuous, hostile, open, actual, notorious, and exclusive possession for a certain period of time. Mullis v. Winchester, 237 S.C. 487, 491, 118 S.E.2d 61, 63 (1961). In South Carolina, adverse possession may be established if the elements of the claim are shown to exist for at least ten years. (S.C. Code § 15-67-10, et seq). To meet this burden of proof, the party asserting the claim must show by "clear and convincing" evidence he has met the requirements for adverse possession. Davis v. Monteith, 289 S.C. 176, 180, 345 S.E. 2d 724, 726 (1986). In the present case Appellant refused to pay any of the expenses related to the maintenance, insurance or property taxes on the subject property. (Appendix I). In addition, since the death of her mother in 2007, Appellant only personally attempted to visit the site on one occasion in 2009. (R. p. 84, lines 6-10) Conversely, since her mothers death, Respondent regularly checked on the property, maintained the property, paid taxes on the property, and paid insurance on the property. Under these facts had Respondent presented evidence that this course of action continued for ten years the court may have granted respondent title by adverse possession. The parties' mother paid the costs of the property until her death in 2007. Appellant brought this claim in 2016, less than the ten years required for Respondent to prove adverse possession. As such the Master-In-Equity ruled that Respondent could not prevail on her claim for adverse because her exclusive possession was not for the required ten year period. Appellant's claim that adverse possession requires the continuous ouster of a co-tenant is simply not true. Appellant's own actions in conjunction with Respondent's exclusive control of the property could have been sufficient prove adverse possession. The overt acts needed to prove ouster are not required to prove adverse possession as Appellant contends.

Appellant asserts that by Respondent claim for adverse possession is an admission that

Respondent ousted Appellant. South Carolina law contradicts Appellant's assertion. Only in rare, extreme cases will the ouster by one cotenant of the other cotenants be implied from exclusive possession and dealings with the property, such as collection of rents and improvement of the property Id., 278 S.C. at 331, 295 S.E.2d at 642. In the present case the home was never rented and the Respondent while the respondent paid all costs for maintenance, insurance and taxes no evidence was presented that respondent ever improved the property.

The Appellant cites Parker v. Shecutt 349 S.C. 226, 562 S.E. 2d 620 in support of her claim for ouster. While the Parker court did find that an a ouster had occurred the facts were significantly different. In Parker, the brother, alleged to have ousted his sister, admitted he had changed the locks, refused to give his sister a working key and otherwise denied his sister access to the property Id at 623. In the present case the Respondent testified she did not change the lock or security code. The only evidence presented that the locks were changed was the Appellant's testimony that she attempted to use keys she thought her mother had given her and they didn't work. Significant evidence was presented that the lock stuck and was difficult to work. Respondent testified that her mother had given her keys to the subject residence. As the lock and security code had not been changed there was no reason for Respondent to provide a "working key" or the security code to Appellant. Unlike Parker, in the present case the respondent never barred the Appellant from the property. In fact the Respondent lived over an hour away and visited the property briefly to check on things once a month. As such Appellant could go to the property any time she desired.

The present case is more similar to Laughon v. O'Braitis 360 S.C. 520, 602 S.E.2d 108. In Laughon one sister brought an action against the other claims. In that case the Court of Appeals held there was no ouster as the plaintiff was allowed to access the property whenever she wanted. There was no evidence presented that the Respondent in eth present case ever barred the Appellant from the property. In fact the testimony is quite the opposite. Appellant

testified that when she was in Savannah for her 40th high school reunion she drove to Hilton Head and tried to get into the house. She wasn't able to work the lock but the scenario is illustrative to the fact that Appellant had the ability to go to the property unfettered by Respondent who did not occupy the subject property. In Laughon the sister claiming ouster did not assert the locks were changed but argued that she was not given a key. The Laughon court apparently was unmoved by this as they distinguished this case from Parker where the brother changed the lock and refused to provide a key. It would seem that the Laughon court doesn't require one co-owner to keep up with the keys of the other or provide extra copies upon request.

The Master-In-Equity correctly denied Appellant's motion for reconsideration, a new trial based upon newly discovered evidence and to stay.

Appellant has also asserted that after the trial she discovered evidence that the respondent changed the locks to the subject residence. Appellant claims that after the trial of this case, on June 23, 2019, Appellant went to the Property and attempted to enter the house using the keys provided to her by the Respondent pursuant to the Consent Order. Upon arrival, however, she discovered that neither of the keys would open the bottom lock on the beach house door. Appellant argues this is prima facie evidence that the Respondent changed the locks to the beach house and the evidence, was not and could not have been discovered until after trial. To the contrary, if this was true which Respondent denies, it most certainly could have been discovered at any time prior to the trial in March of 2019. Appellant was in possession of the keys provided pursuant to the Consent Order since 2017. As such Appellant could have "discovered" that her keys no longer worked at any time prior to the trial. There is evidence that the keys provided to the Appellant worked as late as December of 2018. Appellant's expert, Henri Kirsten, testified that he gained access to the subject property on December 10, 2018 just two and a half months prior to the trial of this matter (Appendix I p. 9). As such, if Appellant's "newly discovered evidence" is to be believed the lock on the residence was

changed between Mr. Kirsten's visit on December 10, 2018 and June of 2019 which is when Appellant's post trial affidavit alleges the keys did not work.

The argument put forth by the Appellant makes little sense. If the lock was changed, which Respondent denies, it had to be done after Mr. Kirsten's site visit in December 2018. Presumably, Mr. Kirsten was provided a key by Appellant or her counsel. The only keys that all agree worked were those provided pursuant to the Consent Order which allowed Appellant to gain access in 2017. Appellant's testimony throughout the trial was that the locks were changed sometime prior to her 2009 attempt to enter the property. This was the basis for Appellant's claim of ouster. When the trial Court rejected that argument Appellant created a new argument that the locks were changed after the Consent Order was entered and after Appellant gained access using keys provided by Respondent and after Appellant's expert gained access to the subject residence in December- just a two and half months prior to trial. By December 2018, when Kirsten accessed the residence, the parties had been in litigation over two years and entered a consent order to share the residence. Despite being in violation of the consent order, the Respondent would have nothing to gain by changing the locks at that stage of the proceedings. The Master-In-Equity correctly denied Appellant's motions to reconsider for a new trial based upon newly discovered evidence and motion to stay.

Appellant's argument that she was entitled to a set off for damages relies entirely on her prevailing on her claim for ouster and being awarded damages. The Master-In-Equity correctly denied Appellant's claim of ouster making Appellants' argument for a set off moot.

The Master-In-Equity's Order correctly calculated the tax benefit from the possible property tax deduction.

This Master-In Equity's Order awards Appellant a set-off for a portion of the tax-benefit realized by Respondent from claiming the taxes for the Property as an itemized

exemption on her income tax return in 2017, the only year respondent claimed an exemption.

Regarding the property tax deduction, the Parties stipulated as follows at trial:

> MR. CONNOR: ... Mr. Finn and I have agreed to stipulate that during the relevant time period in this case ... Ms. Shorter has- her income has been in the 15 percent tax bracket and either has taken the deduction or could have taken the deduction at that 15 percent benefit level.
>
> ... Your Honor, if she takes the property tax deduction, she gets a corresponding benefit to her income tax ... She gets a 15 percent deduction benefit through her tax deduction.
>
> THE COURT: ... All right. So that's a stipulation as well; is that correct, Mr. Finn?
>
> MR. FINN: Yes, Your Honor.

(R. p. 110.)

No evidence was presented from either the Appellant or the Respondent regarding the Respondent's tax returns for the years prior to 2017. As such there is no evidence how the subject property was treated from an accounting perspective by Respondent's accountants. While Respondent did claim the taxes on the property as an itemized deduction on her tax return for 2017 she did not in years prior. Appellant suggests that theoretically Respondent could have taken an itemized deduction on the property taxes paid in previous years. Appellant contends that Respondent could have taken an itemized deduction in prior years and, therefore, Appellant should get a setoff. Without evidence as to how Respondent's accountants treated the Hilton Head property on Respondent's tax returns in years prior, the court cannot presume that Respondent could claim the taxes on the property as an itemized deduction. Since there was no evidence presented regarding how the property was treated on Respondent's prior tax returns the Master-In-Equity correctly ruled in granting a set off only for 2017 which was the only year we know Respondent claimed an exemption.

A. If there was no ouster, the types of expenses Respondent is entitled to are limited to those enforceable as liens against the Property.

Appellant contends that if there was no ouster, the types of damages respondent is permitted to recover are only those enforceable as liens against the property. Not surprisingly, Appellant cites no South Carolina cases for the proposition that "if the payment by the cotenant was not a debt or obligation enforceable against the common property, there can be no contribution since there was no common benefit." Respondent would assert that all of the payments submitted by the Respondent as damages were for the common benefit. Respondent submitted damages for payments made to insure the subject premises. Respondent paid utility bills for telephone water and electricity. Without functioning utilities the home air conditioning system would not function and the home would succumb to the elements and deteriorate. Without a telephone the security system would not have functioned to protect the home against intruders. Respondent submitted damages in the form of payments for flood insurance and property and casualty insurance both of which were necessary for the common benefit.

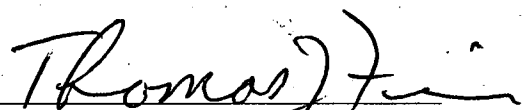
CONCLUSION

For the reasons stated above Respondent respectfully requests that this Court affirm the Master-In-Equity's Order.

(Signature line on following page)

Respectfully submitted,

FINN LAW FIRM, P.C.

By: 

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This 18th day of May, 2020
Hilton Head Island, South Carolina

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CERTIFICATE OF COMPLIANCE

This is to certify that counsel has complied with South Carolina Appellate Court Rule 211(b).

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May 18, 2020