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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Carmen T. Mullen, Circuit Court Judge

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Case No. 2020-CP-07-00091
Appellate Case No. 2020-000883

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Barbara Killingsworth and Brian Killingsworth ..... Respondents,

v.

Stokes Brown Toyota of Hilton Head ..... Appellant.

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# FINAL BRIEF OF APPELLANT

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Bradford N. Martin, Esq. (SC Bar No. 3658)
Laura W. H. Teer, Esq. (SC Bar No. 16698)
Bradford Neal Martin & Associates, PA
Post Office Box 10410
Greenville, South Carolina 29603
(864) 552-9990

Attorneys for Appellant Stokes Brown Toyota of Hilton Head

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II. WHETHER THE LOWER COURT OVERLOOKED THE FACT THAT RESPONDENTS DID NOT DISPUTE THE EXISTENCE OF THE ARBITRATION AGREEMENT, ONLY WHETHER THEIR CAUSES OF ACTION FALL WITHIN ITS SCOPE; THEREFORE, THE HEAVY PRESUMPTION IN FAVOR OF ARBITRATION APPLIES.

III. WHETHER THE LOWER COURT OVERLOOKED THE FACT THAT RESPONDENTS' ARBITRATION AGREEMENT IS BROADLY WRITTEN; THEREFORE, THE HEAVY PRESUMPTION OF ARBITRABILITY IS STRENGTHENED.

IV. WHETHER THE LOWER COURT ERRED IN FAILING TO APPLY THE "TOUCH MATTERS" TEST SET FORTH IN *LANDERS V. FED. DEPOSIT INS. CORP.* RATHER THAN THE MORE STRENUOUS "SUBSTANTIAL RELATIONSHIP" TEST.

V. WHETHER THE LOWER COURT ERRED IN FAILING TO FIND THAT ARBITRATION SHOULD BE COMPELLED UNDER *LANDERS*.

## STATEMENT OF THE CASE

Respondent commenced the subject action with the filing of a Complaint on January 16, 2020 alleging negligence and loss of consortium as a result of a fall that occurred while she was purchasing a car at Appellant's dealership. Appellant filed a Motion to Stay and Compel Arbitration on February 20, 2020. A hearing was held May 15, 2020 and the lower court issued an Order on May 22, 2020 denying Appellant's Motion. Appellant filed a Motion to Alter or Amend on May 27, 2020. The Court denied the Motion by Order dated June 4, 2020. This appeal was filed June 8, 2020.

## STATEMENT OF THE FACTS

The car buying process, which may begin with a call or internet search before a customer even comes to the dealership, is not concluded until the customer drives home with the car.[1] The process includes having sufficient inventory displayed attractively on a well-lit and landscaped lot, both to assist the customer in car selection and ultimate delivery of the car. It also includes explaining how to use all of the modern features of the car.

Respondents came to Stokes Toyota of Hilton Head to purchase a car. They selected a Toyota Highlander and signed the paperwork on April 11, 2018, including a broad arbitration agreement. Barbara Killingsworth was performing the next step of her purchase while walking to the area of the lot where customers regularly take delivery of their cars. She went to review the operational features of the car with the sales associate, but tripped on a well-lit grassy median and fell next to her car. (R. 14, Complaint ¶ 8; R. 31 Affidavit of Bryan Cooler, ¶ 11-13; R. 34, Affidavit of Shawn Richardson, ¶ 7-8)

Unlike most retailers, a dealership's lot is an extension of its showroom and is where 99%

[1] And may continue until all financing contingencies have been met.

of the vehicles are displayed for sale. (R. 30, Affidavit of Bryan Cooler, ¶ 4) The brightness of its lights and the attractiveness of its grassy medians are both important in the selection and delivery of the car. (R. 30, Affidavit of Bryan Cooler, ¶ 5) The lighting and grassy medians are also regulated by local ordinances. (R. 30, Affidavit of Bryan Cooler, ¶ 6)

One of the documents Respondents signed was an Arbitration Agreement, on a separate page in which they agreed that:

> Any claim or dispute . . . in . . . tort . . . which arise out of or relate to . . . your purchase of this vehicle . . . or any matters related thereto (a "Claim") shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. . . .
>
> **Notice of Buyer: When you sign this Arbitration Agreement, you are agreeing that if a Claim arises that it is covered by this Agreement. You are giving up rights you might have to litigate such Claims in a court or before a jury or to participate in a class action with respect to such a Claim. Other rights that you would have if you went to court may not be available or be more limited in arbitration. It is important that you read this entire Arbitration Agreement carefully before you sign it.**

(R. 20)

Respondents' Complaint alleges two causes of action arising out of or related to their purchase of the car (Negligence and Loss of Consortium). (R.13-16)

## ARGUMENT

### I. Standard of Review

The determination whether a claim is subject to arbitration is subject to de novo review. *See Gissel v. Hart,* 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *See Aiken v. World Fin. Corp. of South Carolina,* 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007). Anyone challenging the enforceability of an arbitration agreement bears the burden of proving the provision is unenforceable. *Green Tree Fin. Corp. – Ala. v. Randolph,* 531 U.S.

79, 91 (2000).

## II. Because the Present Case is Under the FAA, the Analysis of *Landers v. Fed. Deposit Ins. Corp.* Must be Applied (Issues I, II, III, V)

*Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 739 S.E.2d 209 (2013) reflects the South Carolina Supreme Court's application of federal substantive law to the scope of any arbitration agreement to which the FAA applies. The parties contractually agreed that any dispute arising out of the purchase of the car would be subject to the Federal Arbitration Act. (R. ) Furthermore, the sale of automobiles is considered commerce sufficient for the FAA to apply. *See Saturn Distribution Corp. v. Williams*, 905 F.2d 719 (4th Cir. 1990). The FAA preempts any contrary state law regarding arbitration. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

Analysis under *Landers* requires the following:

1. any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration;

2. when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration;

3. the heavy presumption in favor of arbitration is strengthened when an arbitration clause is broadly written;

4. unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute, arbitration must generally be ordered;

5. broad clauses are "capable of an expansive reach"; and

6. under the expansive reach of the FAA a tort claim need not raise an issue that requires reference to or the construction of some portion of the contract in order to be encompassed by a broadly-worded arbitration clause

*Landers,* 402 S.C. at 108-09; 739 S.E.2d at 213-14.

Christopher Landers served as Atlantic Bank & Trust's executive vice president pursuant to an employment contract, which contained an arbitration provision requiring arbitration of "any

controversy or claim arising out of or relating to this contract, or breach thereof." *Landers, supra* 402 S.C at 103, 738 S.E.2d at 210. Landers claimed that he was constructively discharged by Atlantic Bank & Trust's new CEO.

The trial court found that only Landers' breach of contract claim was subject to the arbitration provision, while his other four causes of action comprised of several tort and corporate claims were not within the scope of the arbitration clause. The South Carolina Supreme Court reversed the trial court, finding all of Lander's causes of action were subject to arbitration. In reviewing Lander's tort claims of slander and intentional infliction of emotional distress, the Court found Lander's claims were within the scope of his broad arbitration agreement.

### A. There is a strong presumption in favor of the validity of arbitration agreements

Arbitration is good for consumers. Its value lies in its greater efficiency, speed, and cost-effectiveness and the ability to choose "expert adjudicators to resolve specialized disputes." *Stolt-Nielsen SA v. Animalfeeds Intern. Corp.*, 559 U.S. 662, 685 (2010). By agreeing to arbitrate, a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration." *Mitsubishi Motors v. Soler-Chrysler Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

Due to the numerous benefits of arbitration, there is a strong presumption in favor of its validity and both federal and state laws favor them. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Carolina Care Plan, Inc. v. United Healthcare Servs., Inc.*, 361 S.C. 544, 606 S.E.2d 752 (2004). "[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

The lower court erred in overlooking this strong presumption in favor of arbitration.

### B. Any interpretation covering the dispute requires arbitration

Both federal and South Carolina state law are clear that if there is any interpretation of an arbitration agreement that covers a dispute, then arbitration must be ordered. "The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 103, 739 S.E.2d 209, 213 (2013).[2] Unless a court can say with positive assurance that the agreement is not susceptible to an interpretation that covers the dispute, arbitration is required. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001).

Courts view arbitration as "a matter of contract, and the range of issues that can be arbitrated is restricted by the terms of the agreement." *Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 492, 593 S.E.2d 480, 484 (Ct. App. 2004). To decide whether an arbitration agreement encompasses a dispute, this Court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim. *Mitsubishi Motors Corp., supra.*; *Hinson v. Jusco Co.*, 868 F. Supp. 145 (D.S.C. 1994). Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Towles v. United HealthCare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999); *S.C. Pub. Serv. Auth. v. Great W. Coal*, 312 S.C. 559, 564, 437 S.E.2d 22, 25 (1993).

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[2] Respondents did not dispute the existence of the Arbitration Agreement, only whether their causes of action fall within its scope. Therefore, the heavy presumption in favor of arbitration applies, and it was error for the lower court to fail to apply this presumption .

The Supreme Court in *Landers* found:

> Even assuming the arbitrability of the claims was in doubt, which it is not, we cannot say with positive assurance that the arbitration clause is not susceptible of an interpretation that Landers' slander and intentional infliction of emotional distress claims are covered by the clause.

*Id.* 402 S.C. at 112, 739 S.E.2d at 215.

The lower court erred in finding, "[t]he fall does not arise out of, or relate to, the purchase of the vehicle and the Plaintiffs' claims are outside the scope of this Agreement." (R. 7, Order, p. 7). Respondent was in the act of walking to the Highlander to review the features with the salesman and take delivery of the car at the time of her fall. (R. 31, Cooler Affidavit, ¶13) The lower court cannot say with positive assurance that the arbitration clause requiring arbitration of

> . . . tort[s] . . . which arise out of or relate to . . . your purchase of this vehicle . . . or any matters related thereto . . .

(R. 20) is not susceptible of an interpretation that Respondent's claim that she was walking to review the features with the salesman and take delivery of her car is within the scope of the Arbitration Agreement.

The South Carolina Supreme Court found Lander's pleadings supported a finding that his perceived inability to perform his job related to his employment contract. Respondents allege Barbara Killingsworth was injured while walking to "retrieve the vehicle she had purchased." (R. 14, Complaint ¶8). Respondents' Complaint thus supports a finding of a relationship between the fall and the purchase of the Highlander. Further, Appellant's General Manager explained how the sales associate reviews the features of the car with which the customer may be unfamiliar. (R. 31, Cooler Affidavit ¶13). Therefore, it was error for the lower court to find the present matter distinguishable from *Landers*.

Appellant requests that this Court reverse the lower court's order and compel arbitration.

### C. Broadly worded agreements must be enforced

The Arbitration Agreement provides that it applies to disputes which "arise out of or relate to" the purchase of the vehicle. Arbitration clauses using the words "arising out of or relating to" are construed broadly. *See Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013); *Century Indemnity Co. v. Certain Underwriters at Lloyd's, London*, 584 F3d 513, 524 (3rd Cir. 2009)(quoting *AT&T Techs. Inc. v. Communication Workers of America*, 475 U.S. 643, 650 (1986)). Both federal and South Carolina courts have held that such broad clauses are "capable of an expansive reach." *American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 93 (4th Cir. 1996). "Under the expansive reach of the FAA a tort claim need not raise an issue that requires reference to or the construction of some portion of the contract in order to be encompassed by a broadly-worded arbitration clause." *Landers*, 402 S.C at 111, 739 S.E.2d at 214.

Contrary to the lower courts' suggestion, applying the proper analysis to a broadly worded arbitration agreement will not render the scope of the Arbitration Agreement unlimited, but only reflects the heavy presumption in favor of arbitrability. Footnote two of the lower court's Order (positing several hypothetical factual scenarios) ignores the requirement that the court determine whether the factual allegations underlying the claim are within the scope of the Agreement. *Landers*, 402 S.C. at 110, 739 S.E.2d at 214. The Court must, therefore, look at the factual allegations of the case as presented,[3] not whether Respondent can articulate a scenario outside the scope of the arbitration agreement in which she also could have been injured.

[3] *Mitsubishi Motors Corp.* 473 U.S. at 622, n. 9.

### D. The broadly worded agreement covers Respondents' claims

Mrs. Killingsworth fell as she was walking to be instructed on the operation of the features for the Highlander she just purchased. (R. 14, Complaint, ¶8; R, 31, Cooler Affidavit, ¶13). Being instructed on how to use the car's features and taking delivery of the car are part of the purchase process.

Whether a bargain has been "struck" and title passed is a matter of the intention of the parties. *S.C. Tax Comm. v. Schafer Distributing Co.*, 247 S.C. 491, 496, 148 S.E.2d 156 (1966). Delivery of possession is strong, if not conclusive evidence of such an intention. *See Southern Fire & Casualty Co. v. Teal*, 287 F. Supp. 617, 620-21 (D.S.C. 1968).[4] It was foreseeable to a reasonable person in the context of normal business dealings that they would have the features explained and take physical possession of the car on the lot. The alleged fall occurred in the area of the lot Appellant uses to deliver cars. Mr. Killingsworth's loss of consortium claim arises from the allegations regarding Mrs. Killingsworth's injuries. Therefore, Respondents' dispute is related to their purchase of the car.

The United States District Court for the Eastern District of Pennsylvania found the plaintiff's injuries sustained when she was struck by carpet installers negligently moving a piece of furniture was within the scope of her Arbitration Clause with Empire Today for the purchase and installation of carpet. *See Ellin v. Empire Today, LLC,* C.A. 11-2312 (E.D. Pa., August 25 2011). The District Court found the dispute was related to plaintiff's Purchase Contract because Empire Today had an obligation under the contract to install carpet, which included moving

[4] "The actual delivery of the goods is of the greatest importance as evincing an intention to pass title. If unaccompanied by an explanation or the specification of any condition, the buyer generally has a right to regard it as passing title. A fortiori, if there is an accompanying declaration showing an intention to pass the property to the buyer immediately and not at some future time, the fact of delivery, as evidence of intention, becomes manifestly the most cogent of all legal proofs, where the good faith of the transaction is not impugned for fraud." 46 Am.Jur., Sales § 433, p. 602.

furniture. The federal judged relied upon authority from the United States Supreme Court and the Third Circuit Court of Appeals: *AT&T Techs. Inc. v. Communication Workers of America*, 475 U.S. 643 (1986); *Century Indemnity, supra,* 534 F.3d 513 (2009). In the present case, Appellant had an obligation to explain the features and convey physical possession of the Highlander to the Respondent, which included Mrs. Killingsworth walking to the car and being instructed on how to use the car's features so it could be driven home.

South Carolina Courts have found tort claims to be encompassed in arbitration agreements contained in employment contracts[5]. The South Carolina Court of Appeals likewise found tort claims fell within the scope of an arbitration clause in a stucco purchase agreement which applied to "every controversy or claim arising out of or relating to this Agreement, or the breach thereof...." *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013).

Respondents allege Mrs. Killingsworth was injured while taking delivery of the Highlander. There is no dispute she was accompanied by the salesman to be instructed on how to use the options. (R. 31, Cooler Affidavit, ¶ 13) To the extent there is a question whether being instructed as to the car's features and taking physical delivery of the car is related to the purchase, the Court must decide the question in favor of arbitration. *Landers, supra.* This Court should, therefore, vacate the lower court's Order and compel arbitration.

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[5] *See Landers, supra,* 402 S.C. at 111, 739 S.E.2d at 214-15 (finding Landers' defamation claim arbitrable because the alleged defamatory statements "directly related to Landers' ability to perform his duties with Bank"); *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 297, 733 S.E.2d 597, 605 (Ct. App. 2012) (finding Pearson's tort claims, including defamation, arbitrable because the arbitration clause was broad and Pearson's tort claims resulted from his employment).

## III. The Lower Court Erroneously Applied the "Substantial Relationship" Test Rather than the "Touch Matters" Analysis. (Issues IV and V)

### A. The "touch matters" test should be applied

The South Carolina Supreme Court addressed the proper analysis for the scope of an arbitration agreement in *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 739 S.E.2d 209 (2013). The Court noted that while the terms "significant relationship" and "touch matters" have both been used to analyze the scope of arbitration and are interchangeable in theory, the phrase "significant relationship" has "arguably evolved to impose an enhanced burden on the party seeking to compel arbitration" while "touch matters" has been construed as requiring a "lesser showing on the party desiring arbitration". *Id.* 402 S.C. at 117, 739 S.E.2d at 217.

The Fourth Circuit acknowledged the potential tension in these terms:

> We recognize that requiring a *significant* relationship in order to compel arbitration ... appears to be at odds with the language of the [ ] arbitration clause, which only requires that the [ ] claims " *relate to* " the [agreement]. We recognize as well that to require such a significant relationship may appear to be in tension with the Supreme Court's mandate that we apply the ordinary tools of contract interpretation in construing an arbitration agreement, and resolve any ambiguities in favor of arbitration.

*Wachovia Bank Nat'l Assoc. v. Schmidt,* 445 F.3d 762, 767 n. 5 (4th Cir.2006) (emphasis in original).

The *Landers* Court further noted that while it used the "significant relationship" term, it did so only because it was in keeping with their prior jurisprudence; the use of "touch matters" is more appropriate:

> given the text of the FAA, the United States Supreme Court's interpretation of such, and the strong policy favoring arbitration, we would necessarily find that the "touch matters" term hues more closely to Congressional intent concerning the FAA.

*Landers,* 402 S.C. at 117, 739 S.E.2d at 218.

The lower court erroneously focused on the "significant relationship" test in *Aiken v. World Finance*, 373 S.C. 144, 644 S.E.2d 705 (2004) instead, which was not analyzed under the FAA and predates the S.C. Supreme Court's clarification in *Landers*. In applying the "significant relationship" test, the lower court imposed an enhanced burden on the Appellant and overlooked that the liberal federal policy favoring arbitration requires that a court send a claim to arbitration "when presented with a broad arbitration clause ... as long as the underlying factual allegations simply 'touch matters covered by' the arbitration provision". *Landers*, 402 S.C. at 116, 739 S.E.2d at 217.

The "touch matters" analysis is required to enforce the language of the arbitration agreement, which only requires that the claims "relate to" the agreement. *Id.* 402 S.C. at 117, 739 S.E.2d at 218. Being instructed on the use of the features and taking possession of your car clearly relates to its purchase. This is especially true when applying the six prong *Landers* test. Therefore, this Court should vacate the lower court's Order and compel arbitration.

### B. The "substantial relationship" cases relied upon by the lower court are factually distinguishable

*Aiken v. World Finance*, *supra* and the three "post-*Aiken*" cases addressed by the lower court all predate *Landers* and the United States Supreme Court's increasingly strong policy favoring arbitration beginning with *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).[6]

Not only do the cases use the unduly strenuous "significant relationship" test, but they are also factually distinguishable. The question in the cases cited by the lower court was whether outrageous torts were unforeseeable to a reasonable consumer in the context of normal business

[6] Even before *Concepcion*, the South Carolina Supreme Court held that unless a court can say with positive assurance that the agreement is not susceptible to an interpretation that covers the dispute, arbitration is required. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001).

dealings. *Aiken, supra* (after Aiken had paid off his last loan, World Finance employees began using his personal information to obtain sham loans); *Chassereau v. Global Sun Pools*, 373 S.C. 168, 644 S.E.2d 718 (2007) (plaintiff claimed employees began harassing her when she stopped making payments after her pool had been installed); *Partain v Upstate Automotive Group*, 386 S.C. 488, 689 S.E.2d 602 (2010) (finding Partain could not have foreseen that Upstate Auto, after completing a sale, would substitute an entirely different vehicle in place of the truck he had agreed to purchase); *Hatcher v. Edward D. Jones & Co., L.P.*, 379 S.C. 549, 666 S.E. 2d 294 (Ct. App. 2008) (SCUTPA and negligence claims found to be outside the scope of the arbitration agreement because they were based on the wrongful electronic transfer of Hatcher's funds at the direction of a third party and without Hatcher's prior consent.) In the present case, Respondents have not alleged an outrageous tort. Additionally, being instructed on the use of the options and taking physical possession of the Highlander were required; therefore, an injury sustained while on the way to be instructed and taking physical possession were foreseeable to Respondents.

Appellant respectfully requests this Court to vacate the lower court's Order and compel arbitration.

## CONCLUSION

In light of the strong six prong test of *Landers* heavily favoring arbitrability under the FAA, Respondents' claims fall within the scope of the broadly written Arbitration Agreement. A reasonable consumer would expect to have the car's features explained and the car delivered as part of the purchase process. Federal law preempts state law and staying the action to pursue arbitration is the proper remedy. For the foregoing reasons, this Court should reverse the lower court's Order, compel arbitration, and stay the case.

Respectfully submitted,

Date February 26, 2021

Bradford N. Martin, SC Bar No. 3658
Laura W. H. Teer, SC Bar No. 16698
BRADFORD NEAL MARTIN & ASSOCIATES, PA
201 West McBee Avenue, Suite 302
Post Office Box 10410
Greenville, SC 29603
864.552.9990
**ATTORNEYS FOR APPELLANT**



## CERTIFICATE OF COUNSEL

The undersigned, attorney for Appellant, hereby certifies that this Final Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Date February 26, 2021

Bradford N. Martin, SC Bar No. 3658
Laura W. H. Teer, SC Bar No. 16698
BRADFORD NEAL MARTIN & ASSOCIATES, PA
201 West McBee Avenue, Suite 302
Post Office Box 10410
Greenville, SC 29603
864.552.9990
**ATTORNEYS FOR APPELLANT**