

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APR 08 2021

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

SC Court of Appeals

Walton J. McLeod, Circuit Judge

Appellate Case 2021-000033
Case No. 2018-CP-32-04329

John Deere Construction & Forestry Company,
Plaintiff-Respondent,

v.

North Edisto Logging, Inc. and Paul Gunter,
Defendants-Appellants.

AFFIDAVIT OF AMY H. WOOTEN IN SUPPORT OF RESPONDENT'S MOTION
TO DISMISS APPEAL

I, Amy H. Wooten, after first having been duly sworn, depose and say:

1. I am a citizen of the United States and a resident of the State of North Carolina.

2. I am over 18 years of age; I am not subject to any disability; and I am fully able and authorized to make the statements set forth in this Affidavit.

3. I am an attorney with the law firm of Ward and Smith, P.A. ("Ward and Smith"), and I am based out of the Firm's office located in Raleigh, North Carolina, although I practice throughout South Carolina and North Carolina.

4. I have been licensed to practice in the State of South Carolina since 2011, and have been licensed to practice in the State of North Carolina since 2009.

5. This Affidavit is submitted in support of Plaintiff-Respondent John Deere Construction & Forestry Company's ("Respondent's") Motion to Dismiss Appeal in which Respondent seeks to dismiss the above-captioned appeal filed by Defendants-Appellants North Edisto Logging, Inc. and Paul Gunter (collectively, "Appellants").

6. I have read the allegations set forth in this Affidavit, and they are true based on my own knowledge.

7. The factual allegations set forth in the Motion to Dismiss Appeal filed in this case are true, correct, and based upon my personal knowledge, experience, and belief, except where otherwise noted.

8. Ward and Smith represented Respondent, before and throughout that action filed in the County of Lexington, Court of Common Pleas of the Eleventh Judicial Circuit, bearing Case No. 2018-CP-32-04329 ("State Court Action") to which the pending appeal pertains.

9. I, along with Edward J. Coyne, III, Esq. and Paul A. Fanning, Esq., who is admitted *Pro Hac Vice*, have acted as counsel in the State Court Action, and I am familiar with the facts and circumstances surrounding the State Court Action and this appeal.

10. Respondent filed a Complaint against Appellants in the State Court Action on December 20, 2018, in which Respondent asserted claims for breach of contract and possession.

11. On March 19, 2019, Appellants filed an Answer and Counterclaims in which Appellants asserted claims for breach of contract and negligent supervision and sought certification of a class action.

12. On October 27, 2020, a hearing was held before the Honorable Walton J. McLeod, Circuit Court Judge Presiding, on Respondent's Motion for Summary Judgment in the State Court Action.

13. On December 8, 2020, the Honorable Walton J. McLeod, Circuit Court Judge Presiding, entered an Order granting Respondent's Motion for Summary Judgment ("Order"), dismissing Appellant's Counterclaims, and granting Respondent the relief sought in its Complaint. A copy of the Order is attached hereto as "**Exhibit A.**"

14. On January 8, 2021, Appellants filed their Notice of Appeal from that Order ("Notice of Appeal"). A copy of the Notice of Appeal is attached hereto as **"Exhibit B."**

15. On January 15, 2021, Appellants ordered a copy of the transcript of the October 27, 2020 proceedings (the "Transcript") from the South Carolina Court Administration Court Reporter (the "Court Reporter"). A copy of Appellants' Transcript request is attached hereto as **"Exhibit C."**

16. Upon information and belief, on February 9, 2021, the Court Reporter delivered a copy of the Transcript to counsel for Appellants. A copy of the Court Reporter's confirmation of delivery date is attached hereto as **"Exhibit D."**

17. On March 12, 2021, thirty-one (31) days after the Court Reporter delivered the Transcript to Appellants, Appellants filed and served their Initial Brief of Appellants ("Initial Brief"). A copy of Appellants' Initial Brief is attached hereto as **"Exhibit E."**

18. Prior to filing and serving their Initial Brief, Appellants did not serve on Respondent a copy of the Transcript or the correspondence from the Court Reporter, if any, accompanying the delivery of the Transcript to Appellants.

19. Also on March 12, 2021, thirty-one (31) days after delivery of the Transcript, Appellants filed and served their Designation of Matter to be Included in the Record on Appeal ("Designation "). A copy of Appellants' Designation is attached hereto and incorporated herein by reference as **"Exhibit F."**

20. On March 22, 2021, Respondent requested a copy of the Transcript of the October 27, 2020 proceeding from Appellants, but no response has been forthcoming. A copy of Respondent's request to Appellants is attached hereto and incorporated herein by reference as "Exhibit G."

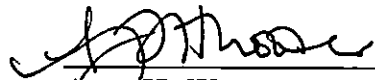
21. Following Appellants' non-response, Respondent ordered a separate copy of the transcript from the Court Reporter. A copy of Respondent's request to the Court Reporter and receipt for payment of same is collectively attached hereto and incorporated herein by reference as "Exhibit H."

22. Respondent received a copy of the Transcript from the Court Reporter on or about March 29, 2021.

23. The undersigned has reviewed the contents of this Affidavit, and the same are true and accurate to the best of her knowledge.

Affiant says nothing more.

This the 7th day of April, 2021.



Amy H. Wooten

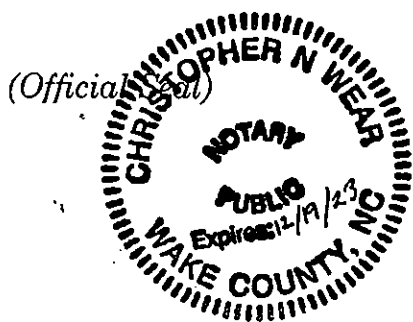
WAKE COUNTY, NORTH CAROLINA

Sworn to (or affirmed) and subscribed before me this day by Amy H. Wooten.

Date: April 7th, 2021



Signature of Notary Public



My commission expires: 12/19/2023

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Jan 06 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

John Deere Construction & Forestry)
Company,)

Civil Action No. 2018-CP-32-04329

Plaintiff,)

**ORDER GRANTING SUMMARY
JUDGMENT**

vs.)

North Edisto Logging, Inc., and Paul)
Gunter,)

Defendants.)

This matter came before the Court on the Motion for Summary Judgment filed by Plaintiff John Deere Construction & Forestry Company (“Plaintiff”). A hearing on the motion was held via the Cisco Webex Virtual Courtroom on October 27, 2020. Plaintiff was represented by Paul A. Fanning. Defendants North Edisto Logging, Inc. and Paul D. Gunter (“Defendants”) were represented by D. Randolph Whitt, Esq.

Having considered the parties’ memoranda and exhibits, the filed affidavits, the arguments heard at the hearing on October 27, 2020, the applicable law, and the parties’ proposed orders, this Court grants Plaintiff’s Motion for Summary Judgment. The Court presents its findings and conclusions below.

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the Court should view the evidence in the light most favorable to the non-moving party. Fleming v. Rose, 350 S.C. 488, 493–94, 567 S.E.2d 857, 860 (2002). Naturally, “[a] court considering summary judgment neither makes factual determinations nor

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considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth the facts that remain undisputed” David v. McLeod Reg’l Med. Ctr., 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). Entry of summary judgment is mandated, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish that existence of an element essential to that party’s case. Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 116, 410 S.E.2d 537, 545-546 (1991) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 317 (1986)). In that kind of situation, “there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” Id. at 116, 410 S.E.2d at 546. “The moving party is entitled to a judgment as a matter of law because the nonmoving party has not made a sufficient showing on an essential element of their case for which they have the burden of proof.” Id.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff’s Complaint asserts causes of action against the Defendants for breach of contract seeking damages of \$946,378.65 along with interest and attorney’s fees. The claims stem from five commercial contracts relating to the purchase and financing of certain logging equipment and warranty products (the “Contracts”). The Contracts were each secured by the financed equipment described therein (the “Collateral”).

Plaintiff’s Complaint alleges that Defendants entered into five separate loan contracts and accompanying security agreements with Plaintiff between January 30, 2014 and September 30, 2015. Defendants admitted each of the Contracts are valid and enforceable. Defendants also admitted that no payments have been made on any of the Contracts since at least January 2017. On December 10, 2018, Plaintiff sent Defendant a notice of default, notice of acceleration, and

demand for payment in full on the Contracts. Plaintiff sought, and was granted, an Order for Dispossession of the Collateral on June 12, 2019. After providing Defendants written notice of their intent and of Defendants' right to redeem, Plaintiff obtained possession of and sold the Collateral, applying the proceeds from the sale to the balance remaining on the Contracts.

In opposition to Plaintiff's Motion, Defendants claim the Collateral was not sold in a commercially reasonable manner after the Order of Dispossession. Defendants rely solely on the Affidavit of Paula Gunter filed on October 22, 2020, five days prior to the hearing. Ms. Gunter states the sales were unreasonably delayed, duplicate expenses and interest were incurred, and the sale prices were inadequate. No additional evidence was provided by Defendants to support these claims. Defendants have reviewed the line itemed account histories for each of the Contracts, and do not contest that the Transaction Histories accurately account for all payments received from or on behalf of Defendants. Defendants do not deny some amount of money is owed to Plaintiff under the Contracts. Defendants claim, however, they are entitled to certain offsets based on Counterclaims they asserted against Plaintiff including breach of the covenant of good faith and fair dealing, negligent supervision, and a class action claim.

ANALYSIS

Defendants assert in their Counterclaim that Plaintiff's conduct in servicing the loans and in attempting to obtain immediate possession was "based on faulty documents, [and] constitutes a breach of contract in that it violates Plaintiff's duty of good faith and fair dealing under each of the loan contracts that are the basis of this action." Specifically, Defendants allege that, over the course of several financing transactions originated by Flint Equipment Company, an authorized dealer of the Plaintiff's equipment, "documents were submitted giving one set of figures to Defendants and inconsistent set of figures to [Plaintiff]."

This allegation seems to center around only one of the Contracts (Contract 5) for equipment and an accompanying warranty plan. The difference in the “inconsistent figures” appears to be a \$30,000.00 credit for a down payment that was included in the total purchase price (the “Purchase Price”) financed through the Plaintiff, but which was not included in the total amount owed, before applying any down payments, featured on original equipment invoice (the “Invoice”). Defendants admit that they agreed to pay the Purchase Price. Defendants also admit they received the Contract 5 Collateral, along with the warranty package, and there was no issue concerning the receipt of either of those items. Plaintiff’s record show Defendants received service on the Contract 5 Collateral, as required under the warranty plan.

Defendants further allege Plaintiff breached the Contracts by failing to provide an agreed six-month extension of payments. However, Defendants have produced no request for a modification or extension of any of the Contracts, much less an agreement by Plaintiff to modify and extend any of the Contracts.

Defendants’ counterclaim for breach of the covenant of good faith and fair dealing fails to state a claim, as it lacks any allegation of their own contractual performance. Additionally, there is no independent cause of action for the implied covenant of good faith and fair dealing under South Carolina law, and even if there was, there is no issue of fact on the record to establish the elements of breach of the covenant of good faith and fair dealing. See RoTec Servs., Inc. v. Encompass Servs., Inc., 359 S.C. 467, 471–73, 597 S.E.2d 881, 883–84 (Ct. App. 2004) (“implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract”). In sum, there is no breach of good faith and fair dealing without a separate and cognizable claim for breach of contract connected with it. It should also be noted that

Defendants neither sought reconsideration nor appeal of the subject Order of Immediate Dispossession on which they base their purported claims here.

In their Answer and Counterclaim, Defendants allege that Plaintiff negligently failed to supervise the filing of documents associated with their request for immediate possession. There is no evidence on the record to establish the elements of negligent supervision. This counterclaim was considered by Judge Keesley in this case at the June 10, 2019 pre-seizure hearing and he determined the request for immediate possession met the requirements of South Carolina law. Again, this Order was not reconsidered or appealed.

Defendants also allege that Plaintiff negligently failed to supervise the production and execution of the loan documents. However, this counterclaim is a restatement of Defendants' first counterclaim regarding inconsistent figures.

Finally, Defendants failed to assert a cause of action in their counterclaim for a Class Action, and their Counterclaims do not form the basis for a Class Action. Further, there is no evidence on the record to establish a Class Action, and Defendants have failed to present any genuine issues of fact that they have suffered any damages as a result of any actions or inactions on the part of Plaintiff.

CONCLUSION

In light of the facts and circumstances presented to this court, Defendant has failed to show that there is a genuine issue as to any material fact on their counterclaim causes of action. Therefore, this Court is persuaded that Plaintiff is entitled to summary judgment.

Based on the foregoing, **IT IS ORDERED**, that Plaintiff's Motion for Summary Judgment is **GRANTED**.

AND IT IS SO ORDERED.

[JUDICIAL E-SIGNATURE PAGE TO FOLLOW]

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SC Court of Appeals



Lexington Common Pleas

Case Caption: John Deere Construction & Forestry Company VS North Edisto Logging Inc , defendant, et al
Case Number: 2018CP3204329
Type: Order/Summary Judgment

It Is So Ordered

s/ Walton J. McLeod

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

SC Court of Appeals

Walton J. McLeod, Circuit Judge

Case No. 2018-CP-32-04329

John Deere Construction & Forestry
Company,

Respondent,

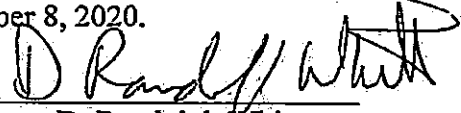
v.

North Edisto Logging, Inc. and Paul Gunter,

Appellants.

NOTICE OF APPEAL

North Edisto Logging, Inc. and Paul Gunter appeal the order of the Honorable Walton J. McLeod . dated December 8, 2020 and filed December 8, 2020. Appellants received written notice of entry of the order on December 8, 2020.



D. Randolph Whitt
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dwhitt2001@aol.com
Attorney for Appellants

January 6, 2021

Other counsel of Record:

Paul A. Fanning
Amy H. Wooten
Ward and Smith P.A.
Post Office Box 8088 | Greenville, NC 27835-8088

Attorneys for Respondent

Exhibit B

Thomas C. Wolff

From: Transcripts <transcripts@sccourts.org>
Sent: Tuesday, March 23, 2021 5:14 PM
To: Fisher, Bobbi
Cc: MCHoward@wardandsmith.com
Subject: FW: John Deere v. North Edisto / Case No. 2018-CP-32-04329

Good evening Bobbi.

The above requested transcript was completed by you and delivered on February 9, 2021. Please contact Ms. Howard and let her know what the estimated cost would be to get a copy of the transcript.

Thank you,

Tammie M. Holmes
Court Reporter/Interpreter Manager
South Carolina Judicial Branch
1220 Senate Street, Ste. 200
Columbia, SC 29201
tholmes@sccourts.org
803-734-1825

From: Michelle C. Howard <MCHoward@wardandsmith.com>
Sent: Tuesday, March 23, 2021 12:21 PM
To: Transcripts <transcripts@sccourts.org>
Subject: John Deere v. North Edisto / Case No. 2018-CP-32-04329

Good afternoon,

This email is a follow-up to a voicemail message I left yesterday.

We represent John Deere in the above-entitled matter as well as the current Appeal matter. Could we please get a copy of the hearing transcript for October 27, 2020 before Judge McLeod. I believe this transcript was already provided to counsel for the Appellant. If we could also get a copy of any correspondence to Mr. Whitt showing when that transcript was sent to him, that would be most appreciated.

Thank you,

~Michelle



Michelle C. Howard
Paralegal

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THE STATE OF SOUTH CAROLINA  
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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

SC Court of Appeals

Walton J. McLeod, Circuit Judge

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Appellate Case 2021-000033  
Case No. 2018-CP-32-04329

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John Deere Construction & Forestry Company, Respondent,

v.

North Edisto Logging, Inc. and Paul Gunter, Appellants.

---

INITIAL BRIEF OF APPELLANTS

---

March 12, 2021

D. Randolph Whitt  
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Attorney for Appellants

**Exhibit E**

TABLE OF CONTENTS

Table of Authorities ..... ii

Statement of Issues on Appeal ..... 1

Statement of the Case ..... 1

Statement of Facts ..... 2

Disputed Issues of Material Fact.....2

Standard of Review.....3

Arguments

1. THE TRIAL COURT ERRED IN CONCLUDING THAT A BREACH OF THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING IS ONLY ACTIONABLE IF THERE IS ALSO A BREACH OF AN EXPRESS TERM OF THE CONTRACT. ....4

2. THE TRIAL COURT ERRED IN CONCLUDING THAT CONSIDERATION OF ISSUES RELATED TO THE RESPONDETNT'S COMPLAINEE WITH THE S.C CLAIM AND DELIVERY STATUTE WAS FORECLOSED BY THE PRESEIZURE HEARING.....6

3. THE TRIAL COURT ERRED IN CONCLUDING THAT CONSIDERATION OF ISSUES RELATED TO THE RESPONDETNT'S LOAN ORIGINATION WAS FORECLOSED BY THE COURT'S RULING ON GOOD FAITH AND FAIR DEALING.....7

4. TO THE EXTENT THAT THE TRIAL COURT GRANTED JUDGMENT IN THE AMOUNT OF \$946,378.65 ALONG WITH INTEREST AND ATTORNEY'S FEES, SUCH A RULING WAS ERRONEOUS.....8

5. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON APPELLANTS' CLASS ACTION CLAIMS BEFORE A MOTION FOR CLASS CERTIFICATION WAS BEFORE THE COURT.....9

Conclusion .....9

TABLE OF AUTHORITIES

CASES

*Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).....3

*Butler Contracting, Inc. v. Court St., L.L.C.*, 369 S.C. 121, 631 S.E.2d 252 (2006).....6

*Doe v. Batson*, 525 S.E.2d 909 (Ct. App. 1999).....3

*Doe ex rel. Doe v. Batson*, 548 S.E.2d 854, 857 (2001).....3

*Gilmore v. Ivey*, 348 S.E.2d 180, 183 (Ct. App. 1986).....3

*Hancock v. Mid-South Management Co.*, 673 S.E.2d 801, 803 (2009).....3

*Manning v. Quinn*, 294 S.C. 383, 365 S.E.2d 24 (1988).....3

*McNair v. Rainsford*, 499 S.E.2d 488, 493 (Ct. App. 1998).....3

*ML-LEE Acquisition Fund, L.P. v. Deloitte & Touche*, 463 S.E.2d 618, 624 (Ct. App. 1995),  
affirmed in part, reversed in part, 489 S.E.2d 470 (1997).....3

*Parks v. Lyons*, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951).....4

*Pilkington v. McBain*, 274 S.C. 312, 262 S.E. 2D 916(1980).....6

*Redwend Ltd. Ptrnship*, 354 S.C. at 468, 581 S.E.2d at 501 (Ct. App. 2003) .....3

*RoTec Svcs., Inc. v. Encompass Svcs. Inc.*, 359 S.C. 467, 597 S.E.2d 881(S.C. App. 2004).....4

*Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 514 S.E.2d 126 (1999).....4

STATUTES

S.C. Code § 15-69-30(5).....6

S.C. Code § 15-69-50.....6

S.C. Code § 15-69-70.....5

S.C. Code § 15-69-210.....5

**OTHER AUTHORITIES**

SCRCP Rule 56.....4

1

## STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN CONCLUDING THAT A BREACH OF THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING IS ONLY ACTIONABLE IF THERE IS ALSO A BREACH OF AN EXPRESS TERM OF THE CONTRACT?
2. DID THE TRIAL COURT ERR IN CONCLUDING THAT CONSIDERATION OF ISSUES RELATED TO THE RESPONDETNT'S COMPLAINCE WITH THE S.C CLAIM AND DELIVERY STATUTE WAS FORECLOSED BY THE PRESEIZURE HEARING.?
3. DID THE TRIAL COURT ERR IN CONCLUDING THAT CONSIDERATION OF ISSUES RELATED TO THE RESPONDETNT'S LOAN ORIGATION WAS FORECLOSED BY THE COURT'S RULING ON GOOD FAITH AND FAIR DEALING?
4. TO THE EXTENT THAT THE TRIAL COURT GRANTED JUDGMENT IN THE AMOUNT OF \$946,378.65 ALONG WITH INTEREST AND ATTORNEY'S FEES, WAS SUCH A RULING ERRONEOUS?
5. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT ON APPELLANTS' CLASS ACTION CLAIMS BEFORE A MOTION FOR CLASS CERTIFICATION WAS BEFORE THE COURT?

## STATEMENT OF THE CASE

This action was commenced by the Respondent's filing of a Summons and Complaint on December 20, 2018.(R. p. \_\_) Appellant served an Answer and Counterclaims alleging respondent had breached the implied duty of good faith under several contracts. (R. p. \_\_)

Respondent filed a Notice of Right to a preseizure Hearing (R. p. \_\_) and an affidavit. (R. p. \_\_) Appellants filed a Demand for Presiezure Hearing. (R. p. \_\_) An Order granting possession was entered (R. p. \_\_).

Respondent served a Reply to the Counterclaims (R. p. \_\_), and an Amended Reply. (R. p. \_\_)

Respondent filed a motion for summary Judgment. (R. p. \_\_),The Circuit Court granted the

1  
motion as to Appellants Counterclaims (R. p. \_\_). A notice of appeal was filed and served (R. p. \_\_).

### STATEMENT OF FACTS

This action involves several contracts financing the purchase of various pieces of heavy equipment. Respondent sought and was granted immediate possession of the equipment, but a substantial time passed before the equipment was sold, with the first sale being canceled because of the actions of Respondent and its agents.

### DISPUTED ISSUES OF MATERIAL FACT

Was it appropriate for Respondent's dealer to create two inconsistent invoices, with one set of figures indicating that no part of the payment for an extended warranty went to Respondent?

Was it appropriate for Respondent's dealer to create two inconsistent invoices, with materially different prices for the equipment sold?

Was it appropriate for Respondent to use an affidavit that was defective in form, and stated wholesale value rather than the required actual value for the equipment that it sought immediate possession of?

Did the Respondent's letter of October 8, 2015 (See Paula Gunter Depo. P 41-42) created an obligation to fairly and in good faith consider modifications for all of defendant's loans?

Did the Respondent ever request any financial information from Appellants to evaluate a modification? (See Paula Gunter Depo. P 66 lines 7-13).

Did the Respondent ever notify Appellants of any decision on the modifications? Appellants deny receiving the unsigned letter relating to one account attached to Respondent's affidavit( see Paula Gunter Affidavit dated October 22, 2020, Paragraphs 2 and 3). and no evidence was submitted by Respondent of any notifications on the other accounts.

Did Paul Whelan's repeated failures to communicate with Appellants constitute a breach of

Respondent's duty of good faith and fair dealing? .(See Paula Gunter Depo. P 61 line22 to P 62 line 13)

Were Respondent's actions with regards to the claim and delivery process, the issue of whether the sales of the collateral in this action were commercially reasonable, and the loan origination issues also breaches of the duty of good faith and fair dealing.

What is the impact of these issues on the defense of unclean hands?

### STANDARD OF REVIEW

In determining whether any triable issues of fact exist, the trial court was required to view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Manning v. Quinn*, 294 S.C. 383, 365 S.E.2d 24 (1988) . Further, a court must consider everything in the record, pleadings, depositions, interrogatories, admissions on file, affidavits, etc.” *Gilmore v. Ivey*, 348 S.E.2d 180, 183 (Ct. App. 1986). “[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” *Hancock v. Mid-South Management Co.*, 673 S.E.2d 801, 803 (2009). Summary judgment is a drastic remedy which should be cautiously invoked so that a litigant is not improperly deprived of a trial on disputed factual issues. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.” *Doe v. Batson*, 525 S.E.2d 909 (Ct. App. 1999) affirmed in part, vacated in part, remanded, *Doe ex rel. Doe v. Batson*, 548 S.E.2d 854, 857 (2001). The party seeking summary judgment has the burden of establishing the absence of a genuine issue of material fact, *McNair v. Rainsford*, 499 S.E.2d 488, 493 (Ct. App. 1998). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary

judgment should be denied. *Redwend Ltd. Ptnrship*, 354 S.C. at 468, 581 S.E.2d at 501 (Ct. App. 2003). Summary judgment also should not be granted if further inquiry into the facts is desirable to clarify the application of the law.” *ML-LEE Acquisition Fund, L.P. v. Deloitte & Touche*, 463 S.E.2d 618, 624 (Ct. App. 1995), affirmed in part, reversed in part, 489 S.E.2d 470 (1997). Summary Judgment is not appropriate in this case because it is only appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law (Rule 56, SCRPC) and Respondent failed to meet its burden of proof on both prongs of this test.

#### ARGUMENT 1

THE TRIAL COURT ERRED IN CONCLUDING THAT A BREACH OF THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING IS ONLY ACTIONABLE IF THERE IS ALSO A BREACH OF AN EXPRESS TERM OF THE CONTRACT.

In the Motion for Summary Judgment Respondent relied primarily on *RoTec Services, Inc. v. Encompass Services, Inc.*, 359 S.C. 467, 597 S.E. 2d 881 (Ct. App. 2004). However, the trial court found more in the RoTec decision than is there. While RoTec found that there is no special cause of action for breach of the duty of good faith and fair dealing, it does not make the breach of the duty no longer actionable. Rather, it makes clear that violation of the implied term requiring good faith and fair dealing is no different than breach of any of the express terms of the contract. The series of cases cited by respondent all involve situations where the claimants attempted to advance both a cause of action for breach of contract and a second cause of action for breach of the duty of good faith and fair dealing. Therefore these cases are not dispositive in this matter, in which the Appellants have brought a single cause of action for breach of contract.

The order appealed from contains the following language: “In sum, there is no breach of good faith and fair dealing without a separate and cognizable claim for breach of contract

connected with it ” (Order filed December 8, 2020 R. p. \_\_). The trial court’s finding that it is necessary to have violated one of the express terms of the contract in order to make a violation of the implied duty of good faith and fair dealing actionable cannot be sustained.

The trial court’s citation of the order for immediate possession as a basis for granting summary judgment on Appellants’ counterclaim for breach of the duty of good faith and fair dealing also exhibits a misconstruction of the statutory purpose of this hearing, S.C. Code § 15-69-70 which mandates that the preseizure hearing determine that claim for immediate possession is “probably valid”. This statutory language clearly indicates that the determination made at the preseizure hearing is provisional and subject to further review when the merits of the underlying action are tried. To conclude otherwise would render the word “probably” in the statute meaningless and violate one of the fundamental tenets of statutory construction.

Additionally Section 15-69-70 provides “The purpose of the preseizure hearing is to protect the defendant’s use and possession of property from arbitrary encroachment, and to prevent unfair or mistaken deprivations of property.” Nothing in this language, which suggests a shield for defendants, allows this proceeding to be used as a sword against a defendant to finally adjudicate their counterclaims in a summary proceeding based on affidavits at the very inception of the case. The limited scope of the preseizure hearing is highlighted by the requirement that the hearing demand must be served within five days of notice.(See Notice (R. p. \_\_) ). Also the existence of S.C. Code § 15-69-210, which sets forth parameters for a final judgment in a claim and delivery action reinforces the conclusion that the order for immediate possession is not a final determination of all issues in the case.

There is also nothing in the brief text of the order for immediate possession that suggest that the court was doing anything more than addressing the issues mandated by S.C. Code § 15-69-70. The order for immediate possession does not even mention the counterclaims or indicate an

intent to do anything more that direct the physical delivery of the property in question.

The Appellants have alleged the existence of a contractual provision, the implied duty of good fair and fair dealing. The existence of this duty under South Carolina Law is undisputed. They have alleged conduct which a reasonable jury could conclude violated that duty, as set forth above under the heading "Disputed Issues of Material Fact". This evidence is far more than the scintilla required in the context of summary judgment. Finally, they have alleged that they suffered damages. See *Pilkington v. McBain*, 274 S.C. 312, 262 S.E. 2d 916(1980). At this stage in the proceeding, that is enough.

## ARGUMENT 2

THE TRIAL COURT ERRED IN CONCLUDING THAT CONSIDERATION OF ISSUES RELATED TO THE RESPONDETNT'S COMPLAINCE WITH THE S.C CLAIM AND DELIVERY STATUTE WAS FORECLOSED BY THE PRESEIZURE HEARING.

As noted above, there is no basis in the statute for concluding that a preseizure hearing under f S.C. Code § 15-69-70 inally adjudicates anything.

Further, in order to receive the statutory remedy under the S.C. Claim and Delivery statutes, the terms of the statute must be strictly complied with, see e.g. *Butler Contracting, Inc. v. Court St., L.L.C.*, 369 S.C. 121, 130, 631 S.E.2d 252, 257 (2006) (Mechanic's lien). S.C. Code § 15-69-30(5) requires the affidavit in a claim and delievery action to state the actual value of the property. In this case the affidavit state the lower wholesale value (See Notice (R. p. \_\_) ).

The bond required by section S.C. Code § 15-69-50 is also rendered defective by being in an amount that it too low, because it is based on the lower wholesale value.

The affidavit offered in support of this claim does not comply with the form required for a valid affidavit in South Carolina. Specifically, the affidavit does not aver that it is made subject to the

penalties of perjury, or that the affiant would be competent to testify in court as to the matters contained in the affidavit, or that the substance of the affidavit would in fact be the affiant's testimony in a hearing before the court. Moreover, the affiant does not even allege the existence of any authorization to testify on behalf of the Respondent. No employment relationship is stated and it is impossible to determine whether the affiant works for the Respondent or for some other entity. What capacity the affiant is employed in by whoever the employer is also a mystery. Affiant could be an experienced senior executive or a new hire with a servicing company executing their first affidavit ever.

The affidavit is also defective in not even attempting to establish a foundation for the conclusory statements it contains. It is unclear what, if any records were consulted in reviewing the affidavit, and what, if any role affiant had in drafting the affidavit.

Respondent has a duty of care to insure that its agents comply with the legal requirements for a claim and delivery action in South Carolina. It is manifest that respondent failed in such duty given the defects listed above. Appellants were damaged by the premature and wrongful loss of possession of the property that is the subject of this action. Negligence claims are particularly ill suited to grants of summary judgment, and the court's ruling on this claim was erroneous and controlled by the trial court's incorrect conclusion as to the impacts of the preseizure hearing.

### ARGUMENT 3

THE TRIAL COURT ERRED IN CONCLUDING THAT CONSIDERATION OF ISSUES RELATED TO THE RESPONDETNT'S LOAN ORIGINATION WAS FORECLOSED BY THE COURT'S RULING ON GOOD FAITH AND FAIR DEALING.

The trial court erroneously granted summary judgment on Appellants negligence claim for respondent's failure to supervise its dealer in the loan origination process.

Respondent has a duty of care to insure that its dealer originated the loans in question in a

manner that complies with South Carolina law. The trial court's grant of summary judgment is clearly controlled by its erroneous construction of the duty of good faith and fair dealing. Under a proper construction of the duty of good faith and fair dealing, Respondent's dealer violated the duty, and Respondent failed in its duty to supervise its agent. Appellants were damaged by being tricked out of the purchase price of a warranty which they were led to believe was from Respondent, which was obviously untrue, when none of the consideration for the warranty went to Respondent. Appellants were further damaged by being charged a price for equipment that apparently had no basis except whatever they needed to be to get the right number. As noted above, negligence claims are particularly ill suited to grants of summary judgment, and the court's ruling on this claim was erroneous and controlled by the trial court's incorrect construction of the duty of good faith and fair dealing,

#### ARGUMENT 4

TO THE EXTENT THAT THE TRIAL COURT GRANTED JUDGMENT IN THE AMOUNT OF \$946,378.65 ALONG WITH INTEREST AND ATTORNEY'S FEES, SUCH A RULING WAS ERRONEOUS

Although the ordering paragraph of the order under appeal is silent about any judgment on Respondent's claim for a deficiency judgment (R. p.\_\_), and the entire order only mentions the amount that they were "seeking" in their complaint (R. p.\_\_), Respondents have taken the position in other litigation that they were awarded a judgment on their claim. Such a construction would be erroneous in light of the order's acknowledgment of Ms. Gunter's testimony "the sales were unreasonably delayed, duplicate expenses and interest were incurred, and the sale prices were inadequate" (R. p.\_\_). The court's further reference to there being no other evidence indicates an impermissible weighing of evidence rather than a proper exercise of the scintilla rule. Choosing between the competing

1  
assessments of the sale of the collateral is the province of a jury, and therefore any ruling granting judgment of Respondent's claim is erroneous.

#### ARGUMENT 5

THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S CLASS ACTION CLAIMS BEFORE A MOTION FOR CLASS CERTIFICATION WAS BEFORE IT..


The factual allegations that any party seeking class certification can make in the absence of discovery are necessarily limited by the party's lack of access to the records that would allow precise pleading about the elements to be considered on the merits of a class certification motion.

The trial court's ruling on class certification was premature as no such motion was before the court and this ruling was also controlled by the trial court's erroneous conclusions regarding the duty of good faith and fair dealing.

#### CONCLUSION

For the foregoing reasons, the Order of the Circuit Court should be reversed and the case remanded to Lexington County, for further proceedings on Appellant's Counterclaims and Respondent's claim for a deficiency balance..

Respectfully submitted,



D. Randolph Whitt  
S.C. Bar No. 13068  
344 Blossom View Ct.  
West Columbia, SC 29170  
(803) 422-2176 Tel  
dwhitt2001@aol.com  
Attorney for Appellant

March 12, 2021 ;

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

**RECEIVED**

Mar 12 2021

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

SC Court of Appeals

Walton J. McLeod, Circuit Judge

---

Appellate Case 2021-000033  
Case No. 2018-CP-32-04329

---

John Deere Construction & Forestry Company, Respondent,

v.

North Edisto Logging, Inc. and Paul Gunter, Appellants.

---

PROOF OF SERVICE

---

I certify that I have served the Appellant's Initial Brief and the Designation of Matter to be Included in the Record on Appeal on Respondent listed above by emailing a copy of each of them on March 12, 2021, addressed to their attorney of record as follows:

Paul A. Fanning PAF@wardandsmith.com

Amy H. Wooten AHWooten@wardandsmith.com

Michelle C. Howard MCHoward@wardandsmith.com

March 12, 2021



---

D. Randolph Whitt  
S.C. Bar no. 13068  
344 Blossom View Ct.  
West Columbia, SC 29170  
(803) 422-2176 Tel  
dwhitt2001@aol.com  
Attorney for Appellants

**From:** dwhitt2001@aol.com,

**To:** paf@wardandsmith.com, ahwooten@wardandsmith.com, mchoward@wardandsmith.com,

**Subject:** North Edisto initial Brief and designation

**Date:** Fri, Mar 12, 2021 8:48 pm

**Attachments:** NEL initial brief scan.pdf (4325K), NEL designation scan.pdf (449K), NEL svc 2 scan.pdf (241K)

---

Greetings All,

attached are scans of North edisto's Initial Brief, designation of Matter and proof of service, which I will also file by email shortly

Regards,  
Randy Whitt

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

Walton J. McLeod, Circuit Judge

---

Appellate Case 2021-000033  
Case No. 2018-CP-32-04329

---

John Deere Construction & Forestry Company, Respondent,

v.

North Edisto Logging, Inc. and Paul Gunter, Appellants.

---

DESIGNATION OF MATTER TO BE  
INCLUDED IN THE RECORD ON APPEAL

---

Appellants propose the following be included in the Record on Appeal:

1. Order filed December 8, 2020, (order appealed from);
2. Summons and Complaint filed December 20, 2018, with exhibits
3. Answer and Counterclaims filed March 13, 2019.
4. Notice of Right to a Preseizure Hearing filed January 8, 2019
5. Claim and Delivery Affidavit filed January 8, 2019.
6. Bond filed in support of Claim and Delivery
7. Demand for Preseizure Hearing filed February 19, 2019.
8. Order for Immediate Dispossession filed June 12, 2019.
9. Reply to Counterclaims filed June 26, 2019
10. Amended Reply to Counterclaims filed July 23, 2019.
11. Motion for Summary Judgment filed August 19, 2020.
12. Affidavit on behalf of Appellant on Summary Judgment
13. Affidavit on behalf of Respondent on Summary Judgment
14. Transcript of hearing held October, 27, 2020
15. Proposed Order submitted by Appellants
16. Proposed Order submitted by Respondents
17. Notice of Appeal and Proof of Service

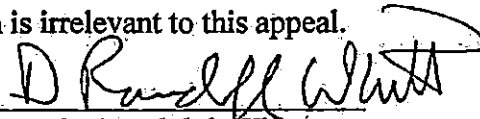
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**Mar 12 2021**

**SC Court of Appeals**

**Exhibit F**

I certify that this designation contains no matter which is irrelevant to this appeal.



D. Randolph Whitt  
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West Columbia, SC 29170  
(803) 422-2176 Tel  
dwhitt2001@aol.com

March 12, 2021

Attorney for Appellants

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

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Mar 12 2021

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

SC Court of Appeals

Walton J. McLeod, Circuit Judge

---

Appellate Case 2021-000033  
Case No. 2018-CP-32-04329

---

John Deere Construction & Forestry Company, Respondent,

v.

North Edisto Logging, Inc. and Paul Gunter, Appellants.

---

PROOF OF SERVICE

---

I certify that I have served the Appellant's Initial Brief and the Designation of Matter to be Included in the Record on Appeal on Respondent listed above by emailing a copy of each of them on March 12, 2021, addressed to their attorney of record as follows:

Paul A. Fanning PAF@wardandsmith.com

Amy H. Wooten AHWooten@wardandsmith.com

Michelle C. Howard MCHoward@wardandsmith.com



D. Randolph Whitt  
S.C. Bar no. 13068  
344 Blossom View Ct.  
West Columbia, SC 29170  
(803) 422-2176 Tel  
dwhitt2001@aol.com  
Attorney for Appellants

March 12, 2021

**From:** dwhitt2001@aol.com,

**To:** paf@wardandsmith.com, ahwooten@wardandsmith.com, mchoward@wardandsmith.com,

**Subject:** North Edisto initial Brief and designation

**Date:** Fri, Mar 12, 2021 8:48 pm

**Attachments:** NEL initial brief scan.pdf (4325K), NEL designation scan.pdf (449K), NEL svc 2 scan.pdf (241K)

---

Greetings All,

attached are scans of North edisto's Initial Brief, designation of Matter and proof of service, which I will also file by email shortly

Regards,  
Randy Whitt

## Thomas C. Wolff

---

**From:** Paul A. Fanning <PAF@wardandsmith.com>  
**Sent:** Monday, March 22, 2021 5:07 PM  
**To:** dwhitt2001@aol.com  
**Cc:** Michelle C. Howard; Amy H. Wooten  
**Subject:** RE: North Edisto initial Brief and designation

I would have thought we would have received it at the same time. But we have not received anything for the court reporter or your office. If you could send us a copy of the transcript, that would be great. Thank you.

**From:** dwhitt2001@aol.com <dwhitt2001@aol.com>  
**Sent:** Monday, March 22, 2021 1:49 PM  
**To:** Paul A. Fanning <PAF@wardandsmith.com>  
**Subject:** Re: North Edisto initial Brief and designation

Hi Paul,

I did get it on February 10, I think, but that date might not be exact. I am absolutely sure that I have it.

Regards,  
Randy Whitt

-----Original Message-----

**From:** Paul A. Fanning <PAF@wardandsmith.com>  
**To:** dwhitt2001@aol.com <dwhitt2001@aol.com>  
**Cc:** Michelle C. Howard <MCHoward@wardandsmith.com>; Amy H. Wooten <AHWooten@wardandsmith.com>  
**Sent:** Mon, Mar 22, 2021 1:30 pm  
**Subject:** RE: North Edisto initial Brief and designation

Randy:

Good afternoon. We have not received the hearing transcript. Have you received it?

**From:** dwhitt2001@aol.com <dwhitt2001@aol.com>  
**Sent:** Friday, March 12, 2021 8:49 PM  
**To:** Paul A. Fanning <PAF@wardandsmith.com>; Amy H. Wooten <AHWooten@wardandsmith.com>; Michelle C. Howard <MCHoward@wardandsmith.com>  
**Subject:** North Edisto initial Brief and designation

Greetings All,

attached are scans of North edisto's Initial Brief, designation of Matter and proof of service, which I will also file by email shortly

Regards,  
Randy Whitt



**Paul A. Fanning**  
Attorney | Board Certified Specialist | Bankruptcy Law

**Ward and Smith, P.A.**  
Post Office Box 8088 | Greenville, NC 27835-8088  
Overnight Delivery:  
120 West Fire Tower Road | Winterville, NC 28590



**Exhibit G**

---

P: 252.215.4027 | F: 252.215.4077 | M: 252.717.5744  
V-card | [www.wardandsmith.com](http://www.wardandsmith.com)  
Resources for North Carolina Businesses during COVID-19

If you have received this confidential message in error, please destroy it and any attachments without reading, printing, copying or forwarding it. Please let us know of the error immediately so that we can prevent it from happening again. You may reply directly to the sender of this message. Neither the name of Ward and Smith, P.A. or its representative, nor transmission of this email from Ward and Smith, P.A., shall be considered an electronic signature unless specifically stated otherwise in this email by a licensed attorney employed by Ward and Smith, P.A. Thank you.

**Thomas C. Wolff**

---

**From:** Michelle C. Howard <MCHoward@wardandsmith.com>  
**Sent:** Tuesday, March 23, 2021 12:21 PM  
**To:** transcripts@sccourts.org  
**Subject:** John Deere v. North Edisto / Case No. 2018-CP-32-04329

Good afternoon,

This email is a follow-up to a voicemail message I left yesterday.

We represent John Deere in the above-entitled matter as well as the current Appeal matter. Could we please get a copy of the hearing transcript for October 27, 2020 before Judge McLeod. I believe this transcript was already provided to counsel for the Appellant. If we could also get a copy of any correspondence to Mr. Whitt showing when that transcript was sent to him, that would be most appreciated.

Thank you,

~Michelle



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703-405-0698

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1000 S. Commons Drive

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2021 the foregoing AFFIDAVIT OF AMY H. WOOTEN IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS APPEAL as served on the following person by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail, addressed to the following person at the following address which is the last addresses known to me:

D. Randolph Whitt, Esq.  
Fleming & Witt, P.A.  
344 Blossom View Court  
West Columbia, SC 29170  
*Counsel for Appellants-Defendants*

**RECEIVED**  
APR 08 2021  
**SC Court of Appeals**

  
\_\_\_\_\_  
Amy H. Wooten, Esq.  
S.C. State Bar I.D. No.: 100128  
N.C. State Bar I.D. No.: 39762  
For the firm of Ward and Smith, P.A.  
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*Attorneys for Respondent-Plaintiff*

Raleigh, North Carolina  
April 7, 2021.

070644-00226  
ND: 4842-2258-3012, v. 2

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ahwooten@wardandsmith.com

April 7, 2021

VIA OVERNIGHT DELIVERY

**RECEIVED**

APR 08 2021

SC Court of Appeals

Ms. Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
1220 Senate Street  
Columbia, South Carolina 29201

RE: John Deere Construction & Forestry Company / North Edisto Logging, Inc. and  
Paul D. Gunter  
Appellate Case: 2021-000033  
Appeal From Lexington County Court File: 2018-CP-32-04329  
Our File 070644-00226

Dear Ms. Kitchings:

Enclosed are the original and six copies each of the following documents:

- 1) Respondent's Notice of Filing of Order Admitting Counsel *Pro Hac Vice*;
- 2) Respondent's Motion to Dismiss Appeal;
- 3) Affidavit of Amy H. Wooten in Support of Respondent's Motion to Dismiss Appeal;  
and
- 4) Memorandum of Law in Support of Respondent's Motion to Dismiss Appeal.

Please file the original, stamp the copies with the necessary filing information and then return the firm's copy of each document to me in the enclosed self-addressed, postage prepaid envelope that I have provided for your convenience. By copy of this letter, I am sending a copy of these documents to opposing counsel.

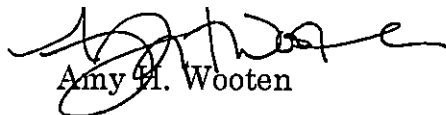
In addition, enclosed is our firm's check in the amount of \$50.00 representing the filing fee as established by the Supreme Court, in connection with the Motion to Dismiss.

WARD AND SMITH, P.A.

Ms. Jenny Abbott Kitchings  
April 7, 2021  
Page 2

Many thanks for your attention to this matter.

Yours truly,

  
Amy E. Wooten



ND: 4813-4575-9460, v. 1

Enclosures


cc: D. Randolph Whitt, Esq. (w/encs.)

AIRWOODEN 9 LBS 1 OF 1  
 91927 9100 DWT: 12.10.6  
 WARD AND SMITH - RALEIGH  
 281 CORPORATE CENTER  
 RALEIGH NC 27607

**SHIP TO:**  
 CLERK OF COURT  
 MS. JENNY ABBOTT KITCHINGS  
 1220 SENATE STREET  
 SOUTH CAROLINA COURT OF APPEALS  
 COLUMBIA SC 29201-3769


**SC 292 9-01**  


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Client Matter Number: 070644-00226  
 Infile: 1622/ATW

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