

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

RECEIVED

JUN 30 2021

SC Court of Appeals

APPEAL from Court of Common Pleas of CHARLESTON COUNTY

Capers G. Barr, III, Special Referee

Appellate Case No. 2021-000185

Case No. 2019-CP-10-03042

Judith A. Brown, as Personal Representative for the Estate of Mildred C. Knight, and
Norman R. "Bobby" Knight III,Appellants

v.

Chloe Knight Tonney,Respondent

APPELLANTS' INITIAL BRIEF

J. Seth Whipper
WHIPPER LAW FIRM
Attorney for the Appellants
P.O. Box 70070
North Charleston, SC 29415
(843) 740-7777

TABLE OF CONTENTS

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES.....III-IV

STATEMENT OF THE ISSUES ON APPEAL.....1

STATEMENT OF THE CASE 1

STANDARD OF REVIEW.....2

ARGUMENTS

**I. MAY APPELLANTS AMEND THEIR ORIGINAL COMPLAINT TO
INCLUDE TWO ADDITIONAL CAUSES OF ACTION WHERE THE
ORIGINAL COMPLAINT WAS FILED IN 2005 AND NEVER TRIED?..
.....2**

**II. IS DENIAL OF APPELLANTS' MOTION TO AMEND THEIR
COMPLAINT TO ADD CAUSES OF ACTION IMMEDIATELY
APPEALABLE.....7**

CONCLUSION.....9

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

CASES

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 1965, 167 L. Ed.2d 929,940-94.....4

Berry v. McLeod, 328 S.C. 435, 492 S.E.2d 794 (Ct. App.1997) reh. den., cert. den.....3

Blakely & Copeland v. Frazier, 11 S.C. 122 (1878).....7

Braudie v. Richland County, 217 S.C. 57, 59 S.E.2d 548 (1950).....7

Conley v. Gibson, 355 U.S. 41, 48, 78 S. Ct. 99, 103, 2 Led 2d 80 (1957).....6

Foggie v. CSX Transportation, Inc., 315 S.C. 17, 22,431 S.E.2d 587, 590 (1993)...2,3

Foman v. Davis, 371 U.S. 178, 83 S.Ct 227, 9 L.Ed2D 222 (1962).....3

Forrester v. Smith & Steele Builders, Inc., 295 S.C.504,369 S.E.2d 156(1988),...3,6,7

Higgins v. Medical University of South Carolina, 326 S.C. 592, 602-605, 486 S.E2d 269, 274-275 (Ct.App.1997).4

Howey v. United States, 481 F.2d 1187 (9th Cir. 1973).....3

Jefferson by Johnson v. Gene's Used Cars, Inc., 295 S.C.317, 368 S.E. 2d 456(1988).8

Jennings v. Jennings, 389 S.C. 190, 209,697 S.E.2d 671, 681 (Ct.App.2010).....4

Krupski v. Costa Crociere, S.p.A., 560 U.S. 538, 130 S. Ct. 2485, 177 L.Ed.2d 48 (2010).....3,5

Love v. State, 428 S.C. 231, 834 S.E.2d 196 (2019).....5

Lee v. Bunch, 373 S.C. 654,661,647 S.E 2d 197, 201 (2007).....5

Marshall v. White, 250 S.C. 308, 157 S.E. 2d 595 (1967).....2

Morrow v. Fundamental Long-Term Care Holdings, LLC, 412 S.C. 534, 537-538, 773 S.E. 2d 144, 146 (2015).....8

Neeltec Enters., Inc. v. Long, 397 S.C. 563, 725 S.E.2d 926 (2012).7

Patton v. Miller, 420 S.C. 471, 804 S.E.2d 252 (2017).....5

Pool v. Pool, 329 S.C. 324,328,494 S.E.2d 820, 822 (1998).....2

Potomac Leasing Co. v. Bone, 294 S.C. 494, 497, 366 S.E.2d 26, 28 (Ct.App. 1988).....2

<u>Skydive Myrtle Beach, Inc. v. Horry County</u> , 426 S.C. 175, 826 S.E.2d 585 (2019)..4	
<u>Smith v. Traxler</u> , 224 S.C. 290, 78 S.E.2d 630 (1953).....7	
<u>Stanley v. Kirkpatrick</u> , 357 S.C. 169, 592 S.E.2d 296 (2004), reh. den.3,5	
<u>Stone v. Thompson</u> , 426 S.C. 291, 826 S.E. 2d 868 (2019).....7,8	
<u>Tanner v. Florence Cty.Treasures</u> , 336 S.C. 552, 558-60, 521 S.E.2d 153, 156-57 (1999).....4	
<u>Thomas v. Grayson</u> , 318 S.C. 82,456 S.E. 2d 377, 380 (1995).....6	
<u>Thomas v. Medesco, Inc., Division of Harvard Industries, Inc.</u> ,67 F.R.D. 129 (E.D.Pa. 1974).....3,6	
<u>Whitfield Const. Co. v. Bank of Tokyo Trust Co.</u> , 338 S.C. 207,525 S.E.2d 888 (Ct.App. 1999).5	

STATUTES

S.C. Code sec. 15-3-380 (1987).....6	
S.C. Code sec. 14-3-330(2)(a)(1987).....7,8	

OTHER AUTHORITIES

South Carolina Rules of Civil Procedure, Rule 15 (a).....1,3,5,6,8	
South Carolina Rules of Civil Procedure, Rule 15 (c).....1,3,4,5,6,8	
South Carolina Rules of Civil Procedure, Rule 40.....1	
H. Lightsey & J. Flanagan, South Carolina Civil Procedure (1985).....2	
J. Moore, 3 Moore's Federal Practice (2dn Ed. 1987).....2,7	

STATEMENT OF THE ISSUES ON APPEAL

1. MAY APPELLANTS AMEND THEIR ORIGINAL COMPLAINT TO INCLUDE TWO ADDITIONAL CAUSES OF ACTION WHERE THE ORIGINAL COMPLAINT WAS FILED IN 2005 AND NEVER TRIED?
2. IS DENIAL OF APPELLANTS' MOTION TO AMEND THEIR COMPLAINT TO ADD CAUSES OF ACTION IMMEDIATELY APPEALABLE?

STATEMENT OF THE CASE

Appellants moved to amend their original complaint pursuant to SCRCP 15(a) and 15(c).(R.p.). The objective of the amendments was to include two additional causes of action: conspiracy and loss of consortium. The loss of consortium claim was offered as an amendment by the Decedent, Mildred C. Knight, pro se, and withdrawn by her acting pro se at a hearing in April, 2008 in response to motions filed by Respondent counsel. (Tr.p.20). The conspiracy cause was offered in 2019 for the first time with the re-offer of the consortium amendment. The present action was commenced in June, 2019 and consolidated with the original action that started in 2005. These parties are still involved with probate matters involving the estates of Norman R. Knight, Jr. and Mildred C. Knight.

These amendments comprise the conduct, transactions, or occurrences that gave rise to the 2005 litigation. (R.p.)

The 2005 action became a 2008 case after earlier administrative consolidation and was inadvertently dismissed in 2009 and restored in 2019 (SCRCP 40) and consolidated with the 2019 action filed by the Personal Representative of the Estate of Mildred C. Knight and Norman R. "Bobby" Knight, III, sole surviving devisee of the Knight Estate. The Special Referee denied the motion to amend the June 2019 complaint. (R.p.)

STANDARD OF REVIEW

Amending Pleadings

The focal inquiry in allowing amendment of pleadings is whether doing so will prejudice the opposing party. Pool v. Pool, 329 S.C. 324, 328, 494 S.E.2d 820, 822 (1998).

It is well established that a motion to amend is addressed to the sound discretion of the trial judge, and the party opposing the motion has the burden of establishing prejudice. Foggie v. CSX Transportation Inc., 315 S.C. 17, 22, 431 S.E. 2d 587, 590 (1993).

Appealability

An order denying a motion is not appealable before final judgment in any respect in which it does not deprive the movant of a substantial right. Marshall v. White, 250 S.C. 308, 157 S.E.2d 595 (1967).

ARGUMENTS

1. MAY APPELLANTS AMEND THEIR ORIGINAL COMPLAINT TO INCLUDE TWO ADDITIONAL CAUSES OF ACTION WHERE THE ORIGINAL COMPLAINT WAS FILED IN 2005 AND NEVER TRIED?

"Rule 15 of the South Carolina Rules of Civil Procedure now governs amendments to pleadings. Under this rule, as under Rule 15 of the Federal Rules of Civil Procedure, delay alone, regardless of its length, is not enough to bar [a proposed amendment] if the other party is not prejudiced." J. MOORE, 3 MOORE'S FEDERAL PRACTICE, 15.08 at 15-76 (2d ed.1987); see H. LIGHTSEY & J. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE at 288 (1985) (while there is no time limit for making a motion to amend, the court should consider the prejudice to the other party). Potomac Leasing Co. v. Bone, 294 S.C. 494, 497, 366 S.E.2d 26, 28 (Ct.App. 1988).

Prejudice as envisioned by Rule 15(a) is a lack of notice that the new issue is to be tried and lack of opportunity to refute it.

Stanley v. Kirkpatrick, 357 S.C. 169, 592 S.E.2d 296 (2004), reh. den. The court has the power to amend pleadings beyond time allowed for amendment when to do so does not prejudice another party. Berry v. McLeod, 328 S.C. 435, 492 S.E.2d 794 (Ct. App.1997) reh. den., cert. den.

A seminal case on the standards for applying Rule 15; Forrester v. Smith & Steele Builders, Inc., 295 S.C.504, 369 S.E.2d 156(1988), recounts the development of Rule 15(a) and surveys pre-rule South Carolina precedents. The Court examines the issue of prejudice in that case and determines that the Defendant failed to demonstrate prejudice or manifest injustice resulting from the proffered amendment. The Court ruled that " The trial court abused its discretion in denying the motion to amend." Forrester at 295 S.C. 511, 369 S.E.2d 160. Forrester cites two cases: Thomas v. Medesco, Inc. Division of Harvard Industries, Inc. 67 F.R.D: 129 (E.D.Pa. 1974), where the court permitted an amendment to add punitive damages in the face of the defendant's assertion the amendment would require it to file new pleadings, engage in new discovery, join new parties, and generally reopen the entire pretrial process; and Howey v. United States, 481 F.2d 1187 (9th Cir. 1973) where denial of a motion to amend offered five years after action commenced and on second day of trial was improper in the absence of prejudice. Forrester does cite Foman v. Davis, 371 U.S. 178, 83 S. Ct 227, 9 L. Ed.2d 222 (1962) and its justifying reasons for denial standard, but even Foman finds abuse of discretion when there is no prejudice. As stated in Krupski, 560 U.S. 538,130 S.Ct. 2485, 177 L.Ed.2d 48 (2010), the issue of undue delay is not persuasive in an evaluation of ' relation back' under Rule 15(c).

In our case, the Defendant cannot demonstrate any prejudice or manifest injustice from the proffered amendment. This amendment is pretrial and early, relative to the discovery process. None of the allegations involve facts that surprise the Defendant or are new to this ongoing conflict. Documents and persons are available for defending and prosecuting the claim.(Tr.p.). The timing of this amendment brings no lawful disadvantage to the Defendant.

Skydive Myrtle Beach, Inc. v. Horry County, 426 S.C. 175, 826 S.E.2d 585 (2019) held that " A court's decision to deny a motion to amend should not be based on the court's perception of the merits of an amended complaint." Skydive at 426 S.C.182-183. Further, the court made clear that " If a proposed amendment is not clearly futile, then denial of leave to amend is improper." Id., 426 S.C. at 182 citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 1965, 167 L. Ed.2d 929, 940-941(A well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely).

"Futility" as related to the issue of prejudice and amendments refers to the capacity to appear and/ or qualify for relief under a given cause of action. See, Jennings v. Jennings, 389 S.C. 190, 209,697 S.E.2d 671, 681 (Ct.App.2010), Higgins v. Medical University of South Carolina, 326 S.C. 592, 602-605, 486 S.E2d 269, 274-275 (Ct.App.1997). Tanner v. Florence Cty. Treasurer, 336 S.C. 552, 558-60, 521 S.E.2d 153, 156-57 (1999) (analogizing a Rule 15(d) motion to supplement a complaint to a motion to amend a complaint under Rule 15 (c) and finding the trial court erred in denying the plaintiff's motion to supplement his complaint because the trial court should not have relied on the merits-related questions of whether the defendant was immune under the Tort Claims Act).

In Whitfield Const. Co. v. Bank of Tokyo Trust Co., 338 S.C. 207, 525 S.E.2d 888 (Ct.App. 1999), the court held that an amendment to a pleading relates back to the date of the original pleading “whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings. Further, the issue of undue delay is not persuasive in an evaluation of ‘relation back’ under Rule 15(c). Krupski v. Costa Crociere, S.p.A., 560 U.S. 538, 130 S. Ct. 2485, 177 L.Ed.2d 48 (2010).

In Love v. State, 428 S.C. 231, 834 S.E. 2d 196(2019), Justice John W. Kittredge, in dissent, said as follows:... Rule 15 of the South Carolina Rules of Civil Procedure provides for a liberal approach to the granting of amendments to pleadings... In Patton v. Miller, 420 S.C. 471, 804 S.E.2d 252 (2017) Justice John C. Few cites 3 Cyclopedia of Federal Procedure sec. 8.2(3d ed.rev. 2017) (“The Spirit of the Rules is to settle controversies upon their merits rather than to dismiss actions on technical grounds, to permit amendments liberally, and to avoid, if possible, depriving a litigant of a chance to bring a case to trial.”). Justice Few concludes his discussion on SCRPC 15 saying that “ Because the record contains no basis for a conclusion the defendant would have been prejudiced by allowing [Plaintiff] Patton to amend her complaint , we find the circuit court erred in not allowing the amendment. Id. 420 S.C.493, 804 S.E.2d 263 (2017).

Despite Justice Few’s descriptive language, prejudice in South Carolina does not per se include delay. See Lee v. Bunch, 373 S.C. 654, 661, 647 S.E2d 197, 201 (2007) (“The prejudice that would warrant denial of a motion to amend the pleadings is a lack of notice that a new issue is to be tried and a lack of opportunity to refute it. “Prejudice as envisioned by Rule 15(a) is a lack of notice that the new issue is to be tried and lack of opportunity to refute it. Stanley v Kirkpatrick, 357 S.C. 169, 592 S.E.2d 296 (2004)., reh. den.

This case is cognizable fundamentally because the original claim carries a forty (40) year statute of limitation. See, S.C. Code sec. 15-3-380. The assignment of undue delay to this matter disregards the expense of this action. The 15(a) SCRPC amendments, herein, merely restore all of the conduct involved in this claim. The decedent estates are still open because of other civil actions involving these parties. Litigation means the Defendant is aware of her behavior and is not without the opportunity to refute the causes and be appropriately notified of the existence of these causes. In arguing this motion, Defendant put forth persuasive arguments based on a 2008 transcript of a hearing attended by our Decedent. (Tr.p. 20) There is no undue delay. In this case, the parties are not involved with delay.

The Special Referee is not recognizing the import of SCRPC 15(c). He is not following Thomas v. Grayson, 318 S.C. 82, 456 S.E.2d 377, 380 (1995)(The purpose of SCRPC 15(c) is to salvage causes of action otherwise barred by the statute of limitations). The purpose of pleadings is to facilitate a proper decision on the merits. Conley v. Gibson, 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2 LEd. 2d 80 (1957), and not erect formal and burdensome impediments in the litigation process. Appellants, in this case, consented to referral to the nonjury docket and announced that they waived their rights to a jury trial although their original pleadings and the amended complaint contained the request for a jury trial during the pandemic. Appellants also requested the Special Referee. These decisions indicate earnest, good faith, expeditious, and cooperative intentions to process the litigation. In Thomas v. Medesco, Inc., Division of Harvard Industries, Inc. 67 F.R.D. 129 (E.D.Pa. 1974), as cited in Forrester, supra, the court found that movant was not introducing new facts and held "we will follow the spirit of Rule 15 and grant plaintiff's motion." Thomas, 67 F.R.D. at 131.

Rule 15(a) has consistently been interpreted by the federal courts to strongly favor

amendments "where the moving party has not been guilty of bad faith and is not acting for the purpose of delay, the opposing party will not be unduly prejudiced, and the trial of the issues will not be unduly delayed." 3 J. Moore, Moore's Federal Practice Section 15.08 at 15-49 (2d ed. 1987). Similarly, our courts have construed [295 S.C. 507] former Section 15-13-920 to require pretrial amendments to pleadings to be freely granted unless a circumstance exists to justify refusal. Smith v. Traxler, 224 S.C. 290, 78 S.E.2d 630 (1953); Braudie v. Richland County, 217 S.C. 57, 59 S.E.2d 548 (1950). Forrester v. Smith & Steele Builders, Inc., 295 S.C.504, 369 S.E.2d 156(1988). There is no prejudice to this Defendant created by these amendments. But for Defendant's actions, Plaintiffs would not have grounds to bring a lawsuit.

2. IS DENIAL OF APPELLANTS' MOTION TO AMEND THEIR COMPLAINT TO ADD CAUSES OF ACTION IMMEDIATELY APPEALABLE?

S.C. Code 14-3-330-(2) declares that "the Supreme Court shall have jurisdiction for corrections of errors of law in law cases, and shall review upon appeal: . . . (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action . . ." "It may be concluded that whenever a substantial right of the party to an action material to obtaining judgment in such action is denied, a right of appeal lies to the Supreme Court. Blakely & Copeland v. Frazier, 11 S.C. 122 (1878). "Whatever can be regarded as affecting the necessary means of obtaining a judgment, must be regarded as affecting the judgment itself. *Id.* at 11 S.C. 135. See, Neeltec Enters., Inc. v. Long, 397 S.C. 563, 725 S.E.2d 926 (2012) (an interlocutory order which affects a substantial right, and either in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues an action, is immediately appealable under sec. 14-3-330(2)(a)). "However, by its nature, the question of whether an order is immediately appealable is determined on a case-by-case basis." Stone v. Thompson, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (2019),

citing Morrow v. Fundamental Long-Term Care Holdings, LLC, 412 S.C. 534, 537-538, 773 S.E.2d 144, 146 (2015).

Failure to include Appellants' claims substantially alters how this matter would proceed at trial. Notwithstanding the reference to the Special Referee for a non-jury proceeding, the manner of disposing the single ground left for resolution effectively abandons legitimate issues, i.e., conspiracy and loss of consortium that are legally contextual and relevant to the Plaintiffs' claim. These matters need to be resolved at the same time, if allowed. "An order 'involves the merits' when it finally determines some substantial matter forming the whole or a part of some cause of action or defense . . ." Jefferson by Johnson v. Gene's Used Cars, Inc., 295 S.C.317, 368 S.E.2d 456(1988). The manner of proceeding in the case at hand does not invoke the formal 'mode of trial' analysis but the impact is similar because Appellants cannot litigate the issues that exist in this action. This case is still in pretrial preparation with discovery outstanding. The denial of the motion to amend prevents reaching the merits of this conflict and forecloses substantial rights of the Appellants.

Please note that the treatment of the facts are now guided by the jurisprudence of the South Carolina Rules and the Federal Rules of Civil Procedure Rules 15(a) and 15(c). The Amendments are a major factor in resolving every issue raised by this family conflict. The essential elements of the Defendants' behavior in relation to her deceased parents must be properly characterized and weighed.

The amendments raise questions of law that can only be answer by finding facts. The Full menu of litigation is required for the protection of all parties.

Primarily, the issue of review of intermediate orders in law cases are controlled by S.C. Code 14-3-330, and the nature of the issue requires a determination on a case-by-case basis. Stone v. Thompson, 426 S.C. 291, 826 S.E. 2d 868 (2019). The stakes are high, the interests are substantial, major issues are

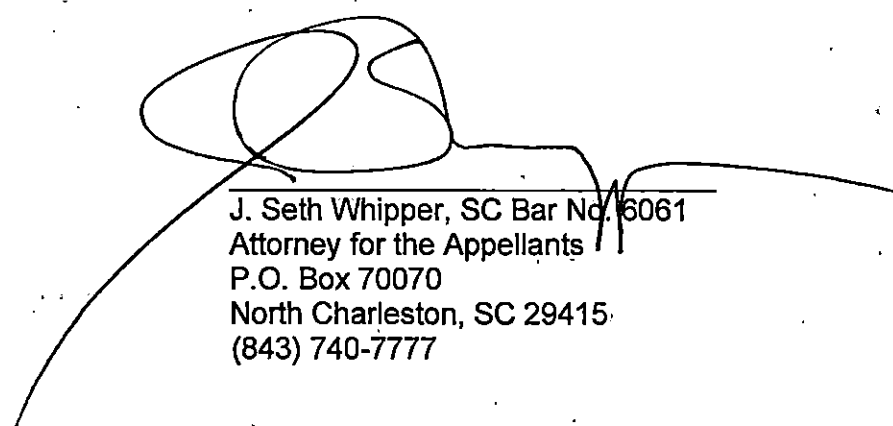
prevalent, and the two stricken causes of action would provide due process for a just resolution in this case.

CONCLUSION

Appellants should be allowed to amend their complaints.

Respectfully Submitted
WHIPPER LAW FIRM

June 28, 2021



J. Seth Whipper, SC Bar No. 6061
Attorney for the Appellants
P.O. Box 70070
North Charleston, SC 29415
(843) 740-7777

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

RECEIVED

JUN 30 2021

SC Court of Appeals

APPEAL from Court of Common Pleas of CHARLESTON COUNTY

Caper G. Barr, III, Special Referee.

CASE NO. 2019-CP-10-03042

Judith A. Brown, as Personal Representative for the Estate of Mildred C. Knight, and
Norman R. "Bobby" Knight, III.....Appellants

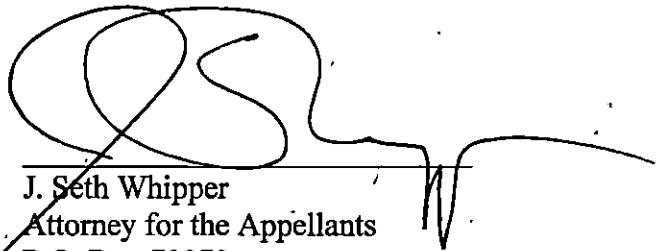
v.

Chloe Knight Tonney isRespondent

PROOF OF SERVICE

The undersigned hereby certifies that the true copy of the foregoing Appellants' Initial Brief and Designation of Matter has been served on the South Carolina Court of Appeals by depositing a copy to them in the United States Mail, postage prepaid, on June 28th, 2021, addressed to Clerk, South Carolina Court of Appeals, Post Office Box 11629, Columbia, South Carolina 29211 and served the same on Charles S. Altman, Attorney for Respondent, 575 King Street, Suite A, Charleston, SC 29403.

June 28, 2021



J. Seth Whipper
Attorney for the Appellants
P.O. Box 70070
North Charleston, SC 29415
843-740-7777

WHIPPER LAW FIRM

Attorneys and Counselors at Law

4592 Durant Avenue
North Charleston, SC 29405
(843) 740-7777
FAX (843) 740-9108

RECEIVED

JUN 30 2021

SC Court of Appeals

CHERYL WHIPPER HAMILTON
J. SETH WHIPPER

MAILING ADDRESS
POST OFFICE BOX 70070
NORTH CHARLESTON, SC 29415

June 28, 2021

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

U.S. Mail Only

**Re: Judith A. Brown, as Personal Representative for the Estate of Mildred C. Knight, and
Norman R. "Bobby" Knight III, Appellants v. Chloe Knight Tonney, Respondent
Appellants' Case No. 2021-000185
Original Appellants' Initial Brief- For Filing
Designation of Matter - For Filing
1 Proof of Service- For Filing**

Dear Ms. Kitchings:

Find enclosed 1 Original Appellants' Initial Brief, 1 Unbound Designation of Matter, and the Proof of Service for filing and conforming. Also, enclosed is a self-addressed, stamped envelope for the return of the Proof of Service.

By copy of this letter, I am serving a copy of the same on Charles S. Altman, Esq. attorney for Respondent.

Sincerely,
WHIPPER LAW FIRM

J. Seth Whipper, Esquire

JSW:lds
Enclosures

xc: Bobby Knight
Judith A. Brown



U.S. POSTAGE PAID
 MAIL STOP
 NORTH CHARLESTON, SC
 29405
 JUN 29, 21
 ACCOUNT
\$1.80
 R8305K143215-12

J. Seth Whipper, Esq.
 Whipper Law Firm
 P.O. Box 70070
 North Charleston, SC 29415

RECEIVED

JUN 30 2021

SC Court of Appeals

The Honorable Jenny Abbott Kitchens
 Clerk, South Carolina Court of Appeals
 Post Office Box 11629
 Columbia, South Carolina 29211

