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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

The Honorable Edgar W. Dickson

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Case No. 2018-CP-18-01505

Appellant Case No. 2021-000177

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Summerville Retail Investment, LLC., .....Appellant,

v.

Montebello JTA Group, LLC.....Respondent.

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APPELLANT’S FINAL BRIEF

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## STATEMENT OF ISSUE ON APPEAL

- I. THE CIRCUIT COURT ERRED IN FAILING TO GRANT A FULL REFUND OF IMPACT FEES PAID TO DORCHESTER COUNTY BY SUMMERVILLE RETAIL INVESTMENT, LLC WHERE THE SOUTH CAROLINA DEVELOPMENT IMPACT FEE ACT AND THE DORCHESTER COUNTY ORDINANCE AT ISSUE CLEARLY STATES THAT THE FEES SHALL BE REFUNDED TO THE RECORD OWNER OF PROPERTY FOR WHICH THE IMPACT FEES WERE PAID AND SUMMERVILLE RETAIL INVESTMENT, LLC PAID THE IMPACT FEES AND WAS THE RECORD OWNER OF THE PROPERTY FOR WHICH THE IMPACT FEES WERE PAID

## STATEMENT OF THE CASE

This case commenced with the filing of a Summons and Complaint by Summerville Retail Investment, LLC, (“Summerville Retail”) on August 24, 2018. (RoA pp. 96-137) In its Complaint, Summerville Retail brought a declaratory judgment action against Dorchester County, Cindy Chitty, as Treasurer of Dorchester County, *ex officio*, and Montebello JTA Group, LLC. *Id.* Pursuant to the South Carolina Uniform Declaratory Judgments Act, S.C. Code Ann. § 15-53-10, *et seq.*, Summerville Retail asked that the Court declare that impact fees paid by it to Dorchester County for the development of real property located at 1616 Central Avenue in Summerville be returned to it pursuant to statute. *Id.* The Defendant Montebello JTA Group, LLC (“Montebello”) bought the subject property from Summerville Retail. *Id.* (RoA pp. 199-207) Summerville Retail had paid Dorchester County the sum of Three Hundred and Twenty-Six Thousand and Eight Hundred and Forty-Eight and No/100 (\$326,848.00) Dollars pursuant to Dorchester County Transportation Impact Fee Ordinance #10-24 (the “Ordinance”)(RoA pp. 224-244)(RoA p198). Pursuant to Dorchester County Ordinance Number 10-24, Article XV, Section 15.1(a). “Funds not obligated for expenditure within three (3) years of the date that they are scheduled to be expended in the *Dorchester County Capital Improvement Plan* shall be **refunded**

**to the record of owner of property for which the impact fees were paid**, with actual interest earned, on a first-in, first-out basis.” (emphasis added)(*Id.* at 224-244)

On September 27, 2018, Dorchester County and Cindy Chitty filed their Answer, Counterclaim, Crossclaim for Inerpleader [sic] of Defendants Dorchester County and Cindy Chitty seeking to pay monies held by the County into the Dorchester County Clerk of Court’s Office pending the Court’s determination of which party was entitled to the funds. (RoA pp. 139-145)

The Defendant Montebello filed its Answer and Counterclaim on October 10, 2018, setting forth affirmative defenses and causes of action against Plaintiff also seeking to obtain the payment of the impact fees paid by Summerville Retail. (RoA pp. 146-159)

The Plaintiff filed its Reply to Counterclaim on November 9, 2018, admitting that it paid the impact fee in the amount of Three Hundred and Twenty-Six Thousand and Eight Hundred and Forty-Eight and No/100 (\$326,848.00) Dollars as required by the Transportation Impact Fee Ordinance #10-24 (the “Ordinance”). (RoA pp. 164-167)

The Defendant Montebello filed its Motion to Dismiss based on its counterclaims and for a Declaratory Judgment on December 13, 2018 *Id.* (RoA pp. 41-42). The Defendant also filed its Memorandum in Support of its Motion to Dismiss on December 13, 2018. (RoA pp. 43-56).

The Defendant’s Montebello’s Motion to Dismiss was denied per the Order Denying the Motion to Dismiss and, in the Alternative, The Motion for Judgment on the Pleadings by The Defendant Montebello JTA Group, LLC and Other Dismissing Dorchester County, a Political Subdivision of the State of South Carolina and Cindy Chitty as Treasurer of Dorchester County, Ex Officio of the Honorable George M. McFaddin, dated October 31, 2019. (RoA pp. 1-8) The Defendants Dorchester County, a Political Subdivision of the State of South Carolina and Cindy Chitty, as Treasurer of Dorchester County, *ex officio*, were dismissed by consent with monies

held by the County to be paid into the Clerk of Court making them no longer necessary parties to this matter. (*Id.*)

The Defendant Montebello filed its Motion to Amend Order dated October 31, 2019, objecting to the recitation of “Findings of Fact and Conclusions of Law” on pages 3-7 thereof. *Id.* (RoA pp. 57-68)

The Plaintiff Summerville Retail filed a Motion for Summary Judgment based on largely undisputed facts that it was rightful owner of the funds to be returned by the Treasurer based upon impact fees charged by the County for the Property pursuant to Dorchester County Ordinance Number 1-24, Article XV, Section 15.1(a) on January 3, 2020. (RoA 69-70)

The Defendant Montebello filed its Memorandum in Opposition to Plaintiff’s Motion for Summary Judgment on January 8, 2020 (RoA pp. 71-72)

A revised Order Denying the Motion to Dismiss and, in the Alternative, The Motion for Judgment on the Pleadings by The Defendant Montebello JTA Group, LLC and Other Dismissing Dorchester County, a Political Subdivision of the State of South Carolina and Cindy Chitty as Treasurer of Dorchester County, *ex officio* was filed by the Honorable George M. McFaddin on January 28, 2020. *Id.* (RoA pp. 9-13).

The parties submitted a Consent Scheduling Order which was denied by the Order of the Honorable Maite Murphy on January 29, 2020 *Id.* (RoA pp. 14-17).

A Consent Scheduling Order of Judge Maite Murphy was filed on February 17, 2020 *Id.* (RoA pp. 17-19).

The parties entered a Consent Amended Scheduling Order of the Honorable Maite Murphy filed on June 1, 2020. (RoA pp. 23-25).

The Defendant Montebello also filed a Motion for Summary Judgment based on its counterclaims on August 18, 2020 (RoA pp. 73-80).

The Plaintiff and the Defendant's Motions for Summary Judgment were heard by the Honorable Edgar W. Dickson, on January 9, 2021, in the Dorchester County Virtual Courtroom on January 19, 2021. (RoA pp. 184 -197).

At the hearing, Judge Dickson took the matter under advisement. (RoA p. 195).

On February 1, 2021, Judge Dickson's Order Granting Motion for Summary Judgment of Defendant Montebello JTA Group, LLC and Denying Motion for Summary Judgment of Plaintiff Summerville Retail Investment, LLC Judge Dickson was filed with the Court. (RoA pp. 29-37)

The Plaintiff filed a Motion to Reconsider on February 2, 2021 (RoA pp. 81-82).

The Defendant filed a Memorandum in Opposition to Plaintiff's Motion to Reconsider on February 4, 2021 (RoA pp. 83-95).

A Form 4 C Order of Judge Dickson Denying Plaintiff's Motion to Reconsider was filed on February 8, 2021 (RoA pp. 38-40).

The case was then appealed to this Court by Notice of Appeal filed on February 16, 2021. (RoA pp. 168-183).

#### STATEMENT OF FACTS

The Plaintiff, Summerville Retail is a South Carolina limited liability company and was the Owner of certain real property located at 1616 Central Avenue, Summerville, South Carolina, in Dorchester County and bearing TMS Number 135-12-00-012 (hereinafter, "the Property"). (RoA pp. 96-138; pp. 184-197; pp. 199-207).

The Defendant Montebello is a Florida limited liability company which took title to the Property from the Plaintiff by way of deed dated January 11, 2017, and recorded on January 26, 2017, in the Dorchester County Register of Deeds office in Deed Book RB 10631 at Pages 342-350. (*Id.* at 199-207).

On February 1, 2011, Dorchester County passed a Transportation Impact Fee Ordinance #10-24 (the “Ordinance”). The Ordinance required the developers of projects within certain areas within the County to pay an impact fee to the County. (RoA pp. 224-244)

Summerville Retail to develop the Property after the effective date of the Ordinance and paid the required the Impact Fee to the Dorchester County *Id.*

As required by the Ordinance, the Plaintiff paid the County Defendants Three Hundred and Twenty-Six Thousand and Eight Hundred and Forty-Eight and No/100 (\$326,848.00) Dollars by check dated October 31, 2016. (RoA p. 198).

Pursuant to Dorchester County Ordinance Number 10-24, Article XV, Section 15.1(a), “Funds not obligated for expenditure within three (3) years of the date that they are scheduled to be expended in the *Dorchester County Capital Improvement Plan* shall be **refunded to the record owner of property for which the impact fees were paid**, with actual interest earned, on a first-in, first-out basis” (*emphasis added*). (RoA p. 242) The Ordinance uses the word “refunded” specifically. *Id.*

Section 11.4 of the same ordinance governing “Reimbursement” also states that the fees shall be returned to the “record owner of property from which the fees were collected, on a first in first out basis.” (RoA p. 238)

The funds were not obligated for expenditure within the three (3) year time frame set forth in the Ordinance, and, therefore, were to be refunded to the record owner of the property for which the impact fees were paid, which was Summerville Retail. *Id.*

Without explanation, the County issued a check to Montebello and Walmart Stores, LP, dated September 27, 2017 for the entire Impact Fee plus interest for a total of Three Hundred Twenty Six Thousand Eight Hundred Ninety Five and 15/100 (\$326,895.15) Dollars which

included a small amount of interest on the original amount paid by Summerville Retail. (RoA p. 208)

The County relied on Section 15.2(a) of the ordinance, which is direct conflict with Sections 15.1(a) and 11.4. Section 15.2 provides that refunds shall be to “the current owner of the property for which a refund is due.” (RoA p. 242) Section 15.2(b) of that ordinance states that the refund shall be sent to “the current owner of record within ninety (90) days after it is determined by County Council that a refund is due.” (*Id.*) They did not refund the party that paid the fee. There could be no refund to Montebello as it did not pay the fee.

Again, this is in direct contradiction of Sections 15.1(a) and 11.4 of the same ordinance that states funds go to the record owner for which funds were paid, being Summerville Retail. (RoA p. 242; RoA p. 238)

The County actually made the refund check payable to the Defendant Montebello and Walmart Stores LP, and not to Summerville Retail, which is in violation of the Ordinance. *Id.*

The Defendant Montebello never made any payments to the County Defendants related to the Impact Fee. *Id.*

The Defendant Montebello and the Plaintiff entered into a Purchase and Sale Agreement for the Property on October 20, 2016. (RoA pp. 199-207). The Purchase and Sale Agreement does not assign impact fee refunds to Montebello. *Id.*

Walmart Stores LP received the funds but returned them to directly to Dorchester County while advising both Summerville Retail and Montebello that it had received the funds and was returning them to Dorchester County. (RoA pp. 208)

Summerville Retail issued a demand to Dorchester County for the return of the funds on June 22, 2018. (RoA pp. 209-217) Instead of returning the funds as required by the applicable

Ordinance, the County required the Summerville Retail obtain permission from the Montebello in order to receive the funds. *Id.*

There is no provision within the Ordinance that requires the permission of subsequent purchasers of property for which impact fees were paid to authorize disbursement of refunds to the payor. However, the County did not wish to disburse disputed funds. (RoA pp. 224-244)

Accordingly, Summerville Retail contacted Montebello by letter dated August 16, 2018, and requested that Montebello authorize the disbursement of the refund. (RoA pp. 218-221)) Montebello refused. (RoA pp. 222-223).

Instead, Montebello claimed the funds held by the County belong to it. *Id.* Prior to receipt of Summerville Retail's letter dated August 16, 2018, the Defendant Montebello made no claim and had no right, title, or interest in those funds paid by Summerville Retail. *Id.* Montebello was unaware of the refund of the impact fees until the Summerville Retail sent a letter requesting information regarding the funds on May 1, 2018. (RoA pp. 222-223)

Thomas Young, a member of Defendant Montebello, advised the Summerville Retail's counsel by email on May 2, 2018, that Montebello had not received the refund check but would keep the Plaintiff informed if it did receive such refund in the future. (*Id.*) Montebello never made any claim to those funds in that email. *Id.* Instead, Montebello only made a claim to the funds upon the realization that the County Defendants required the Defendant Montebello's permission to release the Funds to the Plaintiff in order to not be involved in a dispute. (RoA pp. 146-159)

Dorchester County exercised the right of ownership over the funds paid by Summerville Retail from September of 27, 2017, until Judge McFaddin authorized payment of those sums into the Dorchester County Clerk of Court's Office on January 28, 2020. (RoA p.9-13)

Pursuant to Sections 11.4 and 15.2(a) of the Ordinance, the funds should have gone to Summerville Retail.

#### STANDARD OF REVIEW

Summary judgment is proper when it is clear that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. SCRCivP 56 (c); *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999); *Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct. App. 1999). "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a factfinder." *Moore v. Weinberg*, 733 S.C. 209, 217, 644 S.E.2d 740, 744 (Ct. App. 2007), *aff'd* by 383 S.C. 583, 681 S.E.2d 875 (2009).

Summary judgment should be granted when plain, palpable, and undisputed facts exist upon which reasonable minds cannot differ. *Trico Surveying, Inc. v. Godley Auction Co., Inc.*, 314 S.C. 542, 544, 431 S.E.2d 565, 555 (1993). Where there is no dispute over the operative facts, summary judgment is proper as a matter of law. *Citizens & Southern Nat'l Bank of S.C. v. Langford*, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994).

## ARGUMENT

- I. THE CIRCUIT COURT ERRED IN FAILING TO GRANT A FULL REFUND OF IMPACT FEES PAID TO DORCHESTER COUNTY BY SUMMERVILLE RETAIL INVESTMENT, LLC WHERE THE SOUTH CAROLINA DEVELOPMENT IMPACT FEE ACT AND THE DORCHESTER COUNTY ORDINANCE AT ISSUE CLEARLY STATES THAT THE FEES SHALL BE REFUNDED TO THE RECORD OWNER OF PROPERTY FOR WHICH THE IMPACT FEES WERE PAID AND SUMMERVILLE RETAIL INVESTMENT, LLC PAID THE IMPACT FEES AND WAS THE RECORD OWNER OF THE PROPERTY FOR WHICH THE IMPACT FEES WERE PAID

Summerville Retail is the rightful owner of the funds held by the Dorchester County Clerk of Court pursuant to the South Carolina Development Impact Fee Act, S.C. Code Ann. §§ 6-1-910 *et seq.*, (the “Act”) and Dorchester County Ordinance Number 1-24, Article XV, Section 15.1(a) and Section 11.4. *Id.* Judge Dickson erred in making his determination that Montebello should receive the refund for monies it did not pay and was not entitled to as not being the “record owner of the property for which the impact fees were paid”.

- A. THE ACT PREEMPTS THE COUNTY’S ORDINANCE ON THE ISSUE OF REFUNDS AND PER THE ACT THE REFUND MUST GO TO SUMMERVILLE RETAIL

Summerville Retail is a victim of bad ordinance drafting by Dorchester County, which directly conflicts with the Act’s refund provisions, but it should not suffer the loss of \$326,895.15 when it paid the fees the County decided to refund. The County even realized the error of its ways by repealing Ordinance 10-24 requiring immediate processing of refunds. (RoA pp. 245). The refund of impact fees paid by Summerville Retailer should go immediately to Summerville Retail – not a third-party who did not cut the check.

The county's ordinance directly conflicts with the Act's refund language which preempts the County ordinance's refund provisions. Specifically, S.C. Code Ann. §6-1-930(A)(1) states that a

...governmental entity may not impose an impact fee, regardless of how it is designated, except as provided in this article.

S.C. Code Ann. §6-1-930(A)(1); *see also South Carolina States Ports Auth. v. Jasper County*, 3658 S.C. 388, 397, 629 S.E.2d 624, 628 (2006) (Express preemption occurs when the General Assembly declares in express terms its intention to preclude local action in a given area). To preempt an entire field, an act must make manifest a legislative intent that no other enactment may touch upon the subject in any way. *Town of Hilton Head Island v. Fine Liquors, Ltd.*, 302 S.C. 550, 552, 397 S.E.2d 662, 663 (1990). Clearly, S.C. Code Ann. §6-1-930(A)(1) is an express preemption provision, and the County's ordinance must yield to the Act on the issue of refunds.

Without the express consent of the General Assembly, Dorchester County's ordinances and actions in not refunding the payor of the impact fees directly conflict with the Act's refund provisions. Therefore, the County's ordinances and the decision to refund Summerville Retail's impact fee payment to Montebello is invalid and void *ab initio*, warranting a reversal of Judge Dickson's Order.

The Act provides that impact fee refunds shall go to the "owner of record of property on which a development impact fee has been paid. S.C. Code Ann. §6-1-1020(A). That makes sense; it is a refund. The party who pays it should have the money returned to it. State law states that the owner of record should be refunded within ninety days, too. S.C. Code Ann. §6-1-1020(B). Dorchester County added the word "current" to its impact fee ordinance which does not appear in S.C. Code Ann. §6-1-1020 (or elsewhere in the Act)and which was expressly

preempted by the General Assembly. The County's addition of the word "current" materially alters the refund analysis and disturbs the carefully crafted framework established by the General Assembly. Following the Act, which trumps the County's ordinance where there is a direct conflict, the money should have been refunded to Summerville Retail.

B. THERE IS NO AMBIGUITY IN THE ACT, AND, EVEN IF THERE WERE, THE RULES OF STATUTORY CONSTRUCTION REQUIRE THE FUNDS TO BE REFUNDED TO SUMMERVILLE RETAIL

There is no ambiguity in S.C. Code Ann. §6-1-1020 or the badly drafted County ordinance, and, even if there were, the rules of statutory construction would dictate Summerville Retail should have received the refund. Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law. *Bennett v. Sullivan's Island Board of Adjustment*, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct. App. 1993). It would be unjust and inequitable to award a refund to the party who did not pay the fees. Such an interpretation would lead to "a result so plainly absurd that it could not have been intended..." *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000). It would be "plainly absurd" to allow Montebello to receive the benefit of funds which it clearly did not pay, clearly did not claim, and clearly is now benefitting from a tortured interpretation of a badly drafted ordinance.

Summerville Retail owned 1616 Central Avenue and was indeed the record owner of the property for which the impact fees were paid. As expressed to the Court at the hearing of this matter, for the Court to award the sum to Montebello results in a clear windfall to them for monies they did not pay. (RoA pp. 188-189). The statute is not ambiguous in any way: "record owner for which it was paid" (Ordinance). There is no dispute that Summerville Retail was indeed that "record owner". The word "current" – which does not appear anywhere in the Act – must be ignored for the purposes of this statutory analysis.

There is also no dispute that the Ordinance states that there is to be a refund. A refund cannot be given to a party which did not originally pay the amount due. That is in fact a gift from the County to the other party.

At the hearing, the Summerville Retail explained the chain of title of the property and acknowledged that Plaintiff had paid was required to pay Dorchester County transportation impact fee under Dorchester County Ordinance No. 10-24 in the sum of \$326,848.00. (RoA pp.4-5) That money is governed by that ordinance, and that ordinance states, under Article 15, Section 15(a), and under Section 11.4 that the funds not obligated for expenditure within three years, were to be returned to the record of owner for which the fees were paid. Plaintiff was the record owner for which fees were paid (*Id.*)

The money should go back to the record owner for which the funds were paid versus going to the current owner, Defendant, who would then get a 300 plus thousand dollar windfall of money they did not pay. The two words in the status say “record owner for which it was paid.” The words also say “refund”.

Under the plain meaning and the intent of Dorchester County had to have been for it to go to the party who paid the funds, not the party who actually owns the property, who, by virtue of a deed and of real estate closing, gets \$326,000 to which they are not entitled. All of this was argued to the Court who ignored this plain meaning of the words of the Ordinance. (RoA pp. 5-6). Otherwise, the County has transferred money paid by Summerville Retail to Montebello without consent.

C. THE PURCHASE AND SALE AGREEMENT WAS NOT IN THE RECORD, HAS NO BEARING ON THE INTERPRETATION OF THE ACT AND ORDINANCE, AND THE PURCHASE AND SALE AGREEMENT DID NOT SURVIVE THE SALE OF THE PORPERTY AFTER TITLE TO THE REAL ESTATE WAS CONVEYED

In its Order the Court inexplicably referenced the Purchase and Sale Agreement that was not part of the record in order to make its decision. It also referenced the purchase price which was not an exhibit but only obliquely mentioned by counsel. (RoA p. 9) That Summerville Retail sold an asset to Montebello does not change the clear meaning of the statute nor does it entitle Montebello to receive funds paid by Summerville Retail. Simply put, the contract between the parties is completely irrelevant and should never have been considered by the trial court. That's a clear error in the Court's Order (RoA p. 34)

There is no language in the Deed transferring all right, title and interest to these funds to Montebello. (RoA pp. 199-207) The deed transferred the dirt, not the right to the impact fees, which Montebello did not even know about or claim to have an interest in until the County became fearful that it would be involved in a dispute. The deed makes no mention of any transfer of these funds.

D. THE REFUNDS WERE NOT PAID IN COMPLIANCE WITH OR CONTEMPLATION OF THE REFUND TRIGGER IN BOTH THE ACT AND THE ORDINANCE, THEREFORE THE OWNER OF RECORD ANALYSIS IS IRRELEVANT

The specific impact fee payment at issue in this case was not untimely expended under the Act or the Ordinance; therefore, the refund in dispute need not track the Act's or the Ordinance's refund procedures. The fees in this case were paid on October 31, 2016. The refund was issued to the "current" owner of record in 2017, which was not untimely spent as the

funds were not in the County's coffers for three years. The actual refund the County initiated does not track with its own ordinance's refund provisions. The County discretionarily issued this refund, which takes it outside the ambit of both the Act and the Ordinance. Therefore, the "owner of record" analysis, which is purely derived from the Act and the Ordinance, is irrelevant. The default rule applies, which is that one who pays a fee ought to be the one who receives a discretionary refund issued by the County. *See Asmer v. Livingston*, 225 S.C. 341, 82 S.E.2d 465 (1954)(refund from tax stamps paid to alcoholic beverages should go to the wholesaler who paid the tax and not to the retail licensee who claimed the funds) As such, the County should have paid Summerville Retail.

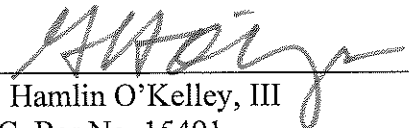
#### CONCLUSION

The Circuit Court improperly granted summary judgment where the statute clearly states Summerville Retail should be refunded its impact fees with interest so that the Dorchester County Clerk of Court should issue its check in the amount of \$326,895.15 to Summerville Retail Investment, LLC.

For these reasons, the decision of the Circuit Court should be REVERSED.

Respectfully submitted:

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Oct-21, 2021

  
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APPEAL FROM DORCHESTER COUNTY  
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The Honorable Edgar W. Dickson

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Appellate Case No. 2021-000177  
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Summerville Retail Investment, LLC., .....Appellant,

v.

Montebello JTA Group, LLC.....Respondent.


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**CERTIFICATION OF COUNSEL  
PURSUANT TO RULE 211(b) SCACR**

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I certify that I have served the Appellant's Final Reply Brief and the Appellant's Final Brief and that they are in compliance with Rule 211(b) SCACR in that no changes were made excepting references to the Record on Appeal and correction of typographical errors and misspellings.

October 21, 2021



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