THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Judge for Sixth Judicial Circuit

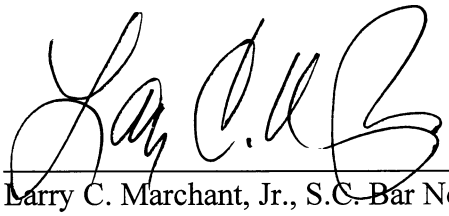
Appellate Case No.: 2021-000561

Robin Allen,..... Appellant,

v.

Richard Winn Academy, Kristen Chaisson (in her individual capacity and a Head of School), and John Ryan, II,..... Respondents.

INITIAL BRIEF OF APPELLANT



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November 29, 2021

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err by granting Defendants' Rule 12(b)(6) motion to dismiss Plaintiff's numerous causes of action for tortuous interference with the parent-child relationship under the holding that South Carolina does not recognize the common law doctrine of tortuous interference with the parent-child relationship?

II. Did the trial court err in failing to find that the Complaint sufficiently alleged a breach of fiduciary duty between Plaintiff and Defendants Richard Winn Academy and Kristen Chaisson?

STATEMENT OF THE CASE

On January 16, 2021, Plaintiff Robin Allen ("Allen") brought this action against the private school Richard Winn Academy ("Winn Academy"), Kristen Chaisson (individually and as head of Winn Academy), and John Ryan, II ("Ryan"), individually. Allen alleges that the Defendants breached her parental rights of her then-minor daughter Zoe Mitsakos through interferences with the parent-child relationship, breach of contract and quantum meruit, breach of fiduciary duty, and attorney's fees. Defendants answered and denied all wrongdoing, filing concurrent Rule 12(b)(6) Motions to Dismiss. Plaintiff issued general Replies to Defendants' Answers and Counterclaims and filed a Return to Defendant's Motion for Partial Dismissal.

On March 19, 2021, Judge Eugene C. Griffith, Jr., presided over a Virtual Motions Hearing for the Defendants' Motions to Dismiss. On April 28, 2021, Judge Griffith issued an Order Granting Motion for Partial Dismissal of Defendants Richard Winn Academy and Kristen Chaisson and Motion to Dismiss on behalf of John Ryan, II. The Court dismissed the Complaint's causes of action for intentional tortious interference with parental rights; negligent tortious interference with parental rights; intentional breach of fiduciary duty; negligent tortious interference with contracts; and attorney fees and held that such dismissal disposed of Ryan as a Defendant. Order Granting Mot. To Dismiss.

STANDARD OF REVIEW

Generally, important questions of novel impression should not be decided on a Rule 12(b)(6), SCRCP, motion to dismiss. Instead, a novel issue is best decided with further development of the facts. *Evans v. State*, 344 S.C. 60 (S.C. 2001); *Tyler v. Macks Stores of South Carolina, Inc.*, 273 SC 456 (SC 1980). However, where the dispute is not as to the underlying facts but as to interpretation of the law, and development of the record will not aid

in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss for failure to state a claim. *Brown v. Theos*, 338 S.C. 305 (Ct.App.1999).

On appeal, the same standard of review mirrors the discretion the trial court used on a Rule 12(b)(6) dismissal of a cause of action. *Palmer v. State*, 427 S.C. 36, 42, (Ct. App. 2019) (quoting *Rydde v. Morris*, 381 S.C. 643, 646 (2009). A trial court has abused its discretion when the court's ruling is based on an error of law or a factual conclusion without evidentiary support. *Conner v. City of Forest Acres*, 363 S.C. 460, 467 (2005) (citing *Carlyle v. Tuomey Hosp.*, 305 S.C. 187, 193 (1991); *Fontaine v. Peitz*, 291 S.C. 536, 538 (1987). An abuse of discretion occurs:

1) when the trial court's ruling is based upon an error of law;
2) when based upon factual conclusions, the ruling is without evidentiary support;
3) when the circuit court is vested with discretion, but the ruling reveals no discretion was exercised; or
4) when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious. *State v. McClinton*, 369 S.C. 167, 169, 631 S.E.2d 895, 896 (2006) (citing *Fontaine v. Peitz*, 291 S.C. 536, 539 (1987); *S.E.C. v. TheStreet.Com*, 273 F.3d 222, 229 n.6 (2nd Cir. 2001)).

However, appellate courts have also held, if a trial court commits an error of law regarding a novel question, the appellate court is free to decide the question with no particular deference to the lower court. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411 (2000).

FACTS

Plaintiff-Appellant Robin Allen is the mother of Zoe Mitsakos, ("Zoe") a former minor child. On or about March 13, 2020, Allen entered a contract with Richard Winn Academy

("Winn") to provide educational services to Zoe. Allen was also employed as a teacher with Richard Winn for approximately four (4) years until her resignation as a result of this matter. Allen learned that Respondent-Defendant Chaisson, Head Mistress of Richard Winn, and Respondent-Defendant Ryan, were playing a significant role in supporting and advising Zoe. On or about September 26, 2020, Zoe, at seventeen (17) years old, left home without permission. Zoe was later found, with the assistance of the police, at the home of Ryan. Shortly thereafter, Zoe turned eighteen (18) and immediately left home and began residing with Ryan. Moreover, without any knowledge, and despite an existing contract, Chaisson facilitated the issuance on a new enrollment contract with Zoe and Ricard Winn to finish her senior year. Defendants/Respondents' interference and resulting alienation has resulted in Plaintiff/Appellant mother having no further opportunity to see or speak with her daughter Zoe.

ARGUMENT

I. THE TRIAL COURT ERRED BY GRANTING DEFENDANTS' RULE 12(B)(6) MOTION TO DISMISS PLAINTIFF'S NUMEROUS CAUSES OF ACTION FOR TORTUOUS INTERFERENCE WITH THE PARENTAL RIGHTS UNDER THE HOLDING THAT SOUTH CAROLINA DOES NOT RECOGNIZE THE COMMON LAW DOCTRINE OF TORTUOUS INTERFERENCE WITH THE PARENT-CHILD RELATIONSHIP

A. Important Questions of Novel Impression

Generally, "important questions of novel impression should *not* be decided on a Rule 12(b)(6) motion to dismiss." *Evans v. State*, 543 S.E.2d 547, 551 (S.C. 2001) (quoting *Tyler v. Macks Stores of South Carolina, Inc.*, 275 S.C. 456 (1980) (emphasis added). Rather, a novel issue is best decided with evidence presented at trial. *Id.* When a trial court does dismiss a novel issue of law, if the only dispute is one of interpretation of the law and not the underlying

facts, the development of which "will not aid in the resolution of the issues," this is a proper use of the trial court's discretion. *Id.* (citing *Brown v. Theos*, 338 S.C. 305 (Ct.App.1999)).

The crux of Defendants' argument in this case is that South Carolina does not recognize tortuous interference with parental rights, under either an intentional or negligent standard. Tr. of Oral Argument for Mot. To Dismiss, p. 4 at 13-14.

The trial court agreed with this argument, holding

> [w]hile South Carolina courts have recognized that parents have a right under the Fourteenth Amendment to the United States Constitution to be free from State interference with the parent-child relationship, they have not recognized a common law claim for tortious interference with parental rights (whether intentional, negligent, or otherwise) against private parties like the Defendants. Order Granting Mot. To Dismiss.

Further, the trial court noted that "[t]he Plaintiff acknowledges as much." *Id.*

These statements contain both a legal and a factual error.

Legally, South Carolina codifies our adherence to the common law of England in absence of statutory, Constitutional, or common law alterations: "All, and every part, of the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State, is hereby continued in full force and effect in the same manner as before the adoption of this section." S.C. Code Ann. § 14-1-50.

The Virginia Supreme Court found precedent in common law of tortious interference with parental rights stating, "Prior to 1607, a comparable cause of action did lie in England, providing a father with recourse for the abduction of his heir or sons rendering services." *Wyatt v. McDermott*, 283 Va. 685, 725 S.E.2d 555, 559 (2012).

Plaintiff/Appellant's action has evolved in our modern era to permit either parent a remedy, not just for loss of service, but for loss of companionship, the inherent value of

relationship between parents and children, and the emotional harm as a result of the loss of the relationship. The Restatement (Second) of Torts § 700 recites a more modern version:

> "One who, with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to its custody or not return to the parent after it has been left him, is subjected to liability to the parent."

Further, as noted in Plaintiff's Return to the Defendant's Motion for Partial Dismissal, the Defendants' reliance on *Cole Vision Corp. v. Hobbs*, 394 S.C. 144 (S.C. 2011), bolstered the Plaintiff's argument that the trial court should have denied the Defendants' Rule 12(b)(6) motion. As noted in the Plaintiff's Return, *Cole Vision*'s refusal to adopt the stand-alone tort of spoilation of evidence due to four (4) factors:

1) the availability of existing remedies;
2) the public policy of adoption of the tort;
3) the speculative degree of damages; and
4) the potential for duplicative and inconsistent litigation. *Id.* at 151-154.

B. The *Cole Vision Corp. v. Hobbs ("Cole Vision")* Factors

i. The Availability of Existing Remedies

With respect to the availability of existing remedies, the *Cole Vision* court noted the availability of jury instructions or striking a party's pleadings in cases where evidence has been lost. *Id.* at 152. In this case, disturbingly neither South Carolina's courts nor statutory scheme provide a civil remedy for inducing a minor child into leaving home and staying with a non-custodial, non-guardian third party.

While a parent can presumably report to the police a potential kidnapping in a case like Allen's, further factual development including discovery methods, deposition and potential trial testimony is necessary regarding the circumstances of the inducement of the

minor to leave home. Such development of the record in a truly puzzling, troubling case where a school and other third parties allegedly induced a child to stay with a third party, bypassing any legal method of obtaining custody, that cries for factual development due to the potential for delineating the bounds of tortuous interference with the parent-child relationship by a private school and third-party individual.

ii. The Public Policy of the Adoption of the Tort

With respect to the public policy of the adoption of the tort, the United States Supreme Court has consistently protected parents' liberty issues of parents with respect to the care, custody, and control of their children. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). *Troxel* summarized the importance of parents' liberty interest:

> The liberty interest at issue in this case -- the interest of parents in the care, custody, and control of their children -- is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer* v. *Nebraska,* 262 U.S. 390, 399, 401.... (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce* v. *Society of Sisters,* 268 U.S. 510, 534-535.... (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in *Pierce* that "the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U.S. at 535. We returned to the subject in *Prince* v. *Massachusetts,* 321 U.S. 158, 88 L. Ed. 645, 64 S. Ct. 438 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. " It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." 321 U.S. at 166. *Id.* at 65-66.

In the above-cited case *Meyer* v. *Nebraska*, the U.S. Supreme Court's finding a state statute that prohibited schools (both public and private) from teaching certain students a

language other than English arbitrary and not reasonably relation to any relevant end is in fact salient for Allen's case at hand. 262 U.S. 390, 403 (1923). South Carolina common law has the same force as statutory law when not in conflict, and by ignoring the opportunity to hear on the merits a case where a private school and others, induces a minor to leave home and violate the sanctity of the parent's liberty interest in protecting her child and directing the child's education, the trial court foreclosed development of the record on a troublesome situation by its very dismissal opens the floodgates to truancy and improper motives, including criminal, of suspicious third parties and those who abuse power in school settings.

Further, as noted in *Meyer,* "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted.....Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States, including Nebraska, enforce this obligation by compulsory laws." 262 U.S. 390, 400 (1923).

This holding applies to *both* public and private schools. While the case dealt with statutory prohibition, in this case the trial court's essential holding is that South Carolina common law does not in fact prevent private schools and other third parties from interfering with the rights of parents. This is contrary to the law of the land.

Additionally, *Pierce v. Society of Sisters* dealt with a state statute that required parents to send students of a certain age to public school. 268 U.S. 510 (1925). First, the U.S. Supreme Court held:

> [n]o question is raised concerning the power of the State reasonably to regulate *all schools*, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, *that teachers shall be of good moral character and patriotic disposition*, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is

> manifestly inimical to the public welfare. *Id.* at 268 U.S. 510, 534 (1925) (emphasis added).

Further, the Court held that under *Meyer v. Nebraska*, the rights of parents and guardians to control the upbringing and education of their children could not be abrogated by unreasonable legislation, noting "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, *coupled with the high duty*, to recognize and prepare him for additional obligations." *Id.* at 534-35 (1925) (emphasis added). In Allen's case, the trial court's granting the Defendants' Motion to Dismiss any claims of tortuous interference with parental rights is effectively an unreasonable, common-law abrogation of the parental rights to control the *upbringing and education* of their children. The trial court shut the door on allowing development of the record regarding the special duties that public *and private* schools have to children:

> [w]hile South Carolina courts have recognized that parents have a right under the Fourteenth Amendment to the United States Constitution to be free from State interference with the parent-child relationship, they have not recognized a common law claim for tortious interference with parental rights (whether intentional, negligent, or otherwise) against *private parties* like the Defendants. (emphasis added).

iii. The Speculative Degree of Damages

As noted in the Plaintiff's Return, "[t]he Supreme Courts of Virginia and Florida citing its similar statute found [the tort of interference with parental rights] within the public policy stating:

> In sum, it is clearly the case that this ancient writ—today labeled tortious interference with parental rights—did exist in English common law in 1607, that it can be construed in a manner not repugnant to the Bill of Rights and the Constitution of the Commonwealth, and that no affirmative steps have been taken by the

> legislature to renounce the tort. We therefore answer the first certified question of law in the affirmative."
>
> *Wyatt v. McDermott*, 283 Va. 685, 725 S.E.2d 555 (2012).

Further, with respect to damages, the *Wyatt* court was easily able to delineate intentional and negligent remedies:

> modern iteration of this common law tort encompasses both tangible and intangible damages, including compensatory damages for the expenses incurred in seeking the recovery of the child, lost services, lost companionship, and mental anguish. "[I]f a tortfeasor's tort was intentional rather than negligent, i.e., deliberately committed with intent to harm the victim ... and if the evidence is sufficient to support an award of compensatory damages, the victim's right to punitive damages and the quantum thereof are jury questions." *Id.* (citing *Smith v. Litten*, 256 Va. 573, 579, 507 S.E.2d 77, 80 (1998); *see also* Giant of Virginia, Inc. v. Pigg, 207 Va. 679, 685–86, 152 S.E.2d 271, 277 (1967)).

iv. Duplicate and Inconsistent Litigation

Remanding this case for further factual development on the potential tortuous interference with the Plaintiff's relationship with her child cannot create this problem, as the trial court itself noted that this potential tort was not currently recognized as a tort in South Carolina.

C. The Need for Factual Development of the Record

The factual error misconstruing Plaintiff's counsel position is evident. Plaintiff's counsel specifically disagreed with the trial court's statement that South Carolina does not recognize a common law claim for tortious interference with parental rights:

> As far as the negligent interference of parent rights, your Honor, it probably may well be recognized in South Carolina law, and again, I'm going refer to the case law that was cited in Wyatt v. McDermott and it is also said within the response to the motion to dismiss.
> In 1607, they looked at the English Common Law that did find that there was common law back then that would prevail on the tortious interference of parental rights. South Carolina had that same

> Common Law language that Virginia does. So we do believe it may be there; it's just not necessaril [sic] worded as "tortious interference of parental rights." Back then, it was interference of the father's right to the child as far as labor and the benefit of the child to the house. So we do believe it's probably there, it's just never officially recognized within the State of South Carolina. Tr. pp. 8-9, at 10-25, 1-2.

In Plaintiff Counsel's Return to Defendants' Motion to Dismiss, Plaintiff argues:

> While South Carolina and Federal Courts have recognized that parents have a right under the Fourteenth Amendment to the United States Constitution to be free from State interference with the parent-child relationship, they, as of yet, have not recognized a common law claim for tortious interference with parental rights against third parties like Richard Winn, Ms. Chaisson, or Mr. Ryan. Accordingly, nor has it, to the Plaintiffs knowledge been argued in South Carolina.
>
> Plaintiff's Return to Defendant's Motion for Partial Dismissal at 2.

Truly, the novel issue of the specific tort of a third parties' interference with parental rights may not have been argued in South Carolina, but South Carolina's intent to keep this common law tort intact is evident in *Russo v. Sutton*[1], where the South Carolina Supreme Court abolished the torts of criminal conversation and alienation of affections. 310 S.C. 200, 204 (1992). Russo sagely noted, "[t]he common law changes when necessary to serve the needs of the people." Id. at 204 (citing Dupuis v. Hand, 814 S.W.2d 340, 346 (Tenn. 1991)).

And the appellate courts have had other opportunities to abolish the tortuous interference of parental rights, reminding trial courts that common law can age like a fine wine

[1] At one time, criminal conversation was based on the premise that one who interfered with the husband's right of exclusive possession of his wife's body was liable in trespass to the husband for injury done by seducing the wife. *Haney v. Townsend*, 12 S.C.L. (1 McCord) 207 (1821) The basis for the common law regarding criminal conversation evolved, so that the law regarded the purpose of criminal conversation to be the protection of the marriage relationship against those who might wrongfully intrude, even when the possibility of reconciliation is remote. *Fennell v. Littlejohn*, 240 S.C. 189 at 197, 125 S.E.2d at 412 (1962). Under this theory, a wife also possessed the legal right to bring a corresponding action when her husband engaged in adultery.

or a rank piece of meat- its age only relevant to whether an appellate court decided to carve it out like the bad cut of meat, throwing into the trash- or ignore it like a bottle of wine in a basement cellar, sitting there with its potency intact and unencumbered by the dust of nonuse.

In *Taylor v. Medenica*, the South Carolina Supreme Court's refusal to amend a statute to include loss of filial consortium (that of a parent's child) in tortuous damages was a direct acknowledgement that the Legislature's inaction with respect to enactment of a statute could be tantamount to denying the loss through the failure to include it in the statutory provision: [b]y enacting S.C. Code Ann. § 15-75-20 (1977), the legislature provided for loss of consortium actions for spouses. The statute has not been amended to provide a similar cause of action for children. Whether South Carolina should recognize a cause of action for loss of parental consortium is a matter best left to the discretion of the General Assembly. *Taylor v. Medenica*, 324 S.C. 200, 222, 479 S.E.2d 35, 47 (1996).

In this case, the Legislature has taken no such action with respect to the essential rights of parents with respect to the children in matters besides loss of consortium relevant for this case.

II. THE TRIAL COURT ERRED IN FAILING TO FIND THAT THE COMPLAINT SUFFICIENTLY ALLEGED A BREACH OF FIDUCIARY DUTY BETWEEN PLAINTIFF AND DEFENDANTS WINN ACADEMY AND CHAISSON.

Within the four corners of the Complaint, the Plaintiff's allegations that Defendants Winn Academy and Chaisson breached their fiduciary duty "with the Plaintiff to protect their contractual and parental interest in safeguarding the minor child while the child was in their care and control."

As noted above, in *Pierce v. Society of Sisters*, the United States Supreme Court dealt with a state statute that required parents to send students of a certain age to public school. 268 U.S. 510 (1925). The U.S. Supreme Court held:

> [n]o question is raised concerning the power of the State reasonably to regulate *all schools*, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, *that teachers shall be of good moral character and patriotic disposition*, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare. *Id.* at 268 U.S. 510, 534 (1925) (emphasis added).

In this case, Defendants Winn Academy and Chaisson attempt to evade liability in part through their status as a private school. Yet, this creates a much higher likelihood of a fiduciary duty than a public school would have to a parent, because Plaintiff paid the tuition for her daughter in this case.

The trial judge's refusal to recognize a fiduciary duty is a clearly arbitrary, unreasonable error of law:

> [w]here the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for the Government to effect, the legislature transcends the limits of its power in interfering with the liberty of contract. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 529 (1925) (citing *C. B. & Q. R. R. Co. v. McGuire*, 219 U.S. 549; *Atlantic Coast Line v. Goldboro*, 232 U.S. 559; *House v. Mayes*, 219 U.S. 270; *Reduction Company v. Sanitary Works, 199 U.S.* 306; *C. B. & Q. R. R. Co. v. Drainage Commissioners,* 200 U.S. 561; Lochner v. New York, 198 U.S. 45.)

Further, *Pierce* found that private schools "have business and property for which they claim protection." These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action. *Id.*, 268 U.S. 510, 535

(1925) (citing *Truax v. Raich,* 239 U.S.33; *Truax v. Corrigan,* 257U.S. 312; *Terrace v. Thompson,* 263 U.S. 197.

Moreover, the fact that the trial court allowed the breach of contract claim to go forth is further evidence that the trial court spun the wheel and then stuck its finger on the convenient spot of when the Defendant Winn School was afforded the protection of a private school and when it was treated just as a public school.

CONCLUSION

Because the Trial Court failed to allow the development of a factual record and allow Plaintiff/Appellant the opportunity to present evidence as to the important novel issue of Tortuous Interference with Parental Rights, his Order granting Defendants'/Respondents' Motion to Dismiss must be reversed. Further, the Trial Court refused to recognize a fiduciary duty owed to Plaintiff/Appellant to protect their contractual and parental interest in safeguarding their minor child while in Defendants'/Respondents' care and control and therefore his Order granting Defendants'/Respondents' Motion to Dismiss must be reversed. Appellant respectfully ask this Court to reverse the Order of the Trial Court and for all other relief as the Court deems just and proper.

Signature page to follow

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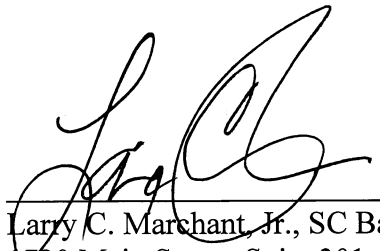
Respectfully submitted,

By: 

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PROOF OF SERVICE

I certify that I served INITIAL BRIEF OF APPELLANT AND DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL by email and by depositing a copy of it in the United States Mail, postage prepaid, on November 29, 2021, addressed as follows:

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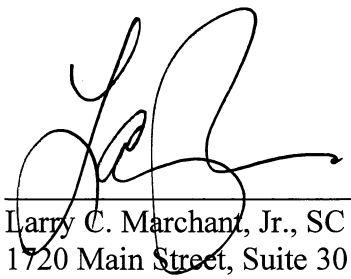

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