The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211
1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

May 06, 2013

The Honorable Alan M. Wilson
South Carolina Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

Re: Sue Widenhouse v. Tammy Colson
Appellate Case No. 2011-204246

Dear Attorney General Wilson:

The above case is scheduled to be argued before this Court on May 14, 2013. As you will see from the attached brief of appellant, this case involves a challenge to the constitutionality of a state statute. Since there is nothing in the record to indicate that your office has been given any notice of this challenge, the Court asked me to inform you of the pendency of this constitutional challenge.

Very truly yours,

CLERK

Enclosure

cc: Matthew D. Lincoln, Esquire
David D. Armstrong, Esquire
Scott Michael Tyler, Esquire

Armstrong Law Firm
Post Office Box 10855
Greenville, South Carolina 29603

(864) 241-0633
www.armstrongfirm.com

DAVID D. ARMSTRONG

201 EAST NORTH STREET
GREENVILLE, SC 29601

FACSIMILE
(864) 271-9136

May 7, 2012

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
PO Box 11330
Columbia, SC 29211

RE: *Sue Taylor Colson Widenhouse, Respondent vs.*
Tammy Batson Colson, Appellant
C.A. No.: 2011-CP-23-5359

Dear Mr. Shearouse:

Enclosed, please find the original and one (1) copy of the Proof of Service, showing service of the Final Brief, via U.S. Mail, on counsel for the Respondent in the above referenced matter. Please return a stamped copy to me in the enclosed self-addressed envelope.

In advance, thank you for your attention and cooperation.

Yours truly,

ARMSTRONG LAW FIRM

David D. Armstrong
Attorney for Appellant

DDA/kas
11-6325
cc: Tammy Colson (w/one copy of Final Brief and Proof of Service)
Scott M. Tyler, Esq. (w/one copy of Final Brief and Proof of Service)
Matthew D. Lincoln, Esq. (w/one copy of Final Brief and Proof of Service)

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
D. Garrison Hill, Circuit Court Judge

Case No. 2011-CP-23-5359

Sue Taylor Colson Widenhouse ..... Respondent,

v.

Tammy Batson Colson ..... Appellant.

FINAL BRIEF OF APPELLANT

David D. Armstrong, Esquire
Armstrong Law Firm
201 East North Street
Post Office Box 10855
Greenville, SC 29603
Telephone: (864) 241-0633
Facsimile: (864) 271-9136

Counsel for Appellant

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in granting Respondent's Motion to Enforce Foreign Judgment and in denying Appellant's Motion for Relief from such judgment?

STATEMENT OF THE CASE

This appeal involves enforcement in South Carolina of a North Carolina judgment. (R.p. 5) The Respondent in the present appeal, Sue Taylor Colson Widenhouse ("Widenhouse"), was the plaintiff in the North Carolina action, which was filed in the Superior Court of Cabarrus County, North Carolina, on August 6, 2009. (R.pp. 15-19) The defendant in the North Carolina action was the Appellant in the present case, Tammy Batson Colson ("Colson").

In the North Carolina suit, Widenhouse sought compensatory and punitive damages against Colson based on two causes of action: alienation of affections and criminal conversation. (Appellate's's Motion for Relief (R.p. 9) Exhibits B-1 through B-7) (R.pp. 15-19) Widenhouse alleged that Colson maintained a romantic relationship with Widenhouse's husband and thereby damaged the Widenhouses' marriage, which ultimately ended in divorce. The North Carolina court entered a judgment against Colson on July 5, 2010 in the amount of $266,000. (R.p. 5)

On August 10, 2011, Widenhouse filed a Notice of Filing Foreign Judgment in the Greenville County, South Carolina, Court of Common Pleas. (R.p. 6) On September 8, 2011, Colson filed a Motion for Relief (R.pp. 9-20), alleging that the

North Carolina judgment was contrary to South Carolina's public policy and was unenforceable, pursuant to South Carolina Code section 15-35-960. On October 14, 2011, Widenhouse filed a Motion to Enforce Foreign Judgment. (R.pp. 21-22)

Both parties filed briefs in support of their respective motions. The parties' motions were argued before Judge D. Garrison Hill on October 27, 2011. In the course of the hearing, the trial court asked counsel for Widenhouse: "So in order to rule in your favor, Mr. Lincoln, wouldn't I have to find that the statute [S.C. Code Ann. § 15-35-960] is unconstitutional?" (R.p. 46, lines 4-6) Counsel for Widenhouse replied, in part: "Yes, in a nutshell, you would." (R.p. 46, lines 7-8) By order dated November 9, 2011 and filed on November 10, 2011 (R.p. 2), Judge Hill denied Colson's Motion for Relief and granted Widenhouse's Motion to Enforce Foreign Judgment, without addressing the constitutionality of section 15-35-960.

Appellant filed a notice of appeal on December 8, 2011 (R.pp. 48-49), and a proof of service on the same date, which indicated that the notice of appeal was mailed to Respondent's counsel on that date. Based on the fact that Respondent raised constitutional issues before the trial court, Appellant notified the Clerk of the South Carolina Supreme Court that the appeal was filed under Rule 203(d)(1)(A)(ii), SCACR. (Letter dated Dec. 8, 2011 (R.p. 48); and Clerk's December 13, 2011 letter to Appellant's counsel (R.p. 50); *see also* Letter dated Dec. 19, 2011. (R.p. 51))

ARGUMENT

THE TRIAL COURT ERRED BECAUSE THE NORTH CAROLINA JUDGMENT IS CONTRARY TO SOUTH CAROLINA'S PUBLIC POLICY AND IS UNENFORCEABLE IN SOUTH CAROLINA, NOTWITHSTANDING THE CONSTITUTION'S FULL FAITH AND CREDIT CLAUSE.

I. The North Carolina Judgment Is Contrary To South Carolina's Public Policy.

In the North Carolina suit (R.pp. 15-20), Widenhouse asserted causes of action for alienation of affections and criminal conversation. Although North Carolina jurisprudence recognizes these torts, South Carolina does not. In 1988, the legislature enacted South Carolina Code section 15-3-150, which provides that "[n]o civil action may be brought in this State for the tort of criminal conversation."

In 1992, this Court abolished the tort of alienation of affections in the case of *Russo v. Sutton*, 310 S.C. 200, 422 S.E.2d 750 (1992). The *Russo* court observed that a majority of other states have abolished both causes of action:

> Many states have abolished "heart balm" litigation through legislative enactments. Other states have abolished causes of action for alienation of affections or criminal conversation by judicial pronouncement. Thus, the majority of states have acknowledged that these causes of action were rooted in antiquated perceptions that wives are chattel of their husbands, and that the actions survived in hopes that they afforded some protection to marital relationships. *Fundermann v. Mickelson*, 304 N.W.2d 790 (Iowa 1981). However, "[h]uman experience is that the affections of persons who are devoted and faithful are not susceptible to larceny . . . ." *Id.* at 791. When a marriage is viable, an outsider can neither entice one spouse to adultery, nor alter the mental attitude of one spouse toward the other. *Accord O'Neil v. Schuckardt*, 112 Idaho 472, 733 P.2d 693 (1986).

> Causes of action for criminal conversation and alienation of affections present opportunities for blackmail. They are often brought for mercenary or vindictive reasons. *O'Neil*, 112 Idaho at 477, 733 P.2d at 698. The remedies of alienation of affections and criminal conversation foster bitterness, promote vexatious lawsuits, put marriages on the marketplace, and use marriages as a means of character assassination. *Hunt v. Hunt*, 309 N.W.2d 818, 822 (S.D.1981). *See also O'Neil*, 112 Idaho at 476, 733 P.2d at 698; *Wyman v. Wallace*, 94 Wash.2d 99, 615 P.2d 452 (1980).

Id. at 203-04, 422 S.E.2d at 752-53 (footnotes omitted).

The *Russo* court emphasized that continued recognition of the two tort causes of action would be contrary to South Carolina's public policy, stating:

> The public policy of this State is to foster and protect marriage, to make it a permanent and public institution, to encourage the parties to live together, and to prevent separation. *Fennell*, 240 S.C. at 196, 125 S.E.2d at 413. We find, however, that the torts of criminal conversation and alienation of affections have outlived any usefulness they may have possessed in regard to preventing the dissolution of marriages. We discern that the public policy of this State is consistent with the modern course of the law moving away from "heart balm" causes of action. In fact, the legislature already has dispensed with causes of action for criminal conversation. S.C.Code Ann. ' 15-3-150 (Supp.1991). We join the majority of states in abolishing the "heart balm" tort of alienation of affections for causes of action accruing after the date of filing of this opinion.

Id. at 204-05, 422 S.E.2d at 753 (footnote omitted).

The *Russo* case reflects the ongoing trend across the country to abolish these causes of action. The *Russo* court noted that the tort of alienation of affections has been eliminated by the legislatures of 34 states and the courts of 4 additional states, *id.* at 203 n.2, 422 S.E.2d at 752 n.2, and that criminal conversation has been abrogated by 28 state legislatures and the courts of two other states, *id.* at 203 n.3, 422 S.E.2d at

753 n.3. Similarly, in Jamie Heard, *The National Trend of Abolishing Actions for the Alienation of a Spouse's Affection and Mississippi's Refusal to Follow Suit*, 28 Miss. C. L. Rev. 313 (2009), the author observes:

> Since Indiana's legislature first abolished the tort of alienation of affection in 1935, thirty-one states have followed suit by enacting similar statutory prohibitions against such actions, including the states of Colorado and Minnesota. Section 13-20-201 of the Colorado Revised Statutes Annotated rationalizes that actions based on alienation of affection, as well as those based on criminal conversation, seduction, and breach of contract to marry, have "been subjected to grave abuses, caused extreme annoyance, embarrassment, humiliation, and pecuniary damage to many persons wholly innocent and free of any wrongdoing who were merely the victims of circumstances." The Colorado statute further provides that these so called "heart balm" actions "have been exercised by unscrupulous persons for their unjust enrichment, and have furnished vehicles for the commission or attempted commission of crime and in many cases have resulted in the perpetration of frauds." Minnesota's statutory probation of the tort of alienation of affection adds that these actions "have caused intimidation and harassment to innocent persons." In accordance with these considerations and others, thirty-two states have enacted similar legislation to reflect that "the best interests of the people . . . will be served by the abolition" of actions based upon alienation of affection.
>
> Three other states - Montana, New Hampshire and Oklahoma - have legislatively abolished the tort as it pertains to the alienation of affection of a spouse but are silent as to the alienation of the affection of a parent or child.

Id. at 316-17 (footnotes omitted).

The author also noted that courts in Louisiana, Washington, Iowa, Idaho, Kentucky, and Missouri have abolished the tort of alienation of affections. *Id.* at 319-25. In short, in South Carolina and other states there is a broad consensus that public

policy requires elimination of causes of action for criminal conversation and alienation of affections.[1]

II. The Constitution's Full Faith And Credit Clause Does Not Require Enforcement Of The North Carolina Judgment Because The Judgment Violates South Carolina's Public Policy.

The federal Constitution's Full Faith and Credit Clause provides as follows:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const. art. IV, § 1. *See generally Nationsbank of N.C., N.A. v. Parsons*, 324 S.C. 506, 512, 477 S.E.2d 735, 738 (Ct. App. 1996).

South Carolina's legislature, as well as its courts, have recognized that judgments of another state are not to be enforced in South Carolina when they are contrary to the state's public policy.[2] The legislature has expressly established a

---

[1]It is noteworthy that as of October 1, 2009, less than two months after Widenhouse filed suit in North Carolina, a statute became effective to limit the scope of potential liability for alienation of affection and criminal conversation in North Carolina. Under Code section 52-13, no act that occurs after the plaintiff and the plaintiff's spouse physically separate (with the intent of either one to remain permanently separated) can give rise to such a cause of action. This statute is consistent with the national trend to reduce or eliminate liability for these torts.

[2]In addition, full faith and credit will not be afforded to another state's judgments if they are the result of fraud, due process violations, or a lack of jurisdiction. *See Colonial Pac. Leasing Corp. v. Taylor*, 326 S.C. 529, 533, 484 S.E.2d 595, 597 (Ct. App. 1997); *Carson v. Vance*, 326 S.C. 543, 551, 485 S.E.2d 126, 130 (Ct. App. 1997); *Bankers Trust Co. v. Braten*, 317 S.C. 547, 550, 455 S.E.2d 199, 200 (Ct. App. 1995); *Purdie v. Smalls*, 293 S.C. 216, 220-21, 359 S.E.2d 306, 308 (Ct. App. 1987).

public policy exception to the Full Faith and Credit Clause in South Carolina's Uniform Enforcement of Foreign Judgments Act ("UEFJA"), S.C. Code Ann. §§ 15-35-900 to -960. Section 15-35-960 provides: "The provisions of this article do not apply to foreign judgments based on claims which are contrary to the public policies of this State." *Id.* § 15-35-960.

Similarly, in *Newberry v. Georgia Department of Industry & Trade*, 283 S.C. 312, 322 S.E.2d 212 (Ct. App. 1984), *quashed*, 286 S.C. 574, 336 S.E.2d 464 (1985), the court of appeals stated:

> The United States Supreme Court has long held that the Full Faith and Credit Clause is not "an inexorable and unqualified command." *Pink v. A.A.A. Highway Express*, 314 U.S. 201, 210, 62 S.Ct. 241, 246, 86 L.Ed. 152 (1941). Forum states are not bound to apply the law of a sister state if that law violates the forum state's own public policy. *Nevada v. Hall, supra*; *see also, Mianecki v. Second Judicial District Court*, 658 P.2d 422 (Nev.1983); *Ehrlich-Bober & Co. v. University of Houston*, 49 N.Y.2d 574, 427 N.Y.S.2d 604, 404 N.E.2d 726 (1980).

Id. at 315, 322 S.E.2d at 214.

On appeal, this Court in *Newberry* implicitly recognized a public policy exception to the Full Faith and Credit Clause by observing that Georgia courts could choose to ignore a South Carolina judgment that violates Georgia's sovereign immunity: "Georgia could refuse to recognize the judgment within its borders[.]" 286 S.C. at 576, 336 S.E.2d at 465; *see also Abba Equip., Inc. v. Thomason*, 335 S.C. 477, 483, 517 S.E.2d 235, 238 (Ct. App. 1999) ("[T]he purpose of the UEFJA is to provide a simpler, more expedient procedure to enforce foreign judgments; it is not to

endow foreign creditors with substantive rights not otherwise available in the forum state.").

It is true that the U.S. Supreme Court has declined to recognize a "roving public policy exception" to the Full Faith and Credit Clause. *Baker v. Gen. Motors Corp.*; 522 U.S. 222, 233 (1998). However, language to that effect in *Baker* may fairly be regarded as dictum because the Court in *Baker* based its ruling on the inherent authority of one state's courts to "control courts elsewhere by precluding them . . . from determining for themselves what witnesses are competent to testify and what evidence is relevant and admissible in their search for the truth." *Id.* at 238. Strictly speaking, the *Baker* decision did not apply the Full Faith and Credit Clause; the Court simply ruled that a "Michigan decree cannot determine evidentiary issues in a lawsuit brought by parties who were not subject to the jurisdiction of the Michigan court." *Id.* at 239.

Regardless of the theoretical scope of the dictum in *Baker*, the fact remains that many courts have not interpreted Supreme Court precedents as a bar to recognizing a public policy exception to the Full Faith and Credit Clause.[3] For example, the Tennessee Court of Appeals has observed that "Tennessee courts are not obligated to give full faith and credit to any judgment of a state which we hold to be violative of Tennessee's public policy[.]" *Seiller & Handmaker, LLP v. Finnell*, 165 S.W.3d 273,

[3]Notably, the U.S. Supreme Court itself has observed that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Nevada v. Hall*, 440 U.S. 410, 422 (1979).

276-77 (Tenn. Ct. App. 2004); *see also Four Seasons Gardening & Landscaping, Inc. v. Crouch*, 688 S.W.2d 439, 445 (Tenn. Ct. App. 1984) ("Tennessee is one of those states following the rule that Article 4, Section 1 of the United States Constitution does not require that full faith and credit be given to foreign judgments when to do so would violate the strong public policy of the state in which the judgment is sought to be enforced.").

In addition to courts in Tennessee, courts in numerous other states have concluded that the Constitution's Full Faith and Credit Clause does not compel enforcement of another state's laws or judgments in contravention of the forum state's public policy. *E.g.*, *Hannah v. Gen. Motors Corp.*, 969 F. Supp. 554, 557 (D. Ariz. 1996) (recognizing "a limited public policy exception" that applies "when certain policy interests of the forum state are at play"); *Wilson v. Ake*, No. 8:04-CV-1680-T-30TBM, 2004 WL 3142528 (M.D. Fla. July 20, 2004) (Full Faith and Credit Clause does not require Florida to recognize a same-sex marriage license from Massachusetts); *Berger v. Hollander*, 391 So. 2d 716, 718 (Fla. Dist. Ct. App. 1980) ("[U]nless a valid final judgment of a sister state violates some public policy of the State of Florida, the courts of Florida must enforce it as they would a Florida judgment."); *Williams v. Gen. Motors Corp.*, 147 F.R.D. 270, 272 (S.D. Ga. 1993) (Michigan order that facially prohibited former litigation consultant for automobile manufacturer from testifying as to matters outside scope of any privilege, in products liability action, violated Georgia public policy, and, thus, Full Faith and Credit Clause

did not require district court in Georgia to give full effect to Michigan court order); *Struebin v. Illinois*, 383 N.W.2d 516, 520 (Iowa 1986) (State of Illinois is not required to enforce tort judgments obtained in Iowa if to do so would clearly offend its fundamental public policies); *Johnson v. Johnson*, 849 N.E.2d 1176, 1179 (Ind. Ct. App. 2006) ("[T]he full faith and credit clause does not require one state to apply another state's laws in violation of its own legitimate public policy."); *Ballard v. Evansville Bd. of Trs. of Police Pension Fund*, 452 N.E.2d 1023, 1026 (Ind. Ct. App. 1983) (Indiana trial court was not bound by Arizona court's order to restore pension benefits because to apply Arizona law in that manner would violate Indiana's public policy, which is that police pensioners convicted of a felony may have their benefits terminated); *Bonura v. United Bankers Life Ins. Co.*, 552 So. 2d 1248, 1252 (La. App. 1989) ("[F]ull faith and credit and the doctrine of comity requires that Louisiana recognize the Texas court judgment, *unless* by doing so we would violate the positive law or public policy of our own state."); *State v. Schmidt*, 712 N.W.2d 530, 537 (Minn. 2006) (rule that convictions of another state should generally be recognized in the forum state is subject to an exception where strong public policy interests of the forum state provide sufficient reason to override the general rule of recognition); *Ake v. Gen. Motors Corp.*, 942 F. Supp. 869, 881 (W.D.N.Y. 1996) (order of Michigan state court that enjoined former employee of automobile manufacturer from testifying in any products liability case involving manufacturer violated New York's strong public policy in favor of full disclosure, and, thus, Full Faith and Credit Clause did

not require federal district court applying New York law to give effect to order, and employee would be allowed to testify); *Blits v. Renaissance Cruise Lines, Inc.*, 633 N.Y.S.2d 933, 935 (Sup. Ct. 1995) ("Under the public policy exception, foreign law will not be enforced when it would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal[.]" (internal quotation marks omitted)); *Wolfe v. Wolfe*, 407 N.Y.S.2d 568, 569 (App. Div. 1978) ("We recognize that public policy in the most extreme case may forbid the enforcement of the judgment of a sister state."); *Somportex Ltd. v. Phila. Chewing Gum Corp.*, 318 F. Supp. 161, 168 (E.D. Pa. 1970) ("It is a well established rule of law that a court will not enforce a foreign judgment, be it of a sister state or foreign nation, if to do so would violate the forum's public policy."), *aff'd*, 453 F.2d 435 (3d Cir. 1971); *Rodgers v. Williamson*, 489 S.W.2d 558, 561 (Tex. 1973) (equitable decree of Illinois court ordering adoptive parents to permit natural father to visit child could be denied enforcement on ground that it was contrary to public policy, without running afoul of Full Faith and Credit Clause); *Sangiovanni-Hernandez v. Dominicana de Aviacion, C. por A.*, 556 F.2d 611, 614 (1st Cir. 1977) (court will not enforce another state's judgment if to do so would violate forum state's public policy).

As these cases and South Carolina Code section 15-35-960 establish, a public policy exception to the Full Faith and Credit Clause has been recognized in South Carolina and numerous other states. In these states, courts have expressly or

implicitly determined that the public policy exception is consistent with case law from the U.S. Supreme Court.

Notably, both the North Carolina legislature and its courts have also recognized a public policy exception. Thus, it is particularly appropriate to recognize the exception in this case because Widenhouse is seeking to enforce a North Carolina judgment that is contrary to South Carolina's public policy. Section 1C-1708 of the North Carolina General Statutes states that the provisions of North Carolina's Uniform Enforcement of Foreign Judgments Act "shall not apply to foreign judgments[4] based on claims which are contrary to the public policies of North Carolina." *See also Gardner v. Tallmadge*, 700 S.E.2d 755, 759 (N.C. Ct. App. 2010) (judgment debtor can rebut presumption of full faith and credit by showing "that the claim on which the judgment is based is contrary to the public policies of North Carolina"), *aff'd*, No. COA10-125, 2011 WL 1379816 (N.C. Apr. 8, 2011); *B. Kelley Enters., Inc. v. Vitacost.com, Inc.*, 710 S.E.2d 334, 337 (N.C. Ct. App. 2011) (a judgment of a court of another state may be attacked in North Carolina on the ground that it is against public policy).

In summary, the courts and legislature in South Carolina and North Carolina, and the courts in numerous other states, have recognized that there is a public policy exception to the Constitution's Full Faith and Credit Clause. Since Widenhouse's

[4]"Foreign judgments" include judgments of other states' courts. N.C. Gen. Stat. § 1C-1702(1).

North Carolina judgment is contrary to South Carolina's public policy, the judgment cannot be enforced in South Carolina. Therefore, the trial court erred in denying Colson's motion for relief and in granting Widenhouse's motion to enforce the judgment.

CONCLUSION

For the foregoing reasons, Appellant respectfully prays that this Court reverse the trial court's order and thereby grant Colson's motion for relief and deny Widenhouse's motion to enforce the North Carolina judgment.

Respectfully submitted,

David D. Armstrong, Esquire
Armstrong Law Firm
201 East North Street
Post Office Box 10855
Greenville, SC 29603
Telephone: (864) 241-0633
Facsimile: (864) 271-9136

Counsel for Appellant

THE STATE OF SOUTH CAROLINA
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D. Garrison Hill, Circuit Court Judge

Case No.: 2011-CP-23-5359

Sue Taylor Colson Widenhouse .....Respondent,

v.

Tammy Batson Colson .....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211**(b)**, SCACR.

May 1, 2012

David D. Armstrong, Esq. SC Bar #416
201 E. North St. – P.O. Box 10855
Greenville, South Carolina 29603
(864) 241-0633
Attorney for Appellant

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PROOF OF SERVICE

I certify that I have served the Final Brief on Sue Taylor Colson Widenhouse, by depositing copies of it in the United States Mail, postage prepaid, on May 7, 2012, addressed to her attorneys of record, Scott M. Tyler and Matthew D. Lincoln, Moore & Van Allen PLLC, 100 N. Tryon St., Suite 4700, Charlotte, NC, 28202.

May 7, 2012

David D. Armstrong, Esq.. SC Bar #416
201 E. North St. – P.O. Box 10855
Greenville, South Carolina 29603
(864) 241-0633
Attorney for Appellant