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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2021-000847

Tony T. Good.....Appellant,

v.

Tomekia Means and United States
Department of Agriculture .....Respondents.

INITIAL BRIEF OF RESPONDENT TOMEKIA MEANS

Dean A. Hayes, SC Bar No. 66066
McCabe, Trotter & Beverly, P.C.
4500 Fort Jackson Blvd., Suite 250
Columbia, South Carolina 29209
Phone: (803) 724-5000 Fax: (803) 724-5001
Email: dean.hayes@mccabetrotter.com
Attorney for Respondent Tomekia Means

February 22, 2022
Columbia, South Carolina

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II. **DID THE CIRCUIT COURT ERR IN CONCLUDING THAT THE CONDUCT OF THE RESPONDENT, TOMEKIA MEANS, DID NOT PRECLUDE HER FROM ASSERTING THE DEFENSE SET FORTH IN S.C. CODE § 40-11-370 WHEN RESPONDENT MEANS SET FORTH § 40-11-370 AS AN AFFIRMATIVE DEFENSE IN RESPONDENT MEANS'S ANSWER TO APPELLANT'S AMENDED COMPLAINT?**

STATEMENT OF THE CASE

This is an appeal from the circuit court's determination that S.C. Code § 40-11-370 bars the appellant, Tony T. Good ("Contractor"), from maintaining this action against the respondent, Tomekia Means ("Homeowner"). Contractor's summons and complaint were filed on November 9, 2017, and in his complaint, Contractor set forth three causes of action: specific performance; breach of contract; and unjust enrichment. (R. pp.). All of the causes of action related to a contract for construction work that Contractor provided at Homeowner's property located at 342 Leamon Avenue, Whitmire, South Carolina ("Subject Property"). The construction work was for the completion of a home ("Home") on the Subject Property. In his complaint, Contractor sought to have the respondent, United States Department of Agriculture ("USDA"), release $37,200 that Contractor then believed was held by the USDA, or in the alternative, for a judgment against Homeowner. (R. pp.). Homeowner's answer, which was filed on December 28, 2017, set forth defenses of faulty construction/termination of contract and two defenses based on S.C. Code § 40-11-370(C). (R. pp.). The USDA, which holds a mortgage on the Subject Property, filed an answer that generally denied the allegations of Contractor's complaint. (R. pp.).

On April 30, 2019, Homeowner filed a motion for summary judgment (R. pp.). On June 14, 2019, Contractor filed a motion to amend his complaint. (R. pp.). Homeowner's motion for summary judgment was heard on June 20, 2019, and on July 15, 2019, the court filed an order denying the motion for summary judgment. (R. pp.). Contractor filed an amended motion to amend his complaint on October 31, 2019, and on November 22, 2019, the court issued an order allowing Contractor to amend his complaint. (R. pp.),

On December 6, 2019, Contractor filed an amended complaint that set forth six causes of action: specific performance; breach of contract; unjust enrichment; negligent misrepresentation/constructive fraud; fraud in the inducement; and equitable lien. (R. pp.). As with Contractor's original complaint, all of the causes of action in the amended complaint related to a contract for construction work that Contractor performed on the Home, and Contractor again alleged he was owed the amount of $37,200 under the terms of the contract Contractor had with Homeowner. (R. pp.). Homeowner's answer to the amended complaint generally denied the allegations of the amended complaint and again set forth two affirmative defenses based on S.C. Code § 40-11-370, with one defense being based on the Contractor engaging in construction under a name other than the exact name which appears on his contractor's license and the other defense being that Contractor did not have a valid license for the Contract. (R. pp.). On December 30, 2019, the USDA filed an answer generally denying the allegations set forth in Contractor's amended complaint. (R. pp.).

The case was called for a non-jury trial on April 21, 2021, before the Honorable R. Lawton McIntosh. USDA did not participate in the trial, as the parties had agreed that USDA's mortgage lien on the Subject Property was protected. (R. pp.). The parties also agreed that each party's exhibits were admitted into evidence without objection and that the depositions of Contractor,

Homeowner, and Melissa Mays, employee of the USDA, were admitted into evidence as court exhibits. (R. pp.). After the non-jury trial, Judge McIntosh, on June 7, 2021, issued a Form 4 order denying the relief sought by Contractor. (R. pp.). The Form 4 order also requested that Homeowner's attorney prepare a formal order. On July 1, 2021, a formal order ("Order") denying the relief sought by Contractor was filed with the court. (R. pp.). The Order found that, because Contractor had entered into a contract that exceeded the limits allowed by his contractor's license, Contractor did not have a valid license; therefore, S.C. Code § 40-11-370(C) barred Contractor from maintaining this action. (R. pp.). Contractor served his notice of appeal on August 2, 2021.

STATEMENT OF FACTS

Contractor's action against Homeowner is based on a contract Contractor and Homeowner signed for labor and materials Contractor was to provide for the completion of the Home. (R. pp. TofR, p. 75, lines 10-20). Homeowner originally entered into a contract with Pennyworth Homes in 2009 to build the Home. (R. pp.). Pennyworth Homes pulled a permit for construction work on the Home in the amount of $130,000, but Pennyworth Homes abandoned the work before completing the Home. (R. pp. TofR, p. 77, lines 7-15, p. 82, line 21, p. 84, line 9; Deposition of Melissa Mays, p 13, line 2 thru p. 16, line 13). Homeowner sued and obtained a judgment against Pennyworth Homes for the amount of $242,000 but did not collect any money from the judgment. (R. pp. TofR, pp. 77, line 16 thru 78, line 9; 82, line 2 thru 84, line 16). However, as a result of the judgment, the Home, which was over fifty percent complete, was awarded to Homeowner. (R. pp. TofR, p. 84, lines 17-23).

After obtaining the judgment against Pennyworth Homes, the Homeowner, sometime around 2013, began speaking with Contractor regarding completion of the Home. (R. pp. TofR p. 15, line 16 thru p. 19, line 24; p. 101, line 6 thru p. 102, line 9). Contractor initially provided an

estimate of $35,000 to complete the Home, then he changed the estimate to $50,000 before providing the final estimate of $74,000. (R. pp. TofR p. 101, line 6 thru p. 102, line 9). Homeowner applied for a loan from the USDA to complete the Home, and she was ultimately determined to be eligible for a loan. (Deposition of Melissa Mays, p. 23, lines 6-19). Homeowner submitted to the USDA the $74,000 estimate from the Contractor to complete the Home. (Deposition of Melissa Mays, p. 23, line 21 thru p. 28, line 11). All parties agree that Contractor's $74,000 estimate to complete the Home was the basis for a contract ("Contract") dated December 31, 2015, signed by both Contractor and Homeowner, in which Contractor agreed to do certain work to complete the Home for the amount of $74,000. (R. pp. TofR p. 27, line 6, p. 28, line 1; p. 86, line 5-17; Deposition of Melissa Mays, p. 25, line 1 thru p. 28, line 5).

According to Contractor, to complete the Home would require some electrical work, a little plumbing work, some heating and air work, and some finishing work. (R. pp. TofR p. 20, line 10 thru p. 22, line 6). Both Contractor and Homeowner admit signing the Contract, but Contractor alleges that he was not going to do all of the work required by the Contract. (R, pp. TofR p. 28, line 2 thru p. 29, line 7; p. 78, lines 10-21). Contractor stated that other parties were going to do the work required by the Contract for the electrical work, plumbing work, and heating and air work, as Contractor admitted he wasn't licensed for any of that work under his license. (R. pp. TofR p. 22, line 1 thru p. 23, line 6). Contractor stated that his license allowed him to do "framing, masonry and roofing" with regard to construction projects. (R. pp. TofR p. 65, 65, line 14 thru p. 72, line 15). "Finishing work," which was going to be completed by Contractor, included hanging insulation and sheetrock, putting down flooring over the existing subfloor, painting, putting down carpet and ceramic tile, some masonry, and putting up vinyl siding. (R. p. TofR p. 21, line 13 thru p. 22, line 3). Contractor admits pulling a permit on January 16, 2016, for the amount of $42,000

and admits that permit for $42,000 was for work he would be doing to the Home himself. (R. pp. TofR., p. 39, line 24 thru p. 41, line 16).

The Contract provided that Contractor would receive a total of three payments or draws from the USDA, with the payments being made as work on the Home was completed. (R. pp. TofR p. 84, line 24 thru p. 86, line 4; p. 91, line 6 thru p. 92, line 90). For his work on the Home, Contractor received two payments totaling $33,300 (R. pp. TofR p. 85, line 18 thru p. 86, line 4; p. 103, lines 10-24). After the second draw, a dispute arose between Contractor and Homeowner, as Homeowner found issues with the quality of Contractor's work and with the slow pace at which the work was being completed. (R. p. TofR p.). Therefore, Homeowner refused to allow the USDA to release the final draw to Contractor (R. p. TofR p.). This resulted in Contractor filing this action.

At the time the Contract was executed in December 2015, Contractor was licensed through the South Carolina Department of Labor, Licensing and Regulation ("LLR") as a general contractor with "BD1" classification (R. pp. TofR P. 62, line 11 thru p. 72, line 14; Deposition of Melissa Mays, p. 28, line 12 thru p. 30, line 6). In December 2015, general contractors with a BD1 classification were limited to projects costing $30,000 or less. (R. pp. TofR P. 62, line 11 thru p. 72, line 14; p. 103, lines 2-9). Contractor was actually fined by LLR for exceeding his license classification on the Contract to perform work on the Home (R. p. TofR p. 79, line 11 thru p. 80, line 9).

Contractor states that he informed both Homeowner, and Melissa Mays with the USDA about the limitations of his contractor's license. (R. pp.). Melissa Mays states that, at the time the Contract was signed in December 2015, Contractor did provide her with a copy of his contractor's license showing the BD1 classification and that Homeowner was provided with a copy

of Contractor's license. (Deposition of Melissa Mays, p. 28, line 12 thru p. 30, line 12). However, Melissa Mays, although stating Contractor provided her with a copy of his license, never states that Contractor mentioned to her his authorized dollar limitations and indicates that Contractor did not discuss it.. (Deposition of Melissa Mays, p.73, line 15 thru p. 74, line 22)). At the time the Contract was signed, Homeowner also was unaware of the limitations of Contractor's license. (R. pp. TofR p. 101, line 6 thru p. 102, line 9).

At his deposition and at the trial of this case, Contractor was very evasive about the dollar limitation of his contractor's license. (Deposition of Tony T Good, p. 26, line 6 thru p. 32, line 1; TofR p. 62, line 11 thru p. 72, line 14). As a matter of fact, at the trial the circuit court judge had to ask Contractor's counsel point blank what the dollar limit was for Contractor's license at the time the Contract was entered into before getting counsel to concede that it was $30,000.00. (R. p. TofR p. 103, lines 2-9). Also, in his response to Homeowner's request for admission specifically asking whether, at the time he entered into the contract, general contractors classified in group number one had a project dollar limit not to exceed $30,000.00, Contractor denied the request. (Deposition of Tony T. Good, p. 34, line 24 thru p. 35, line 20).

ARGUMENTS

I. THE CIRCUIT COURT DID NOT ERR IN CONCLUDING THAT THE APPELLANT, TONY T. GOOD, DID NOT HAVE A VALID CONTRACTOR'S LICENSE AND WAS THEREFORE BARRED FROM MAINTAINING THIS ACTION BY SC CODE § 40-11-370.

Contractor's brief did not have as an issue whether the circuit court erred in determining Contractor did not have a valid license and was therefore barred from maintaining this action by S.C. Code § 40-11-370, so Contractor should be deemed to have waived this issue. However, out of an abundance of caution, Homeowner will address this issue.

The circuit court correctly concluded that S.C. Code § 40-11-370 bars Contractor from maintaining this action. Section 40-11-370(C) states that "[a]n entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract." It is undisputed that, at the time the Contract was entered into in December 2015, Contractor had general contractor's building license ("License"), number G197096, under the name of "Good Building" with a classification of "BD1" from the South Carolina Department of Labor, Licensing and Regulation ("LLR"). Under the "BD1" classification at that time, Contractor was licensed as a builder for construction jobs up to the amount of $30,000.

Contractor admits that he provided the quote for $74,000 to provide labor and materials for the Home and that he voluntarily signed the Contract. Although Contractor contends that he was not going to do all of the work under the Contract, he admitted both in his deposition and at trial that he pulled the original work permit for the construction to the Home for the amount of $42,000, and he admits this permit was for work he was doing to the Home. It is undisputed that Good was doing "general construction" on the Home and that he was a "general contractor." *See* S.C. Code §§ 40-11-20(8) ("General construction" means the installation, replacement, or repair of a building, structure, highway, sewer, grading, asphalt or concrete paving, or improvement of any kind to real property."); and 40-11-20(9) ("General contractor" means any entity which performs or supervises or offers to perform general construction."). There is no question that, while doing the work on the Home, Contractor exceeded the dollar amount of $30,000 on his contractor's license with LLR. As a matter of fact, LLR fined Contractor $1,000 for exceeding the amount of his license by performing work on the Home.

In *C-Sculptures, LLC v. Brown,* 403 S.C. 53, 742 S.E.2d 359 (2013) the South Carolina Supreme Court decided the very issue involved in this case: whether a contractor who is licensed by LLR but exceeds his license amount may maintain an action to enforce a contract. In *C-Sculptures*, the contract price was in excess of $800,000, but the contractor, C-Sculptures, LLC, had a license that limited it to construction contracts that did not exceed $100,000. *C-Sculptures,* 403 S.C. at 55, 742 S.E.2d at 360. A dispute arose between C-Sculptures and the Browns, for whom the construction was being done, and the arbitrator deciding the dispute decided in favor of C-Sculptures. *Id.* The arbitrator's award was thereafter affirmed by both the circuit court and the court of appeals. *Id.*

The South Carolina Supreme Court granted a writ of certiorari and held the arbitrator "manifestly disregarded the law in declining to dismiss the action" filed by C-Sculptures. *Id.* at 360-61. The Court stated that "the plain language of section 40-11-370(C) is clear, defined, explicit, and unquestionably applicable, yet the arbitrator simply chose to ignore it." *Id.* The Court stated that it was undisputed that C-Sculptures was "general contractor" that performed "general construction" within the meaning of S.C. Code §§ 40-11-20(8) and (9). *Id.* The Court then quoted S.C. Code § 40-11-30, which states "No entity or individual may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for general contracting . . . *without a license issued in accordance with this chapter." Id.* (emphasis in original).

Finally, the Court cited S.C. Code § 40-11-370. Section 40-11-370(A) states: "It is unlawful to use the term "licensed contractor" or to perform or offer to perform general or mechanical construction without first obtaining a license as required by this chapter." *Id.* Section 40-11-370(C) states that an "entity which does not have a *valid license* as required by this chapter

may not bring an action either at law or in equity to enforce the provisions of a contract." *Id.* (emphasis in original). The Court stated that "[t]he term 'valid' is clear and unambiguous, and leaves no room for statutory construction." *Id.* Since C-Sculptures did not have the appropriate license for the contract, the Court held C-Sculptures could not bring the action to enforce the contract. *Id.* C-Sculptures attempted "to avoid the door-closing effect of section 40-11-370(C) by claiming it was merely 'under-licensed,'" but the Court again stated that the word "valid" was without ambiguity and held C-Sculptures did not have a valid license. *Id.*

The *C-Sculptures* case is on point with the present case. Although Contractor disputes that he was to perform the full $74,000 of work to be completed under the terms of the Contract, he admits that he was personally going to perform work in the amount of $42,000. It is undisputed that Contractor was only licensed by LLR for contracts up to the amount of $30,000, therefore, since Contractor did not have a valid license for the Contract, § 40-11-370(C) bars Contractor from maintaining this action. Therefore, the circuit did not err in concluding that § 40-11-370(C) Contractor is barred from maintaining this action against Homeowner.

II. DID THE CIRCUIT COURT ERR IN CONCLUDING THAT THE CONDUCT OF THE RESPONDENT, TOMEKIA MEANS, DID NOT PRECLUDE HER FROM ASSERTING THE DEFENSE SET FORTH IN S.C. CODE § 40-11-370 WHEN RESPONDENT MEANS SET FORTH § 40-11-370 AS AN AFFIRMATIVE DEFENSE IN RESPONDENT MEANS'S ANSWER TO APPELLANT'S AMENDED COMPLAINT?

Contractor has set forth several issues on appeal regarding whether circuit court erred in determining that Homeowner did not waive or was not estopped from asserting the bar of S.C. Code § 40-11-370. Another of Contractor's issues on appeal is whether the circuit court erred in failing to find Homeowner's allegedly tortious conduct prevented Homeowner from asserting the bar of § 40-11-370. Homeowner believes that all of these issues on appeal can be condensed down to one issue: whether the circuit court erred in determining that Homeowner, who set forth §40-

11-370 as an affirmative defense in her answer to the Contractor's amended complaint, was not precluded from asserting this defense by Homeowner's allegedly wrongful conduct.

First, Homeowner did not, as asserted by Contractor, commit any tortious conduct. Contractor has failed to carry his burden to prove any of the causes of action against Homeowner. Contractor would have you believe that Homeowner lured him into this trap by promising that she would not use the limits of his license against him. However, neither Melissa Mays nor Homeowner stated that they were aware of the dollar limitations of Contractor's license at the time the Contract was signed. Contractor was definitely aware that his license prevented him from contracting to do work on a project costing more than $30,000, and Contractor entered into the Contract anyway. Also casting doubt on the Contractor's allegations is the fact that throughout this case Contractor has been evasive about the limits of his license.

Second, the case law is clear that S.C. Code § 40-11-370 is a total bar to enforcing a contract if the contractor does not have a valid license. Contractor asserts that the bar of S.C. Code § 40-11-370 may be waived, and this is, to an extent, true. Section 40-11-370 is an affirmative defense, and like any affirmative defense, it may be waived by the failure to assert the defense in a responsive pleading. *See C-Sculptures,* 403 S.C. at 57-58, 742 S.E.2d at 361-62 (discussing cases where the defendant failed to plead Section 40-11-370 as a defense); *Earthscapes Unlimited Inc. v. Ulbrich,* 390 S.C. 609, 703 S.E.2d 221 (2010) (40-11-370 is affirmative defense and the failure to plead an affirmative defense is deemed a waiver of the right to asset it); *Madren v. Bradford,* 378 S.C. 187, 661 S.E.2d (Ct. App. 2008) (statutory prohibition is in the nature of an affirmative defense and should be pled); and *Costa and Sons Constr. Co, Inc. v. Long,* 306 S.C. 465, 412 S.E.2d 450 (Ct. App. 1991) (statute does not involve subject matter jurisdiction and may be waived by failing to assert it in responsive pleading).

In the present case, Homeowner, both in her answer to the original complaint and in her answer to the amended complaint, clearly did plead § 40-11-370 as a defense, therefore, she has not waived the statutory protection.

Contractor argues that Homeowner knew that Contractor did not have a valid license for the work on the Home and that since Homeowner allegedly had this knowledge and was allegedly encouraging Contractor to perform the work, Homeowner is estopped or has waived her right to the protection of S.C. Code § 40-11-370. First, as stated above, Homeowner denies having this knowledge. Second, even if Homeowner did have this knowledge, the South Carolina Court of Appeals has specifically held that a homeowner's knowledge that a contractor did not have a valid license would not prevent the application of the statute. In *Wagner v. Graham,* 296 S.C. 1, 370 S.E.2d 95 (Ct. App. 1988), the Court, faced with this argument, stated:

> The law of estoppel is simply inapplicable to the facts of this case. Assuming, without so deciding, that it might be found by the preponderance of the evidence that the Homeowner was at the time of the agreement aware of the fact that the Contractor did not have a valid license, it would be of no comfort to the Contractor. The statute, as enacted by the Legislature, is for the benefit of the public. If one might avoid the impact of the statute by applying the law of estoppel, one could, by a similar reasoning, avoid the act by agreement between the Contractor and Homeowner. Clearly this would not be allowed.

Wagner, 296 S.C. at 3, 370 S.E.2d at 96.

Contractor alleges that *Wagner* is distinguishable from the present case. However, if, as stated in *Wagner,* a contractor and a homeowner could not, by agreement, prevent the application of § 40-11-370, then Contractor cannot prevent the application of the statute in this case. The language of § 40-11-370(C) is clear and unambiguous: "An entity which does not have a valid license as required by this chapter may not bring an action *either at law or in equity* to enforce the provisions of a contract." (emphasis added). Every cause of action asserted by Contractor in his

amended complaint is either legal or equitable, and all of the cause of action are based on the Contract with Homeowner.

The South Carolina Supreme Court has held that a contractor who was unlicensed at the time the contract was entered into but obtained a license prior to the home being completed was barred from enforcing the contract. *Duckworth v. Cameron,* 270 S.C. 647, 244 S.E.2d 217 (1978). In *Roberta, Inc. v. Trust,* 274 S.C. 53, 260 S.E.2d 818 (1979), the contractor tried to argue that, either on a theory of contract, quantum meruit, or unjust enrichment, a prior version of the statute "should not be so construed as to bar recovery by an unlicensed builder for amounts paid to third parties for labor and materials used in construction, at least, to the extent that the landowner was benefitted." *Roberta,* 274 S.C. at 54, 260 S.E.2d at 818. "In other words, [contractor] argues that the statute should be construed to prevent any benefit or profit to the unlicensed builder, but should not bar recovery for labor and materials used in the construction from which the unlicensed builder received no profit and from which the landowner received a benefit." *Id.* at 818. The Court stated that it found "no basis in the statute for this construction" and denied recovery by the contractor. *Id.* at 818-19.

In the present case, Contractor did not have a valid license to enter into the Contract with Homeowner, and since S.C. Code § 40-11-370 bars Contractor from maintaining any action in law or in equity against Homeowner, the circuit court did not err in concluding that waiver, estoppel, nor any other legal or equitable causes of action asserted by Contractor, prevented Homeowner setting forth § 40-11-370 as a complete bar to Contractor maintaining this action.

CONCLUSION

The circuit court did not err in concluding that Contractor did not have a valid license to enter into the Contract with Homeowner and that Contractor was therefore barred by S.C. Code §

40-11-370 from maintaining this action. The circuit court also did not err by concluding that waiver, estoppel, nor any other legal or equitable cause of action asserted by Contractor, prevented Homeowner from setting forth § 40-11-370 as a complete bar to Contractor maintaining this action.

Respectfully submitted,

s/ Dean A. Hayes
Dean A. Hayes, SC Bar No. 66066
McCabe, Trotter & Beverly, P.C.
4500 Fort Jackson Blvd., Suite 250
Columbia, South Carolina 29209
Phone: (803) 724-5000 Fax: (803) 724-5001
Email: dean.hayes@mccabetrotter.com
Attorney for Respondent Tomekia Means

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Tomekia Means and United States
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PROOF OF SERVICE

I certify that I have served a copy of Initial Brief of Respondent Tomekia Means and Respondent Tomekia Means' Designation of Matter to be included in the Record on Appeal, on the parties hereto by emailing a copy of the same via the email address listed in the Attorney Information System on the date indicated below, addressed to their respective attorneys of record as follows:

Kyle B. Parker, Esq.
Pope Parker Jenkins, P.A.
1508 College Street
Newberry, South Carolina 29108
kyle@ppjlaw.com
Attorney for Appellant Tony T. Good

George J. Conitis, Esq.
U.S. Attorney's Office
55 Beattie Place, Suite 700
Greenville, South Carolina 29601
george.conits@usdoj.gov
Attorney for Respondent United States Department of Agriculture

s/ Dean A. Hayes
Dean A. Hayes, SC Bar No. 66066
McCabe, Trotter & Beverly, P.C.
4500 Fort Jackson Blvd., Suite 250
Columbia, South Carolina 29209
Phone: (803) 724-5000 Fax: (803) 724-5001
Email: dean.hayes@mccabetrotter.com
Attorney for Respondent Tomekia Means

February 22, 2022
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Physical Address:
4500 Ft. Jackson Blvd., Suite 250
Columbia, South Carolina 29209

Locations in:
Columbia, SC
Mount Pleasant, SC

McCabe, Trotter & Beverly, P.C.
COMMUNITY ASSOCIATION AND CONSTRUCTION LAW
www.mccabetrotter.com
Phone: (803) 724-5000
Fax: (803) 724-5001

Dean A. Hayes
Shareholder

Dean.Hayes@mccabetrotter.com

Direct: (803) 724-5006

Licensed to practice in South Carolina

February 22, 2022

VIA EMAIL ONLY: ctappfilings@sccourts.org

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

Re: Tony T. Good v. Tomekia Means and United States Department of Agriculture
Appellate Case No. 2021-000847
MTB File No.: 21223.2

Dear Ms. Kitchings:

Enclosed, please find Initial Brief of Respondent Tomekia Means, Respondent Tomekia Means' Designation of Matter to be included in the Record on Appeal, and Proof of Service prepared in the above-referenced matter. Please have a member of your staff file the aforementioned instruments, and return file-stamped copy to me via email or such other manner as is convenient.

Should you have questions or concerns, please do not hesitate to contact me.

Respectfully,
Dean A. Hayes

DAH/bdp
Enclosures
cc: Kyle B. Parker, Esq. (via email, w/ enclosures)
George Conits, Esq. (via email, w/ enclosures)
Tomekia Means (via email, w/ enclosures)