

THE STATE OF SOUTH CAROLINA
The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Courtney Clyburn Pope, Circuit Court Judge

Appellate Case No: 2021-001253

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SC Court of Appeals

Deborah T. WeeksAppellant

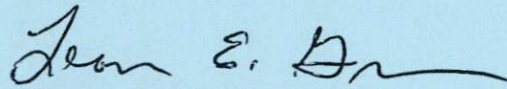
V.

David W. Weeks Respondent

In Re: Estate of James Randall Weeks, Jr.

FINAL BRIEF OF APPELLANT

May 13, 2022



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STATEMENT OF ISSUES ON APPEAL

- 1) Did the Court commit error by disallowing an Elective Share from the Estate of James Randall Weeks, Jr., when the Appellant was legally married to him at the time of his death?
- 2) Did the Court commit error by applying the Domestic Law Statute of Equitable Apportionment of Marital Property to exclude real estate from the probate estate?
- 3) Did the Court commit error by using a 2011 real estate appraisal of \$670,000.00 when **South Carolina Code Section 62-3-706 (A)** requires the use of the property's fair market value as of the date of the decedent's death?
- 4) Did the Court commit error by applying a 40% Marketability/Minority discount in a probate matter where the sale of real estate is not an issue?
- 5) Did the Court commit error by finding that a temporary Family Court Order terminated all marital rights of the Appellant?

STATEMENT OF THE CASE

This matter is before the Court pursuant a Petition for Elective Share timely filed by Deborah T. Weeks on December 21, 2017, in the Probate Court for Aiken County. Deborah T. Weeks is the surviving spouse of the Decedent, James Randall Weeks, Jr., who died on August 16, 2017. James Randall Weeks, Jr., left his Last Will and Testament that did not provide for his surviving spouse, Deborah T. Weeks. (R. p. 81). Deborah T. Weeks claims that she is entitled a one-third (1/3) elective share of the probated estate of James Randall Weeks, Jr., as the surviving spouse, pursuant to **SC Code 62-2-201(a)**, Right of elective share.

Deborah T. Weeks and James Randall Weeks, Jr., were married to each other on January 10, 1998, in Aiken County, South Carolina. James Randall Weeks, Jr., died testate on August 16, 2017, in Aiken County, South Carolina, leaving his wife out of his Last Will and Testament. David W. Weeks was appointed the Personal Representative of the Estate of James Randall Weeks, Jr., on

August 30, 2017.

James Randall Weeks, Jr., executed **his Last Will and Testament** on February 9, 2011. The **Will** is filed with the Aiken County Probate Court. In the Preamble of his **Will**, James Randall Weeks, Jr., acknowledges that he was still married to Debra T. Weeks. He states that, "**I am legally separated from my wife, Deborah T. Weeks.**" The **Will** goes on to provide for the children of Mr. Weeks, but it does not provide any benefit for his surviving wife, Deborah T. Weeks.

On December 21, 2017, Deborah T. Weeks filed a timely Petition for Elective Share in the Probate Court for Aiken County. In the Petition she states that she and James Randall Weeks, Jr., were married to each other on January 10, 1998. She filed a Probate Court Certified Marriage Certificate with the Court confirming her marriage to James Randall Weeks, Jr. (R. p. 54). It is uncontroverted that the parties were never divorced from each other and were legally married to each other at the time of his death on August 16, 2017.

Deborah T. Weeks filed for a divorce from James Randall Weeks, Jr., in the Aiken County Family Court on July 15, 2010. (R. p. 13, Order of Dismissal 2010-DR-02-1080). Several Temporary Hearing were held between the parties, but there was never a final hearing to dissolve the marriage.

One of the Temporary Orders dated March 23, 2011, states that the parties wish to **leave the case open pending a division of the marital assets and a final hearing for divorce.** (R. p. 17, Conclusions of Law, paragraph 1). There was never a final hearing between the parties.

On August 5, 2012, the Aiken County Family Court issued an Order of Dismissal (Without Prejudice). The Order did not divide their marital property or divorce the parties. Deborah T. Weeks nor James Randall Weeks, Jr., elected to refile the divorce action. James Randall Weeks, Jr., subsequently died on August 16, 2017.

On February 27, 2020, a **Merits Hearing** was held on the Petition for Elective Share filed by Deborah T. Weeks. All parties were present for the hearing and testimony was taken and numerous exhibits were entered into evidence by counsel on behalf of both parties. At the close of the hearing the court announced that it would hold all rulings in abeyance and instructed both Counsel to prepare a Proposed Order and Brief in support of their position in the matter.

On May 15, 2020, the Honorable Tonya L. Marchant made a finding that a Final Family Court Order gave the Petitioner all the property she is entitled to, and excluded her from benefitting the real estate in the Probate Estate.

In addition, the Court found that the 2011 real estate appraisal of \$670,000.00, was appropriate while disregarding South Carolina Code Section 62-3-706 (A), that requires the use of the property's fair market value as of the date of the decedent's death.

The Court also found it appropriate to apply a 40% Marketability/Minority discount to the real estate in this probate matter. The Court also found that the temporary Family Court Order terminated all marital rights of Deborah T. Weeks.

On May 15, 2020, the Court issued an Order disallowing Deborah T. Weeks, the surviving spouse, an Elective Share from the Estate of James Randall Weeks, Jr. The Order was appealed to the Common Pleas Court for Aiken County.

On August 2, 2021, a hearing was held before the Honorable Courtney Clyburn Pope. After hearing the arguments of counsel and consideration of the evidence, the Circuit Court ruled that no errors of law were found and Affirmed the Probate Court's decision.

STANDARD OF REVIEW

A proceeding in probate court may either be an action at law or in equity.” In re Estate of Holden, 343 S.C. 267, 278, 539 S.E.2d 703, 709 (2000). “Whether the action is one at law or in equity is determined by the nature of the pleadings and the character of the relief sought.” *Id.* “When a probate court proceeding is an action at law, the circuit court and the appellate court may not disturb the probate court's findings of fact unless a review of the record discloses there is no evidence to support them.” Neely v. Thomasson, 365 S.C. 345, 349–50, 618 S.E.2d 884, 886 (2005). “Questions of law, however, may be decided with no particular deference to the lower court.” Id. at 350, 618 S.E.2d at 886.

This case is an action at law and involves a misapplication of the law. Since this case involves questions involving the law, this case may be decided with no particular deference to the lower court ruling.

ARGUMENTS

ARGUMENT 1

Is Deborah T. Weeks entitled to an Elective Share from the Estate of James Randall Weeks, Jr., pursuant to S.C. Code Section 62-2-201(a) (Supp.)?

Deborah T. Weeks is the surviving spouse of James Randall Weeks, Jr., and filed a timely Petition for an elective share of his estate. There is no controversy related to Debra T. Weeks being the surviving spouse or the timeliness of filing for an Elective Share by her.

South Carolina Code Section 62-2-201(a) is clear and unambiguous regarding the election of an elective share. According to the statute, if a married person domiciled in this State dies, the

surviving spouse has a right of election to take an elective share of one-third of the decedent's **probate estate**. Debra T. Weeks made the election under the statute.

It is uncontroverted by the parties that Mr. Weeks was a resident of this State at the time of his death and is therefore, it is not an issue. All documentation filed with the Court confirms that James Randall Weeks, Jr., was resident of Aiken County South Carolina at his death.

It is also uncontroverted by the parties that Deborah T. Weeks is the surviving spouse of James Randall Weeks, Jr. She filed with the Court a certified Certificate of Marriage showing that she married Mr. Weeks on January 10, 1998. (R. p. 54).

Moreover, the Respondent acknowledges in the Transcript when he says that [it is] "Our contention that she is entitled to file for an Elective Share and as far as we know they were still married" (R. p. 36, line). The Appellant agrees with the Respondent's summation that Ms. Weeks is entitled to file an Elective Share.

When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts. *See* **J.K. Constr., Inc. v. W. Carolina Reg'l Sewer Auth., 336 S.C. 162,166,519 S.E.2d 561, 563 (1999).**

Based on the statute, undisputed testimony and arguments presented, supra, Deborah T. Weeks is entitled to file and take an Elective Share of the Estate of James Randall Weeks, Jr., as a Surviving Spouse.

The ruling in by Court that the "Petitioner is entitled to nothing for her Elective Share Claim against the estate of the Decedent due to the fact that there was essentially and for all practical

purposes, a Family Court Order terminating all marital rights and equitable distribution between the spouses,”¹ The Court does correctly acknowledge that she is entitled to an elective share but incorrectly rules when it says that there is a Family Court Order terminating all marital rights and equitable distribution between the spouses.

There is no evidence to support the Probate Court ruling that a Family Court Order terminated all marital rights and equitable distribution between the spouses. There has never been a Family Court Order terminating all marital rights and equitable distribution between the spouses.

There was marital litigation between the parties where Debra T. Weeks did file for a divorce from James Randall Weeks, Jr., based on Physical Cruelty and Adultery. There were three temporary hearings where each party received some property on a temporary basis, but not any permanent distribution. The Court said in Terry v. Terry, 400 S.C. 453, 456-57, 734 S.E.2d 646, 648 (2012) (“A temporary order of the family court is without prejudice to the rights of the parties. Such orders are, by definition, temporary—they neither decide any issue with finality nor affect a substantial right”). Whatever distributions that were made during those temporary hearings **did not terminate any marital rights and equitable distribution between the spouses, much less all her of rights.**

Even Deborah T. Weeks testified that parties had three temporary hearings,² but no final hearing was ever held in the case. She testified that there was no final property settlement agreement was entered into by them. Even the language in the temporary order dated March 23, 2011, confirms it. It states that “the parties wish to leave the case open pending a division of the

¹ The Court acknowledges that the parties are spouses. Under the Elective Share Statute, a surviving spouse has the right to an elective share that she cannot be divested of except by a written waiver. See S.C. Code § 62-2-204 (Supp.2001).

² One of the hearings was for an Order of Protection against James Randall Weeks, Jr., filed by Debra T. Weeks.

marital assets and a final hearing for divorce." (R. p. 17, Conclusions of Law, paragraph 1). The March 23, 2011, hearing was the last hearing that was held before the Court dismissed the case and sending everything back to where it was before the start of divorce proceedings.

Moreover, the Court acknowledges the hearings were temporary hearings. In its findings, the Court stated that "It therefore appears that there were three hearings between these parties that were all held on temporary basis." (R. p. 6, second full paragraph). They were all temporary hearing and during those hearings, property was divided on a temporary basis and **was not** based on equitable division of marital assets.

Under South Carolina Law there is no such thing as temporary equitable division of marital assets in Domestic Litigation. In Terry v. Terry, 400 S.C. 453, 734 S.E.2d 646 (S.C. 2012), the Court said, "Neither Section 20-3-620 of the South Carolina Code nor case law provides that equitable division can be affected temporarily.

Furthermore, even there was such a thing as temporary equitable division of marital assets, in Domestic Litigation, a temporary order is vacated after one year and the order has no effect on anything. The entire case was dismissed after one year. (R. p. 13 Order of Dismissal dated August 5, 2012).

When the divorce action was dismissed on August 5, 2012, it also dismissed the temporary orders. In effect the temporary orders were vacated well before the Probate hearing began nearly 8 years later. It appears that the Court resurrected the temporary orders to give them effect to create a marital agreement between the parties. In either case the Probate Court does not have Subject Matter Jurisdiction to resurrect a temporary order between litigants or create an agreement between marital litigants.

Moreover, when the Court ruled that “ the Court specifically finds that Deborah received all assets from the marriage to which she was entitled and that the litigation between the parties essentially and for all practical purposes resulted in a final property division of the parties,” it exceeded interpretation of an agreement and reaches creation status or resurrection ability. The Court’s action clearly lands squarely into Domestic Relations Law. However, the Probate Court does not have the authority to make a finding related division of marital property and certainly not to resurrect a temporary order that was vacated on August 5, 2012. Even the Family Court does not resurrect a vacated/dismissed temporary order. After a dismissal of a case the Family Court in South Carolina requires a new action to be filed.

Although the Probate Court has jurisdiction to hear and determine issues relating to interpretation of marital agreements in connection with an estate, it does not have the authority to create a marital agreement between marital litigants.

ARGUMENT 2

Did the Court commit error by applying the Domestic Law Statute of Equitable Apportionment of Marital Property to exclude real estate from the probate estate?

South Carolina Code Section 62-2-202(a) is clear and unambiguous regarding what is to be included in a probate estate. According to **South Carolina Code Section 62-2-202(a)** a probate estate is the decedent’s property passing under the decedent’s will plus the decedent’s property passing by intestacy, reduced by funeral and administration expenses and enforceable claims.

In the case at hand, the Probate Court seems to apply **South Carolina Code Section 20-3-630** to exclude real estate listed on the estate inventory valued at \$670,000.00, as part of the probate estate. Consider what the Court said in the section of the Order entitled **Discussion**. The Court said that, “Petitioner would not have been able to recover any interest in the Decedent’s real estate in

the divorce action based upon Section 20-3-630 of the S. C. Code of Laws." "She now, therefore, seeks an elective share in the inherited and gifted property owned by Decedent which he received from his mother, which would have been unavailable to her in the divorce." "Should this Court allow her to receive an elective share against the inherited property, this would grant property to her unavailable in the Family Court action." "This is an obvious unjust result." "This Court is obligated to follow the law, but it is not obligated to turn a blind eye to justice." (R. p. 11, paragraph 5, - p. 12). If this was marital litigation, then it would be correct exclude inherited property based on Section 20-3-630 of the S. C. Code of Laws, but that is not the case. Here again the Court seems to apply Domestic Law.

Under South Carolina Law, it is clear that South Carolina Code Section 20-3-630(1) applies to non-marital property. That section of the code states that property acquired by either party by inheritance, devise, bequest, or gift from a party other than the spouse is non-marital property and is excluded in equitable distribution in marital litigation. However, this not marital litigation and Domestic Law do not apply. Only Probate Law applies to this case. The Court erroneously excluded the real estate listed on the amended estate inventory valued at \$670,000.00, as part of the probate estate. The Court is not allowed to use South Carolina Code Section 20-3-630(1) to exclude inherited property as if this is marital litigation. When a party dies before marital litigation is complete, as is the case here, that deceased party's probate assets will pass pursuant to the South Carolina Probate Code.

The real estate listed on the estate of James Randall Weeks, Jr., amended inventory, valued at \$670,000.00, is part of the probate estate unless the Court determines it to be a different amount. In either case it is subject to the elective share petitioned for by Deborah T. Weeks.

ARGUMENT 3

Did the Court commit error by using a 2011 real estate appraisal of \$670,000.00 when South Carolina Code Section 62-3-706 (A) requires the use of the property's fair market value as of the date of the decedent's death?

During the course trial of this case, Counsel for the Respondent submitted an appraisal that was conducted in 2011, with parcel ID number 170-00-01-001, which is partially owned by the estate of James Randall Weeks, Jr. The appraisal has the property appraised at \$670,000.00. The Petitioner objected to the appraisal being entered into evidence. The objection was made because the 2011 appraisal was old and was done before the rise in property values in the equine areas of Aiken County. The property is in the equine section of Aiken County. However, the Court overruled the objection made by the Petitioner. (R. p. 34, line 18 – p. 35, line 4).

The appraisal at the time was approximately 8 years old and needed to be updated. The Petitioner believes that the outdated appraisal should not have been allowed into evidence. The Petitioner might have had doubts about the values. The initial inventory dated March 21, 2019, shows the value being \$800,000.00 versus the amended inventory dated September 10, 2018, showing \$670,000.00 as the value. The initial inventory was done closer to the decedent's death.

Moreover, the 2011, appraised value of \$670,000.00, is not representative of fair market value on the date of death according the Aiken County Tax Assessor's Office. The Petitioner introduced into evidence, without objection, a deed of distribution with the 2018 Aiken County Tax Assessor's Office document attached that assessed the fair market value of the same property to be \$1,003,000.00. (See deed of distribution with Aiken County Tax Assessor Document attached). The document was introduced without objection. (R. p. 29, line 12 – p. 33, line 4).

The Aiken County Tax Assessor's Office itemized their assessments. It assessed the land as having a fair market value of \$918,000.00. It assessed the house that is situated on the land as having a fair market value of \$82,973.00. The Tax Assessor's Office also assessed the miscellaneous improvement on the property as having a fair market value of \$2,492.00. The total fair market value of the property according to the Aiken County Tax Assessor's Office is

\$1,003,465.00. Again, the property is in the equine district of Aiken County and there is a substantial difference in the values in that area of the County as compared to today.

The Court found that, "Since this property was appraised for the estate of Harriet K. Weeks on September 6, 2011, only 7 years prior to the date of the decedent [death], the Court finds that the appraised value of \$670,000.00 has not changed and that it is an accurate appraisal for the purposes of this estate." The Court ruling does not incorporate **South Carolina Code Section 62-3-706 (A)**.

Under **South Carolina Code Section 62-3-706 (A)**, within ninety days after his appointment, a personal representative, who is not a special administrator or a successor to another representative who has previously discharged this duty, **shall: (1) prepare an inventory and appraisal of probate property owned by the decedent at the time of his death, listing it with reasonable detail, and indicating as to each listed item, its fair market value as of the date of the decedent's death, and the type and amount of any encumbrance that may exist with reference to any item.**

The Personal Representative has failed to follow the mandate of **South Carolina Code Section 62-3-706 (A)** which requires him to file an inventory with the fair market value associated with parcel ID number 170-00-01-001, consisting of 255 acres of land. The Aiken County Tax Assessor's Office appraised value of \$1,003,000.00, is the appropriate amount to be entered on the

inventory, or in the alternative, have an updated appraisal conducted by a qualified and disinterested appraiser as mandated by the statute. The Probate Court decision to allow the 2011 appraisal into evidence should be reversed and the appraised value of \$1,003,000.00 should be added to the inventory.

ARGUMENT 4

Did the Court commit error by applying a 40% Marketability/Minority discount in a probate matter where the sale of real estate is not an issue?

The Respondent requested that the Probate Court apply a 40% lack-of-marketability discount to the 255 acres of land included in the estate inventory and appraisal filed on September 10, 2018 and the amended estate inventory and appraisal filed on March 21, 2019. The Petitioner objected to the Probate Court applying a 40% lack-of-marketability discount to the 255 acres of land. There is no basis for it or any authority that requires the Probate Court to apply a 40% lack-of-marketability discount in probate litigation or to the inventory and appraisal.

The lack-of-marketability and minority discounts reflect the lack of a ready market in which owners of closely held family corporations can sell their stock. South Carolina Family Courts apply the lack-of-marketability and/or minority discounts in equitable apportionment in marital litigation. Even if they were applicable to this case the application of not automatic. The Courts apply them on a case by case basis. See **Clark v. Clark (2020)** reiterating that whether a marketability discount or a lack of control discount is appropriate when apportioning marital assets is determined on a case-by-case basis." There are no cases dealing with the lack-of-marketability and/or minority discounts in a probate matter.

South Carolina Code Section 62-3-706 (A) requires the Personal Representative to file an inventory with the fair market value associated with estate property. It does not make any provisions for discounting property.

The Respondent cites Lefrak vs. Commissioner 66 T.C.M. 1297(1993) and other Tax Commission cases as authority to unilaterally apply a 40% lack of marketability discount. Lefrak is a New York case wherein the parties were gifted commercial building property and they were requesting the Tax Commissioner to approve a lack of marketability and minority discount for Federal Gift Tax purposes. Petitioners offered the expert report of Mr. Gregory Vlasak to support

their contention concerning the appropriate amount of discount. In that case the Court used expert testimony to allow a combined discount of 30 percent for minority or fractional interest and lack of marketability in valuing the buildings.

Our case is different than Lefrak. In our case deals with property being transferred to Deborah T. Weeks by operation of law, via elective share. The Personal Representative attached a 40% discount to property without benefit of an expert evaluation. The inventory should reflect the fair market value and not a discounted value and not arbitrarily reduced by the Personal Representative.

ARGUMENT 5

Did the Court commit error by finding that a temporary Family Court Order terminated all marital rights of the Appellant?

There was marital litigation between the parties where Debra T. Weeks filed for a divorce from James Randall Weeks, Jr., based on Physical Cruelty and Adultery. There were three temporary hearings where each party received minimal property on a temporary basis, but not any

permanent distribution. The Court spoke about temporary distribution in **Terry**. In **Terry v. Terry, 400 S.C. 453, 456-57, 734 S.E.2d 646,648 (2012)** ("A temporary order of the family court is without prejudice to the rights of the parties. Such orders are, by definition, temporary- they neither decide any issue with finality nor affect a substantial right "). Whatever distributions that were made during those temporary hearings did not terminate any marital rights and equitable distribution between the spouses, much less all her of rights.

Deborah T. Weeks testified that parties had three temporary hearings, but no final hearing was ever held in the case. She testified that there was no final property settlement agreement entered into by them. Even the language in the temporary order dated March 23, 2011, confirms it. It states that **"the parties wish to leave the case open pending a division of the marital assets and a final hearing for divorce."** (R. p. 17, Conclusions of Law, paragraph 1). The March 23, 2011, hearing was the last hearing that was held before the Court dismissed the case and sending everything back to where it was before the start of divorce proceedings.

Moreover, the Court acknowledges the hearings were temporary hearings. In its findings, the Court stated that "It therefore appears that there were three hearings between these parties that were all held on temporary basis." (R. p. 6, second full paragraph). They were all temporary hearing and during those hearings, property was divided on a temporary basis and was not based on equitable division of marital assets.

There is no such thing as temporary equitable division of marital assets in Domestic Litigation. In **Terry v. Terry, 400 S.C. 453, 734 S.E.2d 646 (S.C. 2012)**, the Court said, "Neither

Section 20-3-620 of the South Carolina Code nor case law provides that equitable division can be affected temporarily.

Furthermore, even there was such a thing as temporary equitable division of marital assets, in Domestic Law, a temporary order is vacated after one year and the order has no effect on anything. The case was dismissed after one year. (R. p. 13, Order of Dismissal dated August 5, 2012). The only the case could be revived is by the institution of a new action in Family Court. Neither party filed sothe case does not exist. When the divorce action was dismissed on August 5, 2012, so were the temporary orders. The initial filing was the basis for the temporary orders. In effect the temporary orders were vacated well before the Probate hearing began nearly 8 years later. The Court would have to resurrect the temporary order to give them effect, ultimately to create a marital agreement between the parties that resolved all marital litigation between them. In either case the Probate Court does not have Subject Matter Jurisdiction to resurrect a temporary order between litigants or create an agreement between marital litigants.

CONCLUSION

James Randall Weeks, Jr., was a resident of Aiken County at the time of his death. The Petitioner was legally married to him at the time of his death. The Petition for Elective Share wastimely filed by the Petitioner. The Court made reversible error by disallowing an Elective Share from the Estate of James Randall Weeks, Jr., to the Petitioner.

The Court committed reversible error by applying the Domestic Law Statute of Equitable Apportionment of Marital Property to exclude real estate from the probate estate. The probate estate is the decedent's property passing under the decedent's will plus the decedent's property

passing by intestacy, reduced by funeral and administration expenses and enforceable claims. The Court erred by utilizing the Equitable Apportionment Statute in this matter exclude property.

The Court is obligated by law to follow South Carolina Code Section 62-3-706 (A) which requires the use of the property's fair market value as of the date of the decedent's death. The Court failed to follow procedure by using a 2011 real estate appraisal of \$670,000.00, and by doing that, it did commit reversible error.

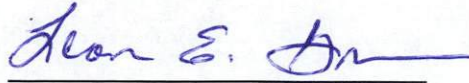
The Court committed reversible error by allowing the Respondent to unilaterally apply a 40% Marketability/Minority discount in a probate matter without expert testimony and where the Petitioner is not selling real estate. Marketability/Minority discount have been used in South Carolina to effect equitable distribution and is used on a case-by-case basis.

The Court committed reversible error by finding that a temporary Family Court Order terminated all marital rights of the Petitioner. A temporary order is used in marital litigation to set temporary boundaries related to property usage pending a final merits hearing. The temporary order in this probate matter was dismissed and found to no effect on equitable distribution of marital assets by the Family Court. The Family Court dismissed the case that was the foundation for the temporary order.

Based on the forgoing, the ruling in this case should be reversed on all these issues on appeal and the Probate Court directed to grant the Petitioner the Elective Share in the Estate of James Randall Weeks, Jr., and do not abridge any rights she has under the Probate Statute

Respectfully Submitted,
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Aiken, South Carolina
Dated: May 13, 2022

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CERTIFICATE OF COUNSEL

I certify that the **Final Brief of Appellate** complies with the Rule 208(b) SCAR.

May 13, 2022



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