THE STATE OF SOUTH CAROLINA

In The Supreme Court

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S.C. Supreme Court

APPEAL FROM LANCASTER COUNTY

Court of Common Pleas

Kenneth G. Goode, Circuit Court Judge

Case No.: 2011-194189

Frances S. Hudson, Deceased Employee, by Kenneth L. Hudson and Keith B. Hudson, Co-Executors of her Estate, as well as Matthew Deese and/or Andrew Deese, of whom Kenneth L. Hudson and Keith B. Hudson,...Petitioners / Respondents.

v.

Lancaster Convalescent Center, Employer, and Legion Insurance Company in liquidation through the South Carolina Property and Casualty Insurance Guaranty Association, Carrier,...Respondents / Petitioners.

REPLY BRIEF OF RESPONDENT / PETITIONER SOUTH CAROLINA PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION

Mark D. Cauthen, S.C. Bar # 064309
Temus C. Miles, Jr., S.C. Bar # 74953
McKay, Cauthen, Settana & Stubley, P.A.
1303 Blanding Street
Post Office Box 7217
Columbia, South Carolina 29202-7217
(803) 256-4645

Attorneys for Respondent/Petitioner S.C. Property and Casualty Insurance Guaranty Association

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STATEMENT OF ISSUES ON APPEAL

I. The Court of Appeals erred in ruling that the order of the Honorable Paul E. Short, Jr. was the law of the case on the issue of abatement.

II. The "alternative rulings" argument put forth by the Petitioners/Respondents is now subject to a timely challenge.

III. Absent the order of the Honorable Paul E. Short, Jr. operating as law of the case on the issue of abatement, the abatement issue should be addressed on the merits.

IV. The Court of Appeals correctly overturned the ruling of the Commission regarding the purported agreement or stipulation between the parties as to a distribution mechanism for an award.

V. The Court of Appeals misconstrued S.C. Code Ann. § 42-9-90 to impose a mandatory penalty despite its express language to the contrary.

STATEMENT OF THE CASE

SCPCIGA hereby incorporates the Statement of the Case contained within its Petitioner's Brief in this matter, which is on file with this Court.

ARGUMENTS

I. The Court of Appeals erred in ruling that the order of the Honorable Paul E. Short, Jr. was the law of the case on the issue of abatement.

The Petitioners/Respondents claim that issues regarding viability of the Claimant's award are barred by the Law of the Case Doctrine. This argument must fail due, in part, to the complex procedural history of this case. A comparable procedural issue arose in Stone v. Roadway Express, 367 S.C. 575, 627 S.E.2d 695 (2006). In Stone the Supreme Court concluded that the employer was not precluded from litigating the issue of survivability of the deceased employee's award at the dependency hearing where this was not and could not have been an issue in the initial proceeding to determine the amount of benefits prior to the employee's death. Id. at 697-698. As in Stone, the Respondents/Petitioners in the present action did not waive the survivability issue and were not precluded from raising this issue at the dependency hearing.

To view this current matter in the proper procedural context, one must look at it as two separate sets of proceedings. The first set of proceedings were those initiated by the Claimant relating to the initial award. These proceedings concluded in the appeal from Judge Short's order that was later dismissed. In the first set of proceedings, the issue of abatement could not properly be raised since it was never presented to the Single Commissioner as the Claimant did not die until after the Single Commissioner had heard the matter and issued her order awarding the lump sum. As a result of the Claimant's death, payment under the standing order could not be effected as there existed no party to pay. This inability to make payment resulted in the second set of proceedings.

The second set of proceedings began when the Claimant's Estate and dependent Grandchildren sought payment of the lump sum award, and the imposition of sanctions before the Single Commissioner. The Order from the initial hearing in the second set of proceedings is

the genesis of the current appeal. Respondents/Petitioners could not have raised the survivability issue in the first hearing before the Single Commissioner nor could this issue have been included in the grounds for appeal to the Full Commission (Form 30), because Claimant died only after the Employer filed its appeal of the Single Commissioner's order granting the lump sum award. (A. pp. 52-64; A. p. 246). The abatement issue was never properly before the Commission or the Circuit Court prior to the dependency hearing before Commissioner Bass. Essentially, the timing of Ms. Hudson's death left Appellants without a mechanism to raise the abatement issue until the dependency hearing.

Judge Short's Order from the first set of proceedings cannot serve as the law of the case on this issue. An order "becomes the law of the case in all subsequent proceedings involving the same parties and the same subject matter..." Matheson v. McCormac, 186 S.C. 93 (1938). Furthermore, the doctrine of collateral estoppel serves to prevent a party from relitigating in a subsequent action an issue actually and necessarily litigated and determined in a prior action. Shelton v. Oscar Mayer Foods Corp., 325 S.C. 248, 251, 481 S.E.2d 706, 707 (1997). The first set of proceedings were brought by the Claimant. The second set of proceedings was initiated by Kenneth Hudson and Keith Hudson, as Co-Executors of the Estate of Frances S. Hudson, and the Grandchildren. Since the two sets of proceedings involved different parties, a procedural ruling in the first case cannot serve as law of the case in the second proceeding.

Moreover, the issues Respondents/Petitioners raised during the second set of proceedings were not litigated and were not issues in the first set of proceedings that resulted in Judge Short's Order. The only issues properly before Judge Short were the issues raised in Respondents'/Petitioners' Petition for Judicial Review which were: (a) whether the Commission erred in finding the Claimant's best interests were furthered by her receipt of a lump sum

payment; and (b) whether the Commission was prohibited from awarding a lump sum payment per the terms of the March 28, 2002 Rehabilitation Order issued by the Commonwealth Court of Pennsylvania. Therefore, the issues/defenses raised by the Respondents/Petitioners in the second set of proceedings were not issues in the first set of proceedings and were not litigated. For this reason, the Respondents/Petitioners are not now collaterally estopped to assert these issues/defenses.

Similarly, *Res Judicata* will not block the issues/defenses. *Res Judicata* is shown if (1) the identities of the parties are the same as a prior litigation; (2) the subject matter is the same as the prior litigation; and (3) there was a prior adjudication of the issue by a court of competent jurisdiction. Riedman Corporation v. Greenville Steel Structures, Inc., 308 S.C. 467, 468-69, 419 S.E.2d 217, 218 (1992). None of the three elements of *Res Judicata* are satisfied.

With respect to the first element, the parties are not the same. The Claimant was a party in the first set of proceedings. On the other hand, Claimant's Sons and Grandchildren, all of whom are Claimant's potential beneficiaries, are pursuing the second set of proceedings.

With respect to the second element, the subject matter of this litigation is entirely different than the initial proceeding. The Circuit Court clearly stated in its Order that the Respondents/Petitioners "limited their present appeal to two issues (existence of evidence and power of Commission to order lump sum payment)." (A. p. 78). The issues which are the subject of this petition are dependency, potential abatement/survivability of the award, and the identity of the person(s) entitled to Claimant's benefits should the award survive, if anyone.

As to the third element, a court of competent jurisdiction must have made a ruling. The Circuit Court clearly provided in its Order that the issues regarding the potential implications of

Claimant's death "exceed the scope of [Respondents/Petitioners] February 26, 2003 exceptions and are not properly before this Court." (A. p. 78). As a result, the Circuit Court's Order cannot be construed to have properly ruled on those issues. Therefore, the elements of *Res Judicata* are not met.

II. **The "alternative rulings" argument put forth by the Petitioners/Respondents is now subject to a timely challenge.**

Petitioner/Respondent has argued that Judge Short made "alternative rulings" that addressed the issue of abatement of Ms. Hudson's award, and these "alternate rulings" became the "law of the case" and cannot be challenged at this point on appeal. Judge Short specifically ruled the appeal was limited to only two issues: (1) the existence of substantial evidence to support the lump sum award; and (2) authority of the Commission to order a lump sum payment. Judge Short further ruled that, despite the Respondents'/Petitioners' attempt to raise issues concerning abatement/survivability of Ms. Hudson's award, "these issues exceed the scope of Appellants' February 23, 2006 exceptions and are not properly before this Court." (A. p. 78). Notwithstanding this determination, Judge Short's Order then goes on to address those issues in a separate section entitled "Untimely Arguments Relative to Impact of Ms. Hudson's Death." (A. pp. 77-80).

The so-called "alternative rulings" are not simply additional rulings based upon any particular legal or factual issue before the Court. Instead, the alternative rulings purport to determine issues that go beyond the jurisdictional purview of the Circuit Court as recognized by Judge Short in his order. (A. p. 78). As Judge Short correctly recognized, the Circuit Court, "can consider only matters that were before the Commission and... to which error has been specifically assigned. Wall v. C.Y. Thompson Co., 232 S.C. 153, 101 S.E.2d 286, 288 (1957)."

(A. pp. 77-78). *See also* Mills, Inc. v. SC Dept. of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998) (on appeal from decision of agency, Circuit Court can only consider issues raised and ruled upon by the Commission).

It is well-settled that jurisdiction is properly raised at any point in a legal proceeding. Jurisdictional issues can be raised by the litigants or *sua sponte* by the court. Judge Short ruled upon Respondents'/Petitioners' attempt to raise abatement/survivability indicating instead that the Circuit Court lacked jurisdiction to make any findings of fact or conclusions of law on abatement/survivability. In addition, Judge Short made a hypothetical ruling as if these issues actually were before the Circuit Court. (A. pp. 78-9). Thus, Judge Short's ruling indicating a complete lack of jurisdiction as to abatement/survivability actually became the "law of the case," rather than the hypothetical ruling.

III. Absent the order of the Honorable Paul E. Short, Jr. operating as law of the case on the issue of abatement, the abatement issue should be addressed on the merits.

Petitioners/Respondents allege the award of a lump sum payment was a final award and thus an accrued benefit at the time of her death. Interestingly, Petitioner/Respondent suggests the Court look years ahead to the withdrawal of the appeal to the Court of Appeals by letter dated April 19, 2004 (A. p. 271), to determine whether the benefits were accrued on July 31, 2002, rather than looking at the status of the case on the date of Claimant's death. The only final award at the time of the Claimant's death was the award for the payment of the remaining 500 weeks on a weekly basis. On the date of Claimant's death, the award of a lump sum payment was on appeal to the Full Commission, and Claimant was receiving weekly disability payments. It is well-settled that the award of a Single Commissioner is not "final" pending appeal to the Full Commission. Riddle v. Fairforest Finishing Company 198 S.C. 419 (1942). "All findings of fact

and law by the hearing commissioner become and are the law of the case, **except only those within the scope of exception of defendant and the notice given to the parties by the Commission**." Ham v. Mullis Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940)(emphasis added).

Petitioners/Respondents argue that this court should look to North Carolina law for a definition of accrued and unaccrued benefits. In this case, there is no need to go beyond South Carolina law to find a definition for accrued versus unaccrued benefits. Accrued benefits are defined in South Carolina case law, *see* Cullum v. New York Life Ins. Co., 197 S.C. 6 (1941). In interpreting how disability benefits accumulate, the Court in Cullum held, "[t]he disability benefits accrue from day to day as the disability continues...." Id. It naturally follows that in the workers' compensation setting, a claimant similarly accrues workers' compensation benefits from day to day as his/her disability continues. Workers' Compensation benefits are analogous to this example. For each week a claimant is out of work due to the work-related injury, he/she accumulates or accrues a week's worth of benefits.

Further, where the South Carolina and North Carolina relevant statues contain significant differences reliance upon North Carolina interpretive law is not utilized. The North Carolina counterpart to S.C. Code Ann. § 42-9-280 is N.C.G.S. 97-37 which provides:

> When an employee receives or is entitled to compensation under this Article for an injury covered by G.S. 97-31 and dies from any other cause than the injury for which he was entitled to compensation, *payment of the unpaid balance of compensation shall be made: First, to the surviving whole dependents; second, to partial dependents, and, if no dependents, to the next of kin as defined in the Article; if there are no whole or partial dependents or next of kin as defined in the Article, then to the personal representative*, in lieu of the compensation the employee would have been entitled to had he lived. (emphasis added)

In contrast to the North Carolina statute, S.C. Code Ann. § 42-9-280 (addressing non-work related death) provides simply that such benefits are payable to:

> ...his *next of kin dependent upon him for support*, in lieu of the compensation the employee would have been entitled to had he lived. (emphasis added)

Comparison of the two statutes evidences that North Carolina makes *express* statutory provisions allowing for transfer of benefits in cases of non-work related deaths to the estate or non-dependent relatives while South Carolina explicitly does **not** so provide. The South Carolina provision is mandatory, in that the award "shall be made to his next of kin dependents," and provides no other options for payment of the award to any persons or entity other than the decedent Claimant's, "next of kin dependent upon him for support." S.C. Code Ann. §42-9-280. In direct contrast to the S.C. Code, the North Carolina statutes provide five different potential recipients for the benefits of the decedent Claimant in non-work related deaths, as listed: "*First*, to the surviving whole dependents; *second*, to partial dependents, and, *if no dependents*, to the next of kin as defined in the Article; if there are no whole or partial dependents or *next* of kin as defined in the Article, *then* to the personal representative." (emphasis added) (N.C.G.S. 97-37).

Petitioners/Respondents rely heavily on Wilhite v. Liberty Veneer Co., 47 N.C. App. 434, 267 S.E.2d 566 (1980) (A. pp. 130-1), which states in pertinent part that:

> In North Carolina, in the situation where a claimant dies after a claim has been filed, the claimant's estate may recover all accrued but unpaid benefits, and all unaccrued benefits to which the employee "would have been entitled" had he lived are payable to decedent's dependents pursuant to N.C.Gen.Stat. 97-37. McCulloh v. Catawba College, 266 N.C. 513, 146 S.E.2d 467 (1966); Inman v. Meares, 247 N.C. 661, 101 S.E.2d 692 (1958).

Wilhite at 568. Unlike North Carolina, South Carolina makes no provisions for granting the award to the estate of a decedent Claimant. Furthermore, in South Carolina, workers' compensation benefits can abate, as expressly recognized by South Carolina courts.

This Court decided years ago the benefits provided pursuant to § 42-9-10 are contingent, and not payable when an employee dies of unrelated causes. In Ashley v. Ware Shoals Mfg. Co., 42 S.E.2d 390, 394 (S.C. 1947), this Court determined liability for payment of total disability under Section [42-9-10] is contingent in nature as the employee may die during the period of such disability from a cause wholly disconnected with the accidental injury sustained. Workers Compensation benefits are statutorily derived, and any right a claimant may have to any such benefit is dependent upon the terms and condition of these statutory provisions. It is well-settled that a cause of action created by statute survives only when some provision for its survival is made in the statute itself or in some other statute. Ferguson v. Charleston Lincoln Mercury, Inc., 544 S.E.2d 285, 288 (S.C. 2001).

Moreover, in Stone, this Court explained that § 42-9-280 provides for the inheritability of only two types of awards:

> The language of §42-9-280 is plain. The legislature, as is its prerogative, determined that dependent survivors should receive all benefits due an injured worker who lost the use of a scheduled member (§42-9-30), or "lost both hands, arms, feet, legs, or vision in both eyes, or any two thereof" (second paragraph of §42-9-10), i.e., those who suffered a physical loss, while the dependents of a person totally disabled for another reason, i.e., one who suffered a wage loss compensated under the first paragraph of §42-9-10, should not. The legislative distinction between "physical loss" and "wage loss" appears in other workers' compensation statutes as well. *See e.g.,* §§42-9-150; 42-9-160; 42-9-170.

Stone, 627 S.E.2d at 700. Citing Professor Larson, this Court held "since a compensation award, unlike a tort award, is a personal one based on the employee's need for a substitute for lost wages and earning capacity, in the absence of a special statutory provision, heirs have no claim to unaccrued weekly payments." Id. at 700.

The Petitioners/Respondents attempt to side step this outcome based on purported ambiguity as to which portion of §42-9-10 the underlying award was based. This arises from the Order following the dependency hearing, wherein Commissioner Bass "found" that Commissioner Lyndon's order of October 3, 2001 awarding permanent and total disability "could legitimately be construed to premise her disability compensation award on either" the first or second paragraph of S.C. Code Ann. §42-9-10. (A. p. 93). However, the Single Commissioner in the dependency hearing is without authority to alter, amend or re-characterize the findings of the single commissioner who determined the basis for disability almost four years earlier. Thus, it is the findings of Commissioner Lyndon in his order of October 3, 2001 which should be considered in determining the basis for the award of total disability.

Respondent/Petitioner believes it is clear that Commissioner Lyndon utilized the "wage loss" basis or first paragraph of §42-9-10 in determining that the claimant was totally disabled, including considerations of her age, education, vocational disabilities, lack of transferable work skills and the absence of a reasonably stable market for the types of services the claimant was capable of providing. (A. pp. 35-38). Moreover, there is no evidence in the record to support a finding of total disability based on the second paragraph of §42-9-10 (*i.e.* loss or loss of use of both legs, hips or any combination thereof). It should be noted that the impairment ratings of claimant indicated in Commissioner Lyndon's order were 20% to the left lower extremity and 5% to the right lower extremity. (A. p. 31).

In this case, Claimant received benefits pursuant to the first paragraph of § 42-9-10. As a result, § 42-9-280 does not permit survivability of such an award. In the absence of any other statutory provision, the Claimant's award abated upon her death from cancer on July 31, 2002. Unless a statute specifically provides for the survival of an action for personal injury, it does not

lie after the injured person's death. Reed v. Medlin, 328 S.E.2d 115, 118 (S.C. App. 1985), *overruled on other grounds by* Washington v. Whitaker, 451 S.E.2d 894 (S.C. 1994); *See also* Chapman v. Home Indemnity Co., 442 S.2d 1388, 1389 (La. 1983) ("Once an employee dies, the disability terminates and along with it goes the employer's obligation to pay").

IV. The Court of Appeals correctly overturned the ruling of the Commission regarding the purported agreement or stipulation between the parties as to a distribution mechanism for an award.

The Petitioners/Respondents argue that the Court of Appeals erred by failing to enforce the purported agreement/stipulation between the parties as to disbursement of an award. However, even a cursory review of the transcript reveals Mr. Huff, Counsel for Employer at the hearing before Commissioner Bass on January 25, 2005, never made any such stipulation on the record to the agreement. Any stipulations, in this regard, were in fact put on the record by Ann Mickle, Esq., counsel for Matthew Deese, one of Claimant's grandchildren.

The record clearly reflects the following as Mr. Huff's position on the issue:

> **Mr. Huff:** []...Our position is that nothing can go to the estate. Anything that could be payable...[], [e]verything is under the Work Comp Act. And 42-9-140, in conjunction with 42-9-280 and 42-9-290 will tell you who gets what. And nowhere in the Work Comp Statute does it say that an estate can take anything. So our position is the estate takes nothing. Now, regarding...the grandchildren...[o]ur position on that would be that if there is any benefits payable because they are dependent, because they are partially dependent, then any benefits would be based upon the pro rata share of what their dependency is.

(A. p. 225, lines 7-24.)

The Court of Appeals correctly reversed the Circuit Court's ruling that the hearing transcript evidenced an 'unambiguous,' stipulation and that the agreement between the estate of

the deceased Claimant and her minor dependent grandchildren complied with S.C. Code Ann. §42-9-390. (A. pp. 136-137).

S.C. Code Ann. §42-9-390 provides:

> Nothing contained in this chapter may be construed so as to prevent settlements made by and between an employee and employer as long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this title. The employer must file a copy of the settlement agreement with the commission if each party is represented by an attorney. If the employee is not represented by an attorney, a copy of the settlement agreement must be filed by the employer with the commission and approved by one member of the commission.

The alleged "agreement" fails to meet the clear language of §42-9-390, in that the agreement is (a) not between the Claimant and the Employer/Carrier (or parties purporting to represent these entities), (b) the agreement is not in the record and no copy has been filed with the Commission as expressly mandated by the statute, and (c) the agreement is not, "in accordance with the provisions of th[e Act]." (§42-3-390), because the agreement was not in compliance with the requirement of §42-9-280 which dictates the method of distribution under the Act for non-work related deaths. Thus, it is irrelevant that the Commissioner believed the settlement agreement was reasonable since the agreement was not in accordance with the Act.

V. The Court of Appeals misconstrued S.C. Code Ann. § 42-9-90 to impose a mandatory penalty despite its express language to the contrary.

The Petitioners/Respondents argue that the Court of Appeals was correct in affirming the reinstatement of the penalty at issue due to stoppage of weekly payments to the Estate. However, this is holding is totally inconsistent with the Court of Appeal's other holding that it was error to award Claimant's "lump sum to her Estate rather than to her beneficiaries...." Moreover, given that this issue was never raised or argued, it was not properly before the Court. The first step in preserving an issue for appellate review is to actually raise it to the lower court.

See Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731(1998); Smith v. Phillips, 318 S.C. 453, 458, S.E.2d 427 (1995).

The Estate was never substituted as a party, nor could it have been under the Workers' Compensation Act. Accordingly, payment was never made to the Estate. Payments were made to the decedent, and ceased due to her death. The Single Commissioner imposed the penalty under Section 42-9-90 for pursuit of a frivolous defense – not for stoppage of weekly payments.

Section 42-9-90 provides:

> If any installment of compensation payable in accordance with the terms of an agreement approved by the Commission without an award is not paid within fourteen days after it becomes due, as provided in Section 42-9-230, or if any installment of compensation payable in accordance with the terms of an award by the Commission is not paid within fourteen days after it becomes due, as provided in Section 42-9-240, there shall be added to such unpaid installment an amount equal to ten per cent thereof, which shall be paid at the same time as, but in addition to, such installment, **unless such nonpayment is excused by the Commission** after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(emphasis added).

The express language of this statute gives the Commission the discretion to excuse the nonpayment, and not impose the penalty, if the employer shows that his nonpayment was due to conditions over which he had no control. In the instant case, payments were not made by the Respondents'/Petitioners' Carriers due to the death of the Claimant and the uncertainty as to the proper party for payment that arose from it. This uncertainty was clearly beyond the employer's control.

The Petitioners/Respondents argue that there was no uncertainty as to which party to pay as all parties had agreed to a disbursement mechanism. As addressed previously, and as found

by the Court of Appeals, the purported agreement simply did not exist. Therefore, the uncertainty as to the proper party for payment remained and was beyond the employer's control. Accordingly, excusing the nonpayment was within the Commission's discretion.

Even if the Commission lacked discretion under the statute, the original imposition of the penalty in this case was based on the Single Commissioner's finding that Defendants pursued a frivolous or meritless defense. The Full Commission did not simply vacate the Single Commissioner's imposition of the penalty, but also found that imposition of a penalty was unwarranted because the, Respondents/Petitioners "did not pursue a frivolous defense." (R. 105-6). This finding overturned the Single Commissioner's factual basis for imposing the penalty.

In order to reinstate the penalty, the Circuit Court would have to overturn the Full Commission's ruling on the penalty and make its own factual findings as to the basis for the awarding of the penalties. Making the required factual finding is beyond the scope of review for appellate courts in Workers' Compensation cases. The Full Commission is the ultimate finder of fact in a Workers' Compensation case. Foggie v. General Elec. Co., 376 S.C. 384, 656 S.E.2d 395 (S.C.App.,2008); Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). Appellate courts are, "limited in their review of the facts to a determination of whether or not there is...[substantial] evidence to support the factual findings of the Commission." Greer v. Greenville Co., 245 S.C. 442, 141 S.E.2d 91 (1965). "A court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Forrest v. A.S. Price Mechanical, 373 S.C. 303, 644 S.E.2d 784 (Ct. App. 2007).

CONCLUSION

For the forgoing reasons, Respondent/Petitioner SCPCIGA respectfully asks this Court to reverse the South Carolina Court of Appeals' and the Circuit Court's ruling on the imposition of

the penalty, law of the case doctrine, and the issue of abatement; and deny the claim for benefits under the Workers' Compensation Act due to abatement upon the death of Claimant.

Respectfully Submitted,

Mark D. Cauthen
Temus C. Miles, Jr.
McKay, Cauthen, Settana & Stubley, P.A.
Post Office Box 7217
Columbia, South Carolina 29202-7217
(803) 256-4645
Attorneys for Appellant SCPCIGA

Columbia, South Carolina
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she mailed a copy of Respondent / Petitioner South Carolina Property & Casualty Insurance Guaranty Association's Reply Brief via First Class mail on June 3, 2013 to the following Counsel of record and the Clerk of Court of the Supreme Court of South Carolina:

E. Ross Huff, Jr., Esquire
Shelby H. Kellahan, Esquire
Huff Law Firm, LLC
Post Office Box 1935
Irmo, S.C. 29063

Andrew N. Safran, Esquire
Post Office Box 12089
Columbia, S.C. 29211

Ann M. Mickle, Esquire
Mickle & Bass
Post Office Box 10751
Rock Hill, S.C. 29731

Pope D. Johnson, III, Esquire
Johnson & Barnette, LLP
Post Office Drawer 11209
Columbia, S.C. 29211-11209

P. Brooke Eaves
Legal Assistant to Temus C. Miles, Jr.
McKay, Cauthen, Settana & Stubley, P.A.
Post Office Box 7217
Columbia, South Carolina 29202-7217
(803) 256-4645

Columbia, South Carolina
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