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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Gene McCaskill, Commissioner
Avery B. Wilkerson, Jr., Commissioner
R. Michael Campbell, II, Commissioner

W.C.C. FILE NO.: 1215681

APPELLATE CASE NO.: 2022-000003

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Vickie Rummage, Employee,.....Petitioner,

vs.

BGF Industries, Employer, and Great American Alliance Insurance Co., Carrier,.....Respondents.

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# PETITIONER'S BRIEF

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## I. QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in holding Ms. Vicki Rummage failed to adequately preserve the contention Respondents had not rebutted her corroborative medical proof with competent evidence in compliance with S.C. Code Ann. Section 42-9-35 (2015) when: (a) the appellate panel specifically determined, notwithstanding Respondents' contrary assertion, the issue had been adequately raised by Ms. Rummage and acknowledged this argument in its February 1, 2018 Order; (b) assuming arguendo the appellate panel's finding on this point was not dispositive, it nonetheless verifies the question of issue preservation in this instance is subject to multiple interpretations; (c) application of the Court of Appeals' rulings in Johnson v. Roberts, 422 S.C. 406, 812 S.E. 2d 207, 210 (Ct. App. 2018) and State v. Franks, 432 S.C. 58, 849 S.E. 2d 580, 592 (Ct. App. 2020) requires resolution of "any doubt . . . in favor of preservation"; (d) assuming arguendo the appellate panel's finding on this point was not dispositive, its rather hyper-technical preservation analysis is wholly inconsistent with not only this Court's relevant rulings weighing in favor of preservation, but also its similar holdings acknowledging a focus on the substance of an appeal, rather than technical discrepancies; and (e) the implication Ms. Rummage was obliged to object to the introduction of Dr. Gualtieri's report into evidence is equally flawed, as it overlooks the clear distinction between admissibility and satisfaction of the requisite standard of proof?

2. Did the Court of Appeals err in considering Respondents' assertion Ms. Rummage had not adequately preserved the issue relative to their failure to satisfy the governing standard of proof established by Section 42-9-35 when: (a) this issue was specifically raised by the parties to the appellate panel prior to its entry of the February 1, 2018 Order; (b) inspection of the pertinent portions of the Appendix establishes the appellate panel was squarely confronted

with the preservation issue; (c) after considering the parties' respective arguments, the appellate panel determined this issue was adequately raised by Ms. Rummage; (d) this ruling was a material element of the appellate panel's February 1, 2018 Order, which required cross appeal for preservation; and (e) the absence of cross appeal results in this ruling becoming the law of this case?

3. Did the Court of Appeals err in declining to determine Ms. Rummage had amply satisfied not only her burden of proof, but also the standard of proof prescribed by Section 42-9-35, as a matter of law, when: (a) this statute requires establishment of an aggravation of preexisting condition by "a preponderance of the evidence, including medical evidence"; (b) it similarly demands this medical evidence entail "expert opinion or testimony stated to a reasonable degree of medical certainty"; (c) she introduced medical evidence, stated to a reasonable degree of medical certainty, verifying this causally related aggravation through no less than four (4) physicians; (d) the contrary medical opinion offered by Respondents was not "stated to a reasonable degree of medical certainty" in compliance with Section 42-9-35; (e) Respondents' medical opinion was consequently not competent to rebut the corroborative evidence introduced by Ms. Rummage; and (f) the only reasonable inference arising from the Appendix establishes she has satisfied the requirements of Section 42-9-35 as a matter of law?

4. Did the Court of Appeals err in ruling the erroneous admission of the irrelevant/immaterial March 5, 2008 Order was harmless, particularly in view of the facts: (a) this Order not only clearly addresses the credibility of Dr. Fred D. McQueen, Jr., but also determines his opinion should be afforded "little weight . . . based on inconsistencies and contradictions"; (b) this physician was unquestionably a key medical expert in the current claim, as he was the only physician who treated Ms. Rummage both before and after the May 18, 2012

compensable injury; (c) despite this uniquely material perspective, Dr. McQueen's corroboration of the causal relationship of Ms. Rummage's current psychological symptoms to the compensable accident consequences is afforded no mention by the appellate panel, which rendered its rulings following "study and consideration . . . [of] all documentary evidence" and "after weighing all of the evidence presented" through the hearing record; (d) this conspicuous absence of reference to a potentially dispositive medical opinion is irreconcilable with anything other than its rejection due to the prior adverse credibility finding; and (e) as this erroneous evidentiary omission reasonably affected the ultimate outcome of this litigation before the Commission, it cannot be characterized as harmless?

## II. STATEMENT OF THE CASE

On May 18, 2012, Ms. Rummage sustained compensable injuries when she fell backwards, striking her head against a doffing machine with sufficient force to produce a laceration that was closed (through use of glue) on site. Although she continued to work following this trauma, Ms. Rummage developed symptoms involving her head, neck and upper back that prompted a May 30, 2012 referral to the company physician (Dr. John F. McLeod, III) who "suspected some element of concussion." (See, Appendix, p. 400). This physician similarly noted the presence of continued ". . . [t]enderness over the posterior scalp with mild edema over the si[t]e . . . of previous laceration" in conjunction with continued headaches, which he again characterized as the "suspected" residual effects of her "concussion" when reassessing Ms. Rummage on June 6, 2012. (Id.).

During the ensuing weeks, Dr. McQueen, **(her long time primary care physician)**: (a) prescribed Fioricet for "severe headaches since the fall"; while (b) endorsing obtaining a neurological assessment, which was subsequently performed per Respondents' authorization on September 5, 2012. (See, Appendix, p. 377).

After examining her on that date, Dr. Jeff Benjamin, an authorized neurologist affiliated with Grand Strand Specialty Associates, advised his examination revealed "typical symptoms of closed-head injury." (See, Appendix, p. 391). In fact, this physician's final (November 14, 2012) note confirmed his belief Ms. Rummage's constellation of symptoms were reflective of "Traumatic Brain Injury". (See, Appendix, p. 397).

Ms. Rummage was then directed by Respondents to Dr. Daniel L. Collins, a physiatrist, who likewise identified post-concussive symptoms, for which he recommended speech therapy. (See, Appendix, p. 249). While engaging in this speech therapy with Martha Williams of

Sandhills Regional Medical Center Rehab Services, Ms. Rummage: (a) displayed "mild impairment of attention, memory, executive function, and visuospatial skills" per testing; and (b) was instructed to "us[e] . . . games to aid with focus and cognitive abilities." Rummage v. BFG Industries, 434 S.C. 441, 865 S.E. 2d 380, 383 (Ct. App. 2021).

Although the record reflects Ms. Rummage informed Dr. Collins of not only her current depressive symptoms, but also her use of psychotropic medication "in the past" for emotional distress, inspection of his March 13, 2014 deposition testimony reflects concerns she had not disclosed all material aspects of her prior medical history. See, Rummage, 865 S.E. 2d at 384. However, despite this fact, he nonetheless acknowledged there was "no doubt she wanted to get better." (Id.).

Additionally, during this deposition, "**Dr. Collins opined a long-term physician would be able to give the best information about the progression of her issues.**" (Emphasis added) (Id.). Given the relevance of Ms. Rummage's pre-injury medical history, including the use of psychotropic medication, in attempting to identify the source of documented post-injury depression, Dr. McQueen, the medical expert who was most familiar with both her pre and post-injury conditions, was requested to address this issue. Pursuant to questionnaire responses dated March 13, 2014, this physician, **who had served as her primary care physician for approximately fourteen (14) years prior to the May 18, 2012 accident**, confirmed: (a) "Ms. Rummage's current headaches are most probably the product of a post-concussive syndrome, as opposed to the tension headaches for which . . . [he] provided treatment prior to the May 18, 2012 trauma"; (b) "the nature/intensity of Ms. Rummage's psychological disturbance **have also increased** in a manner consistent with post-concussive syndrome"; and (c) "**each of these**

**components has been materially aggravated by the consequences of Ms. Rummage's May 18, 2012 work related fall.**" (See, Appendix, pp. 386 - 388).

Notwithstanding his initial uncertainty as to the source of Ms. Rummage's current depression, Dr. Collins nonetheless felt the nature of her symptoms warranted psychological evaluation and neuropsychological testing. As Respondents declined to authorize these assessments, the undersigned ultimately (May 15, 2014) directed Ms. Rummage to Dr. Tora L. Brawley, a neuropsychologist, who: (a) noted the presence of psychological stressors that included not only the consequences of her compensable accident, but also family issues (e.g., "her son attempting suicide this past November"); (b) indicated Ms. Rummage acknowledged having "a prior history of depression"; (c) found she exhibited "severely impaired speed and accuracy . . . of attention and concentration"; (d) administered the "Test of Memory Malingering", which "did not indicate malingering of cognitive symptoms"; (e) determined, despite Ms. Rummage's valid neuropsychological presentation, "her psychiatric symptoms were significantly interfering with cognition and therefore invalidating the test results; (f) recommended psychiatric evaluation in conjunction with counseling for these symptoms; (g) concluded " . . . [w]hile Ms. Rummage does have a previous history of depression, it is clear that her symptoms worsened significantly following the accident and should be aggressively treated . . . [at] this time"; and (h) reiterated ". . . [f]ormal assessment of effort did not reveal attempts to malinger." (See, Appendix, pp. 347 - 348).

In this connection, Dr. Brawley, a seasoned neuropsychologist who had served on the University of South Carolina School of Medicine's faculty for many years (See, Appendix, p. 241), further verified: (a) "Mr. Safran . . . told me he wanted me to . . . see if she was legit . . . to make sure that . . . [Ms. Rummage] was legitimate with her complaints" (See, Appendix, pp.

236, 238 and 240); (b) her review of "a lot of . . . medical records" indicating Ms. Rummage's use of antidepressants for "quite a while" (See, Appendix, pp. 237 and 240); (c) she was aware Ms. Rummage had encountered "lots of stressors . . . throughout her life" (See, Appendix, p. 237); (d) the Test of Memory Malingering was administered "to look and see if she was giving the effort because it was clear she just wasn't - - her cognition was significantly slowed at that time and she was severely impaired on those couple of short tests that I gave her at the beginning" (See, Appendix, p. 238); (e) **Ms. Rummage "passed the test of Memory Malingering . . . [,] a formal assessment that looks at effort"** (See, Appendix, pp. 238 - 239); and (f) " . . . [h]ad Ms. Rummage not passed the malingering test, . . . [she] would . . . absolutely . . . have said so" (actually recalling a prior incidence where one of Mr. Safran's clients "didn't pass the malingering test"). (See, Appendix, pp. 240 and 245).

Ms. Rummage was next referred by Respondents to Dr. Thomas Gualtieri, a North Carolina psychiatrist, who opined her symptoms were not related to the May 18, 2012 trauma and indicative of malingering. As the undersigned had serious doubts as to this physician's objectivity and the reliability of his opinions (which were contained in a report **dated four (4) months before he evaluated Ms. Rummage**) it was determined further psychiatric evaluation was warranted. (See, Appendix, pp. 473 and 479).

Consequently, on April 27, 2015 Ms. Rummage underwent an forensic psychiatric evaluation by Dr. Amanda B. Salas, who: (a) reviewed extensive records from several facilities, including McQueen Medical Center (See, Appendix, p. 332); (b) recognized her prior history of depression, noting these ". . . [m]edical records document history of treatment with" Prozac, Lexapro, Wellbutrin XL, Cymbalta, Elavil, Serzone, Desryl and Ambien (See, Appendix, p. 334); (c) further referenced her prior use of anti-anxiety medications (Ativan and Xanax) (Id.);

(d) identified the current presence of various depressive symptoms, as well as clinical evidence of this condition (See, Appendix, pp. 334 - 336); (e) confirmed **"to a reasonable degree of medical certainty, . . . Ms. Rummage meets the diagnostic criteria for major depressive disorder"** (See, Appendix, p. 338); (f) indicated ". . . [a]lthough she has a history of depressive mood symptoms, her past documented and reported depressive episodes have not risen to the level of severity she is currently experiencing" (Id.); (g) the current Major Depressive Disorder "is most likely related to her work injury" (Id.); (h) "Ms. Rummage is not at maximum medical improvement in regards to her mood symptoms and memory impairment" (See, Appendix, p. 339); and (i) treatment of this aggravated depressive condition was required. (Id.).

Dr. Salas also identified various flaws in Dr. Gualtieri's methodology and conclusions, to wit: (a) reference in the report to an evaluation date (December 11, 2014), which was **four (4) months prior to her actual visit in April, 2015** (See, Appendix, p. 336); (b) test selection bias, noting his use of "the Pediatric Neurocognitive Test, a test designed for a pediatric population," rather than adults (See, Appendix, p. 337); (c) his administration of/reliance upon "the Neuropsych Questionnaire (NPQ) . . . [,] an internet-based computerized symptom checklist **developed by Dr. Gualtieri himself . . . [which b]y his own publication, . . . 'was not developed as a diagnostic test'**" (Id.); (d) conflicting descriptions of Ms. Rummage" (noting his report states "she appeared his/her stated age"; characterizing her as "pleasant, well related, cooperative and compliant", while concluding, without explanation, she exhibited a "non-credible clinical presentation, with dramatic inconsistency") (See, Appendix, pp. 336 and 473); (e) failure "to acknowledge or offer explanation as to why he dismissed" psychomotor retardation, which "is typical of severe depression . . . from being a valid part of his assessment and interpretation" (See, Appendix, p. 338); and (f) "his report stands out in such a divergent

perspective in comparison to the other available records, that it leaves me perplexed as to how one is to find any validity in his offered opinion", which conflicts with the assessments of multiple medical providers (Drs. McQueen, Benjamin and Collins). (Id.).

Dr. Brawley similarly questioned the propriety/reliability of Dr. Gualtieri's testing process and conclusions, explaining: (a) ". . . [i]t is unclear who administered and interpreted these tests" (recalling this physician's report merely bore his signature, while reflecting the participation of a physician's assistant); (b) actual administering and interpreting of these tests "should be done only by a qualified psychologist, or by a trained psychometrician under the supervision of a qualified psychologist"; (c) "review of the raw data . . . [raises] concerns about the accuracy of scoring and interpretation, ("the scoring and interpretation of the copy of complex figure were both incorrect"; "simply because someone cannot recall any details on a delayed recall does not render the test 'invalid'"; use of the "Pediatric Neurocognitive Test" on a 55 year old is "curious"); (d) the inconsistency of his ignoring the fact Ms. Rummage's clinical presentation was consistent with Major Depressive Disorder, "the number one diagnostic consideration listed in the interpretive report . . . [o]n the Personality Assessment Inventory administered by his office"; and (e) the arbitrariness of his acknowledging the "sedating" effects of Ms. Rummage's medications, yet ignoring their impact on her clinical presentation. (See, Appendix, p. 349 - 351).

After being provided with copies of the various reports generated by Drs. Gualtieri, Salas and Brawley, Dr. Collins, who examined Ms. Rummage on numerous occasions over a two year period **per Respondents' authorization**, concluded: (a) Ms. Rummage had "never exhibited any evidence of malingering, symptom magnification or secondary gain"; (b) she "has consistently exhibited clinical evidence of depression and anxiety throughout [his] . . . period of treatment";

(c) "Drs. Salas' and Brawley's observations/opinions/conclusions as to the legitimacy of Ms. Rummage's presentation, the source of her psychological/psychiatric symptoms and current treatment needs are consistent with . . . [his] own"; (d) **"Ms. Rummage's current psychological/psychiatric symptoms most probably result from the aggravation of her preexisting depression/anxiety by the consequences of her May 18, 2012 compensable accident"**; (e) she "requires treatment of the nature identified by Drs. Salas and Brawley"; (f) Ms. Rummage has not reached the point of maximum medical improvement "relative to her psychological/psychiatric injury components"; (g) "Drs. Salas' and Brawley's opinions as to Ms. Rummage's rather serious need for psychological/psychiatric care are consistent with [his] . . . repeated recommendations for authorization of this treatment"; and (h) her receipt of this psychological/psychiatric treatment is reasonable, medically necessary and geared toward lessening the ultimate period of disability produced by the consequences of her May 18, 2012 compensable accident, including the causally related psychological/psychiatric injury component identified by these evaluators . . . ." (See, Appendix, pp. 324 - 328).

Ms. Rummage was also evaluated on two occasions by Dr. Donna Schwartz-Watts (Maddox), a forensic psychiatrist, who: (a) unquestionably reviewed medical records dating back to 1991, clearly noting her receipt of "extensive treatment with Dr. McQueen pre-injury" (See, Appendix, pp. 352 - 353); (b) certainly referenced the fact psychotropic medication was being provided by Dr. McQueen prior to the May 18, 2012 head injury (See, Appendix, p. 353); (c) identified various symptoms that were consistent with her current depression, as well as the fact she was engaging in strategies to assist her cognitive function" (identifying "Luminous, crosswords and . . . Candy Crush") (See, Appendix, p. 354) ; (d) "**found no evidence that Ms. Rummage was exaggerating or feigning symptoms**" (Id.); (e) **concluded, to a reasonable**

**degree of medical certainty, that Ms. Rummage "had a pre-existing history of depression which was worsened by her work-related injury"** (See, Appendix, p. 355); and (f) recommended psychiatric treatment (including medication management) in conjunction with psychotherapy for the "Major Depression" resulting from the aggravating effects of her May 18, 2012 compensable accident. (Id.).

Following their Fall 2016 reevaluations, Drs. Salas and Schwartz-Watts (Maddox) concurred/reiterated, **to a reasonable degree of medical certainty**, Ms. Rummage: (a) had **not "exhibited any evidence of malingering, symptom magnification or secondary gain during [their] . . . evaluations"** (See, Appendix, pp. 344 and 360); (b) "continues to exhibit symptoms reflective of Major Depression and cognitive impairment" (See, Appendix, pp. 345 and 361); (c) is experiencing **"major depression and cognitive impairment . . . [that] most probably result from the consequences (direct cause and/or aggravation) of her May 18, 2012 compensable accident"** (Id.); and (d) "requires treatment of the nature identified in . . . [their] respective reports . . . ." (Id.).

These forensic psychiatrists likewise agreed: (a) Ms. Rummage's receipt of psychological/psychiatric treatment modalities of the nature they had recommended **"is reasonable, medically necessary and geared toward lessening the ultimate period of disability produced the consequences of her May 18, 2012 compensable accident"** (b) their respective opinions were also consistent with Dr. Brawley's observations/opinions/conclusions as to **the legitimacy of Ms. Rummage's presentation, the source of her psychological/psychiatric symptoms and cognitive impairments**, as well as her current treatment needs; and (c) the nature/degree of Ms. Rummage's causally related Major Depression

and cognitive impairment most probably prohibit her from currently engaging in/sustaining any form of work activities. (Id.).

During the course of a November 7, 2016 hearing before the single commissioner, Ms. Rummage: (a) did not "deny . . . [having] struggled with depression" prior to May 18, 2012 (See, Appendix, p. 167); (b) acknowledged not only receipt of medication for this condition through Dr. McQueen, but also the fact she continued to utilize these medications leading up to her May 18, 2012 accident (See, Appendix, p. 168); (c) identified headaches as a pre-accident symptom (See, Appendix, p. 172); (d) recalled the presence of nausea associated with her pre-injury headaches (See, Appendix, p. 173); (e) admitted her post-accident headaches were improved through Botox injection (See, Appendix, p. 176); (f) never attempted to hide her pre-injury depression or use of psychotropic medication from her medical examiners (See, Appendix, pp. 185 - 186); (g) clearly recognized the presence of "other stressors involving family members before this accident" (See, Appendix, p. 221); (h) agreed her use of psychotropic medication dated back to at least 2005 (See, Appendix, pp. 197 - 198); and (i) repeatedly/consistently accepted, as fact, the content of prior medical records if/when she could not remember particular details of her lengthy pre-injury medical history. (See, Appendix, pp. 199 – 203, 216, 219 and 224).

At the commencement of this hearing, Respondents sought to introduce a March 5, 2008 Order issued in connection with a prior workers' compensation claim for the purpose of impeachment. While the undersigned attempted to exclude this document, which negatively commented on the credibility of both Ms. Rummage and Dr. McQueen, from the evidentiary record, the single commissioner overruled the objection. (See, Rummage, 865 S.E. 2d at 386 - 387).

As recognized by the Court of Appeals:

> The single commissioner denied Claimant's claim, by and large based on her assessment of Claimant's credibility. The single commissioner found Claimant to be "wily and manipulative" and noted her belief Claimant was "using the worker[s]' compensation system for purposes of secondary gain." The single commissioner gave little weight to the medical opinions of Drs. Collins, Brawley, Salas and Maddox because they had not been provided Claimant's accurate medical history and had based their opinions on Claimant's unreliable self-reporting. The single commissioner gave greater weight to Dr. Gualtieri's opinion that Claimant was untruthful because it "mirrored" her own impressions and "matched the evidence." According to the single commissioner, Dr. Gualtieri "was not fooled or manipulated" by Claimant . . . In her order, the single commissioner indicated she had not relied on Commissioner Lyndon's credibility analysis in making her own assessment in the present case. Id.

After challenging the single commissioner's ruling on numerous grounds, including its utilization of an "unlawful adjudication procedure", hinging on "a legally impermissible medical opinion" and failure to recognize the only reasonable inference arising from the hearing record established Ms. Rummage's compliance with the provisions of Section 42-9-35, she filed a June 15, 2017 memorandum reiterating these points, particularly the absence of "competent evidence which supports the fact finder's determination [she] . . . did not meet her [statutory] . . . burden of proof . . . ." (See, Appendix, p. 105).

Additionally, as confirmed by the September 18, 2017 "Full Commission Hearing" transcript, she: (a) reminded the appellate panel Section 42-9-35 mandated the use of medical evidence in establishing a compensable aggravation; and (b) explained evidence stated to a reasonable degree of medical certainty was required to not only establish causative aggravation, but also to rebut a contention of aggravation founded upon this statutorily mandated medical

evidence, per this Court's ruling in Michau v. Georgetown County, 396 S.C. 589, 723 S.E. 2d 805 (2012). (See, Appendix, pp. 130-134).

These contentions prompted an appellate panel member to inquire as to whether Dr. Gualtieri's opinions were stated to a reasonable degree of medical certainty. (See, Appendix, p. 139). Respondents' counsel then acknowledged, "I don't believe he actually used those - - that terminology in there". (Id.).

When Respondents attempted to limit the nature/scope of Ms. Rummage's appeal through submission of a proposed order that excluded several assertions of error, the undersigned requested revision of this document to reflect all issues which were properly raised to and ruled upon by the appellate panel. Following consideration of the parties' respective positions, the appellate panel acknowledged:

> . . . Additionally, Appellant: (a) relying on the decision in Michau v. Georgetown County, 396 S.C. 589, 723 S.E. 2d 805 (2012), **contend the provisions of § 42-9-35, S.C. Code Ann. not only require medical evidence to prove the aggravation of a preexisting condition, but also to rebut any medical evidence supporting this contention**; (b) maintains the **record contains no competent evidence which supports the Hearing Commissioner's ruling that she did not meet her burden of proof, as there is no contrary medical evidence that satisfies the requirements of § 42-9-35, as Defendants'/Respondents' expert did not offer any opinions to a reasonable degree of medical certainty**; (c) argues the Hearing Commissioner's **adverse credibility findings alone are insufficient to rebut the multiple medical opinions confirming the aggravation of her preexisting psychological condition** by the consequences of her compensable injury; and (d) claims the denial of her request for treatment **resulted from an arbitrary decision-making process through which a medical question was determined through the Hearing Commissioner's rendering expert opinion.** (See, Appendix, p. 31) (Emphasis added).

Pursuant to a May 19, 2021 Opinion, the Court of Appeals determined while admission of the prior Order, which "commented on the credibility of Dr. McQueen, a key medical provider

in the present case" [, was] . . . erroneous . . . [,] the error was harmless under the particular facts of this case." (See, Appendix, pp. 578 - 579). Additionally, the Court of Appeals rejected the appellate panel's recognition Ms. Rummage's assertion of noncompliance with Section 42-9-35 was preserved, instead concluding this argument was untimely. The Court likewise ruled the Commission's disregarding abundant legally competent medical evidence corroborating the causal relationship of Ms. Rummage's aggravated psychological condition was neither arbitrary nor capricious, notwithstanding: (a) the absence of competent medical rebuttal evidence; and (b) this denial of compensable aggravation is necessarily premised upon the single commissioner's lay opinions.

Among other things, Ms. Rummage's June 18, 2021 Petition for Rehearing addressed the inconsistency of the "harmless error" characterization with the Court's express recognition the erroneously admitted March 5, 2008 Order: (a) "gives little weight to Dr. McQueen's opinion based on . . . . [purported] inconsistencies and contradictions therein"; (b) likewise "commented on the credibility of Dr. McQueen, a key medical provider in the present case"; and (c) "speaks directly to the credibility of Claimant and **a key medical provider in the case.**" (See, Appendix, p. 578).

This Petition for Rehearing further asserted: (a) "the material implications of this tainted evidentiary admission on the viability of Dr. McQueen's uniquely relevant opinions cannot be minimized, as he dispels any notion Ms. Rummage's current psychological symptoms are solely attributable to purely preexisting distress"; (b) neither the single commissioner's nor appellate panel's Orders mention Dr. McQueen's opinions; (c) given this "key medical provider[s]" . . . unique perspective on the ultimate issue in controversy, it is inconceivable his opinions were unworthy of any comment; (d) this Order was part of the evidentiary record, rather than a sealed

document; (e) it could not be presumed this "troubling" admission of inappropriate evidence did not affect the hearing outcome; and (f) in view of the puzzling omission of any reference to Dr. McQueen's rather crucial opinions, the unwarranted attack on this key medical provider materially/negatively impacted upon the outcome of this litigation.

Although the September 22, 2021 Opinion reaffirmed the prior ruling, it curiously deleted the references to Dr. McQueen in analyzing what the Court continued to characterize as a "troubling . . . admission of the prior Order". Rummage, 865 S.E. 2d at 389. However, this Opinion fails to address the irreconcilable omission of any reference to Dr. McQueen's key opinions in the Commission's Order, a point reiterated through Ms. Rummage's October 22, 2021 Petition for Rehearing, which was denied on December 2, 2021.

## ARGUMENTS

**A. THE COURT OF APPEALS ERRED IN HOLDING MS. RUMMAGE FAILED TO ADEQUATELY PRESERVE THE CONTENTION RESPONDENTS HAD NOT REBUTTED HER CORROBORATIVE MEDICAL PROOF WITH COMPETENT EVIDENCE IN COMPLIANCE WITH SECTION 42-9-35 WHEN: (A) THE APPELLATE PANEL SPECIFICALLY DETERMINED, NOTWITHSTANDING RESPONDENTS' CONTRARY ASSERTION, THE ISSUE HAD BEEN ADEQUATELY RAISED BY MS. RUMMAGE AND ACKNOWLEDGED THIS ARGUMENT IN ITS FEBRUARY 1, 2018 ORDER; (B) ASSUMING ARGUENDO THE APPELLATE PANEL'S FINDING ON THIS POINT WAS NOT DISPOSITIVE, IT NEVERTHELESS VERIFIES THE QUESTION OF ISSUE PRESERVATION IN THIS INSTANCE IS SUBJECT TO MULTIPLE INTERPRETATIONS; (C) APPLICATION OF THE COURT OF APPEALS' RULINGS IN JOHNSON V. ROBERTS, 422 S.C. 406, 812 S.E. 2D 207, 210 (CT. APP. 2018) AND STATE V. FRANKS, 432 S.C. 58, 849 S.E. 2D 580, 592 (CT. APP. 2020) REQUIRES RESOLUTION OF "ANY DOUBT . . . IN FAVOR OF PRESERVATION"; (D) ASSUMING ARGUENDO THE APPELLATE PANEL'S FINDING ON THIS POINT WAS NOT DISPOSITIVE, ITS RATHER HYPER-TECHNICAL PRESERVATION ANALYSIS IS WHOLLY INCONSISTENT WITH NOT ONLY THIS COURT'S RELEVANT RULINGS WEIGHING IN FAVOR OF PRESERVATION, BUT ALSO ITS SIMILAR HOLDINGS ACKNOWLEDGING A FOCUS ON THE SUBSTANCE OF AN APPEAL, RATHER THAN TECHNICAL DISCREPANCIES; AND (E) THE IMPLICATION MS. RUMMAGE WAS OBLIGED TO OBJECT TO THE INTRODUCTION OF DR. GUALTIERI'S REPORT INTO EVIDENCE IS EQUALLY FLAWED, AS IT OVERLOOKS THE CLEAR DISTINCTION BETWEEN ADMISSIBILITY AND SATISFACTION OF THE REQUISITE STANDARD OF PROOF.**

As previously outlined, Ms. Rummage repeatedly asserted: (a) the only reasonable inference arising from the hearing record established her compliance with the requirements of Section 42-9-35 as a matter of law; (b) the absence of evidentiary basis for the single commissioner's contrary ruling; (c) the single commissioner's utilization of "an arbitrary, capricious and unlawful adjudication process"; (d) the record was devoid of competent evidence supporting the single commissioner's determination her preexisting psychological condition had not been aggravated by her compensable injury consequences; and (e) the underlying ruling was actually premised upon "a legally impermissible medical opinion" of the single commissioner.

During the September 18, 2017 hearing before the appellate panel, counsel, consistent with prior contentions of error, argued: (a) Section 42-9-35 mandated the use of medical evidence in establishing a compensable aggravation; (b) evidence "stated to a reasonable degree of medical certainty" was required by this statute; and (c) once Ms. Rummage complied with the proof requirements imposed by Section 42-9-35, Respondents were likewise obliged to do so per this Court's ruling in Michau. (See, Appendix, pp. 131-134).

Recognizing this argument fell within the parameters of Ms. Rummage's appeal, an appellate panel member specifically inquired whether Dr. Gualtieri's opinions were stated to a reasonable degree of medical certainty. (See, Appendix, p. 139). This question prompted Respondents' counsel to acknowledge his belief their only rebuttal evidence did not contain "that terminology". (Id.).

After receiving an appellate panel request to prepare a proposed order affirming the single commissioner's rulings, Respondents submitted a document which excluded any reference to Ms. Rummage's assertion they had not complied with the requirements of Section 42-9-35. When Ms. Rummage's objected to this omission, Respondents specifically contended exclusion was appropriate because "the Form 30 does not contain any exception objecting to the introduction of the report of defendants' expert on the grounds on the grounds that it failed to satisfy the requirements of §42-9-35." (See, Appendix, pp. 430 – 433).

When squarely faced with the obligation of identifying the breadth of arguments raised by Ms. Rummage's appeal, the appellate panel clearly found her preserved contentions of error included: (a) the provisions of Section 42-9-35 "not only require medical evidence to prove the aggravation of a preexisting condition, but also to rebut any medical evidence supporting this contention"; (b) "the hearing record contains no competent evidence which supports the Hearing

Commissioner's ruling that she did not meet her burden of proof, as there is no contrary medical evidence that satisfies requirements of § 42-9-35 as Defendants'/Respondents' expert did not offer any opinion to a reasonable degree of medical certainty"; (c) "the Hearing Commissioner's adverse credibility findings alone are insufficient to rebut the multiple medical opinions confirming the aggravation of her preexisting psychological condition by the consequences of her compensable injury"; and (d) "the denial of her request for treatment resulted from an arbitrary decision-making process through which a medical question was determined through the Hearing Commissioner's rendering expert opinion." (See, Appendix, pp. 31-32).

This ruling necessarily: (a) constitutes a factual determination by "the ultimate fact-finder"; (b) verifies the appellate panel was afforded "an opportunity to resolve th[es]e . . . issue[s] before . . . [they were] presented to the appellate court"; and (c) establishes the issue relative to Respondents' noncompliance with Section 42-9-35 was "raised [to] . . . and ruled upon by the commission". See, Barnes v. Charter 1 Realty, 411 S.C. 391, 768 S.E. 2d 651, 652 (2015); Rhame v. Charleston County School District, 412 S.C. 273, 772 S.E. 2d 159, 161 (2015). See also, In re: Michael H., 360 S.C. 540, 602 S.E. 2d 729, 732 (2004); Stone v. Roadway Express, 367 S.C. 575, 627 S.E. 2d 695, 698 (2006).

"Preservation rules are intended to ensure that appellate courts review considered decisions of our trial courts and that issues are not being raised for the first time on appeal." State v. Jones, 435 S.C. 138, 866 S.E. 2d 558, 561 (2021). While routinely declining to "reach issues which were not ruled upon by the trial court", this Court has: (a) remained "mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner"; and (b) declined to promote a preservation standard "where form is elevated over substance." See, Herron v. Century BMW, 395 S.C. 461, 719 S.E. 2d 640, 644 (2011); Conits v.

Conits, 422 S.C. 74, 810 S.E. 2d 253, 254 (2018); Brock v. Board of Adjustment and Appeals of the City of Rock Hill, 308 S.C. 539, 419 S.E. 2d 773, 776 (1982) (substance will generally take precedence over technical rules in considering exceptions); Jones, supra.

Given the appellate panel's definitive factual determination, which is amply supported by the substantial evidence of record, the Court of Appeals mistakenly substituted its judgment on a determination exclusively reserved to the appellate panel. Additionally, Ms. Rummage respectfully submits even assuming *arguendo* the Court of Appeals was authorized to weigh in on this issue: (a) the appellate panel's factual determination cannot simply be ignored; (b) the unequivocal determination Ms. Rummage has sufficiently contested Respondents' compliance with Section 42-9-35 undeniably reflects the Appendix contents can be construed to support the viability of her appeal on this issue; and (c) "where the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." Johnson v. Roberts, 422 S.C. 406, 812 S.E. 2d 207, 210 (Ct. App. 2018) (quoting Atlantic Coast Builders & Contractors, LLC v. Lewis, 730 S.E. 2d at 287 (Toal, C.J., concurring in result in part and dissenting in part); State v. Franks, 432 S.C. 58, 849 S.E. 2d 580, 592 (Ct. App. 2020).

Ms. Rummage would also respectfully note the Court of Appeals' apparent indication she was obliged to object to the admission of Dr. Gualtieri's report is misplaced, as: (a) Section 42-9-35 institutes the **standard of proof** governing establishment and rebuttal (per Michau) of a compensable aggravation; (b) " 'standard of proof' . . . refers to the degree or level of proof demanded in a specific case" (In re: Navarra, 185 A. 3d 342, 353 (2018)(fn. 5); In re: Portus, 325 Mich. App. 374, 926 N.W. 2d 33, 41 (2018)); (c) Section 42-9-35 does not render medical evidence that does not meet its requirements inadmissible, but rather deems it insufficient to meet the prevailing standard of proof; (d) the parties' respective rights, "includ[ing] . . . the

procedures for adjudicating a compensation claim as well as . . . substantive entitlement", are wholly dependent upon the statutes which comprise the South Carolina Workers' Compensation Act (Cook v. Mack's Transfer & Storage, 291 S.C. 84, 352 S.E. 2d 296, 298 (1986); Estate of Covington by Montgomery v. AT&T Nassau Metals Corp., 304 S.C. 436, 405 S.E. 2d 393, 394 (1991)); (e) an adjudicating tribunal "must apply the law as it currently exists" (Redmond v. Lexington County School Dist. No. Four, 314 S.C. 431, 445 S.E. 2d 441, 443 (1994); Colleton County Taxpayers Association v. School District of Colleton County, 371 S.C. 224, 638 S.E. 2d 685, 691 (2005)); (f) Ms. Rummage was entitled to consideration of all evidence of record in accordance with this "heightened standard of proof" (Doe v. South Carolina Department of Social Services, 407 S.C. 623, 757 S.E. 2d 712, 719 (2014); South Carolina Department of Social Services v. Patten, 412 S.C. 93, 770 S.E. 2d 192, 195 (Ct. App. 2015)); and (g) she has appropriately challenged the unlawful adjudication process employed by the single commissioner and appellate panel, which each declined to recognize the evidence introduced by Respondents simply failed to satisfy the statutory standard of proof. See, Moore v. McKelvey, 266 S.C. 95, 221 S.E. 2d 780, 781 (1976); Beneficial Financial I, Inc. v. Windham, 431 S.C. 256, 847 S.E. 2d 793, 804 (Ct. App. 2020).

In this regard, despite Respondents' contrary contention, their expert's noncompliance with the governing standard of proof requirement cannot be remedied through the appellate process, as: (a) the provisions of Section 42-9-35 clearly require medical evidence "stated to a reasonable degree of medical certainty"; (b) their expert's report, though admissible, did not satisfy this standard of proof; (c) no argument, whether to the factfinder or this Court, can cure this evidentiary insufficiency; and (d) the absence of this competent evidence, in the context of a

wholly medical question, legally precludes affirmance of the single commissioner's ruling, as adopted by the appellate panel, at any level.

Accordingly, Ms. Rummage respectfully requests this Court to hold: (a) the appellate panel correctly determined she had adequately preserved the issue relative to Respondent's noncompliance with the requirements of Section 42-9-35; (b) assuming arguendo the appellate panel's determination is not dispositive, applicable rules governing resolution of preservation questions establish Ms. Rummage adequately preserved this issue; (c) the Court of Appeals erred in not only ruling this issue was not preserved, but also declining to address it on the merits; (d) a merits review establishes Respondents did not satisfy the standard of proof prescribed by Section 42-9-35; (e) the Court of Appeals' decision must be reversed; (f) the February 1, 2018 Order must likewise be reversed; (g) Ms. Rummage is entitled to all appropriate compensation and medical benefits attributable to the aggravation of her preexisting psychological condition; and (h) this claim is remanded to South Carolina Workers' Compensation Commission for the sole purpose of enforcing her entitlement to appropriate disability compensation and medical benefits for this aggravated preexisting psychological condition.

**B. THE COURT OF APPEALS ERRED IN CONSIDERING RESPONDENTS' ASSERTION MS. RUMMAGE HAD NOT ADEQUATELY PRESERVED THE ISSUE RELATIVE TO THEIR FAILURE TO SATISFY THE GOVERNING STANDARD OF PROOF ESTABLISHED BY SECTION 42-9-35 WHEN: (A) THIS ISSUE WAS SPECIFICALLY RAISED BY THE PARTIES TO THE APPELLATE PANEL PRIOR TO ITS ENTRY OF THE FEBRUARY 1, 2018 ORDER; (B) INSPECTION OF THE PERTINENT PORTIONS OF THE APPENDIX ESTABLISHES THE APPELLATE PANEL WAS SQUARELY CONFRONTED WITH THE PRESERVATION ISSUE; (C) AFTER CONSIDERING THE PARTIES' RESPECTIVE ARGUMENTS, THE APPELLATE PANEL DETERMINED THIS ISSUE WAS ADEQUATELY RAISED BY MS. RUMMAGE; (D) THIS RULING WAS A MATERIAL ELEMENT OF THE APPELLATE PANEL'S FEBRUARY 1, 2018 ORDER, WHICH REQUIRED CROSS-APPEAL FOR PRESERVATION; AND (E) THE ABSENCE OF CROSS APPEAL RESULTS IN THIS RULING BECOMING THE LAW OF THIS CASE.**

When Respondents attempted to limit the nature/scope of Ms. Rummage's appeal through submission of a proposed Order that excluded several assertions of error, the undersigned requested revision of this document to reflect all issues which were properly raised to and ruled upon by the appellate panel. While the Court of Appeals' opinion notes the appellate panel was ultimately "persuaded . . . to include a mention of the Michau case in section 42-9-35 in its final order", it overlooks the facts: (a) Ms. Rummage did not merely ask the appellate panel to mention the controlling statute, but actually identified the factual basis for her contention the issue relative to compliance with the applicable standard of proof had been preserved; (b) Respondents' formally contested her position through submission of a January 12, 2018 letter (Appendix, pp. 430 - 431); and (c) the appellate panel rejected Respondents' contention, determining Ms. Rummage had adequately preserved this issue through its inclusion of her arguments in the body of its February 1, 2018 Order.

Although Ms. Rummage perfected her appeal several days prior to the March 5, 2018 filing deadline, Respondents accepted this adverse ruling, rather that pursuing a cross appeal. When the purported lack of preservation was subsequently raised through Respondents' brief, Ms. Rummage contested their right to raise the issue at this stage of the proceedings through her

Reply Brief. She further maintained the Commission's disposition of the alleged preservation issue constituted the law of this case through each of her Petitions for Rehearing to the Court of Appeals.

Where, as here, a respondent declines to pursue a cross appeal, the underlying ruling becomes the law of the case. See, Reese v. CCI Construction Company, 334 S.C. 600, 514 S.E. 2d 144, 145 (1999) ("Although, in this appeal, Employer attempts to challenge the commissioner's finding of an occupational disease, Employer never appealed this ruling to either the appellate panel of the commission or the circuit court. Thus, right or wrong, it is the law of the case."); Commercial Credit Loans, Inc. v. Riddle, 334 S.C. 176, 512 S.E. 2d 123, 129 (Ct. App. 1999) (respondent's failure to file cross appeal of special referee's finding precluded consideration of issue, which became the law of the case); Sanders v. South Carolina Department of Corrections, 379 S.C. 411, 665 S.E. 2d 231, 234 (Ct. App. 2008) ("We do not address this issue because the Department failed to cross appeal the ALJ's finding", which was the law of the case); Dreher v. South Carolina Department of Health and Environmental Control, 399 S.C. 259, 730 S.E. 2d 922, 924 (Ct. App. 2012) ("Despite DHEC's attempt to correct this alleged inconsistency in the Order, the ALC did not rule on the motion and DHEC failed to challenge the ALC's finding on appeal; therefore the finding that Tract D is a part of Folly Island is the law of the case.").

In view of these facts, it is respectfully submitted: (a) Respondents were obliged to file a cross appeal in the event they wished to contest the appellate panel's determination Ms. Rummage's assertion as to their noncompliance with the provisions of Section 42-9-35 had been adequately raised and ruled on; (b) the appellate panel's recognition this issue was preserved constitutes the law of this case; and (c) the Court of Appeals erred in not only considering the

purported preservation issue, but also ruling Ms. Rummage had not adequately preserved this ground of her appeal.

Accordingly, Ms. Rummage respectfully requests this Court to hold: (a) the appellate panel's determination she adequately preserved her challenge as to Respondents' noncompliance with Section 42-9-35 constitutes the law of this case; (b) the Court of Appeals erroneously ruled she had not adequately preserved this issue for appellate review; (c) the Court of Appeals' ruling on this issue must be reversed; (d) Respondents failed to rebut her contention of an aggravated preexisting psychological condition through submission of competent evidence in accordance with the requirements of Section 42-9-35; (e) she has proven this aggravation in accordance with the provisions of Section 42-9-35 as a matter of law; (f) the February 1, 2018 Order must be reversed; (g) Ms. Rummage is entitled to all appropriate compensation and medical benefits attributable to the aggravation of her preexisting psychological condition; and (h) this claim is remanded to South Carolina Workers' Compensation Commission for the sole purpose of enforcing her entitlement to appropriate disability compensation and medical benefits for this aggravated preexisting psychological condition.

**C. THE COURT OF APPEALS ERRED IN DECLINING TO DETERMINE MS. RUMMAGE HAD AMPLY SATISFIED NOT ONLY HER BURDEN OF PROOF, BUT ALSO THE STANDARD OF PROOF PRESCRIBED BY SECTION 42-9-35, AS A MATTER OF LAW, WHEN: (A) THIS STATUTE REQUIRES ESTABLISHMENT OF AN AGGRAVATION OF PREEXISTING CONDITION BY "A PREPONDERANCE OF THE EVIDENCE, INCLUDING MEDICAL EVIDENCE"; (B) IT SIMILARLY DEMANDS THIS MEDICAL EVIDENCE ENTAIL "EXPERT OPINION OR TESTIMONY STATED TO A REASONABLE DEGREE OF MEDICAL CERTAINTY"; (C) SHE INTRODUCED MEDICAL EVIDENCE, STATED TO A REASONABLE DEGREE OF MEDICAL CERTAINTY, VERIFYING THIS CAUSALLY RELATED AGGRAVATION THROUGH NO LESS THAN FOUR (4) PHYSICIANS; (D) THE CONTRARY MEDICAL OPINION OFFERED BY RESPONDENTS WAS NOT "STATED TO A REASONABLE DEGREE OF MEDICAL CERTAINTY" IN COMPLIANCE WITH SECTION 42-9-35; (E) RESPONDENTS' MEDICAL OPINION WAS CONSEQUENTLY NOT COMPETENT TO REBUT THE CORROBORATIVE EVIDENCE INTRODUCED BY MS. RUMMAGE; AND (F) THE ONLY REASONABLE INFERENCE ARISING FROM THE RECORD ON APPEAL ESTABLISHES SHE HAS SATISFIED THE REQUIREMENTS OF SECTION 42-9-35 AS A MATTER OF LAW**

Section 42-9-35 prescribes: (a) aggravation of a preexisting condition "shall [be] . . . established by a preponderance of the evidence, including medical evidence"; and (b) " 'medical evidence' means expert opinion or testimony stated to a reasonable degree of medical certainty".

As previously recognized by this Court (when analyzing another portion of the 2007 Amendment to Title 42), this statutory language: (a) "expressly creates an additional heightened standard" for establishing a compensable aggravation of a preexisting condition; and (b) "requires 'medical evidence,' in the form of 'expert opinion or testimony . . . [to be] stated to a reasonable degree of medical certainty.'" Michau, 723 S.E. 2d at 807. See also, Hartzell v. Palmetto Collision, LLC, 419 S.C. 87, 796 S.E. 2d 145, 149-150 (Ct. App. 2016) (recognition of heightened standard of proof established by requirement of medical evidence stated to a reasonable degree of medical certainty). Section 42-9-35 similarly: (a) does not differentiate between the need for "opinion or testimony" when confirming, as opposed to denying, the aggravation of a preexisting condition; and (b) is equally applicable to medical "opinion"

verifying the aggravation of a preexisting condition by compensable injury consequences, as well as to medical "opinion" denying this aggravation. Michau, 723 S.E. 2d at 808.

In this instance, Respondents "specifically sought out Dr. [Gualtieri] . . . to evaluate . . . [Ms. Rummage] and issue a medical 'opinion' to decide the compensability of [her] . . . claim." (Id.) In view of this fact, Dr. Gualtieri's reports: (a) can only be characterized as an "opinion or testimony" that must be "stated to a reasonable degree of medical certainty"; and (b) do not constitute "competent evidence" to support a denial of the aggravated psychological/psychiatric condition validated by no less than four (4) medical experts. Michau, 723 S.E. 2d at 808-809. See also, Section 42-9-35 (C).

Consequently, the appellate panel's attempt to circumvent the specific requirements of Section 42-9-35 is necessarily "null and void." Bazzle v. Huff, 319 S.C. 443, 462 S.E. 2d 273, 274 (1995) (Commission's attempts to require submission/approval of attorney fees prior to effective date of empowering regulation "exceeded their statutory authority and thus were null and void"); Responsible Economic Development v. South Carolina Department of Health and Environmental Control, 371 S.C. 547, 641 S.E. 2d 425, 428 (2007) (action taken by administrative agency outside its statutory authority "is null and void").

The appellate panel's factual findings "may not be based upon surmise, conjecture or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it." Glover v. Rhett Jackson Company of Bush River Road, 274 S.C. 644, 267 S.E. 2d 77, 80 (1980); Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E. 2d 76, 82 (Ct. App. 1995). Where "there is no evidence to support the finding of fact made by the Commission this court . . . has the power to reverse" the administrative agency's determination. Sanders v. Richardson, 251

S.C 325, 162 S.E. 2d 257, 259 (1968); Hutson v. South Carolina State Ports Authority, 399 S.C. 381, 732 S.E. 2d 500, 504 (2012).

It is also axiomatic that while "the Commission is the fact finding body, where the evidence gives rise to but one reasonable inference the question becomes one of law for the court to decide." Kinsey v. Champion American Service Center, 268 S.C. 177, 232 S.E. 2d 720, 722 (1977); Moore v. Family Service of Charleston, 269 S.C. 275, 237 S.E. 2d 84, 86 (1977). A similar rule has been applied to circumstances where only one reasonable inference can be derived for the substantial evidence of record. See, Springs Industries, Inc. v. South Carolina Second Injury Fund, 296 S.C. 359, 272 S.E. 2d 915, 917 (Ct. App. 1988); Carolinas Recycling Group v. South Carolina Second Injury Fund, 398 S.C. 480, 730 S.E. 2d 324, 327 (Ct. App. 2012).

As previously noted, Ms. Rummage submitted medical evidence containing confirmatory opinions relative to the causal relationship of her current psychological distress to the aggravating effects of her May 18, 2012 compensable accident from four (4) physician experts. These medical opinions were offered by not only two forensic psychiatrists, but also: (a) Dr. McQueen, who possesses a unique awareness of Ms. Rummage's extensive pre-accident treatment course; and (b) Dr. Collins, Respondents' designated physician, who personally assessed her on essentially a monthly basis for three years.

Consistent with the requirements of Section 42-9-35, each of Ms. Rummage's physician experts verified, "to a reasonable degree of medical certainty", the consequences of her admittedly compensable physical injuries had aggravated the preexisting psychological condition. Given this fact, as well as the absence of any competent contradictory medical opinion or testimony, Ms. Rummage respectfully submits: (a) the appellate panel's determination

she "failed to prove an aggravation of her preexisting psychological condition" is devoid of competent evidentiary basis; (b) absent the requisite "expert opinion or testimony stated to a reasonable degree of medical certainty", this denial is clearly the product of "surmise, conjecture [and] . . . speculation", rather than "founded on . . . [competent] evidence"; (c) the "only [competent] . . . evidence in the record shows that . . . [her preexisting psychological condition] was . . . aggravated by" the consequences of her compensable injury; (d) the only reasonable inference arising from the record unequivocally establishes she has satisfied the requirements of Section 42-9-35; and (e) her current psychological symptoms are "related to the accident as a matter of law." Mullinax, 445 S.E. 2d at 82.

Accordingly, Ms. Rummage respectfully requests this Court to hold: (a) the Court of Appeals erred in failing to conclude the only reasonable inference arising from the Appendix establishes she satisfied the requirements of Section 42-9-35 as a matter of law; (b) the Court of Appeals' decision must be reversed; (c) the appellate panel's February 1, 2018 Order is likewise reversed; (d) she is entitled to all appropriate disability compensation and medical benefits per the South Carolina Workers' Compensation Act as a result of the aggravation of her preexisting psychological condition by the consequences of her admittedly compensable injury; and (e) this claim is remanded to South Carolina Workers' Compensation Commission for the sole purpose of enforcing her entitlement to appropriate disability compensation and medical benefits for this aggravated preexisting psychological condition.

**D. THE COURT OF APPEALS ERRED IN RULING THE ERRONEOUS ADMISSION OF THE IRRELEVANT/IMMATERIAL MARCH 5, 2008 ORDER WAS HARMLESS, PARTICULARLY IN VIEW OF THE FACTS: (A) THIS ORDER NOT ONLY CLEARLY ADDRESSES THE CREDIBILITY OF DR. MCQUEEN, BUT ALSO DETERMINES HIS OPINION SHOULD BE AFFORDED "LITTLE WEIGHT . . . BASED ON INCONSISTENCIES AND CONTRADICTIONS"; (B) THIS PHYSICIAN WAS UNQUESTIONABLY A KEY MEDICAL EXPERT IN THE CURRENT CLAIM, AS HE WAS THE ONLY PHYSICIAN WHO TREATED MS. RUMMAGE BOTH BEFORE AND AFTER THE MAY 18, 2012 COMPENSABLE INJURY; (C) DESPITE THIS UNIQUELY MATERIAL PERSPECTIVE, DR. MCQUEEN'S CORROBORATION OF THE CAUSAL RELATIONSHIP OF MS. RUMMAGE'S CURRENT PSYCHOLOGICAL SYMPTOMS TO THE COMPENSABLE ACCIDENT CONSEQUENCES IS AFFORDED NO MENTION BY THE APPELLATE PANEL, WHICH RENDERED ITS RULINGS FOLLOWING "STUDY AND CONSIDERATION . . . [OF] ALL DOCUMENTARY EVIDENCE" AND "AFTER WEIGHING ALL OF THE EVIDENCE PRESENTED" THROUGH THE HEARING RECORD; (D) THIS CONSPICUOUS ABSENCE OF REFERENCE TO A POTENTIALLY DISPOSITIVE MEDICAL OPINION IS IRRECONCILABLE WITH ANYTHING OTHER THAN ITS REJECTION DUE TO THE PRIOR ADVERSE CREDIBILITY FINDING; AND (E) AS THIS ERRONEOUS EVIDENTIARY OMISSION REASONABLY AFFECTED THE ULTIMATE OUTCOME OF THIS LITIGATION BEFORE THE COMMISSION, IT CANNOT BE CHARACTERIZED AS HARMLESS**

Significantly, inspection of the appellate panel's February 1, 2018 Order reveals: (a) this tribunal's review process admittedly included "weighing **all** of the evidence presented following "study and consideration . . . [of] **all** documentary evidence." (See, Appendix, pp. 14 and 33); and (b) the evidentiary record unquestionably included the erroneously admitted March 5, 2008 Order. (Emphasis added).

Even it is assumed arguendo the credibility findings relative to Ms. Rummage contained in the appellate panel's Order were cumulative in the context of the current record, it is respectfully submitted: (a) this Court of Appeals first recognized the contents of the March 5, 2008 Order directly/negatively impacted the credibility of Dr. McQueen, who it characterized as a "key medical provider" for Ms. Rummage; (b) while the substituted/refiled September 22, 2021 opinion removed certain verbiage, this deletion neither diminishes nor discounts the significant impact of Respondents' legally impermissible attack on the credibility of Dr.

McQueen, the only medical expert of record who had the benefit of examining/treating Ms. Rummage both prior to and after she sustained the admittedly compensable May 18, 2012 injuries; (c) the material implications of this tainted evidentiary admission on the viability of Dr. McQueen's uniquely relevant opinions cannot be minimized, as **he dispels any notion** Ms. Rummage's current psychological symptoms are solely attributable to purely preexisting distress; (d) inspection of the single commissioner's and appellate panel's Orders reveals Dr. McQueen's materially relevant opinions were wholly ignored; and (e) the substantial prejudicial impact of this "troubling" character attack on Dr. McQueen, especially in the context of this medically driven issue, is readily apparent.

While Drs. Schwartz-Watts, Salas and Collins, like Dr. Gualtieri, were limited to post-accident assessments, in conjunction with review of pre-accident records, Dr. McQueen had an unmatched perspective that allowed him to most reliably address the impact of Ms. Rummage's May 18, 2012 accident consequences on her preexisting conditions. Given this fact, it is respectfully submitted an unwarranted assault on his character necessarily/profoundly undermined Ms. Rummage's effort to establish medical causation of her current symptoms to the compensable accident consequences.

As reflected by his March 13, 2014 questionnaire responses, Dr. McQueen confirmed, to a reasonable degree of medical certainty: (a) **"the nature/intensity of Ms. Rummage's psychological disturbance have increased in a manner consistent with a post-concussive syndrome"**; and (b) this condition **"has been materially aggravated by the consequences of Ms. Rummage's May 18, 2012 work related fall."** (See, Appendix, pp. 386-388).

Inspection of the single commissioner's Order (as adopted by the appellate panel) reveals specific and consistent attempts to justify rejection of the corroborative causation opinions

offered by Drs. Maddox, Salas and Collins, yet not one mention of Dr. McQueen. (See, Appendix, pp. 42-43 and 71-72). Similarly, while the appellate panel chose to focus on Dr. Collins' remote testimony as support for adverse credibility findings (in the process turning a blind eye toward confirmative causation opinions this physician subsequently formed over an extended period of treatment), it conveniently ignored the fact he also unquestionably "opined a long-term physician would be able to give the best information about the progression of her issues." Rummage, 865 S.E. 2d at 384.

Despite this authorized treating physician's recognition of the particular relevance of Dr. McQueen's input on the current dispute, both the single commissioner's and appellate panel's Orders are silent as to the causation opinions expressed by Dr. McQueen. This omission certainly calls the Commission's adjudication process into question, as there is no rational justification for: (a) deeming this unique medical provider's opinions relative to Ms. Rummage's post-injury status **were unworthy of any comment**; (b) any fact finder's determining his corroborative opinions could be summarily/surreptitiously dismissed; and (c) allowing this process to occurred in a vacuum that mysteriously excluded the very opinions Respondents' designated physician felt would provide "the best information about the progression of her issues." Frankly, the only plausible explanation is an outright rejection of his opinions based upon the inappropriate credibility evidence that the law of this case establishes was **erroneously** admitted into the record.

"A harmless error analysis is contextual and specific to the circumstances of the case. . . ." State v. Byers, 392 S.C. 438, 710 S.E. 2d 55, 59 (2011). Error can only be characterized as harmless when it "could not reasonably have affected the result of the trial." State v. Mitchell, 286 S.C. 572, 336 S.E. 2d 150, 151 (1985); State v. Johnson, 432 S.C. 652, 855 S.E. 2d 305, 309

(Ct. App. 2021). Additionally, where, as here, "there [is] . . . no equivalent testimony presented", exclusion of the evidence is not harmless. Means v. Gates, 348 S.C. 161, 558 S.E. 2d 921, 926 (Ct. App. 2001).

In this instance, it must be presumed: (a) the single commissioner reviewed the contents of the March 5, 2008 Order when determining the admissibility of this document in response to Ms. Rummage's objection; (b) the appellate panel members certainly studied and considered "all documentary evidence" (as specified in its Order) when engaging in the appellate review process. (See, Appendix, p. 14); (c) the rather puzzling failure to address Dr. McQueen's unrebutted opinions was hardly coincidental; and (d) there is an undisclosed reason for the incomprehensible omission of any reference to Dr. McQueen's potentially dispositive opinions. Consideration of the current circumstances likewise warrants recognition admission of the March 5, 2008 Order: (a) materially/negatively impacted upon Ms. Rummage's position; and (b) did not constitute harmless error.

Accordingly, Ms. Rummage respectfully requests the Court to hold: (a) the admission of the March 5, 2008 Order did not constitute harmless error; (b) the Court of Appeals' decision must be reversed; (c) the appellate panel's February 1, 2018 is Order is likewise reversed; (d) she is entitled to all appropriate disability compensation and medical benefits per the South Carolina Workers' Compensation Act as a result of the aggravation of her preexisting psychological condition by the consequences of her admittedly compensable injury; and (e) this claim is remanded to South Carolina Workers' Compensation Commission for the sole purpose of enforcing her entitlement to appropriate disability compensation and medical benefits for this aggravated preexisting psychological condition.

Respectfully submitted,

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