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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2022-000655
WCC File No. 0100434

Emitt R. Gunnells, EmployeeAppellant,

v.

Galey & Lord Industries, Employer and
Arrowpoint Capital Corporation, Carrier Respondents,

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. Did the South Carolina Workers' Compensation Commission commit legal error in finding Respondents are legally entitled to terminate Appellant's receipt of indemnity benefits on or about December 31, 2023, in order to recover payment for overpayment of temporary total disability and permanent disability indemnity compensation benefits?

2. Did the South Carolina Workers' Compensation Commission err in following legal precedent and adhering to the holding of the South Carolina Supreme Court in the case of *Glover by Cauthen v. Suitt Const. Co.*, 318 S.C. 465, 458 S.E.2d 535 (1995)?

3. Did the South Carolina Workers' Compensation Commission err in finding as a fact and concluding as a matter of law that Appellant's arguments that Respondents cannot cease payment of indemnity benefits are barred by judicial and equitable estoppel?

STATEMENT OF THE CASE

Emitt Russell Gunnells, Claimant/Appellant, (hereinafter "Appellant") was employed with Galey & Lord Industries, Employer/Respondent, when he suffered a compensable permanent brain injury/damage on January 14, 2001. (R. pp. 3-4; 20-21).

Appellant was in the process of threading a cloth machine when a weighted compensation bar struck his head. (R. p.6). Appellant suffered permanent physical brain damage. (R. p. 16). Appellant also suffered compensable injuries to his cervical spine and shoulders. (R. pp. 16-20).

Prior to the accident, Appellant had suffered with post-traumatic stress disorder as a result of his military service. (R. p.7). The Commission determined Appellant's post-traumatic stress disorder was aggravated by the work-related accident. (R. pp. 16-17).

By Order dated January 7, 2003, former Commissioner Holly Saleeby Atkins adjudicated Appellant permanent and totally disabled due to permanent physical brain damage. (R. pp. 1-29). Appellant was awarded lifetime indemnity and medical benefits pursuant to Sections 42-9-10(C) and 42-15-60 of the South Carolina Code of Laws. (R. p. 28).

The un-appealed Order of Commissioner Atkins reflect the parties stipulated to an average weekly wage of \$765.97 and a corresponding compensation rate of \$510.65. Pursuant to the Order, Appellant was ordered to be paid a compensation rate of \$510.65 per week for life. (R. p. 28).

Subsequent to Appellant being adjudicated permanently and totally disabled and awarded lifetime indemnity and medical benefits, Stephen J. Wukela, Esquire, attorney for Appellant, filed a Form 61 and a Motion to approve a commuted lump sum payment of attorney's fees and costs. (R. pp. 72-78). In the Motion dated August 13, 2003, Appellant and his attorney asserted the following:

1. Appellant was born on July 17, 1956.
2. Pursuant to the life expectancy tables contained in Section 19-1-150, Appellant's life expectancy was 28.76 years or 1,495.52 weeks as of August 13, 2003.
3. Appellant agreed the attorney fee contract entitled his attorney to a one-third contingency fee.
4. Utilizing the established compensation rate of \$510.65, the total calculated award as of August 13, 2003 was \$763,687.29.
5. The South Carolina Workers' Compensation Commission Claims Examiner calculated the attorney's fee award as totaling \$202,231.41.

6. By Order dated September 23, 2003, the Commission approved the Form 61 Attorney Fee Petition and Motion for the Payment of Attorney's Fees and promulgated an Order formally approving the requested attorney's fees. (R. pp. 30-41). The attorney fee payment was deducted from Appellant's lump sum disability award of \$763,687.29, by shortening the period in which disability payments are owed over Appellant's lifetime pursuant to Appellant's request. (R. p. 41, Ruling of Law No. 8).

7. The Order approving the requested attorney's fees specifically states in Ruling of Law No. 8 that:

"Pursuant to §42-15-90; R. 67-1207(B)(2), and *Glover by Cauthen v. Suitt Const. Co.*, 458 S.E.2d 535, 318 S.C. 465 (S.C. 1995) (sic), the amount of each temporary (sic) total payment the Appellant receives shall not be interrupted and attorney's fee shall be deducted from the end of the award."

Later, through a clerical error and inadvertence, Appellant began receiving weekly permanent partial disability compensation benefits in the amount of \$537.77. As a result, Galey & Lord and Arrowpoint Capital Corporation, Defendants/Respondents overpaid Appellant \$22,619.16 in permanent indemnity or disability benefits.

Upon discovery of the error, August 3, 2020, Respondents began paying Appellant the correct compensation rate of \$510.65, pursuant to the Order and the law of the case. (R. pp. 43, 45 & 49).

Subsequently, Arrowpoint Capital Corporation (Respondent) requested the Commission order and award reimbursement of the overpayment by reducing Appellant's weekly benefits from an amount ranging from \$50.00 to \$127.66 per week until the overpayment of indemnity benefits in the amount of \$22,619.16, had been fully reimbursed or repaid. (R. p. 50).

In the alternative, Respondents requested the \$22,619.16 overpayment is deducted from the amount of benefits which are to be paid over Appellant's life expectancy in accordance with Section 19-1-150. (R. p. 46). This alternative approach permits Respondents to shorten and terminate Appellant's indemnity benefits from the designated permanent disability award as is set forth in the Commission's prior orders governing this case.

Two motion hearings were conducted in this matter. As a result, the Hearing Commissioner thoroughly reviewed the file, along with appellate court holdings and rulings regarding the issues raised.

By Order dated August 16, 2021, Commissioner Melody L. James determined that due to Respondents' inadvertent error, which led to Appellant being overpaid \$22,619.16 in indemnity benefits, Respondents are entitled to receive credit from the end of the disability award. (R. pp. 42-53).

Commissioner James also ruled Appellant's objection to obtaining a credit from the end of Appellant's lifetime award and only after Appellant's death was barred by judicial and equitable estoppel. *Quinn v. Sharon Corp.* 343 S.C. 411, 540 S.E.2d 474 (Ct. App. 2000).

Commissioner James found because Appellant had previously stipulated Respondents were entitled to a previous credit for the overpayment of temporary total disability compensation benefits in the initial January 7, 2003 award and could recover that credit by deducting the credit or overpayment from the end of Appellant's lifetime award, his objection to the very same method to which he had previously requested and consented was inconsistent and untenable. *Id.* (R. pp. 47-48 & 50).

In reliance upon the initial Order promulgated by Commissioner Atkins dated January 7, 2003, in which credit for overpayment was granted to Respondents by shortening the period of

expected payment of lifetime benefits (R. p. 28); the arguments made in support of the advanced lump sum payment of attorney's fees as set forth in a Motion dated August 13, 2003 (R. p. 76, Paragraph No. 7); and the South Carolina Supreme Court's ruling in the case of *Glover by Cauthen v. Suitt Const. Co.*, 318 S.C. 465, 458 S.E.2d 535 (1995), Commissioner James determined the credit of \$22,619.16, could be deducted along with the other credits referenced in the two un-appealed 2003 orders.

Specifically, the previous orders afford Respondents credit for overpayments of indemnity benefits and the advanced lump sum attorney fee payments at the end of Appellant's lifetime award by shortening the period of disability by which benefits are owed.

As such, Commissioner James ruled Respondents are entitled to begin taking credit for the advanced payment of attorney's fees and overpayment of indemnity benefits beginning on December 31, 2032, in accordance with the lifetime award as previously established by the Order of Commissioner Atkins dated January 7, 2003 and the award of payment of attorney's fees by Commission Order dated September 23, 2003.

Appellant filed a Form 30 dated August 23, 2021, appealing the Decision and Order of Commissioner James. On November 23, 2021, this matter was heard by the South Carolina Workers' Compensation Full Commission Appellant Panel [hereinafter "Appellant Panel"]. In a Decision and Order dated May 9, 2022, the Appellate Panel affirmed the Hearing Commissioner's Decision and Order. (R. pp. 54-70). From this Decision, Appellant appealed to this Honorable Tribunal.

STATEMENT OF THE FACTS

Emitt Russell Gunnells, Appellant, was employed with Galey & Lord Industries when he suffered a compensable accidental brain injury on January 14, 2001. (R. pp. 3-4; 20-21). The

South Carolina Workers' Compensation Commission determined Appellant had sustained permanent physical brain damage. (R. p. 16). The Commission further noted the accident had aggravated Appellant's pre-existing post-traumatic stress disorder. (R. pp. 16-17). Appellant's post-traumatic stress disorder resulted from Appellant's prior military service. (R. p. 7).

By Order dated January 7, 2003, former Commissioner Holly Saleeby Atkins adjudicated Appellant as permanently and totally disabled because of permanent physical brain damage. Hence, Appellant was awarded lifetime indemnity and medical benefits.

Commissioner Atkins ordered Galey & Lord Industries, the Employer, and Arrowpoint Capital Corporation, the workers' compensation insurance carrier [hereinafter "Respondent" or "Respondents"] to pay Appellant indemnity benefits in the amount of \$510.65 per week.

Subsequently, Appellant began receiving weekly permanent disability compensation or indemnity benefits in the amount of \$537.77. (R. p. 45). The increase in the indemnity benefits was because of an inadvertent computer error. Respondents later discovered it had overpaid Appellant \$22,619.16, in permanent disability or indemnity benefits. (R. pp. 43 & 45).

On August 3, 2020, Respondents began paying Appellant the correct compensation rate of \$510.65 as previously established by the Decision and Order of Commissioner Atkins.

On or about October 19, 2020, Respondents filed a Petition with the South Carolina Workers' Compensation Commission requesting reimbursement for the overpayment of disability benefits paid to Respondent. Respondents first sought to obtain reimbursement for the overpayment by reducing Appellants' weekly benefits from an amount ranging from \$50.00 to \$127.66 per week until the overpayment of indemnity benefits in the amount of \$22,619.16 had been repaid. (R. p. 80).

In the alternative, Respondents requested the overpayment of \$22,619.16 is factored into the overpayment of disability benefits previously paid and the indemnity payment advanced to Appellant as is reflected in Commissioner Atkins' Decision and Order and the Order approving payment for the advancement of attorney's fees and costs. Respondents argued this alternative proposal permits it to shorten the period of Appellant's receipt of indemnity benefits pursuant to Section 19-1-150 of the South Carolina Code of Laws in order to recover credit for overpayment and advanced indemnity payments. *S.C. Code of Laws Ann. § 19-1-150 (2022)*.

The un-appealed findings reflect Appellant's lifetime indemnity award as of August 13, 2003 total \$763,687.29. (R. p. 71). Appellant requested an advance from his indemnity award in the amount of \$202,231.41, in order to pay attorney's fees and costs. (R. pp. 72-78). By Order dated September 23, 2003, the Commission approved the attorney's fees and costs and ordered Respondents to advance payment to Appellant's attorneys in accordance with the Supreme Court's decision in the case of *Glover by Cauthen v. Suitt Constr. Co., supra*. (R. p. 41).

In addition to the attorney's fee award, there is no dispute Appellant had been overpaid temporary disability compensation benefits that were not due after his initial injury on January 14, 2001 in the amount of \$4,299.29. (R. p. 28). Thus, as a result of the credit for overpayment of temporary total disability compensation benefits; credit for overpayment of permanent disability or indemnity benefits in the amount of \$22,619.16; and payment for the advancement of attorney's fees and costs in the amount of \$202,231.41, a total of \$229,149.86 was subject to reimbursement by Appellant.

Based upon Appellant's life expectancy of 75.76 years, Respondents requested 8.629 years or 448.74 weeks is shortened and terminated until the credit and advancements could be recovered. (R. pp. 35 & 76).

Appellant is to reach 67.5 years of age on December 31, 2023. The South Carolina Workers' Compensation Commission found and determined pursuant to the Supreme Court's holding in the case of *Glover by Cauthen v. Suitt Const. Co.*, *supra* – the employer/carrier “can cease payment of benefits until the debt is fully satisfied; and if Appellant is living, Respondents are to resume payment of permanent disability benefits until his death.”

STANDARD OF REVIEW

Judicial review of a Workers' Compensation Commission decision is governed by South Carolina Code Annotated §1-23-380 of the Administrative Procedures Act (hereinafter “the APA”); *Lark v. Bi-Lo*, 276 S.C. 130, 276 S.E.2d 304 (1981). Under the APA, a decision of the South Carolina Workers' Compensation Commission should be reversed, modified or remanded if unsupported by substantial evidence, or if substantial rights of the appellant have been affected by an error of law, or if the decision is arbitrary or capricious or characterized by an abuse or unwarranted exercise of discretion. *S.C. Code Ann. §1-23-380(A)(5) (2022)*.

Review of the Commission's factual findings is governed by the substantial evidence standard. “A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are ‘clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.’” *Bass v. Isochem*, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005), *quoting from* *Bursey v. South Carolina Dep't of Health & Env'tl. Control*, 360 S.C. 135, 600 S.E.2d 80 (Ct. App. 2004); *see also* *Tiller v. Nat'l Health Care Ctr.*, 334 S.C. 333, 513 S.E.2d 843 (1999); *see also* *S.C. Code Ann. §1-23-380(A)(5)(e)*. “Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its

action.” Frame v. Resort Services Inc., 357 S.C. 520, 527–28, 593 S.E.2d 491, 495 (Ct. App. 2004); Bass v. Isochem, 365 S.C. at 468, 617 S.E.2d at 376. In particular, workers’ compensation awards “must not be based on surmise, conjecture or speculation.” Tiller, 334 S.C. at 339, 513 S.E.2d at 845.

In addition, a reviewing court should reverse, remand or modify a decision of the Workers’ Compensation Commission if it is affected by an error of law. Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002). Case law unequivocally establishes that statutory interpretation is a question of law, and the appellate court “is free to decide matters of law with no particular deference to the fact finder.” King v. Int’l Knife & Saw – Florence, 395 S.C. 437, 442, 718 S.E.2d 227, 229 (Ct. App. 2011); S.C. Uninsured Employers’ Fund v. House, 360 S.C. 468, 602 S.E.2d 81 (Ct. App. 2004). Likewise, the determination of legislative intent in a statute is a matter of law. Wehle v. S.C. Retirement Syst., 363 S.E. 394, 611 S.E.2d 240 (2005); Liberty Mutual Insur. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 611 S.E.2d 297 (2005).

In summary, an appellate court must review the Commission’s interpretation of a statute as a question of law and must review the Commission’s application of the facts to the statute as a question of fact under the substantial evidence standard of review. See King, 395 S.C. at 442, 718 S.E.2d at 229.

LEGAL ARGUMENTS

- I. THE SOUTH CAROLINA COMMISSION CORRECTLY RULED AS A MATTER OF LAW THAT APPELLANT’S LIFETIME INDEMNITY AWARD ENDS ON OR ABOUT DECEMBER 31, 2032, IN ORDER FOR RESPONDENTS TO RECOVER CREDIT FOR THE OVERPAYMENT AND ADVANCEMENT OF INDEMNITY BENEFITS PAID TO APPELLANT.**

Respondents first argued that its request for credit for the inadvertent overpayment of weekly disability benefits is governed by Regulation 67-1603. Specifically, Respondents argued Regulation 67-1603 allows the Commission to reduce Appellant's future weekly benefits by no more than 25% of the current weekly benefits (\$510.65) in order to recover the overpayment. *See, Regulation 67-1603(C)(3)(b)(i) (2021).*

Respondents asserted that a weekly reduction of 25% or \$127.66 would be less of an onerous burden on Appellant rather than shortening the period of compensation in order to recover the overpayment. As a matter of fact, Respondents asserted it was willing to accept a weekly reduction of \$50.00 in order to recover the overpayment.

Appellant objected to the applicability of Regulation 67-1603. Appellant argued Regulation 67-1603 is only applicable when there is an error in calculating the Form 20.

Respondents expressed concerns about the potential financial impact of shortening the period during which compensation must be paid pursuant to Section 42-9-210. Respondents, nevertheless, argued that pursuant to the law of the case as established in the Commission's previous orders and by virtue of the position taken by Appellant's counsel with respect to payment of the award of attorney's fees, the recovery of the credit for the overpayment could be accomplished by shortening the period for which Appellant is entitled to benefits.

There is no dispute Appellant had previously requested and agreed to shorten the period in which he is to receive indemnity benefits with respect to payment of credit for the overpayment of temporary total. The amount of that credit is \$4,299.29.

In the same manner, Appellant also agreed to shorten the period of his designated disability in order to pay attorney fees and costs. The \$4,299.29 credit, coupled with the

advancement of attorney's fees and costs in the amount of \$202,231.41 and the recent overpayment in the amount of \$22,619.16 equates to 448.74 weeks of credit.

In Appellant's Motion for approval of attorney's fees, he stipulated his life expectancy pursuant to Section 19-1-150 was 28.76 years or 1,495.52 weeks on August 13, 2003. According to Section 19-1-150, Appellant is entitled to payment of benefits to age 75.76 years. As of March 29, 2021, Appellant is 64 years of age. Hence, Defendants are statutorily obligated to pay benefits through 2032 until he reaches 75.76 years of age. Thus, the credit must be taken before the end of the award, which is 2032, in order to be fully repaid. Accordingly, Respondents argue in order to recoup the 448.74 weeks of benefits owed, the deduction or termination of benefits must begin once Appellant reaches 67.5 years of age or specifically on December 31, 2023.

Despite Appellant's previous legal position on repayment, Appellant objected to Respondents' request that the recovery for the overpayment should be made by shortening the period pursuant to Section 42-9-210. Appellant argues because lifetime benefits are payable for life, no deduction or credit can be taken for the advanced payment of attorney's fees, overpayment of temporary total or overpayment for permanent and total disability benefits.

Appellant argues the Commission is not empowered to convert the Appellant's lifetime award to an award for a fixed period of time from which a deduction can be taken. Appellant argues the order requires he receive benefits for his "lifetime," i.e. his natural life, not his "statutory life expectancy" pursuant to S.C. Code §19-1-150.

Appellant relies Court of Appeals decision in the case of *Floyd v. C.B. Askins and Co.*, 382 S.C. 84 (Ct. App. 2009) in support of this position. However, this argument is disingenuous.

In *Floyd*, the injured worker received the lifetime award pursuant to section 42-9-10 for physical brain damage. *Id.* However, Mr. Floyd died from an unrelated cause before reaching

his statutory life expectancy. Mr. Floyd's beneficiaries sought an award of the balance of his benefits through his statutory life expectancy. The Court of Appeals disagreed finding the award under S.C. Code §42-9-10 was for Mr. Floyd's natural life not his statutory life expectancy in terms of their entitlement to an award. Therefore, Mr. Floyd's *un-accrued benefits abated* upon his death and could not be paid to his beneficiaries.

There is no dispute a lifetime indemnity award would abate upon Appellant's death. However, the issue of repayment of credit for credit and advanced payment from a lifetime award was not addressed in *Floyd. Id.* Our courts have ruled that credit for the advancement of attorney fees and for the overpayment of indemnity benefits can be predicated on an injured worker's statutory life expectancy; and that such can then be shortened pursuant to section 42-9-210 to recover the overpayments and advance payments. *S.C. Code §42-9-210 (2022)*. See also, *Glover by Cauthen v. Suitt Const. Co., supra*.

On page 5 of Commissioner Atkins' order dated January 7, 2003, Appellant stipulated credit could be taken by shortening the period in which compensation must be paid pursuant to Section 42-9-210. (R. p. 5). Moreover, in the un-appealed Order and Finding of Fact No. 9 as is reflected on pages 25 and 26 of the Order, Commissioner Atkins found Respondents were entitled to credit for an overpayment of temporary total disability compensation benefits "by shortening the period during which compensation must be paid and not by reducing the amount of the weekly benefit." (R. pp. 25-26). This finding was further reiterated in Ruling of Law No. 6 on page 27 of the Order. (R. p. 27).

Accordingly, Respondents argue Appellant is equitably and judicially estopped from arguing that the period in which compensation payments must be paid cannot be shortened based upon the un-appealed Order of Commissioner Atkins. *Quinn v. Sharon Corp., supra*.

Furthermore, in the September 23, 2003 Order of the Commission approving the attorney's fees, in Ruling of Law No. 8, the Commission determined as a matter of law the attorney's fees paid "shall be deducted from the end of the award." Appellant requested and consented to this aspect of the order or award. (R. p. 41).

The permanent lifetime indemnity award was calculated by Appellant's attorneys based upon the life expectancy tables and Appellant living until approximately 75.76 years of age. This Commission calculation constitutes the lifetime indemnity award of \$763,687.29; and the award is the basis of the award of attorney's fees and costs. Therefore, Respondents argue the additional credit stemming from the overpayment of permanent disability benefits can be taken from the award by shortening the period in which disability benefits are due.

II. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION CORRECTLY FOUND AS A FACT AND CONCLUDED AS A MATTER OF LAW THAT LEGAL PRECEDENCE ESTABLISHES APPELLANT'S LIFETIME INDEMNITY BENEFITS SHOULD BE SHORTENED IN ORDER FOR RESPONDENTS TO OBTAIN CREDIT FOR OVERPAYMENT AND ADVANCEMENT OF INDEMNITY BENEFITS TO APPELLANT.

A. Legal Precedence Supports the Hearing Commissioner's Findings of Fact and Conclusions of Law.

The case of *Glover by Cauthen v. Suitt Const. Co.*, 318 S.C. 465, 458 S.E.2d 535 (1995) held the South Carolina Workers' Compensation Commission could approve a lump sum award from a lifetime benefits case, which is to be deducted from the end of the Appellant's award for payment of attorney fees. The Court ruled "the mortality tables provide an adequate basis upon which to determine the present day value" of a lifetime indemnity award. *Id.* at 467 n. 3, 458 S.E.2d at 537 n.3.

Appellant's award for lifetime benefits is properly predicated upon his life expectancy pursuant to Section 19-1-150 (life expectancy tables). In the Motion for approval of attorney's fees dated August 13, 2003, the life expectancy tables reflected Appellant's life expectancy was 28.76 years. Based upon Appellant's date of birth of July 17, 1956, Appellant was 47 years of age in 2003. Thus, the lifetime award is based upon Appellant living until 75.76 years. The Commission calculated the lifetime indemnity award as totaling \$763,687.29, predicated upon payment of 1,495.52 weeks of compensation benefits. (R. pp. 71-72).

Because the award with respect to calculating a lump sum award is predicated upon Appellant surviving until age 75.76, credit must be taken from the end of the award. The lifetime indemnity award ends on or about December 31, 2032, according to the mortality or life expectancy tables.

B. Appellant's Reliance Upon the Court of Appeals Decision in the Case of *Floyd v. C.B. Askins & Co.* Is Misplaced.

The Court in *Floyd v. C.B. Askins & Co.*, 382 S.C. 84 (Ct. App. 2009) did not involve the issue for payment of credit for the overpayment of benefits, but whether the beneficiaries of the deceased employee could seek an award for the balance of un-accrued benefits to which the deceased employee was entitled only if he had lived by virtue of a lifetime compensation award.

The Court ruled the deceased employee's beneficiaries were not entitled to an award based upon statutory life expectancy because the un-accrued benefits abated upon the deceased employee's death.

CONCLUSION

In essence, Appellant argues the Commission should simply ignore the Supreme Court's decision in *Glover*. Analyzing Appellant's argument to its logical conclusion, Appellant asserts

Respondents should have appealed Commission Atkins' decision ordering the advance payment of a lump sum award for attorney fees, despite the fact Respondents had no standing to do such. Appellants' argument lacks logic and discernable reasoning.

Thus, based upon the foregoing arguments, it is respectfully requested the South Carolina Workers' Compensation Commission's Decision and Order is affirmed.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

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



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