THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Alex Kinlaw, Jr.
Circuit Court Judge

Case No. 2015-CP-10-02191
Appellate Case Number 2019-001403

Karrie Gurwood & Howard Gurwood ..... Appellants

v.

GCA Services Group, Inc. & GCA Services Group of North Carolina, Inc. ..... Respondents

RESPONDENTS' PETITION FOR A WRIT OF CERTIORARI

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Appellants

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CERTIFICATION OF COUNSEL

The undersigned hereby certifies that a petition for rehearing was made and finally ruled on by the Court of Appeals on March 17, 2023.

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err in holding that the facts at trial supported a submission of gross neglect on the part of GCA to the jury?

II. Did the Court of Appeals err in misapplying the directed verdict standard in its review of the trial court decision not to submit punitive damages to the jury?

III. Did the Court of Appeals err by failing to consider the Trial Court's statutory gate-keeping role, and then applying an abuse of discretion standard The Court of Appeals, reducing the analysis for punitive damages to that of simple negligence.

IV. Did the Court of Appeals err in not recognizing that the jury's verdict did not support punitive damages.

V. Did the Court of Appeals err in not considering judicial economy when remanding for a new trial on all the issues.

STATEMENT OF THE CASE

This appeal arises from a jury verdict in a suit brought by Karrie and Howard Gurwood (the "Appellants") for negligence and loss of consortium (R. pp. 27-36). Karrie Gurwood alleged that she sustained injuries, including Complex Regional Pain Syndrome, "CRPS", as a result of a slip and fall that occurred at Liberty Hill Academy, a school where she was employed, after the floors had been waxed. The Respondents, collectively "GCA," is a large janitorial services

company contracted to provide those services at Liberty Hill Academy. GCA's employee, Ms. Bonnie Every, waxed the floors prior to Mrs. Garwood's fall.

The case was tried beginning on April 22, 2019, and was given to the jury for consideration on April 26, 2019 (R. pp. 44-1125). The testimony was extensive, and a number of issues were disputed, including whether Ms. Every posted notices of the waxed floor, whether Mrs. Gurwood knew the floors were to be waxed before she arrived, whether she saw notices when she arrived, and the extent of Mrs. Gurwood's claimed damages. During deliberations, the jury submitted three questions to the Court asking for the charge on negligence; asking whether Karrie Gurwood had filed a workers' compensation claim; and asking whether Karrie Gurwood would receive any recovery if she were found more than fifty percent (50%) negligent for her own injuries. (R. pp. 1102-1103). The Trial Court answered the questions by recharging the jury with the instruction for negligence, advising that whether a workers' compensation claim had been filed was not material to their deliberations, and recharging them with the instruction for comparative negligence, which indicated that any recovery would be barred if Karrie Gurwood was found to be more than 50% negligent. (R. pp. 1107-1117.)

After further deliberations, the jury returned a verdict and found GCA negligent and awarded Karrie Gurwood total damages of $170,629.10, which represented her past medical bills (R. pp. 22-26). On the verdict form (R. pp. 19-20), the jury expressly declined to award Karrie Gurwood her damages for lost wages and benefits, declined to find in favor of Howard Gurwood's claims for lost consortium, and found that Karrie Gurwood was 50% at fault.

After the verdict was read, counsel for GCA asked the trial court to question the jury as to whether the jury had reduced their award to Karrie Gurwood by the percentage of Karrie Gurwood's fault (R. pp. 1119-1120). Without objection from Appellants' counsel, the Trial

Court made the inquiry and the foreperson stated that the jury had not reduced the total damages awarded by 50%, explaining that the jury expected the Trial Court to reduce their award by 50% (R. pp. 1120-1121). The trial court advised that a 50% reduction in their award would result in a total award of $85,314.55, which the foreperson advised was the total sum the jury intended to award Karrie Gurwood after taking into account her degree of fault. Judgment was then entered in the amount of $85,314.55 (R. pp. 19).

On May 6, 2019, Appellants filed post-trial motions which were briefed by both Appellants and GCA. On or around June 5, 2019, the trial court denied the motions and requested that counsel for GCA prepare the order. On or around June 24, 2019, that order was circulated for review. On July 10, 2019, the Appellants notified the trial court that they would not submit a proposed order and on July 25, 2019, the trial court entered its order denying Appellants' post-trial motions. Appellants filed a notice of appeal on August 15, 2019 (R. pp. 1-18). On December 21, 2022, the Court of Appeals reversed and remanded the matter. *Karrie Gurwood & Howard Gurwood v. GCA Services Group, Inc.*, Appellate Case No. 2019-001403 (Ct. App. December 21, 2022). The Court of Appeals reversed the trial court on the sole basis that the trial court had elected not to submit the issue of punitive damages to the jury. It then directed that the entire matter be remanded for a new trial. GCA then filed a motion to reconsider on January 17, 2023, which was denied on March 17, 2023 (Order March 17, 2023).

STANDARD OF REVIEW

"When reviewing an action at law, on appeal of a case tried without a jury, the appellate court's jurisdiction is limited to correction of errors at law, and the appellate court will not disturb the special referee's findings of fact as long as they are reasonably supported by the

evidence." Ritter & Assocs., Inc. v. Buchanan Volkswagen, Inc., 405 S.C. 643, 649, 748 S.E.2d 801, 804 (Ct. App. 2013) (internal quotation marks omitted).

LEGAL ARGUMENT

I. The Court of Appeals Erroneously Concluded That the Facts at Trial Supported a Finding of Gross Neglect on the Part of GCA.

The Court of Appeals reversed the trial court's refusal to submit the issue of punitive damages to the jury, erroneously finding that the facts at trial, taken in the light most favorable to Gurwood, could have supported a finding of punitive damages. In support, the Court of Appeals cited to certain facts from the trial, but, as it did in *Ralph v. McLaughlin, 432 S.C. 640, 856 S.E.2d 154 (2021)*, the Court of Appeals erroneously concluded that the facts at trial could support a finding for punitive damages. To the contrary, as in *Ralph*, a review of the record leads to the opposite conclusion; that the facts at trial, as a matter of law, did not support submission of the issue of punitive damages to the jury.

In *Ralph*, the trial court granted a directed verdict motion made by the defense as it pertained to punitive damages. In *Ralph*, claims were brought against the McLaughlin's by the Ralphs for wrongfully removing a drainage pipe. The trial court directed verdict on the Ralph's punitive damages claim, finding that the McLaughlin's had relied on an easement in question in that case, and that their actions to remove the drainage pipe did not "rise to the level of punitive damages." *Id.*, 432 S.C. 640, 647, 856 S.E.2d 154,157 (2021). The trial judge's ruling was overturned at the Court of Appeals, which held:

> In ruling that a directed verdict was justified, the circuit court indicated it did not ****229** think the McLaughlin's were acting recklessly or intentionally because it found the McLaughlin's reasonably believed they had the right to remove the pipe. The court stressed that it did not "think [the McLaughlin's were] acting malevolently, *certainly not to the level of clear and convincing* ...." (emphasis added). In so ruling, we find the circuit court invaded the jury's province by improperly weighing the evidence.

The Supreme Court reviewed the case and found that the Court of Appeals applied the correct standard but that they had misconstrued the facts, just as the Court of Appeals has done in the case at hand here. In reversing the Court of Appeals, the Supreme Court stated, "it is undisputed that over the course of six years, [the McLaughlin's] took a series of good-faith steps in dealing with SIPOA and their neighbors in an attempt to resolve the drainage pipe dispute." *Id.*, 432 S.C. 640,651, S.E.2d 154, 159 (2021). The court went on to say, "the suggestion that removing the drainage pipe under these circumstances established clear and convincing evidence of petitioners' malicious intent to invade Respondents' right was not merely speculation, but absurd." Id. 432 S.C. 640, 651, S.E.2d 154, 160 (2021).

The Court of Appeals error in construing the evidence in this case is strikingly similar to how they misconstrued the evidence in *Ralph*. First, the Court of Appeals recognized that there was conflicting testimony concerning whether or not wet wax signs were put up by Mrs. Every, whether they were seen by Mrs. Gurwood and whether or not Mrs. Gurwood heard an announcement made by Mrs. Jamme (the school principal) concerning the waxing that was to take place the next day (a weekend). Then, the Court of Appeals took those disputed facts, in the light most favorable to Mrs. Gurwood, noting that Mrs. Gurwood testified at trial that she did not see warning signs placed by Mrs. Every, or hear announcements made by the school the day before by Mrs. Jamme. The Court of Appeals then erroneously inferred that those facts could support a finding of punitive damages. Even if the facts are true, none of those facts support any inference of reckless conduct on the part of GCA. Instead, those facts merely relate to whether or not Mrs. Gurwood was on notice and was herself negligent. Mrs. Gurwood's lack of awareness does not support a finding of reckless conduct by GCA.

The Court of Appeals then cited to the fact that Mrs. Every, (1) admitted waxed floors were a safety hazard and (2) that signage was important, as further evidence of reckless conduct on the part of GCA. However, while Mrs. Every testified that waxed floors could be dangerous, she also testified that she placed signs warning of the waxed floors. Whether the signs were placed or not, Mrs. Every testified that she was aware of the danger of waxed floors and placed signage to warn of that danger. No recklessness or conscious disregard of the safety of Mrs. Gurwood can be inferred from that. (Had Mrs. Every testified she knew of the danger and, for some reason, intentionally ignored it, that may have given rise to an inference that would support punitive damages. However, that was *not* the testimony at trial.)

As it did in *Ralph* case, the Court of Appeals cited the standard for an award of punitive damages then simply misconstrued the evidence in the case as providing support for a punitive damages award. In this case, just as noted by the Supreme Court in *Ralph*, a review of the facts makes it crystal clear, just as it was to the trial court, that this slip and fall case was not a punitive damages case because there was no evidence in the record that would have supported a finding of reckless conduct on the part of Mrs. Every or GCA, which the jury's verdict also clearly illustrated.

II. The Court of Appeals Erred in Applying the Directed Verdict Standard in Its Review of the Trial Court's Decision Not to Submit the Issue of Punitive Damages to the Jury Without Applying the Clear and Convincing Standard.

In its decision to reverse the trial court's decision not to submit the issue of punitive damages, the Court of Appeals erroneously applied a simple negligence standard of review to the issue of punitive damages, which is contrary to well-settled case law and statutory law.

In its review, the Court of Appeals recognized that to recover an award of punitive damages, the Appellants were required to prove that GCA was grossly negligent, by *clear and convincing evidence*, which has been defined as:

> [That]degree of proof which will produce in the [fact finder] a firm belief as to the allegations sought to be established. Such measure of proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal.

Satcher v. Satcher, 351 S.C. 477, 483, 570 S.E.2d 535, 538 (Ct. App. 2002).

However, in doing its review, the Court of Appeals considered the evidence of GCA's negligence at trial but did not weigh that evidence by the higher standard required for the issue of punitive damages. Instead, the Court of Appeals erroneously applied a simple negligence standard to the issue of punitive damages and demanded submission of the punitive damages to the jury based on that lower standard.

The submission of punitive damages to a jury, by law, requires greater scrutiny than simple negligence. South Carolina has adopted a statutory framework for punitive damages, §15-32-520, which calls for a higher burden of proof, clear and convincing evidence, in order to entitle a party to an award of punitive damages. S.C. Code Ann. § 15-32-520(D) (2011). It also mandates a series of express factors a jury must consider when applying that burden of proof §15-32-520(E). Among others, those factors include:

> *(3) the extent to which the plaintiff's own conduct contributed to the harm;*
>
> *(4) the duration of the conduct, the defendant's awareness, and any concealment by the defendant;*
>
> *(5) the existence of similar past conduct;*
>
> *(6) the profitability of the conduct to the defendant;*
>
> *(8) the likelihood the award will deter the defendant or others from like conduct*

In addition, §15-32-520(F), gives the trial court a gate-keeping role with respect to the issue of punitive damages. That section provides:

> *If punitive damages are awarded, the trial court shall review the jury's decision, considering all relevant evidence, including the factors identified in subsection (E), to ensure that the award is not excessive or the result of passion or prejudice.*

By only applying the standard of review applicable to a simple negligence claim to a decision not to submit the issue of punitive damages to the jury, the Court of Appeals treats the issue of punitive damages no differently than simple negligence.

When conducting the review of a case with a heightened burden of proof, a mere scintilla of evidence is not enough to withstand review. This Court has even stated "[I]n cases requiring a heightened burden of proof … the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment." *Swiger v. Smith*, 426 S.C. 408, 415, 827 S.E.2d 200, 203 (2019) (citing *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330-31, 673 S.E.2d 801, 803 (2009)). In those types of cases, like the matter at hand, when making a review of the evidence, it is paramount that the appellate court determine if a reasonable inference can be made that the burden of proof was met, here clear and convincing evidence of willful, wanton, or reckless conduct on the part of GCA, not just that an inference can be made of some negligence. See, *Ralph v. McLaughlin*, 432 S.C. 640, 856 S.E.2d 154 (2021) (Holding that the evidence at trial did not support a finding of gross negligence by clear and convincing evidence.). It is clear from the case law that this Court must apply the clear and convincing standard of proof when considering the direct verdict's reasonable inference.

Recognizing the clear and convincing standard, the Court of Appeals found that, "it is for the jury to weigh the evidence and decide whether the Gurwoods met their burden of proof to present clear and convincing evidence of GCA's recklessness." (Unpublished Opinion 2022-UP-462 (filed December 21, 2022). However, the Court Appeals failed to consider that higher

standard when reviewing the evidence in the case and erroneously applied a preponderance of the evidence standard. Again, *Ralph* made it clear that the appellate court was to consider the evidence in light of the higher standard, which the Court of Appeals failed to do. The *Ralph* case did exactly that and opined "The suggestion that removing the drainage pipe under these circumstances established clear and convincing evidence of Petitioners' malicious intent to invade Respondents' rights was not merely speculation, but absurd." *Ralph v. McLaughlin*, 432 S.C. 640 (2021).

There was no evidence in the record at trial which would have supported a finding of recklessness by Mrs. Every or GCA. As in the *Ralph* case, the Court of Appeals misconstrued the record and failed to take into consideration the higher burden of proof applicable to punitive damages, which the trial court correctly did.

III. The Court of Appeals Applied the Incorrect Standard of Review of the Trial Court's Statutory Gate-Keeping Function.

In reversing the trial court, the Court of Appeals failed to recognize or properly review the trial court's statutory gate-keeping function relative to the issue of punitive damages, which should have been given deference and an abuse of discretion standard of review.

At issue was the trial court's gate-keeping function articulated in S.C. Code Annotated §15-32-520 (F), set-forth above. That gate-keeping function is not permissive, and instead mandates that a trial court "*shall*" review a jury's punitive damages award, to "*ensure*" it was not the result of "passion or prejudice." In doing so, a trial court is obligated to do the same rigorous analysis of the evidence relative to a punitive damages award that the appellate courts have done. It must consider the enhanced clear and convincing burden of proof that applies, and also consider the evidence relative to the (E) factors a jury is required to consider.

If a court exercises that function and rejects or reduces a punitive damages award, what standard of review applies? If only a simple negligence standard is applied, which is what the Court of Appeals did, then the trial court's gate-keeping function would be effectively eliminated from the statute.

To determine the standard of review that applies, one must see what review applies to similar gate-keeping functions exercised by the trial courts. A similar gate-keeping function is required when a court considers the admissibility of expert testimony under Rule 403, *SCRE*. The gate-keeping function has been recognized in numerous cases discussing *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and *State v. Council*. (*See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786 (1993); *See State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999)). In those cases, when reviewing the trial court's admission or exclusion of expert testimony, the appellate courts have adopted a deferential standard for an abuse of discretion. See, *State v. Phillips*, 430 S.C. 319, 334, 844 S.E.2d 651, 658 (2020) ("[w]e have repeatedly discussed the trial court's "gatekeeping" role regarding the admission of expert testimony…"); and *State v. Dickerson*, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011) ("[w]e review a trial court's decision to admit or exclude evidence under a deferential standard for an abuse of discretion.") It is clear that appellate courts are aware that when a gate-keeping function is in play, deference must be given. The review should be for the abuse of discretion, not simply a minor degree of difference in opinion.

In the event a review of that discretion is required, appellate courts are to undertake that review *de novo* while not completely ignoring the position taken by the trial court, but rather looking at the entirety of the facts. This Court even mentioned they understand that review of a gate-keeping function may appear as "second-guessing" the trial court, but they are actually

conducting the analysis for the first time. (*See State v. Phillips*, 430 S.C. 319, 341, 844 S.E.2d 651, 662 (2020)).

Another area where a trial court is given a gate-keeping function involves the assessment of prospective jurors. In reviewing those decisions, appellate courts apply an abuse of discretion standard and will not reverse a trial court unless it is found to be wholly unsupported by the evidence. (*See State v. Council*, 335 S.C. 1, 515S.E.2d 508 (1999) (citing *State v. Davis*, 309 S.C. 326, 422 S.E.2d 133 (1992)).

The gate-keeping function of the trial court set forth in §15-32-520(F) must also be reviewed under an abuse of discretion standard. To hold otherwise, is to ignore the statutory language.

Turning to the facts of this case, the Trial Judge, in his role as gate-keeper, elected not to submit the issue of punitive damages to the jury in this matter. In doing so, he considered the heightened burden of proof and the evidence from four full days of trial and concluded that the evidence submitted would not legally support any award of punitive damages. With respect to the issue of GCA's willful, wanton and reckless conduct, there simply was none, and certainly none that would satisfy the "clear and convincing" burden of proof.

In reviewing the trial court's ruling on punitive damages on an abuse of discretion standard, the Court of Appeals was also required to consider the (E) factors. The Trial Judge was aware that there was *no evidence* put forth in support of any of the (E) factors in the trial of this case, except factor "3", Mrs. Gurwood's own culpability for the injury, which the jury determined was 50% the fault of Mrs. Gurwood, herself.

If an award for punitive damages had been issued, part of the trial court's gate-keeping function would also have been to consider the reprehensibility of GCA's conduct with regard to

that award, just as appellate courts have in a number of South Carolina decisions. (*See James v. Horace Mann Ins. Co.*, 371 S.C. 187, 638 S.E.2d 667 (2006); *Atkinson v. Orkin Exterminating Co.*, 361 S.C. 156, 604 S.E.2d 385 (2004); *Frazier v. Badger*, 361 S.C. 94,603 S.E.2d 587 (2004); *Hollis v. Stonington Dev. LLC.*, 394 S.C. 383, 714 S.E.2d 904 (Ct. App. 2011); *Hale v. Finn*, 388 S.C. 79, 694 S.E.2d 51 (Ct. App. 2010); *O'Shields v. Columbia Auto.*, LLC, 435 S.C. 319, 867 S.E.2d 446 (Ct. App. 2021)). Again, there was no evidence of reprehensible conduct by GCA or Mrs. Every, which the trial court knew, having listened to all of the witnesses and seen all of the evidence. In the absence of that, any award of punitive damages would have been reversed.

The fact that the trial court exercised its gate-keeping function before submitting the issue to the jury, rather than after, is immaterial. If anything, it should be commended for shortening the trial and not confusing the jury with the law of a heightened burden of proof, the statutory factors and other aspects of a punitive damages issue that he knew was not supportable.

By failing to consider the trial court's statutory gate-keeping role, and then failing to apply an abuse of discretion standard, the Court of Appeals has made the issue of punitive damages no different than simple negligence and has removed the gate-keeping role of the Trial Court from §15-32-520(F).

IV. The Jury's Verdict Does Not Support an Award of Punitive Damages.

The Court of Appeals has ordered a new trial on all issues, even those which have not been disturbed on appeal. This jury found GCA and Mrs. Gurwood herself equally at fault for her injuries. The same jury emphatically limited Mrs. Gurwood's damages to her past medical bills, explicitly rejecting her claim for future medicals (rejecting her claim of having CRPS), and even rejecting her claims for pain and suffering. That verdict explicitly recognized, as did the

Trial Judge, that this was a simple negligence case, in which Mrs. Gurwood failed to prove entitlement to the majority of the damages she claimed. It is inconceivable that the same jury who limited her recovery to past medicals, which they reduced by 50% for her own fault, would have found GCA grossly negligent and awarded Mrs. Gurwood punitive damages.

V. Judicial Economy.

It is considered foundational that the judicial system be just and speedy, along with inexpensive for every action. SCRCP 1. *Judicial Economy* is the idea of efficient management of litigation to streamline the process and ensure that justice is done swiftly and fairly in compliance with the South Carolina Rules of Civil Procedure. (*See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 553 S.E.2d 110 (2001) (finding that for the sake of judicial economy and to prevent further litigation between parties, the Court would state the effect of their prior opinion). This principle is one that is not only important but necessary in order for our court systems in the state of South Carolina, and across the country, to function efficiently. Without the courts keeping one eye on justice and the other on judicial economy, litigation would string on forever with duplicative claims arising as stalling tactics and frivolous suits. Judicial economy is also paramount for the appellate courts to keep in mind when determining the fate of an appeal and its possible remand to be retried.

Courts may address an issue for the sake of judicial economy and to prevent further litigation between the parties. (*See Bruning v. SCDHEC*, 418 S.C. 537, 795 S.E.2d 290 (Ct. App 2016)). If at all possible, appellate courts should strive to reduce the number of cases required to be retried in their entirety to alleviate the backlog of matters in our trial courts.

In this matter, the Court of Appeals has remanded the case for retrial on the grounds that the directed verdict motion on punitive damages should not have been granted. Above we have

made arguments, with ample support, as to why that motion was correctly granted by the trial court. Beyond those arguments, common sense shows that there is no reason this matter needs to be retried. It would take up vital resources of the judicial system on a case that was very clearly decided by the jury. When this matter went to the jury originally, they found that Mrs. Gurwood was as responsible as GCA for her fall and her injuries. Adding emphasis, the jury only awarded Mrs. Gurwood's prior medical expenses (rejecting her claims for CRPS and future medicals and even pain and suffering), and for good measure reduced that verdict by Mrs. Gurwood's own fault of 50%. The jury was clear and adamant that Mrs. Gurwood was very much at fault in this incident and made clear by their verdict that she was not entitled to much in damages.

In addition, §15-32-520, *S.C. Code* states, "All actions tried before a jury involving punitive damages, if requested by any defendant against whom punitive damages are sought, must be conducted in a bifurcated manner before the same jury." S.C. Code Ann. §15-32-520(A) (2011). This section requires the issue of punitive damages be separated from that of culpability. Even if GCA conceded, which it does not, that the punitive damages issue should have been submitted to the jury, a new trial on that issue alone is all that is required. The culpability and fault allocation has already taken place and there is no need for a new trial on those issues.

CONCLUSION

For the foregoing reasons, GCA respectfully requests that the Supreme Court reverse holding of the Court of Appeals in Unpublished Opinion 2022-UP-462 and hold that the Trial Court's granting of a directed verdict was not in error and affirm the Trial Court's decision.

Respectfully submitted,

s/Robert T. Lyles, Jr.

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PROOF OF SERVICE

I certify that I have served a copy of Respondents' Petition for a Writ of Certiorari by electronic mail and U.S. Mail to the following addresses:

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April 17, 2023

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April 17, 2023

VIA U.S. MAIL
The Honorable Patricia A. Howard
Clerk, Supreme Court of South Carolina
Post Office Box 11330
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Re: *Karrie Gurwood, et al. v. GCA Services, et al.*
Appellate Case No. 2019-001403

Dear Ms. Howard:

Enclosed please find this firm's check in the amount of $250.00 representing the required filing fee for RESPONDENTS' PETITION FOR A WRIT OF CERTIORARI filed in the above-referenced matter.

Should you have any questions or need additional information, please let me know.

Thank you, and with kindest regards, I am

Very truly yours,

LYLES & ASSOCIATES, LLC

Robert T. Lyles, Jr.

RTL/cw
Enclosure
cc: Karrie Gurwood
Howard Gurwood