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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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APPEAL FROM GEORGETOWN COUNTY

Court of Common Pleas

The Honorable James E. Lockemy, Circuit Court Judge

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Lower Courts Case No. 2002-CP-22-998

Appeals Case No. 2008-095691

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Employers Insurance of Wausau Respondent

v.

Eric C. Hansen and Robert J. Moran (Defendants) Appellant

Eric C. Hansen (Third- Party Plaintiff),

v.

Caldwell's Diving Co., Inc (Third –Party Defendant),

Of whom Eric C. Hansen is the Appeallant,

And Employers Insurance of Wausau and Caldwell Diving Co. Inc. and Robert J. Moran are the Respondents

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# PETITION FOR REHEARING

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Respectfully submitted by,

X Eric C. Hansen

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July 24th, 2013

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## STATEMENT OF THE CASE

This action began in 1991 when appellant Eric C. Hansen was employed by respondent Caldwell's Diving Co., Inc. and was working on a barge owned by said company when a crane being used on that barge fell and crushed Hansen. Eventually litigation was commenced concerning the incident and on behalf of Hansen a complaint was filed claiming both that Hansen was subject the Longshore and Harbor Workers' Compensation Act (LHWCA) and also was a "seaman" under the Jones Act, as well as other general relief under alternate pleadings.

Around the time a settlement was entered into between the parties in 1996 and for some time thereafter, Caldwell's Diving, both in its capacity as employer and vessel owner, as well as Caldwell's insurance carrier for both entities, Employers Insurance of Wausau ("Wausau") characterized Hansen as subject to the LHWCA, including claiming that the eventual settlement in 1996 included a lien pursuant to the LHWCA that would be released upon approval of a separate application to be submitted to the Department of Labor ("DOL"), a necessary function in settling a claim between employee and employer in such litigation.

Although Hansen was unaware of the lien issue prior to the initial settlement, upon being informed of the issue and Wausau's intent to waive the lien upon the DOL's approval of that application, Hansen cooperated by signing off on all necessary documents. However, the DOL later determined that after further investigation and hearing it had no jurisdiction over the settlement as Hansen was not subject to the LHWCA but was a seaman under the Jones Act. As such, it could neither approve nor deny the settlement of Hansen's claim. Again, up until that time defendants/respondents has always characterized this matter as being subject to the LHWCA, except when perhaps it may have benefited one or more of the parties, such as Wausau's termination of its payment of any benefits to Hansen upon his alleging in his

complaint as an alternate pleading that he may have been a Jones Act seaman which, as all parties acknowledged, is standard in these types of matters.

Thereafter defendants/respondents began to characterize the settlement as being a Jones Act settlement. In 2002 Wausau initiated a collection action against Hansen and his previous attorney to collect the approximately $180,000.00 it had initially paid to Hansen under the LHWCA to go towards his medical costs and temporary pay. Shortly thereafter Hansen filed an answer and counterclaim alleging that such action was a breach of the settlement agreement on the part of Wausau and further claiming other causes of action against both Wausau and his previous attorney.

Although the lower court eventually held that Wausau had no right at law or in equity to seek any recovery of the lien money as it had been paid out under a mistaken belief that the settlement involved a Longshore Harbor Worker, whereas Hansen was a seaman, and therefore such payment being made by mistake on the part of Wausau could not be recovered by it. However, although the Court had accepted the escrowed money by way of interpleader, it curiously held that it did not have jurisdiction to disburse the money to Hansen and thereafter compelled Hansen to expend significant time and effort over the next several years in attempting to obtain a decision from a court of competent jurisdiction that would agree that the money, already found to not be subject to any claim by Wausau, be released to Hansen. This Court eventually did so on June 26, 2006.

In 2007 Wausau filed a motion for summary judgment claiming that Hansen's counterclaim was barred by the statute of limitations and further that Wausau was not subject to violations under the South Carolina Unfair Trade Practices Act (UTPA). The issues were briefed and argued and the lower court agreed that a letter Hansen wrote to his then attorney in 1996

indicated he was aware of actions Wausau would later take in an attempt to obtain the lien money, even though it was acknowledged that the cause of action referenced in Hansen's letter of 1996 was different then the causes of actions alleged in Hansen's counterclaim in 2003. The Court further held that there was no "insurance" contract between Hansen and Wausau, even though that was never alleged and there was no dispute that there was a contract, a settlement agreement, entered into between the parties. After motions for reconsiderations on all relevant issues the trial court again affirmed its dismissal of Hansen's counterclaim and thereafter the matter was appealed.

In an opinion filed July 10, 2013, this Court affirmed the lower court's dismissal of Hansen's counterclaims. The opinion does not provide any factual or legal analysis and it was limited to provision of citations to various cases that appear to respond to certain issues on appeal.

## LEGAL ARGUMENT

### Standard of Review for Summary Judgment

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; BPS, Inc. v. Worthy, 362 S.C. 319, 325, 608 S.E.2d 155, 159 (Ct. App. 2005). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party

below. Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 25, 630 S.E.2d 474, 477 (2006); see also Schmidt v. Courtney, 357 S.C. 310, 317, 592 S.E.2d 326, 330 (Ct. App. 2003) (stating that all ambiguities, conclusions, and inferences arising from the evidence must be construed strongly against the moving party).

When further inquiry into the facts of the case is desirable to clarify application of the law, summary judgment is not appropriate. Gadson v. Hembree, 364 S.C. 316, 320, 613 S.E.2d 533, 535 (2005); Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 220, 616 S.E.2d 722, 729 (Ct. App. 2005). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Nelson v. Charleston County Parks & Recreation Comm'n, 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct. App. 2004).

The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 228, 612 S.E.2d 719, 722 (Ct. App. 2005). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 270, 603 S.E.2d 629, 631 (Ct. App. 2004).

**Standard for Rehearing**

Pursuant to Rule 221(a), SCRCP, a petition for rehearing shall be filed pursuant to Rule 240, SCRCP, and within fifteen (15) days of the date the opinion that is the subject of said petition was filed, and the petition should show points that were either overlooked and/or

misapprehended by the reviewing court in its initial review. Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234 (1933).

**It is plain error to not reverse the Order dismissing Hansen's counterclaim of breach of contract based on the statute of limitations.**

In 2002 Wausau filed a collection action against Hansen to recover $181,160.04 it had paid out to Hansen's attorney. (R. Vol. I pg. 113) Hansen thereafter filed an answer and counterclaim in 2003. Although a copy of Hansen's counterclaim was inadvertently not included in the record on appeal this time (it was part of the record in the appeal under Docket No. 2006-UP-297, and is the subject of a separate petition to supplement the record being filed simultaneously with this petition), a section of Hansen's counterclaim against Wausau alleging breach of contract was, and it states in relevant part the following:

> 32. [] Hansen and [Wausau] entered into a binding contractual agreement to settle all disputes related to [the] Jones Act claims against Caldwell.
>
> 33. As a portion of that agreement, Caldwell and [Wausau] agreed to waive any lien it may have had against any Jones Act recovery.
>
> 34. However, [Wausau] has unreasonably, without substantial basis in law or fact, willfully and wantonly, attempted to recover the amount of that lien from [ ] Hansen...
>
> 35. [Wausau] has therefore breached the previously-referenced settlement agreement and has attempted to commit fraud by continuing to assert its entitlement to those funds without any basis in law or fact." (R. Vol. VI, Wausau's designation, pg. 46-47)

In March, 2007, Wausau filed a motion to dismiss Hansen's counterclaim. Wausau argued that the statute of limitations concerning a breach of contract began to run at the latest as of June 21, 1996, when Wausau's attorney wrote a series of letters, with the June 21, 1996 letter being the latest, advising that Wausau would assert a lien against $181,160.04 paid by Wausau,

subject to a separate application that would be submitted to the Department of Labor. (R. II, pg. 467-480)

Wausau also claimed that a letter Hansen wrote to his attorneys in May, 1996 exposed Hansen's desire to sue Wausau based on a claim of bad faith. Implicit within Wausau's reference is that the assertion of the lien was the impetus for said allegation, and this triggered the running of time under the statute of limitations. (R. Vol. II pg. 473)

The relevant section of the letter dated May 20, 1996 from Hansen to his then attorneys states the following:

> Since Wausau Insurance Company misrepresented that they had the Maritime Insurance coverage for over 4 years and Bob Moran neglected to confirm this, then later exposed that they in fact did not have the coverage this is misrepresentation on both counts. I would also like your professional opinion on filing a bad faith claim against them, their misrepresentation has cause [*sic*] unnecessary delays and emotional damages to my family. I intent [*sic*] to file a bad faith claim against them on behalf of my family. (R. Vol. VI pg. 95)

A fair restatement of the above is that in 1996 Hansen believed Wausau Insurance "misrepresented" whether they had coverage or not, such misrepresentation caused "unnecessary delays and emotional damages" and may constitute "bad faith" on Wausau's part.

The settlement agreement in question dated February 19, 1996 consists only of one page handwritten by an unknown party and states in relevant part that the settlement would be for a certain amount of money as well as "FULL (100%) LIEN WAIVER: approximately $181,000.00 (one hundred eighty one thousand dollars)." (R. Vol. I pg. 82, emphasis in original) The agreement itself does not mention any conditions on the waiver of the lien by Wausau, but the parties were aware of the condition that the Department of Labor (hereinafter the "DOL") would separately review the settlement for the lawsuit to be finalized, and Hansen signed the application in furtherance of that process on June 12, 1996. (R. Vol. I pg. 102-104)

Significantly, neither the agreement, nor any subsequent statement or notice from Wausau, ever advised that if it was determined that the settlement could not be either approved or denied by the DOL because Hansen was a seaman, and therefore outside of the jurisdiction of the DOL, that Wausau would nonetheless demand money it mistakenly paid out for medical benefits to Hansen, until close to the time its collection action was filed in 2002.

At a hearing before the Honorable L. Henry McKellar held on June 30, 1996, various counsel for parties as well as Hansen appeared and discussed the terms of the above settlement. (R. Vol. I pg. 83-87) At the hearing, Judge McKellar specifically asked Hansen if he had any reservations about the "THE COMP LIEN THING" to which Hansen replied that he had some concerns regarding additional medical and reeducation costs totaling approximately $34,000.00 that he wanted to be noted, but that otherwise "I WILL BE GLAD TO SIGN THAT DISMISSAL SETTLEMENT." (*Ibid.*)

At a hearing in 2004 concerning Wausau's first motion to dismiss Hansen's counterclaim for breach of contract, Hansen's then attorney, David Marvel, explained to the Court that "our position is simply that the contract that we allege was breached with fraudulent intent [in the counterclaim] is the settlement which is, is. . was a, an on-the-record settlement in Beaufort County that they have breached by virtue of this action." (R. Vol. I pg. 128) Thus Hansen's attorney who filed the counterclaim on Hansen's behalf made clear that the breach was not misrepresentations made by Wausau prior to 1996 but was in fact Wausau's filing of its collection action on the lien against Hansen in 2002.

At the time of Wausau's hearing on the refiled motion in July, 2008, Hansen representing himself again informed the Court that it was not alleged misrepresentations made by Wausau before 1996 that gave rise to his counterclaim against Wausau in 2003 but, instead, it was only

after Wausau filed its collection action in 2002 against him attempting to recover that money that Wausau breached the contract- the settlement agreement. (R. Vol. IV pg. 949)

In a hearing on July 8, 2008, the Trial Judge found the following:

> According to Hansen's complaint, Hansen and Wausau entered into a contract as part of the settlement of Hansen's Jones Act claim, in which Wausau agreed to waive its lien of $181,160.04. Hansen alleged that Wausau breached that agreement and refused to waive the lien.
>
> The Jones Act settlement occurred in 1996. At that time, Hansen was represented by Mr. Moran. In 1996, Mr. Moran disbursed the settlement proceeds from the Jones Act settlement with the exception of his fee and the funds on which Wausau asserted a lien. It is undisputed that $181,160.04 was not disbursed by Mr. Moran because ownership of those funds was disputed by Wausau. Since Hansen's alleged contract with Wausau required Wausau to waive its lien and since the funds were not disbursed to Hansen in 1996 because Wausau was asserting its lien, I find that a reasonable person knew or should have known that Wausau had breached its alleged contract in 1996.
>
> Furthermore, I find that Hansen knew that Wausau had engaged in wrongful conduct in 1996. It is undisputed that Hansen sent a letter to his attorneys dated May 20, 1996, in which he asserted that Wausau had made misrepresentations and that he intended to file a bad faith claim against Wausau. **Although Mr. Hansen ultimately filed a suit against Wausau for breach of contract accompanied by a fraudulent act and did not file a claim of bad faith, this is of no consequence as to application of the statute of limitations. Hansen clearly knew at this point that his rights had been invaded, even if no full blown theory or recovery had been developed.** Since Hansen did not assert his cause of action against Wausau until 2003, the statute of limitations bars his action. (R. Vol. I pg. 12-13, emphasis added).

The record is clear that Hansen's question to his attorney in 1996 concerning Wausau's bad faith in an earlier lawsuit involves a distinctly different cause of action than that alleged in his counterclaim in 2003. The record is clear that Hansen's counterclaim of Wausau breaching a contract is referring to Wausau's lawsuit it filed in 2002, to which the counterclaim responded, and not the imposition of the lien in 1996, which Hansen acknowledged several times, including in response to direct questioning from the Court and several times on the record. At a minimum, giving all reasonable inferences in the light most favorable to Hansen as this Court is obligated to

do, the statute of limitations does not pose a bar to Hansen's claim that Wausau breached the settlement by filing its collection action in 2002.

**The Lower Court erred in granting Summary Judgment in favor of Wausau on Hansen's claim that Wausau violated the Unfair Trade Practices Act.**

In March, 2007, Wausau filed the motion to dismiss referenced above that also sought to dismiss Hansen's counterclaim that Wausau violated the Unfair Trade Practices Act (hereinafter "UTPA"). (R. Vol. II pg. 465-482). In relevant part the counterclaim Wausau sought to dismiss alleged the following:

> 37. As a result of their acts as outlined above [Wausau] has engaged in unfair trade practices within the meaning of S.C. Code Ann. §§ 39-5-20 and 39-5-140.
>
> 38. Further, [Wausau] has committed unfair trade practices as a result of its bad faith handling of a third-party insurance claim within the meaning of S.C. Code Ann. §§ 38-57-70 and 38-59-20. (R. Vol. II pg. 478-479)

S.C. Code Ann. § 39-5-20(a) sets forth that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." S.C. Code Ann. § 39-5-140(a) adds in relevant part the following:

> Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by Section 39-5-20 may bring an action individually. . . to recover actual damages. If the court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of Section 39-5-20, the court shall award three times the actual damages sustained and may provide such other relief as it deems necessary or proper. Upon the finding by the court of a violation of this article, the court shall award to the person bringing such action under this section reasonable attorney's fees and costs.

In its memorandum Wausau argued the same facts as noted above in claiming that the statute of limitations concerning the UTPA began to run as of June 21, 1996 based on an assertion of the compensation lien, and again referring to the letter from Hansen to his attorney in May 1996, and therefore the counterclaim filed in 2003 was too late. (R. Vol. II pg. 479-480). Wausau also claimed that insurance companies, being regulated, were exempt from the UTPA, citing Trustees of Grace Reformed Episcopal Church v. Charleston Ins. Co., 868 F. Supp. 128, 130–31 (D.S.C. 1994), and that Hansen failed to allege that Wausau's conduct could negatively affect the public interest. (R. Vol. II pg. 480-481).

Wausau's motion to strike Hansen's UTPA counterclaim was heard on Wednesday, June 4, 2008. (R. Vol. III A. pg. 682) Counsel for Wausau reiterated generally the above stated arguments, and added that there was never a "first party insurance relationship between Wausau and Mr. Hansen" and therefore there could not be a bad faith claim under such laws. (*Id.* at pg. 711-712)

As to the contractual relationship between Hansen and Wausau, Hansen specifically responded that "the contract would be the settlement" entered into between the parties in 1996. (*Id.* at 714) (Even counsel for Caldwell's Diving, Mary Bass Lohr, recognized that it was Hansen's position that the settlement agreement was the contract, as opposed to any contract of insurance between Hansen and Wausau.) (*Id.* at 728-730) Hansen further noted how Wausau's actions would affect the public interest by pointing out that Wausau writes "millions of dollars of policies a year" and that there are potentially 900,000.00 Longshore Harbor Workers that could be affected by Wausau's practices, thereby confirming the public interest would be affected. (*Id.* at 714)

Upon conclusion of argument the Court held in favor of Wausau, with the entire basis of the factual analysis and resolution of disputed issues summed up by simply stating the following: "We have a regulated industry." (*Id.* at 738)

Under cover of June 18, 2008, Hansen filed a motion for reconsideration of the Court's order (R. Vol. IV pg. 831) and reiterated arguments made before, and further noting the matter entitled Naef, et. al. vs. Masonite Corp., et al., CV 944033, in the Circuit Court of Mobile County, Alabama leading to a judgment being entered against Wausau in the amount of $93,000,000.00 based on violations of fraud, breach of contract and bad faith, as further support of how Wausau's actions in Hansen's matter could be repeated, and negatively impact the public interest. (R. Vol. IV pg. 843-844) (See also letter from Hansen dated June 12, 2008, *id.* at 893.)

On July 8, 2008 Hansen's motion to reconsider the dismissal of his UTPA counterclaim was heard (R. Vol. IV pg. 930) and was denied. (*Id.* at 965)

On appeal, although respondent Wausau claims that Hansen failed to make any arguments concerning the trial court's dismissal of the UTPA claim (Respondent Wausau's Final Brief, pg. 10), the above demonstrates that to the contrary, arguments were made to each of Wausau's contentions, and Hansen in his appeal brief expressly cited reliance on his lower court briefs, with citation to the record, as setting forth the basis for his position. (Appellant Hansen's Final Brief, pg. 34)

Further, to the extent there is any argument or finding that Hansen's causes of action under S.C. Code Ann. §§ 38-57-70 and/or 38-59-20 would be barred because of the general theory that third-party insurance claims are not typically recognized under these sections of law, while the initial payment was made in the context of a third-party insurance claim nonetheless, with Hansen and Wausau entering into a settlement agreement, Hansen was thereby in a first-

party contractual relationship with the insurance carrier, and such claims are in fact recognized under those sections of the Code. Accordingly, the original third-party status of Hansen, having evolved into a first-party relationship through the settlement agreement, would not constitute a basis for a dismissal of these causes of action.

Moreover, any reliance on Trustees of Grace Reformed Episcopal Church v. Charleston Ins. Co., 868 F. Supp. 128 (D.S.C. 1994) is misplaced as that court was concerned with trade practices of the insurance business and suits seeking payment of benefits (*id.* at pg. 130-131), whereas Hansen's counterclaim was focusing on Wausau's breach of the settlement agreement by its pursuit of the collection action in 2002.

Finally, regarding the statute of limitations, the same analysis set forth above demonstrating that Hansen's cause of action for breach of contract did not accrue until Wausau filed its suit in 2002 would apply here, as Wausau makes the identical argument on this issue, and therefore Hansen's counterclaim alleging violation of the UTPA filed in reply to Wausau's collection action is not barred by the statute of limitations or otherwise.

**The Court erred by not compelling Wausau to comply with a discovery order entered in 2003, but thereafter penalizing Hansen by noting a failure to provide proof on certain issues, and otherwise failing to resolve outstanding motions**

In the Court's Order of September 7, 2010, reflecting in turn the Court's ruling of June 4, 2008 (which had never previously been incorporated into a formal order), the Court based part of its decision in dismissing Hansen's UTPA claim against Wausau by noting that "Plaintiff failed to allege how Wausau's conduct adversely affected the public interest." (R. Vol. I pg. 20)

However, it was made clear at the time of various hearings that Hansen complained that Wausau had not complied with the Court's order compelling it to provide discovery in 2003, and that Wausau's failure to provide such discovery was prejudicial to Hansen (See, *e.g.*, R. Vol. I

pg. 213, R. Vol. III pg. 688, R. Vol. IV pg. 967). If Wausau had been ordered to comply with the discovery order previously entered by the Court evidence could have been thereafter produced and relied upon by Hansen in opposing Wausau's later motions which are now the subject of this appeal. Therefore, it is wrong that Hansen should be penalized for not being able to provide evidence in support of various aspects of Hansen's counterclaim against Wausau, while at the same time allowing that Wausau did not have to comply with the discovery demand which would have in relevant part potentially provided such information necessary for Hansen's prosecution of his counterclaim.

Moreover, notwithstanding the above, Hansen filed other motions such as but not limited to a demand that respondents provide proof of Seaman's releases which, notwithstanding any order entered by the lower court and regardless of whether it was complied with or not, respondents are compelled to produce pursuant to numerous decisions by the United States Supreme Court which have been provided to this Court and have never been disputed. Garrett v. Moore-McCormack Co. 317 U.S. 239, 63 S. Ct 246, 1942 A.M.C. 1645 (1942) followed in Gueh v. Diamond M. Drilling Co., 524, F2d 986, 987 (5th Cir. 1975) cert Denied, U.S. 976, 96 S. Ct. 2177, 48 L.Ed.2d 800 (1976) and Gauthier v. Continental Diving Services Inc., 831 F2d 559 (5th Cir. 1987) Orsini v. O/S Seabrooke O.N., 247 F.3d 953 (9th Cir. 04/24/2001). It was therefore error to dismiss Hansen's counterclaims in light of Wausau's continuing refusal to comply with an order compelling discovery, and otherwise dispose of the entire counterclaim in the absence of respondents' inability to provide proper releases.

## CONCLUSION

For the reasons set forth above, the affirmation of the lower court's dismissal of Hansen's counterclaims can only be supported by ignoring numerous facts and arguments that are throughout the record on appeal. Clearly the lower court failed to give inferences in favor of the non-moving party and, instead, gave inferences in favor of the moving party in dismissing Hansen's counterclaims. The Court is bound, by applicable rules and cases thereunder, to instead draw all inferences in favor of Hansen, and upon a fair review of the facts of record and applicable law must reverse the dismissal of Hansen's counterclaims and otherwise consider the relief sought by Hansen.

Respectfully,

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PROOF OF SERVICE

I hereby certify that I have served each Respondent's attorney as listed below with a copy of the Appellants Petition for Rehearing and provided the Clerk of the Appeals Court with the original motion and 6 copies of the Appellant's Petition for Rehearing on this 24th day of July 2013.

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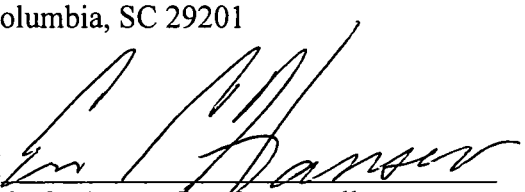
X 

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