THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

69846

APPEAL FROM SPARTANBURG COUNTY

Clifton B. Newman, At-Large Circuit Court Judge
Trial Court Case No.: 2012-CP-42-2859

Appellate Case No.: 2013-000634

South Carolina Second Injury Fund,..Appellant

v.

Spartanburg Regional Healthcare System and
PHTS Risk Management Services..Respondents

INITIAL BRIEF OF RESPONDENTS

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ISSUE ON APPEAL

1. Under S.C. Code Ann. §§ 1-23-380 (1976) and 42-9-400 (2003), did the circuit court properly reverse the decision of the Appellate Panel of the Workers' Compensation Commission denying Second Injury Fund reimbursement to Respondents on the ground that the reliable, probative and substantial evidence on the whole record supported reimbursement in favor of Respondents?

STATEMENT OF THE CASE

Appellant, the South Carolina Second Injury Fund, appeals from the Order of the Honorable Clifton B. Newman, filed with the Spartanburg County Clerk of Court on February 18, 2013, wherein Judge Newman reversed the Decision and Order of the Appellate Panel of the South Carolina Workers' Compensation Commission ("Appellate Panel") denying Respondents full Second Injury Fund reimbursement pursuant to S.C. Code Ann. § 42-9-400 (2003) for benefits paid or to be paid to the injured employee, Sarah Jones ("Ms. Jones"), stemming from Ms. Jones' April 17, 2006 work accident, and wherein Judge Newman found that the reliable, probative and substantial evidence of the whole record supported granting full Second Injury Fund reimbursement in favor of Respondents.

Ms. Jones injured her left upper extremity on April 17, 2006 in a work-related accident while employed by Spartanburg Regional Healthcare System. PHTS Risk Management Services admitted the claim and authorized appropriate medical treatment. Ultimately, the underlying workers' compensation claim was concluded by settlement (Form 19, Apr. 1, 2008).

Prior to the April 2006 work accident, Ms. Jones had sustained another work-related injury affecting her right wrist while working for a different employer. In addition, Ms. Jones suffered from anxiety prior to her April 2006 work accident. Accordingly, Respondents sought Second Injury Fund reimbursement on the basis of Ms. Jones' prior right wrist injury and preexisting anxiety as provided for under S.C. Code Ann. § 42-9-400(a) (2003) (Hearing Tr., Aug. 22, 2011 p. 8). The Fund denied the claim for reimbursement, contending that Ms. Jones did not have a preexisting left wrist injury or preexisting anxiety (Hearing Tr., Aug. 22, 2011 pp. 9–11). Additionally, the Fund based its denial on its contention that Ms. Jones' prior right wrist injury was not serious enough to constitute a hindrance to her employment (Hearing Tr., Aug. 22, 2011, p. 10). The parties appeared before Commissioner Derrick L. Williams on August 22, 2011 and argued their respective positions. On October 11, 2011, Commissioner Williams issued a Decision and Order finding: Ms. Jones did not have a prior left wrist injury; Ms. Jones' prior right wrist injury was not serious enough to constitute a hindrance to her employment; Ms. Jones did not have preexisting anxiety; and if Ms. Jones did have preexisting anxiety, it was not serious enough to constitute a hindrance to her employment (Decision and Order, Oct. 11, 2011 pp. 8–11). Thus, Commissioner Williams denied reimbursement to Respondents (Decision and Order, Oct. 11, 2011 p. 13).

On October 24, 2011, Respondents filed an Application for Full Commission Review of Commissioner Williams' Decision and Order (Form 30). The application contained twenty-one (21) Grounds for Review and Exceptions (Form 30, Exceptions ¶¶ 1–21). The parties submitted briefs in support of their respective positions and appeared

before the Appellate Panel on March 19, 2012 for oral argument. On June 6, 2012, the Appellate Panel issued its Decision and Order wherein it affirmed the Decision and Order of the Hearing Commissioner (Appellate Panel Decision and Order, June 6, 2012 pp. 3–7).

On July 3, 2012, Respondents appealed the Decision and Order of the Appellate Panel to the Spartanburg County Court of Common Pleas (Notice of Intent to Appeal, July 3, 2012). The parties once again submitted briefs in support of their respective positions and appeared before the Honorable Clifton B. Newman on December 13, 2012. Specifically, Respondents contended that the Decision and Order of the Appellate Panel was not supported by substantial evidence because Respondents had submitted medical evidence supporting reimbursement, whereas Appellant, in arguing against reimbursement, had failed to present *any* evidence supporting its position and instead simply pointed to isolated medical records and asked the courts to render medical opinions (Hearing Tr., Dec. 13, 2012 pp. 9–10). On February 18, 2013, Judge Newman filed an Order with the Spartanburg County Clerk of Court reversing the Decision and Order of the Appellate Panel on the ground that its decision was not supported by substantial evidence because the reliable, probative and substantial evidence of the whole record only supported reimbursement (Order Reversing Decision of Appellate Panel, February 18, 2013).

On March 22, 2013, Appellant filed a Notice of Appeal and Proof of Service regarding the same with the Court. This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Appellate Panel of the Workers' Compensation Commission. *Fredrick v. Wellman, Inc.*, 385 S.C. 8, 15–16, 682 S.E.2d 516, 519 (Ct. App. 2009); *see Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134–35, 276 S.E.2d 304, 306 (1981). Under the scope of review established by the APA, the Court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse or modify the Appellate Panel's decision if the appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. *Carolinas Recycling Group v. South Carolina Second Injury Fund*, 398 S.C. 480, 483, 730 S.E.2d 324, 326 (Ct. App. 2012); *see* S.C. Code Ann. § 1-23-380 (1976). Substantial evidence is defined as evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion as the Appellate Panel. *Carolinas Recycling Group*, 398 S.C. at 483, 730 S.E.2d at 326 (citing *Lark*, 276 S.C. at 135, 276 S.E.2d at 306). More specifically, substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the same conclusion the Appellate Panel reached. *Bazen v. Badger R. Bazen Co., Inc.*, 388 S.C. 58, 62, 693 S.E.2d 436, 438 (Ct. App. 2010) (citing *Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000)).

ARGUMENT

I. THE CIRCUIT COURT PROPERLY REVERSED THE DECISION AND ORDER OF THE APPELLATE PANEL OF THE WORKERS' COMPENSATION COMMISSION DENYING RESPONDENTS SECOND INJURY FUND REIMBURSEMENT BECAUSE THE RELIABLE, PROBATIVE & SUBSTANTIAL EVIDENCE OF THE WHOLE RECORD ONLY SUPPORTS GRANTING RESPONDENTS FULL SECOND INJURY FUND REIMBURSEMENT.

a. Respondents Submitted Reliable, Probative and Substantial Evidence Satisfying all Elements of Reimbursement.

Respondents have submitted evidence proving each and every requirement for reimbursement as set forth in S.C. Code Ann. § 42-9-400 (2003). Accordingly, the circuit court properly reversed the Decision and Order of the Appellate Panel on the ground that the Appellate Panel's decision denying reimbursement was not supported by the reliable, probative and substantial evidence of the whole record. Thus, the Order of the circuit court should be affirmed.

The substantial evidence in the record supports that Ms. Jones suffered a right wrist injury and had anxiety prior to her April 2006 work accident. Appellant does not appear to challenge that Ms. Jones had a prior right wrist injury, but the medical records supporting the severity of the injury. Medical records from Dr. Nicholas Lind note a twisting injury to Ms. Jones' right wrist in 1993, resulting in medical treatment with an orthopaedist and Ms. Jones being incapable of work for approximately one year (Dr. Lind, Jan. 30, 2008). Records from Dr. Kathleen Brady also note the same injury, treatment and time missed from work (Dr. Brady, Feb. 14, 2008). With respect to her preexisting anxiety, medical records from Dr. Robert Richards, who evaluated Ms. Jones following her April 2006 work accident, indicate Ms. Jones had "a long history of anxious temperament" (Dr. Richards, June 21, 2007). In evaluating Ms. Jones after her

April 2006 accident, Dr. Lind explained "Ms. Jones reported experiencing 'stress and panic' before 17 April 2006" that she controlled by "pacing herself" (Dr. Lind, Jan. 30, 2008). Dr. Brady noted Ms. Jones' reluctance to admit the severity of her preexisting anxiety, stating "Ms. Jones makes it clear, as reported in her medical records, that she is unwilling to address any pre-existing mental health issues through medication therapy" (Dr. Brady, Feb. 14, 2008). Other records from Dr. Lind note Ms. Jones' aversion to more traditional treatment for her anxiety, instead opting for "natural stress management" including church and support from her friends (Dr. Lind Jan. 30, 2008). Thus, Respondents submitted reliable, probative and substantial evidence proving that Ms. Jones experienced a right wrist injury and suffered from anxiety prior to her April 2006 work accident at Spartanburg Regional Healthcare System.

There is also substantial evidence in the record supporting that Ms. Jones' preexisting right wrist injury and anxiety were permanent and serious enough so as to constitute a hindrance to her employment or reemployment. *See* S.C. Code § 42-9-400(a) & (d) (2003). While Appellant attempts to define permanency and hindrance by resorting to authorities outside of the statute, its formulation misses the mark (Appellant Initial Br. pp. 2–3). For one, *Crisp v. SouthCo., Inc.*, 401 S.C. 627, 738 S.E.2d 835 (S.C. 2012) and the associated case *Sparks v. Palmetto Hardwood, Inc.*, Nos. 2011-186526, 27229, 2013 WL 2245133 (S.C. May 22, 2013) define physical brain damage as used in S.C. Code § 42-9-10(c), which entitles claimants to lifetime benefits. The South Carolina Supreme Court explained in order for a claimant to be entitled to lifetime benefits, the physical brain damage must be both permanent *and* severe. *Crisp*, 401 S.C. at 644, 738 S.E.2d at 843–44; *Sparks* 2013 WL 2245133 at *4 (emphasis added). Appellant improperly

attempts to use the court's formulation of severity specific to a brain damage case to define permanency and hindrance in a non-brain damage case. *See Crisp*, 401 S.C. at 642, 738 S.E.2d at 842 (citing specialized healthcare and inability to return to gainful employment as requirements to make the requisite showing of severity of a brain injury entitling a claimant to lifetime medical benefits under S.C. Code § 42-9-10(c)). Thus, the standard of hindrance or obstacle as contemplated by the statute does not require a showing that the person is unable to return to work, but only that the preexisting impairment interferes with the individual's ability to perform his or her job duties. Adopting Appellant's proposed interpretation of "hindrance or obstacle" as prohibiting a return to work is at odds with the statute which presumes the individual with the preexisting condition is back working in some capacity. Accordingly, Respondents have made the requisite showings of permanence and hindrance and/or obstacle via substantial evidence. Ms. Jones explained to Dr. Lind that following her 1993 right wrist injury, she "eventually learned how to work around her right hand injury" (Dr. Lind, Jan. 30, 2008). Ms. Jones also explained to Dr. Lind that prior to her April 2006 accident, she controlled her *pain and stress* by pacing herself (Dr. Lind, Jan. 30, 2008). Dr. Brady echoed this with respect to Ms. Jones' anxiety, stating Ms. Jones' failure to address her mental health issues through medication likely caused her difficulties with employment prior to her April 2006 work accident (Dr. Brady, Feb. 14, 2008). Therefore, while Ms. Jones may have continued working up until her April 2006 work injury, the evidence proves that she was altering her work duties on account of her anxiety and functional issues and pain with her right wrist. Ms. Jones' inability to do her job duties in the same fashion as she would without the preexisting impairments establishes the impairments constituted

hindrances to her employment or reemployment. In sum, Respondents have proven through substantial evidence that Ms. Jones' preexisting right wrist injury and anxiety were permanent and serious enough to constitute a hindrance to her employment or reemployment.

There is also substantial evidence in the record supporting that Respondents satisfied employer knowledge under S.C. Code Ann. § 42-9-400(c) (2003). The Appellate Panel failed to address whether Respondents established employer knowledge[1] (Appellate Panel Decision and Order, p. 5, ¶ 6), but after viewing and weighing the evidence presented by the parties the circuit court found that the requirement was met via substantial evidence in this instance (Order, Feb. 18, 2013 p. 5 ¶ 1, wherein Judge Newman held "[i]n sum, [Respondents] satisfied each and every requirement for Second Injury Fund reimbursement"). Specifically, Respondents submitted employee health questionnaires from Spartanburg Regional Healthcare System wherein Ms. Jones failed to list either of her preexisting impairments, despite her knowledge of both impairments as established by the aforementioned medical records (Employee Health Questionnaires). In the questionnaires, Ms. Jones denied currently having or having a history of psychological or mental problems (Employee Health Questionnaire, May 2, 2000). She likewise failed to check the catch-all "other" categories on the questionnaires (Employee Health Questionnaire, May 2, 2000). Ms. Jones also left blank the section of the questionnaires inquiring about previous work-related injuries (Employee Health Questionnaire, May 2, 2000). Appellant disputes anxiety is a "psychological problem" so as to require Ms. Jones to indicate such on her employee health questionnaires (Appellant

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[1] Thus, Appellant's statement "the Commission's decision was based on the statutory elements of hindrance and knowledge" is unfounded (Appellant Initial Br. p. 9).

Initial Br. p. 6–7). However, the Diagnostic and Statistical Manual of Mental Disorders specifically lists anxiety and defines "mental disorder" as "a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) . . . ." AMERICAN PSYCHIATRIC ASSOCIATION: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, xxi & 393–444 (4th ed. 1994). Therefore, (1) anxiety is a "psychological problem" within the common nomenclature and as defined within the mental health profession, thus obligating Ms. Jones to give notice to Spartanburg Regional Healthcare System of her preexisting anxiety; and (2) irrespective of whether anxiety is a "psychological problem" as used in the questionnaires, she should have given notice to her employer by virtue of the catch-all "other" condition categories on the questionnaires. It is undisputed that Ms. Jones failed to indicate her preexisting anxiety and prior work-related right wrist injury. This failure constitutes concealment as contemplated by S.C. Code § 42-9-400(c) and thus Respondents have satisfied this requirement for reimbursement via reliable, probative and substantial evidence.

Lastly, Respondents submitted reliable, probative and substantial evidence establishing Ms. Jones' preexisting anxiety and prior right wrist injury combined with or were aggravated by her April 2006 work accident to result in increased compensation and medical payments, and substantially greater liability to Respondents than would have resulted from the April 2006 work accident alone. *See* S.C. Code § 42-9-400(a). Following the April 2006 injury to her left wrist, Ms. Jones began to experience pain in her previously injured right wrist due to overuse. Medical records support this

aggravation of the prior right wrist injury. Dr. Alday, Ms. Jones' treating physician for her wrist injury, noted in August 2006 that Ms. Jones began reporting pain in her right wrist that she attributed to overuse following her left wrist injury (Dr. Alday, Aug. 17, 2006). Dr. Alday indicated that he would monitor Ms. Jones for "returning symptoms" in her right wrist (Dr. Alday, Aug. 17, 2006). A record from February 2007 indicates that Ms. Jones' right wrist symptoms continued; specifically, Dr. Alday noted Ms. Jones was complaining of right hand pain and paresthesias with increased use of her right hand because of the disability of her left hand (Dr. Alday, Feb. 22, 2007). Ms. Jones was placed on work restrictions for her bilateral extremities, underwent multiple nerve conduction studies on her right hand and was prescribed therapy solely with respect to her right hand (Dr. Alday, Jan. 1, 2007 & Mar. 1, 2007; SRHS Center for Rehab, Feb. 22, 2007). Dr. Mourtada noted Ms. Jones presented with bilateral hand pain, tingling and numbness, with muscle wasting in the right hand (Dr. Mourtada, Oct. 31, 2006 & Jan. 19, 2007). Ultimately, Dr. Wilson assigned 40% impairment to the left upper extremity and 25% impairment to the right upper extremity (Dr. Wilson, July 9, 2007). With respect to the aggravation of her anxiety, Ms. Jones explained to Dr. Lind that her "stress and panic" intensified following her April 2006 work injury (Dr. Lind, Jan. 30, 2008). Dr. Lind opined Ms. Jones' physical pain following the April 2006 work injury (including both her right and left extremities) contributed to her psychological symptoms (Dr. Lind, Jan 30, 2008). Dr. Brady lists a number of incidents following the April 2006 work injury where Ms. Jones displayed paranoia, anxiety, hostility and agitation (Dr. Brady, Feb. 14, 2008). Ms. Jones indicated to Dr. Brady that the April 2006 injury "made her 'stress out' more than she did before her injury and she has 'panic attacks' interfering

with her ability to work" (Dr. Brady, Feb. 14, 2008). After evaluating Ms. Jones, Dr. Richards opined Ms. Jones' April 2006 work injury aggravated her preexisting anxiety and her sustained anxiety precipitated subsyndromal depression (Dr. Richards, June 21, 2007). Thus, Respondents submitted reliable, probative and substantial evidence in the form of medical records from the physicians who treated and evaluated Ms. Jones following her work accident at Spartanburg Regional Healthcare System, which prove that Respondents suffered increased medical and compensation costs and Ms. Jones sustained significantly greater disability as a result of her preexisting anxiety and right wrist injury combining with or being aggravated by her April 2006 work accident.

In addition to the aforementioned medical records, Respondents submitted medical questionnaires completed by Dr. Alday and Dr. Wilson, both of whom evaluated Ms. Jones subsequent to her April 2006 work accident and reviewed her prior medical records in relation thereto (Medical Questionnaires). In the questionnaires, both physicians opined: (1) Ms. Jones had anxiety and a right wrist injury prior to April 17, 2006; (2) the preexisting anxiety and prior right wrist injury were permanent and serious enough to hinder her employment or reemployment; (3) the April 17, 2006 work accident combined with or aggravated Ms. Jones' preexisting anxiety and prior right wrist injury to result in substantially greater lost time from work, substantially greater permanent disability, and substantially greater medical costs (Medical Questionnaires). As the foregoing discussion illustrates, Dr. Alday and Dr. Wilson's opinions, as contained in the medical questionnaires, and pertaining to Second Injury Fund specific issues are corroborated by the medical records submitted by Respondents.

Based upon the foregoing, Respondents submitted reliable, probative and substantial evidence satisfying all of the elements entitling them to reimbursement pursuant to S.C. Code Ann. § 42-9-400 (2003). Thus, the circuit court properly reversed the Appellate Panel's Decision and Order denying reimbursement to Respondents because the Appellate Panel's decision was not supported by substantial evidence. Accordingly, the Order of the circuit court granting full reimbursement in favor of Respondents should be affirmed.

b. Appellant Failed to Rebut the Reliable, Probative and Substantial Evidence Submitted by Respondents.

Once Respondents presented substantial evidence supporting their claim for reimbursement, the burden then shifted to Appellant to present reliable, probative and substantial evidence sufficient to rebut that presented by Respondents. *See Carolinas Recycling Group v. South Carolina Second Injury Fund*, 398 S.C. 480, 730 S.E.2d 324 (Ct. App. 2012). The circuit court correctly determined that Appellant failed to satisfy its burden and therefore the Decision and Order of the Appellate Panel denying reimbursement to Respondents was not supported by substantial evidence (Order, Feb. 18, 2013, p. 6–7). Accordingly, the Order of the circuit court granting Respondents full Second Injury Fund reimbursement should be affirmed.

Appellant failed to present any expert medical evidence or expert testimony supporting its position. The issues involved in this action call for a level of expertise beyond laymen's knowledge. The only expert medical evidence and testimony in the record favors reimbursement. When the specific issues relevant to reimbursement were presented to the experts possessing the skills to offer such an opinion, each determined that Ms. Jones suffered from preexisting impairments that combined with or were

aggravated by her work accident to result in greater liability than would have resulted from the work accident alone. Appellant simply points to isolated references in the medical records submitted by Respondents. It bears mentioning that many of the records cited by Appellant as supporting denial of reimbursement were records from Dr. Alday, Ms. Jones' treating physician, who following his evaluation and treatment of Ms. Jones opined that she did have preexisting impairments that were a hindrance to her employment and the preexisting impairments combined with her April 2006 work accident to result greater liability for Respondents. The Appellate Panel, in accepting Appellant's contentions in the absence of any medical support, rendered medical opinions based upon its own interpretation of isolated medical records; such an approach seemingly has been prohibited as outside the scope of the Commission's authority. *See Burnette v. City of Greenville*, 401 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012) (rejecting a finding of the Commission containing a medical opinion that did not originate from a medical provider and remanding the claim to the Commission to enter findings consistent with the substantial evidence in the record).

Assuming *arguendo* that Appellant was not required to present expert medical evidence supporting its position, it has failed to present any evidence sufficient to rebut the evidence submitted by Respondents. Medical opinions can be disregarded where other competent evidence is presented. *See, e.g., Ballenger v. Southern Worsted Corp.*, 209 S.C. 463, 40 S.E.2d 681 (1946). However, under the holding of *Burnette*, Appellant's laymen interpretation of isolated medical records does not constitute "other competent evidence" sufficient to overcome the evidence favoring reimbursement

submitted by Respondents. Again, Appellant has failed to put forth *any* evidence of its own to support its position denying reimbursement.

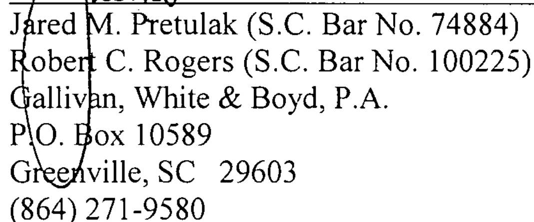
Appellant also contends hindrance is not solely a medical issue and therefore medical evidence is not required to support its denial of reimbursement (Appellant Initial Br. p. 8–9). For one, Appellant's position is in conflict with the Second Injury Fund's instruction on the manner and method of seeking reimbursement. Specifically, the Second Injury Fund indicates that carriers seeking reimbursement should have a *physician* provide an opinion on the issue of hindrance or obstacle to employment. *See* SOUTH CAROLINA SECOND INJURY FUND, A STEP-BY-STEP APPROACH FOR HANDLING SECOND INJURY FUND CLAIMS, section I (July 2002). The guidebook authored by the Second Injury Fund clearly contemplates that hindrance or obstacle to employment is a medical issue, not vocational or otherwise as Appellant now tries to allege. Regardless of whether hindrance/obstacle is a medical issue or not, the same substantial evidence standard of *Carolinas Recycling* applies; where the decision of the Appellate Panel is not supported by substantial evidence, it must be reversed. Respondents remain the only party to have presented any evidence regarding Ms. Jones' preexisting impairments constituting a hindrance or obstacle to her employment. Appellant has failed to present any evidence of its own, either vocational or medical in nature, to rebut the evidence submitted by Respondents.

For the foregoing reasons, the reliable, probative and substantial evidence of the whole record only supports granting reimbursement in favor of Respondents. The circuit court properly reversed the Decision and Order of the Appellate Panel because it was not supported by substantial evidence and the Order of the circuit court should be affirmed.

CONCLUSION

For the reasons set forth herein, the Decision and Order of the Appellate Panel denying Respondents full Second Injury Fund reimbursement for medical and compensation payments pursuant to S.C. Code § 42-9-400 is not supported by the reliable, probative and substantial evidence of the whole record and the Order of the circuit court reversing the Appellate Panel and granting Respondents full Second Injury Fund reimbursement should be affirmed.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA

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CERTIFICATE OF SERVICE

I do hereby certify that on the 19th day of September, 2013, I served a copy of the **RESPONDENTS' INITIAL BRIEF** upon the Clerk of Court for the South Carolina Court of Appeals, the attorney for the Appellant, and others as specified below, by placing a copy of the same in the United States Mail, with due and proper postage affixed thereto, to the following:

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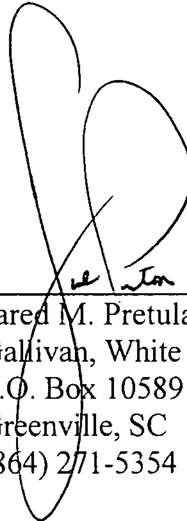

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