THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Maite Murphy, Circuit Court Judge

Appellate Case No. 2024-000443
Case No. 2021-CP-38-1138

Se'Anne Davis (Personal Representative for the
Estate of Adrianne Branton) ..... Respondent,

v.

The Regional Medical Center of Orangeburg and Calhoun Counties, ... Appellant.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities ii

Arguments 1

I. The Appellant's issues on appeal are properly preserved for appellate review. 1

II. The trial court erred in failing to correctly interpret and apply the Tort Claims Act definition of "occurrence" and in failing to reduce the verdict for the Respondent to $1.2 million based on the monetary caps set forth in S.C. Code Ann. § 15-78-120(a)(3) and (4). 3

III. The trial court erred in making an award of "offer of judgment interest" which is in contravention of the legislative intent as expressed in 2005 Act Number 32 and the provisions of the Tort Claims Act including the express bar on any type of "interest prior to judgment." 10

Conclusion 13

TABLE OF AUTHORITIES

Cases

American Surety Co. of New York v. Royall,
160 S.C. 1. 158 S.E. 127 (1931) 9

Atlantic Coast Builders & Contractors, LLC v. Lewis,
398 S.C. 323, S.E.2d 282 (2012) 1

Boiter v. South Carolina Department of Transportation,
393 S.C. 123, 712 S.E.2d 401 (2011) ..... *passim*

Campbell v. City of North Charleston,
431 S.C. 454, 848 S.E.2d 788 (Ct. App. 2020)..... 3, 4

Chastain v. AnMed Health Foundation,
388 S.C. 170, 694 S.E.2d 541 (2010) 4, 5, 6

Faile v. South Carolina Department of Juvenile Justice,
350 S.C. 315, 566 S.E.2d 536 (2002) 12

Hohn v. United States,
524 U.S. 236 (1998)..... 9

House v. Mayo,
324 U.S. 42 (1945)..... 9

Hughes Tool Co. v. Trans World Airlines, Inc.,
409 U.S. 363 (1973)..... 9

Parker v. Spartanburg Sanitary Sewer District,
362 S.C. 276, 607 S.E.2d 711 (Ct. App. 2005)..... 3

Teague v. Lane,
489 U.S. 288 (1989)..... 9

United States v. Carver,
260 U.S. 482 (1923)..... 9

Wood v. Horry County School District,
Op. No. 2023-UP-244 (S.C. Ct. App. 2023) 8, 99

Statutes, Rules, and Other Authorities

S.C. Code Ann. § 15-35-400 ..... 10, 11

S.C. Code Ann. § 15-78-20(f) 12

S.C. Code Ann. § 15-78-120(a) 3

S.C. Code Ann. § 15-78-120(a)(3) 3, 4, 10

S.C. Code Ann. § 15-78-120(a)(4) 3, 10

S.C. Code Ann. § 15-78-120(b) 10, 11

S.C. Code Ann. § 15-78-220 11

2005 Act No. 32, § 18 11

Rule 268(d)(2), SCACR 8, 9

ARGUMENTS

I. The Appellant's issues on appeal are properly preserved for appellate review.

The Respondent Se'Anne Davis, as the Personal Representative for the Estate of Adrianne Branton, has raised preservation arguments in an attempt to convince this Court not to address the merits of the "occurrence" issues that permeated the trial of this case. None of the Respondent's preservation arguments have any merit.

As our appellate courts have stated, issue preservation "is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants." *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, S.E.2d 282, 285 (2012). The Supreme Court has explained: "While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it *clearly* is unpreserved." 730 S.E.2d at 285. (Emphasis added). "[W]here the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." 730 S.E.2d at 287. (Toal, C.J., concurring in result in part and dissenting in part).

In her response brief, the Respondent argues that the Appellant The Regional Medical Center of Orangeburg and Calhoun Counties ("TRMC") has not preserved for appeal its contention that the verdict form was insufficient to support the finding of two occurrences under the terms of the Tort Claims Act. That is clearly unsupported by the record. On the final day of the trial, October 13, 2023, the trial court held an in-chambers conference with counsel to address the jury instructions and the verdict form. (R. 805). Because the trial court conducted that portion of the trial off-the-record, there is no transcription of the full discussion that occurred in chambers. Once on the record, however, TRMC's counsel summarized the objections raised

with respect to the "occurrence" issue and the submission of that issue to the jury. TRMC clearly took the position, which was consistently raised throughout the trial, that the issue of "occurrences" was a mixed question of law and fact – an issue that required adjudication by the court and the jury. As TRMC argues, the jury determines the acts of negligence (or in this case what was termed the "breaches of the standard of care"), and then the court applies those facts to the statutory definition of "occurrence." Consistent with that position, TRMC also took exception with the verdict form to the extent that the trial court was submitting the "occurrence" issue to the jury based upon the jury instructions delivered by the court. The discussion on the record following the in-chambers conference demonstrates that TRMC was objecting to *both* the jury instructions on the "occurrence" issue as well as the verdict form. In fact, the verdict form was mentioned on several occasions during TRMC's counsel's summary of what was addressed in chambers (R. 805-813), and he further closed that discussion by adding: "And just to be clear for the record, Your Honor, I would have the same objections to the verdict form as well; I can't remember if I said it." (R. 813). The trial court then responded, "Yes, sir, your objection is noted." (R. 813). The trial court thus acknowledged that objections were raised to the verdict form, in addition to the jury instructions on the "occurrence" issue.

As further evidence that an objection was made as to the verdict form, the Respondent's counsel himself in his response cited other cases "which all agree that this Court has properly applied both the law in the charge *and in the verdict form* to present this factual dispute to the jury." (R. 812). Clearly, the Respondent's counsel was addressing a challenge to the verdict form. There is no other explanation for counsel to have addressed the verdict form. In sum, to the extent that the Respondent claims that the "occurrence" issue, including the verdict form, was not properly preserved for appellate review, the Court is urged to reject that notion.

II. The trial court erred in failing to correctly interpret and apply the Tort Claims Act definition of "occurrence" and in failing to reduce the verdict for the Respondent to $1.2 million based on the monetary caps set forth in S.C. Code Ann. § 15-78-120(a)(3) and (4).

To recap, the trial court determined that the jury found "two occurrences of negligence" and that the evidence "supported its finding that separate and distinct acts of negligence combined to cause Mrs. Branton's death." (R. 3). Based thereon, the trial court "capped" the damages at $2.4 million "based on the jury's finding of two occurrences." (R. 10). Accordingly, judgment was entered in that amount, with $925,000 awarded on the wrongful death claim and $1,475,000 awarded on the survival claim. (R. 10). TRMC, however, submits that the verdict should have been reduced to a single aggregate "cap" of $1.2 million based on the monetary caps set forth in Sections 15-78-120(a)(3) and (4).

In attempting to justify the trial court's ruling, the Respondent attempts to downplay the significance of this Court's decision in *Parker v. Spartanburg Sanitary Sewer District*, 362 S.C. 276, 607 S.E.2d 711 (Ct. App. 2005), in which this Court, using mandatory language, states: "We conclude that the monetary statutory cap is self-executing and the court is required to apply the monetary statutory cap to any jury verdict exceeding $300,000." 607 S.E.2d at 716. The Respondent refers to that discussion as "unnecessary." *See*, Respondent's Brief, p. 20, n.7. Clearly, the Respondent overlooks the *mandatory* nature of the trial court's duty to apply the monetary caps. That is what is particularly significant in this context. Notably, in *Campbell v. City of North Charleston*, 431 S.C. 454, 848 S.E.2d 788 (Ct. App. 2020), this Court reaffirmed that "the plain meaning of the statute indicates this cap must be executed" and that "under the plain meaning of section 15-78-120(a), courts *must* apply the statutory cap to actions brought pursuant to the Act." 848 S.E.2d at 793-794. (Emphasis added). To reinforce its point, this

Court also emphasized that "the application of the cap is *mandatory* and self-executing." 848 S.E.2d at 793. (Emphasis added).

However, in order for the trial court to carry out that mandatory and self-executing duty, the trial court must be provided certain key information by the jury's verdict. In the case at bar, the verdict form lacks that key information. As the Supreme Court made clear in *Chastain v. AnMed Health Foundation,* 388 S.C. 170, 694 S.E.2d 541 (2010), it is a plaintiff's responsibility to provide a verdict form bearing the information necessary to prove her case and support the judgment, if she seeks a judgment in excess of the statutory cap.

Section 15-78-120(a)(3) of the Tort Claims Act provides that "[n]o person may recover in any action or claim brought hereunder against any governmental entity and caused by the tort of any licensed physician or dentist, employed by a governmental entity and acting within the scope of his profession, *a sum exceeding one million two hundred thousand dollars because of loss arising from a single occurrence* regardless of the number of agencies or political subdivisions involved." S.C. Code Ann. § 15-78-120(a)(3). (Emphasis added). Thus, a plaintiff has the burden of proving not only the existence of multiple "occurrences," but also that a "loss" resulted from each occurrence and the monetary amount of each "loss." Importantly, the cap is not $1.2 million for a single occurrence; the cap is $1.2 million for a "loss arising from a single occurrence."

Thus, as TRMC argues, if multiple occurrences are claimed, a plaintiff has the burden of proving each purported "occurrence" proximately resulted in a "loss" and the amount of damages to compensate each such "loss." Even where there may be multiple occurrences, it is certainly possible that all of the damages were caused by just one of the occurrences. It is also just as possible that one or more of the occurrences caused damages of less than $1.2 million. In

effect, in order for a trial court to fulfill its mandatory and self-executing duty to apply the monetary caps, it is necessary for the court to be provided information on the verdict form as to each "loss" arising from each "occurrence," so that the monetary caps may be properly applied. However, in the case at bar, the court did not have that requisite information.

The Respondent virtually ignores this issue. Her response is primarily that the issues related to the verdict form are not preserved, and she goes further to suggest that TRMC "consented" to the verdict form. Certainly, that is not supported by the record, as discussed above.

The Respondent also tries to shift blame to TRMC suggesting that the inadequacy of the verdict form is somehow TRMC's fault and not the Respondent's fault. However, the Respondent ignores the teaching of the Supreme Court in *Chastain v. AnMed Health Foundation,* 388 S.C. 170, 694 S.E.2d 541 (2010), where it plainly states that it is a plaintiff's burden of proving each "occurrence" as pled. 694 S.E.2d at 544. In the case at bar, the Respondent has not satisfied her burden of proof in demonstrating that there were multiple occurrences or the amount of the "loss," if any, attributable to each occurrence. Fundamentally, a plaintiff meets that burden by requesting a verdict form that furnishes the information needed for the trial court to carry out its mandatory duty to apply the monetary caps. As the Supreme Court made clear in *Chastain*, it is a plaintiff's responsibility to provide a verdict form bearing the information necessary to prove his case and support the judgment, if he seeks a judgment in excess of the cap. A defendant, however, has no responsibility to make sure the verdict form proves the plaintiff's case – that burden lies solely with the plaintiff. Thus, the Respondent's attempts to shift the burden to TRMC should be wholly rejected, just as a similar position taken by the plaintiff in *Chastain* to blame the defendant hospital for the inadequacy of the verdict

form was rejected by the trial judge and the Supreme Court. In sum, it was the Respondent's responsibility to make certain there is an adequate verdict form to prove her entitlement to multiple occurrences and a judgment in excess of the $1.2 million cap. The Respondent did not satisfy that responsibility, just as the plaintiff in *Chastain* did not do so. Accordingly, the judgment should be reduced to one "cap" just as what occurred in *Chastain*.

Finally, the Respondent argues that "a burden to show 'a different loss' arose from each of the multiple occurrences … is directly contrary to the South Carolina Supreme Court's ruling in *Boiter*." *See*, Respondent's Brief, p. 33. That could not be more wrong and only demonstrates a fundamental misunderstanding of the Supreme Court's decision in *Boiter v. South Carolina Department of Transportation*, 393 S.C. 123, 712 S.E.2d 401 (2011). *Boiter* cannot and should not be read as holding that the factfinder is not required to monetize the "loss" arising from each occurrence. *Boiter* does not say that, and in fact, *Boiter* shows the exact opposite is true. As reflected in the Supreme Court's opinion, *Boiter* did not involve one lawsuit with two plaintiffs and two defendants. Instead, as the Supreme Court explained, "[t]he Boiters filed four separate lawsuits against South Carolina Department of Transportation (SCDOT) and South Carolina Department of Public Safety (SCDPS) (collectively, Respondents) alleging negligence in their failure to prevent the accident." *Boiter*, 712 S.E.2d at 402. Thus, there were four separate lawsuits, and as a result, when the cases were tried, the jury returned *four separate verdicts*. Those four verdicts totaled $1.875 million for each plaintiff. 712 S.E.2d at 402-403. In adjudging the post-trial motions, the trial judge in *Boiter* had available to him the jury's determination of the "loss" attributable to each defendant (SCDOT or SCDPS) in favor of each plaintiff (Larry Boiter and Jeannie Boiter). That allowed the Supreme Court to know on appeal that the jury found in excess of $300,000 in damages for each of the two occurrences that the

Supreme Court found, one by SCDOT and another by SCDPS. Thus, when one understands the procedural history of *Boiter* and that there were four separate verdicts returned, it is clear that *Boiter* does indeed stand for the proposition that a factfinder must determine the "loss" attributable to each occurrence. The Respondent is simply wrong to argue or suggest otherwise.

As TRMC also argues, after the jury determined that there were two "breaches of the standard of care," the trial court was required to apply the statutory definition of "occurrence," and analyze whether those breaches gave rise to or proximately caused a different "unfolding sequence of events." If those breaches each give rise to a new "sequence of events" so as not to be "unfolding" or "evolving" from past events, only then is there a new and separate "occurrence." However, if those breaches gave rise to the same "unfolding sequence of events," then there was a single occurrence. In response, the Respondent claims that argument is "unclear" and further suggests that the trial court's failure to engage in that analysis post-trial was unnecessary because "the trial court pre-determined what separate and independent acts of negligence would be presented on the verdict form." *See*, Respondent's Brief, p. 34. Not surprisingly, the Respondent includes no citation to the record to support that claim. Frankly, the record does not support the notion that the trial court "pre-determined" that the acts of negligence (or "breaches of the standard of care") presented to the jury on the verdict form were "separate and independent acts of negligence." That obviously did not happen as demonstrated by the fact that the trial court charged the jury that "[t]he Plaintiff has the burden of proving that each act of negligence was a separate and independent in order for you to find that more than one occurrence occurred." (R. 825-826). Thus, the trial court did not "pre-determine" an issue of fact that was supposedly presented to the jury.

Along those same lines, the Respondent also argues that "the court made a legal determination of which occurrences would be before the jury." *See*, Respondent's Brief, p. 35.

That also did not occur. Again, not surprisingly, Respondent provides no citation to the trial transcript to support that revisionist history. The verdict form did not include "occurrences" for the jury to decide upon; rather, the verdict form presented three "breaches of the standard of care" for the jury to determine. At no point did the trial court rule or "pre-determine" that those "breaches of the standard of care" would each equate to a separate "occurrence." If that had been what happened, certainly there would have been no reason to then charge the jury with the definition of "occurrence." Ironically, in making these arguments, the Respondent appears to agree with TRMC that what constitutes an "occurrence" is a "legal determination." TRMC will agree with that wholeheartedly, but it is simply untrue to conclude that the trial court made that legal determination before the case was presented to the jury.

Additionally, in an attempt to uphold the verdict, the Respondent also argues that "an occurrence is something that flows from 'a single act of negligence' and not something that flows from a combination of multiple acts of negligence." *See*, Respondent's Brief, p. 36. However, an "occurrence" is not "something" by definition; it is "an unfolding sequence of events," which the Respondent tries to write out of the definition. In addition, as *Boiter* teaches, multiple acts of negligence may give rise to a single occurrence. Indeed, the Supreme Court recognized that "[i]n many situations, negligent acts from more than one entity would still equal but one occurrence." *Boiter*, 712 S.E.2d at 407. This would likewise be true where there are multiple acts of negligence committed by the same entity, or in this case, by the same physician.

Finally, it should be noted that the Respondent relies heavily on this Court's unpublished decision in *Wood v. Horry County School District*, Op. No. 2023-UP-244 (S.C. Ct. App. 2023). However, that decision is unpublished and therefore should not be treated as precedent. *See*, Rule 268(d)(2), SCACR ("[m]emorandum opinions and unpublished orders have no precedential

value and should not be cited except in proceedings in which they are directly involved"). Thus, the Respondent's reliance on the *Wood* decision is in direct violation of Rule 268(d)(2). The Respondent also surmises that this Court did not publish its decision in *Wood* because the law "was already clear." *See*, Respondent's Brief, p. 31. Given the varied approaches that state and federal trial courts are taking in addressing the procedure to be applied in adjudicating the "occurrence" question, that is a highly unlikely characterization of the Court's reasoning. The Respondent then attempts to bolster the unpublished decision in *Wood* by pointing out that the Supreme Court granted and then denied a writ of certiorari as improvidently granted. Citing a 1931 case, the Respondent falsely suggests that the denial of a writ of certiorari infers that the decision of the court below was correct on the merits. A careful reading of *American Surety Co. of New York v. Royall*, 160 S.C. 1. 158 S.E. 127 (1931), shows that the South Carolina Supreme Court was addressing what it viewed to be an inference to be drawn from the denial of a writ of certiorari by the United States Supreme Court. That proposition, however, was incorrect then and has been repeatedly rejected by the United States Supreme Court. Quite simply, the denial of a writ of certiorari does not in any way reflect or imply any view on the merits of a decision.[1]

In sum, as *Boiter* instructs, the trial court should have ruled as a matter of law that the same "unfolding sequence of events" proximately flowed from the two "breaches of the standard of care"

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[1] *See e.g., United States v. Carver*, 260 U.S. 482, 490 (1923) ("The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times"); *House v. Mayo*, 324 U.S. 42, 48 (1945) ("as we have often said, a denial of certiorari by this Court imports no expression of opinion upon the merits of a case"), *overruled on other grounds by Hohn v. United States*, 524 U.S. 236 (1998); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365, n.1 (1973) (reiterating "the well-settled view that denial of certiorari imparts no implication or inference concerning the Court's view of the merits"); *Teague v. Lane*, 489 U.S. 288, 296 (1989) ("As we have often stated, the denial of a writ of certiorari imports no expression of opinion upon the merits of the case. The variety of considerations that underlie denials of the writ counsels against according denials of certiorari any precedential value").

committed by the same governmental entity and same physician-employee. There were not two separate and independent "sequences of events" resulting in the decedent's injury and death. Instead, there was a singular, finite medical encounter by one physician, and hence, there was but one "unfolding sequence of events" and thus one "occurrence." The Appellant TRMC, therefore, requests that this Court properly analyze the "occurrence" issue by applying the *entire definition* of "occurrence" and not just the back-end of the definition. When properly analyzed under the rubric from *Boiter*, TRMC submits that the trial court should only have found a "single occurrence" and, accordingly, the verdict should have been reduced to a single aggregate cap of $1.2 million in accordance with the mandates of Sections 15-78-120(a)(3) and (4).

III. The trial court erred in making an award of "offer of judgment interest" which is in contravention of the legislative intent as expressed in 2005 Act Number 32 and the provisions of the Tort Claims Act including the express bar on any type of "interest prior to judgment."

The Respondent filed a post-trial motion seeking an award of "offer of judgment interest" pursuant to Section 15-35-400 and Rule 68, SCRCP. The Appellant TRMC opposed that motion on the basis that "offer of judgment interest" or any type of "interest prior to judgment" is not recoverable against a governmental entity pursuant to Section 15-78-120(b). (Supp. R. 1). Furthermore, relying on the legislative history, TRMC asserted that Section 15-35-400 and Rule 68(b), SCRCP, on which the Respondent's motion is based, are not applicable to governmental entities. (Supp. R. 1). The trial court, nonetheless, granted the motion for "offer of judgment interest" and awarded $31,035.62. (R. 11).

In addressing this issue in her response brief, the Respondent, as did the trial court, disregarded the primary argument made by TRMC – that an award of "offer of judgment

interest" is in contravention of the legislative intent as expressed in Act 32 of 2005. To reiterate, Section 15-35-400 was enacted as part of Act 32 of 2005. Section 18 of Act 32 reads: "The provisions of this act do not affect any right, privilege, or provision of the South Carolina Tort Claims Act contained in Chapter 78, Title 15 of the 1976 Code or the South Carolina Solicitation of Charitable Funds Act as contained in Chapter 56 of Title 33." Section 18 was then actually codified as part of the Tort Claims Act in Section 15-78-220, which states in pertinent part: "The provisions of Act 32 of 2005 do not affect any right, privilege, or provision of the South Carolina Tort Claims Act contained in Chapter 78, Title 15 of the 1976 Code." *See,* S.C. Code Ann. § 15-78-220. Thus, as the General Assembly intended in 2005, the provisions of Act 32, including Section 15-35-400, are not applicable to cases brought pursuant to the Tort Claims Act. It is that simple. Obviously, judging from her silence, the Respondent has no rebuttal to that argument.

Moreover, as to the other argument, which the Respondent did choose to address, Section 15-78-120(b) of the Tort Claims Act bars an award of any "interest prior to judgment." *See*, S.C. Code Ann. § 15-78-120(b) ("No award for damages under this chapter shall include punitive or exemplary damages or interest prior to judgment"). That was not limited to "pre-judgment interest" but, using the precise language of the statute, that applies to any "interest prior to judgment." To try to circumvent that prohibition, the Respondent plays with semantics and tries to claim that "offer of judgment interest" is a type of "post-judgment interest" because it is temporally awarded after judgment is entered. Of course, the same could be said about the conventional pre-judgment interest; it too is awarded only after a judgment is entered.

Notably, by statutory pronouncement, the Tort Claims Act is required *to be liberally construed to limit the liability of the state and its political subdivisions*. The General Assembly did not leave such a construction to chance but included that rule *explicitly* in its codified legislative findings. *See*, S.C. Code Ann. § 15-78-20(f) ("The provisions of this chapter establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, while acting within the scope of official duty, must be liberally construed in favor of limiting the liability of the State"). *See also, Faile v. South Carolina Department of Juvenile Justice,* 350 S.C. 315, 566 S.E.2d 536, 540 (2002) ("[p]rovisions establishing limitations on liability must be liberally construed in the State's favor"). Thus, to the extent there is any confusion as to whether "offer of judgment interest" may be awarded against a governmental entity in a Tort Claims Act case, the law must be construed to limit the liability of the government.

In sum, the trial court erred in making an award of "offer of judgment interest" against a governmental entity. The award of $31,035.62 in interest should be reversed.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant Regional Medical Center of Orangeburg and Calhoun Counties respectfully renews its request that the Court reverse in part the post-trial order of Circuit Court Judge Maite Murphy and order that the judgment be reduced to a single aggregate cap of $1.2 million. In addition, the Court is requested to reverse the award of offer of judgment interest.

Respectfully submitted,

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May 8, 2025

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

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May 8, 2025

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant certifies that the Final Reply Brief of Appellant complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended April 24, 2024), the undersigned employee of Lindemann Law Firm, P.A., counsel for the Appellant, does hereby certify that service of the **Final Reply Brief of Appellant** was made upon all counsel of record by email only this the 8th day of May 2025, as follows:

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RE: Se'Anne Davis (Personal Representative for the Estate of Adrianne Branton) v.
The Regional Medical Center of Orangeburg and Calhoun Counties
Appellate Case Number: 2024-000443
Civil Action Number: 2021-CP-38-1138
Claim Number: F0164
Our File Number: 106.20709

Dear Ms. Kitchings:

Pursuant to Section (b)(2)the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended April 24, 2024), please find enclosed for filing the **Final Brief of Appellant** and **Final Reply Brief of Appellant** with regard to the above referenced appeal. By copy of this letter, I am serving copies on all counsel of record by email only pursuant to Section (d)(1) of the same Supreme Court Order.

One bound copy of each brief will be mailed to the Court via U.S. Mail. If you have any questions, please advise. Thank you for your assistance.

Sincerely,

LINDEMANN LAW FIRM, P.A.

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Enclosures

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