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May 29 2025
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Darlington County
Court of Common Pleas
Paul M. Burch, Circuit Court Judge
Patrick J. McLaughlin, Special Referee

App. Case No. 2023-001016
Ct. App. Op. 2025-UP-165, Filed May 14, 2025

Samantha Joanne Carwile, individually and as the
Personal Representative of the Estate of Marlayna Joan Carwile,

Respondent,

vs.

Chris Anderson and Danielle Anderson,

Appellants.

Petition for Rehearing

In this negligence action arising from the death of three-year-old Marlayna Joan Carwile, the Circuit Court Judge struck the Appellants'/Defendants' answer and placed them in default for failing to respond to discovery requests, and thereafter, the Special Referee, who was appointed by the Clerk of Court, awarded $30 million dollars to the parents. The Appellants have challenged the judgment on multiple grounds, including: (1) the imposition of a default as a harsh sanction where the record shows that their attorney's failure to respond to discovery requests and appear for hearings was tantamount to abandonment, (2) the Clerk of Court lacked jurisdictional authority to sign an order of reference and/or appoint the Special Referee without the consent of the Appellants, and (3) the judgment awarded considered matters beyond the legitimate, recoverable elements of damages for a wrongful death award and was grossly excessive. On appeal, the Court

reversed the judgment as grossly excessive but affirmed the judgment in all other respects. Pursuant to Rule 221, SCACR, the Appellants respectfully petition for rehearing and point to the following issues which have been overlooked or misapprehended by the Court.

I. The Harsh Sanction Default: The Circuit Court Judge abused his discretion in striking the Appellants'/Defendants' answer where the Plaintiff did not make a sufficient showing of egregious discovery violations to justify the harsh sanction that placed them in default.

A. The Court has overlooked or misapprehended that under the applicable standard for Rule 37, imposition of a sanction that results in default is viewed as harsh and should not be administered without a showing of egregious discovery violations. Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 198–99, 511 S.E.2d 716, 718–19 (Ct. App. 1999). Judge Burch did not make any findings of bad faith, willful disobedience, or gross indifference to the Plaintiffs' rights. Instead, he placed the Defendants/Appellants in default based on the mere fact that they did not answer interrogatories or requests to produce. This Court faults the Andersons for failing to produce any explanation for why they did nothing in the litigation from July 2021[1] until April 2023. However, the Court has overlooked or misapprehended that, as the moving party, the Plaintiff bears the responsibility to show bad faith, willful disobedience, or gross indifference to its rights to justify the sanction. Davis v. Parkview Apartments, 409 S.C. 266, 282, 762 S.E.2d 535, 544 (2014); Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991).

B. The Court's recitation of the facts overlooks and misapprehends the evidence as to the Andersons' participation in this litigation, which is highly relevant to showing that striking the

[1] The record shows that Plaintiff's counsel had acknowledged that his office had, in fact, received responses to Plaintiff's Requests for Admission at some point. [ROA 12 n.1.]

answer and placing the Appellants in default was an unjustified, harsh sanction.

The Court states, as fact, that: "The Andersons were permitted to file an answer, but after that, the Andersons and their counsel did virtually nothing to participate in the litigation." There is no evidence that the Andersons willfully failed to participate in the litigation. The evidence of record shows that all communications regarding the discovery and the subsequent motions and courts hearings were directed to the Andersons' retained counsel, Thurmond Brooker.

The Court states: "The case was referred to a special referee. At that point, a new lawyer appeared for the Andersons and requested the second default be set aside. The referee denied the motion, and after a hearing on damages, entered a $30 million default judgment to be split evenly between Marlayna's parents." The Record shows that the Plaintiff moved to refer the case to a special referee on February 9, 2023. [ROA 266.] The very next day, on February 10, 2023, without allowing any time for response or hearing, the Clerk of Court granted the Plaintiff's motion and appointed Patrick J. McLaughlin as Special Referee. [ROA 18.] The Plaintiff filed a motion for a damages hearing on March 7, 2023. [ROA 268.] The next day, March 8, 2023, the Special Referee set the hearing for April 13, 2023. [ROA 270.] On March 30, 2023, the Appellants' home insurance carrier received a subpoena from Plaintiff's counsel for policy documents, which was the first notice of the legal action it had received since Mr. Brooker began representing the Appellants/Defendants. Upon learning of the status of the action, the carrier retained counsel for the Defendants on April 6, 2023, and on April 12, 2023, Andrew MacLeod, Esq., made an appearance on behalf of the Defendants and filed a Rule 55 motion to set aside the entry of default. [ROA 272, 749.] Again, the Record does not show that the Andersons personally received any notice of these proceedings. All notices went to the counsel of record - Mr. Brooker.

When the Rule 37 motion came before the circuit court, the proceedings as evidenced in

the docket showed that Mr. Brooker had virtually abandoned defending his clients:

- He had failed to respond to discovery requests;
- He had failed to respond to communications from Plaintiff's counsel regarding the outstanding discovery;
- He had failed to appear for the hearing on the motion to compel;
- He had failed to comply with the order compelling discovery;
- He had failed to respond to communications from Plaintiff's counsel regarding the order compelling; and
- He had failed to appear at the hearing on the Rule 37 motion.

See discussion in Appellants brief as to abandonment and citation to Graham v. Town of Loris, 272 S.C. 442, 451, 248 S.E.2d 594, 598 (1978), and Stearns Bank Nat. Ass'n v. Glenwood Falls, LP, 373 S.C. 331, 342–43, 644 S.E.2d 793, 799 (Ct. App. 2007), regarding the difference between an attorney's negligence and a situation "where an attorney's conduct transcends mere neglect and the party seeking relief establishes willful abandonment or withdrawal from the case."

Based on the clear evidence of Mr. Brooker's abandonment of his client, the Circuit Judge should have been aware that something was seriously amiss and made further inquiry before imposing the harsh sanction of placing the Appellants in default without any means to defend the allegations on liability and limiting their ability to contest the Plaintiff's demand for damages. And, regardless of how the issue was framed and articulated in the Rule 55 motion to set aside the second default, all this glaring evidence of abandonment was readily apparent on the record and made a sufficient showing of good cause to set aside the entry of default.

C. As discussed in the Appellants' brief, the Special Referee did not have jurisdiction to rule on the Rule 55 motion to set aside the second sanction default because it should have been ruled upon by the Circuit Court Judge that heard the Rule 37 motion and struck the answer, namely Judge Burch. "It is settled that one circuit judge does not have the power to review, modify, affirm or reverse the findings of another circuit judge." State ex rel. Medlock v. Love Shop, Ltd., 286 S.C. 486, 488, 334 S.E.2d 528, 529 (Ct. App. 1985) (citing Cook v. Taylor, 272 S.C. 536, 252 S.E.2d 923 (1979)). "There is a long-standing rule in this State that one judge of the same court cannot overrule another." Charleston Cnty. Dep't of Soc. Servs. v. Father, Stepmother, & Mother, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995) (citing Tisdale v. Amer. Life Ins. Co., 216 S.C. 10, 56 S.E.2d 580 (1950); Dinkins v. Robbins, 203 S.C. 199, 26 S.E.2d 689 (1943)).

In rejecting this concept and upholding the Special Referee's denial of the Rule 55 motion, the Court has overlooked or misapprehended that there is no cited precedent for the concept that Mr. Brooker's failure to appear at the sanctions hearing and to make a record could justify disregarding the jurisdictional principle embedded in the one-judge rule. See discussion below regarding the principle that a lack of judicial authority can be raised at any time.

Similarly, the Clerk of Court's order of reference purporting to give the Special Referee authority over any motions related to the entry of default cannot override the one-judge rule and transfer the authority of Judge Burch to reexamine his sanction order. As discussed below, the Clerk of Court had no authority to enter an order of reference and appoint a special referee without the consent of the Appellants. Moreover, there is no cited precedent for the concept that a circuit court judge could have ceded Judge Burch's authority over his sanction award to anyone else.

D. The Court did not specifically address several issues raised by the Appellants challenging the default sanction. To preserve these issues for further review at the Supreme Court,

the Appellants respectfully submit that the Court overlooked or misapprehended the importance on these issues and ask that the Court address these issues.

Did the Special Referee err in ruling that the Rule 55 motion to set aside the sanctions default was not a timely and proper procedure to seek review of Judge Burch's sanction order? As more fully presented in their Brief[2], the Appellants maintain that the Rule 55 motion to set aside the sanctions [second] default was a timely and proper procedure to seek review of Judge Burch's sanction order.

Did the Special Referee err in ruling that the Defendants took inconsistent positions about the defaults and in misapplying judicial estoppel? Also, as more fully presented in their Briefs, the Appellants maintain that the Special Referee misapplied judicial estoppel because they did not take inconsistent positions about the defaults. The position that the Appellants/Defendants gave Allstate notice of the claim in June 2020 is different from the position that Allstate did not have notice of the progress of the ongoing litigation – or the sanction default – until March 2023. These are not inconsistent positions, and they do not support any application of judicial estoppel as addressed in Auto-Owners Ins. Co. v. Rhodes, 405 S.C. 584, 597–98, 748 S.E.2d 781, 788 (2013).

II. The Special Referee's Lack of Jurisdictional Authority

A. The Appellants have raised the issue that the Special Referee lacked jurisdictional authority to rule on any motions or award damages where the Clerk of Court did not have jurisdictional authority to appoint the Special Referee or sign an order of reference without their consent as required by S.C. Code §14-17-250 and §14-11-60. The Special Referee held that this issue had been waived, and this Court also has questioned whether the issue was properly preserved. However, both the Special Referee and this Court have overlooked or misapprehended

[2] All the arguments made in the Appellants final briefs are incorporated as if fully restated.

the well-settled law that lack of jurisdictional authority can be raised at any time. Gantt v. Selph, 423 S.C. 333, 338, 814 S.E.2d 523, 525–26 (2018) ("[l]ack of subject matter jurisdiction may be raised at any time, and may be raised for the first time on appeal.") "At any time" includes posttrial motions. Limehouse v. Hulsey, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013). In addition, contrary to the Special Referee's ruling and this Court's decision, the lack of jurisdictional authority, as in the power to rule, cannot be waived by a party appearing and submitting to a damages hearing. *See* Chabek v. Nationwide Mut. Fire Ins. Co., 303 S.C. 26, 28–29, 397 S.E.2d 786, 787 (Ct. App. 1990).

The Special Referee also rejected the Appellants/Defendants' jurisdictional challenge on a separate issue preservation ground, ruling that "Defendants waived any right to challenge the Order of Reference by not filing an appeal within thirty (30) days of that order" and the order was law of the case. [ROA 64, 67.] The Appellants have challenged that ruling by presenting on the appeal the issue as to whether the Special Referee erred as a matter of law in applying the law of the case doctrine because Defendants were not required to appeal from the interlocutory order of reference. Although this Court did not address the issue, the Appellants respectfully renew the challenge and maintain that the holding in Link v. School District, 302 S.C. 1, 393 S.E.2d 176 (1990), gave them the option to appeal from the interlocutory, non-final orders on appeal from the final judgment. As discussed in more detail in their briefs, the Appellants submit that since they have not challenged the order of reference as abridging their right to a jury trial, it does not fall into the type of "mode of trial" order which must be immediately appealed. The challenge is one of jurisdictional authority that was properly brought before the Special Referee in the posttrial motions and also is properly presented to this Court in this appeal from the final judgment.

B. The Appellants raise the issue of whether the Special Referee erred as a matter of law in holding that Rule 53(b) authorized the Clerk of Court to appoint and refer the default to a special referee without consent of the Defendants. Rule 53(b), SCRCP, provides, in pertinent part: "In an action where the parties consent, in a default case, or an action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge or the clerk of court." As defined in Rule 53(a): "The term "special referee" means a member of the South Carolina Bar to whom a matter has been referred under S.C. Code Ann. § 14-11-60. The Special Referee and this Court have ruled that Rule 53(b) allowed the Darlington County Clerk of Court to appoint the Special Referee in this default case without the Appellants' consent with citation to Roche v. Young Bros., of Florence, 332 S.C. 75, 504 S.E.2d 311 (1998). In so holding, the Court has overlooked or misapprehended the ruling in Roche and the controlling statutes that authorize the appointment of special referees and that authorize a clerk of court to sign orders of reference.

By enactment of S.C. Code § 14-11-60 – which is specifically identified in Rule 53(a) – the General Assembly has authorized a "presiding circuit court judge" to appoint a special referee "upon agreement of the parties." Similarly, by enactment of S.C. Code § 14-17-250, the General Assembly has authorized a clerk of court to sign orders of reference on two conditions (1) where the county does not have a master in equity and (2) if the parties consent. Here, Darlington County does not have a master-in-equity, so § 14-17-250 could authorize the clerk of court to sign an order of reference – but only with the consent of the parties. In addition, as to the corollary issue of the appointment of a special referee, § 14-11-60 only authorizes a presiding circuit court judge to make such an appointment and only with agreement of the parties. The Appellants did not consent to a

reference or appointment of a special referee, and thus, the Clerk of Court did not have the jurisdictional authority to appoint the Special Referee and make a reference of the matter to him.

By relying on Roche to uphold the Clerk of Court's order, the Court has overlooked or misapprehended that the holding in Roche does not control the issue presented here because of a key distinguishing point. In Roche, ***a circuit court judge*** issued the order appointing the special referee and making the reference[3], and thus, that ruling simply does not support the conclusion that Rule 53 allows a clerk of court to appoint a special referee or sign an order of reference without the consent of the defaulting party where the statutory language is so clear.

By construing Rule 53 as extending a clerk of court's authority beyond the bounds of the statutes, the Court also has overlooked and misapprehended the fundamental principle that the Rules of Civil Procedure cannot limit or expand jurisdiction defined by statute. The Supreme Court is constitutionally empowered, by S.C. Const. art. V, § 4, to make rules of practice and procedure. However, as the Supreme Court has held: "The South Carolina Rules of Civil Procedure provide no guidance in determining the jurisdiction of the circuit court." Skinner v. Westinghouse Elec. Corp., 380 S.C. 91, 94, 668 S.E.2d 795, 796 (2008). This jurisdictional point also is addressed in the express terms of the Rules of Civil Procedure:

- "These rules shall not be construed to extend or limit the jurisdiction of any court of this State…" Rule 82, SCRCP.

[3] *See* Court of Appeals decision, 485 S.E.2d at 111: "Roche filed an *ex parte* motion and accompanying affidavit **with a circuit court judge** requesting that the matter be referred to Eugene Fallon as a special referee. The order of reference was signed the same day with Young Brothers never having received a copy of the motion or any notice that the motion was being considered by **the circuit court judge**." (Emphasis added.)

- "These rules, or any of them, shall apply to every trial court of civil jurisdiction within this state, ***within the limits of the jurisdiction and powers of the court provided by law***…." Rule 81, SCRCP. (Emphasis added.)

In Stokes v. Denmark Emerg. Med. Serv., 315 S.C. 263, 433 S.E.2d 850, 852 (1993), the Supreme Court addressed the constitutional provision in § 4 of Article V, and it held that where the question is one of practice and procedure in the courts, a court rule is subordinate to the statutory law. *See also* Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 570, 703 S.E.2d 197, 201 (2010) (tacitly acknowledging the general rule that any conflict between a statute and court rule must be resolved in favor of the statute); Jefferson by Johnson v. Gene's Used Cars, Inc., 295 S.C. 317, 317, 368 S.E.2d 456, 456 (1988) (holding that appellate jurisdiction is controlled by statute [§14-3-330] and not by Rule 72); Mathias v. Lexington Cnty., 79 S.C. 402, 60 S.E. 970, 971 (1908) (agency rule "must be held subordinate to the express limitation of the statute"); State v. Cottingham, 224 S.C. 181, 187, 77 S.E.2d 897, 900 (1953) ("Statutes override rules of court, if in conflict."); Marichris, LLC v. Derrick, 384 S.C. 345, 353, 682 S.E.2d 301, 305 (Ct. App. 2009)("A rule of civil procedure may not limit the provisions of a statute.")

Based on the applicable, controlling provisions of the Constitution and statutes as construed by the Appellate Courts, Rule 53 does not and cannot grant jurisdictional authority to a clerk of court beyond the statutory provisions which govern the appointment of a special referee and the signing of an order of reference. The Darlington County Clerk of Court did not have the power to appoint the Special Referee and sign an order of reference without the consent of these Appellants/ Defendants and all the orders entered by the Special Referee are void. Accordingly, the judgment and associated orders should be vacated, and the case should be remanded, at the least, to allow a

presiding circuit court judge to rule on the Plaintiff's motion for an order of reference to a special referee.

III. The Excessive Award of $30 Million in Actual Damages: The Court has correctly ruled that the $30 million judgment was grossly excessive. However, the Court has rejected the Appellants' challenges to the Special Referee's improper consideration of matters beyond the legitimate, recoverable elements of damages for a wrongful death award without discussion of the individual issues raised. The Appellants submit that the Court has overlooked or misapprehended the applicable case law on each of those issues as raised and argued in their briefs, including the following points.

A. The Court has overlooked or misapprehended that the Special Referee erred in considering the Parents' loss of work income and diminished earning capacity because those matters do not constitute legitimate, recoverable "pecuniary loss" for the wrongful death of their child. Under the analysis and reasoning found in the existing caselaw cited and discussed in the Appellants' brief, it is clear that, in the case of a child, recoverable "pecuniary loss" refers to the lost wages/income of the deceased child, not the surviving parent(s). *See* Gilliam v. S. Ry. Co., 108 S.C. 195, 93 S.E. 865, 867 (1917); Mock v. Atlantic Coast Line R. Co., 227 S.C. 245, 87 S.E.2d 830 (1955); *see also* Patrick v. United States, 316 F.2d 9, 11 (4th Cir. 1963). The Special Referee improperly relied on the evidence of the parents' loss of income and diminished earning capacity and that evidence should not be considered on remand in awarding judgment in a reasonable amount based on the proper consideration of the relevant evidence under the applicable legal principles.

B. The Court has overlooked or misapprehended that the Special Referee erred in considering the deterioration of the Parents' relationship with each other because any such loss is

not a legitimate, recoverable element of damages. One of the recoverable elements of damages is identified as "loss of companionship and deprivation of the use and comfort ***of intestate's society*** as the beneficiaries may have sustained as the result of the death of the intestate." Self v. Goodrich, 300 S.C. 349, 352, 387 S.E.2d 713, 715 (Ct. App. 1989) (emphasis added). While the Special Referee relied upon the district court's order in Jimenez v. Chrysler Corp., 74 F. Supp. 2d 548 (D.S.C. 1999), as supporting authority on this point, nothing in that order justifies considering the deterioration of the parents' interpersonal relationship in awarding damages for the death of their child where that judgment was vacated on appeal to the Fourth Circuit in Jimenez v. DaimlerChrysler Corp., 269 F.3d 439 (4th Cir. 2001). The Special Referee improperly relied on the evidence of the parents' loss of their relationship with each other when the Father left and severed his relationship with the Mother to start a new life with a new family. That evidence should not be considered on remand.

C. The Court has overlooked or misapprehended that the Special Referee erred in considering the emotional damage suffered by the Child's surviving brother. The brother's emotional damage is not a recoverable element of damages in this wrongful death action because he is not a beneficiary under the wrongful death statute, per S.C. Code Ann. § 15-51-40 and S.C. Code Ann. § 62-2-103. While the Special Referee acknowledged that the brother is not a statutory beneficiary, he still improperly considered that evidence by bootstrapping the brother's emotional harm to the Mother's grief. This bootstrapping is not allowable, and the evidence of the brother's emotional damage should not be considered on remand.

D. The Court has overlooked or misapprehended that the Special Referee erred in allowing the Parents to recover for the emotional damage they suffered by witnessing the immediate aftermath of the accident because they had dropped their bystander claim. [ROA 403.] *See* Kinard

v. Augusta Sash & Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985) (recognizing the cause of action).

The Court's summary affirmance on these points impacts the appropriate determination of a proper award on remand. The Court should reconsider its decision and remand with instructions to the fact finder that none of the evidence on these points should be considered in awarding a judgment in a reasonable amount based on evidence of only the legitimate, recoverable elements of damages.

CONCLUSION

WHEREFORE, based on the foregoing together with the issues raised and argued in their final briefs, the Appellants respectfully maintain and renew the challenge to any and all rulings by the Special Referee because the Clerk of Court had no power to sign an order of reference and to appoint him. On this point, the Appellants request that the Court reconsider its decision in affirming the Clerk of Court's appointment of the Special Referee, and instead, vacate the judgment and remand to allow a Circuit Court Judge to order a reference and appoint a Special Referee.

In addition, and in the alternative, the Appellants ask the Court to reconsider its decision in affirming the Special Referee's denial of the Rule 55(c) motion, and instead, reverse the judgment because the Special Referee had no authority to rule on the Rule 55 motion for review of Judge Burch's sanctions order; and the case should be remanded to allow Judge Burch to rule on the Rule 55 motion seeking to set aside his sanction order striking the answer that placed the Defendants in default. Appellants are confident that given the procedural history demonstrating Mr. Brooker's abandonment of his clients, the sanction default should be set aside and the Appellants/Defendants should be allowed the opportunity to provide discovery and ultimately

proceed to trial on the merits.

In addition, and in the alternative, the Appellants petition the Court to remand with instructions to the fact finder to render a judgment in a reasonable amount based on evidence of only the legitimate, recoverable elements of damages.

Respectfully submitted,

HOOD LAW FIRM, LLC
172 Meeting Street
Post Office Box 1508
Charleston, SC 29401/02
Ph: (843) 577-4435 Fax: (843) 722-1630

/s/ James B. Hood
James B. Hood (70212)
james.hood@hoodlaw.com
Deborah Harrison Sheffield, *Of Counsel* (2757)
deborah.sheffield@hoodlaw.com

Attorneys for the Appellants
Chris Anderson and Danielle Anderson

May 29, 2025

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STATE OF SOUTH CAROLINA

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Appeal from Darlington County
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Case No. 2020-CP-16-00299
Appellate Case No. 2023-001016

Samantha Joanne Carwile, individually and as the Personal Representative of the Estate of Marlayna Joan Carwile,

Respondent,

vs.

Chris Anderson and Danielle Anderson,

Appellants.

CERTIFICATE OF SERVICE

The undersigned certifies that on this **29th** day of **May, 2025**, a copy of the Petition for Rehearing of Appellants Chris Anderson and Danielle Anderson was served by emailing a copy of each to the addresses listed below, per the attached email:

YARBOROUGH APPLEGATE LLC
David B. Yarborough, Jr. (15515)
Douglas E. Jennings, (100137)
Reynolds H. Blankenship, Jr. (72784)
291 East Bay Street, Second Floor
Charleston, SC 29401
david@yarboroughapplegate.com
reynolds@yarboroughapplegate.com

Attorneys for the Respondent Samantha Joanne Carwile

Kathleen C. Barnes
Barnes Law Firm, LLC
Post Office Box 897
13 Mulberry Street East
Hampton, SC 29924
Phone: 803-943-4529
kbarnes@barneslawfirmsc.com

Attorney for the Respondent Samantha Joanne Carwile

Ryan C. Andrews (101104)
Law Office of Ryan C. Andrews LLC
1643B Savannah Highway
Charleston, SC 29407
ryan@ryancandrewslaw.com

Attorneys for the Respondent Samantha Joanne Carwile

WILLSON JONES CARTER & BAXLEY, P.A.
Andrew J. MacLeod (73053)
3600 Forest Drive, Suite 204
Columbia, SC 29204
ajmacleod@wjcblaw.com

Trial Counsel for Defendants

In addition, a hard copy was mailed to Kathleen C. Barnes at 13 Mulberry Street East, Hampton, SC 29924.

HOOD LAW FIRM, LLC
172 Meeting Street
Post Office Box 1508
Charleston, SC 29401/02
Ph: (843) 577-4435
Fx: (843) 722-1630

/s/ James B. Hood
James B. Hood (70212)
james.hood@hoodlaw.com
Deborah Harrison Sheffield, *Of Counsel* (2757)
deborah.sheffield@hoodlaw.com

Attorneys for the Appellants Chris Anderson and Danielle Anderson

May 29, 2025

From:	Stephanie Chickey
To:	David Yarborough; douglas@yarboroughapplegate.com; Reynolds Blankenship; kbarnes@barneslawfirmsc.com; ryan@ryancandrewslaw.com; ajmacleod@wjcblaw.com
Cc:	Jamie Hood; Deborah Sheffield; Joye Ullery
Subject:	2023-001016, Carwile v. Anderson
Date:	Thursday, May 29, 2025 3:49:00 PM
Attachments:	Carwile v. Anderson, Ltr Ct of Appeals.pdf Carwile v. Anderson, Petition for Rehearing.pdf Carwile v. Anderson, COS-Petition for Rehearing.pdf

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Stephanie Chickey

Legal Secretary

Stephanie.Chickey@hoodlaw.com

172 Meeting Street
P.O. Box 1508
Charleston, SC 29401

Direct: (843) 577-1247
Main: (843) 577-4435
Fax: (843) 722-1630
www.hoodlaw.com

HOOD LAW FIRM LLC

JAMES B. HOOD
Partner
DIRECT DIAL: (843) 577-1223
EMAIL: james.hood@hoodlaw.com

May 29, 2025

RECEIVED
May 29 2025
SC Court of Appeals

Via E-Filing and U.S. Mail
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Samantha Joanne Carwile, individually and as the Personal Representative of the Estate of Marlayna Joan Carwile v. Chris Anderson and Danielle Anderson
Appellate Case No. 2023-001016
Appeal from Darlington County, Case No. 2020-CP-16-00299
HLF File No. 12.002

Dear Ms. Kitchings:

Enclosed for filing, please find the Petition for Rehearing in the above-referenced case. I have enclosed a check for the filing fee of $50.00 as well as a Certificate of Service. Should you have any questions, please do not hesitate to contact me.

Kind regards,

Yours truly,

/s/ James B. Hood

James B. Hood

JBH/spc
Enclosure(s)
cc [***Via E-Mail***]:
Andrew J. MacLeod, Esquire
Ryan C. Andrews, Esquire
David B. Yarborough, Jr., Esquire
Douglas E. Jennings, Esquire
Reynolds H. Blankenship, Jr., Esquire
Kathleen Barnes, Esquire