IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Honorable Edgar Warren Dickson, Circuit Court Judge

Appellate Case No. 2013-002695 (Order Filed May 22, 2014)

Audrey Kate Durham,.....Respondent,

v.

South Carolina Department
of Transportation,.....Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on May 22, 2014.

QUESTIONS PRESENTED

1. Does the Court of Appeals erroneously rely on Fulmer v. Cain in holding that the South Carolina Department of Transportation is not entitled to immediately appeal the trial court's order affecting its guaranteed "mode of trial"?

2. Do the trial court and Court of Appeals' orders force the South Carolina Department of Transportation to submit to a "mode of trial" in direct contravention of South Carolina statutory provisions and correspondingly deny the South Carolina Department of Transportation the "mode of trial" mandated by statute?

STATEMENT OF THE CASE

Respondent Audrey Kate Durham ("Durham") filed suit against Petitioner South Carolina Department of Transportation ("SCDOT") on November 29, 2012, asserting two causes of action in her Complaint, both based upon alleged violations of the laws of the South Carolina Human Affairs Commission ("SCHAC"). Specifically, Durham alleges the following violations by SCDOT: 1) disability discrimination in violation of S.C. Code Ann. § 1-13-80(A)(1); and, 2) failure to provide a reasonable accommodation in violation of S.C. Code Ann. § 1-13-80(D)(2). Durham, in her Complaint, requested a jury trial in the Dorchester County Court of Common Pleas.

On March 3, 2013, SCDOT filed a Motion to Dismiss pursuant to Rule 12(b)(1) and (6), SCRCP, asserting that the Circuit Court could not consider Durham's claims because S.C. Code Ann. § 1-13-90(c), in conjunction with S.C. Code Ann. § 1-13-100, prohibits a private cause of action, legal or equitable, against a state agency for alleged violations of the SCHAC laws.[1] The Circuit Court denied SCDOT's Motion to Dismiss on July 2, 2013, and subsequently denied SCDOT's Motion to Alter or Amend on November 26, 2013.

On December 12, 2013, SCDOT filed its Notice of Appeal. Thereafter, on December 31, 2013, counsel for SCDOT received a letter from the Court of Appeals requesting that SCDOT address whether its interlocutory appeal was ripe for review. In response, SCDOT submitted its Memorandum Addressing Ripeness of Appeal on January 9, 2014. On March

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[1] "Lack of subject matter jurisdiction can be raised [and correspondingly addressed] at any time, can be raised for the first time on appeal, and can be raised *sua sponte* by the court." Lake v. Reeder Const. Co., 330 S.C. 242, 248, 498 S.E.2d 650, 653 Ct.App.1998).

3, 2014, the Court of Appeals issued its Order dismissing SCDOT's interlocutory appeal. SCDOT submitted a Petition for Rehearing *En Banc* on March 14, 2014, and the Court of Appeals issued an Order denying SCDOT's Petition for Rehearing *En Banc* on May 22, 2014.

ARGUMENT

1. THE COURT OF APPEALS EXCLUSIVELY AND ERRONEOUSLY RELIED ON FULMER V. CAIN IN DISMISSING SCDOT's APPEAL.

In dismissing SCDOT's appeal, the Court of Appeals relied exclusively on Fulmer v. Cain, 380 S.C. 466, 470, 670 S.E.2d 652, 654 (2008), and noted that Fulmer stands for the proposition that the "mode of trial exception to the general appealability rule 'is confined to orders which abridge a party's constitutional right to trial by jury.'" For the reasons below, however, the Court of Appeals misapplied the law regarding the "mode of trial" exceptions to the general appealability rule and, therefore, erroneously dismissed SCDOT's appeal.

a. History of South Carolina Appeallate Law Regarding the "Mode of Trial" Exception to the General Appealability Rule

South Carolina appellate courts have addressed the "mode of trial" exception to the general appealability rule since, at least, 1901. Alston v. Limehouse, 61 S.C. 1, 39 S.E.2d 192 (1901). However, at the time of this Petition, there is no clear consensus on what orders affecting the "mode of trial" a party may immediately appeal. In order to properly consider the issue, it is first necessary to review the most impacting and prominent South Carolina appellate court cases.

In 1978, the South Carolina Supreme Court issued its opinion in Pelfrey v. Bank of

Greer, 270 S.C. 691, 244 S.E.2d 315 (1978). Pelfrey was a stockholder derivative case in which the trial court denied the defendant corporation's motion for a compulsory reference, and instead found that the plaintiff-stockholder was entitled to a jury trial instead of a bench trial. The corporation immediately appealed, and the plaintiff-stockholder argued that the issue was not immediately appealable.

The South Carolina Supreme Court accepted the appeal and explicitly held that "[i]t is clear that the order of the lower court denying a compulsory reference of the issues affects the mode of trial and . . . is appealable." Id. at 693, 244 S.E.2d at 316(quoting Alston v. Limehouse, 61 S.C. 1, 39 S.E.2d 192 (1901)). The case was subsequently remanded "[s]ince the shareholder derivative's action has historically been considered as one exclusively in equity [and] a party is not entitled to a trial by jury as a matter of right." Id. at 695, 244 S.E.2d at 317. Pelfrey has never been modified, limited, or overturned, and its holding is clear that a party denied its guaranteed "mode of trial" may immediately appeal such an order.

In 1985, the South Carolina Supreme Court stated that a party who objected to an order referring the case to a master was required to immediately appeal the order "because it affected the mode of trial, a substantial right." Creed v. Stokes, 285 S.C. 542, 543, 331 S.E.2d 351 (1985).[2] Three years later, in Edwards v. Timmons, 297 S.C. 314, 316, 377 S.E.2d 97, 97 (1988), the South Carolina Supreme Court again stated that a plaintiff was

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[2] See also Lester v. Dawson, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997)(citing Foggie v. CSX Transp. Inc., 315 S.C. 17, 23, 431 S.E.2d 587, 590 (1993)) ("Issues regarding mode of trial must be raised in the trial court at the first opportunity, and the order of the trial judge is immediately appealable.").

required to immediately appeal an order of reference (i.e. an order affecting the "mode of trial") or lose the right to later appeal.

Thereafter, in 2000, the South Carolina Supreme Court issued its opinion in Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 553 S.E.2d 331 (2000). In the opinion, the Court stated "[a]n order granting bifurcation of issues for trial simply does not strike to the heart of this Court's traditional analysis of claims of denial of a mode of trial." Id. at 72, 553 S.E.2d at 333. Importantly, however, the Court further, and explicitly, stated that the traditional analysis of claims of denial of a mode of trial "proceeds by determining whether or not a party is erroneously denied a trial by jury in a law case, or is erroneously required to proceed before a jury in an equity case." Id. Clearly, the Flagstar Court did not limit a party's right to an immediate appeal only to instances of a deprivation of a constitutional right to a trial by jury.

The Supreme Court also discussed the appealability of orders affecting a "mode of trial" in Hagood v. Sommerville, 362 S.C. 191, 196 - 197, 607 S.E.2d 707, 709 (2005), and held that a trial court order disqualifying a litigant's attorney was immediately appealable as affecting a "mode of trial". Though the Supreme Court's discussion of the "mode of trial" exception to the general rule against interlocutory appeals was not integral to its opinion, the Court did note that they "repeatedly have held that the denial of a party's right to a particular mode of trial is immediately appealable as a substantial right under Section 14-3-330(2)." Id., at 196, 607 S.E.2d at 709. Here, similar to previous opinions, the Court in Hagood did not limit the "mode of trial" exception to only cases that abridge a party's constitutional right to a trial by jury.

Later in 2005, the South Carolina Supreme Court issued its opinion in Cobb v. South Carolina Dept. of Transp, 365 S.C. 360, 618 S.E.2d 299 (2005). Cobb, an inverse condemnation case, required the Supreme Court to determine if a trial court's order **allowing** a jury trial in the compensation phase of an inverse condemnation case was immediately appealable. The Supreme Court, albeit finding that the landowners were not deprived of a constitutional right to a jury trial because no such right existed, ultimately dismissed the appeal because it found that the landowners were entitled a to jury trial (by way of a statute) in the compensation phase.

Because a jury trial was available by statute, SCDOT was "not . . . deprived of a mode of trial to which it [was] entitled as a matter of right". Id. at 365, 618 S.E.2d at 301 - 302. However, the Court cites and relies on Pelfrey and is clear that an order is immediately appealable (and must be appealed) when either party is "deprive[d] . . . of a mode of trial to which that party is entitled as a matter of right . . .." Id.(citing Pelfrey v. Bank of Greer, 270 S.C. 691, 244 S.E.2d 315 (1978)(an order allowing a jury trial is immediately appealable where there is no such entitlement as a matter of right)).

Subsequently, Salmonsen v. CGD, Inc., 377 S.C. 442, 661 S.E.2d 81 (2008), was decided in 2008 and is the precursor to Fulmer. In allowing an immediate appeal of an order regarding class certification as affecting a "mode of trial", the Salmonsen majority noted that "[t]his Court's traditional analysis of claims of denial of a mode of trial requires a determination of whether a party is erroneously denied a trial by jury or is erroneously required to proceed before a jury in an equity case." Id. at 453, 661 S.E.2d at 81(citing Flagstar Corp. v. Royal Surplus Lines, 241 S.C. 68, 72, 533 S.E.2d 331, 333 (2000)).

Fulmer, the lone case on which the Court of Appeals relied on in dismissing SCDOT's appeal, did not outright reject or abrogate the cases decided prior to it that allow any party to immediately appeal an order denying it a guaranteed "mode of trial". In Fulmer, the Supreme Court abrogated Truluck v. Snyder, 362 S.C. 108, 606 S.E.2d 792 (Ct.App.2004), holding that because jury trials were available in probate court, the "mode of trial" was unaffected (i.e. a party is entitled to a jury trial in probate court and circuit court). Fulmer at 469 - 470, 670 S.E.2d 652 at 654.

Here, however, SCDOT's "mode of trial" is mandatory and must be conducted pursuant to the process and procedure available at SCHAC, a process, procedure, and "mode of trial" unavailable in the circuit court (either by jury trial or non-jury trial). Furthermore, while Fulmer cites Justice Pleicones' dissent in Salmonsen v. CGD, Inc., 377 S.C. 442, 661 S.E.2d 81 (2008), for the proposition that the mode of trial exception applies only when a party's constitutional right to a trial by jury is abridged, Fulmer neither rejected nor limited prior case law to the contrary, such as Pelfrey, Cobb, and Flagstar.[3]

Subsequent to Fulmer, the Court of Appeals, in 2013, again relied on Cobb and held that SCDOT failed to properly preserve the "mode of trial" issue for appeal when SCDOT did not immediately appeal the trial court's order denying SCDOT's request for a non-jury trial during the taking phase of an inverse condemnation case. Frampton v. South Carolina Dept. of Transp., 406 S.C. 377, 386, 752 S.E.2d 269, 274 (Ct.App.2013). In Frampton,

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[3] The Salmonsen majority held that the "opt in" class certification procedure was immediately appealable as affecting a "mode of trial," even though it did not involve the question of whether a party's constitutional right to trial by jury was abridged. Fulmer did not reject this reasoning.

SCDOT filed a motion to transfer the case to the non-jury docket and the motion was denied. SCDOT did not appeal the order. SCDOT renewed its request at trial and the request was similarly denied. On appeal, the Court of Appeals reasoned that because the initial ruling could not be overturned by the trial judge that tried the case, SCDOT should have immediately appealed the initial order. In other words, the Court of Appeals stated SCDOT was not only allowed, but required, to appeal an order depriving it of its right to a non-jury trial.

The history of South Carolina's appellate court opinions, as outlined above, reveal that the issue of what constitutes a "mode of trial" exception to the general appealability rule is not clearly defined. However, aside from Justice Pleicones' dissent in Salmonsen and non-controlling dicta in Fulmer, no South Carolina appellate court has ever sought to so narrowly limit a party's right to appeal an order affecting its guaranteed "mode of trial" to only situations where a party is deprived of his or her constitutional right to a trial by jury.[4]

b. SCDOT is Allowed, and Required, to File an Immediate Appeal Because the Trial Court's Order Affects SCDOT's "Mode of Trial"

As South Carolina's appellate courts have never definitively determined the issue, the Court should grant SCDOT's petition and define the parameters of when a party may appeal an order affecting its "mode of trial". Fulmer, standing alone, does not deliniate when an order affecting a party's guaranteed"mode of trial" may be appealed. Because the Court

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[4] Durham has no constitutional right to a trial by jury. Cobb, 365 S.C. at 301, 618 S.E.2d at 364 ("The right to a jury trial is protected under [the South Carolina Constitution] only if such a right existed in 1868 when our constitution was adopted."). The South Carolina Human Affairs Commission was not created until 1972. 14 S.C. Jur. Labor Relations § 45.

of Appeals exclusively relied on Fulmer and ignored cases decided both prior and subsequent to Fulmer, the Court of Appeals acted in error.

First, in deciding Fulmer, the South Carolina Supreme Court did not expressly overrule or reject the reasoning in prior opinions addressing a party's right to pursue an interlocutory appeal when the party's "mode of trial" is affected.[5] Additionally, both Pelfrey and Cobb, decided prior to Fulmer, explicitly allow for immediate appeals when a party is forced to submit to an improper "mode of trial".[6] Fulmer does not mention, implicitly or explicitly, either case, and does not limit, modify, or reject the reasoning contained in the cases. Furthermore, the cases preceding Fulmer do not expressly limit the right to an immediate appeal to only situations where a party is deprived of a jury trial.[7]

Second, Fulmer is inapplicable to SCDOT's instant appeal. In particular, Fulmer

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[5] Hagood v. Sommerville, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005); Salmonsen v. CGD, Inc., 377 S.C. 442, 452 - 453, 661 S.E.2d 81, 87 (2008); Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000); Pelfrey v. Bank of Greer, 270 S.C. 691, 693, 244 S.E.2d 315, 316(1978); Cobb v. South Carolina Dept. of Transp, 365 S.C. 360, 363, 618 S.E.2d 299, 300 (2005).

[6] Pelfrey v. Bank of Greer, 270 S.C. 691, 693, 244 S.E.2d 315, 316 (1978); Cobb v. South Carolina Dept. of Transp, 365 S.C. 360, 363, 618 S.E.2d 299, 300 (2005).

[7] Lester v. Dawson, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997)(citing Foggie v. CSX Transp. Inc., 315 S.C. 17, 23, 431 S.E.2d 587, 590 (1993)) ("Issues regarding mode of trial must be raised in the trial court at the first opportunity, and the order of the trial judge is immediately appealable."); Edwards v. Timmons, 297 S.C. 314, 316, 377 S.E.2d 97, 97(1988)(failing to appeal order referring case to master in equity prohibited challenge to referral after final order); Creed v. Stokes, 285 S.C. 542, 542-543, 331 S.E.2d 351, 351 (1985)(party cannot delay appeal of referral of case to master in equity); Pelfrey v. Bank of Greer, 270 S.C. 691, 693, 244 S.E.2d 315, 316 (1978); Cobb v. South Carolina Dept. of Transp, 365 S.C. 360, 363, 618 S.E.2d 299, 300 (2005); Salmonsen v. CGD, Inc., 377 S.C. 442, 452 - 453, 661 S.E.2d 81, 87 (2008); Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000).

addressed whether final orders of the probate court are appealable and, in doing so, the Fulmer court appropriately noted that "[t]he cases of this Court permitting an appeal from the denial of the mode of trial to which a party is entitled are distinguishable." Fulmer at 470, 670 S.E.2d at 654(citing Salmonsen v. CGD, Inc., 377 S.C. 442, 661 S.E.2d 81, (2008); Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000); Hagood v. Somerville, 362 S.C. 191, 607 S.E.2d 707 (2005); Creed v. Stokes, 285 S.C. 542, 331 S.E.2d 351 (1985)).

Fulmer reviewed the issue of whether the plaintiff was entitled to a jury trial in circuit court and, in comparison, SCDOT asserts that Durham is not entitled to any trial - legal or equitable/jury or non-jury - in circuit court. Although the traditional "analysis proceeds by determining whether or not a party is erroneously denied a trial by jury in a law case, or is erroneously required to proceed before a jury in an equity case," in Durham's circumstances, the traditional analysis requires a different approach. Flagstar at 74, 533 S.E.2d at 333. Here, the dispositive issue is that as a former employee of a state agency, a circuit court trial in any manner is unavailable to Durham and she is required to proceed under the process, procedure, and "mode of trial" expressly provided to her by S.C. Code Ann. § 1-13-90(c).

Finally, Frampton, a Court of Appeals decision decided subsequent to Fulmer, requires parties to appeal an order if such an order denies it a guaranteed right to a non-jury trial. Here, this Court should follow the reasoning contained in Frampton, Cobb, Pelfrey, and the Salmonson majority, that recognized that the South Carolina Supreme Court's "traditional analysis of claims of denial of a mode of trial requires a determination of whether or not a party is erroneously denied a trial by jury in a law case, or is erroneously required

to proceed before a jury in an equity case, . . . [but regardless] the mode of trial analysis indubitably includes the consideration of the availability of trial." Salmonsen at 453, 661 S.E.2d at 87. Therefore, SCDOT petitions this Court for a writ of certiorari so that the Court can consider and determine the "availability of trial" to Durham in circuit court. Furthermore, such a petition for writ of certiorari, if granted, would serve to clarify the law surrounding what orders affecting a party's "mode of trial" are subject to an immediate appeal.[8]

For the reasons discussed above, SCDOT petitions this Court for a writ of certiorari so that this Court may appropriately address SCDOT's interlocutory appeal.

2. THE COURT OF APPEALS' DISMISSAL OF SCDOT'S APPEAL FORCES SCDOT TO SUBMIT TO A "MODE OF TRIAL" THAT IS PROHIBITED BY STATUTE AND CORRESPONDINGLY DENIES SCDOT THE "MODE OF TRIAL" MANDATED BY STATUTE.

The underlying issue to SCDOT's appeal is whether a current or former employee of a state agency (such as Durham in this case) alleging violations of the laws of SCHAC must proceed pursuant to S.C. Code Ann. § 1-13-90(c) or 1-13-90(d). The issue has never been addressed by a South Carolina appellate court, and the Supreme Court should grant SCDOT's petition and resolve this novel issue "in the interest of judicial economy and

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[8] In the event SCDOT's appeal is deemed improper and Durham's case is remanded to the Circuit Court, the Circuit Court will have to determine if Durham is allowed a trial by jury. If the Circuit Court allows Durham to move forward with a jury trial, pursuant to Pelfrey, Cobb, Salmonsen, and Frampton, SCDOT will be required to again appeal the Circuit Court's order because a trial by jury divests SCDOT of its guaranteed "mode of trial". However, if the Circuit Court determines that a jury trial is not available and SCDOT must participate in a non-jury trial, SCDOT will also be compelled to again appeal such a ruling. Therefore, regardless of any determination by the circuit court, SCDOT will be in the same situation once the Circuit Court definitively determines the "mode of trial" (i.e., jury or non-jury) under which the parties will proceed.

guidance to the bench and bar." Salmonsen at 452, 661 S.E.2d at 87. See also Ex parte Wilson, 367 S.C. 7, 14, 625 S.E.2d 205, 208 (2005)("Although we dismiss the order as not immediately appealable, we address this novel issue in the interest of judicial economy.").

SCDOT is "an agency of the State of South Carolina." S.C. Code §1-13-90(c) is clear that the mode of trial "[f]or complaints asserting expressly or in substance a violation by a *state agency* . . . of § 1-13-80," is under the guidelines set forth in S.C. Code §1-13-90(c)(emphasis added). Furthermore, as stated in S.C. Code §1-13-90(c)(15), "[p]roceedings under this section shall be subject to the Administrative Procedures Act."

Notably, S.C. Code § 1-13-90(d), the code section pertaining to alleged violations of SCHAC laws by *private* employers, allows complainants that have their SCHAC charge dismissed to bring an equitable action against the employer in circuit court. S.C. Code § 1-13-90(c), however, does not contain a provision that allows a current or former state employee to seek redress in circuit court.[9] Moreover, the SCHAC laws are clear that "[n]othing in [the SCHAC laws] may be construed to create a cause of action other than those specifically described in Section 1-13-90 of this chapter." S.C. Code § 1-13-100. Therefore, the sole method and "mode of trial" available to Durham is under the process and procedures set forth in S.C. Code § 1-13-90(c), not by way of a legal or equitable action in

[9] At least one Court analyzing this subsection reached a similar conclusion. Ackelson v. Manley Toy Direct, LLC, 832 N.W.2d 678, 683 n.3 (Iowa 2013)("Some states have statutes dealing with employment discrimination that do not create a private cause of action in district court.")(citing S.C.Code §§ 1-13-90, -100 (2005).

the Circuit Court.[10]

S.C. Code § 14-3-330(2) states that "[t]he Supreme Court shall have appellate jurisdiction . . . and shall review upon appeal [a]n order affecting a substantial right made in an action," and, as discussed above, our Supreme Court has "repeatedly . . . held that the denial of a party's right to a particular mode of trial is immediately appealable as a substantial right under Section 14-3-330(2)." Hagood v. Sommerville, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005). "[O]rders affecting the mode of trial affect substantial rights under S.C. Code Ann. § 14-3-330(2) (1977) and must, therefore, be appealed immediately." See also Lester v. Dawson, 327 S.C. 263, 266, 491, S.E.2d 240, 241 (1997), *citing* Foggie v. CSX Transp. Inc., 315 S.C. 17, 23, 431 S.E.2d 587, 590 (1993) ("Issues regarding mode of trial must be raised in the trial court at the first opportunity, and the order of the trial judge is immediately appealable."). Here, both the Court of Appeals and the Circuit Court's orders operate to deprive SCDOT of its statutorily guaranteed "mode of trial" because it forces SCDOT to have Durham's claims "tried" by a jury or the Circuit Court, instead of resolving Durham's claims by the "mode of trial" mandated by S.C. Code Ann. § 1-13-90(c) - the Administrative Procedures Act.

Whether the SCHAC laws, S.C. Code Ann. § 1-31-10 et seq., allow a current or former employee of a state agency, like Durham in this case, alleging a violation of the SCHAC laws to pursue a private cause of action in circuit court against a state agency has

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[10] Regulations 65-3, 65-8, 65-9 of South Carolina's Code of Regulations also provide guidance in interpreting S.C. Code §§ 1-13-90(c) and 1-13-90(d), and offer further support that a current or former state employee is not entitled to bring a private cause of action in circuit court for alleged violations of the SCHAC laws.

not been addressed by South Carolina's appellate courts. Addressing this issue of statutory interpretation now, as opposed to after discovery and a trial, promotes judicial economy and efficiency, and saves the parties' significant time and resources.

CONCLUSION

For the reasons stated, SCDOT asks the Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

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I hereby certify that on June 18, 2014, I served a copy of Petitioner's Petition for a Writ of Certiorari on the following:

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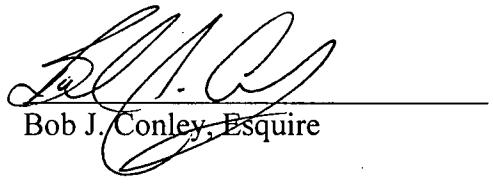

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