STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
L. Casey Manning, Circuit Court Judge
Court of General Sessions
Trial Court Case No.: 2003-GS-40-6670

EX PARTE: TARA DAWN SHURLING,

APPELLANT,

IN RE: STATE OF SOUTH CAROLINA,

RESPONDENT

V.

BEJAY HARLEY, DEFENDANT

APPELLATE CASE NO. 2013-001298

INITIAL BRIEF OF RESPONDENT

J. HUGH RYAN, III
General Counsel

S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Post Office Box 11433
Columbia, South Carolina 29211-1433
Phone: (803) 734-1343
Fax: (803) 734-1345
hryan@sccid.sc.gov

ATTORNEY FOR RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I

At the time Counsel completed her representation in this case, did S.C. Code Ann. § 17-3-50 (C) require advance approval of fees in excess of the statutory cap?

II

Did the Chief Administrative Judge who signed the initial funding orders in this case err in concluding that any additional requests to exceed the caps set by his orders would have to be addressed specifically to him personally as opposed to the presiding judge pursuant to S.C. Code Ann. § 17-3-50 (C)?

III

Did the Chief Administrative Judge who signed the initial funding orders in this case properly modify his previous Orders approving increased fee and expense caps pursuant to S.C. Code Ann. § 17-3-50 (C) to remove the provisions authorizing the presiding judge to determine if any additional increases in the caps were warranted at the conclusion of the case?

IV

Did the Chief Administrative Judge who signed the initial funding orders in this case err in revoking his previous Orders approving an increased fee cap pursuant to S.C. Code Ann. § 17-3-50 (C) where judge who presided over the guilty plea proceeding in this matter had already signed an order approving Counsel's total fees, including those in excess of the cap previously set by the Chief Administrative Judge in question, based upon the original Order approved and signed him?

V

Did the presiding judge in this murder case err in revoking his previous orders approving Counsel's fees and expenses where the Orders of the Chief Administrative Judge in place at the time he signed his orders were proper and supported the authority of the pressing [presiding] judge to make the final determination on fees and expenses in accordance with S.C. Code Ann. § 17-3-50 (C) and previous rulings of the Supreme Court of South Carolina?

VI

At the time the presiding judge initially approved Counsel's billing requests for fees and expense, did he in fact have authority to do so pursuant to S.C. Code Ann. § 17-3-50 (C), independent of any previous Order from the Chief Administrative Judge?

VII

Having authority to approve Counsel's fee and expense bills in excess of the caps set forth in S.C. Code Ann. § 17-3-50 (A) and (B) at the end of this case, did the presiding judge err in revoking that approval in the absence of any specific objections to the amount of time Counsel expended in this particular case or the expenses incurred in building a defense to the charges brought against her client?

RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

I

Whether Judge Manning correctly ruled that Appellant should be limited to $10,000.00 in attorney fees in conjunction with prior rulings of Judge Newman limiting attorney fees to $10,000.00?

II

Whether Judge Manning correctly ruled that Appellant should be limited to $750 for general expenses?

RESPONDENT'S STATEMENT OF THE CASE

Appellant (Attorney Shurling) was court appointed for the underlying criminal prosecution for murder. Attorney Shurling had previously served as counsel for Defendant Harley in a post conviction relief matter, resulting in a new trial. The case concluded when the Defendant entered an Alford[1] plea.

Upon her appointment, Attorney Shurling and the South Commission on Indigent Defense (SCCID) appeared before Judge Newman on May 23, 2011 for a hearing regarding attorney fees, expert fees and expense requests of Attorney Shurling. On the issue of attorney fees Judge Newman ruled "I am approving the rate of $80 in-court, and $70 out-of-court in Bejay Harley's case, *up to a maximum* of $10,000.00." Tr. p. 25, ll. 14-16 of May 23, 2011 transcript[2], emphasis added. Later in the hearing the Court confirmed this:

> Ms. Shurling: And lastly, Your Honor, has Your Honor ruled on my fees or are you now saying you're holding that open?
>
> The Court: I ruled on your fees.

Tr. p. 37, ll. 5-8 of May 23, 2011 transcript.

On the issue of expenses Judge Newman ruled that "I approve up to $500.00 for lay witness fees and expenses, $750.00 for all other expenses, for a total not to exceed $1,250.00." Tr. p. 29, ll. 23-25 of May 23, 2011 transcript. Judge Newman signed an order dated May 24, 2011 reflecting this ruling. R. p. ___.

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[1] North Carolina v. Alford, 400 U.S. 25 (1970)

[2] Cover page of transcript shows May 24, 2011, however, hearing occurred on May 23, 2011.

Judge Newman signed an additional order on December 1, 2011 regarding the attorney fees requests from the May 23, 2011 hearing. R. p. ___. SCCID had not been forwarded a copy of the proposed order prior to Judge Newman signing the order. Tr. p. 5, ll. 17-19 of December 28, 2011 hearing.

Pursuant to Judge Newman's December 1, 2011 order, Judge Manning then signed an order dated December 5, 2011 awarding Attorney Shurling fees in the amount of $18,431.00, and expenses in the amount of $1,138.37. R. p. ___.

SCCID then filed written objections with both Judges Newman and Manning on or about December 15, 2011 objecting to the payment of attorney fees in excess of $10,000.00. SCCID argued that Judge Newman had established a cap of $10,000.00 for attorney fees and that his order of December 1, 2011 did not reflect his ruling from the May 23, 2011 hearing. SCCID requested a hearing to address the issue.

On December 28, 2011 a hearing was held before Judge Newman, at which time he found the order presented to him by Attorney Shurling was not consistent with his ruling from the May 23, 2011 hearing. Judge Newman amended the order, deleting paragraph four of the order, which would have allowed a presiding judge to exceed the fee cap set by Judge Newman. Tr. p. 34, l. 20 – p. 35, l. 23 of December 28, 2011 hearing.

Judge Newman ruled he could not vacate the order of Judge Manning and that Judge Manning would have to look at that. Tr. p. 47, ll. 6-8 of December 28, 2011 hearing. Judge Manning allowed each side to present proposed orders. Judge Manning then issued his order on March 15, 2013 vacating his order of December 5, 2011, and authorizing Attorney Shurling to receive $10,000.00 in attorney fees and $750.00 for expenses. A motion to

reconsider this order was denied by Judge Manning by order dated May 21, 2013. R. p. ___. Appellant has appealed.

Pursuant to Rule 208(b)(1)(C) and 208(b)(2), SCACR, Respondent notes its dissatisfaction with the Appellant's statement of the case due to the inclusion of the following language:

> SCCID objected to payment of any fees and expenses in excess of the limits set in Judge Newman's orders despite the fact that the orders signed by Judge Newman authorized the presiding judge to make a final determination as to fees and expenses.

Brief of Appellant P. 6. As will be demonstrated, Judge Newman himself ruled on the invalidity of the order authorizing payments in excess of the cap he clearly set. This is a critical contested matter and should not appear in this statement. Furthermore, this Court, following Respondent's motion to dismiss this appeal, ordered Appellant to file an amended initial brief with amendments that included a statement of the case that did not contain contested matters. Order of Judge Few April 16, 2014. R. p. ___.

ARGUMENTS

I

Judge Manning correctly ruled that Appellant should be limited to $10,000.00 in attorney fees in conjunction with prior rulings of Judge Newman limiting attorney fees to $10,000.00.

The South Carolina Commission on Indigent Defense asserts that the arguments raised by Attorney Shurling regarding the provisions of S.C. Code Ann. § 17-3-50(C) are not at issue in this matter. The clear language of Judge Newman's rulings establishes a maximum of $10,000.00 in attorney fees (Tr. p. 25, ll. 14-16 of May 23, 2011 hearing) and $750.00 in general expenses. Tr. p. 29, ll. 23-25 of May 23, 2011 hearing. This and Judge Manning's order outlining his reasons for vacating his order of December 5, 2011 are controlling in this case. The Supreme Court has stated previously in Ex parte Shurling, Op. No. 27375, Shearouse's Adv. Sh. No. 14 at pp. 17-20 (April 9, 2014) that statutory construction arguments will not be reached when the language of the funding order is clear.

Attorney Shurling asserts that the proposed order sent to Judge Newman was in complete harmony with his rulings from the bench from the May 23, 2011 hearing. Amended Initial Brief of Appellant pp. 7 and 15. However, Judge Newman makes it absolutely clear in the record of the December 28, 2011 hearing that the order of December 1, 2011 submitted to him was not consistent with his ruling at the May 23, 2011 hearing:

> [L]eaving the hearing, I issued an oral order placing a $10,000 cap on the payment of fees without further approval of the Court. Now, fast forward to December when an order was submitted to me, I did not review notes from the May hearing. I looked at the order and assumed that the order was consistent with what was stated by the Court, but I see now upon it being pointed out by SCCID

> and the order itself that paragraphs three and four are inconsistent and inconsistent with what the Court ordered, and it's also inconsistent with any other order that I've signed the entire year because if an order is made by the Court without further approval, then that's the end of the order without any language allowing for a separate request to be made in excess of the order with the presiding judge as is reflected in paragraph four of this order. So I did not catch that language, and that was brought to my – timely brought to my attention by the department. So I am going to amend the order and delete paragraph four from this order. That would cause this order to be consistent with the proposed order that was submitted to me by Ms. Shurling as far as the amount being up to $10,000 without further approval of the Court, provided the presiding judge finds the time records to be adequate to support the time and expenditures claimed. Then whatever disarray that may cause as to Judge Manning's order, then let that be. It will be addressed by Judge Manning. Mr. Shurling indicates that she would have appealed the order. I invite an appeal of this.

Tr. 34, l. 20 – p. 35, l. 23 of December 28, 2011 hearing.

The transcript of the May 23, 2011 hearing also reflects the clear intent of the court and supports Judge Newman's position that he had authorized "*up to a maximum* of $10,000.00 on each case." Tr. p. 24, ll. 13-16 of May 23, 2011 hearing; emphasis added.

It is only through the addition of paragraph four in the December 1, 2011 order that Judge Manning would have been able to change Judge Newman's prior ruling. Paragraph four allowed the presiding judge to approve fees in excess of the cap set by Judge Newman. Judge Newman acknowledged this stating:

> And I certainly understand Ms. Shurling was seeking to add clarification in order to pave the way for Judge Manning to sign the one that he did days later, but it is inconsistent with what I ordered from the bench. So therefore I am going to modify the order deleting paragraph four and we will see where it goes from there.

Tr. p. 36, l. 24 – p. 37, l. 7 of December 28, 2011 hearing.

Prior to the May 23, 2011 hearing, Attorney Shurling had presented proposed orders (with copies to SCCID) to the Court that did not contain paragraph four. State's Exhibit #3, December 28, 2011 hearing, R. p. ___. It thus appears to SCCID that Appellant knew paragraph four was necessary to exceed the $10,000.00 cap set by Judge Newman. This is supported by the comments of Judge Newman cited immediately above in Brief, p. 10.

With regard to the service of the post-hearing order containing paragraph four, Appellant declares in her Amended Brief: "Counsel did not realize until much later that her proposed orders were inadvertently not sent to SCCID . . ." (Amended Initial Brief of Appellant pp. 7 and 8) and "the failure to send the proposed order to SCCID was a clerical oversight." Amended Initial Brief of Appellant p. 15.

However, in an e-mail to Respondent's counsel Appellant stated: "I was not instructed to serve SCCID with the proposed order I provided to Judge Newman nor does S.C. Law require that I do so." Appellant's e-mail of December 14, 2011, ll. 18-19, Defense Exhibit #1, December 28, 2011 hearing. R. p. ___. SCCID would have objected to the proposed order prior to Judge Newman signing it had a copy been provided.

When it became clear to Judge Manning that his order of December 5, 2011 served to overrule Judge Newman's rulings from the May 23, 2011 hearing, he vacated his order. Judge Manning had based his authority to exceed a $10,000.00 cap on that portion of Judge Newman's order (paragraph four), which Judge Newman made abundantly clear did not reflect his ruling.

Judge Manning stated:

> This court signed the December 5, 2011 order with the understanding that in accordance with paragraph four of Judge Newman's order that counsel could submit to the presiding judge a request for payment in excess of the fee cap set by his order. However after it was clarified and presented to this court, this court finds Judge Newman has specifically ruled consistent with paragraph three in his order that:
>
> "Attorney Shurling may bill SCCID for fees up to $10,000.00 without further approval of the court provided the presiding judge finds her time records to be adequate to support the time expenditures claimed."

March 15, 2013 Order of Judge Manning, R. p. ___.

As Judge Manning further states, "if this court could just automatically exceed the cap set by Judge Newman, the hearing of May 23, 2011 was a useless exercise." March 15, 2013 Order of Judge Manning, R. p. ___. Correctly read, after Judge Newman's deletion of paragraph four, further approval of the Court was required to exceed the $10,000.00 cap. The only authority granted the presiding judge was to review the time records to support the time expenditures claimed. No such approval to exceed the cap was sought from Judge Newman. As in Ex parte Shurling, Op. No. 27375, Shearouse's Adv. Sh. No. 14 at pp. 17-20 (April 9, 2014), Westlaw 2014 WL 1386674 (S.C.), the order requiring further approval was not complied with. The case law is clear, one Circuit Judge cannot overrule another. e.g. Cook v. Taylor, 272 S.C. 536, 252 S.E.2d 923 (1979).

Attorney Shurling has included as part of Appellant's Amended Brief a section entitled Procedural History. Much of this is a rehashing of the statement of the case in her previous brief which included contested matters. This procedural history section also includes contested matters and conversations that are not a part of the Court record. Most

troubling to Respondent is that Appellant seems to imply that Judge Newman was somehow changing his prior rulings.

> On February 15, 2012, Judge Newman orally advised Counsel that he had decided not to issue an Amended Order in this matter. On that date, Counsel had two PCR cases before Judge Newman in Richland County. During a break in those proceedings, Counsel approached Judge Newman, in the presence of his law clerk, and inquired about the status of his amended order in this billing matter. Counsel simply asked the status of the order and expressed her concern that the Court might have executed an order that she had not received for some reason. Judge Newman responded that *he wasn't going to issue an amended order*. He said he had decided that since his term as Chief Administrative Judge was over, he did not have the authority to rule on the issues any longer, and stated that he really didn't feel like he knew enough about the case anyway. He said he had decided to just leave the matter to Judge Manning and Judge Cooper to decide.

Amended Initial Brief of Appellant, p. 9-10.

Respondent was not privy to any such communication. However, Judge Newman made it clear to all parties that the Court transcript reflected his rulings in this matter. In a letter to Attorney Shurling, and copied to SCCID, Judge Newman, through his clerk, noted the following:

> You will note that the law of this state is that the court speaks only through its records. *State v. Gaskins*, 263 S.C. 343, 346, 210 S.E.2d 590, 591 (1974). "Judicial records are not only necessary but indispensable, to the vitality of a court." *See Long v. McMillan*, 226 S.C. 598, 610, 86 S.E.2d 477, 482 (1955) (citation omitted).
>
> The parties, therefore, will have to consult the transcript regarding any concerns involving his ruling.

Letter of Law Clerk, Sutania A. Radlein, February 12, 2013, R. p. ___. As previously noted, the record of this matter is clear as to Judge Newman's ruling.

As stated, this case involves the clear intent of judicial rulings, however, assuming *arguendo* that an analysis of §17-3-50 is even applicable, SCCID does not agree with the statutory interpretation advocated by Attorney Shurling. In construing statutes courts are not to consider a particular clause in isolation but in the context of the purpose of the whole statute. Mid-State Auto Auction v. Altman, 324 S.C. 65, 476 S.E.2d 690 (1996). Attorney Shurling is asking the Court to consider the clause in 17-3-50(C) that "payment in excess of the limit is appropriate because the services provided were reasonably and necessarily incurred" in isolation. She is asking the Court to only consider this last phrase found in S.C. Code Ann. § 17-3-50(C). SCCID agrees the last nine (9) words in Section C are in the past tense. However after examining the whole statute, the correct interpretation of the statute is that prior approval is required for expenses and fees exceeding the statutory caps. Courts generally give deference to an administrative agency's interpretation of its own statute. Brown v. DHEC, 349 S.C. 507, 560 S.E.2d 410 (2002). S.C. Code Ann. § 17-3-50 provides:

> (A) When private counsel is appointed pursuant to this chapter, he must be paid a reasonable fee to be determined on the basis of forty dollars an hour for time spent out of court and sixty dollars an hour for time spent in court. The same hourly rates apply in post-conviction proceedings. Compensation may not exceed three thousand five hundred dollars in a case in which one or more felonies is charged and one thousand dollars in a case in which only misdemeanors are charged. Compensation must be paid from funds available to the Office of Indigent Defense for the defense of indigents represented by court-appointed, private counsel. The same basis must be employed to determine the value of services provided by the office of the public defender for purposes of Section 17-3-40.
>
> (B) Upon a finding in ex parte proceedings that investigative, expert, or other services are reasonably

> necessary for the representation of the defendant, the court shall authorize the defendant's attorney to obtain such services on behalf of the defendant and shall order the payment, from funds available to the Office of Indigent Defense, of fees and expenses not to exceed five hundred dollars as the court considers appropriate.
>
> (C) Payment in excess of the hourly rates and limits in subsection (A) or (B) is authorized only if the court certifies, in a written order with specific findings of fact, that payment in excess of the rates is necessary to provide compensation adequate to ensure effective assistance of counsel and payment in excess of the limit is appropriate because the services provided were reasonably and necessarily incurred.

The entire language in Section B and the majority of Section C supports prior approval. Attorney Shurling in her brief acknowledges that S.C. Code Ann. § 17-3-50(B) arguably requires advance approval for certain professional services or experts. Amended Initial Brief of Appellant, p. 17.

The word authorize means: to empower, to give a right or authority to act.[3] The idea of giving permission involves having something approved before it takes place. The statute also speaks of this authorization in the context seeking to ensure effective assistance of counsel. Seeking to ensure the effective assistance of counsel implies these issues will be addressed before the actual representation. It is too late to try and ensure the effective assistance of counsel after the matter is already complete. It is only logical that counsel would be more effective if counsel had prior assurance from a court that her fee could exceed the statutory cap, up to an amount authorized by the court, rather than only hoping after the fact she is allowed to exceed the cap.

[3] Black's Law Dictionary, 5th Edition at p. 122.

Also, without prior approval being required to exceed the statutory cap there would in essence be no statutory cap. 17-3-50 (A) specifically states that "compensation may not exceed three thousand five hundred dollars in a case in which one or more felonies are charged." (emphasis added) If counsel could automatically exceed the cap, then an important step in the process of judges and SCCID being able to monitor and ensure resources are being properly and effectively expended would be by-passed. Situations such as the instant one will arise where SCCID and the judge believe only a maximum of $10,000 in state funds will be necessary, only to find out later that fees in excess of $18,000 are being sought. SCCID would submit it benefits all parties involved to address these matters on the front end so a proper allocation of limited State resources can be made and attorneys understand the fees they may or may not be entitled to.

Judge Newman described the process familiar to the Court:

> The Court: I sign orders on a weekly basis, daily basis here, and when the public defenders get the order, if they say, "Well, Judge, we need more money," they'll come back and say it. I approved an order, I believe, in the case I had last week approving $10,000 for travel for expert witnesses. $10,000.
>
> Ms. Shurling: Then, Your Honor - - -
>
> The Court: And the public defenders came back and said, "Well, Your Honor, we have these other character witnesses who we must have, and they're coming from far and near. We must have them. So please give us more approval." And I yielded, gave them more approval, under the reasonable professional assistance language that you quoted.
>
> So it's not at all unusual that once an order is approved setting a cap of a certain amount

> without further approval, further approval is often sought, but I have found in so many instances when I set a lower cap, somehow or another the expert's fees get - - they get lower and other things tend to happen.

Tr. p. 39, ll. 1-19 of December 28, 2011 hearing.

Thus, the rulings denying the additional attorney fees beyond $10,000.00 should be affirmed. It must be remembered that as Judge Newman noted, Attorney Shurling had previously represented the same defendant in a PCR matter arising out of this case. Tr. p. 34, ll. 7-22 of December 28, 2011 hearing; Tr. p. 16, ll. 10-14 of May 23, 2011 hearing.

II

Judge Manning correctly ruled that Appellant should be limited to $750 for general expenses.

Judge Newman issued a separate order regarding expenses signed May 24, 2011. As the order shows, Judge Newman struck through the original amounts inserted in the order and wrote in specific amounts for each category. Judge Newman authorized "$500.00 for lay witness fees and expenses and $750.00 for all other general expenses incurred. Costs for investigative expenses are addressed by separate order. Total expenses shall not exceed $1,250.00 without prior authorization from this Court." May 24, 2011 order of Judge Newman, R. p. ___.

Judge Newman specifically struck proposed language stating that, "Counsel may, if necessary, exceed the limits set for either category of expenses provided that the total expenses claimed may not exceed $1,250.00 without prior authorization from this Court." However, Attorney Shurling in claiming $1,138.37 in general expenses is attempting to do just that; merge the witness fee and general expenses to avoid the $750 cap on general expenses.

> The Court: I approve up to $500 for lay witness fees and expenses, $750 for all other general expenses for a total not to exceed $1,250.

Tr. p. 29, ll. 23-25 of May 23, 2011 hearing.

SCCID acknowledges language in the order stating that "Counsel is authorized to seek approval of any balance not covered by this order upon the completion of this case with the express understanding that Counsel assumes the risk that any such balance will not be paid if not approved by the Court." Judge Manning addressed this issue stating:

> However, the Court finds this one sentence cannot be read in isolation. The order of Judge Newman, when viewed in its entirety, set specific expense caps and specifically stated that $750 was the cap for general expenses. This Court cannot issue an order that does not follow the order of Judge Newman.

March 15, 2013 Order of Judge Manning, R. p. ___.

Even assuming the intent of Judge Newman was that this issue could be addressed at the completion of the case, Judge Manning did not approve the additional general expenses and Judge Newman was not asked to reconsider his previous caps.

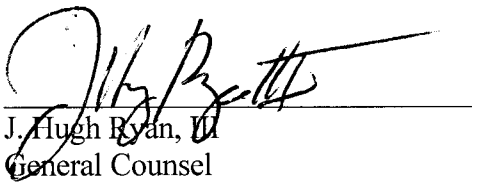
As previously argued with regard to attorney fees, the issue in this case is the rulings of Judges Newman and Manning, not the provisions of the S.C. Code Ann. § 17-3-50. In any event statutory analysis still supports SCCID's position. S.C. Code Ann. § 17-3-50(B) requires prior approval of expenses. S.C. Code Ann. § 17-3-50(B), notes that the court shall authorize "the defendant's attorney to obtain such services on behalf of the defendant" upon a finding of necessity. S.C. Code Ann. § 17-3-50(B). (Emphasis added) This is against a statutory cap of $500. The authorization to obtain the services, by reasonable interpretation, would indicate that advance approval is to be obtained by the attorney before incurring expenses. Attorney Shurling argues that S.C. Code Ann. § 17-3-50(C) provides a court can find after the fact that payment in excess of the limits can be made. However, this analysis would lead to the absurd result that an attorney must have prior approval of expenses up to $500 as established in S.C. Code Ann. § 17-3-50(B), yet any amount beyond the $500 can be approved after the fact under 17-3-50(C), even though it may involve considerably greater expenses.

Therefore the rulings capping general expenses at $750 should be affirmed.

CONCLUSION

The decision of the lower court should be affirmed.

Respectfully submitted,



J. Hugh Ryan, III
General Counsel

S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Post Office Box 11433
Columbia, South Carolina 29211-1433
Phone: (803) 734-1343
Fax: (803) 734-1345
hryan@sccid.sc.gov

ATTORNEY FOR RESPONDENT

This 14th day of July, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
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V.

BEJAY HARLEY, DEFENDANT

APPELLATE CASE NO. 2013-001298

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Respondent and Designation of Matter in the above referenced case has been served upon Tara Dawn Shurling, Esquire, by placing two copies in the United States mail, postage prepaid, to 3614 Landmark Drive, Suite D, Columbia, SC 29204, this 14th day of July, 2014.

J. Hugh Ryan, III
General Counsel

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 14th day of July, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: August 21, 2023 .