

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HAMPTON COUNTY
Court Of Common Pleas

Carmen T. Mullen, Circuit Court Judge

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S.C. Supreme Court

Opinion No. 2014-UP-317 (S.C. Ct. App. Filed Aug. 6, 2014)

CHERRY SCOTT, as Personal Representative of the Estate
of ELIZABETH JONES, Respondent,

v.

HERITAGE HEALTHCARE OF ESTILL, LLC, d/b/a
Heritage of the Lowcountry and/or Uni-Health Post Acute
Care of the Lowcountry, UNITED CLINICAL SERVICES,
INC., UNITED REHAB, INC., and UHS-PRUITT
CORPORATION, Petitioners.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

I. Introduction

Plaintiff's Return to Defendants' Petition for Writ of Certiorari highlights the need for this Court's review of the Court of Appeals decision. Plaintiff argues that Jenkins's authority to handle Jones's admission did not include the authority to decide how disputes arising in connection with that admission would be handled. However, Plaintiff is not permitted to divorce the Arbitration Agreement from the underlying transaction in which it was executed. *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014) (where "the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction," then "[u]nless there is a contrary intention ... , there [is] a merger").

In Plaintiff's view, a principal can expressly authorize an agent to negotiate a transaction, knowingly accept the benefits of that transaction, and then, unilaterally and at her sole option, rewrite or avoid the terms of that transaction. In Plaintiff's view, a principal is not bound by her agent's decisions in negotiating optional terms of a specifically authorized transaction. It matters not, in Plaintiff's view, that the principal voluntarily chose to act through an agent rather than to handle the transaction on her own and had every opportunity to review the agreements signed by the agent and determine the particulars of the agent's actions. Under Plaintiff's view, a principal can never truly delegate decision-making authority because, in order for the agent's decisions to become binding on the principal, the principal would first have to inspect and agree to every single optional term in order to be bound by the agent's decision. This, of course, is not the law of agency in South Carolina. *Thompson v. Ford Motor Co.*, 200 S.C. 393, 414, 21 S.E.2d 34, 43 (1942) ("An agent is one appointed by a principal as his representative and

to whom the principal confides the management of some business to be transacted in the principal's name, or on his account, and who brings about or effects legal relationships between the principal and third parties.”) (citations and quotations omitted).

Perhaps recognizing the flaw in its argument regarding the ability of principals generally to delegate decision-making authority to agents, Plaintiff appears to limit her argument to voluntary arbitration agreements: “Assuming Jones authorized Jenkins to admit her to the nursing home, such admission *did not require the execution of the Arbitration Agreement*. Jones cannot be legally presumed to have authorized Jenkins to waive rights to a civil jury trial when such waiver was not a condition of admission.” (Return at 6-7 (emphasis in original).) Singling out the Arbitration Agreement and treating it as a disfavored agreement outside of the agent's authority violates the Federal Arbitration Act. *See, e.g., Marmet Health Care Ctr., Inc. v. Brown*, 132 S.Ct. 1201, 1203–04 (2012) (per curiam) (unanimously invalidating a state's public policy to not refer wrongful death claims against a nursing home to arbitration); *Dean v. Heritage Healthcare of Ridgeway*, Op. No. 27401 (S.C. Sup. Ct. filed June 18, 2014) (Shearouse Adv. Sh. No. 24 at 34). Because the Court of Appeals' decision supports Plaintiff's view that voluntary arbitration agreements may be singled out and treated less favorably than other optional portions of a transaction negotiated by an agent, it conflicts with decisions of this Court and the United States Supreme Court. For these reasons, Defendants respectfully request that this Court grant its Petition for a Writ of Certiorari.

II. Ms. Jones Authorized Ms. Jenkins to Negotiate Her Admission to Heritage.

Ms. Jones expressly authorized Ms. Jenkins to negotiate her admission to Lowcountry. (R. p. 638, page 8, line 18-p. 639, page 10, line 14; R. p. 629, page 9, lines 2-17; *see also* Final Brief of Appellants (“Appellants’ Brief”) at 11-13; Final Reply Brief

of Appellants (“Appellants’ Reply Brief”) at 3-4.) Nevertheless, Plaintiff argues that the authority to handle Ms. Jones’s admission to Heritage did not include the authority to decide how disputes which might arise in connection with the admission would be resolved. (Return at 6-8.)

Plaintiff cites no authority for the assertion that an agent expressly authorized to handle a transaction has no decision-making authority with respect to optional aspects of the transaction. In this respect, Plaintiff’s position and the Court of Appeals’ decision is contrary to established law. *See Tobacco Redrying Corp. v. U. S. Fidelity & Guaranty Co.*, 185 S.C. 162, 193 S.E. 426 (1937) (stating that “[i]n matters of contract, one dealing with an agent of the principal has the right to rely upon the reasonably apparent scope of authority of the agent”); *Fulmer v. London, Liverpool & Globe Fire Ins. Co.*, 172 S.C. 525, 174 S.E. 466 (1934) (holding it to be a fundamental principle of law that “an oral contract to insure is binding, and that a principal, disclosed or undisclosed, is bound by the acts of his agent done within the scope of his authority”)

Further, the voluntary nature of the Arbitration Agreement does not place it outside of the scope of the authority delegated by Ms. Jones to Ms. Jenkins to handle her admission to Lowcountry. Dispute resolution agreements are common in consumer transactions, and nursing home admissions are no exception. The Arbitration Agreement is meaningless outside of the nursing home admission and, therefore, voluntary or not, cannot be considered independent or separate from the admissions process. *See McCutcheon v. THI of S.C. at Charleston, LLC*, 2011 U.S. Dist. Lexis 144288 at *7 (D.S.C. 2011) (“Here, the Arbitration Agreement and Admissions Agreement, while separate documents, were executed by the same parties, at the same time, and regarding

the same transaction; therefore, they constitute the entire agreement between the parties.”)¹ While it was not necessary that the Arbitration Agreement be signed for Ms. Jones to be admitted to Lowcountry, it was necessary that a decision be made whether or not to sign the Arbitration Agreement. To declare a policy that all agents, acting on behalf of all principals, may only choose *not to sign* an arbitration agreement in connection with an authorized transaction, is to abandon a value-neutral position with respect to arbitration, to adopt a disfavored view of arbitration, and to remove choice from individuals who elect to act through agents. This is not permitted under the Federal Arbitration Act.

Plaintiff’s reliance on *Coleman* for the proposition that Ms. Jenkins was not authorized to act on behalf of Ms. Jones is misplaced. (*See Return at 7.*) *Coleman* did not involve an agent acting with the express permission of a principal, but instead involved a statutory health care proxy acting pursuant to the Adult Health Care Consent Act. *Coleman*, 407 S.C. 346, 350, 755 S.E.2d 450, 452-53 (2014). Thus, *Coleman* did not involve the general questions of agency at issue here but, instead involved “statutory interpretation requiring [the Court] to determine the nature and scope of authority granted a surrogate by the Adult Health Care Consent Act....” *Id.* at 350, 755 S.E.2d 453. The authority of a health care proxy chosen by the state legislature is understandably narrower

¹ A rule that an arbitration agreement becomes unrelated to the underlying transaction simply because the company offers its consumers a choice of whether to elect arbitration will likely result in less voluntary arbitration agreements and more mandatory arbitration agreements, depriving consumers of choice in dispute resolution options. Moreover, a rule that an arbitration agreement becomes unrelated to the underlying transaction because it is offered in a separate document rather than as a clause within the underlying contract will likely result in companies moving arbitration agreements into clauses within the underlying contract, potentially making it more difficult for consumers to learn that they are agreeing to arbitration of disputes.

than the authority of a trusted agent expressly selected by the principal. For that reason, *Coleman* does not define Ms. Jenkins's authority.

Plaintiff's position and the Court of Appeals' decision are inconsistent with the Federal Arbitration Act's mandate to enforce arbitration agreements. Moreover, they represent a departure from longstanding precedent that, if permitted to stand, would have negative consequences for individuals who desire to delegate decision-making authority to trusted agents.

III. The Decision Overlooks This Court's Recent Arbitration Agreement Merger Doctrine In *Coleman*.

This Court has held that where "the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction," then "[u]nless there is a contrary intention ... , there [is] a merger." *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455. Ms. Jenkins signed all of the admissions paperwork, including the Arbitration Agreement, at Ms. Jones's request and as part of a single transaction. (See Respondent's Final Resp. Br., p. 5.) Pursuant to the admissions agreements executed by Ms. Jenkins, Lowcountry provided care to Ms. Jones. Thus, under *Coleman*, because all of the admissions agreements, including the Arbitration Agreement, were executed at the same time, by the same parties, for the same purpose, in a single transaction, there was a merger of the admissions agreements, including the Arbitration Agreement.

Plaintiff seeks to avoid *Coleman*, arguing that Defendants failed to preserve this argument. (Return at 8-10.) However, merger simply requires that multiple documents executed as part of a single transaction must be considered together. This has been the crux of Defendants' argument from the beginning—that the Arbitration Agreement is part of the admissions agreements and cannot be carved out at Plaintiff's whim. In their

Memorandum of Law in Support of Motion to Compel Arbitration and Stay Proceedings,

Defendants noted that

[a]mong the contracts that Ellen Jenkins entered into on behalf of Elizabeth Jones in order to procure her admission to Lowcountry was the Arbitration Agreement. (Jenkins Depo. PP. 13-14.) Based on these contracts, Heritage Healthcare admitted Elizabeth Jones to Lowcountry, and Elizabeth Jones remained a resident of Lowcountry from April 18, 2007 until May 15, 2009.

(R. p. 166; *see also* R. pp. 484-85 (“The admissions agreements, which include the arbitration agreement, were never repudiated or questioned after Ms. Jones was admitted.”).) Defendants further argued that Ms. Jones could not separate the Arbitration Agreement from the overall admission transaction by ratifying everything except for the Arbitration Agreement. (R. pp. 170-71; *see also* Final Brief at 2-3, 12-13, 15; Final Reply Brief at 4-6.) Further, in response to Plaintiff’s attempt “to avoid Ms. Jones’s ratification of the agreements entered into on her behalf by Ms. Jenkins and her status as an intended third-party beneficiary of these contracts by arbitrarily seeking to divorce the Arbitration Agreement from the remainder of the contracts signed by Ms. Jenkins under the express authority granted her by Ms. Jones,” (Final Reply Brief at 4), Defendants argued:

The Arbitration Agreement was entered into in connection with Ms. Jones’s admission to Lowcountry and explicitly references the Admissions Agreement. (R. p. 653.) There was no reason for the parties to enter into an Arbitration Agreement outside of this admission. The Arbitration Agreement does not become wholly unrelated to the Admission Agreement simply because it was optional. [footnote omitted.] *See McCutcheon v. THI of S.C. at Charleston, LLC*, 2011 U.S. Dist. Lexis 144288 at *7 (D.S.C. 2011) (“Here, the Arbitration Agreement and Admissions Agreement, while separate documents, were executed by the same parties, at the same time, and regarding the same transaction; therefore, they constitute the entire agreement between the parties.”) (citing *Klutts Resort Realty, Inc. v. Down’Round Dev. Corp.*, 268 S.C. 80, 232 S.E.2d 20, 24 (S.C. 1977) (“The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the

instruments together. The theory is that the instruments are effectively one instrument or contract.”)).

(Final Reply Brief at 4-5.) Additionally, Defendants alerted the Court of Appeals to the *Coleman* decision on April 7, 2014, shortly after it was decided and in advance of oral argument, where it was subsequently discussed. Accordingly, Plaintiff’s attempt to avoid *Coleman* by arguing that the issue of merger was not raised until the Petition for Rehearing is contrary to fact and without merit.

Further, Plaintiff’s argument with respect to the “separatedness” of the Arbitration Agreement and Admission Agreement is without merit. That the Arbitration Agreement is voluntary and does not affect the Facility’s duties with respect to care and treatment does not indicate a “contrary intention” to the general rule of merger. As indicated above, the Arbitration Agreement is meaningless in the absence of the overall context of the admissions agreements. In fact, the Arbitration Agreement requires arbitration of claims “arising out of or relating to the Resident’s Admission Agreement with the Facility ... or any service or care provided to the Resident by the Facility.” (R. p. 653.) But for the admissions agreements, there would be no Arbitration Agreement, and those contracts, therefore, must be viewed as part of a single transaction. *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

IV. Appellants’ Ratification, Third-Party Beneficiary, and Estoppel Arguments Are Independent of Ms. Jenkins’s Authority.

As set forth above, Ms. Jones expressly authorized Ms. Jenkins to negotiate her admission to Lowcountry. Thus, Ms. Jones, as principal, was a party to the contracts signed by Ms. Jenkins in connection with that transaction. However, even if Ms. Jenkins is considered to have signed the admissions contracts in her individual capacity (which is not the case), the Arbitration Agreement is enforceable because Ms. Jones ratified the

admissions agreements, including the Arbitration Agreement, Ms. Jones is a third-party beneficiary of the contract entered into by Ms. Jenkins, and Plaintiff is estopped from denying the enforceability of the Arbitration Agreement.

A. Ms. Jones Ratified the Agreements Negotiated by Ms. Jenkins by Accepting the Benefits of Those Agreements.

Contrary to Plaintiff's assertion, Defendants raised the issue of ratification to the trial court. (R. p. 171.) Defendants further addressed ratification in their Final Brief and Final Reply Brief. (Final Brief at 13; Final Reply Brief at 4-6.) Accordingly, Plaintiff's argument that Defendants did not preserve this issue is without merit. (Return at 10.)

Plaintiff's argument that there is no evidence of ratification is dependent on the treatment of the Arbitration Agreement as wholly distinct from the remainder of the admissions agreements entered by Ms. Jenkins on behalf of Ms. Jones. (Return at 11-12.) As noted above, the Arbitration Agreement was executed as part of the larger admissions agreement. Ms. Jones understood that Ms. Jenkins had negotiated her admission to Lowcountry. (R. p. 641, page 17, lines 19-25.) With this knowledge, Ms. Jones accepted the benefits of the contracts entered in connection with her admission to Lowcountry and thereby ratified these agreements, which included the Arbitration Agreement. *See Southern Bell Telephone & Telegraph Co. v. WRNO, Inc.*, 216 S.C. 533, 535-36, 59 S.E.2d 146, 147 (1950).

B. Ms. Jones Was An Intended Third-Party Beneficiary of the Agreements Signed by Ms. Jenkins.

Plaintiff argues that Ms. Jones cannot be a third-party beneficiary if Ms. Jenkins lacked authority to execute the Arbitration Agreement on behalf of Ms. Jones. (Return at 10.) However, assuming for the sake of argument that Ms. Jenkins entered into the admissions agreements (including the Arbitration Agreement) individually, rather than on

behalf of Ms. Jones,² then Ms. Jones is bound by the agreements as a third-party beneficiary because those agreements were entered for her sole benefit.

Moreover, Plaintiff's argument that Ms. Jones received no benefit from the Arbitration Agreement is without merit. (Return at 12-13.) Again, this argument relies on the false premise that Plaintiff can divorce the Arbitration Agreement from the remainder of the admissions agreements executed by Ms. Jenkins. Moreover, Plaintiff ignores that the Arbitration Agreement was binding on Lowcountry as well as Ms. Jones, and that this mutual obligation was a benefit to Ms. Jones. As a third-party beneficiary, Ms. Jones (and her estate) are bound by the Arbitration Agreement. *See McCutcheon v. THI of S.C. at Charleston, LLC*, 2011 U.S. Dist. Lexis 144288 (D.S.C. Dec. 15, 2011); *THI of S.C. at Columbia, LLC v. Wiggins*, 2011 U.S. Dist. Lexis 103638 (D.S.C. Sept. 13, 2011) (rejecting argument that family member did not have authority to bind resident to arbitration); *Cook v. GGNSC Ripley, LLC*, 786 F. Supp. 2d 1166, 1171-72 (N.D. Miss. 2011) (holding arbitration agreement in contract for nursing home care was enforceable against third-party beneficiary and her estate under third-party beneficiary principles); *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983 (Ala. 2004) (same); *Trinity Mission Health & Rehab. v. Scott*, 19 So. 3d 735 (Miss. Ct. App. 2008) (same).

C. Plaintiff Is Estopped from Denying the Enforceability of the Arbitration Agreement.

Plaintiff's argument with respect to estoppel is dependent upon the false premise that "the Arbitration Agreement is separate from the admission agreement." (Return at 14.) As discussed above, the Arbitration Agreement is part of the admissions agreements.

² As discussed above Ms. Jenkins did act on behalf of Ms. Jones, and Ms. Jones, as principal, is a party to the admissions agreements (including the Arbitration Agreement).

A nonsignatory can be bound by an arbitration provision within a contract executed by other parties. *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 288, 733 S.E.2d 597, 600-01 (Ct. App. 2012) (“Well-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties.”) (quoting *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000)). “Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity.” *Int’l Paper*, 206 F.3d at 417-18 (citation and internal quotation marks omitted). “A nonsignatory is estopped from refusing to comply with an arbitration clause ‘when it receives a direct benefit from a contract containing an arbitration clause.’” *Id.* (quoting *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999)).

Ms. Jones received the benefits of the agreements signed by Ms. Jenkins in connection with Ms. Jones’s admission to Lowcountry. As Plaintiff acknowledges, Defendants “were bound to provide care to [Ms. Jones] based solely on the admission agreement.” (Return at 14.) These admissions agreements were signed by Ms. Jenkins because Ms. Jones authorized her to handle her admission to Lowcountry, and Lowcountry provided care to Ms. Jones based on the admissions agreements that Ms. Jenkins signed on her behalf. Plaintiff now seeks to enforce rights and duties that were created through the admissions agreements. Plaintiff is estopped to deny the enforceability of these agreements, including the Arbitration Agreement, merely because Ms. Jones did not sign them. Plaintiff is not free to pick and choose those portions of Ms.

Jones's agreements with Lowcountry it wants to enforce and those it does not and should be estopped from doing just that.

V. Defendants Did Not Waive The Remaining Arguments that the Court of Appeals Declined to Address and Which Have Been Decided in Favor of Defendants' Position.

Plaintiff asserts that Defendants' request for remand to the Court of Appeals for rulings on issues regarding the Federal Arbitration Act, rules of the American Arbitration Association, waiver, and the existence of a meeting of the minds, is not preserved because this request was not made in the Petition for Rehearing. (Return p. 11.) Plaintiff's argument runs counter to the appellate court rules and also ignores the policies behind the Petition for Rehearing.

This Court has recognized "the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner." *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011). The appellate rules provide that "[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." Rule 242(d)(2), SCACR. In order to prevail on a petition for rehearing, the petitioning party "must demonstrate that the Court overlooked or misapprehended their argument." *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322 (2001); Rule 221(a), SCACR.

In the present case, the Court of Appeals determined that Ms. Jenkins lacked authority to execute the Arbitration Agreement on behalf of Ms. Jones, overlooked Defendants' ratification, third-party beneficiary, and estoppel arguments, and expressly declined to address the remaining issues pursuant to *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999). *Scott*, Op. No. 2014-

UP-317, ¶ 2. Defendants filed a Petition for Rehearing arguing that the Court of Appeals overlooked evidence demonstrating Ms. Jenkins's authority to act on behalf of Ms. Jones and overlooked Defendants' ratification, estoppel, and third-party beneficiary arguments. (Pet'n for Reh. at 1-4.) With respect to the remaining issues (the Federal Arbitration Act, rules of the American Arbitration Association, waiver, and the existence of a meeting of the minds), the Court of Appeals had not "overlooked or misapprehended" these arguments, but expressly determined that it need not rule on them because its decision on agency was dispositive. Defendants expressly requested the Court of Appeals to "grant its Request for Rehearing, reverse the trial court's Order Denying Defendants' Motion to Compel Arbitration and Stay Proceedings and remand this matter for an Order compelling Plaintiff to pursue her claims in arbitration." (*Id.* at 5.)

To read Rule 242(d), SCACR, as Plaintiff suggests would be worse than a "rigid, hyper-technical" approach to the appellate rules; it would require appellants to do something that is not required by the Rules at all—to request rehearing on an issue that was neither "overlooked" nor "misapprehended." By asking the Court of Appeals to reverse the trial court's Order Denying Defendants' Motion to Compel Arbitration and Stay Proceedings, the Petition for Rehearing should be understood to have included a request to consider the arguments (which were central to the parties' briefing and which issues recently had been decided in Defendants' favor by the Supreme Court and that panel of the Court of Appeals (*see Dean v. Heritage Healthcare of Ridgeway*, Op. No. 27401 (S.C. Sup. Ct. filed June 18, 2014) (Shearouse Adv. Sh. No. 24 at 34); *Johnson v. Heritage Healthcare of Estill, LLC*, 2014-UP-318 (S.C. Ct. App. Filed Aug. 6, 2014)) that the Court of Appeals had previously deemed moot in light of its decision on agency.

To tell the Court of Appeals that, in the event it granted the Petition for Rehearing, it would then need to consider the issues that it had expressly considered moot in light of its challenged decision, is simply to state the obvious implication of the requested relief.

CONCLUSION

For the reasons stated, Petitioners ask the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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November __, 2014

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PROOF OF SERVICE

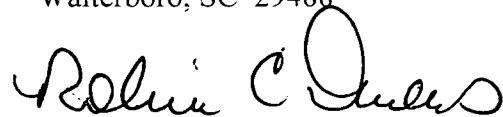
I, the undersigned legal assistant, of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Appellants, do hereby certify that I have served all counsel in this action with a copy of the Reply to Return to Petition for A Writ of Cert by mailing a copy of same to counsel via United States Mail, postage prepaid, at the following address(es):

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November 24, 2014

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VIA HAND DELIVERY

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
1231 Gervais Street
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S.C. Supreme Court

RE: Cherry T. Scott, as PR of the Estate of Elizabeth Jones v.
Heritage Healthcare of Estill, LLC d/b/a Heritage of the Lowcountry
and/or d/b/a Uni-Health Post Acute Care of the Lowcountry,
United Clinical Services, Inc., United Rehab, Inc., and UHS-Pruitt Corporation
Opinion No. 2014-UP-317 (S.C. Ct. App. Filed Aug. 6, 2014)
Civil Action No. 10-CP-25-491 and 492
SC Supreme Court Case No. 2014-002232
Our File No. 5593/1507

Dear Mr. Shearouse:

I enclose for filing the original and seven (7) copies of the Reply to Return to Petition for a Writ of Cert on behalf of Appellants in the above-referenced matter. Please return a clocked-in copy of same to me for our records.

By copy of this letter to counsel shown below, I am serving a copy of same upon them by mail. Thank you for your assistance.

Yours truly,


J. Michael Montgomery

JMM:rco

Enclosures

cc: Lee D. Cope, Esquire
Charles McCutchen, Esquire
Matthew Creech, Esquire
Margie Bright Matthews, Esquire