THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

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SC Court of Appeals

WCC File No. 0800660

Opinion No. 5272 (S.C. Ct. App. filed September 17, 2014)

Cindy Ella Dozier, Employee, ... Petitioner,

v.

American Red Cross, Employer, and Sedgwick CMS, Carrier, ... Respondents.

PETITION FOR 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 January 28, 2015.

QUESTIONS PRESENTED

1. Whether the Appellate Panel erred as a matter of fact and law in failing to find Claimant was permanently and totally disabled under § 42-9-10 when there is no evidence "that work is available that would allow her to work under the 5-pound weight restriction Dr. Shealy and Dr. Zgleszewski rendered her for her compensable carpal tunnel syndrome."

2. Whether the Court of Appeals erred in finding substantial evidence supports the finding "work is available" when Respondents' vocational expert (James Myers) gave on opinion based on speculation in that the sedentary jobs he listed all require the physical ability to lift 10-pounds.

3. Whether Respondents are estopped from contesting the existence of CRPS/RSD when Appellant withdrew her appeal on the issue in detrimental reliance on the Employer's selection and authorization of a specialist to provide treatment for those conditions.

4. Whether Respondents waived the right to litigate the existence of CRPS/RSD when they knowingly and willingly provided treatment for the condition for two years based on a common understanding of a previous order of the Commission, only to first raise the issue denying CRPS 10 days before a hearing on permanent disability.

5. Whether the Commission erred in finding Appellant did not suffer from CRPS when the only competent evidence showed she did in fact suffer from CRPS.

STATEMENT OF THE CASE

This workers' compensation appeal arises out of an accident suffered by the Petitioner, Cindy Dozier, on January 17, 2008 on her job with the Employer, American Red Cross. After a series of hearings, Respondents began providing ongoing treatment for bilateral carpal tunnel syndrome (CTS) and CRPS/RSD[1] with Dr. Timothy Zgleszewski beginning on January 26, 2010. Dozier also

[1]Complex Regional Pain Syndrome is a newer term for Reflex Sympathetic Dystrophy.

underwent carpal tunnel release surgery on both arms performed by Dr. Gerald Shealey. Both doctors placed Dozier at MMI with a permanent lifting restriction of no greater than 5-pounds.

The case went to a hearing to determine Dozier's disability and long-term medical requirements. The Appellate Panel (affirming *in toto* the Single Commissioner) held:

> This Panel finds that Claimant is not permanently and totally disabled *due to the fact that work is available that would allow her to work under the 5-pound weight restriction* Dr. Shealy and Dr. Zgleszewski rendered her for her compensable carpal tunnel syndrome. In addition, Dr. Bitting opined that Claimant could return to work without any work restrictions. In arriving at this finding, this Panel put great weight on the report of James Myers. This Panel also took into account the fact that Claimant admitted that she had sought no employment since being released by her doctors. [Order, Finding of Fact 35, page 18 (emphasis added)].

The Appellate Panel also held that Dozier did not suffer from CRPS/RSD. She was to be provided ongoing pain management treatment for her CTS only. The Court of Appeals affirmed in a published opinion. Dozier v. American Red Cross, Op. No. 5272 (S.C.Ct.App. filed September 17, 2014)(Shearouse Adv.Sh. No. 37 at 18).

As grounds for granting her Petition, Appellant would respectfully show the Court of Appeals erred on the issues of (1) Dozier's 5-pound work restriction disqualified her from sedentary work; (2) the vocational opinion of James Myers' lacked a foundation as he opined work was available at a sedentary to light level when Dozier's restrictions were less than sedentary; (3) selection by an employer of a doctor to treat RSD/CRPS and authorizing his treatment specifically for that condition constitutes waiver and estoppel; and (4) the only competent medical evidence in the record confirms Dozier suffers from RSD/CRPS as a complication of her work-related injuries.

ARGUMENT

I. Cindy Dozier is permanently and totally disabled as there are no jobs available to someone with permanent restrictions of no more than occasional lifting up to 5 pounds.

The Court of Appeals affirmed the Commission's finding "that Claimant is not permanently and totally disabled *due to the fact that work is available that would allow her to work under the 5-pound weight restriction* Dr. Shealy and Dr. Zgleszewski rendered her for her compensable carpal tunnel syndrome." Dozier v. American Red Cross, Op. No. 5272 (S.C.Ct.App. filed September 17, 2014)(Shearouse Adv.Sh. No. 37 at 18). Respectfully, this finding is clearly erroneous, as there is *no evidence* any such work is available. See Hutson v. South Carolina State Ports Authority,732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate Panel's conclusion because "rank speculation" cannot outweigh competent evidence of disability).

The determination of disability in workers' compensation is a multi-step analysis. The first step is determining the injured worker's permanent physical restrictions. The Commission correctly held Dozier was limited to a "5-pound weight restriction." [R. p. 84]. Both Dr. Shealey and Dr. Zgleszewski concurred in the 5-pound restriction. On May 23, 2011, Dr. Shealey provided Dozier "with a permanent restriction of 5 pounds" for the carpal tunnel syndrome. [R. p. 399]. Dr. Zgleszewski concurred that the "5-pound lifting restriction for the carpal tunnel syndrome [is] reasonable." [R. p. 250, lines 1-19]. Dr. Zgleszewski further stated "she is unable to use either upper extremity on a repetitive basis secondary to her CRPS and chronic pain from her failed CTS release surgery." He added "in my medical opinion from a medical standpoint, Ms. Dozier *cannot perform even at a sedentary position* if the job requires anything greater than less than occasional use of her arms given the diagnoses she has of CRPS and CTS." In his deposition, he testified her permanent restrictions "would be no lifting greater than 5 pounds and that she could not even perform a

sedentary position if the job required anything greater than less than occasional use of her arms given the diagnosis of the CRPS and the carpal tunnel syndrome, and also, in my medical opinion, I stated that she cannot use either upper extremity on a repetitive basis." [R. p. 230, lines 7-24].

The next step in the analysis is determining whether the employee is unable to perform services other than those that are "so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist." See, e.g Wynn v. Peoples Natural Gas Co., 238 S.C. 1, 118 S.E.2d 812 (1961). In answering this question, the Commission can rely on expert vocational testimony – provided the expert's opinion is based on the physical limitations as found by the Commission (and consistent with the evidence). The Commission specifically relied on the opinion of James Myers. However, this is where both the Commission and the Court of Appeals erred.

The court reasoned:

> The Appellate Panel's reliance on these medical opinions is also supported by James Myers' report, *which presented jobs within Dozier's weight restrictions.* Myers listed twelve jobs he concluded Dozier qualified for based on her education, prior vocational experience, geographic location, and physical work restriction of "sedentary." Myers stated he relied upon Dr. Shealy's medical opinion and Dozier's previous life experiences when he identified possible alternative employment opportunities. To that end, Myers specifically noted Dr. Shealy placed a five-pound restriction upon Dozier at her own request. Because Myers relied upon Dr. Shealy's assessment of and restrictions placed upon Dozier, *we find it reasonable to conclude the employment opportunities Myers generated for Dozier were also within the five-pound weight restriction.* Dozier at 28 (emphasis added).

Myers *never* states the jobs he listed are within the five-pound weight restriction. The jobs he listed are *all* outside Dozier's five-pound restriction. She simply does not qualify for any work in the market. Sedentary work requires the ability to *lift 10 pounds* occasionally; light duty requires the ability to lift 20 pounds.[2] Myers did not even pretend the jobs he listed were within the medical

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[2]The full PDL definition for sedentary work states:

S-Sedentary Work - Exerting up to 10 pounds of force occasionally (Occasionally: activity or

restrictions. See Hutson v. South Carolina State Ports Authority,732 S.E.2d 500, 399 S.C. 381 (2012)("To use such unsupported and wildly optimistic goals which are in direct conflict with the only concrete evidence in the record would turn the Act on its head and violate the stated policy behind it."); Michau v. Georgetown County, 396 S.C. 589, 723 S.E.2d 805 (2012)(reversing Commission's finding based on incompetent expert opinion and remanding for Commission to decide whether the remaining competent evidence supports employee's claim).

The word "sedentary" is a term of art. Physical Demand Levels are defined by the Dictionary of Occupational Titles (DOT). For Myers' opinion to have any probative value at all, Dozier *must* be able to lift 10 pounds occasionally. The medical evidence shows she cannot.

Respectfully, it was error for the Court of Appeals "to conclude the employment opportunities Myers generated for Dozier were also within the five-pound weight restriction" when Myers' report states otherwise. Dozier at 28 (emphasis added). Both treating physicians opined Dozier cannot lift more than 5 pounds – which *completely disqualifies her from sedentary employment*. Myers simply pretends these restrictions do not exist. See Young v. Tide Craft, 270 S.C. 453, 468, 242 S.E.2d 671, 678 (1978)("It is, of course, elementary that the factual or underlying basis for the expert's opinion be set out, otherwise the opinion lacks probative value."). Such an unsupported opinion must be rejected as rank speculation. See Hutson v. South Carolina State Ports Authority,732 S.E.2d 500, 399 S.C. 381 (2012)("the full commission's conclusion is based on rank speculation and cannot now be used as the basis for denying [employee's] claim for lost wages.").

Eleven of the twelve jobs are listed in Myers' report with the description: "Physical

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condition exists up to 1/3 of the time) and/or a negligible amount of force frequently (Frequently: activity or condition exists from 1/3 to 2/3 of the time) to lift, carry, push, pull, or otherwise move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met.

requirements: Sedentary."[3] [R.p. 568-571]. These jobs are all *by definition* outside the five-pound weight restriction. Myers adds the "average wage of these employers was based upon a *sedentary physical demand level* provided by the Department of Labor . . ." [R.p. 571]. Even if Dozier has the education and transferable skills to perform these jobs, the job descriptions uniformly exceed the restrictions imposed by her doctors.

Nowhere in Myers' report does he ever state any of the potential jobs are within Dozier's actual restrictions. From what little he does state, they are not. Conversely, the remaining evidence overwhelmingly shows Dozier is permanently and totally disabled. One cannot read Myers' report and conclude a reasonably stable job exists within Dozier's restrictions. See, e.g. Hutson v. S.C. State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Commission's findings as based on rank speculation). There is no substantial evidence to support the Commission's findings.

Certiorari should be granted because decisions based on speculation from hired experts cannot be permitted. Expert testimony must consistently be built on a foundation on which the Commission can rely; else medical and disability decisions are no more than rank speculation.

II. Employer is procedurally barred from denying the existence of CRPS.

Respondents' designation and authorization of Dr. Zgleszewski to treat CRPS constitutes acceptance of the condition. As such, waiver and estoppel apply. Petitioner respectfully requests the Court grant the writ to consider the procedural and due process issues raised by the denial of an established medical condition at the 11th hour. Cf. Jervey v. Martint Envtl., Inc., 406 S.C. 210, 750

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[3] The twelfth job (job #2) was with an employer or agency in Lee Summit, Missouri. Myers did not state what the physical requirements of that job were. He listed the wrong DOT Code for a mail sorter. The Code he provided (612.462.010) was for a "MULTI-OPERATION-MACHINE OPERATOR" – which carries a "Light" physical duty requirement. The DOT Code for a "MAIL CLERK" (209.687.026) also requires the ability to work "Light" duty. Job #3 was also a light duty machine operator job.

S.E.2d 90 (S.C. 2013)(vacating Court of Appeals holding that § 42-9-260 was not a bar to denying an accepted claim after 150 days).

A. Estoppel

Respondents should be estopped from contesting the existence of CRPS. The essential elements of estoppel as related to the party estopped are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the real facts. Langdale v. Harris Carpets, 395 S.C. 194, 717 S.E.2d 80 (Ct. App. 2011). To successfully assert the doctrine of estoppel, a party must show a (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) prejudicial change in position. Id.

These elements were met in this case. The Court of Appeals specifically stated "we are not convinced that ARC possessed actual knowledge that Dozier suffered from CRPS/RSD because the issue of compensability of her injuries, with the exception of her bilateral wrists, was a contested issue from the outset of this litigation." Compensability of CRPS *had* been a contested issue from the outset – up until (so far as the parties understood it) the 2009 ruling from Commissioner Huffstetler. Following that hearing, Respondents authorized Dr. Zgleszewski to treat Dozier specifically for CRPS/RSD. Respondents cannot say they were unaware of this when Dr. Zgleszewski diagnosed "Reflex Sympathetic Dystrophy of Upper Limb" in every medical record from 2010 forward. [R.p. 423-517].

Petitioner respectfully asks the Court to review the holding on estoppel in light of the

evidence which may have been overlooked or misapprehended by the Court of Appeals.

B. Waiver.

The Court of Appeals held the Employer was not procedurally barred by the doctrine of waiver from contesting the diagnosis of CRPS by the authorized treating physician. Appellant asks the Court to reconsider that the Employer's ongoing provision of treatment for CRPS by a physician specifically chosen by them to provide that treatment constitutes a *waiver* of any such defense. See Jervey v. Martint Environmental, Inc., 396 S.C. 442, 721 S.E.2d 469 (Ct. App. 2012)(Employer waived defenses when they provided benefits for 450 days after accident). Moreover, denial of CRPS was not raised in their previous Form 21 filing, the Form 58 submitted for the Form 21 hearing, nor in their Form 51. [R. pp. 95, 102, 100-101]. It was not raised until the Form 58 in this case – ten days before the hearing.

Waiver is the "voluntary and intentional relinquishment or abandonment of a known right." Strickland v. Strickland, 375 S.C. 76, 85, 650 S.E.2d 465, 470 (2007). The party claiming waiver must show the other party possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they were dependent. Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 344, 415 S.E.2d 384, 387-88 (1992).

In Jervey, the Court of Appeals held, "because [employer] knew of its defense the day of the accident, yet it paid and has continued to pay [claimant] disability compensation, and it did not assert the defense until at least 450 days after the accident, the evidence supports the Appellate Panel's finding that [employer's] defense is barred by the doctrine of waiver and laches." Id. at 451, 721 S.E.2d at 474. In this case, Employer knew that Commissioner Huffstetler had ordered treatment for CRPS in his order notes (although the actual Decision and Order was not as specific). [R. p. 572]. They began providing treatment for CRPS on January 26, 2010 and continued providing it up

through Dr. Zgleszewski's deposition on January 24, 2012 – an **uninterrupted period of 728 days!** These facts support a finding that Employer waived any defense that the complex regional pain syndrome is not related or does not exist. Therefore, Appellant respectfully asks the Court to issue the writ of certiorari and reverse the Appellate Panel on this issue.

III. The Commission erred in finding Dozier did not suffer from CRPS at the time of the February 6, 2012 hearing.

The Court of Appeals affirmed the Appellate Panel's 2012 finding that Dozier did not suffer from CRPS – holding the opinions of Dr. Bitting and Mancuso[4] were substantial evidence. An essential predicate to this holding was the Court of Appeals finding that "neither Commissioner Huffstetler's 2009 order nor the Appellate Panel's 2010 order demonstrate the issue of CRPS/RSD was addressed with finality." Dozier v. American Red Cross, Op. No. 5272 (S.C.Ct.App. filed September 17, 2014)(Shearouse Adv.Sh. No. 37 at 18, 30).

At the time of the February 6, 2012 hearing, Dr. Zgleszewski, the authorized treating physician chosen by Employer, had treated Dozier's CRPS for over two years. Dr. Zgleszewski states repeatedly and unequivocally that Dozier suffers from CRPS Type II. [R. p. 272, lines 1-20]. He gave a long, detailed explanation for his diagnosis. [R. pp. 211-225]. The significance of his diagnosis – made in 2010 when he became the treating physician – is that up until then, Dozier did not have a *definitive* diagnosis. Dr. Zgleszewski made that diagnosis. See Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992)(claim did not accrue until physician made correct diagnosis).

The Appellate Panel placed "great emphasis on the opinions of Dr. Mancuso and Dr. Bitting." [R. p. 83]. Dr. Bitting's opinion was stale. He and Dr. Mancuso last saw Dozier in 2009.

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[4]Both doctors were in the same practice with shared medical records.

See, Smith v. S.C. Dep't of Mental Health, 329 S.C. 485, 494 S.E.2d 630 (Ct. App. 1997)(reversing and remanding for taking of additional evidence when "[m]uch of the medical evidence upon which the single commissioner relied was more than two years old at the time of the hearing.")(emphasis added). Cf. Johnson v. Renta-A-Center, Inc., 730 S.E.2d 857, 398 S.C. 595 (2012)(noting Commission found medical release more than a year old was "stale."). He openly conceded he could not "speak to her *current physical condition* [and] *diagnosis*..." [R. p. 199, lines 17-24 (emphasis added)].

Unlike Dr. Bitting, other treating doctors had diagnosed Dozier with CRPS prior to the November 3, 2009 hearing. On January 10, 2009, Dr. Moore diagnosed her with "Reflex Sympathetic Dystrophy/Complex Regional Pain Syndrome." [R. p. 370]. Dr. Rhea, a neurosurgeon, noted it "may be some type of a sympathetic mediated pain syndrome." [R. p. 417]. He prescribed a "cervical sympathetic block" for the diagnosis of "RSD" on April 6, 2009.

However, as the Court of Appeals noted, the definitive diagnosis was not made in 2009. And by the February 6, 2012 hearing the opinions of Dr. Moore and Dr. Rhea were every bit as stale and outdated as those of Dr. Bitting and Dr. Mancuso. The *only* medical evidence from the original November 3, 2009 hearing forward relative to RSD/CRPS came from Dr. Zgleszewski – who had the unique advantage of treating Dozier for that condition for a full two years.

Dr. Zgleszewski unequivocally opined to a reasonable degree of medical certainty that Dozier had developed RSD/CRPS as a direct result of her work injury. This was the only competent evidence before the Commission. Incompetent evidence is not substantial evidence. See Michau v. Georgetown County, 396 S.C. 589, 723 S.E.2d 805 (2012)(reversing Commission's finding based on incompetent expert opinion and remanding for Commission to decide whether the remaining competent evidence supports employee's claim).

Dr. Bitting's deposition testimony should be given no weight as he did not state his opinions regarding RSD to a reasonable degree of medical certainty. Id. Furthermore, he deferred to the current treating physician (Dr. Zgleszewski) "regarding any other treatment that would have occurred since [he] last saw Ms. Dozier on August 26, 2009." [R. p. 199, lines 6-20]. Because, "I haven't seen her in over two years," Dr. Bitting further confirmed he "can't speak to her *current physical condition, diagnosis*, work restrictions or impairment." [R. p. 199, lines 14-24 (emphasis added)]. As Dr. Bitting's opinion regarding the *current existence* of CRPS is not competent evidence, it was legal error for the Appellate Panel to give it any weight.

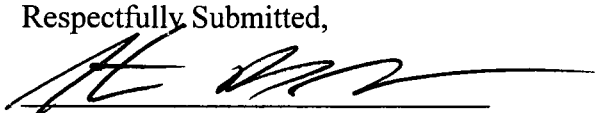
Furthermore, the Appellate Panel relies on its own diagnosis of CRPS, rather than relying on the medical experts. The Panel based its opinion on what constitutes CRPS on its own diagnostic criteria – disregarding Dr. Zgleszewski's unrefuted opinion as to the diagnostic criteria used by medical experts. [R. p. 213, line 14-p.224, line 18; p. 242, line 18-p. 243, line 8; p. 254, line 19-p. 255, line 13; p. 257, line 23-p. 261, line 2]. See Burnette v. City of Greenville, 737 S.E.2d 200, 401, S.C. 417 (Ct. App 2012) (findings based on commissioner's own medical opinion is not substantial evidence and must be reversed).

As the competent medical evidence shows, Cindy Dozier suffers from CRPS Type II as a result of her work-related injury. As such, the decision of the Appellate Panel is not supported by substantial evidence and should be reversed. Respectfully, Appellant asks the Court to grant certiorari and reverse the findings regarding CRPS/RSD.

CONCLUSION

Petitioner requests the Court grant the Petition for Writ of Certiorari. This case raises significant issues regarding the definitions and evidence required to prove disability and medical conditions in worker's compensation cases. The Court should find Dozier has suffered permanent total disability as a result of her bilateral arm injuries. The Court should further find Dozier is entitled to lifetime medical treatment for her carpal tunnel syndrome and complex regional pain syndrome.

Respectfully Submitted,



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February 25, 2015

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

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Cindy Ella Dozier, Employee, ... Petitioner,

v.

American Red Cross, Employer, and Sedgwick CMS, Carrier, ... Respondents.

PROOF OF SERVICE

I certify that I am paralegal to Stephen B. Samuels and I have caused a copy of the **Petition for a Writ of Certiorari** and **Appendix** to be served upon counsel for the Respondents by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on **February 27, 2015**, addressed as follows:

Wesley J. Shull, Esquire
Attorney for Respondents
Willson Jones Carter & Baxley, P.A.
872 S. Pleasantburg Drive
Greenville, South Carolina 29607

Honorable Jenny Abbott Kitchings, Clerk of Court
The South Carolina Court of Appeals
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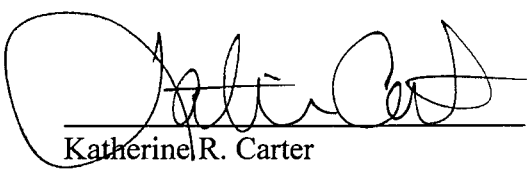
Columbia, South Carolina 29211
(Petition for a Writ of Certiorari only)



Katherine R. Carter

Columbia, South Carolina
February 27, 2015

SAMUELS LAW FIRM

STEPHEN B SAMUELS
ATTORNEY AT LAW

February 27, 2015

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VIA HAND DELIVERY
Honorable Daniel E. Shearouse
Clerk of Court, S.C. Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

Re: Cindy Ella Dozier v. American Red Cross and Sedgwick CMS
WCC File No.: 08006600

Dear Mr. Shearouse:

Enclosed for filing please find the original and six (6) copies of our **Petition for a Writ of Certiorari** in the above-referenced matter along with our check in the amount of One Hundred ($100.00) Dollars as payment of the filing fee. We have also enclosed two (2) copies of the **Appendix**, one of which is unbound per Rule 267(d)

By copy of this letter and enclosure to Wesley J. Shull, we are serving a copy of our **Petition for a Writ of Certiorari** and **Appendix** upon counsel for the Respondents as indicated by the attached Proof of Service. We are also providing a copy of our **Petition for a Writ of Certiorari** to the South Carolina Court of Appeals pursuant to Rule 242(c).

If you have any questions or concerns, please do not hesitate to contact me. Thank you for your consideration.

With kindest regards, I am

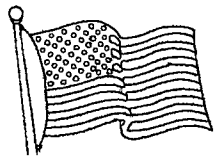
Yours very truly,

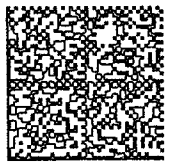
Stephen B. Samuels

SBS/krc

Enclosure(s)

cc w/encl: Wesley J. Shull, Esquire
Ms. Cindy Dozier
Honorable Jenny Abbott Kitchings





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