THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Lower Court Case No. 1004913
Appellate Case No. 2013-00274

Virginia A. Miles, Employee, ... Petitioner,

v.

Waffle House, Inc., Employer, and Brentwood Services, Inc., Carrier, ... Respondents.

REPLY BRIEF OF PETITIONER

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Although our courts have uniformly held an assault arising out of the employment is compensable, no previous decision has ever denied benefits to an employee assaulted on the employer's premises by a customer. See Baggott v. Southern Music, Inc., 496 S.E.2d 852, 330 S.C. 1 (1998)(assault on employee by customer in pool hall arose out of and in the course of employment because the "dispute had its origin in . . . claimant's employment"). Cf. Skipper v. Southern Bell Telephone & Telegraph Co., 271 S.C. 152, 246 S.E.2d 94 (1978) (injury to employee assaulted by another employee growing out of a quarrel about the employer's work arises out of the employment). In so doing, the Court of Appeals and Commission turned the Workers' Compensation Act on its head by injecting negligence concepts of fault into a system intended to provide "sure, swift recovery for workplace injuries *regardless of fault*." Peay v. U.S. Silica Co., 313 S.C. 91, 94, 437 S.E.2d 64, 65 (1993)(emphasis added). As such, the decisions below plainly involve novel issues and are in conflict with all previous case law.

Respondents charge Miles with "over-dramatiz[ing] her account of events of the events inside the restaurant in an apparent attempt to entice this Court into usurping the fact-finding role of the commission." [Brief of Respondents, page 27, note 13]. This is an unfortunate and unfounded accusation. The events of March 14, 2010 are well-documented – considering the confusion inherent in a fast-developing "wild and wooly situation." [R. page 206, lines 1-4]. Broken down into their essence, a few key undisputed facts control this case and render it a question of law; not a factual dispute determined by substantial evidence.[1] Those key facts are:

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[1]There are *some* conflicts in the testimony over certain *specific* details. For example, Mike Strong (grill cook) testified in his deposition that, "She got from behind the car, walked

1. Virginia Miles was assaulted by a rowdy Waffle House customer on Waffle House premises.

2. The responsibilities of a waitress included "dealing with rowdy customers."

3. As no managers were present and the grill cooks did not take charge of the situation involving the rowdy customers, Miles was the one who called the police. [R. p. 94, lines 15-18].

4. Miles derived no personal benefit from the actions she took on behalf of Waffle House.

5. The events happened extremely quickly as less than 90 seconds elapsed from the first 911 call made by Miles to the actual assault by Kelly Mae Howes. [R. p. 94, lines 15-18; pp. 292-293; p. 315 (audio CD)].

6. Miles was not trained in Waffle House safety and security procedures. [R. p. 81, line 16-p. 83, line 25; p. 312]. No Waffle House waitresses were trained to deal with the situation which ultimately arose in this case. [R. p. 177, lines 11-24].

7. Miles reacted spontaneously to the events; "Claimant's actions were taken without thinking." [R. p. 63, Finding of Fact 12].

The totality of these undisputed facts shows that the Appellate Panel engaged in an "unusual finesse of reasoning" to conclude that Miles was acting outside the scope of her employment. See Young v. Hyman Motors, 19 S.E.2d 109, 199 S.C. 233 (1942)("If it be conceded that there may be deduced by a process of unusual finesse of reasoning that there is a scintilla of evidence . . . nevertheless there is another rule, more founded upon common sense and reason, to the effect what when only one reasonable inference, not just one inference, but one reasonable inference, can be deduced from the evidence, it becomes a question of law for the court, and not a question of fact for

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around the front, was walking back in, and the girl mashed the gas and went to hit her." [R. p. 228, lines 10-14]. Strong changed his testimony at the hearing. Strong had earlier testified that immediately before the hearing he and a group of his coworkers had met "to agree what [their] testimony was going to be." [R. p. 125, line 19-page 126, line 2].

the jury."). Miles may not have done well, but she did the best she could in a difficult situation for which she was unprepared, untrained and unsupported. A rule that punishes employees who panic when thrust into danger by the conditions of their employment is untenable, unworkable and unacceptable. It turns our no-fault workers' compensation into a fault-based blame game. This Court should reverse.

1. Miles is entitled to workers' compensation benefits because injuries arising from an assault by the Employer's customer arise in the course and scope of the employment as a matter of law.

Respondents largely overlook the fact Miles was injured by a Waffle House customer, instead contending the issue is the fact it happened in Waffle House's parking lot rather than inside the store. That phrasing implies that Miles had been assaulted off the Waffle House premises by a person who had once eaten at Waffle House over some issue entirely unrelated to her employment. Such a mischaracterization is far from accurate. Miles was assaulted *on the Waffle House premises*. She was *assaulted by a customer*. The *assault arose directly out of a dispute with Miles' coworker which originated out of the employment* only moments before the actual assault occurred. See Baggott v. Southern Music, Inc., 496 S.E.2d 852, 330 S.C. 1 (1998)(assault on employee by customer in pool hall arose out of and in the course of employment because the "dispute had its origin in . . . claimant's employment"); Doe v. South Carolina State Hosp., 285 S.C. 183, 328 S.E.2d 652 (Ct.App.1985)(intentional assault on nurse by patient arose out of and in the course of employment as a matter of law); Shah v. Howard Johnson, 140 N.C.App. 58, 535 S.E.2d 577 (N.C.App. 2000)(employee shot during robbery was injured under "unquestionably compensable circumstances"). Cf. Youmans v. Coastal Petroleum Co., 508 S.E.2d 43, 333 S.C. 195 (Ct. App. 1998).

Had Miles actually left the premises and pursued Howes in her car, then the decision below would be correct. *Compare* Wright v. Bi-Lo, Inc., 314 S.C. 152, 442 S.E.2d 186 (Ct. App. 1994)(stocker who left premises on moped to chase shoplifter acted outside course and scope of employment), *with* Howell v. Kash & Karry, 264 S.C. 298, 214 S.E.2d 821 (1975)(injuries from fall suffered by bagboy while chasing purse snatcher on foot off the premises acting within course and scope of his employment).[2]

A. Miles' actions did not exceed the scope of her employment because as a waitress she was required to deal with rowdy customers and no manager instructed her otherwise on the day of the assault.

Respondents contend "Regardless of whether or not Miles' job required her to deal with 'rowdy customers,' the customers had been dealt with and the situation had been resolved and controlled once the rowdy customers exited the waffle house." If only the situation had been wrapped up so nicely and tidily. The fact is, it had not been resolved and not been controlled. The cooks who were ostensibly in charge had done nothing.[3] Even though she was the least prepared to handle it, Miles was the one person who took the responsibility to call the police and at least try "to get a license plate number." [R. p. 138, line 12].

Less than 90 seconds elapsed between the first 911 call and the actual vehicular assault. Miles' call to the police ended at 5:12:39. The 911 operator called back thirteen seconds later at 5:12:52. The phone was answered by Brittany Massalou. At 5:14:09, Massalou – even more panicked and frantic than Miles – screamed and told the police "they have one of our waitresses on

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[2]Note in neither Wright nor Howell did the injury result from an assault by a customer on the premises. In both cases, the employee was injured off the employer's premises attempting to apprehend a criminal who had robbed the employer (Wright) or a customer (Howell).

[3]Mike Strong testified, "I was sitting down the whole time." [R. p. 97, line 2].

the hood of their car." From the time Miles hung up the phone and Massalou told the police Miles was on the hood of the car, a mere 90 seconds had elapsed. [R. pp. 292-293]. The situation did not suddenly become under control the instant Miles hung up the phone – it clearly continued quite longer; not really ending until Howes was arrested and Miles was taken to the hospital.

During this entire time, Miles was performing her duties. As a waitress, she was required to deal with rowdy customers. This is the central legal distinction between the instant case versus Howell[4] and Wright. The materials on how "To help handle 'out of control' customers" relied on by Waffle House are merely " a few tips." [R. p. 148]. They tell waitresses "how to" because this is part of their job. You cannot work third shift at Waffle House and not encounter "out of control" customers as a central part of your job. Certainly Miles was "hired as a waitress, not a law enforcement officer." [Brief of Respondents, page 8]. The risk she was exposed to, which ultimately let to her injuries, was a central part of her job as a waitress – particularly early in the morning in the rowdiest weekend of the year.

Even if the tips were actually communicated to Miles, they address *how* to deal with out of control customers. An instruction on *how to deal with out of control customers* necessarily means dealing with out of control customers is an essential part of the employment. As this Court explained in Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854 (1950):

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[4]In their Respondents contend "although she now asserts Howell does not apply, to the Court of Appeals that Howell was controlling." [Respondents Return in Opposition to Petition for a Writ of Certiorari, page 9]. This a mischaracterization, as Petitioner has been consistent regarding Howell. Howell is the *leading* case for analyzing the "scope of employment" defense raised by Respondents. The argument has consistently been made that Howell does not apply because Miles never stepped outside the scope of her employment. However, in the alternative, Petitioner has argued that if she did step outside the scope of her employment, the fact her actions were for the benefit of Waffle House means that Howell's analysis controls over Wright.

> [N]ot every violation of an order given to a workman will necessarily remove him from the protection of the Workmen's Compensation Act . . . Certain rules concern the conduct of the workman within his sphere of employment, while others limit the sphere itself. A transgression of the former class leaves the scope of his employment unchanged, and will not prevent the recovery of compensation, while a transgression of the latter sort carries the workman outside of the sphere of his employment and compensation will be denied. Id., *quoting* Johnson v. Merchants Fertilizer Co., 183 S.C. 373, 378-379, 17 S.E.2d 695, 697-698 (1941).

Respondents further contend it would be "completely unrealistic to expect employers to repeated warn employees regarding prohibited activities and/or always be able to warn an employee immediately before he or she is about to do something that wold violated the employer's policy." [Brief of Respondents, page 18]. However, that has been the rule in all the cases which barred compensation. See, e.g., Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (2004)(employee explicitly instructed not to take company truck home on the day of the accident); Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854 (1950)(police chief given specific instructions not to ride on the fire truck immediately before climbing onto fire truck from which he fell); Wright v. Bi-Lo, Inc., 314 S.C. 152, 442 S.E.2d 186 (Ct. App. 1994)(employee specifically told not to pursue a shoplifter and go back into the store immediately before chasing shoplifter on moped). Moreover, Respondents overlook the fact that *no managers were working* when Miles was assaulted. No one could warn Miles because no one was in charge – she, ultimately to her detriment, took action in an emergency situation because she was the responsible employee looking out for her employer's interest.

The ruling barring compensation for acts taken outside the scope of employment is a harsh one, particularly so in the instant case. Employees are often put into situations for which they are unprepared. It is not always crystal clear as to what the particular rule might be – it certainly was

not in this case where the testimony as to what the rules were and what rules may have been broken was all over the place. As such, it has always been a requirement that there must be crystal clear evidence that the employee knew what the rule was and made the affirmative choice to break the rule for his own benefit. The employee in Pratt admitted he had disobeyed orders not to take the truck home. Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (2004). The fire chief in Black was repeatedly told not to ride on the fire truck – even including a final admonition 5 minutes before he embarked on his fatal journey.[5] Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854 (1950). The employee in Wright was told three times in the week before his death not to chase shoplifters – including on the fatal day when "As Wright headed out on his moped, the customer service manager came outside. He began waving his arms and screaming at Wright to go back inside the store. Wright ignored him and continued the chase." Wright v. Bi-Lo, Inc., 314 S.C. 152, 442 S.E.2d 186 (Ct. App. 1994).

The application of the rule in this case is an extraordinary harsh and draconian punishment for an employee who was simply doing her job the best she could – no matter how unthinking or "devoid of common sense" her actions may seem when reviewed after the fact and knowing the

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[5]In a footnote, Respondents mischaracterizes (or misunderstands) Petitioners' point that a fireman injured falling off the fire truck would still be covered under workers' compensation even if the prohibition against riding on the outside of the truck extended to fireman. Petitioner never said such a prohibition actually existed. The point is that the rule applied to fireman would "concern the conduct of the workman within his sphere of employment, while others limit the sphere itself." . Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854 (1950). The police chief was prohibited from riding on the firetruck because it was not within his sphere of employment – hence, his injuries occurred outside the scope of his employment. Conversely, the fireman might break the same rule, but while it might subject him to disciplinary action, it would not remove him from the sphere of his employment. In the same respect, even if Miles broke some sort of rule (which is denied), it was a rule concerning conduct within the sphere of her employment as a waitress – which undeniably required her to deal with rowdy customers. In this respect, her actions were analogous to the fireman; not the police chief.

result. This Court should reverse and state more fully the law on this novel issue; not merely for Ginny Miles but also to prevent other employees from suffering the same fate.

B. The Commission's finding that "Claimant's actions were taken without thinking" prohibits Waffle House from asserting Miles committed a direct and intentional violation of a specific and express policy when she was assaulted by a customer on the Employer's premises.

Respondents argue that the rule advocated here would mean "any time an employee broke a workplace rule that took him or her outside the scope of employment, they could simply argue that they just did not think." [Respondents Return in Opposition to Petition for a Writ of Certiorari, page 9]. That is not the rule actually advocated here – but it is not that far off.

Our public policy has always been to construe the workers' compensation act "liberally in favor of the employees and their dependents, in furtherance of the beneficent purposes for which they were enacted, and to avoid any incongruous or harsh results." Cokeley v. Robert Lee, Inc., 14 S.E.2d 889, 197 S.C. 157 (1941). This Court recently reaffirmed the principle that "an injured employee should not be excluded from the benefits of the law upon the ground that the accident did not arise out of and in the course of his employment when there is substantial doubt (arising from the proven facts) of the propriety of such conclusion." Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010), *quoting* Pelfrey v. Oconee County, 207 S.C. 433, 440, 36 S.E.2d 297, 300 (1945).

In this case, it is not mere argument; it is a proven fact that "Claimant's actions were taken without thinking." [R. p. 63, Finding of Fact 12]. If she was not thinking while acting, then her actions must have been "spontaneous, impulsive, instinctive or otherwise lacking a deliberate or formed intention." Kinsey v. Champion Am. Service Center, 232 S.E.2d 720, 268 S.C. 177 (1977). The rule has to require a deliberate formed intention to knowingly break a workplace rule.

Otherwise, an employer can evade liability by doing what was done here. It can simply raise any unclear or ambiguous "tip" that may somewhere be found in a procedures manual kept on a shelf in the manager's office.

It would defy logic to bar compensation for an employee injured in an unprovoked assault by a customer on the employer's premises – yet award compensation to an employee injured in mutual combat with a coworker. In Kinsey, the employee was injured in a fight with a coworker. The Commission found the injured employee "was the aggressor in the fight; he had been dismissed prior to the fight; and, that he was drinking on the day in question." Id. This Court reversed the Commission's denial of benefits, holding "the only testimony is that the ultimate altercation was *spontaneous and impulsive* rendering the 'aggressor defense' inapplicable." Id.

A similar result was reached in Youmans v. Coastal Petroleum Co., 508 S.E.2d 43, 333 S.C. 195 (Ct. App. 1998). In Youmans, the employee was awarded benefits for injuries he sustained when he assaulted his supervisor in the supervisor's office. The court held the "The commission could have reasonably concluded [employee] reacted spontaneously and without a willful intent to injure when [his supervisor] directed a racial slur at him." Id.

Kinsey and Youmans demonstrate why the Act requires a deliberate formed intent; and why the Commission's finding that "Claimant's actions were taken without thinking" commands reversal in this case. Even if Miles may have committed a technical violation of a policy, there is no evidence she did so deliberately, willfully or intentionally. The Commission's own findings prove that the ultimate legal conclusion was in error. See Hutson v. South Carolina State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012)(reversing denial of claim for lost earnings capacity where "full commission's conclusion is based on rank speculation"). This Court should reverse.

C. Even if the alleged policy violation took Miles outside the scope of her employment, her actions were done for the benefit of Waffle House, not Miles personally, and actually did benefit Waffle House.

Respondents concede Miles' actions were taken in good faith with the intent to benefit Waffle House. However, they argue Mile's subjective intent does not matter. Instead, they contend the proper test is whether "there was some objective benefit to the employer beyond the claimant's *subjective* intention to somehow benefit his or her employer." [Brief of Respondents, pag 23].

The proper test was stated in Howell: "An act outside an employee's regular duties taken in good faith to advance the employer's interest, whether or not the employee's own assigned work is thereby furthered, is within the course of the employment." Howell v. Kash & Karry, 264 S.C. 298, 214 S.E.2d 821 (1975). This definition plainly turns on the subjective intent of the employee – as shown by the use of the term "good faith." This is confirmed by this Court's statement in Hiers which explicitly adopts a subjective test based on: " [the worker doing] *what he thinks necessary* for the purpose of advancing the work in which he is engaged in the interest of his employer . . ." Hiers v. Brunson Construction Co., 221 S.C. 212, 234-235, 70 S.E.2d 211, 222 (1952) (quoting 58 Am.Jur. 764)(emphasis added).

Even if an objective test is to be used, the evidence conclusively shows Miles actions conferred a benefit on Waffle House. James Kearse testified to five specific: (1) calming the customers; (2) getting the police there; (3) getting the tag numbers; (4) being able to collect money from people rather than having them walk out without paying; and (5) ensuring that people who vandalize the store are apprehended by law enforcement. [R. p. 207, line 6-p. 208, line 5]. See Medlin v. Upstate Plaster Service, 329 S.C. 92, 495 S.E.2d 447 (S.C. 1998)(reversing Commission's factual findings as unsupported by substantial evidence because employer bound by its own

testimony); Hutson v. South Carolina State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012)(speculation cannot outweigh uncontradicted testimony).

Respondents concede the fact Miles called 911 benefitted Waffle House, yet contend what happened in the parking lot was detrimental to the interests of her employer. The main point Waffle House makes is that it did not foster good relations with customers - specifically the very customers who assaulted Miles. This contention is based on patently self-serving testimony from Kearse elicited on redirect by Waffle House's attorney. While inconsistent testimony from a witness is to be resolved by the Commission, this Court is not required to review evidence in isolation. See Young v. Hyman Motors, 19 S.E.2d 109, 199 S.C. 233 (1942)("If it be conceded that there may be deduced by a process of unusual finesse of reasoning that there is a scintilla of evidence . . . nevertheless there is another rule, more founded upon common sense and reason, to the effect what when only one reasonable inference, not just one inference, but one reasonable inference, can be deduced from the evidence, it becomes a question of law for the court, and not a question of fact for the jury.").

The totality of Kearse's testimony confirms that Miles conferred some benefit on Waffle House. This Court has consistently awarded compensation in circumstances where an employee acted outside the scope of his normal duties even where the benefit to the employer was only slight or indirect. See, e.g., Howell v. Kash & Karry, 264 S.C. 298, 214 S.E.2d 821 (1975)(goodwill from employee chasing two boys who had stolen a customer's purse); Sexton v. Freeman Gas Co., 258 S.C. 15, 187 S.E.2d 821 (1975)(employee injured putting out brush fire); Cauley v. Ross Builders Supplies, Inc., 238 S.C. 38, 118 S.E.2d 879(1961)(employee injured while using company saw to fashion table leg for fellow employee).

It was legal error for the Appellate Panel to find no benefit was conferred on Waffle House. This Court should reverse that decision.

2. As this was an emergency situation with no time for reflection, Miles' injuries arose out of her employment under the Sudden Emergency Doctrine.

Respondents question whether the "Sudden Emergency Doctrine" exists at all in South Carolina. The case law shows it does. The rule was explicitly adopted in Hiers: "[I]f in the course of [a worker's] employment an emergency arises and, without deserting his employment, [the worker] does what he thinks necessary for the purpose of advancing the work in which he is engaged in the interest of his employer, and in so doing he suffers injury, the accident may properly be regarded as arising out of the employment." Hiers v. Brunson Construction Co., 221 S.C. 212, 234-235, 70 S.E.2d 211, 222 (1952) (quoting 58 Am.Jur. 764). Cf. Globe Indem. Co. v. Legien, 171 S.E. 185 (Ga. 1933)(An employee does not deviate from "his employment if, when confronted with a sudden emergency, he steps beyond his regularly designated duties in an attempt to save himself from injury, to rescue another employee from danger, or to save his employer's property.")

It is both impossible and unreasonable to draw a bright line and state exactly when the emergency situation ended. The assailants were still in the parking lot. No one had obtained the license number.[6] The police had not yet arrived – and in fact, were still on the phone with Brittany Massalou when Miles jumped on the hood of the car to avoid being run over by Howes. [R. pp. 292-293; p. 315 (audio CD)].

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[6]Mike Strong testified, "So either you get the tag number or you're just stuck. But in that case we needed the tag number anyway. I mean, she tore up the whole restaurant." [R. p. 13, lines 14-21]. As Howes' car was pulled in forward, the tag number could not be seen without going outside and getting behind the car.

Indeed, the evidence shows Miles consistently tried to defuse the situation by calming the intoxicated patrons. [R. p. 91, line 16- p. 92, line 14]. When things got out of control and Howes began vandalizing the store, Miles was the one who called the police. "As soon as [she] saw trouble starting," Miles called 911. [R. p. 94, lines 15-18]. Miles can hardly be held to be the cause of an emergency created by rowdy intoxicated customers.

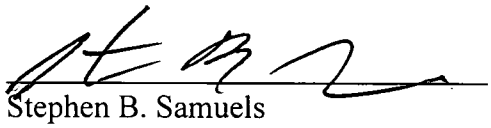
The situation was created by an altercation between Howes and another waitress, Brittany Massalou. [R. p. 133, lines 5-p. 134, line 11]. The man who was supposed to be in charge, Mike Strong, "was sitting down the whole time." [R. p. 97, line 2].

The Sudden Emergency Doctrine plainly applies to the facts of this case. No South Carolina court has previously addressed the issue in the context of a criminal act by a customer. If the rule is not explicitly adopted, then every employee who panics during a robbery and is shot will be denied workers' compensation benefits. Such a rule is anathema to the purposes underlying our workers' compensation system. This Court should explicitly adopt the Sudden Emergency Doctrine and reverse the decision below.

CONCLUSION

For the foregoing reasons and the reasons previously raised in the Briefs, this Court should reverse on all issues raised. This case presents novel issues of law on the scope of employment and sudden emergency doctrines, as well as a critical issue on the ability of the appellate courts to review inconsistent and unsubstantiated credibility findings made by the Commission. Furthermore, as it would violate legislative intent and public policy to deny benefits to an employee assaulted on the employer's premises by a customer, the decision below must be reversed.

Respectfully Submitted,



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PROOF OF SERVICE

I certify that I, Katherine Carter, the undersigned paralegal to Stephen B. Samuels have caused a copy of the **REPLY BRIEF OF PETITIONER**, to be served, via first class mail and addressed to the attorneys for Respondents as indicated below:

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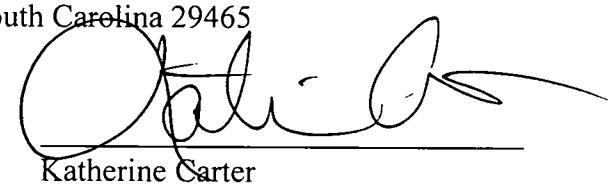

Katherine Carter

April 13, 2015

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April 13, 2015

Via Hand Delivery
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RE: Virginia Miles v. Waffle House, Inc. and Brentwood Services, Inc.
Appellate Case No.: 2013-000274

Dear Mr. Shearouse:

Enclosed for filing please find the original and seven (7) copies of the Reply Brief of Petitioner. Also enclosed is the Proof of Service showing service upon the attorneys for the Respondents. Please have your staff file the original and copies, and return a clocked copy to my office with my courier.

If you have any questions or concerns, please feel free to call me. Thank you for your assistance in this matter.

With kindest regards, I am

Yours very truly,

Stephen B. Samuels

SBS/krc
Enclosure(s) as stated

cc: Weston Adams, III, Esquire
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