

**The State of South Carolina
In the SUPREME COURT**

RECEIVED

JUL 20 2015

Appeal from Aiken County
Court of Common Pleas
The Honorable Doyet A. Early, III Circuit Court Judge
The Honorable Clifton Newman, Circuit Court Judge

SC Court of Appeals

Civil Action No.: 2011-CP-02-00868

Opinion No. 5315 (S.C. Ct App filed May 6, 2015)

**Paige Weeks Johnson, as Personal Representative
of the Estate of Christie Lane Valenzuela,**

Respondent,

versus

Sam English Grading, Inc.,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

Charles E. Carpenter, Jr.
Carpenter Appeals & Trial Support, LLC
4825 Portobello Road
Columbia, SC 29206
(803) 758-2886

James C. (Trey) Cox, III
Grier, Cox & Cranshaw, LLC
Post Office Box 2823
Columbia, SC 29202
(803) 731-0030
**Attorneys for Petitioner
Sam English Grading, Inc.**

Certification by Counsel

The Court of Appeals issued its decision on May 6, 2015. A Petition for Rehearing was filed May 20, 2015. The Court of Appeals denied the Petition for Rehearing by Order dated, June 18, 2015.

Sam English Grading, Inc., Petitions this Court for a Writ of Certiorari to the South Carolina Court of Appeals to Review and Reverse the decision of the Court of Appeals which affirmed the result of the trial before Judge Doyet A. Early III.

Sam English Grading, Inc., Petitions this Court on multiple grounds, being fully aware of the infrequency in which there are so many outcome determinative reversible errors.

Facts

The Motorcycle Accident and How It Happened

This case arises from a single vehicle motorcycle accident on Redd's Branch Road that occurred at about 11 a.m. on a clear day, Friday, August 7, 2009. [Coffin Testimony, R. p. 723; McLaurin Testimony, R. p. 513]. The plaintiff's decedent, Christie Valenzuela, was a passenger on the back of a 2001 Softtail Heritage Harley Davidson driven by her husband, Michael Valenzuela. [Valenzuela Testimony, R. p. 464; 466].

The accident happened on Redd's Branch Rd. at a point just before it intersects with a private driveway of Owens Corning. The driveway is the entrance

and exit for the Owens Corning landfill and is used by vendors and contractors such as Waste Management, Sam English Grading and others.

Most of Sam English Grading's work is done within the landfill without using the driveway because Sam English Grading's daily operation involves taking dirt that is already in the landfill, and using it to cover the next deposit of fiberglass waste brought to the landfill. [English Testimony, R. p. 807].

Sam English Grading also occasionally used the driveway to cross Redd's Branch Rd. to Owens Corning's dirt borrow pit on the opposite side of Redd's Branch Rd. [English Testimony, R. p. 807].

Michael Valenzuela's View Toward Where He Threw Down The Motorcycle.

As Michael Valenzuela, with his wife on the back of the motorcycle, was driving down Redd's Branch Rd., and was approaching the location of the Owens Corning driveway, a pan (sometimes also called a scraper) was being driven toward the intersection to cross over to the borrow pit to get dirt. [English Testimony, R. p. 807].

Plaintiff's Exhibit 30 [R. p. 1321]

This photo shows the view for Michael Valenzuela as he rounds a curve and drives toward the intersection with the driveway.



As Michael Valenzuela continued toward the intersection his wife tapped him as a warning that something was wrong and he began to look around. [Valenzuela Testimony, R. p.467]. In retrospect, we know that she had seen the scraper approaching the intersection but Michael did not yet see what she had seen.

Michael Valenzuela's View Getting Closer To The Intersection With The Driveway.

Plaintiff's Exhibit 39 [R. p.1322]. This photo shows the Redd's Branch view for the motorcycle and it shows some vehicles through the trees on the driveway along which the scraper was moving. The photo also shows the skid mark.



Valenzuela thought the pan was going to enter the road and that he might collide with it. [Valenzuela Testimony, R. p. 468]. Unfortunately, instead of trying to stop his motorcycle by applying both front and rear brakes, Valenzuela decided to put his rear brake on to skid his rear tire making it smoke, hoping the pan driver would see him, and he could drive on through. [Valenzuela Testimony, R. p. 468].

“All I seen was a dust tornado coming off the front tire that was spinning and in my mind I was like, What in the world -- what -- I just couldn't -- I couldn't comprehend that he was not going to stop. I couldn't. Why won't he look, you know? **So I laid in my back brake. I started skidding.** We were coming - - we were going to hit right in the intersection. I mean, just like if you shot two bullets at each other. We're coming just like that.

I'm looking at him, begging him, please acknowledge me, man. Just hit the brakes please and I'll hold upright, you know, but I couldn't [R.p. 468].”

....

I skidded as long as I could to see if he would see me, you know. I stayed upright, but right there at the last” [R. p. 469].

Valenzuela decided skid his rear brake to draw attention instead of using his brakes to stop and that was negligent and it led to his next negligent decision. He decided during his attention drawing skid that it had become too late to stop, and that it was too late to continue to drive through, so he decided to throw the motorcycle down on the road.

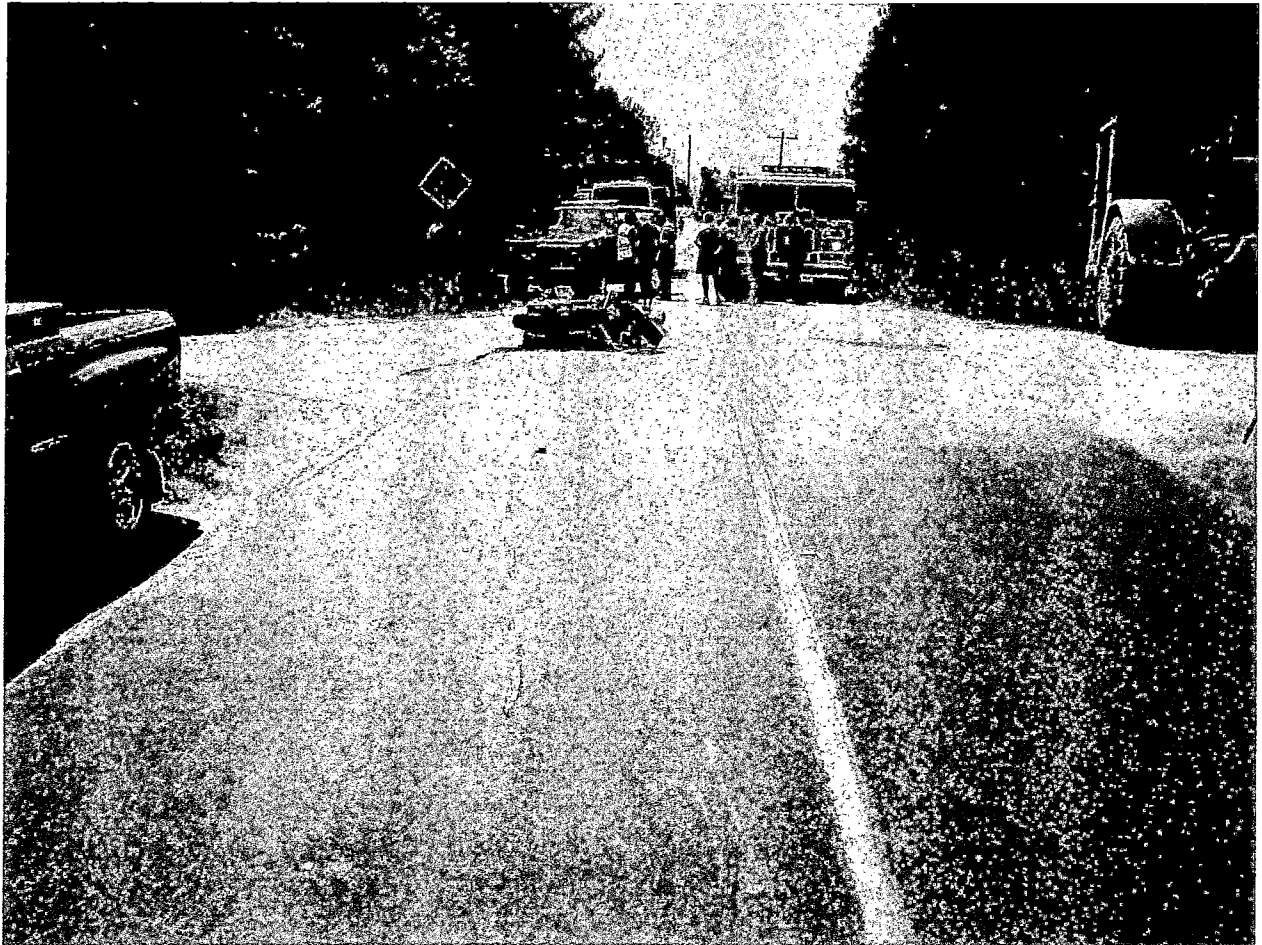
"Just hit the brakes please and I'll hold upright, you know, but I couldn't. He kept coming; never did see me. I threw the bike down. I slid it out hoping we could stay behind it. The bike could crash into him. We could survive it -- because there was no way in the world we was going to miss him."[R. p. 468].

....
He never would look up the road. I was like I got to lay this bike down and that's what I did. I don't know how many feet it was he never would acknowledge me; so I just threw the motorcycle at him, laid it down hoping that we would stay behind it and we would survive it. He would get caught up in the motorcycle himself. That was my plan. [R. p.469].

Valenzuela was wrong in not trying to stop and he was wrong in throwing the motorcycle down on the road.

The pan was able to stop and did not come out of the driveway and never entered onto Redd's Branch Rd. The accident is a single vehicle motorcycle accident and the picture from **Plaintiff's Exhibit 12** [R. p.1315] shows the scene immediately afterward. The only things that appear in the road are motorcycle and the gouge marks and appear as the motorcycle is tumbling, and the motorcycle, which is in its opposite lane of travel. (The skid marks which are not seen in this photo because it is closer to the motorcycle than where the skid marks appear.

[Coffin Testimony, R. p. 725].



Plaintiff's Exhibit 12 [R. p. 1315]

Michael Valenzuela did not try to stop using both brakes but, instead, skidded with his rear brake to draw attention. He did not apply his front brake as is prescribed by the S. C. Driver's manual. [Valenzuela Testimony, R.p. 468-469; Dawes Testimony, R. p. 898]. Michael Valenzuela also did not keep the motorcycle upright and threw it down on the pavement.

Had Michael Valenzuela stopped the motorcycle with both of his brakes instead of skidding his rear wheel to draw attention, this accident would not have occurred.

Had Michael Valenzuela kept the motorcycle upright instead of throwing it down on the road, this accident would not have occurred.

Law and Analysis

This Record reflects several critical errors beginning with the very first three witnesses in the case. These “witnesses” were simply neighbors or acquaintances who knew nothing of the accident and merely described their own unrelated prior experiences in which they complained of vehicles entering the highway from the Owens Corning landfill where Sam English Grading was working.

It was a great way to begin a trial with nice sympathetic people who know nothing about the case but who are more than willing to express their negative feelings about heavy vehicle traffic from a commercial landfill.

This kind of “evidence” is well known to the law as not only irrelevant and of no probative value to the issues in the case; but also, as obviously prejudicial and therefore not allowed. It is prejudice and not proof.

This classically inappropriate and prejudicial testimony by the first three “witnesses” was followed by the admission into evidence of third party contracts between Owens Corning and Sam English Grading which only dealt with the

private driveway property of Owens Corning. But these were used as if they had the force of South Carolina statutory or common law rules of the road.

The most standalone overriding evidence which entitled Sam English Grading to a judgment for the Defendant was the testimony of Michael Valenzuela himself. Michael Valenzuela was driving the Harley Davidson motorcycle on which his wife was a passenger when she was killed in this single vehicle accident. Michael Valenzuela testified without dispute or contradiction about his own actions. His actions, in his own words, lead to the singular conclusion that his actions were the exclusive proximate cause of this accident.

Finally, in spite of these reversible errors, the jury was deadlocked and not able to reach a verdict. The trial judge decided that he was going to “get this done” but used his own supplement to an “Allen” charge that improperly burdened juror service and improperly forced a verdict that was the result of coercion and not the considered result of a jury that is the legal right of your Petitioner, Sam English Grading.

Sam English Grading petitions this Court to issue a Writ of Certiorari to the Court of Appeals to review, reverse or modify its decision in this case. The reasons Sam English Grading believes the Court of Appeals is in error in affirming the Circuit Court is because the Court of Appeals has misapprehended, overlooked, or failed to correctly rule on the following:

Proximate Cause

The Court of Appeals refused to address this central issue saying that short conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review, citing *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). As a general statement that is a correct proposition but it is a mischaracterization of what was argued to the Court of Appeals in this case.

This proximate cause issue was the very first question presented and was argued under three different subheadings.

It was stated in the Table of Contents of the Brief of the Appellant on the first visible page of the Appellants Brief in bold:

I. The negligence that caused this single vehicle accident was the negligence of its driver in:

a. Deciding not to stop but instead to use his rear brake to skid his rear tire to draw attention to himself, instead of using both brakes to stop.

b. Having committed to his decision not to try to stop, but to skid his rear tire, he made his second negligent decision when he decided to throw down the motorcycle. While he was skidding the pan drier was stopping and did not enter the road. It was not necessary to throw down the motorcycle.

c. There is no evidence of any negligent act or breach of duty by Sam English

Grading that caused the driver of the motorcycle to decide not to stop his motorcycle or decide to throw down the motorcycle.

The Proximate Cause issue was stated again in the *Questions Presented* on the first numerical Page 1 of the Brief of the Appellant.

The crucial proximate cause undisputed testimony of the motorcycle driver, Michael Valenzuela, was not just cited, but was quoted, in the Statement of Facts on page 9 of the Appellant's Brief.

That conduct and how it describes the proximate cause of the accident is further explained on pages 10 and 11 of the Brief of the Appellant.

The proximate cause issue is again stated at the very beginning of the Argument section of the Brief of the Appellant on page 19 and continues through page 23 of the Appellant's Brief.

This crucial outcome determinative evidence of the proximate cause of this accident comes from the deceased's own husband, who was driving the motorcycle. It was elicited by his own lawyer:

“Q. Tell us about what happened.

A. All right. So I'm coming up down Redd's Branch Road and my wife Christie taps me on the side; so I know I sense something is wrong. So I look. I look in my rear view mirror. I look up ahead. I look everywhere. I let off my throttle. I'm looking. I am trying to figure out is it a deer, is it a dog?

Something is going on. [R. p. 467].

Q. Describe for the jury the type braking you did when you saw that that pan was coming out in front of you.

A. I just stayed on the back brake because what I was hoping he was going to do is when we started to hit brakes maybe he could get stopped that I could continue my path is what I was hoping. I wasn't going to lay the bike

down. That was not my intention until I realized he is not going to stop. That's when I had no other choice but to just completely slide her out, to throw it straight at him -- come off the bike, let the bike go and hopefully we would be just fine. [R. p. 470].

I was like I got to lay this bike down and that's what I did. I skidded as long as I could to see if he would see me, you know. I stayed upright, but right there at the last I don't know how many feet it was he never would acknowledge me; so I just threw the motorcycle at him, laid it down hoping that we would stay behind it and we would survive it. He would get caught up in the motorcycle himself. That was my plan. [R. p. 469].”

Finally, the proximate cause analysis was stated as the first basis for a reversal in the Conclusion on page 47 of the Appellant's Brief.

The Court of Appeals erred in deeming the central issue in this case to be abandoned. The analysis of the proximate cause of this accident was vigorously and extensively argued in the Appellants brief and at oral argument. This was no conclusory assertion of a principle of law with no support. This is a detailed analysis of the facts of this case showing the negligence that proximately caused this motorcycle accident was, as a matter of law, the negligence of Valenzuela, its driver, in either or both of two independently sufficient negligent proximate causes of the accident:

- 1.) in skidding his rear tire to draw attention instead of using his brakes to stop;**
- 2.) in throwing down the motorcycle on the road.**

The Court of Appeals omitted from its recitation of the facts the critical testimony of Michael Valenzuela. His undisputed evidence shows as a matter of

law that his actions were the proximate cause of the accident by deciding not to stop. The undisputed evidence from Michael Valenzuela shows as a matter of law that his actions were the proximate cause of the accident by deciding to throw down the motorcycle.

If it is necessary to cite a case for the application of the doctrine of proximate cause to this tort case, then your Petitioner apologizes and respectfully requests that this Court take Appellate Judicial Notice that the courts of South Carolina have long adopted proximate cause as set down by Chief Justice Benjamin Cardozo in *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 162 N.B. 99 (1928). The South Carolina Supreme Court has cited *Palsgraf in Doe v Batson*, 345 S.C. 316, 548 S.E.2d 854 (2001) and relied upon Chief Justice Cardozo who quotes Sir Frederick Pollock. The South Carolina Court of Appeals has cited this famous proximate cause case. *Sharpe V South Carolina Department of Mental Health*, 292 S.C. 11, 354 S.E.2d 778 (1987). Proximate Cause has been the universally known and accepted doctrine in South Carolina Law for many decades and is similarly prevalent in jurisdictions and law schools throughout the nation. It seemed that proximate cause was such an established doctrine of law in South Carolina that it would go without saying and that analysis would be more helpful to the Court.

The undisputed evidence that no act of this defendant was the proximate cause of the plaintiff's injuries is the testimony of Michael Valenzuela of his plan not to stop, but to skid to draw attention, and following that, his throwing the motorcycle down.

Because there is only evidence that these acts of Michael Valenzuela are the proximate cause of this accident, Judgment should be entered for this defendant.

Inadmissible Witnesses to Prior Events

The first three witnesses in the case were neighbors or acquaintances. They did not witness any facts that are in dispute in this case. They only described their own unrelated prior experiences in which they complained of vehicles entering the highway from the Owens Corning landfill where Sam English Grading was working.

Evidence of prior conduct is a classic evidence problem and the prejudicial effect of bringing conduct that is from some other day and time is known in the law as strongly influential to a lay jury and equally improper and inadmissible. "You committed some other crime so you must have committed this one." "You were negligent on that day so you must have been negligent on this day." It is time proven to be error and for good reasons. It is only admitted in limited circumstances in which a pattern is an element of a case.

In this case the evidence was not only not of similar accidents but was not *even* about prior accidents. It was only speculations of risk that neighbors or passersby testified about. Neither Ann Johnson, nor Laura Boozer, nor Virginia Gunter gave competent admissible testimony relevant to proving negligence in this case.

This evidence was not relevant to nor was it admissible and the Court of Appeals has even acknowledged that it should not have been admitted in the

liability phase of the case. Yet it was the very first testimony the jury was exposed to and were under the influence of during the entire trial.

For the Court of Appeals to conclude that even if this was not admissible to prove negligence, it comes in for punitive damages is reversible error. This trial was bifurcated and the evidence was admitted in the liability phase of the case, not the punitive damages phase. It didn't support punitive damages because there were none.

The evidence was also not admissible for purposes of punitive damages. There is no testimony any of this information was ever brought to the attention of Sam English Grading. Beyond all of that, the jury awarded no punitive damages, so the only possible impact was on the issue of negligence during the liability phase of the case.

Contracts That Should Not Have Been Admitted Into Evidence

In the Facts/Procedural History the Court of Appeals was correct to find that the pan was being driven on a private driveway owned by Coming. However, the Court of Appeals erred in affirming the admission a series of evidentiary rulings from private contracts that were inadmissible for the following reasons:

They were private contracts between Owens Corning and Sam English Grading about the grading work at the Owens Coming land fill and an encroachment permit issued by the SC DOT to Owens Coming which expired in 1984.

The contracts' references to Construction Zone Warning signs, flagmen, and private driveway stop signs are not public rules of the road and do not create rights or duties between Sam English Grading and the public.

The private driveway was not the property of Sam English Grading.

The terms of the contract documents between Sam English Grading and Corning do not create duties to the motoring public on the public roads, do not constitute statutory or common law standards of care, and should not have been admitted as evidence.

Yet these were allowed into evidence to create the impression that every time a Sam English Grading vehicle crossed the road it had to create the same set up as back when it used an encroachment permit to create the driveway crossing.

The issue in this case is about the operation of two vehicles that were approaching the end of the Corning driveway. It is not about preparing the road for an encroachment. It is the failure of the motorcycle driver to exercise of due care by not trying to stop that controls how this accident happened.

Coercive Jury Charge

After the jury reported it could not reach a unanimous verdict, the Trial Court gave a coercive improper variant of an Allen charge that should require a new trial for the following reasons:

- 1.) The coercive charge was not just an Allen Charge but was combined with additional coercive language that constitutes reversible error.

2.) The purported "Allen Charge" created an improper pressure on a divided jury to compromise into a verdict.

3.) The purported "Allen Charge" placed an improper burden on the jurors' service and constitutes reversible error.

The Court announced to the parties that the Court was going to get it done. The Court told the jurors to reach a verdict. There was no time or outcome alternative given to the jury. The coercive charge was given late Friday of the Labor Day weekend. "If we can't agree, we can come back tomorrow, Saturday. If you don't want to come back tomorrow, we'll come back Tuesday morning let's reach a verdict in this case."

The time for an evening break before having to return on Saturday or Tuesday was 9:00 pm. The jury skipped the offered meal and the jury returned its verdict only moments before they triggered being brought back on Saturday of the Labor Day weekend.

Conclusion

1. Your Petitioner, Sam English Grading, asks this Court to issue a Writ of Certiorari to the Court of Appeals to review and reverse the decision of the Court of Appeals and enter judgment for the defendant.

2. If this Court determines not to enter judgment for the defendant then the Court should reverse and grant a new trial:

a.) to proceed without the inadmissible evidence from the contracts that was

allowed in the first trial;

b.) to proceed without the inadmissible testimony of the three witnesses about prior events that was allowed in the first trial.

c.) to proceed without the coercive jury charge that was allowed in the first trial.

This the 16th day of July, 2015

Respectfully Submitted,

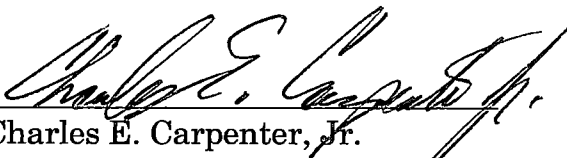

Charles E. Carpenter, Jr.
Carpenter Appeals & Trial Support
4825 Portobello Road
Columbia, SC 29206
(803) 758-2886

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Doe v. Batson</i> 345 S.C. 316, 548 S.E. 2d 854 (2001)	13
<i>Glasscock, Inc. v. Fid. & Guar Co.</i> 348 S.C. 76, 557 S.E. 2d 689,691 (Ct. App. 2001).....	10
<i>Palsgraf v. Long Island Railroad Co.,</i> 248 N.Y. 339, 162 N.B. 99 (1928).....	13
<i>Sharpe v. South Carolina Department of Mental Health</i> 292 S.C. 11, 354 S.E. 2d 778 (1987)	13

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Carpenter Appeals and Trial Support, LLC, attorneys for Petitioner, Sam English Grading, Inc., do hereby certify that I have this date served the foregoing , Petition for Writ of Certiorari, by personally depositing a copy of the same in a United States Postal Service mailbox, postage prepaid, addressed to the parties indicated below:

J. Paul Detrick
PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.
Post Office Box 457
Hampton, SC 29924

-and-

L. Lisa McPherson
MCWHIRTER, BELLINGER & ASSOCIATES
119 East Main Street
Lexington, SC 29072

-and-

Robert Hill, Esquire
Law Offices of Robert Hill
P.O. Box 51
Newberry, SC 29108

-and-

Ronald Maxwell, Esquire
Maxwell Law Firm
P.O. Box 1115
Aiken, SC 29802

-and-

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED

JUL 20 2015

SC Court of Appeals

Dated: July, 17, 2015

B. Allison Estrada
Allison Estrada, Paralegal to Charles E. Carpenter, Jr.

Carpenter Appeals & Trial Support, LLC

An AV Appellate Practice Law Firm

Charles E. Carpenter, Jr.
Attorney at Law
charlie@carpenterappeals.com



4825 Portobello Road
Columbia, SC 29206
Tel 1-803-758-2886

www.carpenterappeals.com

July 17, 2015

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

RECEIVED

JUL 20 2015

SC Court of Appeals

Re: *Paige Weeks Johnson, as Personal Representative of the Estate of
Christie Lane Valenzuela v. Sam English Grading, Inc.*
Civil Action No. 2011-CP-02-00868
Appellate Case No. 2012-213307

Dear Mr Shearhouse:

Enclosed for filing are the original and 7 copies of our Petition for Writ of Certiorari along with the required filing fee of \$100.00.

Also enclosed are 3 copies of our Appendix, one of those is unbound as required as well.

Please file stamp one of those bound copies and return it to me at the time of filing.

By copy of this letter, we are this day serving a copy of our Petition for Writ of Certiorari on all counsel of record as well as the Court of Appeals

/ae
enclosures

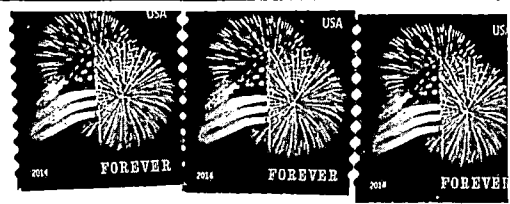
Sincerely,

B. Allison Estrada

Paralegal to Charles E. Carpenter, Jr.

cc: J. Paul Detrick, Esquire
Lisa McPherson, Esquire
James C. (Trey) Cox, III, Esquire
Robert Hill, Esquire
Ronald Maxwell, Esquire
The Honorable Jenny Abott-Kitchings

eals & Trial Support, LLC
Road
29206



First Class Mail

The Honorable Jenny Abbott Kitchings
Clerk of SC Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RECEIVED

JUL 20 2015

SC Court of Appeals

ASSEMBLY