THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

Appellate Case No. 2015-000486
W.C.C. File No. 1219902

Anthony Ransom, Claimant, ... Respondent,

v.

John Clark, Employer, Builders Firstsource, and Liberty Mutual Insurance Co., Carrier, and S.C. Uninsured Employers Fund, Defendant,

of whom Builders Firstsource and Liberty Mutual Insurance Co. are the ..... Appellants.

BRIEF OF APPELLANTS

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II. DOES A PREPONDERANCE OF THE EVIDENCE SHOW BUILDERS FIRSTSOURCE MET ITS BURDEN TO TRANSFER LIABILITY TO THE UNINSURED EMPLOYERS' FUND?

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STATEMENT OF THE CASE

Respondent Anthony S. Ransom ("Ransom") initiated these proceedings with the filing of his Form 50, Request for Hearing, against Employer John Clark, d/b/a John Clark Builders ("John Clark Builders"), on January 17, 2013. In his Form 50, Request for Hearing, Ransom alleged injuries to his head, back, right knee, lower back, left buttock, and left leg that occurred when he fell while placing a tarp over a gap in a roof on November 18, 2012. Since Ransom was informed and believed John Clark was uninsured, he served the Form 50 on the South Carolina Uninsured Employers' Fund ("the Fund"), the general contractor, Builders FirstSource, Inc. ("Builders FirstSource"), and their Carrier, Liberty Mutual Insurance Company ("Liberty Mutual"). Builders FirstSource and Liberty Mutual (collectively "Appellants") filed a Form 51 and an Amended Form 51 denying liability for the claim, noting Ransom was not an employee of Builders FirstSource, and noting that they had received a certificate of insurance from John Clark Builders.

Following a hearing on July 9, 2013, the single commissioner issued an Order on February 18, 2014, finding Builders FirstSource was Ransom's statutory employer and that Appellants failed to meet their burden to transfer liability for the claim to the Fund. (R., p. 36, ¶¶ 4, 11) The single commissioner concluded Ransom's hourly wage was $14.00 per hour and that Ransom should have received time and a half for overtime pay. (*Id.*, p. 35, ¶ 20) Further, the single commissioner determined Ransom worked an average of 54 hours per week, resulting in an average weekly wage of $854.00 and a compensation rate of $569.36. (*Id.*) Finally, the single commissioner found Ransom was entitled to temporary total disability benefits from March 25, 2013, to the present. (*Id., p. 35,* ¶ 21)

Appellants filed a timely Form 30, Request for Commission Review, on February 27, 2014, in which they raised several grounds for review of the single commissioner's findings regarding Ransom's employment status, transfer of the claim to the Fund, and liability for on-going medical care and treatment. Ransom also filed a Form 30 Request for Commission Review on March 4, 2014, in which he challenged the single commissioner's denial of temporary total disability benefits from November 18, 2012, through March 24, 2013. Following oral argument on July 21, 2014, the Appellate Panel of the Full Commission issued its February 9, 2015 Decision and Order in which it unanimously affirmed the February 18, 2014 Order of the single commissioner in its entirety.

STATEMENT OF THE FACTS

All parties stipulated that Builders FirstSource is an upstream contractor of John Clark. (R., p. 302, lines 1-2) Clark's work for Builders FirstSource occurred at Lafayette Park, where Ransom's injuries occurred. (*Id.*, p. 320, lines 3-13) Ransom began working for Clark August 6 or 7, 2012, when Clark was performing work for non-party Lumber 84 rather than Builders FirstSource. (*Id.*, p. 310, lines 6-16; p. 316, lines 16-19; p. 407, lines 5-12) Ransom concedes there was roughly a two week period in October 2012 when Clark had no work for him to do. (*Id.*, p. 274, line 7 – p. 275, line 17) Clark's work for Builders FirstSource at Lafayette Park began about two weeks prior to November 15, or approximately November 1. (*Id.*, p. 319, lines 23-25; p. 320, lines 1-5; p. 321, lines 5-14) Clark's job for Builders FirstSource was to build a house from the slab up. (*Id.*, p. 366, lines 13-17)

Ransom testified he was paid $13.00 an hour by John Clark to perform carpentry work. (R., p. 310, lines 17-24) He was then promoted to lead man and received $14.00 an hour, plus time and a half for overtime. (*Id.*, p. 312, lines 7-17; p. 319, line 22 – p. 320, line 2) Ransom was paid in cash, and he kept a record log of the time he spent on the job, subtracting thirty minutes for lunch daily. (*Id.*, p. 313, lines 4-17; p. 484) Ransom presented a record of hours from his time at Lafayette Park to the single commissioner; however, the time log was created all at one time and was not Ransom's original log of hours. (*Id.*, p. 354, lines 16-25; p. 484) Ransom testified he has not seen his original log book since the date of accident. (*Id.*, p. 316, lines 1-15) He also admits he does not know on average how many hours a week he worked, but, when looking at his typed log, he worked about 62 or 63 hours per week. (*Id.*, p. 345, lines 1-20; p. 365,

lines 8-12) Ransom later admitted he was not paid overtime. (*Id.*, p. 345, lines 21-23) He did not know how much he made in 2011 and did not know how much he planned to make in 2012. (*Id.*, p. 346, lines 20 – p. 348, line 18)

Ransom testified that, prior to the alleged accident, he would call his crew and instruct them not to come to work in the event of rainy weather. (R., p. 318, lines 1-14) Clark fussed at Ransom for making the call since Clark was to decide when the work was to be cancelled because of weather, and Ransom stopped calling his crew. (*Id.*, p. 318, line 25 – p. 319, line 1) On the day before the accident, Clark spoke with Ransom and the crew about the next day's weather, and Clark instructed Ransom to get a tarp to put over the roof so the crew could work inside the house during the rain. (*Id.*, p. 321, line 19 – p. 322, line 13) Clark does not remember this meeting and testified Ransom never got a tarp from him to put on the roof. (*Id.*, p. 401, lines 4-16) Ransom does not remember Clark telling him not to work on the date of the alleged accident or telling him not to put the tarp on the roof. (*Id.*, p. 325, lines 2-7) Further, Ransom was not sure whether he spoke with Clark the morning of the alleged accident, despite phone records indicating a four minute conversation beginning at 7:23 a.m. (*Id.*, p. 324, line 22 – p. 325, line 1; p. 348, line 19 – p. 349, line 15; pp. 496-497)

While it was drizzling with the rain about to hit, Ransom was on the roof attempting to tie down a tarp to cover an open hole when he fell through the hole. (R., p. 325, lines 14-19; p. 328, lines 9-18) Ransom lost consciousness and woke up to co-employee, Harley, asking if he was OK. (*Id.*, p. 330, lines 1-11) Ransom left the site in an ambulance, but knows Harley, Robert Austin, Rick and John Grozia showed up at the job site that morning. (*Id.*, p. 331, lines 1-11)

Ransom testified he originally injured his head, face, neck, upper back, mid back, lower back, right shoulder, left leg and right knee, but that on the date of the hearing, everything had resolved except for his head, right shoulder, lower back and radicular symptoms through his left hip and leg. (R., p. 329, lines 11-21) Ransom also testified the emergency room report was inaccurate because he did not tell the doctor that he did not hit his head, and the doctor did not examine his head to determine whether it was non-tender. (*Id.*, p. 353, lines 7-20; p. 460) The report notes a loss of consciousness and a CT scan of the head, which was normal. (*Id.*, pp. 460-461, 478)

Ransom treated at the emergency room at Grand Strand Regional Medical Center and later had an appointment with Dr. Chambers. (R., pp. 456-484) Ransom testified Clark would not allow him to return to work until he was cleared by a physician that Clark was going to set up, but Clark never set up an appointment. (*Id.*, p. 339, lines 13-21) Dr. Chambers noted in his March 25, 2013 report that it was not appropriate to release Ransom to work "at this point." (*Id.*, p. 459)

James Bray, a co-employee, was a carpenter who made $13 an hour while working for Clark. (R., p. 376, lines 18-25) Both Ransom and Bray worked 35-40 hours a week for Clark. (*Id.*, p. 378, lines 8-18) Bray worked overtime, but only received his normal wage for overtime work. (*Id.*, p. 378, lines 19-23)

John Clark testified Ransom worked an average of 40-50 hours per week at $10 an hour. (R., p. 397, lines 18-25) Ransom was not paid time and a half for overtime work. (*Id.*, p. 397, line 25 – p. 398, line 2)

Clark talked with Ransom the morning of the alleged accident. Clark instructed Ransom to call once he got to the jobsite and knew whether it was raining. (R., p. 398,

lines 19-23; p. 416, lines 6-10) Clark instructed Ransom during the call not to work if it was raining, and Clark had told Ransom in the past not to work on the roof in the rain. (*Id.*, p. 400, lines 9-13; p. 416, lines 18-21) Ransom never called Clark back, so he assumed it was raining and that Ransom was not working. (*Id.*, p. 398, lines 23-25)

Clark presented a certificate of insurance to Builders FirstSource created September 27, 2012, noting workers' compensation coverage from August 6, 2012, through August 6, 2013, produced by Waccamaw Insurance Services of Murrells Inlet, South Carolina for John Clark of Myrtle Beach, South Carolina. (R., p. 495) Clark believes his policy lapsed a week prior to Ransom's alleged accident. (*Id.*, p. 212, lines 4-11)

ARGUMENT

I. A PREPONDERANCE OF THE EVIDENCE DEMONSTRATES RESPONDENT DID NOT SUSTAIN A COMPENSABLE INJURY ARISING OUT AND IN THE COURSE AND SCOPE OF HIS EMPLOYMENT.

Ransom's alleged injury is not compensable because he was instructed not to report for duty on the date of his accident because it was raining. Ransom also knew prior to the alleged date of his accident no employees should work on a roof in the rain. Ransom specifically violated his employer's instructions, and therefore, his alleged injury is not compensable because it did not occur within the scope of his employment. Accordingly, Ransom is not entitled to benefits pursuant to the Workers' Compensation Act, including reimbursement for past medical expenses, past or future temporary or permanent disability benefits, and any future medical benefits.

When an employer limits the sphere of employment by specific prohibitions, injuries incurred while violating these prohibitions fall outside the scope of employment and, therefore, are not compensable. *Wright v. Bi Lo, Inc.*, 314 S.C. 152, 442 S.E.2d 186 (Ct. App. 1994) (citing *Black v. Town of Springfield*, 217 S.C. 413, 60 S.E.2d 854 (1950)).

> [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 the sphere of his 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.

Johnson v. Merchants Fertilizer Co., 198 S.C. 373, 378-379, 17 S.E.2d 695, 697-698 (1941) (internal citations omitted). "[T]he employee's knowledge of work rules continues to be a critical factor in these types of cases." *Wright*, 314 S.C. at 157, n.4, 442

S.E.2d at 189 (citing *Davis v. By-Pass Auto Parts, Inc.*, 304 S.C. 75, 403 S.E.2d 133 (Ct. App. 1991)).

In *Black v. Town of Springfield*, the claimant, the town's chief of police, was killed when he feel off the side of a fire truck he was riding on its way to extinguish a fire. 217 S.C. at 415, 60 S.E.2d at 855. The Supreme Court held the claimant was not within the course and scope of employment when he was killed. *Id.* at 422, 60 S.E.2d at 858. The court reasoned the town's mayor and town counsel explicitly instructed that only firemen ride on the fire truck, and that on the date of accident, the mayor specifically instructed the claimant not to ride on the truck. *Id.* at 420-21, 60 S.E.2d at 858.

In *Wright v. Bi Lo, Inc.*, the claimant died of a heart attack after chasing a shoplifter. 314 S.C. at 153, 442 S.E.2d at 187. The employer had a specific and express policy against pursuing shoplifters, but the claimant's wife argued it was also the claimant's job to take prescribed measures to prevent shoplifting. *Id.* at 153, 156, 442 S.E.2d at 187, 189. The Court of Appeals found the death was not within the course and scope of employment. *Id.* at 156, 442 S.E.2d at 189. The court reasoned the employer's "prescribed" measures of preventing shoplifting specifically excluded and prohibited confronting, pursuing and apprehending shoplifters. *Id.* The court reasoned this prohibition limited the sphere of employment itself, and therefore the claimant was not within the course and scope of employment. *Id.* The court also noted this case did not fall within the exception that allows compensability when an employee is outside the duties of his own employment, but within the duties of a fellow employee. *Id.* at 156, n. 5, 442 S.E.2d at 189 (citing 1A Arthur Larson, *The Law of Workmen's Compensation* § 27.11 (1993)).

In *Pratt v. Morris Roofing, Inc.*, the claimant was injured in a motor vehicle accident while driving to work from his home in a company car. 357 S.C. 619, 621, 594 S.E.2d 272, 273 (2004). The employer had instructed the claimant not to drive the company truck home and back to work the next day because the claimant was late almost every morning. *Id.* at 622, 594 S.E.2d at 273. The employer told the claimant that when he was done working, he was to report to another job site to turn in the company car and someone would drive him home. *Id.* However, the claimant never reported to the other job site the night before the accident. *Id.* The Supreme Court held the claimant left the course and scope of his employment by violating the employer's specific order not to drive the company vehicle home or to work. *Id.* at 623, 594 S.E.2d at 274.

Similar to *Pratt* and *Black*, where the employees disregarded their employer's instructions and were subsequently injured, in the instant case, Ransom disregarded Clark's rule that there would be no work on the roof while it was raining. Like in *Wright*, where the employee was outside the sphere of employment because the employer made it specifically and expressly against company policy to pursue shoplifters, in the instant case, Ransom was outside the sphere of employment because he was told by Clark prior to the date of the alleged accident that employees are not to work on the roof while it is raining and also told on the morning of the alleged accident while on the phone with Clark not to work in the rain.

On the other hand, in *Johnson v. Merchants Fertilizer Co.*, the claimant was found dead on the drive shaft in an area he was forbidden to go. *Id.* at 373, 17 S.E.2d at 696 (1941). The Supreme Court found the accident occurred within the course and scope of employment and held the claim was compensable. *Id.* The court reasoned this was

only the claimant's first week of working in this area and there was no designated line or boundary or printed notice indicating where the claimant could and could not perform his job duty of sweeping the floor. *Id.* at 373, 17 S.E.2d at 697-698.

In contrast to *Johnson*, where the claimant could not have been aware of the boundary where he should and should not perform his job duties, in the instant case, Ransom was specifically prohibited from working on the roof because it was raining on the day of the alleged accident. He cannot argue he was unaware of the prohibition against climbing onto the roof.

In *Davis v. By-Pass Auto Parts, Inc.*, the claimant was found dead under a car that had fallen on top of him while he attempted to remove the car's transmission. 304 S.C. at 77, 403 S.E.2d at 134. While the employer only allowed two employees to pull parts, which did not include the claimant, another employee who worked for the employer for three years stated he was not aware of this rule and had pulled parts on numerous occasions. Further, the claimant's brother testified he had seen the claimant pull parts in the past. *Id.* at 78, 403 S.E.2d at 135. The Court of Appeals found the claim compensable. *Id.* The court reasoned the employer was aware the claimant was going to pull a transmission from another car and was last seen heading to the junkyard to remove the transmission, therefore he had, or at least believed he had, authority to pull parts from the car that later killed him. *Id.*

If other employees had been permitted to work on the roof in the rain, Appellants submit the claim like would be found compensable. However, unlike in *Davis*, where the company's policy was unknown to some employees and possibly ignored by the employer, Ransom was specifically told not to go on the roof while it was raining on the

date of the alleged accident and was aware of the rule prior to the date he allegedly fell.

The single commissioner affirmed by the Full Commission found Ransom was not told by Clark on the morning of the alleged accident not to work on the roof. (R., p. 46, ¶ 8) Thus, the Full Commission determined Ransom's testimony was more credible than Clark's testimony on this issue. However, Ransom testified he never spoke with Clark on the morning of the alleged accident, until confronted with phone records showing a four-minute call that Ransom made to Clark at 7:23 a.m., wherein he then testified "[Clark] says we [talked]." (*Id.*, p. 348, line 19 – p. 349, line 6) Based on a preponderance of the evidence, the Full Commission should have found Clark's testimony more credible than Ransom's with regard to the phone call on the morning of the alleged accident. Clark and Ransom spoke for four minutes that morning, and a preponderance of the evidence supports Clarks' testimony that they discussed the rain and Clark's policy of not working on the roof in the rain. Further, Ransom was to call Clark back once he reached the jobsite to discuss the weather at the site and how to proceed with the day.

Ransom's alleged injury was outside the scope of employment because it occurred while he was performing a task in direct contradiction of his employer's express policy. Accordingly, Ransom is not entitled to any benefits pursuant to the Workers' Compensation Act, including reimbursement for medical expenses, past or future indemnity benefits or future medical expenses and the single commissioner's Order on this issue should be reversed.

II. A PREPONDERANCE OF THE EVIDENCE SHOWS BUILDERS FIRSTSOURCE MET ITS BURDEN TO TRANSFER LIABILITY TO THE UNINSURED EMPLOYERS' FUND.

Appellants deny Ransom is entitled to workers' compensation benefits. However, if Ransom is awarded benefits, liability should transfer from Appellants to the Uninsured Employers' Fund because Appellants received valid proof of insurance from Clark which was still in effect at the start of the Lafayette Park project where Ransom was allegedly later injured.

Appellants admit Builders FirstSource is an upstream contractor of Clark. Appellants have consistently argued they properly received proof of insurance from Ransom's direct employer, Clark, prior to the alleged date of accident. Appellants submitted a copy of the proof of insurance to the Commission, and no evidence to the contrary has been produced. However, the Appellate Panel affirmed the single commissioner's determination that Appellants did not meet their burden for obtaining a transfer of liability to the Uninsured Employer's Fund. On this point, the single commissioner found "there is no evidence that John Clark provided this 'Certificate of Liability Insurance' at the time he commenced work at the project at Lafayette Park" and that the certification does not indicate coverage in South Carolina. (R., p. 35, ¶ 22).

> (A) "[U]pon the submission of documentation to the commission that a contractor or subcontractor has represented himself to a higher tier subcontractor, contractor, or project owner as having workers' compensation insurance at the time the contractor or subcontractor was engaged to perform work, the higher tier subcontractor, contractor, or project owner must be relieved of any and all liability under this title except as specifically provided in this section. In the event that employer is uninsured, regardless of the number of employees that employer has, the higher tier subcontractor, contractor, project owner, or his insurance carrier shall in the first instance pay all benefits due

> under this title. The higher tier subcontractor, contractor, project owner, or his insurance carrier may petition the commission to transfer responsibility for continuing compensation and benefits to the Uninsured Employers' Fund. The Uninsured Employers' Fund shall assume responsibility for claims within thirty days of a determination of responsibility made by the commission. The higher tier subcontractor, contractor, or project owner must be reimbursed from the Uninsured Employers' Fund as created by Section 42-7-200 for compensation and medical benefits as may be determined by the commission.
>
> (B) To qualify for reimbursement under this section, the higher tier subcontractor, contractor, or project owner must collect documentation of insurance as provided in subsection (A) on a standard form acceptable to the commission. The documentation must be collected at the time the contractor or subcontractor is engaged to perform work and must be turned over to the commission at the time a claim is filed by the injured employee.

S.C. Code § 42-1-415. In the instant case, Appellants provided in their APA submissions proof of Clark's insurance for the period including the alleged date of accident for Clark's company to work as a subcontractor for Defendants. The certificate was prepared September 27, 2012, the work on the project at Lafayette Park started around November 1, 2012, and Clark's workers' compensation insurance did not lapse until one week prior to Ransom's alleged injury, which would have been November 11, 2012, eleven days after the project started.

The proof of insurance Clark presented to Appellants was on a form acceptable to the Commission. The insurance notes South Carolina for the producer's state and the insured's state, which satisfies the condition that the workers' compensation coverage includes South Carolina, unlike *Hopper v. Terry Hunt Construction*, 373 S.C. 475, 646 S.E.2d 162 (Ct. App. 2007), where this Court held the contractor had not met the burden to transfer liability because the insured, certificate holder and coverage producer were all in Georgia with no mention of South Carolina on the certificate.

Finally, no evidence to the contrary was presented before the Commission to contradict Appellants' assertion that liability should be transferred to the Uninsured Employer's Fund.

Inasmuch as Appellants received a valid proof of insurance from Clark for the Lafayette Park project, which was in effect until *after the start* of the Lafayette Park project, Appellants met their burden of proving liability should be transferred to the Uninsured Employers' Fund. Thus, a preponderance of the evidence shows liability for the alleged accident should transfer to the Uninsured Employer's Fund and the Orders on this issue should be reversed.

III. A PREPONDERANCE OF THE EVIDENCE DOES NOT SUPPORT THE CALCULATION OF RESPONDENT'S AVERAGE WEEKLY WAGE AND COMPENSATION RATE.

The finding that Ransom's average weekly wage should be based on working 54 hours per week, with fourteen hours of overtime pay at time and a half, is based solely upon surmise and conjecture, which is in error. *See Rudd v. Fairforest Finishing Company, et al.*, 189 S.C. 188; 200 S.E. 727 (1939) (an award must be based on more than surmise or conjecture). Ransom admitted he was not paid time and a half for overtime while working for Clark, which supports the testimony given by Clark and Bray. Clark also testified Ransom worked 40-50 hours a week, and Bray testified Ransom worked only 35-40 hours a week. The single commissioner used time slips from Ransom's job with Clark for a previous contractor, Lumber 84, to determine the average weekly wage. That method simply fails to account for the weeks Ransom would not work at all, for example, the two weeks between "The Farm" job and "The Reserve" job.

Ransom only worked for Clark from August to November, and there were at least two weeks in that time period where Clark did not have any work for Ransom. Nevertheless, the single commissioner's calculations use 54 hours in a week rather than reducing the weekly hours for time not worked because of the ebb and flow common in the construction industry.

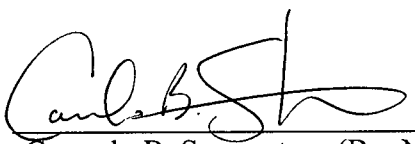
Further, despite testimony from three witnesses that Ransom did not receive time and a half for overtime pay, the Commission adopted an average weekly wage with an increased rate for overtime. Thus, the Commission erred in not calculating Ransom's weekly wage according to S.C. Code § 42-1-40 and in not making factual findings regarding the method used to calculate the wages.

Based on the preponderance of the evidence, Ransom should not receive an average weekly wage over 50 hours per week. Further, Ransom's hourly rate should be $12.33, an average of the three rates admitted into evidence at the hearing ($10 according to Clark, $13 according to Bray and $14 according to Ransom). Finally, Ransom should not receive time and a half pay for any overtime hours. Even if it had been proper for the Appellate Panel to find Ransom worked an average of fifty hours a week (which would mean Ransom worked extreme hours to compensate for weeks in which no work was available), Ransom would have an average weekly wage of $616.50 and a compensation rate of $411.00.

CONCLUSION

A preponderance of the evidence does not support a finding that Ransom sustained an injury in the course and scope of employment where he was instructed not to work in the rain at the time of the alleged accident. Further, even if the claim is compensable, Builders FirstSource received proper proof of insurance indicating South Carolina coverage before starting work at Lafayette Park, which did not lapse until after work at Lafayette Park began. Thus, Builders FirstSource met its burden to transfer any liability for this claim to the Uninsured Employer's Fund. Additionally, the calculation of Ransom's average weekly wage and compensation rate is based on surmise and conjecture and does not use the methods prescribed in S.C. Code § 42-1-40. Therefore, a preponderance of the evidence supports a reversal on these issues.

April 4, 2016

By: 

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CERTIFICATE OF COUNSEL

The undersigned certifies that the BRIEF OF APPELLANTS and REPLY BRIEF OF APPELLANTS comply with Rule 211(b), SCACR, as well as the South Carolina Supreme Court's Order dated April 15, 2014.

April 4, 2016

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PROOF OF SERVICE

I certify this 4th day of April 2016 that I have served copies of the BRIEF OF APPELLANTS, REPLY BRIEF OF APPELLANTS, CERTIFICATE OF COUNSEL and RECORD ON APPEAL by mailing same, postage prepaid in the United States mail, addressed to the following:

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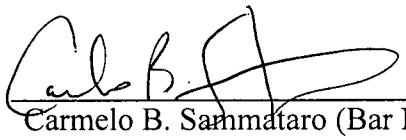
April 4, 2016

By: 

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