THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1012533
Appellate Case No. 2017-001764

Chisolm Frampton, Employee, ... Appellant,

v.

S.C. Department of Natural Resources, Employer,
and S.C. State Accident Fund, Carrier, ... Respondents.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the Workers' Compensation Commission's appellate panel erroneously required Chisolm Frampton to prove a compensable injury to his spine after liability had been admitted, when there was no appeal of the finding that liability had been admitted, and when the alleged defense to liability was not properly raised.

II. Whether the single commissioner erroneously used Frampton's post-injury return to work and his subsequent promotions as factors in estimating the percentage of Frampton's impairment.

STATEMENT OF THE CASE

A. Beginning Summary

This case is about what it means when an employer and its insurance carrier admit an employee suffered a compensable injury, how to properly allege defenses to a workers' compensation claim, and whether it is permissible to use an injured worker's return to work in arriving at the numerical estimation of that person's disability.

Chisolm Frampton is a long-time employee of the Department of Natural Resources. He injured his neck in September of 2010 while riding in a truck across a rough dove field in pursuit of people who appeared to leave the field hastily when they saw law enforcement. (R.p.77, lines 9-23). He went to the doctor three days after the event, was diagnosed with cervical and trapezius strains, given medications, and released to work. (R.pp.158-159).

Several months later—in March of 2011—Frampton was evaluated by a neurosurgeon who recommended and performed surgery, fusing two of Frampton's vertebra together. The parties dispute certain facts surrounding this treatment. Frampton testified he was sent to the neurosurgeon by workers' compensation and that workers' compensation paid for his surgery. (R.p.80, lines 6-14; p.84, lines 6-8). Respondents countered—and nobody

contests—that the neurosurgeon's notes do not reference a work-related injury and that some of the records from the March visit and surgery list Frampton's health insurance, not workers' compensation. (R.pp.166-168, 196-197, 201, 203). Respondents also noted Frampton had seen this same neurosurgeon about six months before his injury in the dove field, complaining of numbness and tingling in his arm. (R.pp.245-246). Frampton was prescribed medication and physical therapy. *Id.*

Nobody disputes certain particulars of what happened after Frampton had surgery. Three months later—in June of 2011—Frampton was involved in a motor vehicle accident while driving home from a work-related conference in Florida. (R.p.84, line 12 - p.85 line 14). He went to the doctor about a week later complaining of neck pain and was referred to the same neurosurgeon who had performed his fusion. (R.p.162). His diagnosis was "acute neck pain - reactivation of prior injury." *Id.*

Frampton had periodic appointments with the neurosurgeon from 2011 to 2014 following a regimen consisting of medication, anti-inflammatory injections, and physical therapy. See (R.pp.169-172, 175, and 179). Workers' compensation appears to have paid for all of these visits except the last one. (R.pp.205, 207, 209, 211, and 217).

Frampton filed a hearing request with the Workers' Compensation Commission in November of 2014 alleging injuries to his neck and right arm. (R.p.31).

Respondents filed an answer to the hearing request, admitting Frampton sustained an injury. (R.p.32, ¶1). Respondents admitted "an injury to the cervical spine only," denied the extent of the spinal injury, and denied all other body parts. *Id.* Respondents noted they were continuing to provide treatment for the June 2011 motor vehicle accident. (Id., ¶6).

B. Summary of the Relevant Arguments

Frampton contended he was permanently and totally disabled because he had lost more than 50% of the use of his back. Frampton's pre-hearing brief listed this issue as the key fact in controversy. (R.p.33, ¶4). He readily admitted he had missed no significant time from work, he said he wanted to continue working, and he said he believed he was capable of working. (R.p.114, line 22 - p.116, line 14). The argument for permanent and total disability was that even though he was actively working the law deemed him permanently and totally disabled due to the extent of his injury. (R.p.124, lines 5-7).

Respondents filed a pre-hearing brief denying Frampton was permanently and totally disabled, raising a number of issues as "facts in controversy" and "legal issues involved." (R.pp.37-40). Respondents alleged Frampton's 2011 motor vehicle accident occurred while he was "on vacation" and was an "intervening accident." *Id.* Respondents also alleged the incident in the dove field caused a "non-disabling neck injury" and that Frampton could not be permanently and totally disabled because he was currently working full-time. *Id.*

A single commissioner conducted a hearing in July of 2015. Frampton was the only witness. (R.pp.63-128).

At the hearing Respondents argued Frampton had the burden of proving the dove field incident had aggravated the pre-existing problems for which Frampton had visited the neurosurgeon in March of 2010. (R.p.71, lines 4-14). Respondents also argued Frampton might have experienced an intervening neck injury in November of 2010. (R.p.71, lines 20-23). After Respondents explained they were questioning whether Frampton got hurt, Frampton explained the claim had been accepted. (R.p.123, line 2 - p.125, line 7).

C. Summary of the Relevant Rulings Below

The single commissioner declined to find permanent and total disability but issued an award finding as a fact that Frampton has sustained a 20% permanent disability to his back. (R.pp.9-10, ¶19). The single commissioner considered the fact that Frampton was working full time and had been promoted after his injury in arriving at this estimation of Frampton's disability to his back. *Id.*

With respect to burden of proof, the single commissioner found there was no medical evidence stated to a reasonable degree of medical certainty that the dove field incident had aggravated Frampton's pre-existing condition, but the single commissioner also found Respondents had "admitted the claim and provided medical treatment." (R.p.7, ¶7). A conclusion of law contained similar language with respect to burden of proof. (R.p.11, ¶2). This conclusion omitted mention of the claim being admitted. *Id.*

Both sides asked the appellate panel to review the single commissioner's decision.

Frampton argued the single commissioner's finding of only a 20% impairment to the back was inconsistent with the medical evidence, noting Frampton had undergone a cervical fusion and that the claim was admitted. (R.p.45). He also argued the single commissioner erred in considering his return to work and his post-injury promotions in arriving at the estimated percentage Frampton's back impairment. (R.p.46).

Respondents argued no award was appropriate. Their case for the award's outright reversal included a claim that any award of benefits was barred by the single commissioner's finding and conclusion that Frampton did not prove the dove field incident aggravated his pre-existing condition. (R.pp.52-53).

The appellate panel heard the cross-appeals in March of 2017 and issued an order the following July reversing the single commissioner's award of benefits. The appellate panel's analysis appears on pages 12, 13, and 14 of the order. (R.pp.25-27). The order recites the single commissioner's conclusion of law regarding the burden of proof, notes that Frampton did not appeal this conclusion of law, deems this conclusion the "law of the case," and holds that there cannot be an award if Frampton did not meet his burden of proof. *Id.*

ARGUMENT

There are two reasons this Court should reverse.

First, Frampton did not have to prove aggravation of a pre-existing condition. Liability for an injury to the "cervical spine" was admitted. The single commissioner noted liability was admitted in the very same finding of fact discussing burden of proof. This makes the finding of the claim's admission the law of the case. The commission's use of the aggravation statute is inconsistent with the claim's admission and it is worth nothing that the aggravation statute was not presented as a defense. If Respondents were contesting whether Frampton was genuinely hurt, their answer to Frampton's claim shouldn't have said "admitted"—it should have said "denied."

Second, the single commissioner erroneously used Mr. Frampton's post-injury return to work and his subsequent promotions in estimating the percentage of his impairment. This evidence—commonly called "wage loss" evidence—would be relevant to whether Frampton was permanently and totally disabled, but it has nothing to do with whether his spine is impaired and the degree of that impairment.

Both of these reasons are errors of law. This Court should reverse.

I. The appellate panel erroneously required Frampton to prove a compensable injury to his back/spine.

The Court should reverse the appellate panel's denial of this claim because the pertinent part of the claim—the injury to the back/spine—was admitted. Respondents admitted the claim in their answer, Respondents did not appeal the single commissioner's finding that the claim was admitted, and the statute the commission used to reverse the single commissioner was not raised as a defense.

a. Respondents' answer admitted a compensable claim.

The parties in a workers' compensation case are required to file pleading-type documents with the commission. An injured worker begins a case by filing an "Employee's Notice of Claim and/or Request for Hearing," commonly called a "Form 50." A statute requires an injured worker to specify his or her injuries on this form and explains the limited circumstances under which the commission may award compensation for injuries that are not listed on this form. S.C. Code Ann. § 42-1-700 (2015). A similar statute binds the employer to the contents of its answer—the "Form 51"—unless certain exceptions are satisfied. S.C. Code Ann. § 42-1-705 (2015). The Supreme Court's decision in *Chapman v. Foremost Dairies* explains this process is less formal than the pleading process in circuit court but serves the same function. 249 S.C. 438, 452, 154 S.E.2d 845, 852 (1967).

Frampton's Form 50 alleged an injury to his neck and right arm. (R.p.31, ¶1). He alleged it occurred in September of 2010 while riding in a pickup truck through a rough dove field and he listed the practitioners who had treated him as a result of this injury. (R.p.31, ¶¶2, 11a). Respondents' Form 51 admitted Frampton sustained an injury on or about the date

he alleged, explaining they "admit an injury to the cervical spine only." (R.p.32, ¶1). Respondents explained they denied the "extent of the injury and all other body parts." *Id.*

Admissions acknowledge that alleged facts are true. Respondents' admission of a back injury is an acknowledgment that they agree Frampton injured his spine and they agree it occurred while riding through a rough field. Those were Frampton's specific allegations. If Respondents disagreed with them, they would have said so.

The use of the word "admit" has additional significance given the context. A neurosurgeon had been monitoring Frampton for several years and Respondents paid for almost all of this. The first medical record documenting Frampton's 2011 motor vehicle accident deemed it a "reactivation of a prior injury." (R.p.162). The neurosurgeon also completed an original and an amended "physician's statement," a workers' compensation form describing his assessment of Frampton's "work related injury." (R.pp.178, 183). All of this occurred *before* Frampton filed his Form 50 and before Respondents filed a Form 51 admitting an injury to Frampton's cervical spine. When read in the light of this history, Respondents' filing signaled the disputes at the hearing would be the extent to which Frampton's back was disabled and whether his arms were affected.

An injury's admission has particular importance in a workers' compensation case because it acknowledges the injury is significant, not trivial. A disability has to last for more than 14 days in order to merit any award. S.C. Code Ann. § 42-9-200 (2015). If an injury does not cause such a disability, the claim is limited to medical care for no more than ten weeks from the date of the injury "and for such additional time as . . . will tend to lessen the degree of disability[.]" S.C. Code Ann. § 42-15-60(A) (2015).

When Respondents' Form 51 admitted there was a back injury, Respondents were necessarily admitting there was some disability warranting the existence of an actual claim. If this was not Respondents' intention, the Form 51 would have said "denied."

A party does not have the burden of proving an admitted case. Litigants are bound by their admissions. *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 579 S.E.2d 151 (Ct. App. 2003) (discussing requests to admit and admissions in pleadings). A court could not require evidence on duty of care, breach of that duty, or causation if liability in a negligence action was admitted. The trial in such instance would be limited to damages. Respondents' admission recognized Frampton had a disability warranting a workers' compensation claim. If Respondents believed this injury was nothing more than a superficial muscle sprain, they would not have paid for multiple visits with a neurosurgeon and they would not have admitted the claim.

b. The single commissioner found the claim was admitted and that finding was not appealed.

Parties are required to list their grounds for appeal with specificity when asking the commission's appellate panel to review a single commissioner's decision. This requirement is currently imposed by regulation, see S.C. Code Ann. Reg. 67-701(A)(3) (2012), but it has been a fixture of South Carolina's workers' compensation law for decades. *Jones v. Anderson Cotton Mills*, 205 S.C. 247, 255-56, 31 S.E.2d 447, 450 (1944) (discussing a prior version of the same requirement).

Any part of a single commissioner's decision that is not covered by an appealing party's "exceptions" is deemed the law of the case and may not be altered by the appellate

panel. *Hilton v. Flakeboard* is a recent case articulating this principle. 418 S.C. 245, 249-250, 791 S.E.2d 719, 721-722 (2016). The Supreme Court's decision in *Ham v. Mullins Lumber Co.* contains an early and forceful application of the rule, rejecting the argument that any exception to the single commissioner's decision reopens the entire case for review. 193 S.C. 66, 72-74, 7 S.E.2d 712, 715-16 (1940).

The appellate panel based its reversal of Frampton's award on the single commissioner's conclusion of law #2 in which the single commissioner found Frampton did not meet his burden of proving the dove field incident aggravated his pre-existing condition. (R.pp.25-27). The panel deemed this conclusion the law of the case and held any award of benefits required Frampton to meet this burden of proof. *Id.*

This was a misapplication of the law of the case doctrine. Just as Frampton did not appeal that conclusion of law, Respondents did not appeal the single commissioner's finding of fact that the claim was admitted. The single commissioner found Frampton did not present medical evidence that the dove field incident aggravated any pre-existing condition, but in the very same finding, the single commissioner explained "[n]evertheless, Defendants admitted the claim and provided medical treatment." (R.p.7, ¶7). Respondents never took exception to this finding. The appellate panel's order recites the six grounds on which Respondents appealed to the panel. (R.p.22). None of those grounds charged the single commissioner with error in finding the claim was admitted.

The reason why Frampton did not appeal the single commissioner's finding or conclusion about burden of proof is obvious. A party must be aggrieved by a judgment in order to appeal. The single commissioner's judgment awarded Frampton benefits, it did not

bar them. Frampton appealed the portions of the single commissioner's decision that he believed inadequately estimated the impairment to his spine. He did not appeal—and had no reason to appeal—findings that were not relevant to that issue, including the finding that the claim had been admitted.

The "aggrieved party" requirement finds expression in statutory law as well as in court rules. S.C. Code Ann. § 18-1-30 (2014); Rule 201(b), SCACR. There is no reason to think a different rule applies to administrative proceedings.

The single commissioner found as a fact that Frampton's neck claim was admitted. Respondents did not appeal the finding, making the neck claim's admission the law of the case. The appellate panel's decision conspicuously ignored the single commissioner's language about Respondents' admission. It included the admission language when block-quoting all of the single commissioner's findings and conclusions, see (R.pp.15-21), but it omitted the language in its statement of the case and in its analysis. (R.pp.14-15, 28 ¶6). This was error. The single commissioner found the claim was admitted. When this finding was not appealed it became the law of the case.

c. The statute the appellate panel used to reverse the award was not properly raised as an issue or defense.

As the first section of this brief noted, a statute requires an employer to describe its defenses to a workers' compensation claim "with as much specificity as possible." See § 42-1-705(A). Subsection (B) of the statute explains the commission may consider a defense if it was not listed on the Form 51, but it must be proven to the commissioner that the defendants had no knowledge of the facts supporting the defense when they completed the

Form 51. The defense must also be set forth on the defendants' pre-hearing brief. *Id.* These requirements provide simple procedures allowing "the principle issues to be framed before a hearing is commenced." *Chapman*, 249 S.C. at 443, 154 S.E.2d at 852.

The appellate panel's decision and the single commissioner's finding about burden of proof were driven by the statute requiring medical evidence to prove aggravation of a pre-existing condition. This statute—S.C. Code Ann. § 42-9-35 (2015)—was not referenced anywhere on Respondents' Form 51 and it was not referenced anywhere on Respondents' pre-hearing brief. (R.pp.32, 37-40).

The statute's omission from the pre-hearing brief is noteworthy because unlike the Form 51's advertisement that the claim was admitted, the pre-hearing brief advertised a number of things that were inconsistent with admission. The pre-hearing brief indicated Respondents would be contending Frampton's motor vehicle accident was an "intervening accident" that "aggravated his work-related neck injury." (R.pp.37-40). The brief also indicated Respondents would be claiming Frampton did not need any additional medical care and that Frampton's neck injury was non-disabling because he has been working full duty and without restrictions since June of 2011. *Id.* Respondents specifically listed all of these arguments, yet Respondents never mentioned section 42-9-35, Respondents never indicated they would be claiming Frampton had a pre-existing condition, and Respondents never said anything about proving a pre-existing condition had been aggravated. This argument was barred from consideration.

The prior sections of this brief focused on this claim's admission because an admission is different from a denial, even a general denial which gives no indication of what

the defenses to a claim will be. A party does not approach a trial believing he must prove an admitted case. Respondents' claim of a trivial injury is inconsistent with their admission.

The argument in this section is based on notice. Apart from the question whether the claim was admitted, Frampton might have provided medical testimony that the dove field incident aggravated his pre-existing condition if he had known this would be an issue. As his lawyer told the appellate panel, there were no reservations as to liability in the Form 51. (R.p.147, lines 6-8). Frampton would have set out to prove liability if it had been denied.

This case is most like the circumstances that were present in *Chapman v. Foremost Dairies*. There, the employer's filing with the commissioner indicated it did not believe the claimant sustained an accident arising out of and during the course of employment. 249 S.C. at 450, 154 S.E.2d at 851. At the hearing, however, the employer raised the defenses of notice and the statute of limitations. The commission barred these from consideration and that decision was affirmed. The court explained "[i]f an employer has . . . grounds for denying liability for compensation[] there is no sound reason why it should not be required to advise the Commission . . . as to the substantive grounds on which liability is denied." *Id.* at 452, 154 S.E.2d at 852. The same failure was present here. None of Respondent's filings with the commission signaled they would be contending Frampton had a pre-existing condition and that the dove field did not aggravate such condition.

II. The single commissioner erroneously used Frampton's post-injury return to work and his subsequent promotions in estimating the percentage of his impairment.

The single commissioner erroneously used Mr. Frampton's post-injury return to work and his subsequent promotions in estimating the percentage of his impairment. This

evidence—commonly called "wage loss" evidence—would be relevant to whether Frampton was permanently and totally disabled, but it has nothing to do with whether his spine is impaired and the degree of that impairment.

a. Frampton's argument for total disability relied on the degree of injury to his back. "Wage loss" evidence is not relevant to that determination.

As this Court is aware, South Carolina's workers' compensation law contains two models of compensating for the loss in earning capacity caused by a work-related injury. The "medical model" uses disability awards based on the degree of medical impairment to specified body parts. *Wigfall v. Tideland Utilities*, 354 S.C. 100, 104, 580 S.E.2d 100, 102 (2003). The "economic model," relies on the evidence of reduction in the injured worker's earnings. *Id.* at 104, 580 S.E.2d at 102.

Both models are focused on compensating a claimant for the injury a disability causes to the claimant's earning capacity. The difference is in how the models go about this function. The medical model is based on the legislature's conclusive presumption about the effects certain injuries have on earning capacity. *Id.* at 107, 580 S.E.2d at 103. The economic model allows the injured worker to prove the wage loss the injury has caused.

Many cases recognize that evidence of lost wages is not relevant in a case involving the medical model of compensation. For example, the fact that a claimant's loss of vision could be corrected with glasses was irrelevant to an eye injury claim because the determinative question was the functional loss of the eye, not the loss in the claimant's earnings. *Dykes v. Daniel Const. Co.*, 262 S.C. 98, 106, 202 S.E.2d 646, 650 (1974). A different case explains "scheduled" injuries are compensable "irrespective" of the injured

worker's earnings. *Hoke v. Cherokee Cty.*, 216 S.C. 376, 381, 58 S.E.2d 330, 332 (1950). Other cases explain it is immaterial in a case under the medical model that an injured worker is working after the injury and earning more money than before. *G. E. Moore Co. v. Walker*, 232 S.C. 320, 325, 102 S.E.2d 106, 108 (1958); *Ripley v. Anderson Cotton Mills*, 209 S.C. 401, 405-406, 40 S.E.2d 508, 510 (1946). Earnings are not relevant to such an award.

Settled precedent recognizes this principle's application to total disability awards under the medical model of compensation. The claimant in *Lyles v. Quantum Chemical Company* was found permanently and totally disabled even though he had been promoted after his injury and continued working. The employer and its carrier contended the claimant could not be totally and permanently disabled because he was still working, but the commission explained (and this Court affirmed) that permanent and total disability was required. The claimant had lost more than 50% of the use of his back, requiring a finding of permanent and total disability under the version of the scheduled disability statute in existence at that time. This Court noted compensation under the medical model rests on the presumed injury to earning capacity that certain injuries cause. 315 S.C. 440, 446, 434 S.E.2d 292, 295 (Ct. App. 1993). This decision is not an outlier. *Bateman v. Town & Country Furniture Co.*, 287 S.C. 158, 158, 336 S.E.2d 890, 890 (Ct. App. 1985) (affirming permanent total disability for greater than 50% loss of use to the back to worker who was still employed after the injury).

This was Frampton's argument for total disability. He admitted he had missed no significant time from work as a result of his injury, he said he wanted to continue working, and he said he believed he was capable of working. (R.p.114, line 22 - p.116, line 14). He

also said he was severely limited in how he could use his neck. He has to be "extremely careful" with his neck. (R.p.91, lines 13-16). He cannot jog, (R.p.91, line 22), he cannot jump out of a truck, (R.p.91, lines 22-23), and he has limited movement in his neck. (R.p.93, lines 7-8). He contended this amounted to a greater than 50% loss of the use of his back, rendering total disability appropriate.

b. Frampton's return to work is relevant to whether he is totally disabled but has nothing to do with whether his back is impaired and the degree of that impairment.

There is an important difference between Frampton's case and the precedents described in the preceding section. The 2007 amendments to the Workers' Compensation Act changed the scheduled disability statute from requiring a total disability award if the claimant has lost more than 50% of the use of his back. The revised statute explains the claimant who has lost most of the use of his back is presumed to be totally disabled, but "[t]he presumption set forth in this item is rebuttable." S.C. Code Ann. § 42-9-30(21) (2015).

This amendment seems to have been aimed at cases like *Lyles* and *Bateman*—cases where injured people continued working after suffering substantial back injuries. The revised statute signals that total disability may still be appropriate in such circumstances, but is no longer mandatory.

There is as yet no appellate decision comprehensively explaining how the revised statute operates. The sole decision by the Supreme Court reversed the commission based on a lack of substantial evidence supporting the commission's estimation of the claimant's back

impairment. *Clemmons v. Lowe's Home Centers*, 420 S.C. 282, 803 S.E.2d 268 (2017). Still, it seems obvious that a claimant's return to work would be considered in determining whether an award of permanent and total disability is appropriate. A reasonable person could say return to work is the most appropriate evidence available on the question.

The problem with the single commissioner's decision is that it did not account for Frampton's return to work in considering whether he was permanently and totally disabled. The single commissioner considered Frampton's work and promotions in deciding the degree of Frampton's injury to his spine. The single commissioner explained this in the order, noting she considered the neurosurgeon's impairment ratings as well as Frampton's "continued full-duty, unrestricted employment and advancement/promotions . . . since his work injury." (R.pp.9-10, ¶19). This reasoning conflates the medical model and the economic model.

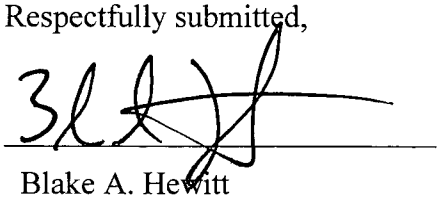
Frampton's return to work has nothing to do with the degree of impairment to his spine. There is no way to compare the fact that Frampton can sit at his desk and capably handle his job supervising conservation officers with impairment ratings issued by his treating neurosurgeon or the back specialist who supplied an independent medical evaluation. These things do not relate to each other. The commission might be justified in giving Frampton a 50% award rather than a total disability award if Frampton's spine was 50% percent impaired, he was gainfully working, and he was not in sheltered employment. But there is no authority allowing the commission to consider a claimant's return to work as part of determining the degree of the claimant's medical impairment. Nothing suggests a doctor would revisit Frampton's impairment rating based on his ability to sit at a desk.

The Court need not reach this issue, but may do so because it is likely the issue will arise on remand. Numerous other decisions have addressed similar issues in that context. *Weatherford v. Price*, 340 S.C. 572, 583, 532 S.E.2d 310, 316 (Ct. App. 2000); *Osprey, Inc. v. Cabana Ltd. P'ship*, 340 S.C. 367, 384, 532 S.E.2d 269, 279 (2000); *Stevens v. Allen*, 336 S.C. 439, 454, 520 S.E.2d 625, 632 (Ct. App. 1999).

CONCLUSION

For the foregoing reasons this Court should reverse the commission and remand this case for adjudication of Frampton's cross-appeal.

Respectfully submitted,



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S.C. Department of Natural Resources, Employer,
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellant* and *Reply Brief* comply with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

Respectfully submitted,

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