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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

The Honorable R. Michael Campbell, II, Commissioner

Appellate Case No. 2016-000497
W.C.C. 1112328

Samuel Rose, Claimant.....Appellant,

v.

JJS Trucking, LLC, Uninsured Employer, and Chris Thompson Services, Upstream Employer, and Bridgefield Casualty Ins. Co., Carrier for Chris Thompson Services, and The State Accident Fund,.....Respondents.

FINAL BRIEF OF THE RESPONDENTS

Kirsten L. Barr
Trask & Howell, L.L.C.
P.O. Box 2167
Mt. Pleasant, SC 29465
(843) 881-4228
Attorneys for Respondents
kbarr@trask-howell.com
SC Bar #15525

Table of Contents

Table of Authorities

Cases

Statutes

Regulations

Court Rules

Statement of the Issues on Appeal

I. Are the Workers' Compensation Commission's conclusions of law with respect to the Claimant's entitlement to additional medical and compensation benefits the law of the case?

II. Are the Claimant's arguments impermissibly based upon facts not in evidence and, therefore, not properly before the Court of Appeals?

III. Did the Workers' Compensation Commission properly conclude that the Claimant has failed to satisfy the mandatory requirements of S.C. Code Ann. § 42-1-560 based upon substantial evidence in the record and the applicable law?

IV. Was the Respondents' argument under S.C. Code Ann. § 42-1-560 timely and properly raised?

Statement of the Case

This matter came before Workers' Compensation Commissioner Aisha Taylor for a hearing on September 23, 2013 in St. Matthews, South Carolina, pursuant to the Form 21, Stop Payment Application, filed by Chris Thompson Services and Bridgefield Casualty Insurance (hereinafter "the Respondents"), requesting permission to terminate compensation on the basis that the Claimant had been released at maximum medical improvement and no work restrictions.[1]

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[1] After extensive evaluation and treatment, the Claimant was ultimately diagnosed with "myofascial pain and/or fibromyalgia." (R. pp. 116–19). According to Dr. Greg Jones, the Claimant reached maximum medical

(R. p. 43, pp. 235–91). A previous Commission Order found that the Claimant sustained an injury by accident on August 10, 2011 and was entitled to a medical evaluation to determine the extent of his injuries, as well as ongoing temporary total disability compensation. (R. pp. 9–11). Only after the hearing before Hearing Commissioner Taylor, but before a decision was rendered, the Respondents learned for the first time on November 8, 2013 that the Claimant had an ongoing third-party claim arising out of the August 10, 2011 accident pending in the Charleston County Court of Common Pleas. (R. p. 109).

Immediately thereafter, on November 12, 2013, the Respondents filed a Motion to Introduce Newly Discovered Evidence, specifically the Claimant's pleadings in connection with the third-party claim he filed in the Charleston County Court of Common Pleas some eight months earlier, on February 20, 2013. (R. pp. 158–169). The Respondents argued that this newly discovered evidence was relevant to the determination of the issues pending before Commissioner Taylor because the Claimant did not file a Form S-2 with the Workers' Compensation Commission, the Employer, or the Carrier within thirty days after filing his third-party claim. (R. pp. 158–160). As a result, the Respondents argued that the Claimant is not entitled to additional benefits under the Workers' Compensation

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improvement by March 20, 2013 and "[i]t does not appear that any future treatment would be warranted." (R. p. 119). Dr. Jones further opined that the Claimant "is capable of working without restrictions." (R. p. 119).

Act as a matter of law for failure to comply with the requirements of S.C. Code Ann. § 42-1-560. (R. pp. 159–160).

The Claimant did not file a return[2] to the Respondent's Motion to Introduce Newly Discovered Evidence. The Respondents' Motion was granted by Administrative Order dated January 3, 2014, and the Claimant's third-party pleadings were admitted into evidence and made part of the record in this case. (R. pp. 12–13). The Claimant then filed a Motion to Introduce New Evidence into the record. (R. pp. 177–79). Hearing Commissioner Taylor denied the Claimant's Motion by Administrative Order dated January 3, 2014 on the basis that the evidence the Claimant sought to introduce was not "of the same nature and character required for granting a new trial" as required by S.C. Code Reg. 67-707(C) and S.C.R.C.P. Rules 59 and 60.[3] (R. pp. 16–17).

On September 2, 2014, Commissioner Taylor issued a Decision and Order, by which she concluded that the Claimant failed to satisfy the mandatory requirements of S.C. Code Ann. § 42-1-560. (R. pp. 19–31). Commissioner Taylor further granted the Respondents Stop Payment Application, concluding that the Respondents were entitled to terminate temporary disability pursuant to S.C.

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[2] The Claimant did file a "Motion in Opposition to Introduce After Discovered Evidence." (R. pp. 170–2). The Claimant's Motion was denied by Administrative Order dated January 3, 2014. (R. pp. 14–15).

[3] The Claimant did not appeal this January 3, 2014 Administrative Order to the Court of Appeals.

Code Ann. § 42-9-210 and § 42-9-260. (R. pp. 29–30). In addition, Commissioner Taylor concluded that the Claimant is not entitled to any additional medical care or treatment under S.C. Code Ann. § 42-15-60, or benefits for permanent disability or loss of use under S.C. Code Ann. § 42-9-10, § 42-9-20, or § 42-9-30. (R. pp. 29–30).

Thereafter, the Claimant filed a Form 30 requesting the Commission's Appellate Panel review Commissioner Taylor's September 2, 2014 Order; however, the only exceptions raised related to "newly discovered evidence" and the application of S.C. Code Ann. § 42-1-560. (R. pp. 189–92). The Claimant raised no exception to the remainder of the Hearing Commissioner's Conclusions of Law. (R. pp. 189–92). Similarly, the Claimant raised no argument with regard to Commissioner Taylor's denial of benefits under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 in his brief to the Appellate Panel. (R. pp. 193–207). In fact, the Clamant did not even mention these statutes in his Form 30 or in his brief to the Appellate Panel. (R. pp. 189–92, pp. 193–207). Therefore, the Respondents argued that the Commissioner's conclusions of law with regard to the Claimant's entitlement to benefits under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 are the law of the case and is not subject to review by the Appellate Panel or the Courts.[4] (R. pp. 208–210, pp. 218–220).

After oral arguments in Columbia on April 21, 2015, the Appellate Panel issued the Commission's final Decision and Order dated February 8, 2016, affirming the Decision and Order of Commissioner Taylor in its entirety. (R. pp. 33–42). The Claimant timely filed the present appeal to the South Carolina Court of Appeals. (R. p. 223). In his brief to the Court of Appeals, the Claimant again failed to raise any argument with respect to (or even mention) the Commission's conclusion of law pursuant to S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30.

Arguments

I. The Workers' Compensation Commission's conclusions of law with respect to the Claimant's entitlement to additional medical and compensation benefits are the law of the case.

The Claimant did not appeal conclusions of law numbers 4, 5, 6, 7, or 8 of the Hearing Commissioner's Decision and Order in his Form 30, nor did he raise any exception to these conclusions in his brief to the Appellate Panel. (R. pp. 189–92, pp. 193–207). Similarly, the Claimant raises no argument with respect to these conclusions of law in his brief to the Court of Appeals. These conclusions deal with the Claimant's entitlement to benefits under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, and 42-9-30; yet none of these statutes are ever mentioned in the Claimant's Form 30, his brief to the Appellate Panel, or his brief to the Court of Appeals. (R. pp. 189–92, pp. 193–207). Quite simply, the Claimant makes no argument with regard to the proper application of these statutes and; therefore, the following conclusions are the law of the case:

- *Pursuant to S.C. Code Ann. Sec. 42-9-210, any and all compensation payments made by the Defendants to the Claimant after February 20, 2013, the date on which he commenced his third-party action without notice to the Defendants or the Commission, were not due and payable as a result of the Claimant's failure to comply with the mandatory requirements of S.C. Code Ann. Sec. 42-1-560.*

- *Pursuant to S.C. Code Ann. Sec. 42-9-260, the Defendants are entitled to terminate temporary disability compensation effective the date of the hearing, September 23, 2013.*

- *Pursuant to S.C. Code Ann. Sec. 42-15-60, the Defendants shall have no liability for any additional medical care or treatment under the workers' Compensation Act.*
- *Pursuant to S.C. Code Ann. Sec. 42-9-10, Sec. 42-9-20, and Sec. 42-9-30, the Claimant is not entitled to, and the Defendants shall have no liability for, any benefits for permanent disability or loss of use under the Workers' Compensation Act.*
- *Pursuant to S.C. Code Sec. 42-1-560(b), the Defendants shall have a lien on the proceeds of any recovery from any third party whether by judgment, settlement or otherwise, to the extent of the total amount of compensation, including medical and other expenses paid by the Defendants.*

S.C. Code Ann. § 42-17-50 provides the procedure for appealing a Hearing Commissioner's Order; however, "only issues within the application are preserved for the full Commission." Creech v. Ducane Co., 320 S.C. 559, 476, S.E.2d 114, *rehr 'g denied, cert. denied* (Ct. App. 1995). Furthermore, all findings of fact and law by the Hearing Commissioner "become and are the law of the case, except only those within the scope of the exception." Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2s 712 (1940). Here, the Claimant did not raise any exception to the above-reference conclusions of law and the Commission's Appellate Panel lacked the authority or jurisdiction to extend the fourteen days permitted for the perfecting of an appeal. Allison v. W.L. Gore & Assoc., 394 S.C. 185, 714 S.E.2d 547 (2011).[3]

Therefore, regardless of any argument the Claimant makes under S.C. Code Ann. § 42-1-560, the issue is moot because the Claimant is not entitled to any additional medical or compensation benefits under the South Carolina Workers' Compensation Act as a matter of law. According to the South Carolina Supreme Court, "an unappealed ruling, right or wrong, is the law of the case." Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (citing Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 160-61, 177 S.E.2d 544 (1970). In addition, mere "conclusory statements unaccompanied by argument and citation to authority are insufficient to preserve an issue for appellate review." State v. Crocker, 366 S.C. 394, 621 S.E.2d 890 (Ct. App. 2005) (citing Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) (holding that failure to provide argument or supporting authority for

an issue renders it abandoned)). Due to his failure to raise any exception to Conclusions 4, 5, 6, 7, or 8 in his Form 30 and his failure to raise any argument regarding Conclusions 4, 5, 6, 7, or 8 in his brief to the Appellate Panel or the Court of Appeals,[5] the Respondents respectfully contend that the Claimant's appeal is moot and otherwise without merit and further respectfully contend that the Workers' Compensation Commission's final Decision and Order should be affirmed in its entirety as a matter of law.[6]

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[5] Note that due to an obvious typographical error, the Appellate Panel's Decision and Order refers to these same conclusions of law as numbers 11, 12, 13, 14, and 15.

[6] It is well settled that issues for which no legal authority is cited are abandoned on appeal. See, e.g., Colleton County Taxpayers Ass'n v. School Dist. of Colleton County, 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006); First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994); R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000). Indeed, our courts have often reiterated that even "[a]n issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court." Wright v. Craft, 372 S.C. 1, 20, 640 S.E.2d 486, 496-97 (Ct. App. 2006); Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106, 439 S.E.2d 283, 284 (Ct. App. 1993); Bell v. Bennett, 307 S.C. 286, 294, 414 S.E.2d 786, 791 (Ct. App. 1992). South Carolina law is also well settled that a trial court's or hearing officer's unappealed ruling, right or wrong, is the law of the case. See, e.g., Charleston Lumber Co. v. Miller Housing Corp., 338 S.C. 171, 175, 525 S.E.2d

II. The Claimant's arguments are impermissibly based upon facts not in evidence and are not properly before the Court of Appeals.

The Claimant makes repeated, specific references to facts not in evidence and to documents that were excluded from the record below in support of his arguments on appeal.[7] Specifically, the Claimant sought to introduce newly-manufactured evidence by motion dated December 20, 2014. (R. pp. 177–79). This motion was denied by Order dated January 3, 2014. (R. pp. 16–17). The Claimant did not appeal the Commission's January 3, 2014 Order to the Court of Appeals. The Claimant's March 8, 2016 Notice of Appeal filed with the Court of Appeals makes no mention of the Commission's January 3, 2014 Order and that Order was not otherwise attached to the Notice, as specifically required by Rule 203(d)(2)(B)ii and Rule 203(e)(2)(C), S.C.A.C.R. (R. pp. 222–24). Therefore, the Claimant cannot now be heard to complain about the propriety of the Commission's January 3, 2014 decision to deny the Claimant's motion to introduce additional evidence, because "an unappealed ruling, right or wrong, is the law of the case." Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 869, 871 (2000) (finding that an unappealed ruling, right or wrong, is the law of the case and requires affirmation); Mid-South Mgmt. Co. v. Sherwood Devel. Corp., 374 S.C. 588, 596 n.3, 649 S.E.2d 135, 139 n.3 (Ct. App. 2007); Fickling v. City of Charleston, 372 S.C. 597, 599, 643 S.E.2d 110, 112 n.1 (Ct. App. 2007).

[7] The Claimant refers to this document, which was specifically excluded from evidence by the Commission, as a "stipulation."

323, 329, 730 S.E.2d 282, 285 (2012) (citing Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 160-61, 177 S.E.2d 544 (1970).

Furthermore, the Court of Appeals lacks appellate jurisdiction to consider arguments regarding the admissibility of additional evidence because the Claimant did not comply with Rule 203, S.C.A.C.R. See State v. Brown, 358 S.C. 382, 596 S.E.2e 39 (2004) (holding that an appellant's failure to comply with the procedural rules for appeal deprives the court of appellate jurisdiction). The Court of Appeals also lacks subject matter jurisdiction over the Claimant's evidentiary arguments because S.C. Code Ann. § 42-17-60 and S.C. Code Ann. § 1-23-380(A)(1) make the unappealed Order of January 3, 2014 conclusive and binding. Therefore, it would be improper for the Court of Appeals to either reverse the Commission's decision on the admissibility of the Claimant's new evidence, or to take judicial notice thereof as the Claimant now requests.

However, the entirety of the Claimant's arguments on appeal concern these facts and documents which were not admitted into evidence by the Commission and which are not properly before the Court of Appeals. The Respondents respectfully contend that such arguments based on facts not in evidence are improper. Rule 208(b)(4), S.C.A.C.R., specifically requires that a party's "brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal." Because facts and documents not admitted into evidence by the Commission are not properly included in the Record on Appeal pursuant to Rule 210(c), S.C.A.C.R., the Respondents request that arguments made in reliance on such improper references be rejected by the Court of Appeals. See Altichiler v. Dept. of Prof.

Reg., 442 S.2d 349, 350 (Fla. Dist. App. 1st 1983) ("That an appellate court may not consider matters outside the record is so elemental that there is no excuse for an attorney to attempt to bring such matters before the court.").

III. The Workers' Compensation Commission properly concluded that the Claimant has failed to satisfy the mandatory requirements of S.C. Code Ann.§ 42-1-560 based upon substantial evidence in the record and the applicable law.

The Claimant commenced a civil action against a third-party as a result of the same August 10, 2011 accident for which he seeks workers' compensation benefits by filing a counterclaim against Robbie Clark in the Charleston County Court of Common Pleas on February 20, 2013. (R. pp. 161–69). The Claimant did not file or serve a Form S2 on the Employer, Carrier, or the Commission within thirty days after commencing the third-party action on February 20, 2013 and did not otherwise notify the Employer, Carrier or the commission that this third-party action had been commenced. As a result, the Commission concluded that the Claimant had failed to comply with the mandatory requirements of S.C. Code Ann. § 42-1-560. (R. pp. 19–31). The Respondents respectfully request that the Court of Appeals affirm this conclusion based upon substantial evidence in the record and the applicable law.

S.C. Code Ann. § 42-1-560 sets forth the requirements for simultaneously pursuing a third-party civil action and a workers' compensation claim. The statue provides that:

> "Notice of the commencement of the [third-party] action shall[8] be given within thirty days thereafter to the [Commission], the employer and carrier upon a form prescribed by the [Commission]." (emphasis added)

In fact, the only way a claimant may proceed against both an employer/carrier and against a third-party tortfeasor is by complying with the requirements of S.C. Code Ann. § 42-1-560. Fisher v. S.C. Dept. of Mental Retardation, 277 S.C. 5763, 575, 291 S.E.2d 200, 201 (1982); Hudson v. Townsend Saw Chain Co., 296 S.C. 17, 20, 370 S.E.2d 104, 106 (Ct. App. 1988) (holding that § 42-1-560(b) "plainly requires an employee, when he or she brings a third-party action, to give notice to the Commission, the employer, and the employer's carrier of the commencement of the third-party action within 30 days of its commencement"). Because the Claimant did not file or serve a Form S-2 (the notice form prescribed by the Commission) or otherwise provide any notice of the commencement of the third-party action to the Commission, the Employer, or the Carrier within thirty days,

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[8] "The use of the term 'shall' in a statute means that the action is mandatory." Johnston v. S.C. Dept. of Labor, Licensing, and Reg., 365 S.C. 293, 296-97, 617 S.E.2d 363, 364 (2005) (citing Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003)).

the Claimant failed to satisfy the mandatory requirements of S.C. Code Ann. § 42-1-560.

Furthermore, the Workers' Compensation Act is in derogation of common law rights, and; therefore, the terms and requirements of S.C. Code Ann. § 42-1-560 must be strictly construed. Callahan v. Beaufort Co. Sch. Dist., 375 S.C. 92, 651 S.E.2d 311 (2007). Even though Respondents are entitled to maintain their lien on the proceeds of any recovery from the third-party whether by judgment, settlement, or otherwise and despite the fact that the Respondents have "not lost [their] right of subrogation against the responsible third-party, the statutory provision mandates notice to the employer, carrier, and the Commission within thirty days of filing the third-party suit." Callahan, *supra*. According to the South Carolina Supreme Court, "42-1-560(b) must be strictly followed in order for a claimant to preserve [the] right to proceed against both an employer and a third-party." Callahan, *supra*. Because the Claimant has not followed the mandatory requirements of S.C. Code Ann. § 42-1-560, but has ignored them entirely, the Claimant has failed to preserve his right to proceed against the employer for additional benefits under the Workers' Compensation Act after the date he commenced the third-party action, February 20, 2013.

The Claimant would argue that his admitted failure to comply with S.C. Code Ann. § 421-560 could somehow be "cured" by voluntarily dismissing this third-party lawsuit and then simply re-filing. The Respondents respectfully contend that the Claimant should not be permitted to grossly circumvent the clear statutory requirements in this manner. To date, there is no case law on this

issue and the Supreme Court has previously declined to address the "efficacy" of a re-filing. See Callahan, *supra*, at n.1. Should the Claimant voluntarily dismiss his third-party suit and then re-file, then the third-party suit filed on February 20, 2013 could no longer be considered a "nullity" and to suggest that the Commission should pretend that the February 20, 2013 suit was never filed under such circumstances would entail a grossly prejudicial legal fiction. Therefore, the Respondents respectfully contend that that the Hearing Commissioner's Decision and Order should not be reversed based on facts not in evidence, hypothetical scenarios, or newly-manufactured events.

IV. The Claimant's argument regarding the timeliness or propriety of the Respondents' argument under S.C. Code Ann. § 42-1-560 is untenable.

The Claimant admits that he filed a third-party suit against Robbie Clark and his insurance carrier in the Charleston County Court of Common Pleas on February 20, 2013 and concealed this fact from the Respondents and the Workers' Compensation Commission for over eight (8) months while he completed discovery and sought to settle that claim. (R. pp. 170–72). Because the Claimant concealed the fact of his third-party suit from the Respondents, in clear violation of S.C. Code Ann. § 42-1-560, the Respondents were unable to raise S.C. Code Ann. § 42-1-560 as a defense to the claim for benefits under the Workers' Compensation Act until the Claimant's illegal and improper concealment was revealed. Yet, the Claimant now argues that it was somehow

untimely or prejudicial for the Respondents to raise these material facts upon discovery. The Respondents respectfully contend that the Claimant's argument in this regard is untenable.

Specifically, the Claimant now contends that his due process rights were somehow infringed upon when the Commission granted the Respondents' Motion to introduce the Claimant's third-party pleadings into evidence. However, the Commission did not prevent the Claimant from responding to this Motion or the arguments contained therein. "Due process is flexible and calls for such procedural protections as the particular situation demands." Stono River Envtl. Protection Ass'n v. South Carolina Dep't of Health and Envtl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 341 (1991) (citing Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972)). To prove the denial of due process in an administrative proceeding, a party must show that it was substantially prejudiced by the administrative process. Palmetto Alliance, Inc. v. South Carolina Public Service Comm'n, 282 S.C. 430, 319 S.E.2d 695 (1984) (citing Ka Fung Chan v. Immigration and Naturalization Serv., 634 F.2d 248 (5th Cir. 1981)).

Here, the Commission's regulations specifically guaranteed the Claimant the opportunity to be heard, which he could have exercised by simply filing a Return to the Respondent's Motion or a Memorandum in Reply. See S.C. Code Reg. 67-215(F). In fact, the Commission's Regulations require that the jurisdictional commissioner not consider a motion until "after the opposing party has had ten days notice." S.C. Code Reg. 67-215(G). Nevertheless, the Claimant

simply chose not to file a return or reply memorandum in response to the Respondent's Motion to Introduce Newly Discovered Evidence. The Claimant cannot now be heard to allege prejudice of his own making. Therefore, the Commission neither committed legal error, nor infringed upon the Claimant's right to due process, in granting the Respondents' Motion and considering the legal arguments contained therein, despite the fact that the Claimant failed to avail himself of his right to be heard on this issue. As such, the Commission's decision to admit and consider evidence regarding the third-party suit filed by the Claimant some eight (8) months prior to the workers' compensation hearing, should be affirmed.

Conclusion

Therefore, based upon the arguments set forth above, the Respondents respectfully request that the Decision and Order of the South Carolina Workers' Compensation Commission be affirmed in its entirety.

Respectfully submitted,

November 28, 2016

Kirsten L. Barr
Trask & Howell, L.L.C.
P.O. Box 2167
Mt. Pleasant, SC 29465
(843) 881-4228
Attorneys for Respondents
kbarr@trask-howell.com
SC Bar #15525

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of the Respondents complies with Rule 211(b), SCACR, and Supreme Court Order 2007-08-16-02, dated August 13, 2007, requiring redaction of personal data identifiers.

November 28, 2016

Kirsten L. Barr

Kirsten L. Barr
Trask & Howell, L.L.C.
P.O. Box 2167
Mt. Pleasant, SC 29465
(843) 881-4228
Attorney for Respondents