THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Aisha Taylor, Commissioner
Susan S. Barden, Chair/Commissioner
Avery B. Wilkerson, Jr., Commissioner

WCC File No. 0917785
Appellate Case No. 2017-002122

Paula Russell, Petitioner,

v.

Wal-Mart Stores, Inc.,

&

Illinois National Insurance Company, Respondents.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d)(1), SCACR, Petitioner's counsel certifies that a Petition for Reinstatement was made on December 21, 2017, and denied on February 1, 2018.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in dismissing the Petitioner Paula Russell's appeal under S.C. Code Ann. § 1-23-380?

STATEMENT OF THE CASE

This Claim began in 2009 when Paula Russell ("Russell"), the petitioner, suffered work related injuries to her back and pelvis. (App. p. 7). After initially adjudicating the claim, Russell developed new radicular symptoms in 2012 and requested a review of her previous award on the ground of change of condition for the worse. (App. p. 12). Respondents ("Wal-Mart") denied Ms. Russell's claims, provided no medical treatment, and fired her instead of honoring her request to work at a location that did not require she make a difficult hours-long drive. (App. pp. 15–16). The parties were heard on February 11, 2013, by Commissioner Andrea C. Roche, who agreed Russell had suffered a change of condition for the worse, found Russell was disabled, found Russell was credible, and ordered Russell receive benefits. (App. pp. 15–17). Wal-Mart then filed an appeal to the appellate panel of the South Carolina Workers' Compensation Commission ("the Commission") and continued to provide no benefits or medical treatment. (App. p. 18).

In its brief to the Commission, Wal-Mart focused solely on the issue of compensability and did not address the award of benefits. (App. pp. 19–25). Wal-Mart's compensability argument, specifically, relied on the claim that Russell had not presented "objective evidence" to prove she suffered a change of condition for the worse. (App. p. 21). The Commission agreed, essentially stating that objective evidence is required to prove a physical change of condition; therefore, the Commission also found Russell had not presented any objective testimony other than self-serving complaints, it found Russell was not credible, and it found Russell had not suffered a change of condition for the worse. (App. pp. 37–41). After receiving the Commission's order, Russell properly filed an appeal with the Court of Appeals. (App. pp. 42–43).

On January 20, 2016, the Court of Appeals found the Commission "erred as a matter of law by imposing a requirement to the statute mandating that a claimant prove a change of condition

for the worse with objective evidence."[1] (App. p. 112). The court pointed out that the Commission ignored the fact that both of Russell's authorized treating physicians testified to a reasonable degree of medical certainty that Russell suffered a change of condition for the worse. (App. p. 112). In fact, no physician has testified or opined that Russell did not suffer a change of condition. (*See* App. p. 112). The Court of Appeals stated that despite the contentions of the Commission that the Commissioners considered the record as a whole, it was evident from the transcript that the Commission relied solely on the MRI's and was requiring objective evidence. (App. p. 112). The court, therefore, found the Commission erred and remanded to the Commission with instructions to use a preponderance of the evidence standard in its review of the record. (App. p. 112).

After remand, the Commission assigned the case to a single commissioner, Commissioner Michael R. Campbell. (App. p. 140). Commissioner Campbell reviewed the entire record and concluded Russell met her burden of proving a change of condition for the worse and found Russell was entitled to medical care and temporary total disability benefits. (App. pp. 132, 144). Commissioner Campbell's order included a detailed summary of the record and 124 Findings of Fact. (App. pp. 114-44). Wal-Mart again appealed the order of the Commissioner and continued to provide no benefits or medical treatment. (App. pp. 146–51).

On September 7, 2017, the Commission's appellate panel issued an order stating Commissioner Campbell "simply reinstated the 2013 award of Commissioner Roche and erred by not conducting a full evidentiary hearing." (App. p. 211). The order further stated that "a full evidentiary hearing on the issue of benefits" should have been held and that a failure to hold a

[1] The court noted that the Commission specifically found "the preponderance of the evidence indicates that there was no objective difference between [Russell's] MRI scan after the award and the MRI scan before the original award."

second evidentiary hearing amounted to a due process violation. (App. p. 211). The Commission then ordered "the Single Commissioner's March 20, 2017, Order is hereby VACATED and REMANDED to the Single Commissioner to conduct a full evidentiary hearing." (App. p. 213). Additionally, the Commission ordered that the hearing should be a *de novo* hearing. (App. p. 213). The order also states the Commission did not—and did not need to—consider the *threshold* issue of compensability, but the Commission still reversed Commissioner Campbell's findings on that issue. (App. p. 212). The order of the Commission cited no error in Commissioner Campbell's order; it only asserts that he should have conducted an evidentiary hearing. On that point, the order also completely ignores Ms. Russell's argument, which she briefed for the Commission, that the doctrine of issue preclusion or the law of case doctrine precluded many of Wal-Mart's issues from reconsideration, for they were not properly preserved. (*See* App. pp. 167–97). As a result of the nature of the Commission's order, the fact Ms. Russell has received no medical treatment during the entire litigation of the change of condition, the overall duration of the claim, the ever growing procedural history of the claim, and the fact she will not have an adequate remedy after remand, she filed an appeal with the South Carolina Court of Appeals. (App. pp. 216–18)

Upon receipt of Russell's Notice of Appeal, Wal-Mart filed a motion to dismiss and supporting memorandum. (App. pp. 219–32). Wal-Mart essentially argued that Russell's appeal was interlocutory and thus not immediately appealable. (App. pp. 223–24). Russell, however, did not dispute that the order was not a final order, but instead relied upon the exception to the final order requirement that is provided in S.C. Code Ann. § 1-23-380. (App. pp. 237–38). The crux of Russell's argument was that her case is very similar to *Hilton v. Flakeboard Am. Ltd.*, in which this Court stated the Court of Appeals erred in dismissing Hilton's appeal. 418 S.C. 245, 791 S.E.2d 719 (2016). Specifically, Russell argued that in both her case and in *Hilton*, the

Commission ordered a new trial without regard to the law of the case and without an explanation for why doing so is required, and the Commission considered and ruled upon issues that should have been precluded from reconsideration by the doctrine of issue preclusion or the law of the case doctrine. (App. pp. 250–53).

The Court of Appeals, however, dismissed Russell's appeal, stating that the underlying order was not immediately appealable. (App. pp. 248). In support of its decision, the court cited section 1-23-380, but only referenced the language requiring an exhaustion of administrative remedies and did not address the applicability of the exception provided in section 1-23-380. (App. pp. 248). Russell, therefore, filed a petition for rehearing or reconsideration, asserting the Court of Appeals overlooked the exception provided in section 1-23-380, that the court misapprehended how the Commission has created a perpetual cycle of orders and appeals that denies Ms. Russell an adequate remedy, and that the court overlooked the similarities between this case and *Hilton*. (App. pp. 250–253). The Court of Appeals, nevertheless, asserted that it had not overlooked or misapprehended any material fact or principle of law and denied Russell's motion for reinstatement on February 1, 2018. (App. p. 275).

ARGUMENT

I. THE COURT OF APPEALS ERRED IN DISMISSING THE PETITIONER PAULA RUSSELL'S APPEAL UNDER S.C. CODE ANN. § 1-23-380.

This appeal was immediately appealable under section 1-23-380. Appeals from administrative agencies, including the Workers' Compensation Commission, are governed by the Administrative Procedures Act ("APA"). *Bone v. U.S. Food Service*, 404 S.C. 67, 76, 744 S.E.2d 552, 557 (2013). Specifically, section 1-23-380 of the APA states a "preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." The South Carolina Supreme Court has stated

that whether review of a final agency decision provides an adequate remedy is decided on a case-by-case basis. *Hilton v. Flakeboard Am. Ltd.*, 418 S.C. 245, 249, 791 S.E.2d 719, 721 (2016) (citing *The Island Packet* v. *Kittrel*, 365 S.C. 332, 339, 617 S.E.2d 730, 734 (2005)). Because of the extraordinary circumstances, the oddities, and the egregious errors in the Commission's order, Russell petitioned the Court of Appeals to hear her appeal immediately.

The court, however, ostensibly overlooked or failed to give adequate consideration to the exceptions upon which Russell premised her appeal. In the court's order dismissing her appeal, the court only addressed the exhaustion of administrative remedies and final decision portions of section 1-23-380. (App. p. 248). Likewise, the court again appeared to have failed to adequately consider the applicability of that exception to this appeal in its denial of Russell motion for reinstatement. (*See* App. p. 275). Therefore, Russell requests this Court remand this matter to the Court of Appeals so that it may adjudicate this appeal, for a failure to do so will deprive Russell of an adequate remedy. Specifically, Russell relies on *Hilton* in support of the proposition that this Court can review the Court of Appeals' decision not to permit an appeal pursuant to section 1-23-380.

A. The Court of Appeals should have heard Russell's appeal pursuant to *Hilton*, for the errors of the Commission in this case are parallel to the errors the Commission committed in *Hilton*.

The Court of Appeals should have heard Russell's appeal pursuant to *Hilton*, for the errors of the Commission in this case are parallel to the errors the Commission committed in *Hilton*, in which it was found the Claimant would not have an adequate remedy if he waited to appeal. In *Hilton*, this Court essentially found that the Commission erred in two ways. First, the Commission *sua sponte* raised issues on appeal that neither party had appealed, which this Court held was an error, for the Commission can only consider issues raised to it. *Hilton*, 418 S.C. at 249–51, 791

S.E.2d at 721–22. Second, this Court held the Commission erred for it, "instead of simply remanding . . . , it vacated the single commissioner's order, thus ordering both parties begin anew, regardless of the ultimate . . . determination. *Id.* at 252, 791 S.E.2d 722. The *Hilton* court ultimately held that when "the Commission has in effect ordered a new trial without regard to the matters raised by the appealing party and without any explanation why such an extreme remedy is appropriate," the aggrieved party is without an adequate remedy if required to wait until the final agency decision. *Id.* at 251–52, 791 S.E.2d at 722–23. If the Commission's order in *Hilton* was allowed to stand, this Court believed, "a party could face the possibility of repeated unexplained 'do overs' before a final decision of the Commission." *Id.* at 252, 791 S.E.2d at 723.

The two pivotal errors identified by this Court in *Hilton* that made the underlying order immediately appealable are present in this case: The Commission considered issues that were barred from reconsideration by the doctrine of issue preclusion and the law of the case doctrine, and the Commission, instead of simply remanding on those issues, vacated the single commissioner's order. (App. pp. 14–16).

1. The Commission's disregard for the rules of issue preservation

Regarding the law of case issues, the Commission remanded to the single commissioner on the issues of benefits, but that issue was not briefed to the Commission when this case first went before it in 2013 nor were the issues adequately noted on Wal-Mart's 2013 Form 30. (App. pp. 21–24). While Wal-Mart did note exceptions to some of the findings regarding Russell's entitlement to benefits in the 2013 order of Commissioner Roche, in its brief, Wal-Mart argued only that Commissioner Roche erred in finding Russell suffered a change of condition for the worse. (App. pp. 21–24). Moreover, Wal-Mart, regarding the benefits issues it claims it has preserved, must rely on the following statement, for it makes no other mention of its exception to

the findings at issue: "It is respectfully submitted that the Hearing Commissioner erred in finding (Findings of Fact #1,2,4,5,6,7,8,9,10,12,16,17, and 18; Findings of Law # 1,2,3,4,5,and 6) that Claimant sustained a change of condition for the worse under S.C. Code Ann. Sec. [sic] 42-17-90 as a result of her original November 3, 2009 accident at work, . . ." (App. p. 18). That statement, itself insufficient to satisfy S.C. Code Ann. Regs. 67-701(3)(a) (2012),[2] goes on to limit its scope to the portions of the findings of fact and conclusions of law that relate to the finding that "Claimant sustained a change of condition for the worse." (App. p. 18). Wal-Mart did not cite any authority in support of its other exceptions and did not present an argument in support of them. (App. pp. 21–24).

In South Carolina, it is axiomatic that if no authority is cited in support of a proposition or if an argument is conclusory, the issue is abandoned. *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000). Furthermore, "this Court has also held that general exceptions, . . . are too ambiguous to fulfil the notice requirements of due process and do not preserve an issue for review." *Hilton*, 418 S.C. at 250, 791 S.E.2d at 722 (citing *Jones v. Anderson Cotton Mills*, 205 S.C. 247, 31 S.E.2d 447 (1944)). The Commission itself has further, by regulation, expanded the requirements for issues preservation on appeals from the single commissioner to the appellate panel of the Commission and the Commission actually includes relevant language from the regulation on the Form 30 it provides. (*See* App. p. 18). Specifically, the Commission requires that the grounds for appeal be set out in detail and also that

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[2] S.C. Code Ann. Regs. 67-701(3)(A) (2012) states:

> (3) The grounds for appeal must be set out in detail on the Form 30 in the form of questions presented.
>
> (a) Each question presented must be concise and concern one finding of fact, conclusion of law, or other proposition the appellant believes is in error.

they be presented in the form of questions presented. S.C. Code Ann. Regs. 67-701(3)(a) (2012). If a raised issue does not meet the requirements espoused by this state's appellate courts and by the Commission, the related findings of fact and law by the single commissioner become the law of the case. *See Brunson v. American Koyo Bearings*, 367 S.C. 161, 165, 623 S.E.2d 870, 872 (Ct. App. 2005) *abrogated on other grounds by Bone v. U.S. Food Service*, 404 S.C. 67, 80, 427 S.E.2d 552 (2013).

Therefore, Wal-Mart abandoned all issues except whether Russell suffered a change of condition for the worse. Wal-Mart did not even object by number to Commissioner Roche's Findings of Fact No. 3, 11, 13, 14, so those findings became the law of the case and, right or wrong, cannot be altered. (App. pp. 14–18). *See Ham v. Mullins Lumber Co.*, 193 S.C. 66, 7 S.E.2d 712 (1952). Furthermore, even though Wal-Mart may have listed by number several of Commissioner Roche's findings related to Russell's entitlement to medical benefits and temporary total benefits, those issues were also abandoned and the findings have become the law of the case, for they were only referenced by number. (App. pp. 14–16, 18, 19–25). *See R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000); S.C. Code Ann. Regs. 67-701(3)(a) (2012).

Hence, it was error for the Commission in 2017 to consider the issues of Russell's entitlement to benefits, for those issues had been adjudicated and subsequently not appealed. The findings of fact of Commissioner Roche are the law of the case and cannot be relitigated or reappealed. Jean Hoefer Toal et. al., *Appellate Practice in South Carolina* 214 (3rd ed. 2016) ("An unappealed order, right or wrong, is considered the law of the case." "An issue not raised in an intermediate appeal cannot be considered in a subsequent appeal."). This error is extremely similar to the error in *Hilton* that this Court found sufficient to necessitate an immediate appeal. In *Hilton*,

the Commission impermissibly considered unappealed issues *sua sponte*. *Hilton*, 418 S.C. at 251, 791 S.E.2d at 722. Here, the Commission impermissibly considered unappealed issues on Wal-Mart's petition. Any distinction here is irrelevant; the prejudice suffered by Russell is the same when the law of case doctrine is violated regardless of whether the Commission does so on its own accord or at the urging of Wal-Mart. This Court reversed the decision of the Court of Appeals in *Hilton* because of errors regarding issue preservation; a similar issue has arisen in the case at bar, and it inflicts the same harm. Therefore, Russell respectfully requests this Court reverse the Court of Appeals' dismissal of her appeal pursuant to *Hilton*.

2. *The Commission's unwarranted and unexplained vacation of the single commissioner's order.*

The Commission, because it found a full evidentiary hearing was needed on benefits, vacated the entire order of Commissioner Campbell. Commissioner Campbell's order, despite its length, essentially addressed two issues: Whether Russell suffered a change of condition for the worse and to what benefits she was entitled. (App. pp. 114-45). The first issue, essentially one of compensability, is the threshold consideration; if the claim is compensable, then an award of benefits is needed; if the claim is not compensable, then the second step is never reached.

The Commission, however, decided second issue first, and then reversed the entire order without articulating any reason for doing so. The order of the Commission states,

> [Wal-Mart] also asserted that the preponderance of the evidence . . . do [sic] not support the finding of the Single Commissioner that [Russell] sustained a physical worsening of condition after the original award. However, based upon our decision that the single commissioner erred in not conducting a full evidentiary hearing on any award of benefits and our subsequent decision to vacate the order of Commissioner Campbell and remand the case, *there is no need for us to address this issue*.

(App. p. 212 (emphasis added)). The Commission, therefore, by its own account, did not address whether Commissioner Campbell erred when he applied the facts of this case to the legal standard

espoused by the Court of Appeals in 2016. However, the Commission ordered that "at the remand hearing, the single commissioner shall review the evidence submitted at the hearing on February 11, 2013, and issue findings of fact and conclusions of law concerning the issue as to whether [Russell] has had a change of condition for the worse per [section] 42-17-90." (App. p. 213).

This is exactly what the Commission in *Hilton* did when it raised the issue of competency, but "instead of simply remanding for a competency determination leaving open the possibility the single commissioner would find Hilton competent, it vacated the single commissioner's order; thus ordering the parties begin anew." *Hilton*, 418 S.C. at 251, 791 S.E.2d at 722. As in *Hilton*, this is an extreme remedy, which was "ordered without any explanation from the Commission." *Id.* The Commission's remanding the entire case because of what it identified, albeit erroneously, as an error in the award of benefits, is akin to reversing the findings on all elements in a civil negligence case because of an error in the damages calculation. Further, this is grossly similar to what happened in *Hilton* and leads to the deprivation of Ms. Russell's remedy.

Overall, the Commission's willingness to order the relitigation of issues not properly raised for its consideration shows that Ms. Russell, like Hilton, could "face the possibility of repeated unexplained 'do overs.'" *Id.* The facts of this case—where the Commission has in effect ordered a new trial without regard to the law of the case and without any explanation why such an extreme remedy is appropriate—confirms that requiring Ms. Russell to wait to appeal until a final agency decision would not provide her with an adequate remedy. The Commission is trying to give Wal-Mart a second chance to argue that the evidence presented at the 2013 hearing does not support a finding of change of condition, and offers no support for that choice.[3] The Commission is likewise trying to give Wal-Mart the option to relitigate the issue of benefits after it failed to

[3] Wal-Mart has lost twice on this issue before single commissioners, but the Commission is giving them a third try to litigate the same issue.

properly appeal those issues in 2013. In essence, the Commission is giving Wal-Mart an unexplained do over of nearly the entire litigation. These errors were sufficient for the *Hilton* Court to hold the immediate appeal was necessary and this Court should so hold in this case and remand this case to the Court of Appeals for consideration of alleged errors.

B. The Commission committed additional errors that further result in a deprivation of Russell's remedy.

While the Commission in the case at bar committed essentially the same errors this Court identified in *Hilton*, the Commission also committed additional errors that further show requiring Ms. Russell wait to appeal until the final agency decision would not provide an adequate remedy. In essence, Russell asserts that the order of the Commission is inconsistent with the 2016 opinion of the Court of Appeals, that the Court of Appeals gave clear instructions that the Commission ignored, and that those inconsistencies and the willingness to ignore the court of appeal's opinion creates a cycle of orders and appeals such that Russell will be deprived of an adequate remedy.

To recapitulate, the Court of Appeals found in 2016 that the Commission committed legal error in requiring Russell prove her change of condition with purely objective evidence, it stated the appropriate standard was a preponderance of the evidence, and it remanded to the Commission to determine if Russell suffered a change of condition by applying the appropriate standard. *Russell v. Wal-Mart Stores Inc.*, 415 S.C. 395, 400-01, 782 S.E.2d 753, 756 (2016). Commissioner Campbell did so on remand, and found Russell sustained a change of condition for the worse and was entitled to benefits. (*See* App. pp. 114–45). On appeal, however, the Commission issued an order compelling the single commissioner to "conduct a full evidentiary hearing and allow both parties to submit testimony, medical records, and other additional evidence. . . " on the issue of benefits, that said hearing shall be a de novo hearing, and that the commissioner should again

consider whether a change of condition occurred pursuant to the evidence presented at the 2013 hearing. (App. p. 213).

The Court of Appeals has stated "where a case that has been appealed is remanded by the court to the workers' compensation commission with specific directions, the commission must proceed in accordance with those directions." *Bobo v. Marshane Corp.*, 302 S.C. 86, 88, 394 S.E.2d 2, 4 (Ct. App. 1990) (citing 101 C.J.S. *Workmen's Compensation* § 790 at 37 (1958)). Further, the court opined, "[i]n such a case, the order limits the authority of the commission." *Id.* This Court has additionally held that an administrative body could not consider additional evidence where the court had reversed a judgment and remanded the issues to the administrative body for further consideration. *Parker v. S.C. Public Service Commission*, 288 S.C. 304, 342 S.E.2d 403 (1986); *See also In re Doherty*, 109 N.E. 887 (Mass. 1915) (where a remand order did not authorize the commission to expunge the old record and to make a new one, the commission lacked authority to make a new record).

Ultimately, from this point forward, any order of a single commissioner must comply with the 2017 order of the Commission and the 2016 decision of this Court. 18B Charles Alan Wright, et. al., Federal Practice and Procedure § 4478 (2nd ed. 2017) ("Principles of authority . . . do inhere in the 'mandate rule' that binds a lower court on remand to the law of the case established on appeal. The very structure of a hierarchical court system demands as much."). The single commissioner, however, cannot do so; her orders will either be inconsistent with the law of the case as it was established by the Court of Appeals or they will be inconsistent with the law of the case as it was established by the Commission. These inconsistent orders will then be appealed to the Commission, which will remand back to the single commissioner because of the inconsistencies. The perpetual nature of this cycle is akin to that in *Hilton*, where the Supreme

Court explained that the possibility of repeated "do overs" before reaching a final decision deprives a claimant of an adequate remedy upon review. 418 S.C. at 252, 791 S.E.2d at 723. As Justice Hearn stated in *Bone*:

> Taken to its logical conclusion, [this case could be] trapped in a cycle of remands for years. [After remand], the parties will return again to [the Commission and] the court of appeals. In doing so, [the parties] run the risk that the [Commission or the] court of appeals will again remand the case, at which point [they] will have to start the process all over again.

Bone v. U.S. Food Service, 404 S.C. 67, 92, 744 S.E.2d 552, 566 (2013) (Hearn, J. dissenting). Without immediate review, Ms. Russell will wait many more years for surgery and compensation and will see an unknowing number of orders and appeals before a final decision will, if ever, be reached. Therefore, Ms. Russell will be deprived of an adequate remedy if she is not granted immediate review.

CONCLUSION

For the reasons stated above, Petitioner respectfully asks the Court grant her petition for a writ of certiorari and review the Court of Appeals' decision to dismiss her appeal. Ms. Russell is in a position where a final agency decision would not provide her an adequate remedy and is, therefore entitled to immediate appeal. While the issue at hand has been addressed on two occasions in the last five years, there still exists confusion amongst the bench and bar as to when the exceptions to section 1-23-380 apply, and further clarity on this point of law is needed.

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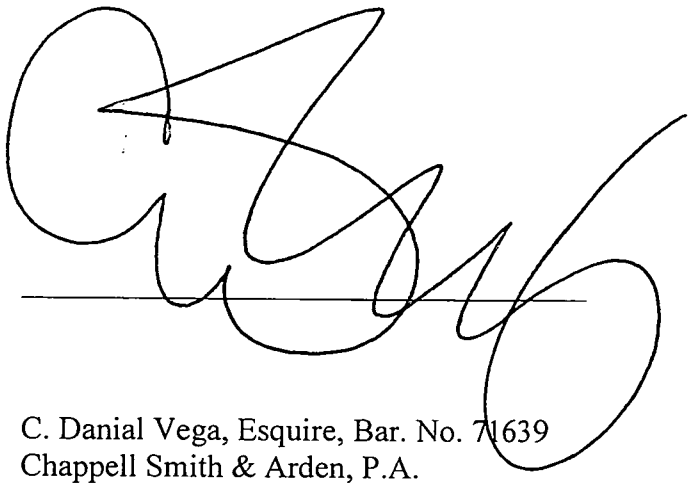

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel of record with a copy of the *Petition for a Writ of Certiorari* and a copy of *Appendix* by mailing copies of the same by United States mail with first class postage prepaid to the following address:

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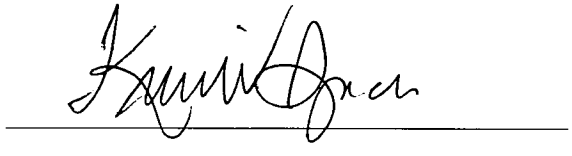
March 1, 2018



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