

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM
THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Full Commission Decision

Appellate Case No. 2016 - 001497

Ignacio Rodriguez, Employee, Claimant,.....Respondent,

v.

Robert R. Pierson d/b/a Pierson Construction Co., Employer, and ABC Care, Inc. Employers,
Respondents,

and

South Carolina Uninsured Employers' Fund, Property Casualty Insurance Co. of Hartford,
Carriers, Defendants,

Of which Property and Casualty Insurance Co. of Hartford is the.....Appellant.

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STATEMENT OF ISSUES ON APPEAL

STATEMENT OF THE CASE

This is a joint brief submitted by the Respondents, Ignacio Rodriguez and the South Carolina Uninsured Employers Fund. This is an appeal from the South Carolina Workers' Compensation Commission. The Appellant/Claimant, Ignacio Rodriguez, received an injury by accident arising out of and in the course of employment on or about December 23, 2013. Rodriguez was working on a residential house on Lake Keowee in upstate South Carolina when he fell from the roof and received serious injuries to his left leg, left arm, left elbow, left knee, left hip, back, neck and mouth. He was transported by Pickens County EMS to Greenville Memorial Hospital and immediately received surgery for a left femoral shaft fracture. He subsequently underwent surgery for a left lateral condyle elbow fracture. He continues to have serious medical issues but has not received further medical care and treatment due to the denial of this case by all parties involved.

The main issue in this case is whether Rodriguez was an employee of anyone, and if so, whom. This issue involves the question of whether the claimant was a subcontractor, whether he was an employee of a subcontractor, or whether he was directly employed by an entity that had four or more employees regularly employed in South Carolina, in this case, ABC Care, Inc. (hereafter ABC)

In early 2013, the board of directors of ABC voted as part of their long range plan to construct a residential house at Lake Keowee, South Carolina. Although ABC is a Maryland corporation and the bulk of their business entities at the time of this injury were located in Maryland, they were planning on expanding the operation to include summer camps in various

places. The first place they chose was a place where the executive director of ABC. and her husband owned a house, Lake Keowee, South Carolina.

The executive director of ABC is Robin Pierson. Her husband, Robert T. Pierson, who is a party to this action, is also a member of the board of directors of ABC and is an employee of ABC. Specifically, Pierson works as the facilities manager for ABC. (R. p.147 lines 22-25- R. p. 148 line 1; P. 173, lines 10-12). Pierson owned a construction company, Robert T. Pierson Construction Co. which is an unincorporated construction company located primarily in Maryland, where he and his wife reside.

The board of directors made a decision to have Mr. Pierson travel to South Carolina and construct a residential house for ABC so that summer camp employees could be housed at Lake Keowee, thus significantly reducing the cost of food and lodging for the summer camp employees. The board of directors specifically authorized Mr. Pierson to travel to South Carolina and obtain the necessary permits to begin construction on a piece of property owned by ABC at 149 Lakewood Lane, in Sunset/Lake Keowee. Pierson first talked to ABC's insurance agent in Maryland, Mr. Oates who (wrongly) advised Pierson he did not need workers' compensation coverage in South Carolina.

Pierson then went to Home Depot in Seneca, South Carolina in an attempt to find workers for his project. As a result of this search he found an individual named Francisco Chavez who he hired to oversee the project. Chavez went to the property with Pierson and Pierson showed him where the house would be located, what trees needed to be cut down, and where the footings for the foundation needed to go. Chavez initially started doing this job by himself but in short order realized the job was too big for one person. He requested permission

from Pierson to hire two other workers. (R. p 90 lines 5-16). This was approved by Pierson and Chavez hired the Respondent, Rodriguez, and another individual named Francisco Bello.

The three workers on the Lake Keowee project shared the duties of building the residential home for ABC. There were no blue prints provided, but Pierson drew up plans on paper and oversaw the construction of the home. All of the building permits were taken out in the name of ABC.

The controversy arises in this matter in part, because Pierson was also the owner and operator of his own independent construction company. He paid the three workers on an hourly basis based on hours kept by Chavez. However, he paid them on Pierson Construction Co. checks. Pierson testified, and the Full Commission found as a fact, the workers were paid with Pierson Construction Co. checks because the only bank account of ABC was on the Bank of Maryland, while Pierson's bank account was with BB&T. BB&T has local branches in Pickens County and it was, therefore, easier for the three employees to cash their paychecks. Further, Pierson did not have signature authority for ABC checks.

Pierson testified, and the Full Commission found as a fact, Pierson Construction was not involved in the actual building process and that the three employees were paid by Pierson Construction Co. checks so they could be more easily cashed. They also found ABC reimbursed Pierson Construction Co. dollar for dollar any of the wages he paid the three employees. Based on the testimony, there are only four possibilities concerning the employment status of the Respondent, Rodriguez.

- (1) That Pierson Construction Co. was the employer and Pierson himself was the owner of the company. There would therefore have been only three employees in South

Carolina and Pierson Construction would not be subject to the South Carolina Workers' Compensation Act.

- (2) That ABC Care, Inc. was the primary employer and Pierson was an employee of ABC, and, therefore, there were four or more employees in South Carolina making ABC subject to the Act and the Hartford Insurance Company, ABC's carrier, responsible for the claim.
- (3) That ABC Care, Inc. was the employer and the individual who hired the claimant, Francisco Chavez, was a contractor himself and therefore giving ABC no more than only three employees in South Carolina and therefore not being subject to the Act.
- (4) That Hartford is not responsible for benefits even if ABC Care, Inc. is the employer because the Hartford only insured ABC in the state of Maryland and solely for its daycare business. (Respondent, the UEF, would point out to the court that in any of these four scenarios the Uninsured Employers' Fund would not be responsible for the claim and only in scenario #2 would Rodriguez have any remedy at all).

A hearing was initially held before Commissioner Aisha Taylor of the South Carolina Workers' Compensation Commission on January 20, 2015 in Greenville, South Carolina. On July 30, 2015 Commissioner Taylor issued an Opinion and Award finding ABC was the primary employer, that ABC had at least four employees in South Carolina and was therefore subject to Title 42, and the Hartford was the responsible workers' compensation carrier for ABC. She also found Hartford included an "ALL STATES" endorsement in its workers compensation policy which included coverage in multiple states, including South Carolina. She ordered ABC Care, Inc. and their carrier, the Hartford, to pay Rodriguez temporary total disability compensation

from December 23, 2013 to present and continuing and to provide ongoing medical care and treatment to claimant until such time as he achieved maximum medical improvement.

Subsequently, in due time, the Hartford appealed the Order to the Full South Carolina Workers' Compensation Commission. Oral argument was held before a three member panel of the Full Commission on February 22, 2016. On June 20, 2016 the Full Commission issued an Appellate Panel Decision and Order in which they fully affirmed the Order of Commissioner Taylor and also made additional Findings of Fact and Conclusions of Law relating to the fact that ABC Care, Inc. had specifically and voluntarily undertaken to do construction in the State of South Carolina on the site where the claimant was injured and, therefore, made that project and the construction thereof a part of the trade, business, or occupation, of ABC. In all other respects they fully affirmed the Order of Commissioner Taylor and ordered payment of temporary total disability compensation and medical care and treatment to claimant. This appeal follows.

ISSUE I – WHETHER THE SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD SUPPORTS THE FINDING OF THE FULL COMMISSION THAT IGNACIO RODRIGUEZ WAS AN EMPLOYEE OF ABC CARE, INC.?

In her Order, Commissioner Taylor found the Respondent, Ignacio Rodriguez, was an employee of ABC Care, Inc. (Order Commissioner Taylor) (R. pp13-30) This Order was affirmed by the Full Commission which also specifically found as a fact that ABC Care, Inc. maintained four or more employees in the State of South Carolina in the same trade, business, or occupation. (Full Commission Order) (R. pp 1-12). The Full Commission also found as a fact that ABC Care, Inc. undertook specifically to do a construction project in the State of South Carolina, and thereby, specifically brought construction projects within the “ambit” of the trade, business, and/or occupation of ABC Care, Inc. (Full Commission Order) (R. p 1-12)

First, Respondents agree with Appellant’s statement of the standards of review. This Court cannot reverse the Findings of Fact of the Full Commission unless they are not supported

by the substantial evidence on the whole record. Pierre v. Seaside Farms, Inc., 386 SC 534, 689 SE2d 615 (2010). In this case the substantial evidence on the whole record more than supports the determination of the Single Commissioner as affirmed by the Full Commission that all of the individuals working on the Lake Keowee site were employees of ABC Care, Inc.

The evidence is undisputed ABC is a non-profit child daycare service operating out of the State of Maryland. (R. pp147-148). The board of directors of ABC had previously authorized a summer camp program which was initially begun in Pickens County South Carolina. Because the costs of housing employees were very large, the board of ABC determined that it would make more sense to build a residential facility at Lake Keowee to house the summer camp employees. (R p. 172 lines 15-25; R. p. 173 line 1-5). To this end, the board of directors of ABC voted to allow their facilities manager, Robert Pierson, to travel to South Carolina and build a residential home for ABC at Lake Keowee. Besides being the actual facilities manager, and a full-time employee of ABC Care, Mr. Pierson is also an ex officio and non-voting member of the board of directors. (R p. 149 lines 16-22). Pierson accepted the request of the board and traveled to South Carolina to build a residential home on the property which is the subject of this workers' compensation claim.

Pierson was also the owner of a construction company, Robert T. Pierson Construction, Co. and was an experienced builder. In order to carry out the mandate of the board, Pierson traveled to Pickens County, South Carolina and obtained appropriate permits for the building of the home. He also took out a building permit in the name of ABC Care, Inc. (Hartford APA, p. 76; TR p. 121; building permit)

After talking to several contractors in Seneca, Pierson was introduced to Francesco Chavez who Pierson hired to oversee the project at Lake Keowee (R p 154 lines 10-25; R. p. 155

lines 1-7; R. p. 158 lines 1-14). Chavez had experience in building houses from the ground up including putting in footings. (R. pp. 157-158). Shortly after his hiring, Pierson met Chavez at the job site and showed him which trees needed to be cut down and where the footings for the house needed to go. (R p. 162 lines 22-25; R p.163 lines1-25) Once the project started, Chavez realized the project was too big for more than one person and requested permission from Pierson to hire two more individuals to assist him with the project. (R. p. 90 lines 5-13). This request was approved by Pierson and two other employees were hired. (R p.90 lines 14-25; R. p. 166 lines 20-24).

It is completely undisputed Pierson was an employee and board member of ABC, that ABC sent him to South Carolina for the purposes of building a residential house for ABC and in that capacity, he hired three individuals to assist in the project, Chavez, Bello, and the Respondent, Rodriguez. (Orders R. pp 1-30; R.p. 166 lines 11-25).

The Single Commissioner and Full Commission also found that although the three employees were paid with Pierson Construction, Co. checks, there was a valid and unchallenged reason for doing the same.

Pierson testified he paid the three employees with Pierson Construction, Co. checks because the bank account of ABC Care, Inc. was drawn on the National Bank of Maryland and that bank had no branches in South Carolina. However, the Pierson Construction, Co. checks were drawn on BB&T Bank which has branches in South Carolina, and therefore, the three employees were able to cash their checks. (R. pp 164-166). This explanation is totally unrefuted in the record by Hartford or any other party.

It also clear the indicia of employment, found by the Single Commissioner and Full Commission are totally supported in the record. While it is not required that any traditional test

be used exclusively to determine employment status, nonetheless, the Commission and the Courts look at four factors which serve as a means for analyzing a work relationship. Shatto v. McLeod Regional Medical Center, 406 SC 4770, 753 SE2d 416 (2013). Further, any doubts as to a workers' status are resolved in favor of including the worker under the terms of the Workers' Compensation Act. Poch v Bayshore Concrete Products, Inc., 405 SC 359, 747 SE2d 757 (2013).

The ultimate issue of employment is control. Shatto. The four factors the Court looks at to determine an employment relationship as a whole are: (1) Direct evidence of the right to exercise control; (2) Furnishing of tools and/or equipment; (3) Method of payment; and (4) Right to fire. Clearly the evidence in this case supports all four Shatto requirements. While all four factors are not required to determine employment, nonetheless, in this case all four have been met.

The evidence is clear Pierson directed the actual operations on behalf of ABC. There were no actual blueprints, and, therefore, Pierson did drawings and sent regular text messages in order to ensure the workers' knew exactly what they were to accomplish. (R. pp 87-88; R. pp 161-162). While it appears that a concrete mixer may have been furnished by Chavez, according to the unrefuted testimony, all other tools, equipment, and items used in the actual construction, including construction materials were provided by ABC. (R p. 88 lines 23-25- R. p. 89.line 1; R.p. 159 lines 15-19). The employees were paid on an hourly basis and their hours were kept track of by Chavez who turned over a timesheet for all three employees to Pierson on a weekly basis. (R p.90 lines 17-20). Pierson then wrote checks to the workers based on the number of hours worked. (R pp. 166-167). The unrefuted testimony in this matter was Pierson was then reimbursed dollar for dollar directly by ABC for all payments he made through the Pierson

Construction account. (R p.181 lines 20-25-R. 182 line1-2). Finally, the undisputed testimony of Chavez was he could not fire the workers without first consulting with Pierson. (R p.113 lines 13-15).

All of the evidence, totally unrefuted by Hartford in this record makes it clear much more than substantial evidence supports the determination of Commissioner Taylor and the Full Commission that Chavez, Rodriguez, and Bello were hired by Pierson as employees of ABC. Respondents believe Hartford is urging either Rodriguez was not an employee of ABC or Chavez was a contractor himself. While these are possibilities, nonetheless, Hartford presented no evidence that Chavez was a contractor himself or Rodriguez was ever an employee of Chavez. As noted above, ABC authorized its facilities manager and ex officio board member, Pierson to build a residential home in South Carolina for the purpose of housing employees during summer camps. To that end, Pierson traveled to South Carolina and obtained building permits in the name of ABC. He then hired Chavez, who in turn requested permission of Pierson to hire Bello and Rodriguez. All three individuals were paid on an hourly basis based on hours kept by Chavez and reported weekly to Pierson. All of the tools with the possible exception of a concrete mixer, and all of the supplies and materials were provided by Pierson, who was a direct employee and board member of ABC. The individuals in question were paid with Pierson Construction, Co. checks, but Hartford presented no evidence to contradict Pierson's testimony he was reimbursed dollar for dollar by ABC for any amounts he expended. He also presented both a plausible and unrefuted explanation for why the employees were paid in this manner because of the ability of his employees to be able to cash their checks at a local bank and his inability to sign ABC checks.

While Hartford is correct in noting that the claimant in a worker's compensation case bears the burden of presenting evidence to prove his case, the defendant bears the same responsibility if he is contesting the case to present evidence which would contradict the evidence presented by a workers' compensation claimant. See eg, Fishburne v. ATI Systems Intern, 384 SC 75, 681 SE2d 595 (Ct. App. 2009). In this case, Hartford presented no evidence of any kind to contradict the evidence presented by the claimant that: (1) ABC specifically entered into the trade, business, or occupation, of construction by a voluntary vote of the board of directors; (2) Pierson, an employee and board member of ABC was authorized to undertake one or more construction projects in South Carolina; (3) Pierson took out construction permits in the name of ABC; (4) While the employees were paid with Pierson Construction Co. checks, there was a plausible and valid reason for doing the same, i.e. so that the employees could cash their checks in South Carolina; and (5) Pierson, Chavez, Bello, and Rodriguez were all employees of ABC operating in South Carolina.

It is therefore respectfully submitted that the substantial evidence on the whole record fully supports the determination of the Single Commissioner, as affirmed by the Full Commission that all four individuals were employees of ABC and therefore, that ABC had four or more employees in South Carolina and was, therefore, subject to the South Carolina Workers' Compensation Act. Section 42-1-380.

ISSUE II – IS HARTFORD'S ALL STATES ENDORSEMENT VALID IN THIS CASE?

The insurance policy in this matter, issued by Hartford, insuring ABC Care, Inc. in the State of Maryland contains the following endorsement: "Part 3 of this policy applies to the States, if any, listed here: ALL STATES *except* ND, OH, WA, WY, AND STATES DESIGNATED IN ITEM

3.A of the Information page.” (emphasis added) (Hartford APA pg. 4). Part 3 of the policy applies to “worker’s compensation insurance”. (R. p. 246)

Contrary to the argument of Hartford, the case of Deanhardt v. Deanhardt Masonry Contractors, 298 SC 244, 379 SE2d 726 (Ct. App. 1989) does not apply to this case. The Deanhardt case involved subject matter jurisdiction as it relates to the procuring of insurance and becoming subject to the Act when the employer *does not* have four or more employees in the State under Section 42-1-360(2). While the employee in Deanhardt did claim the employer had four or more employees in the State, both the Commission and the Courts determined they did not. Therefore Deanhardt was not subject to the Workers’ Compensation Act. The issue of whether the “ALL STATES” endorsement brought Deanhardt under the terms and provisions of the South Carolina Workers’ Compensation Act arose under the claimant’s contention that the employer elected to be subject to the Workers’ Compensation Act by virtue of having an “ALL STATES” endorsement in its insurance policy even though it was otherwise exempt.

The Court cited Nolan v. National Sales Co., Inc., 292 SC 1, 354 SE2d 575 (Ct. App. 1987) for the proposition that an employer *not otherwise subject to the Act* can come under the Act only if it complies “or substantially complies” with the Commission’s regulations in South Carolina to voluntarily come under the Act. Because Deanhardt did not have four or more employees regularly employed in South Carolina, the issue was simply whether the “ALL STATES” endorsement in their policy rises to the level of “substantial compliance” with the Commission’s regulations in order to voluntarily come under the Act. The Court held that the existence of an “ALL STATES” endorsement, alone, does not meet the requirements.

There is a long line of South Carolina case law dealing with the issue presented to the Court in Deanhardt as opposed to the proposition presented by Hartford. In order for a company

which is *not otherwise subject to the Act by having four or more employees* to become subject to the Act it is necessary that the actions required under the regulations to voluntarily come under the Act be substantially complied with. However in a “common sense” approach the Court held as early as the case of Yomens v. Anheuser-Busch, Inc., 198 SC 65, 15 SE2d 833 (1941) the procuring of insurance and otherwise doing all actions necessary to come under the Act, even though the employer was not otherwise subject to the Act by having four or more employees, “substantially complied” with the Act. In Yomens, the regulation at the time specifically required an actual policy be filed with the Commission. Anheuser-Busch had taken all other steps necessary to come under the Act even though it only had two employees in South Carolina, but failed to specifically file an insurance policy with the Workers’ Compensation Commission. The Supreme Court held, for an employer who was otherwise not subject to the Act but who voluntarily came under the Act, to be allowed to raise the defense of lack of jurisdiction was against public policy when the employer had done everything else to voluntarily come under the Act except the filing of the actual policy of insurance. Therefore, the Court held Anheuser-Busch substantially complied with the provisions of the Regulation. This principal has been reaffirmed in the cases of Carter v. Associated Petroleum Carriers, 235 SC 80, 110 Se2d 8 (1959), Dependents of Sweeney v. Cape Fear Wood Corp., 237 SC 471, 118 SE2d 70 (1961) and Nolan.

In this case, the issue is not whether ABC had substantially complied with the requirements of Title 42 to come under the Act, but whether they in actuality had four or more employees which *automatically* made them subject to the Act and to the jurisdiction of the South Carolina Workers’ Compensation Commission. Id. The evidence is clear that they did have four or more employees regularly employed in South Carolina and were, therefore, subject to the

South Carolina Workers' Compensation Act. Section 42-1-380 (2). The Commission further noted a memo filed by counsel for Hartford in which Hartford admitted coverage existed in South Carolina under the "ALL STATES" endorsement if the injured employee was operating in the trade, business, or occupation of ABC. That memo states: "Admittedly, coverage may have been provided to employees of ABC Care Inc. that were performing childcare services in South Carolina under Part 3 of the (Hartford) policy. (R. p. 25).

In other words Hartford is not seriously contesting the "ALL STATES" endorsement gives coverage, but merely that construction was not in the trade, business, or occupation of ABC an issue decided adversely to them by the Commission.

There is also unrefuted testimony concerning Mr. Pierson meeting with the insurance agent *for ABC*, Pat Oates, to discuss this project with him. (R p.151 lines 10-21). As a result thereof, Mr. Oates obtained for ABC a builders risk policy. (R. p. 151 lines 22-25). However, Mr. Oates advised Pierson they would not need workers' compensation insurance in South Carolina. (R. p. 152 lines 18-25) Pierson also testified Oates advised him the ABC workers' compensation policy would cover employees in South Carolina. (R pp.167-168).

Finally, the determination of this issue is within the purview and jurisdiction of the South Carolina Workers' Compensation Commission. The interpretation of the "ALL STATES" endorsement falls squarely within the jurisdiction of the Commission. Posey v. Proper Mold and Engineering, Inc. 378, SC 210, 661 SE2d 395 (Ct. App. 2008), Laboureur v. Harleysville Mut. Ins. Co., 302 SC 540, 397 SE2d 526 (1990). In this particular case there is actually nothing to interpret as the insurance carrier, the actual creator of this policy, specifically stated the policy would apply to any state in which jurisdiction was determined to exist except ND, OH, WA, and

WY. South Carolina is not exempted from the policy and, therefore, the “ALL STATES” endorsement specifically covers employees in South Carolina. Nolan.

**ISSUE III – WHETHER THE FULL SOUTH CAROLINA WORKERS’
COMPENSATION COMMISSION PROPERLY DISMISSED THE UNINSURED
EMPLOYERS FUND AS A PARTY TO THIS ACTION?**

The South Carolina Uninsured Employers Fund is an agency created by statute for the purpose of covering claims of individuals whose employers are subject to the South Carolina Workers’ Compensation Act but have failed to obtain workers’ compensation coverage. S.C. Code of Laws Ann. Section 42-7-200. In order for an employee to obtain benefits from the Uninsured Employers Fund it is first necessary that the employer be subject to the South Carolina Workers’ Compensation Act. Section 42-7-200(B). In this particular case, based on any of the potential scenarios the Uninsured Employers Fund is an improper party under any circumstances.

As specifically noted by Commissioner Taylor and the Full Commission there are four possible scenarios in this case. (Orders). First, if Pierson Construction is the employer, then the owner of the company, Robert T. Pierson, would not be an employee and the company would have only three employees. Under Section 42-1-360, neither Pierson nor Rodriguez would have been subject to the Workers’ Compensation Act. Second, if Chavez was an independent contractor hired by Pierson Construction Co., Chavez and Pierson would not be counted and Chavez, as subcontractor would have had only two employees and would not be subject to the Act. Id. If ABC Care, Inc. was the employer but Chavez was a subcontractor, then Chavez would have had only two employees and would not have been subject to the Act. Id. It is noted that in the case of Ost v. Integrated Products, Inc., 296 SC 241, 371 SE2d 796 (1988) the

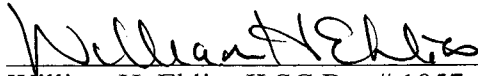
Supreme Court determined a statutory employee could go up the chain of statutory employment to include four or more employees, however, for a company to be subject to Title 42 the four or more employees must be located in the state of South Carolina. Id.; Section 42-1-360(2). In this case, ABC would have had only one employee in the State of South Carolina, Pierson, and therefore, ABC and Rodriguez would not have been subject to the Workers' Compensation Act. Fourth, the situation that currently exists, if ABC had four or more employees in the State of South Carolina, Pierson, Chavez, Bello, and Rodriguez, then ABC Care, Inc. was subject to the South Carolina Workers' Compensation Act and pursuant to the "ALL STATES" endorsement, the Hartford is the responsible carrier.

Therefore, regardless of any of the possible scenarios in this case, the Single Commissioner and Full Commission were correct in dismissing the SCUEF as a party to this claim.

CONCLUSION

It is therefore respectfully submitted that the Order of the Single Commissioner as affirmed by the Full South Carolina Workers' Compensation Commission was correct and is based not only the substantial evidence on the whole record, but on overwhelming evidence in the whole record, and therefore, the Order of the Full Commission should be affirmed as written.

Respectfully submitted,



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We certify that the Brief of Respondent complies with Rule 211(b).



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Robert T. Pierson d/b/a Robert T. Pierson Constr. Co., Employer
and ABC Care, Inc., Employer- Respondents,

and

South Carolina Uninsured Employers' Fund, Property & Casualty
Insurance Co. of Hartford, Carriers- Defendants

Of which Property and Casualty Insurance Co. of Hartford, is theAppellate.

PROOF OF SERVICE

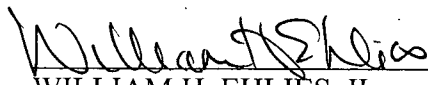
The undersigned hereby certifies that the Final Brief of Respondent is served on the following parties by mailing a copy of same in the United States mail on this the 7th day of December 2016:

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