THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 2018-UP-287 (S.C. Ct. App. Filed June 27, 2018)

South Carolina Farm Bureau Mutual Insurance Company ..... Respondent

vs.

Michael David Harrelson, Devora Harrelson, Kevin Duke
and Government Employees Insurance Company ..... Defendants

OF WHOM:
Michael David Harrelson and Devora Harrelson are..... Petitioners
and
Government Employees Insurance Company is..... Respondent

PETITION FOR WRIT OF CERTIORARI

J. Dwight Hudson
Hudson & Graham Law Offices
P. O. Box 70218
Myrtle Beach, SC 29572
(843) 692-9889
Attorney for Respondent South Carolina Farm Bureau Mutual Insurance Company

John E. Rogers, II
Ginger D. Goforth
The Ward Law Firm, P.A.
P. O. Box 5663
Spartanburg, SC 29304
(864) 591-2366
Attorneys for Respondent Government Employees Insurance Company

Gene M. Connell, Jr.
(S.C. Bar No. 1358)
Kelaher, Connell & Connor, P.C.
The Courtyard, Suite 209
1500 U. S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648
gconnell@classactlaw.net
Attorney for Petitioners

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S.C. SUPREME COURT

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CERTIFICATE OF COUNSEL

Counsel for the Petitioners certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on August 16, 2018.

QUESTIONS PRESENTED

I. Does the Court of Appeals opinion comply with SCACR 220(b)?

II. Did the Court of Appeals correctly apply the case of *South Carolina Farm Bureau Mutual Insurance Company v. Mumford*, 299 S.C. 14, 382 S.E.2d 11 (Ct. App. 1989) to the facts of this case?

III. Did the Court of Appeals err in failing to consider the case of *South Carolina Farm Bureau Mutual Insurance Co. v. Kennedy*, 398 S.C. 604, 730 S.E.2d 862 (2012) in deciding this case?

IV. Should this Court consider this case to clarify what constitutes the use of an automobile which was raised in *Silva v. Allstate*, Opinion No. 27838 filed August 29, 2018?

V. Did the Court of Appeals err in not applying *Wassau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992) to this case?

STATEMENT OF THE CASE

This matter is before this Court on a Petition for Certiorari. The Court of Appeals, in an unpublished memorandum opinion, affirmed a grant of summary judgment to South Carolina Farm Bureau Mutual Insurance Company (the uninsured motorist carrier) and Government Employees Insurance Company (the liability insurance carrier). There were two separate lawsuits filed entitled *South Carolina Farm Bureau Mutual Insurance Company v. Michael David Harrelson, Devora Harrelson, Kevin Duke and Government Employees Insurance Company*, C/A No. 2016-CP-26-798; and *Government Employees Insurance Company v. Kevin Duke, Michael Harrelson and Devora Harrelson*, C/A No. 2016-CP-26-424. The circuit court consolidated these matters for hearing by both insurers for summary judgment. (R. pp. 21-22).

The facts which arise in this case involve a severe beating of Michael David Harrelson and Devora Harrelson by Kevin Duke at the Wal-Mart Store in Myrtle Beach before Christmas 2012. Duke had blocked the Harrelsons' car in a parking spot and used his car as a weapon to intentionally injury them. The parties' testimony and versions of the encounter are consistent and all parties agree that the assault occurred over how Michael Harrelson was operating his car in a crowded Wal-Mart parking lot during the Christmas season. Duke was waiting behind him to get in or out of the same crowded parking lot and was upset with Harrelson's driving. The testimony is Duke gunned his engine and flashed his lights while Harrelson waited for a parking place to open up so he could park. Duke, a retired police officer, was eventually convicted of third degree assault for his actions on December 21, 2012. Government Employees Insurance Company (GEICO) is the automobile liability insurance carrier for Kevin Duke. South Carolina Farm Bureau Mutual Insurance Company had uninsured/underinsured motorist coverage on the car owned by the Harrelsons. The Orders of the circuit court which were affirmed by the Court of Appeals are significantly different in a legal sense since the GEICO policy (the liability insurance policy) must be construed pursuant to the South Carolina Financial Responsibility Act. (See S.C. Code § 38-77-140. The South Carolina Farm Bureau Mutual Insurance Company policy is for uninsured/underinsured motorist coverage and must be construed pursuant to S.C. Code § 38-77-150, *et. seq.* (2013). The circuit court granted summary judgment to both Geico and Farm Bureau. The Court of Appeals affirmed and denied Appellants' Petition for Rehearing. Thus, this Petition requests the Court review these two significant questions of law regarding construction of automobile insurance statutes in this state.

Finally, the Petitioners, Michael and Devora Harrelson, submit that the Court of Appeals granted summary judgment without applying the facts to the law in a memorandum opinion

pursuant to SCACR 220(b). The decision of that court is difficult to read and even harder to apply to the facts of this case.

REASONS FOR GRANTING CERTIORARI

The Court of Appeals filed its Opinion No. 2018-UP-287 on June 27, 2018 affirming the summary judgment orders issued by the trial court. Petitioners believe that this case is appropriate for certiorari to this Court. The questions of statewide importance in this case are as follows:

1. Did the Court of Appeals comply with SCACR 220(b) in issuing a memorandum opinion which did not state the reasons and apply the facts in affirming the trial judge's grant of summary judgment?

2. Did the Court of Appeals properly apply the facts of this case consistent with *South Carolina Farm Bureau Mutual Insurance Company v. Mumford*, 299 S.C. 14, 382 S.E.2d 11 (Ct. App. 1989) to the facts of this case?

3. Is there a conflict between this Court's opinion in *Wassau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992) and *State Farm Fire and Casualty Co. v. Aytes*, 332 S.C. 30, 503 S.E.2d 744 (1998)?

4. Did the Court of Appeals apply the scintilla test in affirming summary judgment pursuant to SCRCP 56?

5. Should this Court hear this case since it did not answer an important and novel certified question in *Silva v. Allstate,* Opinion No. 27838 filed August 29, 2018 which was pending before this Court?

All of these issues are not only important to this case, but will be applied to similar automobile accidents in the future. Petitioners seek a ruling from the court applying the standards of *Mumford*, *Aytes* and *Wassau* so that a bright line may be provided to the bench and the bar about

these types of cases in the future and whether there is either liability or uninsured/underinsured insurance coverage available. Clearly, guidance is needed by this court because of the multitude of conflicting opinions in this confusing area of insurance law. Thus, a definitive statewide ruling is essential to the application of insurance law because, as has been stated before, these types of accidents occur every day in this state.

ARGUMENT

I. A SIMILAR QUESTION WAS PENDING BEFORE THIS COURT IN THE CASE OF *SILVA V. ALLSTATE* AND STILL NEEDS RESOLUTION.

This Court accepted certified questions from the United States District Court in *Silva v. Allstate*, Opinion No. 27838 filed August 29, 2018. In *Silva*, a motorcyclist was shot while riding his motorcycle in Richland County, South Carolina. Judge Richard Gergel of the United States District Court certified two questions to this Court which agreed to answer those questions on November 16, 2017. One of those questions which has application here is whether injuries caused by a drive-by shooting arise out of the use of a motor vehicle under S.C. Code § 38-77-140. This Court in its opinion declined to answer that question as the first question was dispositive. In the *Silva* case, the shooting victim was operating a motor vehicle followed by an assailant vehicle which blocked Silva's escape during which he was shot. The circumstances in this case, while not involving a gun, do involve a dispute over parking and the blocking of an escape and the use and operation of a motor vehicle to injure Harrelson.

All automobile liability insurance policies delivered in South Carolina to an owner of a motor vehicle are required to contain a provision "insuring the person defined as insured against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of these motor vehicles. S.C. Code § 38-77-140(a). Further S.C. Code 38-77-140(a) draws no

distinction between intentional acts and negligent acts of the insured since liability for damages is "imposed by law." Thus, coverage must be provided. It is without question the law imposes liability on one who intentionally uses an automobile in the manner that causes damage to another. See, *South Carolina Farm Bureau Mutual Insurance Company v. Mumford*, 299 S.C. 14, 17-18, 382 S.E. 2d 11 (1989).

In the *Silva* case, the death resulted from a shooting by someone pursuing him in a separate motor vehicle while Silva rode his motorcycle. In this case, Harrelson's injuries resulted after his vehicle was blocked by an assailant and the vehicle was then used to corner Harrelson and severely injure him when Duke pinned Harrelson against the vehicle.

Previously, the Court in *Wassau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992) has been asked whether the uninsured (UM) provision of an automobile liability policy covers potential acts sustained by a person traveling on a public highway. The *Wassau* Court answered this question in the affirmative.

Since *Wassau*, this Court has developed a three part test to determine coverage in *State Farm Fire and Casualty Co. v. Aytes*, 332 S.C. 30, 503 S.E.2d 744 (1998). As this court is aware, the *Aytes* case and the *Howser* cases conflict and thus this Court needs to weigh in on how these cases relate to intentional acts by motorists in this state. For additional confusion in this area of the law, see *Peagler v. USAA Ins. Co.*, 368 S.C. 153, 629 S.E.2d 475 (2006) in which this Court was asked whether a fatal injury caused by the actual discharge of a shotgun which occurred during the unloading of firearms from a stationary vehicle arose out of the use, maintenance or operation of a motor vehicle. In *Peagler*, the Court held no coverage was available for the decedent.

Petitioner notes the case law of other jurisdictions has made the application of insurance to these types of cases simpler, more uniform, rational and efficient. In *State Farm Mutual Auto Ins.*

Co. v. Blystra, 86 F 3d 1007 (10th Cir. 1996), the United States Court of Appeals for the Tenth Circuit stated:

> When an automobile is used by an assailant to undertake a drive-by shooting, the automobile is almost by definition an "active accessory" to the assault. Through the use of an automobile, a drive by shooter achieves several advantages in the commission of his crime that would otherwise be unavailable to him. First, the assailant can use the vehicle to unsuspiciously and quickly approach his victim, all the while hiding from public observation that he is armed with a gun. Second, during the commission of the assault, the assailant can use the vehicle to help hide his identify. Third, the assailant can use the vehicle to leave the scene quickly and avoid apprehension.

Other courts have followed the Tenth Circuit's lead. The Oregon Appellate Court noted in *De Zafra v. Farmers Insurance Company*, 270 Or. App. 77, 86, 346 P.3d 652, 657 (2015) that the unknown vehicle can be used with surprise and to maximize the likelihood of injury. There is established the temporal and spatial distance between the vehicle use and the injury are sufficient to permit the conclusion that the injury arose out of the use of the vehicle. Most certainly the unknown assailant used the unknown vehicle to catch up and overtake the unsuspecting motorist for the purpose of assaulting him and thus the vehicle is an active accessory. See *Continental West Ins. Co. v. Klug*, 415 N.W.2d 876 (Min. 1987).

Other courts have stated that drive-by shootings and assaults of driving have become an increasingly common part of the American experience. Regrettably, a court can no longer say with any certainty that such occurrences are so removed from the American scene as not to be foreseeable. *See, Lindstrom by Lindstrom v. Hanover Insurance Co. on Behalf of New Jersey Automobile Full Insurance Underwriting Association*, 138 N.J. 242, 252-253, 649 A.2d 1272, 1277 (1994).

The shooting cases cited above have great application to this case in that while a gun was not used, the assailant in this case used his vehicle to block the Harrelson vehicle and also used his

vehicle to beat Harrelson because of his driving or parking in a Wal-Mart lot on a busy weekend before Christmas. It is entirely foreseeable that this type of a dispute over driving activity will occur during the busy Christmas season and will happen over and over again throughout the state. Here, the assailant used his vehicle, fled with his vehicle and the argument arose over Harrelson's driving. Under those circumstances, a causal connection is established since the vehicle was being used for transportation at the time of the assault which is without doubt the normal and foreseeable use of a motor vehicle. The key question being: Did the injury occur through the use of a motor vehicle? In this case the answer is clearly "yes" as, but for the use of their motor vehicle and the dispute over either Harrelson's driving or his parking, his injury would not have occurred.

II. THE COURT OF APPEALS DID NOT CORRECTLY APPLY *SOUTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY V. MUMFORD* ON RULING ON THIS CASE.

Petitioners believe that *Mumford* applies to the facts of this case; and, thus, GEICO's automobile liability insurance policy is applicable. As the Court is aware, South Carolina has codified the Motor Vehicle Financial Responsibility Act. See S.C. Code § 56-9-10. Numerous South Carolina cases have held "the purpose of the Motor Vehicle Financial Responsibility Act (MVFRA) is to give greater protection to those injured through the negligent operation of automobiles: this legislation requires insurance for the benefit of the public, and an insurer may not nullify its purposes by engrafting exceptions from liability as to uses that the evident purpose of the legislation was to cover." *Williams v. Governmental Employees Insurance Co.*, 409 S.C. 586, 762 S.E.2d 705 (S.C. 2014).

Petitioners argue that *South Carolina Farm Bureau Mutual Insurance Company v. Mumford,* 299 S.C. 14, 382 S.E.2d 11 (1989) is applicable to the facts of this case. In *Mumford*, the defendant intentionally drove her automobile across the center line and struck another vehicle while

attempting to commit suicide. Farm Bureau denied responsibility arguing that it was not liable for an intentional act. The Court held that the *Mumford* case presented a matter of first impression. The Court went on to state:

> The statute requires any automobile insurance policy issued in this State to insure against "loss from liability imposed by law" for damages arising out of the use of a covered motor vehicle. It draws no distinction between intentional acts and negligent acts of the insured if liability for damages is "imposed by law," coverage must be provided. Without question, the law imposes liability on one who intentionally uses an automobile in a manner that causes damage to another....

The *Mumford* case has been repeatedly cited in this state and other states as the modern rule requiring mandatory liability insurance coverage under state financial responsibility laws; *accord Hudson v. State Farm Mut. Ins. Co.*, 569 A.2d 1168, 1169 (Del. 1990); *Martin v. Chicago Ins. Co.*, 184 Ga. App. 472, 361 S.E.2d 835, 837 (Ga. Ct. App. 1987); *Mosley v. W. Am. Ins. Co.*, 743 S.W.2d 854, 855 (Ky. Ct. App. 1987); *Cannon v. Commerce Ins. Co.*, 18 Mass. App. Ct. 984, 470 N.E.2d 805, 806 (Mass. App. Ct. 1984); *Hartford Accident & Indem. Co. v. Wolbarst*, 95 N.H. 40, 57 A.2d 151, 153-55 (N.H. 1948); *Dotts v. Taressa J.A.*, 182 W.Va. 586, 390 S.E.2d 568, 572-74 (W.Va. 1990); *But see Williams v. Diggs*, 593 So.2d 385, 387 (La. Ct. App. 1991); *Snyder v. Nelson*, 278 Ore. 409, 564 P.2d 681, 684 (Or. 1977); *State Farm Mut. Auto Ins. Co. v. Wertz*, 540 N.W.2d 636, 640-41 (S.D. 1995); *Utica Mut. Ins. Co. v. Travelers Indem. Co.*, 223 Va. 145, 286 S.E.2d 225, 226 (Va. 1982).

In this case, Duke and Harrelson had a dispute over Harrelson's driving on a busy weekend before Christmas in a Wal-Mart parking lot. Duke, the assailant, blocked Harrelson after he pulled into a parking space and then pinned Harrelson against his car with intent to injure him over his driving in that same parking lot. The *Mumford* Court stated: "The statute does not say insurers must cover 'accidents' arising from the use of the insured vehicle; it says they must cover 'liability imposed by law' on the insured." In this case, the facts are clear that the intentional act occurred by

Duke because of Harrelson's driving activities. The Court of Appeals in its opinion makes no mention of the facts of the case, but curiously its memorandum opinion cites *Mumford* without explanation. Petitioner cannot explain or understand how the Court of Appeals reaches its opinion because the Court does not give Petitioners the benefit of its reasoning. This Court in *State Auto Property and Casualty Ins. Co., v. Gibbs*, 314 S.C. 345, 444 S.E.2d 504 (1994) wrote: "The *Mumford* decision recognized the evolving policy of the legislature in its continuing effort to require that all South Carolinians have the ability to pay for injury on our highways." (444 S.E.2d at 507). Petitioners assert this is just such a case and that *Mumford* is applicable as to the liability insurance policy and that coverage should be afforded as a matter of law.

III. THE COURT OF APPEALS OPINION DOES NOT COMPLY WITH SCACR 220.

Petitioners also point out to the Court that the opinion provided by the Court of Appeals does not comply with SCACR 220(b). It provides: "In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case."

In this case, Petitioners are unable to discover how the Court of Appeals arrived at its decision as it does not apply any of the facts presented in this case to the application of the case law. Further, pursuant to SCACR 220(b)(1) only the Supreme Court may file such a memorandum opinion and this Court should require the Court of Appeals to specifically address the facts of the case in applying the case law.

It is settled in South Carolina that when an appellate court chooses to find facts in accordance with its own view of the evidence, the court must state distinctly its findings of fact and

reasons for its decisions.[1] The Court of Appeals has not explained why the evidence presented in the summary judgment hearing allows it to affirm summary judgment for both South Carolina Farm Bureau and Geico. In fact, the opposite result is reached if one applies the South Carolina summary judgment rule which requires that evidence must be viewed in the light most favorable to the non-moving party. See *Carpenter v. Burr*, 381 S.C. 494, 673 S.E. 2d 818, *rehearing denied, certiorari dismissed*, 394 S.C. 518, 716 S.E.2d 295 (2009) (If appellate court chooses to find facts in accordance with its own view of the evidence, the court must state distinctly its findings of fact and reasons for its decisions.); *Simmons v. Berkley Electric Coop.*, 319 S.C. 479, 462 S.E.2d 291 (2016) (Appellate court must apply the same standard as circuit court when considering the motion for summary judgment.)

Thus, the Court of Appeals opinion is lacking in applying the facts to the law through the use of a memorandum opinion. This Court should require the Court of Appeals to view the facts presented and apply the South Carolina Financial Responsibility Act and the *Mumford* decision in reaching a ruling in this matter. Petitioners fail to understand why the Court of Appeals has not articulated a reason why this case is different from *Mumford*. Here, Duke used his vehicle as an active weapon after Duke and Harrelson were involved in a traffic dispute and Duke positioned his vehicle behind Harrelson in such a way that Harrelson could not escape and then used his own vehicle to attack Harrelson by pinning him against the car. The Court of Appeals has provided no reason why it affirmed summary judgment other than citing the same cases that Petitioners cite without recitation of the facts. Petitioners believe that under the scintilla of evidence rule established by this Court summary judgment should be reversed.

[1] This is not a jury case so the standard of review is different.

IV. THE COURT OF APPEALS ERRED IN GRANTING SUMMARY JUDGMENT.

The Court of Appeals in its unpublished decision in this case elected not to discuss how the facts apply to the law. It does not inform Petitioners why there is no genuine issue of material fact and it does not state what facts it relied upon in reaching its conclusion.

This Court has listed elements in several decisions of this Court to be considered in these types of cases. The cases which list specific elements are *State Farm Mutual Automobile Ins. Co. v. Bookert*, 337 S.C. 291, 293, 523 S.E.2d 181 (1999) and *Peagler v. USAA Ins. Co.*, 368 S.C. 153, 159, 628 S.E.2d 475 (2006). Here, the Court of Appeals did not review the depositions or cite to the evidence in the record in reaching its decision. The Court of Appeals gives no reason why Petitioners have not presented a scintilla of evidence despite the significant evidence offered in the record. Petitioners cited extensively in their brief the testimony of Harrelson. See pages 4-6 of Petitioners' Memorandum of Law in Support of Petition for Rehearing (App. pp. 13-15) which extensively discuss the facts of the case and the testimony of Michael Harrelson for authority that summary judgment was inappropriate in this case.

V. THE COURT SHOULD GRANT THIS PETITION FOR PUBLIC POLICY REASONS.

As has been stated, the insurance law is in a state of confusion when the court has considered intentional acts of motorists. The *Mumford* case (intentional acts covered), the *Bookert* case (intentional acts not covered), the *Howser* case (intentional acts covered) and other cases have resulted in a quilt work of confusing and conflicting case law in an area of the law that needs to be streamlined and settled for the good of the public. To put it simply, lawyers, insurance brokers, judges and others have great difficulty in determining what S.C. Code § 38-77-140 and S.C. Code § 38-77-150 mean in regard to automobile policies and cases arising out of the ownership, maintenance and use of a motor vehicle.

VI. IF THIS COURT FINDS THAT *STATE FARM FIRE AND CASUALTY CO. V. AYTES* IS THE LAW IN THIS STATE (AS TO THE UNINSURED/ UNDERINSURED FARM BUREAU CLAIM) THEN THE FACTS OF THIS CASE CLEARLY MEET THE TEST ANNOUNCED IN THAT DECISION.

As Plaintiffs have indicated previously, the law in this area is unsettled. If the Court adheres to *State Farm Fire and Casualty Co. v. Aytes*, 332 S.C. 30, 503 S.E.2d 744 (1998), the facts of this case require coverage be extended. In *Aytes*, the Supreme Court held a three part test for determining whether an individual's personal injuries arose out of the "ownership, maintenance or use" of an automobile such that they are covered by an automobile insurance policy. The three part test is met when: (1) there exists a causal connection between the vehicle and the injury; (2) no act of independent significance breaks the causal link; and (3) the vehicle is being used for transportation at the time of the assault.

Based on *Aytes*, there is evidence which shows a causal connection between the vehicle and the injury; i.e., the case involves a dispute between Harrelson and Duke over Harrelson's driving in the parking lot of the Wal-Mart. As has previously been argued, Duke drove up behind Harrelson, revved his engine and flashed his lights while Harrelson waited to get a parking space during the busy Christmas season. Because Harrelson did not move quickly enough for Duke, a dispute broke out which caused Duke to assault Harrelson. Duke used his vehicle to block Harrelson in the parking space and blocked his escape.

The facts of this case squarely meet the elements of *Aytes* as to the uninsured/underinsured Farm Bureau claim. There was an argument about the way Harrelson was driving his vehicle and the injury arose during the course of that argument. Further, there was no independent act which broke the causal link and the vehicle was used for transportation at the time of the assault.

Under either the *Aytes* test or the *Wassau* test, the injuries arose out of the ownership and use of a vehicle. The Petitioners assert that the Court of Appeals erred in not finding coverage for

the intentional acts under *Mumford* and in further not finding underinsured motorist coverage was applicable under the *Aytes* test, especially in light of this Court's opinion in *South Carolina Farm Bureau Mutual Ins. Co. v. Kennedy*, 398 S.C. 604, 730 S.E.2d 862 (2012) which holds "touching" a vehicle qualifies an injured party for underinsured motorist coverages. (In this case, the testimony by Harrelson is that he was touching his car while being assaulted.) Accordingly, Petitioners request that this Court grant a writ of certiorari to hear this case and to provide bright line rules for the bench and the bar regarding these types of case.

CONCLUSION

Petitioners believe that this area of the law is in a state of constant confusion and that this case should establish bright line rules for the bench and the bar to follow in the future. (Public records show that one person is injured in a traffic accident in South Carolina every 8.5 minutes. See South Carolina Public Safety Department Statistics, 2016). See *Antley v. N.Y. Life Ins. Co.*, 139 S.C. 23, 137 S.E.2d 199 (1927) (This court's duty is to determine which best appeals to it sense of law, justice and to determine right.) Accordingly, Petitioners request that a writ of certiorari be issued by this Court to consider the issues in this case.

KELAHER, CONNELL & CONNOR, P.C.

Gene M. Connell, Jr. (S.C. Bar No. 1358)
The Courtyard, Suite 209
1500 U. S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net
Attorney for Petitioners

September 11, 2018

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PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P.C., and that she has served a copy of Appellants' **Petition for Writ of Certiorari** on the Respondents on the 11th day of September, 2018, by depositing a copy of same in the United States Mail, postage prepaid, to:

John E. Rogers, II, Esquire
Ginger D. Goforth, Esquire
The Ward Law Firm, P.A.
P. O. Box 5663
Spartanburg, SC 29304

J. Dwight Hudson, Esquire
Hudson & Graham Law Offices
P. O. Box 70218
Myrtle Beach, SC 29572

Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 11 day of September, 2018.

Michelle Sanders

Notary Public for South Carolina
My Commission Expires: 8-10-2021