IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Case No. 2011-CP-10-4867

Permanent General Assurance Company..... .....Respondent,

vs.

Karen D. Givens, Individually and as Personal Representative of the Estate of E. Cierra Givens, and Kayla Givens .....Appellants.

FINAL BRIEF OF RESPONDENT

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June 19, 2013

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STATEMENT OF THE CASE

Permanent General Assurance Company ("Permanent General") brought this declaratory action on July 11, 2011 in the Charleston County Court of Common Pleas seeking a declaration that it properly cancelled a policy of insurance on March 16, 2011 due to Karen Givens' failure to pay an installment of the policy premium when due. On March 19, 2011, after the cancellation, Karen's daughter Kayla Givens was in a single-car accident resulting in the death of her younger sister, Cierra. Because the policy cancelled prior to the accident, no policy was in place on the date of the accident and Permanent General denied coverage.

Permanent General filed an Amended Complaint on August 4, 2011. Permanent General sought a declaration that there was no coverage in place at the time of the accident because the policy was properly cancelled for non-payment of the premium. Karen and Kayla Givens filed an Answer and Counterclaim on August 18, 2011. The counterclaim alleged claims for a declaratory judgment as to coverage, attorney's fees, and breach of contract based upon the Givens' claim that the addition of a second auto to

Karen Givens' existing policy created a new policy and that South Carolina Code § 56-10-280(A)(4) required the policy to remain in effect for an additional thirty days. Permanent General filed an Answer to the counterclaims on August 25, 2011. The parties filed cross motions for summary judgment and the Court held a hearing on May 29, 2011. The Honorable Michael G. Nettles signed an Order on June 14, 2012 granting Permanent General's motion for summary judgment and denying Appellants' motion.

Judge Nettles applied this Court's holding in Smith v. South Carolina Insurance Company, 350 S.C. 82, 564 S.E.2d 358 (Ct. App. 2002) and found that the addition of a second vehicle to an existing insurance policy merely endorsed the pre-existing policy rather than creating an entirely new policy. Therefore, the thirty-day requirement under South Carolina Code § 56-10-280(A)(4) ran from the initial date of the policy and not the date that Appellants added the new vehicle to the existing policy. Judge Nettles also found that Appellants never paid the additional premium for the new vehicle. For these reasons, Judge Nettles ruled in favor of Permanent General and found that no policy existed on the date of the accident.

Appellant filed a motion to alter or amend on July 7, 2012. The Court held a hearing on the motion on November 29, 2012 and denied the motion on December 31, 2012. Appellants served the Notice of Appeal on January 29, 2013.

STATEMENT OF FACTS

After receiving a ticket for driving without liability insurance, Karen Givens applied for insurance with Permanent General via the internet on February 13, 2011. (R. p. 66, lines 5-15; p. 142). She did not list any other household drivers on the application and the policy covered only Karen's 1999 Ford Taurus. (R. pp. 143-44). Givens paid the

initial payment of $101.20 when she applied for coverage and Permanent General issued a policy of insurance, policy number 30-SC-762345. (R. p. 70, lines 7-20; p. 142). After getting the ticket dropped, she never paid another installment for the premium until after the policy cancelled and the accident occurred. (R. p. 66, lines 16-19).

On February 21, 2011, Permanent General sent Givens a bill for $90.96, which represented the next installment of the premium. According to the bill, the premium was due to be paid by March 12, 2011. (R. p. 38, ¶ 5; p. 162). On that same day, Karen's daughter, Kayla Givens, purchased a Buick Century from Crazy J's Auto Express. Because Kayla was financing the purchase, Crazy J's required her to purchase insurance before leaving. In order to save money, Karen and Kayla Givens elected to add the vehicle to Karen's existing policy rather than obtain a new policy from another insurer. (R. p. 135, lines 17-21; p. 80, lines 1-24). Permanent General issued an automobile insurance binder providing temporary coverage for the Buick. (R. p. 164). After receiving the binder, Crazy J's allowed Kayla to take the car off the lot. (R. p. 83, lines 3-5). Specifically, the binder provided "THIS BINDER IS A TEMPORARY INSURANCE CONTRACT, SUBJECT TO THE CONDITIONS SHOWN ON THE REVERSE SIDE OF THIS FORM". (R. p. 164). The reverse side of the binder provides in relevant part:

CONDITIONS

> This Company binds the kind(s) of insurance stipulated on the reverse side. The insurance is subject to the terms, conditions, and limitations of the policy(ies) in current use by the Company.

* * *

> The Company may cancel this binder by notice to the insured in accordance with policy conditions. **The binder is cancelled when replaced by a policy**. . . .

(R. p. 165) (emphasis added). Importantly, the binder is replaced by a policy at the time the vehicle is actually added to the policy. (R. p. 39, ¶ 8). The binder also states: "This binder is issued to extend coverage in the above-named company per expiring policy NO: 30-SC-762345 (quote 1432870)". (R. p. 164). Permanent General added the Buick to the existing policy and issued an "Endorsement Policy Declarations" on March 10, 2011. (R. p. 39, ¶ 9; p. 168). Therefore, the binder cancelled as of March 10, 2011 and the Buick became covered under the existing policy that was issued on February 13, 2011. (R. p. 38, ¶ 9). This is undisputed in the record.

On February 25, 2011, Permanent General issued a Notice of Cancellation[1] to Karen Givens advising that if she did not pay the $90.96 premium installment by March 16, 2011, Permanent General would cancel the policy as of that day.[2] (R. p. 39, ¶ 10; p. 170). Because Karen Givens failed to pay the premium by March 16, 2011, the policy covering the Ford and the Buick cancelled. (R. p. 39, ¶ 11).

On March 19, 2011, after the cancellation, Kayla Givens was driving the Buick when she ran off the road and struck a tree. E. Cierra Givens, Kayla's sister, was a passenger in the Buick and tragically sustained fatal injuries in the accident. On March 23, 2011, Karen Givens called Permanent General to have the policy reinstated, ***but did not report the accident***. (R. p. 39, ¶ 12; p. 103, lines 8-12). After obtaining information for Kayla Givens and determining that she should be added as a household driver,

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[1] Appellants have not contended that the Notice of Cancellation failed to comply with the statutory requirements.

[2] The payment was originally due on March 12, so Givens was provided a four-day grace period.

Permanent General agreed to reinstate the policy, ***with a lapse in coverage***, upon payment of the $90.96 that was owed from the original premium before the Buick was added to the policy. (R. p. 39, ¶ 13). Permanent General was not aware of the accident at that time. Ten days after the accident in which Cierra was killed, Karen Givens paid the $90.96, and Permanent General reinstated the policy effective March 29, 2011. (R. p. 175). The Reinstatement Notice provided: "[T]here is no coverage for losses occurring between the cancellation date and the reinstatement date . . . ." (R. p. 175).

Importantly, neither Karen nor Kayla Givens ever paid a single penny for coverage on the Buick even though a bill for the premium was sent on April 1, 2011. Permanent General sent a bill for the premium and notice of cancellation showing the amount due as $178.46. (R. p. 181) This premium represents, in part, the increased premium for adding the Buick to Karen Givens' policy, otherwise, she only owed $90.96. Neither Karen nor Kayla paid this increased premium and the policy subsequently cancelled on April 19, 2011.

ARGUMENT

The Givens received all the insurance they paid for. Karen Givens paid the first month's installment for the policy. The Permanent General policy insured Givens' Ford for over thirty days, as required by South Carolina Code § 56-10-280, before Permanent General cancelled the policy for Givens' failure to pay the next monthly installment. Adding an additional vehicle to an existing policy does not reset the clock for the thirty day requirement under § 56-10-280. Rather, § 56-10-280 requires the ***policy*** to remain in effect for thirty days. Because Permanent General issued a policy that remained in effect

for over thirty days before it was cancelled for the Givens' failure to pay the premium, no policy was in place on the date of the accident.

Importantly, Karen Givens purchased insurance to avoid a ticket. Kayla added the Buick to the existing insurance policy so that Crazy J's would let her take the car off the lot. After the accident, Karen Givens paid the past-due premium to reinstate the policy, ***without reporting the accident***, in an attempt to regain coverage after the policy cancelled. Once they learned that the policy only reinstated with a lapse, neither Karen nor Kayla ***ever*** paid a subsequent premium.

Nonetheless, the Givens seek to nullify the valid cancellation in order to obtain coverage for which they never paid, either before or after the accident. On March 16, 2011, the policy that insured both the Buick and the Ford cancelled because the Givens failed to pay the premium when due. Permanent General complied with all statutory requirements by providing fourteen days' notice of the impending cancellation and providing a policy of insurance for more than thirty days. Therefore, the trial court properly held that no policy was in effect on the date of the accident.

I. THE TRIAL COURT PROPERLY HELD THAT COVERAGE ON THE BUICK CANCELLED WHEN THE POLICY CANCELLED ON MARCH 16, 2011.

The trial court applied the plain and unambiguous terms of the policy when it determined that the binder expired when Permanent General issued the endorsement declarations reflecting the addition of the Buick to the Permanent General policy. Therefore, when the policy cancelled on March 16, 2011, coverage for the Buick also cancelled. The policy cancellation was due only to the Givens' failure to pay the policy premium when owed even after receiving a notice of cancellation. Because the binder

and policy language is clear and unambiguous, and because it fully complied with all statutory requirements, it must be applied according to its plain terms. Therefore, there is no coverage for this accident, which occurred ***after*** the policy cancelled for non-payment.

A. By its plain terms, the newly acquired auto coverage is limited to the *lesser* of 30 days from the date of acquisition of the policy *or* the date the policy is cancelled.

The plain and unambiguous language of the newly acquired auto provision limits coverage for a newly acquired auto to the lesser of 30 days or the date the policy is cancelled or expires. The Trial Court properly applied the plain terms of the policy language and found that the Buick was not insured on the date of the accident.

Parties are free to make their own contract with regards to insurance. Sphere Drake Ins. Co. v. Litchfield, 313 S.C. 471, 473, 438 S.E.2d 275, 276-77 (Ct. App. 1993). "It is not the function of the courts to rewrite or torture the meaning of the policy to extend coverage." Id. (citation omitted). Courts will apply the plain language of an insurance contract to give effect to the intention of the parties as stated in the agreement. Id. When language is clear and unambiguous, "it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense." Id. (citation omitted).

The newly acquired auto provision is located under the definition of "Your covered auto." (R. p. 185). The provision provides in pertinent part:

> L. "Your covered auto" means
>
> 1. Any "car, pickup, or van" shown on the declarations page.
>
> 2. A "car, pickup or van" as of the date "you" become the owner or lessee provided that:

a. "You" acquire the "car, pickup, or van" during the policy period shown on the declarations page; and

b. "You" ask "us" to insure it within 30 days after "you" become the owner. Coverage is limited to the lesser of 30 days from the date of acquisition or the date the policy subsequently expires or is cancelled unless "we" agree in writing to a further extension of coverage; and

* * *

f. "You" have paid any additional premium required by "us;" and

* * *

(R. p. 185). In a rather confounding reading of part L.2.b., Appellants interpret "subsequently expires or is cancelled" as meaning subsequent to the expiration of the 30 days limitation. In doing so, Appellants read the "lesser of" language out of existence. "All contracts should receive a sensible and reasonable construction, and not such a one as will lead to absurd consequences or unjust results." Bruce v. Blalock, 241 S.C. 155, 161, 127 S.E.2d 439, 442 (1962). Given a sensible construction that gives effect to every word, part L.2.b. should be read – as it is written – to say, "Coverage [for the Buick] is ***limited*** *to* the ***lesser of*** 30 days from the date of acquisition ***or*** the date the policy subsequently expires ***or is cancelled*** unless [Permanent General] agree[s] in writing to a further extension of coverage." (R. p. 185) (emphasis added). Thirty days is the maximum amount of time the policy will provide coverage for the newly acquired auto. In the event that the policy cancels or expires before those thirty days, the policy cancels at that earlier time. The only potential exception provided for in the clause is if Permanent General agrees in writing to a further extension of coverage. As discussed in detail below, Permanent General did not agree to such an extension.

By its plain an unambiguous terms of the policy, coverage for a newly acquired auto – which is a provision located in the main insurance policy – terminated with the rest of the policy upon cancellation. The policy cancelled on March 16, 2011.[3] Therefore, even if the Buick qualified as a newly acquired auto, coverage under that provision cancelled along with all other coverage provided under the policy on March 16, 2011.

B. The insurance binder automatically expired when Permanent General added the Buick to the policy.

By its own terms, the binder by which Permanent General initially agreed to insure the Buick only remained in force until the Buick was added to the existing insurance policy. Specifically, the binder stated in all capital letters: "THIS BINDER IS A ***TEMPORARY INSURANCE CONTRACT***, SUBJECT TO THE CONDITIONS SHOWN ON THE REVERSE SIDE OF THIS FORM." (R. p. 164) (emphasis added). On the reverse side, under "CONDITIONS," the binder provides that: "The binder is cancelled when replaced by a policy." (R. p. 165). Permanent General added the vehicle to Karen Givens' policy by issuing an "Endorsement Policy Declarations" on March 10, 2011. (R. p. 168). The endorsement declarations, issued on March 10, 2011, lists the Buick as a covered auto.

The binder language is plain and unambiguous. Once Permanent General issued an endorsement policy declarations listing the Buick as a covered auto, it was "replaced by a policy" and automatically cancelled. This is no different from a binder issued when

[3] Appellants place great emphasis on the fact that Permanent General provided different dates for the payment due date prior to the cancellation in different letters sent to Karen Givens. However, the ***latest*** of these three dates was March 16, 2011. Moreover, it only gave March 16, 2011 as the date of cancellation. Therefore, regardless of any doubt created by the three separate letters, there was no doubt that the payment was overdue as of March 16, 2011 and the cancellation would take effect on that date.

an insured first applies for coverage. Once the initial policy issues, the binder becomes a nullity or is absorbed into the policy. Because Permanent General issued the endorsement adding the Buick to the existing policy on March 10, 2011 – ***before the cancellation*** – coverage for the Buick cancelled on March 16, 2011 when the policy was cancelled. Givens asserts no fact or legal theory opposing the fact that the binder cancelled when the Buick was added to the policy, but argues without support that the terms of the binder remained applicable at the time of the accident.

Whether Appellant relies upon the insurance binder or the newly acquired auto provision, the plain language under either venue reveals that the Buick was not covered on the date of the March 19, 2011 accident. The binder terminated on March 10 when Permanent General issued the endorsement declarations, and the policy cancelled on March 16 pursuant to the Notice of Cancellation due to the Givens' failure to pay the policy premium. Therefore, the Trial Court properly held that no policy of insurance was in effect on the date of the accident.

II. THE TRIAL COURT PROPERLY HELD, CONSISTENT WITH THIS COURT'S HOLDING IN SMITH, THAT THE ADDITION OF EXTRA VEHICLES TO AN EXISTING POLICY DOES NOT RESET THE THIRTY-DAY REQUIREMENT OF § 56-10-280(A)(4).

South Carolina Code § 56-10-280 permits cancellation of insurance contracts or policies within the first sixty days under certain circumstances. One such circumstance is when "the insured fails to pay when due the premium for the policy, an installment of the premium, or an installment payment under a premium service contract . . . ." S.C. Code Ann. § 56-10-280(A)(4). If the policy is cancelled for failure to pay the premium or an installment, "[t]he ***contract*** or ***policy of insurance*** must remain in effect for at least thirty days." S.C. Code Ann. § 56-10-280(A)(4) (emphasis added). In an attempt to avoid their

failure to pay the policy premium, Appellants argue – in spite of the clear statutory language to the contrary – that § 56-10-280 requires that every ***vehicle*** be insured for at least thirty days. However, the statute's plain language controls.

A. In plain and unambiguous language, the General Assembly only requires that the policy of insurance – and not every amendment thereto – remains in effect for at least thirty days.

Permanent General issued a policy of insurance to Karen Givens on February 13 and cancelled the policy thirty-one days later on March 16. Where a statute is clear and unambiguous, there is no room for construction and the terms of the statute must be given their literal meaning. Duke Power Co. v. South Carolina Tax Comm'n, 292 S.C. 64, 66, 354 S.E.2d 902, 903 (1987) (citation omitted). In construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction for the purpose of limiting or expanding its operation. Ex parte State ex rel. Wilson, 391 S.C. 565, 577, 707 S.E.2d 402, 408 (2011) (citation omitted). The court "must respect the General Assembly's use of distinct terms" in a statute. *Id.* "The legislature is presumed to have fully understood the meaning of the words it used in a statute" and intended to use them in their ordinary and common meaning. Rorrer v. P.J. Club, Inc., 347 S.C. 560, 569, 556 S.E.2d 726, 731 (Ct. App. 2001) (citation omitted).

The General Assembly drafted section 56-10-280 in plain and unambiguous language. The statute provides, "The ***contract*** or ***policy of insurance*** must remain in effect for at least thirty days." S.C. Code Ann. § 56-10-280 (emphasis added). Importantly, it would have taken no special effort for the General Assembly to require that "Every ***vehicle*** must remain insured for at least thirty days." However, it did not. Because the language is clear, the trial court properly applied the statute according to its

plain terms. The Permanent General policy was in place for over thirty days and therefore satisfied the requirement of § 56-10-280(A)(4).

B. The trial court properly applied this Court's holding in Smith when it found that the addition of an extra vehicle to an existing policy does not create a new policy of insurance.

Rather than pay extra to apply for and purchase an entirely new insurance policy to cover the Buick, Karen and Kayla givens chose to add the vehicle to Karen Givens' existing policy of insurance. (R. p. 80, lines 1-24, p. 135, lines 17-21). In doing so, neither Karen nor Kayla bothered to inform Permanent General that Kayla givens would be the primary operator of the vehicle and no initial premium was required before Permanent General issued the binder.[4]

By choosing to add the Buick to her mother's existing policy, Kayla Givens gained the benefit of a reduced premium and avoided the inconvenience of applying for her own insurance. There are certain distinct benefits that go along with purchasing a new policy of insurance that do not apply when a vehicle is merely added to an existing policy. For example, a new policy would require that Kayla Givens receive an offer of optional uninsured and underinsured motorist coverage. See S.C. Code Ann. § 38-77-160; S.C. Code Ann. § 38-77-350 (requiring that new applicants for insurance received offers of optional coverage). If purchased by Kayla, she would be a named insured on the new policy and thereby extend coverage to her resident relatives living in her home. See S.C. Code Ann. § 38-77-30(7) (defining insured). She would also obtain the

[4] Moreover, less than two weeks earlier, Karen Givens chose not to list her daughter Kayla on the insurance application under the heading: "**DRIVERS . . .** Complete this section for all persons 14 or older living in your household and all other persons who use your vehicle on a regular basis." (R. p. 143). It is undisputed that Kayla was over 14 and living with her mother in February, 2011. (R. p. 63, line 17-p. 64, line 2; p. 69, lines 9-14).

assurance that her policy would remain in effect for a minimum of thirty days. See S.C. Code Ann. § 56-10-280(A)(4). However, Kayla gave up these benefits in exchange for a reduced premium and chose to add her vehicle to her mother's existing insurance policy.

Section 56-10-280(A)(4) requires that ***policies*** remain in effect for thirty days. Appellants ignore the plain statutory language by claiming that each ***vehicle*** must be insured for thirty days and that there is no difference for the thirty-day requirement between when a new policy is issued to insure a vehicle and when a vehicle is merely added to an existing policy of insurance. However, this Court has already recognized the important difference between when a vehicle is merely added to an existing policy and when a new policy is issued in Smith v. South Carolina Ins. Co., 350 S.C. 82, 564 S.E.2d 358 (Ct. App. 2002). In that case, the insured claimed that his insurer was required to make a meaningful offer of underinsured motorist coverage when a second vehicle was added to an existing policy of insurance. Id. at 84, 564 S.E.2d at 359. Section 38-77-350(C) provides that "an insurer is not required to make a new offer of coverage on any automobile insurance policy which renews, extends, changes, supersedes, or replaces an existing policy." S.C. Code Ann. § 38-77-350(C). This Court concluded that no new offer was required, stating, "We hold the addition of a new vehicle is a "change" to an existing policy . . . ." Id. at 89, 564 S.E.2d at 362.

Under this Court's well-reasoned holding in Smith, the addition of a vehicle to an existing policy of insurance does not create a new policy of insurance. Because § 56-10-280(A)(4) only requires that each ***policy*** remain in effect for a minimum of thirty days, the addition of a new vehicle does not reset the clock. Therefore, all coverage provided

by the Permanent General policy – including coverage for the Buick – cancelled on March 16, 2011, thirty-one days after the policy incepted.

III. EVEN IF THE ADDITION OF AN EXTRA VEHICLE TO AN EXISTING POLICY CONSTITUTES A NEW POLICY, THE TRIAL COURT PROPERLY FOUND THAT THE GIVENS NEVER PAID THE INITIAL PREMIUM.

Permanent General received one single premium installment for the policy prior to the accident. That premium installment was necessary for Permanent General to issue the policy to Karen Givens on February 13, 2011. By obtaining the policy, Karen Givens got herself out of a ticket for driving without liability insurance. (R. p. 66, lines 16-19). Between February 13, 2011 and the March 16 cancellation, Givens received no less than three notifications that payment was due. Despite ignoring each of these notifications and her contractual obligation to pay the premiums when due, Givens now seeks coverage for an accident that occurred after the policy cancelled.

Furthermore, after the accident occurred, Givens attempted to make the past-due payment to reinstate the policy without notifying Permanent General of the accident. (R. p. 39, ¶ 12; p. 103, lines 8-12). After learning that the policy would only be reinstated with a lapse in coverage, Givens never paid another premium on the policy. (R. p. 176, p. 96, line 23-p. 97, line 1).

Neither Karen nor Kayla ***ever*** paid the increased premium charged for adding the Buick to the policy. (R. p. 97, lines 5-11). Givens argues that she was not billed for coverage on the Buick prior to the accident. However, there was no reason to send a subsequent bill until she reinstated the policy because the policy was already cancelled. See 2 Couch on Ins. (3d. ed.) § 30:23 ("When a policy is effectively cancelled, the insured is not liable for further premiums which would become due thereafter."). After

Givens paid the $90.96 – from before addition of the Buick – to reinstate the policy, Permanent General did send a bill/notice of cancellation on April 1, 2011 reflecting the increased premium owed after the addition of the Buick. (R. p. 181). Givens never paid this premium and the policy cancelled a second time for non-payment on April 19, 2011. (R. p. 124, line 11-p. 125, line 8). Therefore, Givens did receive a bill for the increased premium and chose not to pay it.

Now, after failing to ever pay the premium for the coverage they are seeking in this case, Appellants want this Court to treat the addition of the Buick as a separate policy of insurance even though they never paid any separate consideration. The Givens want the benefit of a bargain they never paid for. Awarding such a gain not only flies in the face of the plain policy and statutory language, but constitutes an unjust windfall to the Appellants. Therefore, the Trial Court properly rejected Appellants' claims and granted summary judgment to Permanent General.

CONCLUSION

Respondent Permanent General respectfully requests that this Court affirm the Trial Court's Order finding that the Permanent General policy issued to Karen Givens cancelled for non-payment on March 16, 2011, three days before the accident. The policy remained in effect for the required thirty-day period. Moreover, the addition of another automobile to an existing insurance policy constitutes a mere change to the policy and does not reset the thirty-day time period under South Carolina Code § 56-10-280(A)(4). The Givens failed to pay the premium installment when due and must face the consequence of their own actions. There was no policy in effect, and therefore no coverage applied on the date of the accident.

Respectfully submitted,

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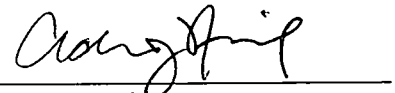
CERTIFICATE

I, Adam J. Neil, attorney for Respondent, certify that Respondent's Final Brief, complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.



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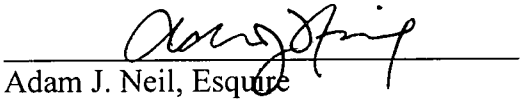
PROOF OF SERVICE

I certify that I have served Respondent's Final Brief on Karen D. Givens, Individually and as Personal Representative of the Estate of E. Cierra Givens, and Kayla Givens, by depositing a copy of it in the United States Mail, postage prepaid, on June 19, 2013, addressed to their attorney of record, Donald J. Budman, Esquire, Solomon, Budman & Strickler, LLP, Post Office Box 30280, Charleston, South Carolina 29417.



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