THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. File No. 1423018

Appellate Case No. 2019-000897

Giles Gregg Long, Claimant, Appellant/Respondent,

v.

Metro Construction, Inc., Employer, American Zurich Ins. Co., Carrier, and South Carolina Workers' Compensation Uninsured Employers' Fund, Respondents/Appellants,

of which Metro Construction, Inc., Employer and the South Carolina Workers' Compensation Uninsured Employers' Fund are Respondents/Appellants,

and American Zurich Ins. Co. is the Respondent.

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STATEMENT OF THE CASE

This is an appeal from the South Carolina Workers' Compensation Commission. The case was head by the Single Commissioner on March 13, 2018. Claimant filed his claim *via* a Form 50 on September 29, 2015. ROA ; Form 50, dated September 29, 2015. The underlying hearing arose from the Claimant's Form 50, Request for Hearing, dated September 20, 2017. In the Forms 50, Claimant alleges multiple injuries suffered on November 20, 2014, while employed by Metro Construction. ROA ; Forms 50. In its Form 51 of October 13, 2017, Defendant/Appellant South Carolina Workers' Compensation Uninsured Employers' Fund ("Fund") asserted that the claim "is either covered by the American Zurich policy or not compensable, as Claimant was the sole proprietor (or president of a corporation in forfeiture) and failed to secure coverage for himself." ROA . Defendant/Appellant American Zurich Ins. Co. ("Carrier") denied both coverage and compensability in its Form 51 of October 20, 2017. ROA . The Employer did not file a Form 51.

Fund filed a Motion to Add Party Defendant on March 24, 2017. ROA . The motion was based on the grounds that, at the time of the alleged accident, Employer Corporation had been administratively dissolved. The Motion was denied by a Single Commissioner on April 19, 2017. ROA . Fund appealed the April 19, 2017, Motion Order by timely filing a Form 30 on April 27, 2017. ROA . The appeal was dismissed as interlocutory by Judicial Conference Decision and Order dated May 15, 2017. ROA .

The Single Commissioner issued his Order on the merits on August 22, 2018. ROA ; The Single Commissioner found, *inter alia*, that the Employer had coverage on the date of accident

through Carrier. ROA ; Findings of Fact Ten (10) through Twenty-One (21), Thirty-Five (35) through Thirty-Eight (38), Single Commissioner's Order. However, the Single Commissioner also found that the Claimant was an employee of Employer on the date of accident, that Claimant's injuries were suffered in the course and scope of employment with Employer, and that the majority rule regarding corporations in forfeiture should not be applied in South Carolina. ROA ; Findings of Fact Four (4) through Six (6), Twenty-Three (23) through Twenty-Four (24), Single Commissioner's Order.

Both Fund and Carrier timely appealed. ROA ; Fund's Form 30, dated September 5, 2018; Carrier's Form 30, dated September 5, 2018. The matter was heard by the Appellate Panel of the Full Commission on December 17, 2018. ROA ; Appellate Panel Order p. 3. The Appellate Panel issued its Order on April 30, 2019. ROA ; Appellate Panel Order p. 44. The Appellate reversed the Single Commissioner's Findings that Carrier is liable for payment of benefits; however, the Appellate Panel affirmed the Single Commissioner's Findings that Claimant continued to be protected by the corporate veil even though he continued to operate corporation's business while in forfeiture. ROA .

STANDARD OF REVIEW

The Administrative Procedures Act governs judicial review of decisions of the commission. S.C. Code Ann. § 1-23-380 (Supp. 2014); *Bone v. U.S. Food Serv.*, 404 S.C. 67, 73, 744 S.E.2d 552, 556 (2013). "Whether an intermediate action or ruling is immediately reviewable is to be decided on a case-by-case basis i.e., whether a review of the final decision would not provide an adequate remedy." *Hilton v. Flakeboard America Limited*, 418 S.C. 245, 249, 791 S.E.2d 719, 721 (2016). "In proceedings governed by the APA, a final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing

to be done but to enforce by execution what has been determined." *Nucor Corp. v. S.C. Dept. of Employment and Workforce*, 410 S.C. 507, 514-15, 765 S.E.2d 558, 562 (2014). "An agency decision which does not decide the merits of a contested case but merely remands to the Department for further action is not a final agency decision subject to judicial review." *S.C. Baptist Hosp. v. S.C. Dept. of Health and Envt'l Control*, 291 S.C. 267, 270, 353 S.E.2d 277, 279 (1987).

The South Carolina Administrative Procedures Act sets forth the standard for judicial review of decisions of the Workers' Compensation Commission. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981); *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2004). Pursuant to this scope of review, the Court may not substitute its judgment for that of the appellate panel as to the weight of the evidence on questions of fact. *Gadson v. Mikasa Corp.*, 364 S.C. 214, 221, 628 S.E.2d 262 (2006); *Grant v. Grant Textiles*, 361 S.C. 188, 603 S.E.2d 858 (Ct. App. 2004). Substantial evidence is described as, "not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached." *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 622, 594 S.E.2d 727 (2004). "The determination of whether a worker is a[n] [] employee is jurisdictional and, therefore, the question on appeal is one of law." *Collins v. Seko Charlotte*, 412 S.C. 283, 288, 772 S.E.2d 510, 513 (2015) (citing *Fortner v. Thomas M. Evans Constr. & Dev., L.L.C.*, 402 S.C. 421, 429, 741 S.E.2d 538, 543 (Ct. App. 2013). On issues of law, "this court has the power and duty to review the entire record and decide the jurisdictional facts in accord with its view of the preponderance of the evidence." *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 216, 661 S.E.2d 395, 399 (Ct. App. 2008).

STATEMENT OF FACTS

Claimant alleges that, on November 20, 2014, he suffered multiple injuries in an explosion that arose out of and were suffered in the course of his employment. Claimant alleges that, at the time of the incident, he was an employee of Employer. ROA ; Forms 50. Employer was incorporated on September 14, 1999. ROA ; APA pp. 742 – 743. Claimant is the sole shareholder and officer (president) of Employer. ROA ; Hr. Tr. p. 203, ll. 10 – 20.

Claimant capitalized Employer with a loan from himself, and that loan has never been repaid. ROA ; Hr. Tr. p. 203, l. 21 – p. 204, l. 5. Employer has no board of directors. ROA ; Hr. Tr. p. 204, ll. 8 – 9. Employer conducts no shareholder meetings. ROA ; Hr. Tr. p. 204, ll. 10 – 11. Employer fails to keep minutes. ROA ; Hr. Tr. p. 204, ll. 12 – 13. Claimant owns, in his own name, the property where Employer conducts business. ROA ; Hr. Tr. p. 207, l. 20 – p. 208, l. 2; APA p. 915. Employer uses equipment personally owned by Claimant in its business (including a farm tractor and farm implements) and does not pay a fair rental price to Claimant. ROA ; Hr. Tr. p. 210, ll. 4 – 15. The *Claimant's* attorney – not the Employer's attorney – mailed a $1,000.00 check to the Workers' Compensation Commission for the penalty it assessed against *Employer* as a result of Employer's failure to maintain workers' compensation coverage. ROA ; APA p. 917. Claimant self-servingly signed a Compliance Agreement with this Commission on behalf of Employer. ROA ; APA p. 918.

Employer was not in good standing with the South Carolina Secretary of State at the time of the incident. ROA ; Hr. Tr. p. 212, ll. 7 – 15; APA p. 916. Nor was Employer in good standing at the time the claim was filed. ROA ; Form 50, dated September 29, 2015. The evidence shows that Employer went into forfeiture on March 3, 2014. ROA ; APA p. 916. The date of the incident is November 20, 2014. ROA ; Form 50, dated September 29, 2015. Employer's corporate status

was not reinstated until December 14, 2016, subsequent to discovery being performed by the parties. ROA ; APA p. 916.

ARGUMENT

WHETHER THE COMMISSION ERRED IN FAILING TO APPLY THE MAJORITY RULE REGARDING LIABILITY FOR ACTIONS TAKEN BY OFFICERS OF CORPORATIONS IN FORFEITURE?

Employer was administratively dissolved by the Secretary of State on March 3, 2014. ROA ; APA 916. Over eight months later, Claimant suffered the subject injuries (November 20, 2014). ROA ; Forms 50. Employer's corporate status was reinstated on December 14, 2016. ROA ; APA p. 916. The question in the Fund's appeal is whether, by conducting business on behalf of a corporation in forfeiture, does the Claimant/President of Corporation in Forfeiture/Sole Shareholder of Corporation in Forfeiture assume liability for the actions he takes? If so, was Claimant self-employed at the time of the accident? Fund asserts that Claimant was self-employed at the time of the accident, and, as such, his injuries are not compensable under the South Carolina Workers' Compensation Act.

Administrative Dismissal & Meaning of "Relate Back"

According to S.C. Code Ann. § 33-14-210(d), "[a] corporation dissolved administratively continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs . . . ." An administratively dissolved corporation may be reinstated under S.C. Code Ann. § 33-14-220. Further, per S.C. Code Ann. § 33-14-220(c), "[w]hen the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and *the corporation resumes carrying on business* as if the administrative dissolution had never occurred." (emphasis added).

Whether personal liability is imposed on the officers in such situations has been litigated in other courts, but Fund can find no reported opinion from South Carolina. As such, this is a matter of first impression. In the Fourth Circuit case of *Moore v. Occupational Safety and Health Review Commission*, 591 F.2d 991, the issue is discussed extensively. The Fourth Circuit wrote that,

> A majority appears to have construed their statutes of dissolution as imposing personal responsibility on the directors for any liabilities, whether in contract or in tort, incurred in the continued operations of the dissolved corporation's business after forfeiture of its charter. This construction accords with what was the rule at common law.

Moore v. Occupational Safety and Health Review Commission, 591 F.2d 991, 994-95 (4th Cir. 1979). The Supreme Court of Vermont has also addressed this issue. In *Daniels v. Elks Club of Hartford*, that Court wrote, "Where the reinstatement statute does not explicitly address personal liability, the majority rule appears to be that those who act for the corporation after its termination, *but before reinstatement, are personally liable for actions occurring during that period.*" 2012 VT 55, 58 A.3d 925, 945 (2012) (emphasis added).

Without dispute, the South Carolina reinstatement statute does not address personal liability. According to the plain language of our statute, the words "relate back" specifically refer to the corporation's business and in no way refer to the potential personal liability of actions taken by corporate officers during forfeiture; the South Carolina reinstatement statute is silent on personal liability of corporate officers. If the majority rule were applied in South Carolina, which equity would require, Claimant/Employer would be personally liable for the actions taken during the dissolution. Here, because corporations are creatures of statute and cannot carry on business during forfeiture, the actions that were taken by Claimant during the incident were necessarily taken on behalf of Claimant. If Claimant/Employer continued to operate his business while in

dissolution (as the Appellate Panel so found), he did so without securing necessary workers' compensation insurance coverage, contrary to law (as the Appellate Panel so found). According to the majority rule, Claimant would be personally liable for the actions taken during that time. According to the Fourth Circuit, "[e]ven after dissolution, the directors are shielded from individual liability *if they discharge the duties the statute places on them to marshal assets, pay pre-existing debts, and distribute the remaining funds, if any, to the shareholders*. Moreover, the directors may temporarily continue the corporate business as an incident to its liquidation without incurring individual liability." *Flip Mortg. Corp. v. McElhone*, 841 F.2d 531, 534 (4th Cir. 1988) (emphasis added). Thus, he could not be performing work for the corporation because, by law, the corporation could not perform any wok other than that necessary to wind up its affairs. S.C. Code Ann. § 33-14-210(d).

Both Claimant and Employer will argue that the wording of the reinstatement statute absolves the Claimant/Employer of any personal liability for his actions taken in conducting the business during dissolution. However, this argument ignores the majority rule. Further, if the Employer were a distinct legal entity separate from the Claimant, one would presume that Employer would not be advocating that it should be liable, as it did to the Appellate Panel of the Full Commission (especially stupefying considering that the Commission determined that "Claimant has accumulated over two million dollars in casually related medical expenses . . . ." ROA ; Finding of Fact Thirty-Six (36), Order of Single Commissioner, p. 24.). As a result of Employer's argument, it should be liable (more on this *infra*), the Appellate Panel of the Full Commission made an award of over Two Million Dollars ($2,000,000.00) against Employer. ROA ; Fiding of Fact Thirty-Six (36), Order of Appellate Panel of Full Commission, pp. 38 – 39.

In this case, Claimant/Employer became a sole proprietor who did not elect coverage under the Workers' Compensation Act (if Employer is ultimately determined to be without coverage), and, as such, he is not be entitled to benefits, per S.C. Code Ann. § 42-1-130 ("Any sole proprietor or partner, upon this election [of obtaining coverage through a carrier], is entitled to benefits . . . ."). Interestingly, the Appellate Panel seemed to find that because the Fund's Motion to Add Claimant as Employer was dismissed by a previous Appellate Panel as Interlocutory, that the matter could not be raised again:

> On April 19, 2017, Commissioner Aisha Taylor ruled in favor of the Claimant and denied Defendant Fund's motion to add Gregory Long individually as a Defendant. Moreover, we further find that Defendant Fund's appeal to the Full Commission was denied on May 15, 2017 as Commissioner Taylor's ruling was considered interlocutory and not subject to further appeal.

ROA ; Finding of Fact Twenty-Four (24), Appellate Panel Order pp. 36 – 37. Certainly, effectively applying the doctrine of *res judicata* to appeals dismissed as interlocutory within an administrative agency is in error. *See Bone v. United States Food Serv.*, 399 S.C. 566, 733 S.E.2d 200 (2012). The appeal was dismissed as interlocutory because a final judgment had not yet been entered: "In proceedings governed by the APA, a final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." *Nucor Corp. v. S.C. Dept. of Employment and Workforce*, 410 S.C. 507, 514-15, 765 S.E.2d 558, 562 (2014). If it could be, it would provide no avenue for relief.

The Appellate Panel also dismissed the application of *Moore v. Occupational Safety and Health Review Commission*,[1] because "the corporation in *Moore* was in forfeiture at the time of the proceedings against it, [Employer] is not *currently* in forfeiture." ROA ; Finding of Fact

[1] 591 F.2d 991 (4th Cir. 1979).

Twenty-Four (24), Appellate Panel Order p. 37. The Fund argues this is also in error. Employer was in forfeiture on the date of the accident: "The law in effect at the time of the injury governs the rights of the parties and not the law effective at the time the award is made . . . ." *Sellers v. Daniel Constr. Co.*, 285 S.C. 484, 486, 330 S.E.2d 305, 306 (1985) (citing *Grigsby v. Industrial Commission*, 76 Ill. (2d) 528, 31 Ill. Dec. 796, 394 N.E. (2d) 1173 (1979)) (a case from a foreign jurisdiction). Further, Employer remained in forfeiture at the time he filed a claim. ROA ; Form 50, dated September 29, 2015.

Fund's Payment of Benefits on Behalf of Employer

Like corporations, the Fund is a creature of statute. The Fund is not an insurance carrier. Employers do not pay premiums to the Fund. The Fund was "created to ensure payment of workers' compensation benefits to injured employees whose employers have failed to acquire necessary coverage for employees in accordance with provisions of this section." S.C. Code Ann. § 42-7-200(A)(2). The Legislature gave the Fund the ability to "place a lien on the assets of the employer by way of *lis pendens* or otherwise so as to protect the fund from payments of costs and benefits. If the fund is required to incur costs or expenses or to pay benefits, the fund has a lien against the assets of the employer to the full extent of all costs, expenses, and benefits paid . . . ." S.C. Code Ann. § 42-7-200(C). Further, the Fund "has all rights of attachment set forth in Section 15-19-10 and has the right to proceed otherwise in the collection of its lien in the same manner as the Department of Revenue is allowed to enforce a collection of taxes generally pursuant to Section 12-49-10, *et seq.*" S.C. Code Ann. § 42-7-200(D).

Accordingly, if Fund is required to pay benefits in this case, it may then undertake collections actions against Employer. Under these facts, Employer's corporate veil is thin. According to the this Court in *Hunting v. Elders*, the eight (8) factors considered when determining

whether the corporate veil can be pierced are: "(1) whether the corporation was grossly undercapitalized; (2) failure to observe corporate formalities; (3) non-payment of dividends; (4) insolvency of the debtor corporation at the time; (5) siphoning of funds of the corporation by the dominant stockholder; (6) non-functioning of other officers or directors; (7) absence of corporate records; and (8) the fact that the corporation was merely a facade for the operations of the dominant stockholder." 359 S.C. 217, 225, 597 S.E.2d 803, 807 (Ct. App. 2004). This eight (8) factor analysis "looks to observance of the corporate formalities by the dominant shareholders." *Sturkie v. Sifly*, at 280 S.C. 453, 455 – 56, 313 S.E.2d 316, 317 – 18. Here, absolutely no corporate formalities were observed and there was only one (1) shareholder and a single officer: that being Claimant.

Here, Claimant/President of Employer Corporation in Forfeiture/Sole Shareholder of Employer Corporation in Forfeiture was the individual responsible for the employer maintaining coverage. However, if this Court determines that he, in fact, failed to maintain coverage, equity demands that Claimant should be estopped from seeking benefits through Fund. If he is awarded benefits from the Fund, it will be because, through his negligence, he failed to opt in and pay for coverage, shifting the burden to the State. Claimant should not be rewarded for his negligent acts.

As noted above, if the Employer were a distinct legal entity separate from the Claimant, one would presume that Employer would not be advocating that it should be liable, as it did to the Appellate Panel of the Full Commission (especially stupefying considering that the Commission determined that "Claimant has accumulated over two million dollars in casually related medical expenses . . . ." ROA ; Finding of Fact Thirty-Six (36), Order of Single Commissioner, p. 24.). As a result of Employer's argument, it should be liable (more on this *infra*), the Appellate Panel of the Full Commission made an award of over Two Million Dollars ($2,000,000.00) against

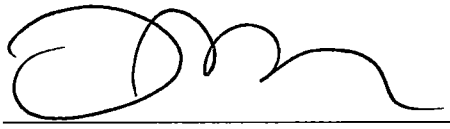
Employer. ROA ; Fiding of Fact Thirty-Six (36), Order of Appellate Panel of Full Commission, pp. 38 – 39.

Because of the reasons set forth herein and that may be heard at oral arguments, if the ultimate determination is that Carrier did not provide coverage to Employer on the date of incident, because Claimant was self-employed at the time of the incident and did not elect to be covered under the South Carolina Workers' Compensation Act, he is not entitled to benefits, and the Order of the Appellate Panel of the Full Commission should be reversed.

CONCLUSION

Based upon the foregoing arguments and authorities, if the ultimate determination is that Carrier did not provide coverage to Employer on the date of incident, because Claimant was self-employed at the time of the incident and did not elect to be covered under the South Carolina Workers' Compensation Act, he is not entitled to benefits, and the Order of the Appellate Panel of the Full Commission should be reversed.

RESPECTFULLY SUBMITTED,



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and American Zurich Ins. Co. is the Respondent.

PROOF OF SERVICE

I hereby certify that I have served Respondent/Appellant Fund's Initial Brief and Designation of Matter to be included in the Record on Appeal of the attorneys for all other parties by placing them in the U.S. Mail, sufficient postage pre-paid, on August 28, 2019, addressed as follows:

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August 28, 2019

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RE: Appellate Case No 2019-000897
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Metro Construction, Inc., Employer, and American Zurich Ins. Co. and The SC Uninsured Employers' Fund, Carrier, Defendants,
of which Metro Construction, Inc., Employer, and The SC Uninsured Employers' Fund, Carrier are Respondents/Appellants,
and American Zurich Ins. Co. is the Respondent.

Dear Ms. Kitchings:

I am enclosing herewith the following documents to be filed in your office:

1. One copy of the Initial Brief of the Respondent/Appellant Fund; and
2. Respondent/Appellant Fund's Designation of Matter to be Included in Record on Appeal; and
3. Certificate of Counsel; and
4. Proof of Service upon counsel for the Appellants and Respondents.

Respectfully,

HOLDER PADGETT LITTLEJOHN + PRICKETT

Timothy B. Killen

TBK/maa
Enclosures
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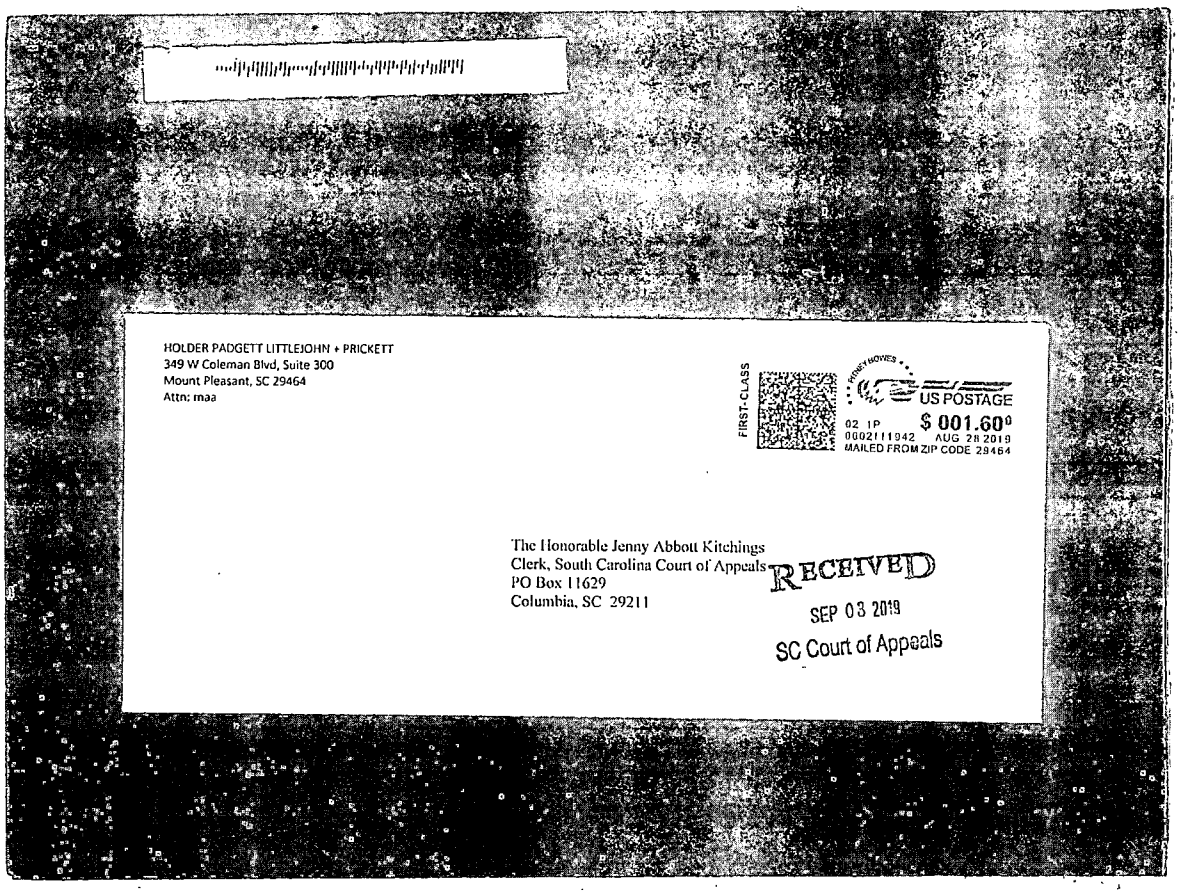

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