

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

J Mark Hayes II, Circuit Court Judge

Case No.: 2017-CP-42-03726
Appellate Case No.: 2019-001382

Raquel Martinez, Employee, Respondent,

-v.-

Spartanburg County, Employer,
and South Carolina Association
of Counties, Self-Insurance Fund, Appellants.

BRIEF OF THE RESPONDENT

J. Kevin Holmes
David T. Pearlman
THE STEINBERG LAW FIRM, L.L.P
61 Broad Street
Post Office Box 9
Charleston, South Carolina 29402
(843) 720-2800

and

Chadwick D. Pye
CHDWICK D. PYE, L.L.C.
Post Office Box 6346
Spartanburg, South Carolina 29304
(864) 583-5658
Attorneys for the Respondent

TABLE OF CONTENTS

Table of Authorities	ii
Facts	1
Standard of Review	9
Arguments	
I THE CIRCUIT COURT DID NOT ERR IN REVERSING THE COMMISSION'S DECISIONS ON COMPENABILITY UNDER SECTIONS 1-23-380(5)(d), (e), AND (f)	11
II. THE CIRCUIT COURT DID NOT ERR IN RULING CAUSATION WAS ESTABLISHED AS A MATTER OF LAW BASED ON THE UNANIMOUS OPINIONS OF THE MEDICAL EXPERTS	21
III. THE CIRCUIT COURT DID NOT EXCEED ITS JURISDICTION BY REVERSING THE COMMISSION UNDER SECTION 1-23-380 FOR THE REASONS STATED IN THE CIRCUIT COURT'S ORDERS	26
IV. THE COURT SHOULD DECLINE TO HEAR THE APPELLANT'S DUE PROCESS AND EQUAL PROTECTION ARGUMENTS BECAUSE NO JUSTICIABLE CONTROVERSY HAS BEEN PRESENTED	28
Conclusion	29

TABLE OF AUTHORITIES

CASES

<u>Anderson v. Baptist Med. Ctr.</u> , 343 S.C. 487, 541 S.E.2d 526 (2001)	22
<u>Bentley v. Spartanburg County</u> , 398 S.C. 418, 730 S.E.2d 296 (2012)	24
<u>Bone v. U.S. Food Service</u> , 404 S.C. 67, 744 S.E.2d 552 (2012)	14
<u>Brown v. R.I. Jordan Oil Company</u> , 291 S.C. 272, 353 S.E.2d 280 (1987) .	
<u>Burnette v. City of Greenville</u> , 401 S.C. 417, 737 S.E.2d 200 (S.C. App. 2012)	24
<u>Christy v. Christy</u> , 317 S.C. 145, 452 S.E.2d 1 (S.C. App. 1994)	15
<u>Consolidated Edison Co. v. NLRB</u> , 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126 (1938)	16
<u>Crane v. Raber's Discount Tire Rack</u> , Opinion No. 27951 filed March 11, 2020).....	23
<u>Dickert v. Metropolitan Life Ins. Co.</u> , 306 S.C. 311, 411 S.E.2d 672 (S.C. App. 1991)	11
<u>Doe v. Dept. of Disabilities</u> , 364 S.C. 411, 615 S.E.2d 785 (S.C. App. 2005)	13
<u>Edwards v. Pettit Constr. Co., Inc.</u> , 273 S.C. 576, 257 S.E.2d 754 (1979)	23
<u>Ellison v. Frigidair Home Products</u> , 371 S.C. 159, 638 S.E.2d 664 (2006) ...	22
<u>Etheredge v. Monsanto Co.</u> , 349 S.C. 452, 562 S.E.2d 679 (S.C. App. 2002)	11
<u>Ferguson v. State Highway Dept.</u> , 197 S.C. 520, 15 S.E.2d 775 (S.C. 1941)	23
<u>Fowler v. Abbott Motor Co.</u> , 236 S.C. 226, 113 S.E.2d 737 (S.C. 1960)	23
<u>Gibson v. Spartanburg School District #3</u> , 338 S.C. 510, 526, S.E.2d 725 (S.C. App. 2000)	12
<u>Glover v. Columbia Hospital of Richland County</u> , 236 S.C. 410, 114 S.E.2d 565 (S.C. 1960)	23
<u>Grayson v. Carter Rhoad Furniture</u> , 317 S.C. 306, 454 S.E.2d 320 (1995) ..	23
<u>Heirs v. Brunson Const. Co.</u> , 221 S.C. 212, 70 SE2d 211 (1952)	23
<u>In re: Morrison</u> , 321 S.C. 370, 468 S.E.2d 651 (1996)	20
<u>Jon L.L.C. v. Town of Mt. Pleasant</u> , 338 S.C. 406, 526 S.E.2d 716 (2000) ...	20
<u>Kearse v. S.C. Wildlife Resources Dept.</u> , 236 S.C. 540, 115 S.E.2d 183 (1960)	13
<u>Kinsey v. Champion American Service Center</u> , 268 S.C. 177, 232 S.E.2d 720 (1977)	11
<u>Lark v. Bi-Lo, Inc.</u> , 276 S.C. 130, 276 S.E.2d 304 (S.C. 1981)	11
<u>Lorrick v. S.C. Electric & Gas Co.</u> , 245 S.C. 513, 141 S.E.2d 662 (1965)	11
<u>Lennon v. S.C. Coastal Council</u> , 330 S.C. 414, 498 S.E.2d 906 (S.C. App. 1998)	28
<u>Martinez v. Spartanburg County</u> , 406 S.C. 532, 753 S.E.2d 436 (2014)	28

<u>Mullen v. Myrtle Beach Golf & Yacht Club</u> , 313 S.C. 412, 438 S.E.2d 248 (1993)	15
<u>Muir v. C. R. Bard, Inc.</u> , 336 S.C. 266, 519 S.E.2d 583 (S.C. App. 1999)	11
<u>Nawa v. Wachenhut Corp.</u> , 288 S.C. 250, 341 S.E.2d 800 (S.C. App. 1986)	21
<u>Pee Dee Elec. Coop, Inc. v. Carolina Power and Light</u> , 279 S.C. 64, 301 S.E.2d 761 (1983)	28
<u>Portman v. Garbade</u> , 337 S.C. 186, 522 S.E.2d 830 (S.C. App. 1999)	20
<u>Potter v. Spartanburg Sch. Dist. 7</u> , 395 S.C. 17, 23, 716 S.E.2d 123, 126 (S.C. App.2011)	23
<u>Russell v. Wal-Mart Stores, Inc.</u> , 426 S.C. 281, 826 S.E.2d 863 (2019)	28
<u>Shealy v. Aiken County</u> , 341 S.C. 448, 535 S.E.2d 438 (2000)	11
<u>Shealy v. Aiken County</u> , No. 96-CP-02-1181, 1997 WL 34881021 (S.C. Com. Pl. July 21, 1997)	22
<u>Sloan v. Greenville County</u> , 356 S.C. 5311, 590 S.E.2d 338 (S.C. App. 2003)	28
<u>Smith v. NCCI, Inc.</u> , 369 S.C. 236, 631 S.E.2d 268 (S.C. App. 2006)	23
<u>Smith v. Union Bleachery/Cone Mills</u> , 276 S.C. 454, 280 S.E.2d 52 (1881)	11
<u>Spivey Ex Rel. Spivey v. Carolina Crawler</u> , 367 S.C. 154, 624 S.E.2d 435 (S.C. App 2006)	28
<u>Sturkie v. Ballenger</u> , 268 S.C. 536, 235 S.E.2d 120 (S.C. 1977)	11
<u>Universal Camera Corp. v. NLRB</u> , 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed 456 (1951)	16

STATUTES

Article 1, Section 8 of the South Carolina Constitution	29
Article 1, Section 22 of the South Carolina Constitution	10
<i>S.C. Code Anno.</i> , § 1-23-380(5), 1976 as amended	10
<i>S.C. Anno.</i> , § 42-1-160 as amended in 2007	29
<i>S.C. Code Anno.</i> , § 42-17-60, 1976 as amended	10

OTHER AUTHORITY

Jean Hoefler Toal, Shahin Vafai & Robert A. Muckenfuss, <i>Appellate Practice in South Carolina</i> 122 (1999)	30
5 C.J.S., Appeal and Error, § 975(a) (1993)	15

FACTS

Martinez served as a probation and parole officer before becoming a Spartanburg County Sherriff's Office patrol officer and a crime scene investigator. (R. 243, 257). Her supervisor, Captain Denton, testified she performed her job diligently, dependably, and without emotional problems of any kind. (R. 307 - 308).

On April 4, 2005, Martinez was assigned to investigate a fatal motor vehicle accident involving the death of an infant daughter run over by her father. The father was a police officer, Officer Johnson, who Martinez had served with when she was a uniformed patrol officer. Martinez' supervisor, Captain Denton, described the crime scene:

I observed our former officer, Officer Johnson, in his carport. The door was open, he was balled up, crunched up. Obviously, probably the most distraught I've ever seen anybody. He actually wanted to take his own life and attempted to do that prior to us getting there, however, his weapon was taken from him... [The officer] had backed over – evidently backed over his daughter, who I believe at the time was either two or just under the age of two, and essentially, it had crushed her. If you can imagine taking a watermelon or something like that and running it over with a car, that's essentially what you have, but it's a human being.

(R. 306 - 307). It was the worst crime scene Captain Denton ever saw:

Well, first of all, having known the officer and having a child run over by a vehicle, or the person having a child run over by a vehicle or the person you know causing the death of that, I've never encountered that. As far as ranking the grotesqueness of it, it's a child. It was run over by a police car. It was an accident. If I had to rank it as far as my feeling, my emotion, it would be the worst.

(R. 306). It was the only time in Captain Denton's twenty year law enforcement career that he investigated a violent death involving someone he knew:

Q: In your 20-plus years in law enforcement, how many times have you investigated a crime scene where you knew the victim?

A: I can't — I can't think of any violent crimes, burglaries, property crimes, I can probably name a few, but violent crimes where a person — either suicide or been killed, I can't — I can't recall any.

(R. 313).

Captain Denton testified the crime scene investigation was extreme and out of the ordinary for Martinez:

Q: All right. Well, let me ask you this: as a 20-plus year veteran of the Sheriff's Office with 70 to 75% of your time spent in death investigations, and as Raquel's supervisor, would you say that the April 4th, 2005, investigation involving your former employee, A.J., killing his two-year-old daughter would have been an extreme situation in her employment?

A: Yes.

Q: Was this a scene that was out of the ordinary?

A: Yes.

(R. 318 - 319). When cross examined in an attempt to show Martinez was performing her ordinary job, Captain Denton testified:

Q: In fact, everything she did out there as far as her activities at the scene in doing a crime scene investigation was a part of her ordinary duties that day?

A: If you remove the condition of the child itself and knowing the officer, remove that condition and that would be true.

Q: Well, you have to — forensic investigators have to investigate deaths of children, don't they?

A: Sure.

Q: So the fact that she was investigating a child doesn't take it out of her ordinary investigations, does it?

A: I don't think the whole — you get the whole story until you add the condition that existed, and the whole truth is that, that condition existed that day, and I think it was extraordinary because of that.

Q: Because...

A: I don't think it was ordinary that day.

Q: Pardon?

A: I don't think it was an ordinary job for anybody that day, and I think –

Q: But what she did was her job, was it not?

A: What she did was her job. Ordinary, if you're talking about, you know, had it been anywhere else that day, it would have been ordinary. But it wasn't anywhere else, and that's –

Q: Well, as far as the child is concerned – let's take the father out of it. If some other child has been run over, would you consider that to be extraordinary?

A: That's not what happened.

Q: Well, I'm not asking you – I'm saying assume. If it was some other person's child that had been run over, they would that – and she investigated the child, would there be anything unusual or extraordinary about that?

A: No.

Q: So it boils down to the fact that this [child's father] was a former employee of the Spartanburg County's Sheriff's Department?

A: It boils down – that's half of the fact. The other half of the fact is, again, it's an infant that was run over by a police car that was driven by a former employee whom we were friends with. That's the whole fact.

(322 - 324).

Upon learning the investigation involved her friend and fellow officer, Officer Johnson, Martinez asked to be excused from the investigation for the first time in her career. (R. 246, 307). Captain Denton denied her request but later regretted his decision:

I don't know that I feel guilt. What I do know I feel is I would attack an investigation or a situation, it doesn't always mean that's probably the right way for each person, depending on gender, depending on experience levels, depending on those kind of issues. And if I had taken that into account that afternoon, knowing what I know now, I probably would have let somebody else more experienced come out there and listened to the

employee instead of deciding that regardless we were gonna do our job.

(R. 332).

Like Captain Denton, Martinez testified she had never investigated a violent death involving someone she knew:

It's hard to believe that – that I can recall in all 28 years I have never had to deal with someone in a violent situation or in a violent death – I have never had to deal with someone that I actually knew...

(R. 254). Martinez further testified what affect her law enforcement relationship with Officer Johnson had upon her:

I considered [him] a friend, not to mention a co-police officer. We kind of stick together like a thin blue line, if y'all have ever heard that expression. We deal with things all the time that regular people don't see, so you get very close to your workers.

(R. 254). Martinez explained:

It's really us against them and – ... this is the way I feel, anyway as a police officer. I can be in the middle of a park full of people, and if somebody jumps me to hurt me, then I've got to defend myself, but if there's somebody in uniform near me, I know that I'm not going to die because somebody's gonna be there to back me up. That person. I don't know about all the other 99 behind me, but that police officer has a bond that's going to make them help a fellow officer. That's just it.

(R. 286 - 287). Martinez described serving with Officer Johnson:

The county was cut into like eight pieces, and each one was a zone; [Officer Johnson] was assigned another zone. Sometimes we had two to a zone. Sometimes we didn't have but one person working two zones. So, a lot of times if you were in this zone here and there was call in this zone that you're not sure about it, it might be a bad call or whatever or just sounds suspicious, you go that way to go back up the officer that responds to the call. That way you don't have 20 minutes, you know, when they get into a fight or whatever to get there; you're already close to them. So, that's why

I said that we backed each other up. Did we work in the same area? I don't think we ever worked the same area, but we worked side by side, and if he got into fights or if I got into fights, we would respond. He would be there and I would be there.

(R. 282).

Martinez explained how her relationship with Officer Johnson affected her:

I think the difference is that like when you go to a burn scene, this is – and it sounds cold, but you get through it the way you get through it this is no longer a person; this is an object. And you have to keep a distance when you do these. I think [Officer Johnson's] case, or the child's case, was different because I have never seen it with anyone that I knew or that I couldn't turn her into an object. I couldn't just say that's just a little girl over there. I couldn't do that. You can't do that.

(R. 264 - 264).

To her credit and despite her misgivings, Martinez performed her duties that day for four hours. (R. 248). She took the unusual step of putting up screens to block views of the "ghoulish" scene. (R. 269 - 270). She gathered evidence, took measurements, and moved the body so it could also be photographed. (R. 258 - 262).

Martinez testified the most disturbing part of the investigation was:

I had to get underneath [the car] to take – see if I see any evidence of where the child was underneath the vehicle, and there were clumps of her hair and skin on the tire and on the asphalt, and then on the part of the – I don't know the undercarriage of the car very well, but the biggest part, I guess is going to be the gasoline tank. There were fingerprints, and there was the impression of a hand, I should say, not the whole hand but, just the little-bitty fingerprints dragging across the gasoline tank.

(R. 249 - 250). Those "little-bitty fingerprints" would become Martinez' recurring nightmare.

Captain Denton's testified the investigation had an immediate, "specifically that day," effect on Martinez. (R. 308). Martinez testified she began having nightmares about the fingerprints. (R. 249). She began having crying spells. (R. 291). A few days later, on April 7, 2005, her family physician, Dr. Wider, for the first time wrote in her medical chart "[t]here is a lot of stress on [Martinez's] job...". (R. 372). Over the following weeks Martinez' condition and job performance deteriorated. Captain Denton asked two chaplains to counsel her but Martinez testified:

...that didn't work, and it kept bothering me. I couldn't sleep at night. It would always be about the little girl, about the fingerprints under the tank.

(R. 249,, 312). She became vulnerable to other emotional stresses in her life. On April 19, 2005 her family physician noted she was upset and crying because her husband's cousin had expectedly died from AIDS, prescribed Xanax, and took her out of work. (R. 372). When Martinez attempted to returned to work on April 29, 2005, she passed out and was admitted to the hospital for uncontrollable hypertension. (R. 374). In his office note of May 26, 2005, Dr. Weider wondered whether there was something bothering Martinez he was missing:

But I am really at a loss as to explain why this girl's blood pressure is running so high. There has got to be either we are missing the boat somewhere or she is not taking her medicine. It has got to be one or the other, and I have a feeling I am missing the boat on something.

(R. 378).

The stress, lack of sleep, and nightmares took their toll. On August 7, 2005, Martinez suffered a complete mental breakdown. Her father described what he found when he responded to a call for help from Martinez' neighbor:

It was about 6:00 to 6:30 in the morning. I got a call from her next-door neighbor, she called and said, "Mr. Martinez, Raquel is going up and down in the front yard, and she's talking weird. I mean, something is wrong with her. I think it's good for you to come and look and it." So I did. I got in my car and went over there. As soon as I got there, I saw something was really bad because the car windshield was smashed to pieces. So I continued going to her house door, knock on the door, and it wasn't locked. I opened the door, and I knew right away that something was real bad. It looked like a hurricane came through it. Everything was everywhere. The glass back door was to pieces, one of the window screens was all smashed. I mean it was a mess. So I went through the house asking, "Raquel, Raquel, where are you?" And I could not find her, so I went outside and looked in the yard. I didn't see her, so I told the next-door neighbor, I said, "Please call 911 because I'm gonna go and find – and try to find Raquel. But when I find her, I want somebody here." So I took my car, I went around the neighborhood, and I could not find her. So when I was coming back, a lady said, "Hey, sir, are you looking for somebody?" I said, "yes, ma'am." She said, "Well, there's a young lady behind these bushes."

(R. 292 - 293). Hiding in the bushes Martinez kept saying, "I want this little girl to be with me. I want her here. I want her here." (R. 295). Martinez' mother testified Martinez pretended to brush an imaginary little girl's hair at the hospital. (R. 299-300).

The hospital admitted Martinez for psychotic delusions, including the delusion she was traveling on a steamboat down the Mississippi River with an imaginary little girl. (R. 293). She was discharged from the hospital to out-patient care but quickly had to be "stepped back up" to in-patient care. (R 491 - 493). Her in-patient psychiatrist, Dr. Castriotta, realized "because of [Martinez's] work as a police officer, she feels reluctant to open up in group in case there are some people in some way

related to open cases she's working on." (R. 485 - 487). In private counseling Dr.

Castriotta reported what Martinez said:

When I asked her why she was overtaking her medicines she returns to discussing a case she had several months back when a 2 year old was run over inadvertently by a police officer who ran over his own child. That would have been distressing but she knew the police officer ...

(R. 485 - 489).

Martinez continued to receive medical care after discharge from the psychiatric hospital from Dr. Sherbondy, her out-patient psychiatrist, Luther A. Diehl, Ph.D., her clinical psychologist, and Dr. Weider, her primary care physician. All of her treating medical providers related her mental breakdown to the crime scene investigation she performed on April 4, 2005. Dr. Sherbondy stated his opinion:

The above referenced patient is currently under my care for Major Depressive Disorder the Post Traumatic Stress Disorder. It is my professional opinion that the patient's current condition is directly related to the incident that occurred in April of 2005 while employed with the Sheriff's Department. Ms. Martinez investigated the accidental death of a two year old child whose death occurred while her father was moving a car.

(R. 525 - 526). Dr. Diehl stated his opinion:

I am writing in response to your request about two issues related to Ms. Martinez and her psychiatric difficulties. She did experience a significant traumatic work related situation which occurred on April 4, 2005. This situation involved investigation of a death which was of a young child and the death was a result of her father's moving of a car. The father was a former Spartanburg County Deputy and current Greenville County deputy. The severity of injuries along with the personal involvement regarding the father were certainly an unusual and fairly unique set of circumstances. It would be my impression that Ms. Martinez had been functioning quite well in her employment situation with the Sheriff's Department for six years and prior to that in Probation and Parole in South Carolina for about ten

years. While she experienced the recent death of a cousin, this individual has serious medical problems and was really considered to have a terminal prognosis. Based on these factors, it is my opinion that her current psychological difficulties and impairment in work functioning were precipitated by the work related stressor on April 4, 2005.

(R. 525 - 526). And, Dr. Weider, who previously wondered if he was missing something, put the pieces together and stated:

Raquel comes back to the office today after a long absence she is no longer with the Sheriff's Department due to some very severe emotional problems that occurred during an investigation... She has been hospitalized for emotional problems after the investigation of a former deputy who ran over his little two-year-old girl in their driveway accidently and it was just the last straw for Raquel.

(R. 502).

Appellants had Martinez independently evaluated by Dr. John F. Abess, a psychiatrist. In response to specific written questions, Dr. Abess stated his opinion:

1) WHAT IS YOUR DIAGNOSIS OF MS. MARTINEZ'S PSYCHIATRIC CONDITION?

Her primary psychiatric diagnoses are:

Post Traumatic Stress Disorder, Recurrent Episode,
Chronic Bipolar I Affective Disorder

2) IN YOUR OPINION, DID SHE HAVE ANY OF THESE CONDITIONS PRIOR TO 4 APRIL 2005?

Claimant has evidence of Bipolar Mood Disorder existing prior to her related trauma although the diagnosis was not officially recognized.

3) IN YOUR OPINION WAS ANY OF MS. MARTINEZ'S PSYCHIATRIC CONDITIONS CAUSED OR AGGRAVATED BY THE ACCIDENT INVESTIGATION CONDUCTED BY MS. MARTINEZ ON APRIL 4, 2005?

Yes. Both Bipolar and Post Traumatic Stress Disorders were aggravated by the trauma experienced during the accident investigation she conducted on April 4, 2005.

(R. 542 - 543).

STANDARD OF REVIEW

Judicial review of the decisions of administrative agencies is guaranteed by Article I, Section 22 of the South Carolina Constitution. Judicial review of the decisions of the Workers' Compensation Commission is provided under Section 42-17-60 of the Workers' Compensation Act:

The award of the commission ... is conclusive and binding as to all questions of fact. However, either party to the dispute ... may appeal from the decision of the commission ... for errors of law under the same terms and conditions as govern appeals in ordinary civil actions.

Judicial review of the Commission's decisions is also provided under Section 1-23-380(5) of the Administrative Procedures Act:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decision are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

The Workers' Compensation Act is liberally construed toward providing coverage rather than non-coverage. *Shealy v. Aiken County*, 341 S.C. 448, 535 S.E.2d 438 (2000) citing *Dickert v. Metropolitan Life Ins. Co.*, 306 S.C. 311, 411 S.E.2d 672 (S.C. App. 1991). Courts reviewing a decision of the Commission may reverse for an error of law. *Sturkie v. Ballenger*, 268 S.C. 536, 235 S.E.2d 120 (1977); *Etheredge v. Monsanto Co.*, 349 S.C. 452, 562 S.E.2d 679 (S.C. App. 2002); *Muir v. C. R. Bard, Inc.*, 336 S.C. 266, 519 S.E.2d 583 (S.C. App. 1999). When the evidence gives rise to only one reasonable inference, the question becomes one of law for the court to decide. *Smith v. Union Bleachery/Cone Mills*, 276 S.C. 454, 280 S.E.2d 52 (1881); *Kinsey v. Champion American Service Center*, 268 S.C. 177, 232 S.E.2d 720 (1977); *Lorrick v. S.C. Electric & Gas Co.*, 245 S.C. 513, 141 S.E.2d 662 (1965). The substantial evidence required to support a factual finding of the Commission is not a mere scintilla of evidence, nor 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 in order to justify its action. (emphasis in original). *Etheredge v. Monsanto Co.*, 349 S.C. 452, 652 S.E.2d 679 (2002); *Gibson v. Spartanburg School District #3*, 338 S.C. 510, 526, S.E.2d 725 (S.C. App. 2000).

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN REVERSING THE COMMISSION'S DECISIONS ON COMPENABILITY FOR BEING AFFECTED BY AN ERROR OF LAW, UNSUPPORTED BY THE SUBSTANTIAL EVIENCE ON THE WHOLE RECORD, AND ARBITRARY.

Appellants argue in Question I of their brief that this Court should reverse the Circuit Court because the Commission's findings on compensability were supported

by substantial evidence. The Circuit Court reversed the Commission's decisions on compensability because they were affected by an error of law, unsupported by the substantial evidence on the whole record, and arbitrary. This claim was before the Circuit Court for judicial review twice before this appeal. It is important to understand the procedural history to understand the reasons for the Circuit Court's reversals. Each time the Circuit Court reversed the Commission it remanded the case out of deference to the Commission. Each time the Commission repaid that deference by deliberately ignoring the Circuit Court's Orders. This appeal involves more than substantial evidence.

In Case No.: 2007-CP-42-1966, the Circuit Court found the Commission's findings of facts 14 and 15 were relevant to compensability:

14. Investigating the death of a child, even the child of a former Sheriff's Deputy, was not an unusual or extraordinary condition of [Martinez'] Employment.
15. [Martinez] failed to prove that she encountered an unusual or extraordinary condition in her employment on April 4, 2005, while employed by the Spartanburg Sheriff's Department. This finding is based on all the evidence in the record.

(R. 22, 34). The Circuit Court noted, "[t]he Single Commissioner gave no basis for his factual conclusion in Finding of Fact 14, and as to Finding of Fact 15 ... he simply stated ... '[t]his finding is based on all the evidence in the record.'" (R. 34). That left the Circuit Court having "to speculate if the proper analysis was applied and whether the factual conclusions upon which the law was applied has a substantial basis in the record." (R. 35 - 36). To determine whether a proper analysis had been applied, the

Circuit Court reviewed the mental injury case law. “Although stress may be inherent in a given job, a combination of stressful events may still be unusual and extraordinary and, therefore, compensable.” *Shealy, supra.*, citing *Kearse v. S.C. Wildlife Resources Dept.*, 236 S.C. 540, 115 S.E.2d 183 (1960); *Doe v. Dept. of Disabilities*, 364 S.C. 411, 615 S.E.2d 785 (S.C. App. 2005). “A fatal error occurs in the analysis when the Commission focuses on the ordinary aspects of the claimant’s employment to the exclusion of an examination of the extraordinary, and the consequent use of these ordinary aspects to support the conclusion that the injury is not compensable.” *Doe, supra.* (concurring opinion of Chief Justice Toal). (R. 38). The Circuit Court found, “the fatal flaw in the present case is the [Commission’s] focus on the ordinary aspects of [Martinez]’ employment to the exclusion of an examination of the extraordinary or unusual, and the effects on [Martinez] of these factors.” (R. 39). To determine whether the factual conclusions upon which the law was applied had a substantial basis in the record, the Circuit Court reviewed the testimony of Martinez and Captain Denton, the only witnesses who testified as to compensability, and found:

There is nothing in the record which this Court can find to support the factual conclusion that investigating the death of a child of a former Sheriff’s deputy’s child was not unusual or extraordinary. Again, the [Appellant] called no witnesses at the hearing. [Martinez] and [Captain] Denton were the only witnesses to testify on the subject and their testimony does not support Finding of Fact 14.

(R. 36). The Circuit Court ruled the Commission's decision was affected by an error of law and not supported by the substantial evidence on the whole record under Sections 1-23-350(5)(d) and (e) and remanded the claim to the Commission. (R. 45).

There was an appeal to the Court of Appeals followed by a Petition for a Writ of Certiorari granted by this Court before the appeal was remanded as interlocutory under *Bone v. U.S. Food Service*, 404 S.C. 67, 744 S.E.2d 552 (2012). It was almost six years before Martinez' claim was back before the Commission. An Appellate Panel of the Commission heard oral arguments and the Circuit Court took note of the following colloquy between Commissioner Barden and Appellants' former attorney:

MR. KALE: Okay. May it please the panel. First, let me address Judge Hayes' order and what it requires or implies. And I would cite you to the very bottom sentence of page nine. He says, this court is left to speculate if the proper analysis was applied by the commission and whether the factual conclusions upon which the law was applied has a substantial base in the record. If he says that the record is not sufficient findings of fact that would allow him to do a judicial review, then how can we [accept] all of this other analysis as being a proper judicial review when he says he can't make it. And that's what I have a problem with, with Judge Hayes. Judge Hayes, I think, is clear from his order what he wanted to do in this case.

COMMISSIONER BARDEN: Right, right.

MR. KALE: And the fact is he's having his cake and eating it too.

COMMISSIONER BARDEN: By saying he has to speculate or he can only speculate, but then ---

MR. KALE: And then he tells us -- he's supposedly telling the commission where they went wrong. So I think it's very clear from his order that the remand is to get sufficient findings of fact that would support judicial review. And is not any kind of mandate that you have follow his -- anything else that's in his order. But let me also, if I may --

COMMISSIONER BARDEN: Do you think that we are bound by his -- they're a couple of things in here I don't ---

MR. KALE: I do not think you're bound by anything he puts in the order, because he has already prefaced that he's remanding it

because are insufficient findings of fact, and he would have to speculate as to what the findings of the commission were and what the conclusions of the commissioner were. So I don't think that you're bound by anything that is in his order. (*Emphasis added*)

(R. 352 - 353). The Appellate Panel agreed it was not bound by the Circuit Court Order, ignored it, and issued a new forty-six-page decision again denying Martinez' claim. (R. 71 - 116).

In Case No.: 2015-CP-42-2015, the Circuit Court began his Order by observing judicial review is guaranteed by Article 1, Section 22 of the South Carolina Constitution as a check on the administrative adjudication of private rights. (R. 121). "After a remittitur is sent down from an appellate court, the [agency] acquires jurisdiction to enforce the judgment and take any action consistent with the appellate court ruling." *Mullen v. Myrtle Beach Golf & Beach Club*, 313 S.C. 412, 438 S.E.2d 248 (1993); *Christy v. Christy*, 317 S.C. 166, 452 S.E.2d 1 (S.C. App. 1994). "Matters decided by the appellate court cannot be reheard, reconsidered, or relitigated, even under the guise of a different form." See: 5 C.J.S., Appeal and Error, § 975(a) (1993). (Circuit Court Order dated 12/3/15, p. 5). The Circuit Court clarified it "did not have a problem determining what the facts were, it had a problem determining whether the proper legal standards for compensability had been applied to the facts." (R. 121). "While this Court did not intend to substitute its judgement for that of the Commission as to the weight of the evidence or to substitute its findings of fact for those of the Commission, it did intend for the Commission to consider the testimony of the only witnesses who testified, quoted by this Court in its prior Order..." (R. 132). The Circuit Court found:

Under the guise of making finding of fact, however, the Appellate Panel did not include any of the quoted testimony supporting compensability. Not only did the Commission ignore the testimony quoted by this Court, it ignored the case law on compensability cited by this Court. This Court cited six cases addressing compensability of mental injuries under the Workers' Compensation Act. Only three of the cases were cited by the Appellate Panel and none of them were cited for the reasons they were cited by this Court. Ignoring the evidence quoted by this Court and the case law cited by this Court on the issue of compensability is not conducting further proceedings consistent with this Court's Order; but, rather, constitutes an arbitrary or capricious disregard of the mandate from this Court.

(R. 133). The Circuit Court then reviewed the historical development of the substantial evidence on the whole record standard first adopted by the United States Congress when it enacted Federal Administrative Procedures Act in 1946. *Compare: Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 59 S. Ct. 206, 83 L.Ed. 126 (1938) (substantial evidence) with *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed 456 (1951) (substantial evidence on the whole record). The importance of the new standard was discussed by Supreme Court Justice Frankfurter:

Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of the evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.

Id., 340 U.S. at 487 – 488. The Circuit Court ruled the substantial evidence on the whole record standard was the standard adopted by the South Carolina Legislature when it enacted Section 1-23-380(5)(e) of the South Carolina Administrative Procedures Act and is consistent with South Carolina case law holding, “[t]he

substantial evidence required to support a finding is not a mere scintilla of evidence, nor 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 in order to justify its action.”

Etheredge, supra.; Gibson, supra. The Circuit Court ruled:

By ignoring the uncontested testimony from the only witnesses who testified, the Appellate Panel blindly viewed the evidence from only one side of the case. The substantial evidence on the whole record established that these officers did in fact know each other, served together, and backed each other up in the line of duty. When this Court considers all the testimony, including the testimony quoted above that was ignored by the Appellate Panel, it cannot conscientiously find the Appellate Panel’s findings on compensability are supported by substantial evidence on the whole record.

(R. 140 - 142).

The Circuit Court felt it was necessary to distinguish this Court’s holding in *Bentley v. Spartanburg County*, 398 S.C. 418, 730 S.E.2d 296 (2012), decided after its prior Order. The Circuit Court noted the police officer in that case who accidentally shot a suspect knew he could be required to use deadly force, was trained on the use of deadly force, and was authorized by departmental policy to use deadly force. The Circuit Court found there was no evidence Martinez knew she could be called upon to investigate violent deaths involving persons she knew, was trained how to perform such investigations, and there was no departmental policy requiring her to perform such an investigation. The Circuit Court further noted the investigation of the violent death of someone she knew was not just a rare occurrence, it was the only time in Captain Denton’s and Martinez’ combined forty-eight-years of law

enforcement experience it had ever happened. Finally, the Circuit Court noted Officer Bentley shot an unknown suspect, not a friend and fellow police officer. (R. 142 - 143).

To avoid any further misunderstanding, the Circuit Court's second remand Order contained specific instructions on compensability:

IT IS HEREBY ORDERED that the Appellate Panel's new findings on compensability are reversed and the claim is remanded to the Commission with the specific instruction that ignoring the undisputed testimony quoted by this Court and the case law supporting compensability cited by the Court is not conducting further proceedings consistent with this Court's prior Order and constitutes an arbitrary and capricious abuse of discretion under § 1-23-380(5)(f); and

IT IS HEREBY ORDERED that the Appellate Panel's new findings of fact on compensability that Deputy Martinez and Officer Johnson did not have a law enforcement relationship are reversed because they are not supported by substantial evidence on the whole record under § 1-23-380(5)(e).

(R. 143).

With the dismissal of another interlocutory appeal to the Court of Appeals and the withdrawal of a Petition for a Writ of Certiorari, it would be another year and half before Martinez' claim was back before the Commission for a second time following judicial review. This time the Appellate Panel, without oral argument, deliberately ignored the Circuit Court's specific instructions and reissued a nearly identical decision. (R. 162 - 194). In Case No.:2017-CP-42-3726, the Circuit Court's Order cut right to the chase:

Despite this Court's clear and specific instructions, the Appellate Panel disregarded this Court's Order a second time and reissued an almost identical Decision and Order ... again ignored the

testimony of the witnesses who testified quoted by this Court, made the same flawed finding Deputy Martinez had no law enforcement relationship with Officer Johnson this Court found was clearly erroneous based on the substantial evidence on the whole record, and failed to make a ruling whether the horrific death of the infant child run over her law enforcement father with whom Deputy Martinez had a law enforcement relationship made the crime scene investigation extraordinary and unusual.

(R. 216). The Circuit Court railed, “[Martinez] has been denied due process of law, denied a final Decision and Order of the Commission that complies with the previous Orders of this Court for eight and a half years.” (R. 216 - 217). The Circuit Court reversed the Commission’s Decision but again, out of deference to the Commission, remanded the claim. The Circuit Court admonished the Commission, however, its third remand “should not be interpreted to suggest this Court is powerless to enforce compliance with its Order” and reminded the Appellate Panel of its power to punish for civil or criminal contempt, to award costs including attorney’s fees, and to refer offending members of the Commission to the appropriate bodies for judicial or professional sanctioning. (R. 219 - 220).

The Circuit Court did not reverse the Commission’s decisions on compensability solely on the grounds its decision was not supported by the substantial evidence on the whole record. The Circuit Court also reversed the Commission’s decisions as affected by an error of law because the Commission focused on the usual and ordinary conditions of Martinez’s employment to the exclusion of the unusual and extraordinary conditions she encountered on November 4, 2005 and as arbitrary because the Commission deliberately refused to consider the testimony of the only witnesses who testified on compensability or the case law cited by the

Circuit Court. Appellants fail to address these alternative grounds for reversal and, therefore, they stand as the law of the case. *Ion L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000); *Portman v. Garbade*, 337 S.C. 186, 190–91, 522 S.E.2d 830, 832–33 (S.C. App. 1999); *In re: Morrison*, 321 S.C. 370, 468 S.E.2d 651 (1996) (ruling which is not contested on appeal is the law of the case). This Court should affirm the Circuit Court's rulings the Commission's decisions were affected by an error of law and arbitrary under Section 1-23-380(5)(d) and (f) not argued in Appellants' brief.

If this Court undertakes to address the single ground argued by Appellants in Question I of their brief, that this Court should reverse the Circuit Court because the Commission's decision was supported by substantial evidence, this Court should begin by ruling the standard is not substantial evidence but substantial evidence on the whole record. This is a critical distinction when the error articulated by the Circuit Court was the Commission's deliberate and repeated failure to consider the testimony of the only witnesses who testified about the conditions of Martinez' employment on the date in question and the affect they had upon her. When the Circuit Court considered the omitted testimony, it found it could not conscientiously find the Commission's decision on compensability was supported by the substantial evidence on the whole record.

In law, as it is in life, unless all the evidence is considered, the decision reached may be wrong. The evidence intentionally omitted by the Commission changes everything. This Court should not countenance the Commission's deliberate failure

to consider the testimony of the only witnesses who testified about compensability. This Court should affirm the Circuit Court's rulings the Commission's findings on compensability were affected by an error of law and arbitrary as the law of the case and as not supported by the substantial evidence on the whole record under Sections 1-23-380(5)(d), (e), and (f).

II. THE CIRCUIT COURT DID NOT ERR IN RULING CAUSATION WAS ESTABLISHED AS A MATTER OF LAW BASED ON THE UNANIMOUS OPINIONS OF THE MEDICAL EXPERTS.

Appellants argue in Question II of their brief that this Court should reverse the Circuit Court because Martinez failed to prove the unusual and extraordinary conditions of her employment were the proximate cause of her mental breakdown. In support of this argument that the conditions of the employment must be "the" proximate cause of a mental injury, the Commission and Appellants reliance on *Nawa v. Wachenhut Corp.*, 288 S.C. 250, 341 S.E.2d 800 (S.C. App. 1986) is misplaced. *Nawa* did not involve a mental injury but a fatal stroke during sexual intercourse. The Court of Appeals in affirming the Commission and Circuit Court in *Nawa*, noted the testimony of a cardiologist that the rupturing of an aneurysm is most commonly associated with sexual intercourse and the testimony of a physician that "most probably" the employee would not have suffered the stroke had he not been engaging in sexual intercourse. The Commission and Appellants reliance on *Shealy, supra.*, is also misplaced. In *Shealy* the issue of whether the aggravation of a pre-existing mental condition is compensable was not preserved for appellate review. *Shealy, supra.*, 535 S.E.2d at 444 - 445. The Circuit Court from which the appeal was taken

found there was an absence of any medical opinion the stress causing Shealy's disability was work related. *Shealy v Aiken County*, No. 96-CP-02-1181, 1997 WL 34881021 (S.C.Com.Pl. July 21, 1997). No medical evidence in either case supported causation and are distinguishable because in the present case it was the unanimous opinions of the medical experts that the conditions of Martinez' employment on November 4, 2005 caused or contributed to her mental injury.

Although the issue of whether the aggravation of a pre-existing mental condition was compensable was not preserved in *Shealy*, it was preserved in the latter case of *Doe, supra.*, in which this Court ruled:

The only evidence of causation is that Claimant's mental injury was caused by her stress at work as stated by Dr. Lowe. Moreover, a history of pre-existing depression does not preclude workers' compensation benefits for a mental-mental injury.

Doe, supra. citing *Ellison v. Frigidaire Home Prods.*, 37 S.C. 159, 638 S.E.2d 664 (2006); *Smith v. NCCI, Inc.*, 369 S.C. 236, 631 S.E.2d 268 (S.C. App. 2006) (the right to compensation for the aggravation of a pre-existing psychiatric condition arises where there is a dormant condition which has produced no disability but which becomes disabling by reason of an aggravating injury) citing *Anderson v. Baptist Med. Ctr.*, 343 S.C. 487, 493, 541 S.E.2d 526, 528 (2001). This is in accord with precedent the generally accepted definition of proximate cause in workers' compensation that, "[a]n accident arises out of the employment when it arises because of it, as when the employment is a contributing proximate cause." *Fowler v. Abbott Motor Co.*, 236 S.C. 226, 113 S.E.2d 737 (1960). "It has been held the aggravation, acceleration, or lighting up of a pre-existing or latent infirmity or weakened physical

condition is compensable, even though the accident would not have caused an injury to a perfectly healthy individual.” *Ferguson v. State Highway Dept.*, 197 S.C. 520, 15 S.E.2d 775 (1941); *Heirs v. Brunson Const. Co.*, 221 S.C. 212, 70 S.E.2d 211 (S.C. 1952); *Glover v. Columbia Hospital of Richland County*, 236 S.C. 410, 114 S.E.2d 565 (S.C. 1960). Like the medical evidence in *Doe, supra.*, the only medical evidence as to causation in the present case was that the conditions of Martinez’ employment caused or aggravated her mental injury.

Martinez understands, while medical evidence “is entitled to great respect,” the Commission is not bound by the opinions of medical experts. *Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (S.C. App.2011). But an important limitation to this rule is that the Commission is only permitted to disregard medical testimony based on other competent evidence in the record. “While a finding of fact of the commission will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it.” *Edwards v. Pettit Constr. Co., Inc.*, 273 S.C. 576, 579, 257 S.E.2d 754, 755 (1979); *Grayson v. Carter Rhoad Furniture*, 317 S.C. 306, 309–10, 454 S.E.2d 320, 322 (1995) (affirming reversal of Commission's decision unsupported by evidence in the record). In *Burnette v. City of Greenville*, 401 S.C. 417, 427–29, 737 S.E.2d 200, 206 (Ct. App. 2012), the Court of Appeals reversed a decision by Commissioner Barden because she substituted her opinion a work injury did not injure or aggravate the claimant’s back for the unanimous opinions of the medical experts that it did. Similarly, in *Crane v. Raber’s*

Discount Tire Rack, Opinion No. 27951 filed March 11, 2020, this Court found Commissioner Barden's credibility findings did not justify ignoring the medical evidence the claimant's hearing loss was caused by an explosion at work.

When the medical evidence is in dispute, the Commission of necessity must weigh the evidence and decide which opinion to believe but when, as here, the medical evidence is not in dispute, the Commission is not allowed to ignore it. The question of causation on undisputed medical evidence becomes a matter of law for the Court to decide.¹ This Court should not be expected to speculate what relevance Martinez having been molested as a child, forty-one years ago, or her having been raped as a teenage woman, twenty-eight years ago, or her having taken a mild antidepressant following a divorce ten years ago have in this case in light of Captain Denton's testimony Martinez performed her duties diligently, dependably, and without any emotional problems of any kind before this investigation. This Court in dicta in *Bentley, supra.*, questioned the continued need for the unusual or extraordinary standard in mental injury cases due to advances in psychiatric and psychological medical science. It should not now countenance the Commission turning its back on the unanimous opinions of the medical experts in this claim.

Like the issue of compensability, the question of causation involves more than whether the Commission can ignore the unanimous opinions of the medical experts.

¹ While not controlling since this claim arose before the amendment, it is worth noting the South Carolina Legislature codified the necessity for medical evidence to establish causation in mental injury claims when it amended Section 42-1-160 in 2007.

In Case No.: 2007-CP-42-1966, the Circuit Court ruled “[t]he only causation conclusion that can be drawn from the record below is that Martinez established her burden of proof that her mental injuries were proximately caused by the stress from the accident investigation.” (R. 43). On remand, however, the Appellate Panel issued a new forty-six-page decision reversing the Circuit’s ruling on causation. In Case No.: 2015-CP-42-2015, the Circuit Court ruled:

Deputy Martinez’ substantial rights were prejudiced by the Appellate Panel reconsidering the issue of causation and, in effect, reversing rather than enforcing, this Court’s prior Order. Reconsidering the issue of causation was in violation of constitutional provisions, in excess of the statutory authority of the agency, made upon an unlawful procedure, or affected by an error of law.

(R. 126). Again, to avoid any misunderstanding, the Circuit Court’s remand Order contained a specific instruction on causation:

IT IS HEREBY ORDERED that the Appellate Panel’s new findings of fact on causation are reversed and the claim is remanded to the Commission with the specific instruction that the Appellate Panel is not to reconsider the issue of causation and to enforce this Court’s previous Order ruling that causation was established as a matter of law based upon the unanimous opinions of the medical experts;

(R. 143). The Appellate Panel deliberately ignored the Circuit Court’s specific instruction and reissued a nearly identical decision again reversing the Circuit Court.

In Case No.:2017-CP-42-3726, the Circuit Court expressed its displeasure:

[Martinez] has now been compelled to file for judicial review for a third time. She has been denied due process of law, denied a final Decision and Order of the Commission that complies with the previous Orders of this Court for eight and a half years. This Court specifically ruled the Commission was not to reconsider causation decided by the Court as a matter of law based on the

factual record, which is not contested. Disregarding this Court's ruling, the Commission reissued an almost identical Decision and Order; again reconsidering causation in what can only be understood as an attempt to reverse this Court. The Commission's findings of fact and ruling of law on causation must again be reversed because the Commission exceeded its limited jurisdiction on remand.

(R. 218). The Circuit Court ruled:

Deputy Martinez' substantial rights were prejudiced by the Appellate Panel reconsidering the issue of causation and, in effect, reversing rather than enforcing, this Court's prior Order. Reconsidering the issue of causation was in violation of constitutional provisions, in excess of the statutory authority of the agency, made upon an unlawful procedure, or affected by an error of law. The Appellate Panel's new findings of fact on causation are reversed under § 1-23-380(5)(a), (b), (c), and (d)...

(R. 126).

This Court should affirm the Circuit Court's reversal of the Commission's decisions on causation because causation was established as a matter of law based on the unanimous opinions of the medical experts and because the Commission's reversal of the Circuit Court's decision on causation was made in violation of constitutional provisions, in excess of the Commission's statutory authority, made upon an unlawful procedure, and affected by errors of law under § 1-23-380(5)(a), (b), (c), and (d).

III. THE CIRCUIT COURT DID NOT EXCEED ITS JURISDICTION BY REVERSING THE COMMISSION UNDER SECTION 1-23-380(5) FOR THE REASONS STATED IN THE CIRCUIT COURT'S ORDERS.

Appellant argue in Question III of their brief that virtually all findings and rulings made by the Commission are factual matters within the exclusive jurisdiction of the Commission. Such a restrictive interpretation of judicial review infringes upon

the right of judicial review guaranteed by Article 1, Section 22 of the South Carolina Constitution and as provided by the Workers' Compensation Act and the Administrative Procedures Act.

Appellants argue the Circuit Court overstepped its jurisdiction by reweighing the evidence and substituting its judgment to that of the Commission. It is not clear how quoting the testimony of the only witnesses who testified as to compensability or quoting the unanimous opinions of the medical experts on causation deliberately and repeatedly omitted from the Commission's decisions could possibly constitute a reweighing of evidence. Nor is it clear how remanding the claim three times out of deference to the Commission constitutes substituting its judgment for that of the Commission. What is clear is the Commission deliberately and intentionally disregarded the Circuit Court Orders thereby infringing on the separation of powers guaranteed by Article 1, Section 8 of the South Carolina Constitution and Martinez' substantial right to have her workers' compensation claim adjudicated in a lawful and timely manner. *Russell v. Wal-Mart Stores, Inc.*, 426 S.C. 281, 826 S.E.2d 863 (2019).

Once the Circuit Court found Martinez' substantial rights had been violated, it had jurisdiction under the Administrative Act to reverse or modify a decision of the Commission for any of the reasons enumerated in Section 1-23-380(5) (a) through (f). Factual findings made by the Commission are not sacrosanct. They must be made in accordance with constitutional principles, in accordance with statutory and case law. They must be made on lawful procedures. They must be such that an appellate court

conscientiously reviewing the whole record can reasonably reach the conclusion reached by the Commission. And, they must not constitute an arbitrary refusal to the follow the judgment of an appellate court on remand following judicial review. For the reasons set forth more fully in Questions I and II above, this Court should rule the Circuit Court had jurisdiction under Section 1-23-380(5) (a) through (f) to reverse the Commission for the reasons stated in the Circuit Court Orders.

IV. THE COURT SHOULD DECLINE TO HEAR THE APPELLANT'S DUE PROCESS AND EQUAL PROTECTION ARGUMENTS BECAUSE NO JUSTICIABLE CONTROVERSY HAS BEEN PRESENTED.

The Appellants argue in Question IV of their brief that their rights to equal protection of the law and due process have been violated. Appellate courts do not give opinions on abstract or hypothetical matters and will only consider a case when a justiciable controversy exists. *Spivey Ex Rel. Spivey v. Carolina Crawler*, 367 S.C. 154, 624 S.E.2d 435, 438 (S.C. App 2006) citing *Sloan v. Greenville County*, 356 S.C. 5311, 590 S.E.2d 338 (S.C. App. 2003) and *Lennon v. S.C. Coastal Council*, 330 S.C. 414, 498 S.E.2d 906 (S.C. App. 1998). "A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical, or abstract dispute." *Pee Dee Elec. Coop, Inc. v.* 279 S.C. 64, 301 S.E.2d 761 (1983).

Appellants' equal protection argument is hypothetical and abstract. Appellants fail to articulate how they have been denied equal protection. It was Martinez' Petition for Certiorari, granted by this Court, that was dismissed as interlocutory under *Bone, supra.*, in *Martinez v. Spartanburg County*, 406 S.C. 532, 753 S.E.2d 436

(2014). It was the Appellants' appeal that was also dismissed by the Court of Appeals as interlocutory under the same case. The rule prohibiting interlocutory appeals was applied equally to both parties below. Appellants' due process argument is tenuous and contingent. Appellants' argument set forth in bullet points at pages 43 and 44 of its brief is: if the claim is remanded, and, if the Commission bends to the will of the Circuit Court, and, if the Appellants start paying the award, and, if it takes a long time for an appeal to work its way through the courts, then the Appellants will have paid out the award leaving them without a legal remedy. None of these "ifs" has yet occurred. Appellants' due process argument is not ripe. *Spivey Ex Rel. Spivey, supra*. A justiciable controversy also requires that an appeal must not be moot. A moot appeal results when intervening events render a case nonjusticiable. *See*: Jean Hoefler Toal, Shahin Vafai & Robert A. Muckenfuss, *Appellate Practice in South Carolina* 122 (1999). This Court's decision in *Russell v. Wal-Mart Stores, Inc.*, 426 S.C. 281, 826 S.E.2d 863 (2019), renders the Appellants' equal protection and due process arguments moot. Under the holding in *Russell*, when the rule against interlocutory appeals results in a cycle of appeals and remands denying a timely resolution of a workers' compensation claim, relief can be granted. Indeed, this Court has agreed to hear this appeal. This Court should decline to hear Appellant's equal protection and due process arguments because they do not present a justiciable controversy.

CONCLUSION

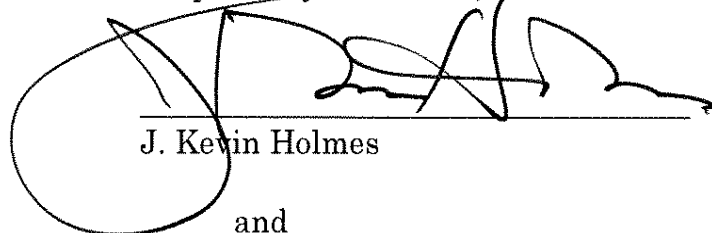
For the reasons set forth under Question I above, this Court should affirm the Circuit Court's reversals of the Commission's decisions on compensability under Sections 1-23-380(5)(d), (e), and (f) because they are affected by errors of law, not supported by the substantial evidence on the whole record, and arbitrary. For the reasons set forth in Question II above, this Court should affirm the Circuit Court reversals of the Commission's decisions on causation under Section 1-23-380(5)(a), (b), (c), and (d) because the Commission improperly ignored the unanimous opinions of the medical experts, reconsidered causation, and improperly reversed the Circuit Court's Order in violation of constitutional provisions. For the reasons set forth under Question III above, this Court should affirm the Circuit Court had jurisdiction under Section 1-23-380(5) to reverse of the Commission's decisions for the reasons stated in the Circuit Court's Orders. And, as set forth in as argued in Question IV above, this Court should decline to hear Appellants' equal protection and due process arguments because they do not present a justiciable controversy.

In fashioning a remedy, Martinez requests this Court put an end to the appeals and remands. Based upon the testimony of the only witnesses who testified as to compensability and the unanimous opinions of the medical experts as to causation, Martinez requests this Court affirm the Circuit Court's ruling the only reasonable conclusion that can be drawn is that the death of a two-year-old infant smashed like a watermelon when run over by her father, a police officer with whom the Martinez had served and considered a friend, made the crime scene investigation on April 4, 2005 unusual and extraordinary. Based on the unanimous opinions of the medical

experts Martinez requests this Court affirm the Circuit Court's ruling the crime scene investigation she performed on April 4, 2005 caused or contributed to Martinez' mental breakdown. If deemed necessary, Martinez requests this Court remand the claim to the Commission solely to perform the ministerial task of awarding benefits under the Act.

The fundamental rights and interests involved in this case, however, extend beyond Martinez' individual claim. The Commission has deliberately and repeatedly ignored the Circuit Court's Orders following judicial review not only denying Martinez of her right to have her claim adjudicated in a lawful and timely manner but infringing on the constitutional separation of powers and the right to judicial review. Remanding Martinez' claim without addressing the Commission's misconduct will allow such misconduct to be repeated. This Court, like the Circuit Court, should admonish the Commission willful contempt of appellate court orders will not be tolerated. In addition to reprimanding the Commission for its wrongful conduct, Martinez requests that this Court retain jurisdiction of this appeal and indicate it will entertain a Petition for Writ of Certiorari in its original jurisdiction if similar misconduct is brought to the Court's attention in the future.

Respectfully submitted,



J. Kevin Holmes

and

David T. Pearlman
THE STEINBERG LAW FIRM, L.L.P.

61 Broad Street
Post Office Box 9
Charleston, South Carolina 29402
(843) 720-2800

and

Chadwick D. Pye
CHADWICK D. PYE, L.L.C.
Post Office Box 6346
Spartanburg, South Carolina 29304
(864) 583-5658
Attorneys for the Respondent

Charleston, South Carolina

July 3, 2020.