THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

Appellate Case No. 2018-001664

Anthony Graham, Employee, Respondent,

v.

Stacy Whitfield d/b/a Whitfield Land & Tree Service, Direct Employer, and S.C. Uninsured Employers' Fund, Carrier,

Of which Stacy Whitfield d/b/a Whitfield Land & Tree Service is the Respondent and S.C. Uninsured Employers' Fund is the Appellant.

FINAL REPLY BRIEF OF APPELLANT

David H. Keller (S.C. Bar # 3345)
Turner Padget Graham & Laney P.A.
200 E. Broad Street
P.O. Box 1509 (29602)
Greenville, South Carolina 29601
Telephone: (864) 552-4622
(864) 552-4620 (facsimile)
dkeller@turnerpadget.com

Evelyn A. Norton, Esq. (S.C. Bar # 102792)
Turner Padget Graham & Laney P.A.
200 E. Broad Street
P.O. Box 1509 (29602)
Greenville, South Carolina 29601
Telephone: (864) 552-4619
(864) 552-4620 (facsimile)
enorton@turnerpadget.com

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I. Mr. Whitfield did not regularly employ four or more employees within the meaning of the Act.

Applying a *de novo* standard of review, the Appellant respectfully requests that this Court reverse the Commission's Decision and Order finding that Mr. Whitfield regularly employed four or more employees and was thus within the purview of the Commission's jurisdiction. This Court should conclude that just the opposite was the case here after exercising "both [its] power and duty to review the entire record, find jurisdictional facts *without regard* to conclusions of the Commissioner on the issue, and decide the jurisdictional question in accord with the preponderance of the evidence." Hernandez-Zuniga v. Tickle, 374 S.C. 235, 244, 647 S.E.2d 691, 695 (Ct. App. 2007) (citing Canady v. Charleston Cnty. Sch. Dist., 265 S.C. 21, 25, 216 S.E.2d 755, 757 (1975)) (emphasis added). Mr. Whitfield simply did not satisfy the minimum number requirement under § 42-1-360 during the relevant time period, and therefore, he was not within the scope of the Act. In turn, he was not required to have workers' compensation insurance, and this incident does not fall under the Commission's jurisdiction.

Despite that the *de novo* standard of review clearly requires that this Court make its own findings of fact *without any regard* to the Commission's findings, Respondent repeatedly relies upon the Commission's findings in his Brief to urge this Court to arrive at exactly the same conclusion as the Commission. (Resp't's Br. 6-7 (citing R. pp. 27-29, Finding of Facts 6, 7, 8, 9, and 13)). Yet, case law makes plain that "[t]he commission's findings of fact relative to the number of employees employed by the employer are not conclusive on appeal" and should be disregarded. Harding v. Plumley d/b/a Plumley Constr. Co., 329 S.C. 580, 584, 496 S.E.2d 29, 32 (Ct. App. 1998).

Here, upon properly reviewing the Record anew pursuant to the *de novo* standard of review, Appellant requests that this Court determine that the preponderance of evidence demonstrates that Mr. Whitfield did not regularly employ four or more employees. While Mr. Whitfield did employ individuals other than the Respondent at various times as day laborers, Mr. Whitfield never worked these individuals all at once. (R. pp. 283-85). Importantly, no more than two individuals ever worked for Mr. Whitfield at the same time, and the individuals hired to work on any given project was determined strictly by the needs of Mr. Whitfield's business. (R. pp. 297, 310-11). In fact, on smaller jobs, Mr. Whitfield worked by himself and did not hire a single day laborer. (R. p. 313). But, even for larger jobs, Mr. Whitfield did not need to hire more than one or two day laborers. (R. p. 313).

While Respondent clings to the fact that Mr. Whitfield paid his day laborers in cash and did not keep them on the company books, this has never been required of any employer and does little to bolster Respondent's tenuous argument that less paperwork than the Respondent's counsel now demands somehow implicates the employer in this case. To be sure, given the nature and limited size of Mr. Whitfield's business, one would hardly expect to find a lengthy payroll. By all accounts, his day laborers' work was "irregular" and "sporadic," determined "by chance" and "for no fixed time" depending on each new project. Smith v. Coastal Tire & Auto Serv., 263 S.C. 77, 81, 207 S.E.2d 810, 811 (1974). Often, on smaller jobs, Mr. Whitfield did not need to hire even a single day laborer. (R. p. 313). Even the term itself, "day laborer," indicates the nature of their work as irregular and dependent upon the day. Plainly, Mr. Whitfield's day laborers were not regularly employed and had no reason to be listed on a payroll. Unsurprisingly then, the only individual ever entered on the company books was Mr. Whitfield's son. (R. pp. 283, 315).

Disregarding Respondent's speculation and the Commission's previous findings, and instead, deferring only to what the Record demonstrates, Appellant respectfully urges this Court to conclude that the preponderance of evidence supports that Mr. Whitfield does not fall with the Commission's jurisdiction by virtue of never having regularly employed four of more employees within the meaning of the Act.

II. Mr. Whitfield's employees were casual in nature, and thus must be excluded from counting toward the total number of employees employed by Mr. Whitfield.

The controlling statute in this case specifically excludes certain individuals from counting toward the four or more total employees required to fall within the scope of the Act. S.C. Code Ann. §§ 42-1-360, 42-1-130. Whether or not an individual is excluded depends upon the nature of their work within the business. One notable example is that of a "casual employee," who is excluded from counting toward the four or more total employees required, *even if* their work is within "the trade, business, profession, or occupation of the employer." § 42-1-130 ("The Act excludes a person whose employment is both casual *and* not in the course of the trade, business, profession, or occupation of his employer.") (emphasis added); § 42-1-360(1) ("This title does not apply to[] a casual employee, as defined in Section 42-1-130.").

The Court's determination of whether or not the individuals in this case fall within the excluded group hinges upon the Court's examination of the nature of the individuals' work within Mr. Whitfield's business. Despite Respondent's baseless assertion, the fact that the specific term "casual" was not utilized during the hearing testimony is completely irrelevant and simply not required in order to conclude that "casual employees" exist here. (Resp't's Br. 8). To the contrary, this is a legal term of art provided by the Act and defined by our case law as "irregular, unpredictable, sporadic and brief in nature." Smith, 263 S.C. at 81, 207 S.E.2d at 811 (quoting 1A Larson, WORKMEN'S COMPENSATION LAW, § 51.00, p. 909) (internal quotations omitted); Benbow

v. Edmunds High School, 220 S.C. 363, 67 S.E.2d 680 (1951). Thus, Respondent's argument that there cannot be any "casual employees" here merely because no witness called them that exact term while giving testimony is, at best, dangerously misleading to this Court and, at worst, in complete derogation of established statutory and case law. (Resp't's Br. 8). Testimony was given that goes directly to the Court's inquiry and constitutes preponderant evidence that these employees were merely "casual" in nature.

Respondent further argues, on equally shaky grounds, that no witness testified that the labor was "irregular, unpredictable, sporadic or brief." (Resp't's Br. 8). A cursory review of the hearing transcript demonstrates a plethora of testimony to that point was, in fact, given: Mr. Whitfield's son, Brant Ritchey, did not work every day, often working a week and then going out of work for some time; Cody Moore worked for Mr. Whitfield for only two days; Mr. Whitfield only hired Cody Moore and Trinity Wilson (Cody Moore's son-in-law) because extra help was needed on one particular job; Gary Whitfield (Mr. Whitfield's brother) only worked as a day laborer for Mr. Whitfield if and when no one else was available to work. (R. pp. 283-85, 290, 315).

Plainly, this constitutes testimony directly addressing the nature of the individuals' work for Mr. Whitfield. And, this testimony demonstrates that these individuals "worked on a most irregular, spasmodic, and sporadic basis." Smith, 263 S.C. at 81, 207 S.E.2d at 812. Nevertheless, Respondent blindly accuses Mr. Whitfield of intentionally deciding not to keep records and pay in cash to skirt legal obligations such as retaining workers' compensation insurance. (Resp't's Br. 9). Respondent further argues that there would be "a lot more employees on the payroll" if records were kept. (Resp't's Br. 9). However, no testimony whatsoever supports this empty accusation and presenting such an argument to this Court without any support is improper.

Accordingly, Appellant urges this Court to disregard Respondent's unfounded finger-pointing and examine facts and testimony actually in evidence to conclude that the Record shows that Mr. Whitfield's employees were merely "casual employees" within the meaning of the Act. Therefore, all should be excluded from counting toward the four or more total employees required to place Mr. Whitfield within the Commission's jurisdiction.

III. Gratuitous employees, many of which are often family members of the employer, such as Mr. Whitfield's wife in the present case, must also be excluded from counting toward the total number of employees employed by Mr. Whitfield.

In addition to employing mere "casual employees" that should not count toward the four or more total employees required to fall within the scope of the Act, Mr. Whitfield's wife also cannot be counted as an employee for the purposes of the Act. Gratuitous employees—many of whom are often close friends or family members of the employer—are also specifically excluded. Such employees are "gratuitous" if they are unpaid for their work or services rendered. Kirksey v. Assurance Tire Co., 311 S.C. 255, 255, 428 S.E.2d 721, 721 (Ct. App. 1993) (holding a person who neither receives nor expects any kind of pay or remuneration for keeping the company books is not an employee). Mr. Whitfield's wife of 11 years, Carla Weaver, clearly falls within this exception as the evidentiary Record shows that she helped Mr. Whitfield with the company books and paperwork but was never paid for her assistance. (R. pp. 293-94, 296).

Appellant clearly made this argument during the hearing and properly preserved the issue for this Court's present review, regardless of Respondent's feigned surprise at the same in his Brief. (Resp't's Br. 9). Indeed, Respondent concedes that counsel for Appellant explained to the Commissioner that "there is case law that says that family members who work in the business and don't get paid cash—even if they live in the family home, are not employees." (Resp't's Br.

9) (quoting R. p. 295). Counsel for Appellant was clearly referencing the almost identical case of Kirksey, wherein this Court held that a family member keeping the company books and performing secretarial duties, but whom was never paid for that work, is not an employee for the purposes of the Act. 311 S.C. at 257-8, 428 S.E.2d at 723 (citing McCreery v. Covenant Presbyterian Church, 299 S.C. 218, 383 S.E.2d 264, 266 (Ct. App. 1989)) (observing that "employee" is defined by the Act as a person in an employment under a contract of hire and that contract of hire connotes payment of some kind). As a result, this Court in Kirksey held that the family member qualified as merely a gratuitous worker. Id.

Accordingly, counsel for Appellant made the issue "sufficiently clear to bring into focus the precise nature of the alleged error so that it [could] be reasonably understood by the judge." Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011). Nothing more is required of Appellant to adequately preserve this argument for appeal. Id. ("Of course, a party is not required to use the exact name of a legal doctrine in order to preserve the issue."). Moreover, even if the issue was not raised below at any level, the issue goes directly to subject matter jurisdiction and can be raised at any time. See, e.g., Lake v. Reeder Constr. Co., 330 S.C. 242, 248, 498 S.E.2d 650, 653 (Ct. App. 1998) ("Lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised *sua sponte* by the court."). Therefore, guided by the case law on point, Appellant urges this Court to characterize Mr. Whitfield's wife as a mere gratuitous employee and exclude her from counting toward the total employees needed to give the Commission jurisdiction over Mr. Whitfield in this case.

IV. Case law makes patent that Mr. Whitfield falls beyond the purview of the Act because he never "regularly" employed four or more of these individuals during the *relevant* time period.

Even if the preponderance of the evidence did not support that all of Mr. Whitfield's employees were mere casual or gratuitous employees, Mr. Whitfield still did not "regularly" employ four or more of those employees during the time period relevant to this case pursuant to § 42-1-360. Therefore, the Commission's finding that Mr. Whitfield fell within the scope of the Act constitutes reversible error.

Contrary to well-established case law regarding the requirement that an employer "regularly" employ four or more employees, Respondent argues that the relevant time period in this case should be 20 years because Mr. Whitfield has been in business for 20 years. (Resp't's Br. 12). However, case law imposes a much tighter fitting timeframe contemporaneous to the work-related injury, which is determined on a case-by-case basis depending upon the nature and needs of the employer's business. See, e.g., Harding, 329 S.C. at 496 S.E.2d at 29 (determining the relevant time period to be two months before through two months after the accident); see also Hernandez, 374 S.C. at 245-46, 647 S.E.2d at 696 (quoting 4 Larson, WORKMEN'S COMPENSATION LAW, § 74.01-02) ("It is the established mode or plan of operation of the business that is decisive."). Furthermore, even if such an extensive time period was appropriate here, Respondent failed to present *any* evidence on this issue.

Clearly, a 20-year review of Mr. Whitfield's business is nowhere near contemporaneous to Respondent's injury as required by case law. Moreover, as a practical matter, a review of two decades of business operations would impose a serious burden on the Court's time as well as distort the longstanding case law parameters into an unworkable legal framework. Therefore, this Court should look only to a short period proximate to the injury in this case. The number of

individuals employed by Mr. Whitfield at other, various times in the past is immaterial to the Court's analysis.

Respondent submits that this issue, too, has not been preserved for appeal, but the relevant time period during which to count up the total number of employees working for the employer is part and parcel to the jurisdictional inquiry. (Resp't's Br. 12). This is evidenced by the hearing testimony, which repeatedly delves into which individuals were working and when they were working. (R. pp. 263-65, 283-94, 296-97, 310-11). Moreover, Respondent admits the hearing testimony itself was limited to a specific timeframe, all focusing on the year during which the Respondent worked for Mr. Whitfield and was injured. (Res'p Br. 12). Plainly, the "when" portion of the jurisdictional inquiry must be addressed before the "who" portion can be ascertained, and is therefore, preserved for this Court's review.

A. Harding v. Plumley d/b/a Plumley Construction Company

Although Harding illustrates how to identify the relevant time period followed by how to apply the definition of "regularly" employed, Respondent reduces the case to standing for the proposition that an employer must provide the Court with payroll records to determine which employees are "regularly" employed. 329 S.C. at 584, 496 S.E.2d at 31. Id. 329 S.C. at 586, 496 S.E.2d at 32-33 (citing Grouse v. DRB Baseball Mgmt., Inc., 121 N.C. App. 376, 378-79, 465 S.E.2d 568, 570 (1996); Patterson v. L.M. Parker Co., 2 N.C. App. 43, 48-49, 162 S.E.2d 571, 575 (1968)) (identifying the relevant time period as two months before and two months after the work-related accident occurred as this corresponded to the period of the construction job and applying "employment of the same number of persons throughout the period with some constancy" as the definition of "regularly" employed).

First, Harding does not impose such a requirement. To the contrary, the burden of proof actually lies with the Respondent here—not the employer—and thus, Respondent improperly attempts to shift the burden onto the employer. See also Ferguson v. New Hampshire Ins. Co., 412 S.C. 203, 213-14, 771 S.E.2d 851, 857 (Ct. App. 2015) (examining whether or not claimant met his burden of proof); Hernandez, 374 S.C. at 242, 647 S.E.2d at 694 (same). Second, and again, such a requirement has never been imposed upon any employer. Even worse, Respondent makes another mental leap by suggesting that the Court would have found Mr. Whitfield had upwards of ten regular employees if only Mr. Whitfield had kept records of his payroll. (Resp't's Br. 13-14). This argument is entirely baseless, constitutes complete speculation, and—yet again—attempts to implicate the employer of intentionally trying to skirt his legal duties with absolutely no evidence to support such a contention.

To summarize the appropriate application of Harding since Respondent has plainly missed the salience thereof, this Court concluded that the Harding employer only "regularly" employed two employees during the relevant time period and that additional laborers "entering and leaving" the employer's service (which in total technically exceeded the minimum four required) was insufficient to bring the employer within the scope of the Act. 329 S.C. at 587, 496 S.E.2d at 33. More specifically, the alleged uninsured employer had at least six individuals working for him at various times during the year in which the claimant's injury occurred, but only two "with any regularity." Id. 329 S.C. at 583, 496 S.E.2d at 30-31. As for the other four employees: Gordon Trammel and John Hall worked only on occasion during half of the relevant time period; Stephen Harding worked for only one day; and Clint Plumley was only paid $350 for work occurring sometime during the same year as the work-related accident. Id. 329 S.C. at 586-87, 496 S.E.2d at 33.

Accordingly, the Court opined that to count these four other employees toward the requisite four would prove contrary to the Act's very purpose of relieving small employers from both the administration and jurisdiction of the Act "by making it applicable to an employer who may have had, in the total number of persons entering and leaving his service during the period, more than the minimum number [four employees] required by the Act. Id. 329 S.C. at 586, 496 S.E.2d at 32 32 (quoting Grouse, 121 N.C. App. at 378-79, 465 S.E.2d at 570; Patterson, 2 N.C. App. at 48-49, 162 S.E.2d at 575).

Exactly as in Harding, Mr. Whitfield did have more than four individuals working for him at various times, but he never worked these individuals all at once and never had four employees at the same time. Id. 329 S.C. at 583, 496 S.E.2d at 30-31. (R. pp. 278-85, 297, 310-11). Moreover, on the date of the Respondent's injury, only the Respondent and Mr. Whitfield's son were working. (R. p. 311). Therefore, the evidentiary Record supports that none of Mr. Whitfield's employees worked "with any regularity." Harding, 329 S.C. at 584, 496 S.E.2d at 31.

B. Hernandez-Zuniga v. Tickle

Respondent fails to address the even tighter relevant time period applied by this Court in Hernandez—beginning approximately one month before the work-related accident and ending shortly after the claimant was injured—and instead pivots to the fact that part-time and full-time employees both count as employees for purposes of determining jurisdiction. (Resp't's Br. 14-15). Appellant does not contest that this is an accepted practice in our workers' compensation system. But, that is not the issue before the Court.

Disregarding Respondent's aside and course correcting back to the inquiry actually before the Court, Appellant urges the Court to apply the legal framework of Harding and

Hernandez to conclude that a narrow time period should apply given "the employer's established mode of operation" but that during that period the employer did not regularly employ at least four employees as required under § 42-1-360. Hernandez, 374 S.C. at 257, 647 S.E.2d at 702.

Here, Mr. Whitfield, like both the Harding employer and the Hernandez-Zuniga employer, had only two or fewer "regularly" employed workers and his remaining employees did not work "with some constancy." In fact, some of Mr. Whitfield's jobs did not require any employees whatsoever and other jobs only required one employee. (R. p. 313). As the evidentiary Record makes clear, Mr. Whitfield might work by himself and hire no day laborers when the job in question was small. (R. p. 313). Only in the case of a larger job would Mr. Whitfield possibly need to hire one or two day laborers. (R. p. 313). Thus, Mr. Whitfield did not "regularly" employ the required number of employees to fall within the Commission's jurisdiction.

C. Ferguson v. New Hampshire Insurance Company

Not only is this case decidedly similar to Harding and Hernandez, the instant case is also remarkably close to the facts and legal analysis set forth by this Court in Ferguson. While Respondent may argue that "[t]he facts of the Ferguson case are so different than the facts in the case at bar that the Ferguson case has no significant relevance to the determination of this case," the facts prove Ferguson to be anything but inapposite. (Resp't's Br. 16).

For example, the employer in Ferguson testified that he operated largely by himself with "some friends here and there, but no one in particular person for a certain—for a long, lengthy time." 412 S.C. at 214, 771 S.E.2d at 851. He also opined that when he would find someone to help him was based on when he acquired work. Id. Here, the Record in this case is clear that Mr. Whitfield's mode of operation was identical.

Mr. Whitfield worked many jobs by himself. (R. p. 313). At other times, Mr. Whitfield hired "pick up" labor based on the particular job that he had and the daily availability of the laborers but never four or more. (R. p. 313). This is exactly like the Ferguson employer, who would decide to hire additional laborers based upon when he acquired new work that necessitated extra help. Thus, the employer's mode of operation in Ferguson was the exact same as the employer in the present case.

As a result, the Appellant respectfully requests that this Court find that Ferguson is not only instructive case law on point, but binding precedent which militates against concluding that the employer here "regularly" employed four or more employees.

V. There is absolutely no evidence in the Record that Mr. Whitfield was intentionally trying to avoid the Act, rendering the Commissioner's finding of the same arbitrary, capricious, and an abuse of discretion.

In his Brief, Respondent merely states that this Court does not permit an employer to "avoid the Act by simply shifting the particular employees they hire." (Resp't's Br. 16). But, yet again, Respondent entirely misses the point. Appellant does not contest that case law forbids an employer from avoiding the Act by such means. Nor does Appellant argue for a change in this doctrine.

Rather, Appellant only points out the fact that the employer in this case has made no such attempt to skirt his legal duties and there is absolutely no evidence whatsoever in the Record to support that the employer was trying to avoid the Act. For this reason, it is unsurprising that Respondent entirely failed to cite to any supporting evidence in his Brief. (Resp't's Br. 16). In fact, the evidentiary Record establishes just the opposite: Mr. Whitfield testified specifically that the needs of his business determine the individuals to be hired and when each is hired. (R. pp. 285, 315). Hiring decisions were dependent upon the demands and size of each job and never

required that all Mr. Whitfield's employees work at once. (R. p. 285). This testimony is uncontradicted and directly undercuts the Commissioner's finding.

Accordingly, without the support of any evidence, the Commissioner's finding that Mr. Whitfield was intentionally trying to avoid the Act was impermissibly based on surmise, conjecture or speculation." Shealy v. Aiken Co., 341 S.C. 448, 455, 535 S.E.2d 438, 443 (2000); Clade v. Champion Labs, 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998). In turn, the Appellant urges this Court to overturn the award by the Commission as unsupported by substantial evidence. Gadson v. Mikasa Corp., 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct. App. 2006) (citing cases). Furthermore, the Commissioner's finding was arbitrary, capricious, and an abuse of discretion. S.C. Code Ann. § 1-23-380(5)(f). The Appellant thus respectfully requests that this Court reverse, at minimum, for both of these reasons.

CONCLUSION

For the foregoing reasons, the Appellant respectfully requests that this Court reverse.

First, Mr. Whitfield does not fall with the Commission's jurisdiction by virtue of never having regularly employed four of more employees within the meaning of the Act.

Second, the Act specifically excludes "casual employees" from counting toward the four or more total employees required, and here, the Record demonstrates that Mr. Whitfield's employees were merely "casual employees."

Third, even if several of these employees were not casual employees and could fairly be counted toward the required minimum number of employees, Mr. Whitfield's own wife still cannot be counted as an employee for the purposes of the Act because she constituted a mere gratuitous employee, having never been paid for her work. Without a doubt, this issue was properly preserved for the Court's review.

Fourth, even if the preponderance of the evidence did not support that all of Mr. Whitfield's employees were mere casual or gratuitous employees that cannot be counted toward the required four or more total employees to place Mr. Whitfield within the Commission's jurisdiction, these individuals were also never "regularly" employed by Mr. Whitfield during the time period relevant to this case. Thus, the Commission's finding that Mr. Whitfield fell within the scope of the Act constitutes error on a second, separate basis. All of the case law on this point requires taking a narrow look at the limited number of people "regularly" working during only a short and relevant period proximate to the injury in question.

Finally, the Commissioner's finding that Mr. Whitfield was intentionally trying to avoid the Act was arbitrary, capricious, and an abuse of discretion given that no evidence whatsoever supports this finding. The Commissioner's finding is baseless speculation.

Any of the above reasons constitutes sufficient grounds for reversing this case.

Respectfully submitted,

David H. Keller, Esquire (S.C. Bar # 3345)
TURNER, PADGET, GRAHAM & LANEY, P.A.
200 E. Broad Street
P.O. Box 1509 (29602)
Greenville, South Carolina 29601
(864) 552-4622
(864) 552-4620 (facsimile)
dkeller@turnerpadget.com

Evelyn A. Norton, Esquire (S.C. Bar # 102792)
TURNER, PADGET, GRAHAM & LANEY, P.A.
200 E. Broad Street
P.O. Box 1509 (29602)
Greenville, SC 29601
(864) 552-4619
(864) 552-4620 (facsimile)
enorton@turnerpadget.com

Attorneys for Appellant

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellant and Final Reply Brief of Appellant comply with Rule 211(b), SCACR.

January 7, 2019

David Hill Keller, Esquire
Turner, Padget, Graham & Laney, P.A.
200 E. Broad St.
Post Office Box 1509 (29602)
Greenville, SC 29601
(864) 552-4622
(864) 552-4620 (facsimile)
dkeller@turnerpadget.com
Attorney for Appellant
South Carolina Uninsured Employers' Fund