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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION APPELLATE PANEL
Aisha Taylor, Commissioner

Appellate Case No. 2018-001237
W.C.C. 1507304

Kenneth L. Barr, Employee,.....Appellant,

v.

Darlington County School District, Employer, and
SC School Boards Insurance Trust, Carrier,.....Respondents.

RESPONDENTS' RETURN TO MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

PLEASE TAKE NOTICE, that the above-named Respondents, Darlington County School District and the South Carolina School Boards Insurance Trust, respectfully request that the Court of Appeals deny the Motion for Leave to File an *Amicus* Brief, based upon the following:

1. The Record on Appeal was filed on March 7, 2019 and pursuant to the mandates of Rule 211, S.C.A.C.R., final briefs were required to be filed no later than March 27, 2019.

2. The Court of Appeals heard oral arguments in this case on February 2, 2021 and issued its Order on April 7, 2021.
3. On May 17, 2021, a group called the "Injured Workers' Advocates" or "IWA" filed a Motion for Leave to File a Brief as *amicus curiae* and provisionally filed a brief with the Court of Appeals containing new arguments and at least 12 new legal citations not raised or cited by the Appellant.
4. Appellate Court Rule 213 requires that a "brief of an *amicus curiae* may be filed only by leave of the appellate court granted on motion" and "shall comply with the requirements of Rule 208(b) and 211."
5. The brief provisionally filed by the IWA does not comply with either Rule 208(b) or Rule 211, S.C.A.C.R., and the Respondents respectfully contend that the Motion for Leave to File should be denied.
6. Rule 211 requires that final briefs "shall" be filed and served within "twenty (20) days after the service of the Record on Appeal." By their Motion, the IWA attempt to file a brief 783 days after the service of the Record on Appeal (exceeding the deadline by a factor of 39) and more than three-months after the conclusion of arguments in this case. Therefore, the brief is not in compliance with Rules 208(b), 211, or 213, S.C.A.C.R., and the Motion for Leave to File a brief should be denied.
7. To grant such extraordinary relief at this stage of the appellate process, when the Respondents themselves are not entitled to even reply to the Petition for Rehearing (Rule 221, S.C.A.C.R.), would be grossly prejudicial the Respondents, detrimental to judicial economy, and would in effect give the Appellant a second bite at the proverbial apple in violation of the Respondents' right to due process and the clear mandates of the Appellate Court Rules. *See* Toal, *et al.*, APPELLATE PRACTICE IN

SOUTH CAROLINA (2nd Ed. 2002) at p. 309 (explaining that the "purpose of a petition for rehearing is not to ... have the case tried in the appellate courts a second time") (citing Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E.2d 234 (1933)). Indeed, "[t]he purpose of a petition for rehearing is not to have presented points which lawyers for the losing parties have overlooked or misapprehended." Arnold, *supra*. However, that is exactly what the IWA attempts to do with their Motion for Leave to File and one of the reasons it should be denied.

8. More importantly, Rule 213 requires that an *amicus* brief "shall be limited to argument of the issues on appeal." The sole issue raised by the IWA concerns the admissibility of Dr. Pritchard's opinions under S.C. Code Ann. § 42-15-95. What the Injured Workers Advocates (and indeed the Court of Appeals) fail to recognize is that the Appellant raised **no objection** to the admission of Dr. Pritchard's opinions at the August 31, 2016 hearing under any legal theory.[1] There being no contemporaneous objection, neither the IWA, nor the Appellant, can be heard to challenge the admission of Dr. Prichard's opinion on appeal. Because the issue briefed by the IWA was not properly raised to or ruled upon by the Workers'

[1] The Respondents' Brief to the Court of Appeals makes this point clear by stating that the Appellant "made no objection to the submission of Dr. Pritchard's report or Dr. Pritchard's deposition becoming part of the Record when submitted to the Hearing Commissioner...It was not until *after* the Hearing Commissioner denied Barr's claim, based in part on Dr. Pritchard's opinions, that he argued for their exclusion. Therefore, any error now alleged is not preserved for review, as it was neither raised before nor ruled upon by the Hearing Commissioner." (Respondents' Brief pp.46—46) (citations omitted).

Compensation Commission, nor preserved for appeal, the IWA's brief does not comply with Rule 213, S.C.A.C.R., and the Motion for Leave to File should be denied.

9. Prior to the evidentiary hearing before Hearing Commissioner Campbell on August 31, 2016, the Respondents notified the Appellant of their intention to submit both the written report and deposition testimony of Dr. Pritchard into evidence in accordance with S.C. Code Reg. 67-612 and S.C. Code Ann. § 1-23-330. (R. pp.534–535).

10. At the call of the hearing on August 31, 2016, Commissioner Campbell specifically asked,

> "[a]re there any objections to A.P.A.s ... or any other items?
>
> ...
>
> Mr. McDaniel, any objections?" (R. p.1255, l.16 – p.1257, l.24).

In response, counsel for the Appellant raised no objection whatsoever to the admission of Dr. Pritchard's written report or deposition testimony. Instead, according to the Appellant's attorney's own statement to the Hearing Commissioner, he

> "objected to the submission of the reports from Dr. Wade [sic] ... and Dr. Wagner ... and also Dr. Eagerton ... they have never seen or evaluated nor are they here personally to testify .... **outside of that, we don't have any objection to the A.P.A. submissions.**" (R. p.1258) (emphasis added).

Therefore, the opinions of Dr. Pritchard were properly admitted into evidence -- without objection -- by Hearing Commissioner Campbell. Our courts have consistently held that evidence admitted without objection becomes competent and must be considered by the finder of fact. *See* Wayne Smith Const. Co., Inc. v. Wolman, Duberstein, & Thompson, 294 S.C. 140, 363 S.E.2d 115 (Ct. App. 1987) (refusing to address arguments concerning evidence admitted without objection); Cantrell v. Carruth, 250 S.C. 415, 158 S.E.2d 208 (1967) (holding that testimony received without objection "becomes competent and cannot be disregarded" by the court); Wessinger v. Duncan, 113 S.C. 205, 102 S.E. 6 (1920) (explaining that where testimony was not objected to, it "must be considered by the jury"); Minton v. Pickens, 24 S.C. 592 (1886) (holding that "[t]estimony not objected to at the time is competent."). This is true even where there may have been a statutory basis upon which to object to said evidence. Geddings v. Geddings, 319 S.C. 213, 460 S.E.2d. 367 (1995) (involving appellants who failed to contemporaneously object to testimony presented in violation of the Dead Man's Statute).

11. It is also well-settled that the failure to object to evidence at the time it is offered constitutes a waiver of the right to have the issue considered on appeal. Parr v. Gaines, 309 S.C. 477, 424 S.E.2d 515 (Ct. App. 1992). Here, the Appellant did not object to Dr. Pritchard's opinions at the time they were admitted into evidence by Hearing Commissioner Campbell, despite "ample opportunity to object." Id.; *see also* 75 AM. JUR.2d Trial § 426 at 613 (1991) ("an objection to evidence based on a specific ground constitutes a waiver of objections on all grounds not so specified"); id. § 429 at 615 ("[o]n appeal, the party will be limited, ordinarily, to the specific

objections to evidence made at the trial"). Therefore, the Appellant clearly waived his right to have any question regarding the admissibility of this evidence considered on appeal (much less addressed by way of an untimely *amicus* brief) because the Appellant made no contemporaneous or specific objection to Dr. Pritchard's opinions when they were admitted into evidence at the hearing before Commissioner Campbell.[2] *See* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (explaining that a "contemporaneous objection requirement enables trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any particular legal proposition. This, in turn, allows potential errors to be prevented or cured.").

12. Not only did the Appellant consent to the admission of Dr. Pritchard's opinions, the Appellant made no reference to S.C. Code Ann. § 42-15-95 (with respect to Dr.

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[2] The Appellant's Form 58 dated August 16, 2016 does state that "Claimant may object to any report from Dr. Pritchard," however, he did not actually make any such objection at the hearing on August 31, 2016 and he never even threatened to object to Dr. Pritchard's testimony taken by deposition on March 3, 2016. (R. pp.268—275, p.1258) (emphasis added). *Cf.* State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996), *cert. denied,* 117 S.Ct. 2460, 138 L.Ed. 2d 217 (1997) (explaining that even when a motion *in limine* is made and ruled upon, a contemporaneous objection must be made again when the evidence is presented at trial to preserve the issue for appeal); State v. Floyd, 295 S.C. 518, 369 S.E.2d 842 (1988) (holding that a motion *in limine*, even if granted, does not remove the need for a contemporaneous objection at trial); White v. Wilbanks, 298 S.C. 225, 379 S.E.2d 298 (Ct.App. 1989), *rev'd on other grounds*, 301 S.C. 560, 393 S.E.2d 182 (1990)(holding that if a motion *in limine* to exclude evidence is denied, a party must renew its objection when the evidence is presented during trial).

Pritchard's opinions or otherwise) at the evidentiary hearing before Commissioner Campbell. On August 31, 2016, the Appellant presented no arguments and no evidence regarding the application of § 42-15-95. Therefore, no issue regarding § 42-15-95 (or the admissibility of Dr. Pritchard's opinions generally) was properly raised to, or ruled upon by, the Hearing Commissioner and no such issues are preserved for appellate review. Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997) (holding that "[i]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review"); Southern Region Industrial Realty, Inc. v. Timmerman, 285 S.C. 142, 328 S.E.2d 128 (Ct. App. 1985) (holding that where appellant failed to raise the applicability of a statute at the trial level, the statute's applicability may not be considered on appeal).

13. Following the admission of Dr. Pritchard's opinions into evidence, the Appellant made no motion to strike Dr. Pritchard's report or testimony from the record. (R. pp.1252—1398). Of course, "in absence of a contemporaneous objection, a motion to strike may be denied" and the Appellant "could not cure [his] failure to object contemporaneously by moving to exclude the evidence at the end of [his] case." Parr, 309 S.C. 477, 424 S.E.2d 515 (citing Lindsey v. City of Greenville, 247 S.C. 232, 146 S.E.2d 863 (1966)). Nevertheless, the Appellant did not even attempt to cure his failure to contemporaneously object by asking Hearing Commissioner Campbell to strike Dr. Pritchard's opinions.

14. Indeed, the Appellant never raised any issue with respect to the admissibility of Dr. Pritchard's opinions or the applicability of S.C. Code Ann. § 42-15-95 at any time during the August 31, 2016 evidentiary hearing. Of course,

> "[t]he first step in preserving an issue for appellate review is to actually raise it to the lower court ... The idea is to give the lower court a chance to resolve the issue before it is presented to the appellate court. Thus, the lower court must also rule upon the issue for it to be preserved for review." Toal, *et al.*, APPELLATE PRACTICE IN SOUTH CAROLINA (2nd Ed. 2002) at p.66 (citing Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998); Smith v. Phillips, 318 S.C. 453 S.C. 453, 458 S.E.2d 427 (1995)).

Because the Appellant failed to object to Dr. Pritchard's opinions when they were admitted into evidence and failed to raise any argument with respect to S.C. Code Ann. § 42-15-95 at the hearing, Commissioner Campbell had no reason to address these (non)issues in his September 20, 2017 Decision and Order. (R. pp.13—60). *See* S.C. Code Ann. § 42-17-40 (requiring the Commission to make findings of fact and conclusions of law "pertinent to the questions at issue"). As a result, the Hearing Commissioner's Decision and Order does not contain any findings of fact or rulings of law with respect to the admissibility of Dr. Pritchard's opinions or the applicability of S.C. Code Ann. § 42-15-95 and; therefore, these issues are neither preserved for appellate review, nor properly argued by way of an *amicus* brief, and the Motion for Leave to File should be denied.

15. Not only did the Appellant fail to make any contemporaneous objection, not only did the Appellant fail to make any motion to strike during the evidentiary hearing, not only did the Hearing Commissioner not rule upon these issues in his Decision and Order, the Appellant did not file any post-hearing motion asking Hearing

Commissioner Campbell to rule on the admissibility of Dr. Pritchard's opinions or the applicability of S.C. Code Ann. § 42-15-95, as was his right.[3] *See* S.C. Code Reg. 67-215(B) (stating that a Commissioner "may entertain motions to reconsider an order"). Prior to the issuance of Hearing Commissioner Campbell's Decision and Order, the Appellant did file an informal "Request for Reconsideration" by letter dated January 19, 2017 (R. pp.1495—1499; p.1511), in which he (improperly) attempted to relitigate the merits of his claim. *See* S.C. Code Ann. § 67-215(B) (mandating that the Commission will only entertain a motion to reconsider "if the purpose of the motion is not an attempt to reargue the merits of the dispute"). However, the Appellant's January 19, 2017 letter does not raise any argument regarding the admissibility of Dr. Pritchard's opinions or the applicability of S.C. Code Ann. § 42-15-95, though it does complain about the weight accorded Dr. Pritchard's opinions. (R. p.1497). Therefore, no argument with regard to the admissibility of Dr. Pritchard's opinions or the applicability of S.C. Code Ann. § 42-15-95 was preserved for appellate review and the Motion for Leave to File an *amicus* brief addressing these issues should be denied. *See* Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998) (stating that "[p]ost-trial motions are ... used to preserve those [issues] that have been raised to the trial court but not yet ruled upon by it.") (internal citations omitted).

16. Even in the Appellant's six-page letter to the Hearing Commissioner dated September 18, 2017 (sent two-days prior to the issuance of the Decision and Order),

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[3] To be clear, the Appellant never filed any formal motion to reconsider an order in accordance with S.C. Code Reg. 67-215(B).

the Appellant raised no objection to the admissibility of Dr. Pritchard's opinions pursuant to S.C. Code Ann. § 42-15-95 or on any other basis. (R. pp.1500—1505). However, the law clearly requires that objections to the admissibility of evidence be specific, in additional to being contemporaneously raised and actually ruled upon by the Hearing Commissioner. *See* Broom v. Southeastern Highway Contracting Co., 291 S.C. 93, 352 S.E.2d 301 (Ct. App. 1986) (holding that the objection should be sufficiently specific to bring into focus the precise nature of the alleged error). While the Appellant's September 18, 2017 letter outlines a litany of complaints, including a critique about which passages of Dr. Prichard's testimony should be quoted in the Decision and Order (R. pp.1502—1503), such complaints do not constitute evidentiary objections and certainly lack the requisite specificity to preserve any argument regarding the admissibility of Dr. Pritchard's opinions or the applicability of S.C. Code Ann. § 42-15-95 for review by the appellate courts. Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998) (holding that to preserve an issue for appeal, specific grounds in support of the objection must be clearly stated).

17. Even after the Workers' Compensation Commission's Appellate Panel issued its final Order on June 5, 2018 -- without addressing the admission of Dr. Pritchard's opinions or the application of S.C. Code Ann. § 42-15-95 -- the Appellant did not file a Motion for Reconsideration in an attempt to preserve these issues for appellate review, as was his right pursuant to S.C. Code Reg. 67-215(B). The Appellant did "strongly object" to the Order ultimately endorsed by the Appellate Panel, but made no request that the Panel address the admissibility of Dr. Pritchard's opinions or the applicability of S.C. Code Ann. § 42-15-95 in its Order. (R. pp.1516—1517). Therefore, the Appellant failed to preserve these issues for appellate review and the

IWA's Motion for Leave to File should be denied on the basis that it addresses issues not properly before the Court of Appeals, in contravention of Rule 213, S.C.A.C.R..

18. In addition, both Rule 208(b)(4) and Rule 211, S.C.A.C.R., require that all briefs shall contain references to the Record "to support the salient facts alleged." The IWA alleges that "[t]here is no question the required notification [under § 42-15-95] was not provided," but their provisional brief is completely devoid of any reference to the Record and; therefore, by definition, it lacks the requisite support for the salient "facts" alleged that the Appellate Court Rules require. In fact, there is no evidence to support IWA's allegations, as the record contains no evidence or documentation of any allegedly improper communications with any health care provider, nor any evidence that any medical reports or opinions were the result of any allegedly improper communication, and the Respondents deny any improper communication. Of course, the trier of fact – the Workers' Compensation Commission – made no finding or conclusion regarding the elements or application of S.C. Code § 42-15-95 and certainly made no finding that the "required notification was not provided." Because the Appellant did not actually object to Dr. Pritchard's opinions when they were admitted into evidence and because the Commission never made any findings of fact or conclusions of law regarding the admissibility of Dr. Pritchard's opinion or applicability of S.C. Code Ann. § 42-15-95, the IWA apparently relies on nothing more than the Appellant's own self-serving declarations in this regard.[4] However,

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[4] In the Court's April 7, 2021 Order, reference is made to a number of unfounded "assertions" made by the Appellant regarding alleged communications with Dr. Pritchard, which are not evinced by actual evidence in the Record. The Appellants have denied these assertions (characterizing them as allegations); therefore, it is presumed

the substantial evidence rule governs appeals from the Workers' Compensation Commission, which prohibits reliance on a "mere scintilla of evidence" or "evidence viewed blindly from one side of the case." Lark v. Bi-Lo, Inc., 375 S.C. 130, 276 S.E.2d 304 (1981). A factual claim cannot be based on surmise, conjecture or speculation as the IWA and Appellant argue. *See* Kennedy v. Williamsburg Co., 242 S.C. 477, 131 S.E.2d 512 (citing numerous cases for the proposition that findings of the Workers' Compensation Commission "must not be based on surmise, conjecture, or speculation). Therefore, the provisional *amicus* brief is not in compliance with Rules 208(b), 211, or 213, S.C.A.C.R., and the Motion for Leave to File a brief should be denied.

19. Not only did the Workers' Compensation Commission not make any findings of fact or conclusions of law regarding the elements of S.C. Code Ann. § 42-15-95, but the Respondents respectfully contend that a reviewing court lacks the authority to do so on appeal. S.C. Code Ann. § 42-15-95 governs the "communication of medical history by health care providers" and requires that "opinions obtained in violation of this section must be excluded from any proceedings." The authority to resolve the

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the Court's opinion contains a typographical error to when it states, "Employer [sic] asserts Employer communicated with Dr. Pritchard..." Since the issue was first raised on appeal, the Respondents have consistently maintained that there was no violation of S.C. Code Ann. § 42-15-95 – even if the Appellant's allegations were accepted as true— and, more importantly, that "this objection was not raised before or ruled upon by the Hearing Commissioner and is not preserved for review." (Respondents' Brief p.47, ¶2; R. p.894). No evidence to the contrary was presented to the Workers' Compensation Commission, which made no findings of fact regarding the nature or implication of any alleged communications.

factual questions under § 42-15-95 (*i.e.*, whether a health care provider communicated improperly and, if so, whether proffered opinions resulted from such improper communication) is expressly reserved to the Workers' Compensation Commission. Fox v. Newberry County Memorial Hospital, 319 S.C. 278, 461 S.E.2d 392 (1995) (holding that a reviewing court has no authority to determine factual issues on appeal); *see also* S.C. Code Ann. § 42-3-180 (requiring that "[a]ll questions arising under [Title 42] ... shall be determined by the commission"). Here, the Workers' Compensation Commission made no findings of fact or rulings of law applying S.C. Code Ann. § 42-15-95 because the Appellant did not properly raise any objection to any evidence under this statute. (R. p.1258). Therefore, the Respondents respectfully contend that the Court of Appeals misapprehended its authority to make a finding that "Employer failed to communicate with Employee pursuant to section 42-15-95(B)" for the first time on appeal, although the Court's ultimate legal conclusion was correct.

20. Furthermore, because the Appellant did not actually introduce any evidence of improper communications, much less evidence that any "discussions, communications, medical reports, or opinions" were obtained in violation of S.C. Code Ann. § 42-15-95, there is no substantial evidence in the record that could support the Court's finding on appeal regarding the application of S.C. Code Ann. § 42-15-95. Like the untimely *amicus* brief now being proposed by the IWA, the Appellant's Brief to the Court of Appeals and his Petition for Rehearing point to no such evidence, only self-serving allegations and unsubstantiated innuendo for which

no citation to the Record exists.[5] Ordinarily, "the appellate court will not consider any fact which does not appear in the Record on Appeal." Rule 210(h), S.C.A.C.R..

21. The Respondents respectfully contend that the IWA's purported concerns about the Court's "application of § 42-15-95" would be most appropriately addressed by a modification of Section V of the Court's Order. Specifically, by merely applying long-established principles of issue preservation and by refusing to make findings of fact on appeal, the Court could reject the entirety of the Appellant's § 42-15-95 argument without addressing its theoretical application in the case *sub judice*, thus negating the allegedly "far-reaching implications" of the current Order and the concerns the IWA. *See, e.g.,* Hendrix v. Eastern Distrib., Inc., 320 S.C. 218, 464 S.E.2d 112 (1995) (vacating Court of Appeals opinion to the extent it addressed issue that was not preserved).

22. In the alternative, because the IWA concedes that an alleged violation of S.C. Code Ann. § 42-15-95 can be "cured" by "explicitly consenting to the admission of the

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[5] In the Appellant's Brief to the Court of Appeals at page 34, the Appellant makes numerous, specific allegations without a single citation to evidence in the actual Record on Appeal. Likewise, in his Petition for Rehearing, the Appellant makes numerous, specific allegations regarding at pages 31—34 without citation to the record. The Appellant claims (at page 29 of the Petition) support for his allegations "can be found at multiple places in the record," but cites only page 1167, lines 2-23, wherein he asked Dr. Pritchard about dates of correspondence that was not marked as an exhibit or otherwise admitted into evidence. The Appellant's Brief and Petition similarly fails to make any references "to where relevant objections and rulings occurred in the transcript," in contravention of the mandates of the appellate court rules. *See* Rule 208(b)(4), S.C.A.C.R. (stating "[r]eferences shall also be made to where relevant objections and rulings occurred in the transcript").

evidence," the IWA's concerns could also be ameliorated by amending Section V of the Court's Order so as to acknowledge the Appellant's consent to the admission of Dr. Pritchard's opinions into evidence on August 31, 2016, such that the Court's analysis of S.C. Code Ann. § 42-15-95 (with its allegedly far-reaching affects) becomes unnecessary and irrelevant. (*Amicus* Brief pp.8—9). Indeed, because no objection was raised to their admission, Dr. Pritchard's opinions are competent evidence that must be considered in accordance with more than 100-years of sound jurisprudence in South Carolina, regardless of any argument advanced for the first time on appeal. Wayne Smith Const. Co., Inc. v. Wolman, Duberstein, & Thompson, 294 S.C. 140, 363 S.E.2d 115 (Ct. App. 1987) (refusing to address arguments concerning evidence admitted without objection); Cantrell v. Carruth, 250 S.C. 415, 158 S.E.2d 208 (1967) (holding that testimony received without objection "becomes competent and cannot be disregarded" by the court); Wessinger v. Duncan, 113 S.C. 205, 102 S.E. 6 (1920) (explaining that where testimony was not objected to, it "must be considered by the jury"); Minton v. Pickens, 24 S.C. 592 (1886) (holding that "[t]estimony not objected to at the time is competent.").

THEREFORE, because the Appellant did not make a contemporaneous objection to the admission of Dr. Pritchard's opinions into evidence, because the Appellant did not raise any argument with respect to the application of S.C. Code Ann. § 42-15-95 at the August 31, 2017 hearing, because the Appellant did not move to strike Dr. Pritchard's opinions from the record, because the Commission did make any findings or conclusions regarding the admission of Dr. Pritchard's opinions or the applicability of S.C. Code Ann. § 42-15-95, because the Appellant did not make any post-hearing motion

requesting that the Commission address admissibility of Dr. Prichard's opinions or the applicability of S.C. Code Ann. § 42-15-95, and because the Record on Appeal does not contain any findings of fact, conclusions of law, or even evidence that Dr. Pritchard's opinions were obtained in violation of S.C. Code Ann. § 42-15-95, no argument regarding the admissibility of Dr. Pritchard's opinions or the applicability of S.C. Code Ann. § 42-15-95 was preserved for appellate review and it would be improper for an *amicus curiae* to raise these issues by way of a provisional brief (without citation to the Record) filed after briefing has been completed and the case has been decided by the Court of Appeals. As such, the Respondents respectfully contend that the Motion for Leave to File an *Amicus* Brief should be denied. The Respondents further respectfully request that the Court of Appeals amend Section V of its April 7, 2021 Order to conclude that the Appellant's arguments regarding the admissibility of Dr. Pritchard's opinions and the applicability of S.C. Code Ann. § 42-15-95 were not preserved for appeal and are otherwise without merit.

Respectfully submitted,

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Attorneys for Respondents

May 27, 2021
Mount Pleasant, South Carolina

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APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION APPELLATE PANEL
Aisha Taylor, Commissioner

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W.C.C. 1507304

Kenneth L. Barr, Employee,.....Appellant,

v.

Darlington County School District, Employer, and
SC School Boards Insurance Trust, Carrier,.....Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the attached Return to Motion of Amicus Curiae Injured Workers' Advocate for Leave to File Amicus Brief was served by the Respondents this 27th day of May 2021, by emailing and depositing a copy of the same in the United States Mail, first class postage prepaid, addressed to the parties of record, as follows:

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May 27, 2021

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TRASK HOWELL
WORKERS' COMPENSATION DEFENSE

Reply to
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May 27 2021

Via Email: ctappfilings@sccourts.org\Regular Mail
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: Kenneth L. Barr v. Darlington County School District
W.C.C. File No.: 1507304
Appellate Case No.: 2018-001237
Carrier File No.: WC016314
Date of Accident: May 21, 2015

Dear Ms. Kitchings:

Enclosed herewith for filing, please find our Return to Motion of Amicus Curiae Injured Workers' Advocate for Leave to File Amicus Brief and original Proof of Service of the same in the above-referenced case. By a copy of this correspondence, I am serving the other counsel of record with a copy of our Return to Motion.

Yours very truly,

Kirsten L. Barr

KLB/ldd/les
Enc.
cc: Eric Mayer, SC School Boards Insurance Trust (w/enc.)
Christy Sandifer, Darlington County School District (w/enc.)
Stephen B. Samuels, Esq. (w/enc.) (email/mail)
Preston F. McDaniel, Esq. (w/enc.) (email/mail)
Gerald Malloy, Esq. (w/enc.) (email/mail)