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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM LANCASTER COUNTY

Court of Common Pleas

Kenneth G. Goode, Circuit Court Judge

Case No. 2011-194189

Frances S. Hudson, Deceased Employee, by Kenneth L. Hudson and Keith B. Hudson, Co-Executors of her Estate, as well as Matthew Deese and/or Andrew Deese, of whom Kenneth L. Hudson and Keith B. Hudson

Petitioners/Respondents

v.

Lancaster Convalescent Center, Employer, and Legion Insurance Company, in liquidation through the South Carolina Property and Casualty Insurance Guaranty Association, Carrier

Respondents/Petitioners

RESPONDENT'S BRIEF OF RESPONDENT/PETITIONER SOUTH CAROLINA PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION

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Respondent / Petitioner Legion Insurance Company, In Liquidation through the South Carolina Property and Casualty Insurance Guaranty Association (hereinafter referred to as "SCPCIGA"), pursuant to Rule 242(i), South Carolina Appellate Court Rules, sets forth its Respondent's Brief as follows:

STATEMENT OF THE CASE

SCPCIGA hereby incorporates the Statement of the Case contained within its Petitioner's Brief in this matter, which is on file with this Court.

ARGUMENT

A. **The Court of Appeals correctly reversed the ruling of the Commission regarding the viability of the Claimant's award in finding that her Estate possessed no rights to the funds.**

The Petitioners / Respondents assert that the Court of Appeals erred in its rulings regarding the viability of the Estate's claims to what it has characterized as an "accrued lump sum disability compensation award". The basis of Petitioner's argument is that because the award had "accrued" at the time of the Claimant death, it must be paid to her

Estate. There is simply no support for this proposition in South Carolina law. The Petitioners / Respondents assert that "there are no applicable statutory provisions that preclude accrued compensation from becoming an asset of" the Claimant's Estate. (Petitioners' / Respondents' Petitioners' Brief at p. 15). This assertion is logically flawed as it attempts to improperly shift the default treatment of statutorily created causes of action at the time of death of the claimant from abatement to survivable.

It is well-settled law that a cause of action created by statute survives only when some provision for its survival is made in the statute itself or in some other statute. Ferguson v. Charleston Lincoln Mercury, Inc., 544 S.E.2d 285, 288 (S.C. 2001). Workers Compensation benefits are created by statute and any right a claimant may have to any such benefit is dependent upon the terms and condition of these statutory provisions. Unless a statute specifically provides for the survival of an action for personal injury, it does not lie after the injured person's death. Reed v. Medlin, 328 S.E.2d 115, 118 (S.C. App. 1985), *overruled on other grounds by* Washington v. Whitaker, 451 S.E.2d 894 (S.C. 1994); *See also* Chapman v. Home Indemnity Co., 442 S.2d 1388, 1389 (La. 1983) ("Once an employee dies, the disability terminates and along with it goes the employer's obligation to pay").

When an injured employee dies, compensation is governed by three sections of the Workers' Compensation Act, to wit: (1) § 42-9-280 (death unrelated to work); (2) § 42-9-290 (death related to work); and (3) § 42-9-140 (decedent leaves no dependants). Thus, in the case of Claimant, Section 42-9-280 governs because Claimant died from a non-work related cause and had at least partially dependent next of kin.

S.C. Code Ann. § 42-9-280, which will be addressed more thoroughly in Section B, states in relevant part, "When an employee receives or is entitled to compensation under this Title for an injury covered by the second paragraph of § 42-9-10 or § 42-9-30 and dies from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made to his next of kin dependent upon him for support, in lieu of the compensation the employee would have been entitled to had he lived." This provision has been construed to allow for survivability of only awards based upon a scheduled injury (§42-9-30 or second paragraph of §42-9-10), not awards based on wage loss. Stone v. Roadway Express, 367 S.C. 575, 627 S.E.2d 695 (2006).

The first paragraph of S.C. Code Ann. § 42-9-10 provides for compensation to an employee whose injury results in total incapacity or "wage loss". The second paragraph of this statute provides for total and permanent disability resulting from "the loss of both hands, arms, feet, legs, or vision in both eyes, or any two thereof...." This distinction in the basis of a total and permanent disability determination is important as it relates to survivability of a compensation award should the claimant die from non-work related causes.

Commissioner Lyndon in his October 2001 Order finding permanent and total disability utilized the "wage loss" basis, or first paragraph, of S.C. Code Ann. § 42-9-10. His Order finds and determines in relevant part as follows:

> 16. I further find: ...(b) Dr. Stewart's opinions and Ms. Hudson's contention that she is incapable of returning to gainful employment are validated by the South Carolina Vocational Rehabilitation Department's determination that her severe handicaps prohibit meaningful vocational

rehabilitation: and (c) a reasonably stable market does not exists for the types of services she is capable of providing.

17. Based upon these facts, I also find Ms. Hudson: ...(b) is permanently and totally disabled as a result of the combination of her bilateral leg/hip symptoms/pathology and the physical/functional limitations produced by these injuries.

4. I conclude Ms. Hudson is permanently and totally disabled per S.C. Code Ann. Section 42-9-10 (1976, as amended) as a matter of law based upon the combination of impairments/limitations stemming from her compensable left leg injury and its consequences (left hip and right leg/hip symptoms). In this regard, I further conclude that these physical impairments/limitations coupled with the vocational deficits identified by Dr. Stewart and the South Carolina Vocational Rehabilitation Department, prohibit her from providing any form of employment services for which a reasonably stable market exists.

(A. pp. 35-8.)

Commissioner Lyndon found Claimant lost the ability to compete in the open job market due to her left leg injury and the *symptoms* she was experiencing with her right leg/hip area **and her inability to return to any gainful employment**. Commissioner Lyndon did not find Claimant had a loss of or loss of use of both legs, hips, or any combination thereof which would entitle Claimant to seek total disability under the second paragraph of S.C. Code Ann. § 42-9-10. Commissioner Lyndon's findings clearly indicate Claimant was compensated under the first paragraph of S.C. Code Ann. § 42-9-10 because that is the only portion requiring proof of incapacity to work. Evidence of vocational inability would be irrelevant to a finding of total and permanent disability pursuant to the second paragraph of that statute.

There are only three options under Workers' Compensation Act for disbursement of compensation when an injured employee dies: (1) § 42-9-280 (death unrelated to work); (2) § 42-9-290 (death related to work); and (3) § 42-9-140 (decedent leaves no dependants). Thus, in the case of Claimant, Section 42-9-280 governs because Claimant died from a non-work related cause and had at least partially dependent next of kin. S.C. Code Ann. § 42-9-280. This section has been construed to allow for survivability of only awards based upon a scheduled injury (§42-9-30 or second paragraph of §42-9-10), not awards based on wage loss. Stone v. Roadway Express, 367 S.C. 575, 627 S.E.2d 695 (2006).

The Petitioners / Respondents allege the award of a lump sum payment was a final award and thus an accrued benefit at the time of Claimant's death. Interestingly, the Petitioners / Respondents suggest the Court look years ahead to the withdrawal of the appeal to the Court of Appeals by letter dated April 19, 2004 (A. p. 271), to determine whether the benefits were accrued on July 31, 2002, rather than looking at the status of the case on the date of Claimant's death. The only final award at the time of the Claimant's death was the award for the payment of the remaining 500 weeks on a weekly basis. On the date of Claimant's death, the award of a lump sum payment was on appeal to the Full Commission, and Claimant was receiving weekly disability payments. It is well-settled that the award of a single commissioner is not "final" pending appeal to the Full Commission. Riddle v. Fairforest Finishing Company 198 S.C. 419 (1942). "All findings of fact and law by the hearing commissioner become and are the law of the case, **except only those within the scope of exception of defendant and the notice given to**

the parties by the Commission." Ham v. Mullis Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940)(emphasis added).

The Petitioners / Respondents argue that this court should look to North Carolina law for a definition of accrued and unaccrued benefits. In this case, there is no need to go beyond South Carolina law to find a definition for accrued and unaccrued benefits especially when the pertinent section of the South Carolina Workers' Compensation Act at issue in this case is substantially different than the corresponding North Carolina section.

In general, North Carolina appellate decisions construing the Workers' Compensation Act, "are entitled to great weight," in South Carolina. Hines v. Hendricks Canning Co., 263 S.C. 399, 211 S.E.2d 220, 223 (1975). However, where South Carolina courts have already spoken on the interpretation of a statute, there is no need to look to North Carolina courts for guidance. The purpose of using North Carolina law to interpret South Carolina workers' compensation statutes is premised on the fact South Carolina's Act is based on North Carolina's Act and they share synonymous statutory language in the many of the statues, but in areas where the statutory language is not congruent, North Carolina court decisions are completely uninstructive to South Carolina courts.

Accrued benefits are defined in South Carolina case law, *see* Cullum v. New York Life Ins. Co., 197 S.C. 6 (1941). In interpreting how disability benefits accumulate, the Court in Cullum held, "[t]he disability benefits accrue from day to day as the disability continues...." It naturally follows that in the workers' compensation setting, a claimant similarly accrues workers' compensation benefits from day to day as his/her disability continues. Workers' Compensation benefits are analogous to this example. For each

week a claimant is out of work due to the work-related injury, he/she accumulates or accrues a week's worth of benefits.

Further, where the South Carolina and North Carolina relevant statues contain significant differences reliance upon North Carolina interpretive law is not utilized. The counterpart to S.C. Code Ann. § 42-9-280 in North Carolina is N.C.G.S. 97-37 which provides:

> When an employee receives or is entitled to compensation under this Article for an injury covered by G.S. 97-31 and dies from any other cause than the injury for which he was entitled to compensation, *payment of the unpaid balance of compensation shall be made: First, to the surviving whole dependents; second, to partial dependents, and, if no dependents, to the next of kin as defined in the Article; if there are no whole or partial dependents or next of kin as defined in the Article, then to the personal representative*, in lieu of the compensation the employee would have been entitled to had he lived. (emphasis added)

In contrast to the North Carolina statute, S.C. Code Ann. § 42-9-280 provides simply:

> "payment of the unpaid balance of compensation shall be made to his *next of kin dependant upon him for support*, in lieu of the compensation the employee would have been entitled to had he lived." (emphasis added)

Comparison of the two statutes evidences North Carolina makes *express* statutory provisions allowing for transfer of benefits in cases of non-work related deaths to the estate or non-dependent relatives while South Carolina explicitly does not so provide. The South Carolina provision is mandatory, in that the award "shall be made to his next of kin dependents," and provides no other options for payment of the award to any persons or entity other than the decedent Claimant's, "next of kin dependant upon him for support." S.C. Code Ann. §42-9-280. In direct contrast to the S.C. Code, the North

Carolina general statute provides five different potential recipients for the benefits of the decedent Claimant in non-work related deaths, as listed, "*First*, to the surviving whole dependents; *second*, to partial dependents, and, *if no dependents*, to the next of kin as defined in the Article; if there are no whole or partial dependents or *next* of kin as defined in the Article, *then* to the personal representative." (emphasis added) (N.C.G.S. 97-37).

The Petitioners / Respondents rely heavily on Wilhite v. Liberty Veneer Co., 47 N.C. App. 434, 267 S.E.2d 566 (1980). (A. pp. 130-131). This was a claim where a Claimant actually died prior to even filing a workers' compensation claim after suffering an injury of disfigurement at work. Wilhite states in pertinent part that:

> "In North Carolina, in the situation where a claimant dies after a claim has been filed, the claimant's estate may recover all accrued but unpaid benefits, and all unaccrued benefits to which the employee "would have been entitled" had he lived are payable to decedent's dependents pursuant to N.C.Gen.Stat. 97-37. McCulloh v. Catawba College, 266 N.C. 513, 146 S.E.2d 467 (1966); Inman v. Meares, 247 N.C. 661, 101 S.E.2d 692 (1958).
>
> Wilhite at 568.

This statement from the Wilhite court should make it abundantly clear that North Carolina has instituted a regime whereby "accrued" and "unaccrued" benefits are distributed to the estate vs. the dependents in different situations and shows a clear distinction between S.C. and N.C. on this point: S.C. makes no provisions for granting the award to the estate of a decedent Claimant. Furthermore, the Stone and Covington courts of South Carolina clearly provide that under South Carolina Workers' Compensation Act benefits can abate. Under North Carolina accrued vs. unaccrued benefits only seem to delineate which party – the estate or the dependents – are entitled to an award for the non-work related death of a Claimant.

Given that the cause of action at issue is a claim for Workers' Compensation, it was created by statute. Therefore, it survives only when some provision for its survival is made in the statute itself or in some other statute. Ferguson v. Charleston Lincoln Mercury, Inc., 544 S.E.2d 285, 288 (S.C. 2001). Section 42-9-280 governs distribution of Workers' Compensation benefits in the event of the Claimant's death from unrelated causes. Accordingly, to the extent that any benefits are due to anyone after the Claimant's death, Section 42-9-280 must control.

B. The Court of Appeals correctly reversed/vacated the ruling of the Commission approving the potential beneficiaries' settlement agreement.

The Circuit Court erred in affirming the Appellate Panel's decision to award Claimant's lump sum to the Estate rather than to her beneficiaries pursuant to Section 42-9-280. The Court of Appeals reversed that portion of the Circuit Court's Order and directed all lump-sum payments be paid directly to Claimant's dependent grandsons.

When an injured employee dies, compensation is governed by three sections of the Workers' Compensation Act, to wit: (1) § 42-9-280 (death unrelated to work); (2) § 42-9-290 (death related to work); and (3) § 42-9-140 (decedent leaves no dependants). Thus, in the case of Claimant, Section 42-9-280 governs because Claimant died from a non-work related cause and had at least partially dependent next of kin.

S.C. Code Ann. § 42-9-280 evidences the legislature's intent to provide benefits to survivors that are dependant on the deceased. The legislature did not provide any other statutes regarding distribution for a non-work related death. S.C. Code Ann. § 42-9-280 was interpreted by the South Carolina Supreme Court in Covington holding that unpaid benefits would abate if there are no next of kin dependents. Therefore, the Act and

Covington require the Commission to disburse benefits to the next of kin dependents, or if there are none, the unpaid benefits abate. There are no other existing alternatives under current South Carolina law.

It is the duty of the Commission under S.C. Code § 42-9-280 to determine questions as to dependency in accordance with the facts as they may be at the time of the accident. Day v. Day, 216 S.C. 334, 58 S.E.2d 83 (1957). "One of the obvious primary purposes of this Act is to prevent injured employees and those lawfully dependent upon them for support from becoming charges on society and the public generally for support." Felmon v. Dickert-Keowee, Inc., 259 S.C. 99, 104; 190 S.E.2d 751, 754 (1972). The statute is intended to support those who are dependent on the decedent, in this case the claimant's grandchildren, so that they do not become a "charge on society."

Claimant's Grandchildren lived with Claimant at the time of her death, and it is undisputed that they were her only next of kin dependents. Commissioner Bass found in the June 3, 2005 Order Claimant's Grandchildren "were each dependent, to some extent, upon [Claimant] for support at the time of her death." (A. p. 98). As such, S.C. Code Ann. § 42-9-280 requires any unpaid benefits be awarded to them in the event the award survives Claimant's death.

The Petitioner cites the general grant of authority to the Commission pursuant to Section 42-3-180, as providing the Commission authority to approve the purported settlement in regards to this issue. Section 42-3-180 provides: All questions arising under this Title, if not settled by agreement of the parties interested therein with the approval of the Commission, shall be determined by the Commission, **except as otherwise provided in this Title.** (Emphasis added).

As explained above, the Act and Covington require the Commission to disburse benefits to the next of kin dependents. There is no other authority in South Carolina for the unpaid benefits to be paid to the claimant's estate, to other individuals via external agreement, or to anyone else for any reason. The clear and unambiguous language of S.C. Code Ann. § 42-9-280 neither offers nor allows for any provisions under which benefits awarded pursuant to the Act pass to Claimant's estate or by the dictates of Claimant's will. To make an award authorizing such a distribution, by agreement of the parties or otherwise, would supersede the authority of the Commission, as there is no South Carolina statute extending such authority to the Commission. Moreover, as explained in the next argument section, there was no binding agreement on the issue as the Employer and Carrier were not party the purported agreement.

C. The Court of Appeals correctly overturned the ruling of the Commission regarding the purported agreement or stipulation between the parties as to a distribution mechanism for an award.

The Circuit Court's Order noted Appellants' hereto stipulated to the agreement by the potential beneficiaries (Claimant's sons and Claimant's grandchildren), and had no objection as to how to split the funds. (A. p. 136). Yet, upon review of the hearing transcript before Commissioner Bass on January 25, 2005, it is readily apparent no such stipulation was made. Even a cursory review of the transcript reveals Mr. Huff, Counsel for Employer at the hearing, never made any such stipulation on the record to the agreement. Any stipulations, in this regard, were in fact put on the record by Ann Mickle, Esq., counsel for Matthew Deese, one of Claimant's grandchildren. As cited below,

when Commission Bass asked for stipulations and positions of the parties. Ms. Mickle responded:

> "**Ms. Mickle:** In terms of stipulations...
>
> **Commissioner Bass:** Yes, ma'am.
>
> **Ms. Mickle:** ...too, Your Honor. I think there was a stipulation by Mr. Huff that he had no objection to any arrangement on how to split the funds. I think that was a stipulation...off the record."

(A. p. 200, lines 15-21).

This colloquy extends onward between Commissioner Bass, Clamaint's counsel, and Ms. Mickle as to what stipulations they believe may have been made off the record. *However*, attorney Huff does not have the opportunity to put his position regarding any stipulated matters on the record until fifteen pages or more further into the transcript. Mr. Huff does not agree to any such stipulation prescribed to him by others, and clearly asserts his position as to the case in chief as well as the distribution of proceeds to the Claimant's beneficiaries, *if any*:

> **Mr. Huff:** []...Our position is that nothing can go to the estate. Anything that could be payable...[]. [e]verything is under the Work Comp Act. And 42-9-140, in conjunction with 42-9-280 and 42-9-290 will tell you who gets what. And nowhere in the Work Comp Statute does it say that an estate can take anything. So our position is the estate takes nothing. Now, regarding...the grandchildren...[o]ur position on that would be that if there is any benefits payable because they are dependent, because they are partially dependent, then any benefits would be based upon the pro rata share of what their dependency is.

(A. p. 225, lines 7-24.)

From review of the transcript before Commissioner Bass, it is apparent Appellants did not stipulate, agree or acquiesce in the undisclosed, settlement agreement regarding distribution of the proceeds. This agreement was purportedly made by and between counsel for Claimant, Claimant's sons and Claimant's grandchildren. The Court of Appeals correctly reversed the Circuit Court's ruling that the hearing transcript evidenced an 'unambiguous,' stipulation and that the agreement between the estate of the deceased Claimant and her minor dependent grandchildren complied with S.C. Code Ann. §42-9-390. (A. pp. 136-137).

S.C. Code Ann. §42-9-390 provides:

> Nothing contained in this chapter may be construed so as to prevent settlements made by and between an employee and employer as long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this title. The employer must file a copy of the settlement agreement with the commission if each party is represented by an attorney. If the employee is not represented by an attorney, a copy of the settlement agreement must be filed by the employer with the commission and approved by one member of the commission.

The alleged "agreement" fails to meet the clear language of §42-9-390, in that the agreement is (a) not between the Claimant and the Employer/Carrier (or parties purporting to represent these entities), (b) the agreement is not in the record and no copy has been filed with the Commission as expressly mandated by the statute, and (c) the agreement is not, "in accordance with the provisions of th[e Act]." (§42-3-390), because the agreement was not in compliance with the requirement of §42-9-280 which dictates the method of distribution under the Act for non-work related deaths. Thus, it is irrelevant that the Commissioner believed the settlement agreement was reasonable since the agreement was not in accordance with the Act.

D. The Court of Appeals correctly reversed the imposition of interest against SCPCIGA.

The Court of Appeals reversed the imposition of interest because, as a matter of law, interest may not be awarded against an insolvent insurer covered by the South Carolina Property and Casualty Insurance Guaranty Association Act, S.C. Code Ann. §§ 38-31-10, et seq. Legislative amendments in 2001 to S.C. Code Ann. § 38-31-20 specifically disallow as a non-covered claim any claims for interest. S.C. Code Ann. § 38-31-20(8)(h) ("Covered claim" does not include:... (h) any claims for interest.

The Petitioner / Respondents admit this point in their Petitioner's Brief by stating: "Significantly, while this entity's derivative liability has been refined/restricted to some extent through the passage of... Section 38-31-20... the Legislature has **never limited the Guaranty Association's responsibility for its own conduct** through the adoption of similar amendments to Section 38-31-60." (Petitioners' / Respondents' Petitioner's Brief P. 23 - 24)(Emphasis in the original). However, the Petitioners / Respondents argue that interest should be allowed in this case because, in addition to its derivative liability, SCPCIGA is "**subject to civil liability ('may sue or be sued')**" under Section 38-31-60(j). (Petitioners' / Respondents' Petitioner's Brief P. 23 - 24)(Emphasis in the original).

The Petitioners / Respondents' argument on this point must fail due to the express language of the very Section cited as its basis. In full, Section 38-31-60(j) provides that SCPCIGA "may sue or be sued; provided, however, that any action brought directly against the association *must be brought against the association* in the State of South Carolina *as a condition precedent to recovery directly against the association.*" (Emphasis added). Assuming for the sake of argument that interest could ever be proper

against SCPCIGA, in order to utilize this Section to justify the imposition of interest against SCPCIGA for its own conduct, as the Petitioner has alleged, the action would have to be brought against SCPCIGA. This action was not brought against SCPCIGA; instead, the Association is a party to this action based solely on its derivative liability under the Guaranty Association Act. Moreover, the Commissioner's award of interest was not a "sanction" as characterized by the Petitioners / Respondents and was not a product of the Association's alleged "unreasonable failure to timely accept liability for the payment of [the award]." Instead, the hearing Commissioner's award of interest, as affirmed by the Full Commission, was based simply on S.C. Code Ann. §42-9-240 which provides for interest from the original date of the award, without regard to any party's conduct. See also New York Times Co. v. Spartanburg County Sch. Dist. No. 7, 374 S.C. 307, 310, 649 S.E.2d 28, 29-30 (2007). ("We cannot construe a statute without regard to its plain and ordinary meaning, and this Court may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope"). See also Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning"). The statute's language is considered the best evidence of legislative intent. Id. Because the statute specifically excludes liability of the Association for "any claims for interest," the Court of Appeals was clearly correct in reversing the Circuit Court's Order affirming the award of interest.

CONCLUSION

Based upon the foregoing, SCPCIGA respectfully requests that this Court affirm the ruling of the Court of Appeals: in finding the Claimant's Estate possessed no rights to the funds at issue: in reversing/vacating the ruling of the Commission which approved the potential beneficiaries' settlement agreement or stipulation between parties as to a distribution mechanism for an award: and in reversing the imposition of interest against SCPCIGA.

Respectfully Submitted,

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March 22, 2013

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM LANCASTER COUNTY

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v.

Lancaster Convalescent Center, Employer, and Legion Insurance Company in liquidation through the South Carolina Property and Casualty Insurance Guaranty Association, Carrier,.....Respondents / Petitioners.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she mailed a copy of Respondent / Petitioner South Carolina Property & Casualty Insurance Guaranty Association's Respondent's Brief via First Class mail on April 22, 2013 to the following

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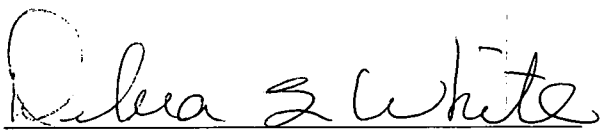

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