STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 2012-CP-40-00626

The Catawba Indian Nation a/k/a
The Catawba Indian Nation of South Carolina a/k/a
The Catawba Indian Tribe of South Carolina.....Appellant

vs.

State of South Carolina and Mark Keel, in
his official capacity as Chief of the South
Carolina Law Enforcement Division.....Respondents.

MOTION TO CERTIFY APPEAL TO SOUTH CAROLINA SUPREME COURT

Respondents, State of South Carolina and Mark Keel, in his official capacity as Chief of the South Carolina Law Enforcement Division, seek an order transferring this case from the South Carolina Court of Appeals and having the case certified for review by the South Carolina Supreme Court, thereby maintaining jurisdiction in the Supreme Court pursuant to Rule 204(b), SCACR. Certification here is warranted because this case presents issues of significant public interest and involves legal principles of major importance, not only to law enforcement agencies in South Carolina, but to the citizens at large.

Appellant, Catawba Indian Tribe of South Carolina, filed an action for declaratory judgment on January 24, 2012, contending that, pursuant to Gambling Cruise Act of 2005, S.C. Code Ann. Section 3-11-100 *et seq.*, the Tribe is entitled to operate video gaming devices on its Reservation. Both the Appellant Tribe and Respondents moved for summary judgment. The cross motions were argued on April 2, 2012 before the Honorable J. Ernest Kinard, Jr., Judge, Fifth Judicial Circuit. On April 23, 2012, the circuit court issued its order granting summary judgment to the Respondents. On May 23, 2012, Appellant, by way of correspondence attached, filed a notice of appeal with the South Carolina Court of Appeals. Respondents now move to certify the appeal in the Supreme Court.

The novel issue presented is whether the Gambling Cruise Act of 2005, S.C. Code Ann. Section 3-11-100 *et seq.*, now enables Appellant Catawba Indian Tribe to offer video gaming on its Reservation pursuant to the terms of the 1993 Settlement with the State of South Carolina. Moreover, this issue is heightened in importance by the fact that this Court, in its 2007 decision in *Catawba Indian Tribe v. State,* 372 S. C. 519, 642 S.E.2d 751 (2007) unanimously ruled that the Tribe's Settlement Agreement with the State resulted in the Tribe possessing no current right to video gaming on the Reservation. Nothing of significance has changed since that ruling. The Gambling Cruise Act was on the books at the time this Court issued its 2007 decision in *Catawba Tribe*. In view of the fact that state law still currently bans video gaming throughout South Carolina, see § 12-21-2710, and still deems video gaming devices contraband *per se* and subject to immediate seizure forfeiture and destruction, see *Union Co. Sheriff's*

Office v. Henderson, 395 S.C. 516, 719 S.E.2d 665 (2011), any decision that the Tribe is entitled to video gaming on its Reservation would have far-reaching impact and thus should be resolved by this Court. A decision in the Tribe's favor would legalize video gaming in one small area of the State, notwithstanding its illegality throughout the rest of the State. Such a result is not what the parties to the Settlement Act intended, nor is it what the Legislature, in approving the Settlement, enacted. Additionally, any alteration, modification or limitation of this Court's decision in *Catawba Tribe* should be a decision made by this Court and this Court alone.

In recent years, issues related to gambling and the forfeiture of gambling devices have been regarded as matters of fundamental public interest and importance to the State. A survey of recent cases demonstrates that virtually every gambling case of significance has been decided by the Supreme Court without prior adjudication by the Court of Appeals. See, e.g. *State v. Four Video Slot Machines*, 317 S.C. 397, 453 S.E.2d 896 (1995); *State v. One Coin Operated Video Game*, 321 S.C. 176, 467 S.E.2d 443 (1996); *Stardancer Casino, Inc. v. Stewart*, 347 S.C. 377, 556 S.E.2d 357 (2001); *Rick's Amusement, Inc. v. State*, 351 S.C. 352, 570 S.E.2d 155 (2001); *Video Gaming Consultants, Inc. v. S.C. Dept. of Pub. Revenue*, 342 S.C. 34, 535 S.E.2d 642 (2000); *Westside Quik Shop, Inc. v.* Stewart, 341 S.C. 297, 534 S.E.2d 270 (2000); State *v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000); *Mibbs, Inc. v. S.C. Dept. of Revenue*, 337 S.C. 601, 524 S.E.2d 626 (1999); *Joytime Distributors & Amusement Co. v. State*, 338 S.C. 634, 528 S.E.2d 647 (1999); *Sun Light Prepaid Phonecard v. State*, 360 S.C. 49, 600 S.E.2d 61 (2004); *Allendale Cnty. Sheriff's Office v.*

Two Chess Challenge II, 361 S.C. 581, 606 S.E.2d 471 (2004); *Mims Amusement Co. v. SLED*, 366 S.C. 141, 621 S.E.2d 344 (2005); *Catawba Indian Tribe, supra; Union Co. Sheriff's Off. v. Henderson, supra.* Thus, this Court, the State's highest tribunal, has historically determined such important issues related to interpretation and application of the law concerning gambling without those issues first being heard by the Court of Appeals. See, e.g., *Mims*, 366 S.C., *supra* at 146, 641 S.E.2d, *supra* at 346 ["We decide this case in light of the recent history of video gambling in South Carolina, which mushroomed from a rather clandestine and inauspicious beginning in 1986 into a multi-billion dollar business by its demise in July 2000."].

Moreover, this Court has already decided this question. In *Catawba Indian Tribe, supra*, the Court rejected the Catawba Tribe's right to video gaming on its Reservation under the 1993 Settlement. Characterizing the applicable Settlement Act provision (§ 27-16-110(G))[1] to be "unambiguous," the Court found that the Legislature intended "to limit Respondent's [Tribe's] right to operate video poker devices on its Reservation to *the same extent* state law authorizes such devices." 372 S.C. at 526, n. 6, 642 S.E.2d at 755, n. 6. According to the Court, "the legislative intent in enacting the Settlement Act was to *circumscribe* Respondent's right to allow video poker devices on its Reservation ... to the extent that state law allowed the devices." *Id* at 527, 642 S.E.2d at 755 (emphasis

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[1] Section27-16-110(G) of the Settlement Act provides as follows:

> (G) The Tribe may permit on its Reservation video poker or similar electronic play devices to the same extent that the devices are authorized by state law. The Tribe is subject to all taxes, license requirements, regulations, and fees governing electronic play devices provided by state law, except if the Reservation is located in a county or counties which prohibit the devices pursuant to state law, the Tribe nonetheless must be permitted to operate the devices on the Reservation if the governing body of the Tribe so authorizes, subject to all taxes, license requirements, regulations, and fees governing electronic play devices provided by state law.

added). Moreover, in this Court's opinion, "[b]y Congress's express approval of the State Act and by the terms of the Settlement Agreement and the State Act, Respondent relinquished any attributes of sovereignty relating to games of chance *in this State.*" 372 S.C. at 591, 642 S.E.2d at 756 (emphasis added). Thus, as this Court held in 2007, the Tribe's gaming rights are presently governed by Act No. 125 of 1999 (§ 12-21-2710). As the *Catawba Tribe* Court emphasized, Section 12-21-2710 "presently bans the possession and operation of video poker devices," and "[t]herefore, under the plain language of § 27-16-110(G), Respondent [Tribe] may not currently allow the devices on its Reservation." 372 S.C. at 527, n. 7, 642 S.E.2d at 755, n. 7.

Nothing has changed since 2007. Relying heavily upon *Catawba Tribe*, the circuit court in this case rejected the Tribe's argument that the Gambling Cruise Act now serves to allow the Tribe to have video gaming on its Reservation. In the words of the circuit court,

> Plaintiff seeks to avoid *Catawba Tribe* by relying upon the Gambling Cruise Act. This Act was not argued in *Catawba Tribe,* but existed when the first action was brought. However, the Gambling Cruise Act does not alter the statewide ban on video gambling, and so states. Even in port, the Act requires gaming devices aboard "cruise to nowhere" vessels may not be operated while in the State's territorial waters. See, § 3-11-400(B)(3). Most importantly, the Gambling Cruise Act expressly states it does not repeal or modify state gambling laws. § 3-11-400(B)(1).
>
> While Plaintiff's "non-geographic component" argument relies upon the State's authorized use of video gaming devices *outside the state's territory* to "trigger" gaming rights under Section 27-16-110(G), such a reading comports neither with the language of § 27-16-110(G), nor *Catawba Tribe*. As noted, *Catawba Tribe* construed § 27-16-110(G) ["same extent"] as requiring authorization of video gaming devices *in the State*, not outside. The Supreme Court tied the Tribe's gaming rights to the fact that "state law presently bans the possession and operation of video poker devices" and, therefore, under the plain language of § 27-16-

> 110(G), "[the Tribe] may not currently allow the devices on its Reservation." 372 S.C. at 527, n. 7, 642 S.E.2d at 755, n. 7. It is thus clear that, pursuant to the Settlement Act, the Tribe is governed by state law [§ 12-21-2710] with respect to "games of chance *in this state.*" 372 S.C. at 528, 642 S.E.2d at 756 (emphasis added).
>
> In short, notwithstanding the Gambling Cruise Act, gambling "devices" are currently not "authorized" by state law in South Carolina. Repeal of § 12-21-2710 would be necessary to "authorize" such devices. In the view of this Court, *Catawba Tribe's* reading is faithful to the Settlement Act language because "same" extent means "identical" or "exact" extent. However, this Court cannot agree with the Tribe's interpretation: that the State in authorizing gaming devices outside the State thereby triggered the Tribe's right to have the same devices on its Reservation. The Tribe's reading does not reflect, for purposes of § 27-16-110(G), the "same extent the devices are authorized by state law" because gaming devices are banned completely, even as to possession, to everyone in this State. See, *Union Co. Sheriff's Office v. Henderson*, 395 S.C. 516, 719 S.E.2d 665 (2011), citing *State v. 192 Coin Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000). The Tribe's construction that "any authorization," regardless of whether outside the State, gives it a similar right on the Reservation is, in this Court's opinion, untenable.

Order, at 4-5.

Further, this Court's decision in *Stardancer Casino, supra*, decided before the Gambling Cruise Act was enacted, further emphasizes the importance of this case and reinforces the irrelevance of that Act here. This Court concluded in *Stardancer* that so-called "cruises to nowhere" did not offend any state law. However, as the Court also emphasized in *Stardancer*, authorization of cruises to nowhere is not "indicative of any intent to restrict the scope and application of laws criminalizing gambling activities *in this State*. *Stardancer*, 347 S.C. *supra* at 386-87, 556 S.E.2d *supra* at 362. (emphasis added). Thus, as the Gambling Cruise Act emphasizes, *Stardancer* also made clear that the legality of cruises to nowhere in no way undermines, modifies or limits South

Carolina's laws prohibiting gambling. In short, the Court's clear line of demarcation between the prohibition of gaming activities *in South Carolina* and the authorization of "cruises to nowhere" *outside the State* is now threatened by the Tribe's insistence that the Gambling Cruise Act conveys a right to gaming to the Tribe on its Reservation. If successful, the Tribe would breach that line and authorize video gaming in this State to it alone. This was not the intent of the Legislature in approving the Settlement.

It is clear that this Court emphasized in *Catawba Tribe* that the Settlement Act places the Tribe *on an equal footing with all other citizens* in terms of gaming rights. As the lower court correctly held, "[t]he Tribe bargained away its sovereignty for purposes of gaming rights, and thus its gaming rights and those of other citizens are the same under state law." *Order*, at 8. Such equal treatment was settled by this Court in 2007. Now, however, the Appellant seeks to restore its sovereignty by having the courts bestow upon it video gaming rights on the Reservation, rights which no other South Carolinian currently possesses. Those rights can only be conveyed, if at all, to every citizen, by the General Assembly.

Finally, the lower court correctly held that the *Catawba Tribe* decision operates as *res judicata* and collateral estoppel to the Tribe, thereby precluding this lawsuit. The decisions of this Court – the highest court in South Carolina – must be honored fully, absent an overruling or limiting by this Court. Such integrity of the Court's decisions is further reason for this Court to certify this appeal.

CONCLUSION

For all the foregoing reasons, Respondents' Motion to Certify the appeal in the foregoing matter should be granted and this Court decide the appeal.

Respectfully submitted,

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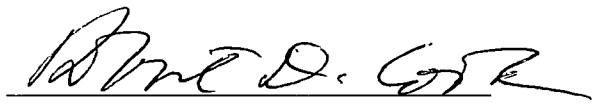

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May 31, 2012.

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James W. Fayssoux, Jr.

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Paul S. Landis
T. Hunt Reid

May 23, 2012

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RE: The Catawba Indian Nation a/k/a The Catawba Indian Nation of South Carolina a/k/a The Catawba Indian Tribe of South Carolina vs. State of South Carolina and Mark Keel, in his official capacity as Chief of the South Carolina Law Enforcement Division
Case No. 2012-CP-40-00626

Dear Counselors:

Please find enclosed, copies of the following concerning Plaintiff/Appellant's Notice of Appeal in the above-referenced matter:

1. Notice of Appeal;
2. Proof of Service;
3. Cover Letter to Hon. Jenny Abbott Kitchings;
4. Correspondence to Crystal M. Holmes, Court Reporter; and
5. Cover Letter to Hon. Jeanette McBride.

With kind regards,

Paul S. Landis

PSL/lmf
Enclosures (as stated)
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May 23, 2012

Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: The Catawba Indian Nation a/k/a The Catawba Indian Nation of South Carolina a/k/a The Catawba Indian Tribe of South Carolina vs. State of South Carolina and Mark Keel, in his official capacity as Chief of the South Carolina Law Enforcement Division
Case No. 2012-CP-40-00626

Dear Ms. Kitchings:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. Proof of service of the notice of appeal on the respondents.
2. A copy of the judgment and order which are to be challenged on appeal.
3. A filing fee of $100.00.

If you have any questions or concerns, please do not hesitate to contact me.

With kind regards,

Paul S. Landis

PSL/lmf
Enclosures (as stated)
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 2012-CP-40-00626

The Catawba Indian Nation a/k/a
The Catawba Indian Nation of South Carolina a/k/a
The Catawba Indian Tribe of South Carolina ..... Appellant,

vs.

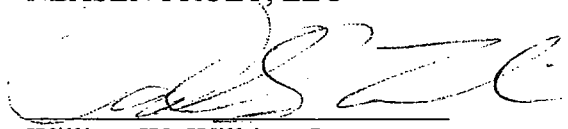
State of South Carolina and Mark Keel, in
His official capacity as Chief of the South
Carolina Law Enforcement Division ..... Respondents.

NOTICE OF APPEAL

The Catawba Indian Tribe of South Carolina hereby appeals the order granting summary judgment in favor of Respondents' which was entered by the Honorable J. Ernest Kinard, Jr. on April 24, 2012 and received by counsel on April 25, 2012.

May 23, 2012

NEXSEN PRUET, LLC



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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2012CP4000626

Catawba Indian Nation
Catawba Indian Nation of SC
PLAINTIFF(S)

State Of South Carolina
Mark Keel
DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk : _____

JEANETTE W. McBRIDE
C.C.P. & G.S.
RICHLAND COUNTY
FILED
2012 APR 24 PM 4:06

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

dgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 24 April 2012 to attorneys of record or to parties (when appearing pro se) as follows:

James Walter Fayssoux Jr.
William W. Wilkins
Gregory P Harris
Robert D. Cook

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

SCANNED

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
The Catawba Indian Nation a/k/a The Catawba Indian Nation of South Carolina a/k/a The Catawba Indian Tribe of South Carolina	)	Case No. 2012-CP-00626
Plaintiff,	)	
vs.	)	ORDER
State of South Carolina and Mark Keel, in his official capacity as Chief of the South Carolina Law Enforcement Division,	)	
Defendants.	)	

Plaintiff Catawba Indian Tribe of South Carolina brings a declaratory judgment action seeking interpretation of a provision in the 1993 Settlement Agreement between the State and Tribe relating to the Tribe's gaming rights on its Reservation. Plaintiff contends enactment of the Gambling Cruise Act of 2005, § 3-11-100 *et seq.*, which authorizes "cruises to nowhere" allowing video gambling *only outside the State's territorial waters*, now enables the Tribe, pursuant to the Settlement, to offer video gaming on the Reservation. This is so, Plaintiff argues, because § 27-16-110(G) of the Settlement permits on the Reservation electronic play devices to "the same extent that the devices are authorized by State law." The Tribe's interpretation is that if state law authorizes video gaming anywhere – even on the high seas – authorization of video gambling on the Reservation is triggered pursuant to § 27-16-110(G).

Specifically, the Tribe urges that *any State authorization of gambling devices* – even for the narrow purpose of transportation of the devices for play in federal territorial waters – is sufficient to trigger a right to the same gaming devices on its Reservation. The Tribe fully acknowledges video gambling is banned in South Carolina, but argues nevertheless that the

Settlement is not specific as to any geographic location. Since the Tribe is "not required to have an ocean" on its Reservation, in order to be given "equivalent" rights under the Gambling Cruise Act, it must have identical video gambling rights on its Reservation. *Plaintiff's Memorandum For Summary Judgment*, at 14-15.

The State argues that § 27-16-110(G) of the Settlement Act, as interpreted in *Catawba Indian Tribe v. State*, 372 S.C. 519, 642 S.E.2d 751 (2007), is dispositive. In *Catawba Tribe*, the Supreme Court ruled the Tribe's Settlement Agreement with the State results in the Tribe's possessing no current right to video gaming on its Reservation. The ruling was based upon the imposition of a "statewide ban" on video gaming by Act 125 of 1999 (§ 12-21-2710). The Court found this "statewide ban" applies equally to the Tribe pursuant to the Settlement. Because the Settlement Act allows gaming "to the same extent the [gaming] devices are authorized by state law," gaming is currently banned on the Reservation, as well as elsewhere in the State.

Thus, in the State's view, nothing has changed since the 2007 Supreme Court ruling. The Gambling Cruise Act was effective when the *Catawba Tribe* action was filed. Moreover, since the "statewide ban" on video gaming remains, the Gambling Cruise Act's authorization of video gaming beyond the territorial limits of South Carolina is irrelevant. In the State's view, the Supreme Court's decision tied the relevant Settlement Act language to § 12-21-2710, deeming all gambling devices *in South Carolina* contraband *per se*. Further, the State argues that the Gambling Cruise Act expressly preserves all laws prohibiting gaming in South Carolina, and prohibits all gaming aboard any "cruise to nowhere" until the cruise vessel is outside state waters.

In addition, the State contends that *Catawba Tribe* operates as *res judicata* and collateral estoppel. The parties and subject matter are the same here. Plaintiff asserts the same cause of action, only employing a different legal theory. Since the Gambling Cruise Act was effective

when the Tribe sued the first time, the State contends Plaintiff could have raised that argument then, but did not. Thus, the first judgment forecloses the bringing of the second.

Both Plaintiff and Defendants seek summary judgment. There is no disagreement that these are solely questions of law. The cross motions were argued on April 2, 2012. For the reasons below, the Court finds that summary judgment for Defendants is warranted.

Law / Analysis

In *Catawba Tribe,* the Supreme Court rejected Plaintiff's right to video gaming on its Reservation under the 1993 Settlement. The Court noted that Congress, in approving the Settlement, provided that "'*all* laws, ordinances, and regulations of the State, and its political subdivisions govern the regulation of gambling devices and conduct of wagering by [the Tribe] on and off its Reservation,' unless the Settlement Agreement and the State Act specifically provide otherwise." 372 S.C. at 591, 642 S.E.2d at 755 (emphasis added). Further, the Court quoted § 27-16-40, deeming the Tribe "subject to the civil, criminal and regulatory jurisdiction of the courts of the State and to the same extent as any other person, citizen, or land of the State ...." Concluding that "the language of § 27-16-110(G) is unambiguous ...," thus making rules of statutory interpretation inapplicable, the Court found the Legislature intended "to limit Respondent's [Tribe's] right to operate video poker devices on its Reservation to *the same extent* state law authorizes such devices." 372 S.C. at 526, n. 6, 642 S.E.2d at 755, n. 6. According to the Court, "the legislative intent was to *circumscribe* Respondent's right to allow video poker devices on its Reservation ... *to the extent that state law allowed the devices.*" *Id.* at 527, 642 S.E.2d at 755. (emphasis added).

Moreover, in the Supreme Court's opinion, "[b]y Congress's express approval of the State Act and by the terms of the Settlement Agreement and the State Act, Respondent relinquished any attributes of sovereignty relating to games of chance *in this state.*" 372 S.C. at

591, 642 S.E.2d at 756. (emphasis added). In short, the Catawbas agreed that the Indian Gaming Regulatory Act or IGRA (25 U.S.C. §§ 2701-2721) is inapplicable; thus, Plaintiff is treated like everyone else *in South Carolina* for purposes of gaming rights. Therefore, Plaintiff's gaming rights are governed by Act 125 of 1999 (§ 12-21-2710). As the Court emphasized, Section 12-21-2710 "presently bans the possession and operation of video poker devices," and "[t]herefore, under the plain language of § 27-16-110(G), Respondent [Tribe] may not currently allow the devices on its Reservation." 372 S.C. at 527, n. 7, 642 S.E.2d 755, n. 7.

Plaintiff seeks to avoid *Catawba Tribe* by relying upon the Gambling Cruise Act. This Act was not argued in *Catawba Tribe,* but existed when the first action was brought. However, the Gambling Cruise Act does not alter the statewide ban on video gambling, and so states. Even in port, the Act requires gaming devices aboard "cruise to nowhere" vessels may not be operated while in the State's territorial waters. See, § 3-11-400(B)(3). Most importantly, the Gambling Cruise Act expressly states it does not repeal or modify state gambling laws. § 3-11-400(B)(1).[1]

While Plaintiff's "non-geographic component" argument relies upon the State's authorized use of video gaming devices *outside the state's territory* to "trigger" gaming rights under Section 27-16-110(G), such a reading comports neither with the language of § 27-16-110(G), nor *Catawba Tribe*. As noted, *Catawba Tribe* construed § 27-16-110(G) ["same

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[1] Section 27-16-110(G) of the Settlement Act is clear and unambiguous, according to the Court, and thus "the rules of statutory construction are inapplicable." 372 S.C. at 527, 642 S.E.2d at 755. Plaintiff's efforts here to invoke rules of statutory construction governing ambiguous provisions are, therefore, to no avail. In *Catawba Tribe*, the Supreme Court thus rejected use of the longstanding rule of liberal construction in favor of Indian Tribes. *Id.* Moreover, Section 3-11-400(B)(1) makes clear that the Gambling Cruise Act does not repeal any law relating to gambling. Act 125 of 1999 would, of course, thus not be repealed or modified by the Gambling Cruise Act. In similar circumstances, where there is a non-repealer provision in a subsequently enacted law, the Supreme Court has recognized the Court's duty to honor such provision. As the Court concluded in *Wilson v. City Council of Florence*, 40 S.C. 426, 19 S.E. 4 (1894), where a subsequent act stated that such act "does not repeal any law in force in the City of Florence," the earlier law, authorizing bond issuances, was deemed to stand.

extent"] as requiring authorization of video gaming devices *in the State*, not outside. The Supreme Court tied the Tribe's gaming rights to the fact that "state law presently bans the possession and operation of video poker devices" and, therefore, under the plain language of § 27-16-110(G), "[the Tribe] may not currently allow the devices on its Reservation." 372 S.C. at 527, n. 7, 642 S.E.2d at 755, n. 7. It is thus clear that, pursuant to the Settlement Act, the Tribe is governed by state law [§ 12-21-2710] with respect to "games of chance *in this state.*" 372 S.C. at 528, 642 S.E.2d at 756 (emphasis added).

In short, notwithstanding the Gambling Cruise Act, gambling "devices" are currently not "authorized" by state law in South Carolina. Repeal of § 12-21-2710 would be necessary to "authorize" such devices. In the view of this Court, *Catawba Tribe's* reading is faithful to the Settlement Act language because "same" extent means "identical" or "exact" extent. However, this Court cannot agree with the Tribe's interpretation: that the State in authorizing gaming devices outside the State thereby triggered the Tribe's right to have the same devices on its Reservation. The Tribe's reading does not reflect, for purposes of § 27-16-110(G), the "same extent the devices are authorized by state law" because gaming devices are banned completely, even as to possession, to everyone in this State. See, *Union Co. Sheriff's Office v. Henderson*, 395 S.C. 516, 719 S.E.2d 665 (2011), citing *State v. 192 Coin Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000). The Tribe's construction that "any authorization," regardless of whether outside the State, gives it a similar right on the Reservation is, in this Court's opinion, untenable.

The federal Johnson Act, from which the Gambling Cruise Act originated, reaffirms the bright line distinction between authorization of gaming outside the State and gambling prohibitions within. In *Palmetto Princess, LLC v. Town of Edisto Beach*, 369 S.C. 50, 52, n. 1, 631 S.E.2d 76, 77, n. 1 (2006), the Supreme Court recognized that the Johnson Act, 15 U.S.C.

§ 1175 (b)(1), specifies only that "the possession or transport of a gambling device *within state territorial waters* is not a violation of the prohibition [prohibition against gambling devices] if the device remains on board the vessel and is used only *outside those territorial waters.*" (emphasis added). In short, the Johnson Act recognizes only that the Act "no longer restricts the transport and possession of gambling devices on vessels, provided that those devices are not used while the vessel is *within the boundaries of a state* or possession of the United States." *Casino Ventures v. Stewart*, 183 F.3d 307, 309 (4th Cir. 1999). The Gambling Cruise Act reiterates this distinction. *See* § 3-11-400(B). Thus, neither the Johnson Act, nor the Gambling Cruise Act, alter South Carolina's "statewide ban" against gaming devices. Indeed, both reaffirm such ban.

Further, as *Stardancer Casino v. Stewart*, 347 S.C. 377, 386-87, 556 S.E.2d 357, 362 (2001) emphasized, authorization of cruises to nowhere is not "indicative of any intent to otherwise restrict the scope and application of laws criminalizing gambling activities *in this State.*" (emphasis added). Even though *Stardancer* was not argued to the Court in *Catawba Tribe*, the Supreme Court is obviously aware of its own decisions. See, *People ex rel. McDonough v. Chicago M., St. P. & P. R. Co.*, 188 N.E. 404, 442 (Ill. 1933) [Supreme Court has notice of its decisions]. If the *Catawba Tribe* Court had thought authorization of "cruises to nowhere" made even the slightest difference whatsoever, it would certainly have said so.

Also instructive is *Seminole Tribe of Fla. v. State of Fla.*, 1993 WL 475999 (S.D. Fla. 1993), applying the Indian Gaming Regulatory Act (IGRA), not applicable here.[2] There, the Seminoles argued that Florida permitted certain Class III gaming activities, including "cruises to nowhere." As here, the Tribe sought to operate these same games on Tribal lands. Under IGRA,

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[2] The Indian Gaming Regulatory Act (IGRA) [25 U.S.C.A. §§ 2701-2721] has as its central purpose that of providing "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self sufficiency and strong tribal governments." § 2702(1). As *Catawba Tribe* points out, the Tribe waived its right to be governed by IGRA in the Settlement Agreement, choosing instead "to be governed by the terms of the Settlement Agreement and the State Act with regard to games of chance." 372 S.C. at 524, 642 S.E.2d at 753.

a conclusion that the State permitted such games, could have resulted in the State being required to negotiate with the Tribe for purposes of providing such gaming on the Indian lands. The Court rejected the Tribe's argument that permission to operate cruises to nowhere also constituted authorization for the gaming devices on the Reservation. In Florida, state law prohibited "the possession of gambling paraphernalia." The Court concluded that the fact that the State also authorized "cruises to nowhere" was irrelevant because such permission to operate games out of state did not constitute an authorization for gaming to the Seminoles on the Reservation. The Court stated as follows:

> Each case interpreting the IGRA which found permission of a Class III gaming activity presented some form of explicit legislative approval of the activity *within the State's territory*. The Tribe's theory would seem to place an affirmative duty on a state to eradicate means by which its citizens could legally gamble in other jurisdictions in order to demonstrate a public policy prohibiting Class III activities ... . *For the same reason, the Tribe's argument that the State's continued allowance of these cruises to use its ports must fail, especially in light of the fact that no gambling occurs within the State's boundaries. Thus, even when viewing the evidence before the Court in the light most favorable to the Tribe, we conclude that these cruises by foreign flag vessels cannot be fairly said to constitute permission of casino gambling by the State within the State and within the ambit of IGRA.*

Id, at page 14. (emphasis added).

Such analysis governs. The *Seminole Tribe* Court was unwilling to construe authorization of cruises to nowhere in the Indians' favor under IGRA. Likewise, *a fortiori*, the Catawbas' similar argument must fail. This is particularly so in light of the fact that the Supreme Court of South Carolina has deemed both § 27-16-110(G) of the Settlement Act, as well as § 12-21-2710, to be unambiguous and thus not subject to the rules of statutory construction, including a liberal construction in favor of the Tribe. Moreover, the Catawba Tribe does not operate under the more generous IGRA, but is treated similarly for gaming purposes to others in South Carolina.

In this Court's opinion, the Tribe's argument fails to account for the clear difference between the "statewide ban" upon video gaming, established by Act 125 of 1999 (§ 12-21-2710), and applied by *Catawba Tribe*, and the very narrow authorization for cruises to nowhere in waters completely outside South Carolina. The two are not in conflict, but deal with different and separate matters and do not operate to convey gaming rights in South Carolina. Under the express provisions of the Gambling Cruise Act, gaming devices are inoperable until the three mile limit has been passed. See § 3-11-400(B)(3) and (5). Regardless, the Gambling Cruise Act cannot serve to create a right of the Tribe to operate video gaming on the Reservation. As the Court stated in *Seminole Tribe,* authorization of cruises to nowhere "cannot be fairly said to constitute permission of casino gambling by the State within the State."

Video gaming is currently banned in South Carolina and the Tribe's reliance upon legislation regulating "cruises to nowhere" does not lift that ban. If it did, everyone in South Carolina could take advantage of the Gambling Cruise Act to have video gaming in the State. If state law has now "authorized" these devices for the Tribe on the Reservation, it has authorized them for others. The Tribe bargained away its sovereignty for purposes of gaming rights, and thus its gaming rights and those of other citizens are the same under state law. Accordingly, the Court agrees with the Defendants and disagrees with the Plaintiff regarding the Gambling Cruise Act's serving as a "trigger" to § 27-16-110(G) of the Settlement Act. The Tribe has no current right to video gaming on its Reservation.

In addition, Defendants argue that Plaintiff's action is barred by *res judicata* and/or collateral estoppel. This Court agrees. The fundamental purpose of the doctrine of *res judicata* is to ensure that "no one should be twice sued for the same cause of action." *First Nat'l. Bank of Greenville v. U.S. Fid. and Guar. Co.*, 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945). A litigant does not receive a second bite at the same apple. "Res judicata is the branch of the law that defines

the effect of a valid judgment may have on subsequent litigation between the same parties and their privies. Res judicata ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues." *Plum Creek Dev. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 108 (1999). As the Supreme Court recently stated in *Judy v. Judy*, 393 S.C. 160, 172, 712 S.E.2d, 408, 414 (2011),

> ... we reiterate and rely on the conceptual framework recognized in *Plum Creek Dev. v. City of Conway*, 334 S.C. 30, 512 S.E.2d 106 (1999), wherein we stated:
>
> > Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. Under the doctrine of res judicata, "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit. *Id.* at 34, 512 S.E.2d at 109 (citations omitted).

Judy recognized four persuasive indicators to determine applicability of *res judicata.* These are: (1) when there is identity of the subject matter in both cases; (2) when the first and second cases involve the same primary right held by the plaintiff and one primary wrong committed by the defendant; (3) when there is the same evidence in both cases: (4) when the claims arise out of the same transaction or occurrence that is the subject of the prior action. *Id.*, at 172, n. 7, 393 S.E.2d at 414.

These factors fully apply here. The identical two parties, Tribe and State, are before the Court a second time. The subject matter is the same: the identical provision of the Settlement Agreement and Act. Most importantly, the Tribe is asserting the same right it previously asserted: the right to video gaming on its Reservation to the exclusion of all others. However, in *Catawba Tribe*, it was concluded that the Tribe possesses no such right because, pursuant to § 27-16-110(G) of the Settlement Act, the Tribe possesses the same video gaming rights as everyone else. Video gaming devices are currently banned as contraband *per se* throughout

South Carolina. Therefore, the *Catawba Tribe* Court has concluded the Tribe has no current right to video gaming on its Reservation.

Plaintiff's first action was brought on July 28, 2005, almost two months after the Gambling Cruise Act took effect on June 1, 2005. As here, the Tribe relied upon § 27-16-110(G) and asked the Court to determine its rights under the Settlement Agreement and Act with respect to the operation of video poker or similar electronic play devices on its Reservation.

It is true the Tribe made a somewhat different legal argument in the first action than now, contending that the Settlement Agreement and § 27-16-110(G) could not be "amended" by the General Assembly based upon any future ban placed upon video poker. But there, the Tribe *also had the opportunity* to make the same legal arguments it is now presenting. In such circumstances, *res judicata* or collateral estoppel bars the second suit. *See, Eichman v. Eichman*, 285 S.C. 378, 329 S.E.2d 764 (1985) ["There can be no question that the same parties were previously before the Court relative to the same subject matter and that an adjudication was made. Certainly, the husband could have raised the same issue in the former action. Having failed to do so, he is now barred by the doctrines of res judicata and collateral estoppel."]. *See also*, *Sub-Zero Freezer Co. v. R. J. Clarkson Co.*, 308 S.C. 188, 189, 417 S.E.2d 569, 571 (1992) ["Res judicata also bars subsequent suit by the same parties when the claims arise out of the same transaction or occurrence that is the subject of the prior suit between those parties."]; *Aliff v. Joy Mfg. Co.*, 914 F.2d 39, 43 (4th Cir. 1990) ["The law, however, is well established that res judicata may apply even though the plaintiff in the first suit proceeded under a different legal theory."]; *Plum Creek Dev. Co., supra*, at 36, 512 S.E.2d at 110 ["(F)or purposes of res judicata, 'cause of action is not the form of action in which a claim is asserted but, rather the cause for action , meaning the underlying facts combined with the law giving the party a right to a remedy of one form or another based thereon.'"].

Most recently, in *Yelsen Land Co., Inc. v. State of South Carolina and the State Ports Authority*, Op. No. 27103 (March 14, 2012), the Supreme Court concluded that "newly discovered" evidence of a sovereign grant to tidelands, even if probative, would not entitle appellant to relitigate his claim to the "newly created" highlands. The *Yelsen* Court found that "a defendant may not relitigate title based on newly discovered documents in his chain where those documents predate the first judgment." Thus, the availability of the Gambling Cruise Act as an alternative legal theory on the same claim – that the Tribe possesses video gaming rights on the Reservation pursuant to § 27-16-110(G) of the Settlement Act – cannot defeat applicability of *res judicata* here.

At the Summary Judgment hearing, Plaintiff referenced *Robison v. Asbill*, 328 S.C. 450, 453, 492 S.E.2d 400, 401 (Ct. App. 1997) in support of its argument that neither *res judicata* nor collateral estoppel apply. In *Robison*, the Court pointed to language from 22A Am.Jur.2d *Declaratory Judgments* §§ 239 and 240 (1988) that "'[a] declaratory judgment is not *res judicata* as to matters not at issue and not passed upon." Continuing, the Court further quoted from the same treatise to the effect that the doctrine "is only a bar to matters which were actually litigated, not those that might have been litigated."

Robison, however, is inapposite. It's holding rested upon the well-recognized doctrine that "[w]hen the plaintiff in the earlier declaratory judgment action sought only declaratory relief, the plaintiff may later be permitted to seek additional, coercive relief based on the same claim." In *Robison*, unlike here, Plaintiff had *prevailed* in the first suit, and then later sought coercive relief in further support of its declaratory relief. By contrast, the Tribe was *unsuccessful* in the first action, and now tries again based upon the same claim, but seeking to employ a different legal theory. Thus, *Robison* provides no comfort to Plaintiff.

Moreover, the same year the Court of Appeals decided *Robison*, that Court also rendered the decision in *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997). In *Pye*, an earlier federal declaratory judgment action was deemed to operate as *res judicata* and collateral estoppel with respect to the issue of liability. The Court stated that for *res judicata* to apply, "[t]he parties must be the same or their privies; (2) the subject matter must be the same; and (3) while generally the precise point must be ruled, yet where the parties are the same or in privity, the judgment is an absolute bar not only of what was decided but what might have been decided." 325S.C. at 432, 480 S.E.2d at 458. *Pye* noted that "a fundamental test for comparing causes of action is to determine whether the primary right and duty and the delict and wrong are the same in each action." *Id.*, at 433, 480 S.E.2d at 458. *Pye* defined the "subject matter of the action" for purposes of *res judicata* as "a matter or thing concerning which a wrong has been done, which is ordinarily property, contract, or other thing involved, or main primary right from the breach of which a remedial right arises." *Id.*

Even though the first action involved a declaratory judgment, the *Pye* Court, nevertheless, concluded that *res judicata* applied. As the Court recognized, "[e]ven though the federal action is in the form of a declaratory judgment proceeding and the state action is under the ambit of intentional tort litigation, the subject matter is the same in both actions." 325 S.C. at 434, 480 S.E.2d at 459. Moreover, *Pye* found that the same parties were present and that "[t]he facts at issue in this case are identical to the facts at issue in the declaratory judgment action." *Id.* Inasmuch as there "was a prior adjudication of this issue by a court of competent jurisdiction" regarding Aycock's liability, *res judicata* governed such liability.

Finally, even assuming that *res judicata* applies only as to claims *actually litigated,* the claim the Tribe raises here was actually litigated in the first suit. Here, the Tribe asserts the same primary right as it maintained in the first action; the right pursuant to § 27-16-110(G) to have

video gaming on its Reservation. The fact it now argues a different legal theory – the Gambling Cruise Act – to support the right to gaming under § 27-16-110(G), when that legal theory was available in the first action, does not avoid *res judicata*. Where, as here, Plaintiff "seeks the same declaratory relief against the same defendants ... but presents a different legal theory," on that same claim, *res judicata* applies. *Fogel v. Secretary of the Air Force*, 351 F.Supp. 47, 50 (E.D. N.Y. 2005). As has been stated, "[a]lternative theories of recovery for the same claim may not be brought in different lawsuits ...." 50 C.J.S. *Judgments* § 987.

In short, the governing rule is that "[i]f a declaratory judgment is valid and final, it is conclusive, *with respect to the matters declared* ... ." *Restatement* 2d *Judgments* § 33 (emphasis added). In the first action between the Tribe and State, the Supreme Court declared that "state law presently bans the possession and operation of video poker devices" and thus "under the plain language of § 12-16-110(G), [the Tribe] ... may not currently allow the devices on its Reservation.. "*Catawba Tribe*, 372 S.C. at 527, n. 7, 642 S.E.2d at 755, n. 7. Since that is a matter which was declared in the first declaratory judgment action, it is thus *res judicata* here. *Restatement, Id.*

For the foregoing reasons, summary judgment in favor of Defendants is granted, and as to Plaintiff is denied.

So Ordered.

J. Ernest Kinard, Jr.
Judge, Fifth Judicial Circuit

April 23, 2012

Camden, South Carolina.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 2012-CP-40-00626

The Catawba Indian Nation a/k/a
The Catawba Indian Nation of South Carolina a/k/a
The Catawba Indian Tribe of South Carolina ..... Appellant,

vs.

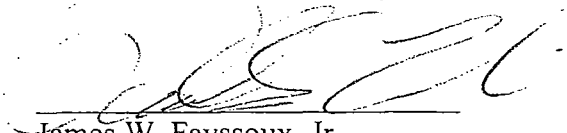
State of South Carolina and Mark Keel, in
His official capacity as Chief of the South
Carolina Law Enforcement Division..... Respondents.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondents State of South Carolina and Mark Keel, in His official capacity as Chief of the South Carolina Law Enforcement Division, addressed to their attorneys of record Alan Wilson, Attorney General; Robert D. Cook, Deputy Attorney General; and C. Havird Jones, Jr., Assistant Deputy Attorney General, all at Post Office Box 11549, Columbia, South Carolina 29211; by depositing a copy of the same in the United States Mail, postage prepaid, on May 23, 2012

May 23, 2012

FAYSSOUX LAW FIRM, PA



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Paul S. Landis
T. Hunt Reid

May 23, 2012

The Honorable Jeanette W. McBride
Clerk of Court for Richland County
1701 Main St., Rm. 205
Columbia, SC 29201

RE: The Catawba Indian Nation a/k/a The Catawba Indian Nation of South Carolina a/k/a The Catawba Indian Tribe of South Carolina vs. State of South Carolina and Mark Keel, in his official capacity as Chief of the South Carolina Law Enforcement Division
Case No. 2012-CP-40-00626

Dear Ms. McBride:

Enclosed for filing is a notice of appeal in the above case.

Thank you for your assistance, and please do not hesitate to contact me with any questions or concerns.

With kind regards,

Paul S. Landis

PSL/lmf
Enclosures (as stated)
Cc:
Hon. Jenny Abbott Kitchings, Clerk, SC Court of Appeals
Alan Wilson, Attorney General
Robert D. Cook, Deputy Attorney General
C. Havird Jones, Jr., Assistant Deputy Attorney General
William W. Wilkins, Jr., Esquire
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JAMES W. FAYSSOUX, SR.
JAMES W. FAYSSOUX, JR.

FAYSSOUX
LAW FIRM P. A.

PAUL S. LANDIS
T. HUNT REID

May 23, 2012

Crystal M. Holmes, Court Reporter
Post Office Box 611
Columbia, SC 29202

RE: The Catawba Indian Nation a/k/a The Catawba Indian Nation of South Carolina a/k/a The Catawba Indian Tribe of South Carolina vs. State of South Carolina and Mark Keel, in his official capacity as Chief of the South Carolina Law Enforcement Division
Case No. 2012-CP-40-00626

Dear Ms. Holmes:

My records indicate that you were the assigned court reporter for a hearing on a Motion for Summary Judgment in the above-referenced matter, which took place in Richland County on April 2, 2012.

I request that you provide me with a transcript of the proceedings. Please transcribe the entire record, and I agree to pay the per page charge for this transcript as provided by Rule 607, SCACR.

Please let me know if you have any questions or concerns, and thank you for your assistance with this request.

With kind regards,

Paul S. Landis

PSL/lmf
Cc:
Alan Wilson, Attorney General
Robert D. Cook, Deputy Attorney General
C. Havird Jones, Jr., Assistant Deputy Attorney General
William W. Wilkins, Jr., Esquire
Gregory P. Harris, Esquire
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STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 2012-CP-40-00626

The Catawba Indian Nation a/k/a
The Catawba Indian Nation of South Carolina a/k/a
The Catawba Indian Tribe of South Carolina.....Appellant

vs.

State of South Carolina and Mark Keel, in
his official capacity as Chief of the South
Carolina Law Enforcement Division.....Respondents.

PROOF OF SERVICE

I certify that I have served the Motion to Certify Appeal to the South Carolina Supreme Court on counsel for Appellant by depositing a copy in the United States Mail, postage prepaid on May 31, 2012, addressed as follows:

William W. Wilkins, Jr., Esquire
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Paul S. Landis, Esquire
Fayssoux Law Firm, PA
P. O. Box 10207
Greenville, South Carolina 29603

Gregory P. Harris, Esquire
Harris & Gasser, LLC
1529 Laurel Street
Columbia, South Carolina 29201

I have also provided a copy of the Motion to Certify Appeal to the South Carolina Supreme Court to the Clerk of Court of the South Carolina Court of Appeals by depositing a copy in the United States Mail, postage prepaid on May 31, 2012, addressed as follows:

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P. O. Box 11629
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