

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jenean Trammell Gibson, as Personal Representative for the Estate of James E. Gibson,
III, Appellant,

v.

Christopher C. Wright, M.D., Respondent

Appellate Case No. 2010- 163726

Appeal From Greenville County
D. Garrison Hill, Circuit Court Judge

PETITION FOR REHEARING/REHEARING EN BANC AND MEMORANDUM IN
SUPPORT

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Appellants' request that this Court grant rehearing in *Jenean Trammell Gibson, as Personal Representative for the Estate of James E. Gibson, III, Appellant v. Christopher C. Wright, M.D., Respondent*, Op. No. 5127 (S.C. Ct. App. Filed May 1, 2013).

This Court's opinion affirmed the Circuit Court's decision, which: (1) admitted summaries as evidence; (2) failed to grant a mistrial after Christopher C. Wright, M.D. asked about Gibson's social security benefits; (3) and excluded as hearsay Gibson's questions to Dr. Wright about another doctor's deposition. In reaching this decision, the Court may have overlooked or misapprehended three points:

I. The Court of Appeals may have Overlooked or Misapprehended that the Admission of the Slides was an Abuse of Discretion and that there was Prejudice to the Plaintiff in this admission

The Decision held that the trial court did not abuse its discretion in allowing Dr. Wright to use the powerpoint slides. Slip op. at 8. The Decision acknowledged Gibson's argument that he did not receive the timeline until the Friday prior to the trial yet disregarded South Carolina law establishing that reversal on appeal is proper when the documents are not provided in a timely manner.¹

The Decision also failed to recognize the substantial prejudice that resulted to Gibson by virtue of the numerous delays and distractions accompanying the introduction of the slides at such a late date. The first mention of the slides came on March 17th, 2010 when Plaintiff was being cross-examined by defense counsel. Defense counsel put up a summary time-line on the PowerPoint screen that had not been provided to Plaintiff previously and Plaintiff's counsel objected (R. p.107, lines 15-23). Plaintiff's counsel moved to exclude the summary. Defense counsel, in response to Plaintiff's motion, replied "We pulled all the records and put them in a notebook page by page so they correspond with the timeline. We could introduce the records but they correspond with the timeline." (R. p. 110, line 22 – p. 111, line 1). This notebook was produced to Plaintiff just days before trial. The court agreed to allow Plaintiff's counsel to go through and find what was objectionable, but the notebook was extremely voluminous. (R. p. 122, lines 3-6). The jury had been sent out following Plaintiff's objection at 1:59 pm (R. p. 108, lines 6-7) and was forced to sit in the jury room for over an hour until approximately 3:03pm. Defense counsel had represented that the records to be reviewed were under a

¹ Crowley v. Spivey, 285 S.C. 397, 329 S.E. 2d 774. (Ct. App. 1985).

tab “7” but in fact the records were at a tab “9”; given this misrepresentation and the volume of documents, only 1 hour to review documents in the middle of trial is far from an adequate amount of time for review and analysis of objections. (R. p. 123, lines 15-23; p.124, line 1).

Yet Plaintiff’s counsel did discover discrepancies. For example, Defense counsel included in the timeline summary a description of a letter sent from a “Dr. Hollinger” purportedly by certified mail dated January 17, 2003. Review of the actual letter document showed that the letter was not signed, there was no document of certification, and there was no evidence the Plaintiff was even living at the address the letter was sent. Yet, the court overruled Plaintiff’s objection and allowed the reference to the letter in the timeline. (R. p. 125, line 21-25; R. p. 126, lines 2-9, and unsigned letter, R. p. 944). This was prejudicial to the Plaintiff because the jury was led to believe the Plaintiff was not following the instructions of his doctors; a key theme of Defendant’s case to which Plaintiff was not given sufficient time to respond.

Similarly, in attempting to show Plaintiff’s non-compliance with doctor instruction for use of a CPAP machine Defendant’s timeline referenced a document from Hillcrest Internal Medicine dated 07/03/03. (R. p. 130; p.00078 Hillcrest Internal Medicine, R. p. 945). The summary timeline misleadingly interpreted the document in a way that indicated non-compliance by Plaintiff, but when Plaintiff reviewed the actual document it was unreadable. In fact, the records show the plaintiff refused the CPAP machine because the one he was given would not fit. (R. p. 126, line 10 – p. 127, line 10; and records which show the machine did not fit, R. pp. 571-604). Again, the Court overruled Plaintiff’s objection. (R, p. 129, lines 16-17). Interestingly, the court correctly

pointed out to defense counsel “[W]hy do you have to put ten records that say he declined the CPAP? Can’t you just ask him that he repeatedly declined the CPAP?” (R. p. 128, lines 7-10). Again the trial court overruled Plaintiff’s objection despite the additional argument of double hearsay. (R. p. 131, lines 1-24).

At the end of that day, Defense counsel stated: “We’re going to do a time-we’re going to do a timeline tomorrow, but I will go ahead and alert the court, it’s all going to be evidence.” (R. p. 162, lines 2-5). Again, Plaintiff’s counsel asked the court for protective order directing Defense counsel to alert Plaintiff’s counsel which new records would be utilized. (R. p. 163, lines 1-9). Plaintiff’s counsel reiterated that once an excerpt of a record is put in, that essentially becomes evidence. There is no opportunity to have the witness corroborate it, question the witness, or place the timeline in context. Counsel reiterated that if the record was not admissible, it should not be admissible in the timeline. (R. p. 164, lines 2-9, 15-19, 23-25; R. p. 165, lines 1-15). The court made the documents referred to in these arguments court exhibit 5 (Court Exhibit 5, R. pp. 365-407). Those arguments took until 4:10 in the afternoon after Plaintiff had made the initial motion for side bar at 1:59pm. (R. p. 168, lines 5-6). Again, because of the failure to provide the documents ahead of time, Plaintiff was forced to make continued objections in front of the jury leading the jury to isolation in the jury room for hours on end. Each time the jury returned from this isolation, they clearly scowled at Plaintiff and his counsel as the source of the delay.

Another example of the trial by ambush came after cross-examination of the plaintiff when Defense counsel embarked on a series of statements, not questions, which were read from the summary timeline that was being shown to the jury. (R. p. 169, lines

9-23; p. 170, lines 1-6). The practical difficulty of dealing with defense counsel's questioning from a summary timeline allegedly cross-referenced in a record is aptly illustrated in the following exchange. "It says alcohol frequency daily. Last alcohol use 2005. Tobacco use, past, tobacco type, cigarettes. Last tobacco use, 2007. You remember telling Baptist Easley that? I did not tell them that. I was not smoking and I was not drinking. Right, I'm not suggesting that. What it says is that your last alcohol was 2005 and that would be during the period of time that they advised you not to drink alcoholic beverages." At that juncture, Plaintiff's counsel said: "Your honor, I am sorry to interrupt. But I'm looking at page 352. I don't see what he is talking about, and that is tab 16." Defense counsel replied: "Alright. Thank you." Plaintiff's counsel said: "If he could identify it by page number it helps." (R. p. 171, lines 7-23). Defense counsel then began examining the plaintiff from records that had no bate-stamp numbers. It was impossible for Plaintiff's counsel to react to the records as the records were not sufficiently identified before the question was postured. (R. p. 172, lines 4-19). Throughout the examination of the witness, Defendant's counsel continued to simply read statements without questions. (R. p. 174, lines 7-12; p. 175, lines 7-25; p.176, lines 1-6). At the conclusion of March 17th (the 3rd day of trial), the jury had seen Plaintiff make multiple objections, seen Plaintiff make a motion for sidebar, and been sent outside the jury room for hours on end following Plaintiff's objections. In other words, the Plaintiff looked to the jury to be the disruptive party and Defendant was rewarded for bad behavior.

On March 18th, the case resumed at 9:13 am. Plaintiff renewed its motion for mistrial based on the mis-conduct which had occurred with collateral source and also

supplemented that motion based on evidence that was produced through the use of the PowerPoint which was inaccurate and did not contain the full record. The night following trial on March 17th, Plaintiff's counsel spent until midnight reviewing the slides provided by Defendant literally with a magnifying glass. It was discovered that words were interpreted and references and inferences were made that were simply not in the record. (R. p. 177, lines 2-25). It took five hours to go through 10 pages of slides. There were 25 total pages of such slides. (R. p. 178, lines 1-8). Specific examples of inconsistencies were given to the judge at pages 742, lines 13-16. (R. p.182, lines 1-23; p. 183, lines 7-25; p.184, lines 1-17; p. 185, lines 4-16; p. 186, lines 8-25; p. 187, lines 1-10, 17-22; p.188, lines 1-19; and p.189, lines 5-23). Plaintiff's counsel continued to argue that if the timeline is seen and presented to the jury then it becomes evidence. (R. p. 190, lines 11-22). The jury was again delayed from hearing testimony until 11:05 am and Defendant was again rewarded for bad behavior. (R. p. 192, lines 2-3) During a lunch break, there was a lengthy discussion in chambers with the court and Plaintiff's counsel requested a minimum of 15 hours to prepare for the PowerPoint describing how approximately 1/3 of the slides had been reviewed and it took 5 hours. Plaintiff's counsel also requested to be able to use the court exhibit summary, which was different from the summary provided to Plaintiff and was actually legible without a magnifying glass. (R. p. 225, line 25- p. 229, line 14). As Plaintiff's counsel pointed out, "He will have it up and they will see it. It is the largest exhibit in the whole place. It has enormous visual impact. In fact, Mr. Paschal will probably agree that is why he does it, because it has enormous visual impact. So I have to respond in kind. The way I am going to respond is I am going to put the real record up there and point out the discrepancies. But I have got

to have time to discern those discrepancies. (R. p. 232, lines 2-11). At the end of day 4, the Court was going to adjourn until Monday morning and allow Plaintiff's counsel to review the slides so as to fairly compare the slides to the record. (R. p. 235, lines 10-16). A lengthy exchange then occurred with Defense counsel insisting he be allowed to utilize testimony of his expert from Duke that Friday. The court then reversed itself and agreed to allow Defense counsel to utilize the PowerPoint with the witness. Again Plaintiff's counsel pointed out the inequity in the situation. (R. pp. 235 – 249).

The trial resumed on March 19, 2010, shortly after noon. Plaintiff renewed his previous motions. It was pointed out to the court that Defense counsel handed to Plaintiff's counsel a packet of material and advised that his timeline/summary had now been revised. Plaintiff had no chance to review the newly-produced material before Defendant attempted to introduce it into evidence. At that point, Court's exhibit 7, the legible summary with larger writing, had to be compared with the smaller slide previously-provided to counsel. It turned out that many of the slides in the smaller version referred to as "Lilliputian" writing were missing from the bigger exposed slides. After all of that, defense counsel once again changed the rules. Plaintiff's counsel did not have an adequate time to prepare for what defense counsel intended to use before the jury. (R. p. 254, line 2- p. 255, line 14). Defense counsel admitted removing 110 of the 199 slides. (R. p. 256, line 14 – p. 257, line 25), but of course, did not notify Plaintiff's counsel until trial began again. (R. p. 254, lines 4-25; p. 255, lines 1-14; p. 256, lines 16-25; p. 257, lines 1-25). Thus, Plaintiff wasted hours of valuable trial preparation time reviewing slides that had been removed without notice from Defense counsel.

The next day of trial was March 22, 2010. Plaintiff set out for the court the events that had transpired over the weekend (March 20th and 21st) with regard to submission of voluminous records by the Defendant. First the protective order was referenced and Plaintiff's counsel's request that any documents that were going to be utilized in the trial of the case be provided. As counsel noted "that presumes a timely manner". (R. p. 291, lines 9-17). Records were to have been provided by 12:00 noon on Saturday, March 20th. (R. p. 293, lines 4-19). A letter from Defense counsel to plaintiff's counsel was sent at 1:18pm. This was now the third different summary timeline of PowerPoint slides. That summary timeline was marked as Court's Exhibit 10 (R. p. 294; Court Exhibit 10, R. p. 444-571). Plaintiff's counsel noted a first batch of records marked 1 through 129 and a second batch 91 of 129. As Plaintiff's counsel noted, the second batch sent at 1:30pm referenced certain page numbers. (R. p. 295, lines 1-13; Court Exhibit #11, R. pp. 571-605). Court Exhibit 12 was 39 more pages sent along with Defense counsel's letter stating: "Dear Charlie, I've attached another copy of number three which I am identifying as number five..." (R. p. 295, lines 19-23). Plaintiff's counsel related to the Court that he was becoming confused and was running around in circles trying to chase down the various documents. Yet again, on Sunday, March 21st at 11:57 am, another 60 documents were sent accompanied by a letter stating defense counsel was enclosing a new copy of 9/26/01 through 12/21/01 progress notes timeline summary. (R. p. 296, lines 1-10). Plaintiff's counsel stated that this imposed an unfair burden because not only did Plaintiff's counsel have to prepare his case, but he had to review new information provided by the Defendant at the end of the day or on the weekend before trial resumes. (R. p. 297, lines 1-19). Counsel further explained to the Court there were so many

different summary/timelines provided it took time to make sure the right one was being reviewed. (R. p. 303, lines 3-25) At that point in arguments, Plaintiff's counsel requested to take pictures of the screen with the timelines in order to preserve the matter for review. (R. p. 304, line 19-p. 306, line 5; and trial pictures, R. pp. 942-943). During this argument, Defense counsel then handed up another document which is marked as Court's Exhibit # 16. That exhibit contained blank pages and it again altered previous timelines/summaries submitted. (R. p. 306, line 15 – p. 307, line 20). By this time, the Court was having a hard time understanding what timeline was sent to Plaintiff's counsel over the weekend. (R. p. 308, line 23 – p. 309, line 1). Plaintiff's counsel pointed out during argument to the Court that the Court had asked Mr. Paschal to find the very first document given in the "final timeline" which was handed to the Plaintiff March 22nd. Defense counsel went through 10 minutes of hunting that particular page then handed the Court something different sent in a separate fax. Plaintiff's counsel pointed out to the Court the problem in getting records that are sent out of order, or in a format that is out of order was inherently unfair. (R. p. 312, lines 3-24). The Court responded it understood the Plaintiff's concern that it is hard to adequately prepare if the target is moving and acknowledged the problems caused to Plaintiff, but ultimately concluded the summary/timeline was admissible. (R. p. 312, line 25 - p. 314, line 20). The Court then allowed defense counsel to utilize the summary/timeline in questioning the Defendant. (R. p. 319, lines 6-8). Nearly one hour had transpired for arguments on the summary/timeline once again until the jury was brought back in. (R. p. 290, lines 2-3; p. 318, lines 3-4).

Defendant failed to produce the documents upon which his summary/timeline was based until the Friday before the Monday on which trial began. At that time, Appellant was not even aware that Defendant intended to use any summary/timeline. It was not until the middle of trial that Defendant first presented the timeline and this failed to afford Plaintiff sufficient time to review the timeline for authenticity and prepare for cross examination. In the limited time Plaintiff did have to review the timeline, it found the numerous errors outlined above. Defendant then produced several more versions of the timeline during trial and even the Court acknowledged that this caused the Plaintiff to have to try to hit a “moving target.” Yet, despite this acknowledgement, the Court allowed this unfairness to persist and in so doing specifically contravened the cases on this topic precluding a party from springing summaries of thousands of documents on the opposing party so late in the day that the party cannot check their accuracy against the summarized documents before trial.²

The Court of Appeals may have misunderstood or misapprehended that the prejudice to the Plaintiff was manifest: hours upon hours spent during the trial attempting to decipher the tiny font in the copy of the summary provided by Defendant; hours upon hours during the trial locating the documents purportedly “interpreted” by the Defendant’s summary; hours upon hours during the trial comparing the tiny font to documents that were nearly illegible if not actually illegible; presentation to the jury of misleading information that was not actually reflected in the documents upon which the summary was purportedly based; putting Plaintiff’s counsel in the position of having to make multiple objections leading to substantial delays the jury no-doubt attributed to

² Air Safety, Inc., 94 F.3d at 8; 31 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure § 8045, pp. 548-50.(2000); Canada Dry Corp., 723 F.2d at 523; Davis & Cox., 751 F.2d at 1516; See J. Weinstein and M. Berger, Weinstein’s Evidence Sec. 1006 (1983).

Plaintiff; and collectively an extraordinarily unfair situation in which Defendant was given the ability to conduct trial by ambush. The Court should have and could have easily resolved this issue and eliminated the prejudice by excluding the summary/timeline and requiring the actual records that supported Defendant's contentions be presented, and it was an abuse of discretion not to.

II. The Court of Appeals may have Overlooked or Misapprehended that Appellee's Violation of the Motion in Limine Implicated the Collateral Source Rule and Caused Prejudice to Appellant

The Court noted that Plaintiff filed a Motion in Limine at the outset of the trial to exclude collateral source materials including social security disability, workers compensation, and insurance. (Slip Opinion at 10). The Court also noted that Counsel for Defendant agreed with the motion and stated he had no intention of bringing it up. (Slip Opinion at 10). Yet, the Court of Appeals sanctioned Defense counsel's cross examination in direct violation of this Order by using the precise words "social security disability" that he agreed and was bound not to use. Defense counsel never sought permission from or gave any notice to the Court that he desired to ask the questions he agreed not to ask.

Social security disability implicates the collateral source rule because the rule provides that compensation received by an injured party from a source wholly independent of the wrongdoer cannot reduce the damages owed by the wrongdoer.³ This rule has been liberally applied in South Carolina to preclude the reduction of tortfeasors liability for damages.⁴ The only requirement for qualification as a collateral source is

³ Citizens & S. Nat'l Bank of S.C. v. Gregory, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995)

⁴ Id.

that the source be "wholly independent of the wrongdoer."⁵ Thus, the Court of Appeals may have overlooked or misapprehended that the collateral source rule was applicable in this case.

The prejudice again is manifest. It is common knowledge that Social Security Disability benefits include the benefit of Medicare health coverage. Accordingly, Defendant's counsel introduced to the jury a collateral source wholly independent of Plaintiff that reduced the damages owed to Plaintiff by Dr. Wright. From this information it is more than plausible that the jury found for Defendant on the basis that Plaintiff himself was not obligated to pay the medical bills in the case. This is precisely the reason for the collateral source rule and precisely the reason Plaintiff filed a Motion in Limine. Because the Court of Appeals may have misapprehended or overlooked this prejudice, Appellant is entitled to a rehearing on the issue of collateral source and mistrial.

III. The Court of Appeals may have Overlooked or Misapprehended that Appellant Provided the Purpose for which the Deposition of Dr. Wallace was Admissible under the Rules

The Court of Appeals noted that it was proper to exclude the Deposition of Dr. Wallace for impeachment of the Defendant under hearsay principles. "At the trial . . . any part or all of a deposition so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who

⁵ See Otis Elevator v. Hardin Construction Co., 316 S.C. 292, 450 S.E.2d 41 (1994) (contractual right to indemnification not defeated by fact that loss was actually paid by an insurance company); Rattenni v. Grainger, 298 S.C. 276, 379 S.E.2d 890 (1989) (tortfeasor's liability for damages not reduced by underinsurance proceeds); Powers v. Temple, 250 S.C. 149, 156 S.E.2d 759 (1967) (tortfeasor's liability for damages not reduced by disability payments from employer); New Foundation Baptist Church v. Davis, 257 S.C. 443, 186 S.E.2d 247 (1972) (tortfeasor's liability for damages not reduced by value of gratuitous repairs).

was present and represented at the taking of the deposition or who had reasonable notice thereof.”⁶

“Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute.”⁷

South Carolina Rule of Civil Procedure (“S.C.R.Civ.P.”) 32(a) and Federal Rule of Civil Procedure (“F.R.Civ.P.”) 32(a) are essentially the same with only minor changes in the wording.⁸ Further, S.C.R.Civ.P. 802 and F.R.E. 802 are basically the same with minor changes in wording.⁹

F.R.Civ.P. 32(a), is “a freestanding exception to the hearsay rule, [and] is one of the ‘other rules’ to which [FRE] 802 refers. Evidence authorized by Rule 32(a) cannot be excluded as hearsay, unless it would be inadmissible even if delivered in court.”¹⁰

S.C.R.Civ.P 32(a) permits the admission of the deposition as long as it would not be objectionable under the rules of evidence applied as though the witness were then present and testifying. It is not limited in its purpose and accordingly can be used for impeachment. The Court of Appeals may have overlooked or misapprehended that the purpose for which Appellant sought to introduce the deposition of Dr. Wallace was the impeachment of Dr. Wright; as Dr. Wright was testifying contrary to what Dr. Wallace had stated. Because the deposition was admissible as if the deponent were present and testifying at the time Plaintiff sought to introduce portions of his deposition, hearsay would not be a proper objection and thus was not a proper basis to prevent Plaintiff from

⁶ Rule 32 (a), SCRCPP (emphasis added); Rule 32(b), SCRCPP; McAllister v. Smiley, 301 S.C. 10, 16, 389 S.E.2d 857, 862 (1990) (Toal, J. Dissent); Paschal v. Causey, 309 S.C. 206, 210, 420 S.E.2d 863, 864 (Ct. App. 1992).

⁷ Rule 802, SCRE.

⁸ Rule 32(a) Notes, SCRCPP.

⁹ Rule 802, SCRCPP and Rule 802, FRE and Notes.

¹⁰ Veland v. U.S., 291 F.3d 993, 996 (7th Cir. 2002); Angelo v. Armstrong World Indus., 11 F.3d 957, 962-63 (10th Cir. 1993).

asking Defendant questions referencing the deposition of Dr. Wallace. This is consistent with S.C.R.E. 802, which references "other rules" under which hearsay might be admissible.

The Court of Appeals may have misapprehended over overlooked that federal law is directly applicable to this matter because S.C.R.Civ.P 32(a) and Fed.R.Civ.P. 32(a) and S.C.R.E. 802 and F.R.E. 802 are nearly the same.

Under the federal cases, Fed.R.Civ.P. 32(a), is "a freestanding exception to the hearsay rule, [and] is one of the 'other rules' to which [FRE] 802 refers. Evidence authorized by Rule 32(a) cannot be excluded as hearsay, unless it would be inadmissible even if delivered in court."¹¹

There are differences in the facts applicable in the federal cases and those at bar. However, combining the federal analysis under which hearsay as not a proper objection with Justice Toal's broad view of S.C.R.Civ.P. 32(a) in McAllister, leads to the reasonable and proper conclusion that the depositions of Dr. Smith and Dr. Wallace should not have been excluded as hearsay in questions against Dr. Wright in this matter.

The exclusion of this material was extremely prejudicial to Plaintiff because it went to the heart of the case regarding Defendant's knowledge of the presence of the pacing wires and the appropriate treatment for a patient that has these retained wires. Defendant thought he had taken the wires out and all the other doctors thought he had taken the wires out. Dr. Wallace testified that he thought the wires were out in his deposition and it was reversible error to exclude as hearsay the portion Dr. Wallace's deposition in which he directly contradicted the testimony of the Defendant during cross examination.

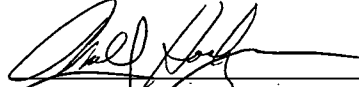
¹¹ Id.; see also, Fed.R.Evid. 802 advisory committee's note (identifying Rule 32 as one of the "other rules").

CONCLUSION

The Court of Appeals may have misapprehended or overlooked the prejudice that resulted to Appellants by the admission of the timeline summary; the prejudice that resulted from Appellee's violation of the motion in limine; and the purpose for which Dr. Wallace's deposition should have been allowed as impeachment evidence against Dr. Wright. Accordingly, Appellant respectfully submits that this matter is appropriate for rehearing/rehearing en banc.

Respectfully Submitted by:

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Dated: 5/15, 2013
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

68392

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Case No. 2008-CP-23-5737
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RECEIVED

MAY 15 2013

James E. Gibson

Appellant,

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v.

Christopher C. Wright, M.D.

Respondent.

CERTIFICATE OF SERVICE

This is to certify that I did serve on this date a copy of **PETITION FOR REHEARING** in the above-mentioned matter on the person(s) listed below by enclosing a copy of same in an envelope with sufficient postage thereon prepaid in the United States mail, addressed as follows:

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Dated: May 15, 2013
Spartanburg, South Carolina